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The Supreme Court's October 2020 Term: A Review of Selected Major Rulings

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SUMMARY

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The Supreme Court's October 2020 Term: A Review of Selected Major Rulings

The Supreme Court issued the last merits decision of its 2020–2021 Term on July 1, 2021. This term was also Justice Amy Coney Barrett's first term as an Associate Justice of the Supreme Court. The Court issued 55 merits decisions in all, addressing a wide range of issues in American public law. Many of these decisions have potential implications for federal law or litigation and thus are likely to be of general interest to Congress.

Among the Court's major rulings was *Brnovich v. Democratic National Committee*, where, for the first time, the Supreme Court issued a decision interpreting Section 2 of the Voting Rights Act in the context of state voting rules. While it did not establish a standard to govern all Section 2 challenges, the Court identified five specific circumstances for courts to consider. Going forward, the ruling will guide lower courts in determining if recently enacted state election laws comply with the Voting Rights Act.

In another case with potential ramifications for election law, *Americans for Prosperity Foundation v. Bonta*, the Court held that a California requirement that charities disclose their significant donors to the state violated the First Amendment freedom of association. The Court's ruling is potentially significant because it suggests that any disclosure requirement that burdens associational rights must, at a minimum, be narrowly tailored to advance an important governmental interest. That rule could be extended, for example, to federal campaign finance disclosures.

In a case impacting property rights and organized labor, the Supreme Court ruled that a California regulation allowing union organizers to enter agricultural employers' property for a certain amount of time each year was an unconstitutional taking of property in violation of the Takings Clause of the Fifth Amendment. The decision, *Cedar Point Nursery v. Hassid*, may mark a shift toward greater scrutiny of government actions affecting property rights, including state and federal property regulations beyond the labor context.

TransUnion LLC v. Ramirez involved the constitutional requirements for standing in class action litigation alleging violations of the Fair Credit Reporting Act. The Court held that only those class members whose inaccurate credit reports had been provided to third-party businesses had suffered concrete reputational harm sufficient to establish standing. The Court's decision may limit Congress's ability to confer standing on plaintiffs to recover damages in federal court for procedural violations of privacy laws.

United States v. Arthrex held that administrative patent judges' authority to issue final decisions regarding the validity of previously issued patents for the federal government violated the Constitution's Appointments Clause. *Arthrex* could affect other patent proceedings and agencies because it suggests that administrative adjudicators with protections from at-will removal may not issue final, unreviewable decisions on behalf of the government unless they are appointed by the President with the Senate's advice and consent. This decision may also inform how Congress chooses to structure agencies in the future.

In *Collins v. Yellen*, the Court ruled that the structure of the Federal Housing Finance Agency (FHFA) violates the Constitution's separation of powers. The FHFA is headed by a single Director who, under the statute establishing the agency, could be removed by the President only for cause, rather than at will. The Court's ruling, which comes on the heels of a decision last year invalidating the similarly structured Consumer Financial Protection Bureau (CFPB), could affect Congress's ability to configure agencies in the executive branch with relative independence from the President.

The Index at the end of this report lists all of the Court's merits decisions, states their holdings in summary form, and provides a directory to CRS resources that address selected cases in more detail.

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In its first term with Justice Amy Coney Barrett, the Supreme Court issued 55 merits decisions, addressing a wide range of issues in American public law.[1] This report highlights selected major rulings from the Court's October 2020 Term spanning six legal areas. The decisions discussed in this report are: (1) *Brnovich v. Democratic National Committee*; (2) *Americans for Prosperity Foundation v. Bonta*; (3) *Cedar Point Nursery v. Hassid*; (4) *TransUnion v. Ramirez*; (5) *United States v. Arthrex*; and (6) *Collins v. Yellen*. For each case, the report explains the factual and procedural background of the case, summarizes the Supreme Court's decision and any concurring or dissenting opinions, and examines the relevance that the Court's ruling could have for Congress. The report then provides an Index of all of the Court's merits decisions. The Index states the holdings of these decisions in summary form and provides a directory to CRS resources that address selected cases in more detail.

Brnovich v. Democratic National Committee: Election Law and Section 2 of the Voting Rights Act[2]

For the first time, in *Brnovich v. Democratic National Committee (DNC)*, the Supreme Court issued a decision interpreting Section 2 of the Voting Rights Act (VRA) in the context of state voting rules.[3] The Court held that two Arizona voting rules—restrictions on out-of-precinct voting and third-party ballot collection—do not violate Section 2.[4] In interpreting the statutory language, the Court determined that Section 2 requires that voting be "'equally open' to minority and non-minority groups alike" and that courts should apply a broad "totality of circumstances" test to determine whether state voting rules violate Section 2.[5] While not establishing a standard to govern all Section 2 challenges, the Court identified "certain guideposts," including five specific circumstances for courts to consider.[6] Going forward, the ruling will guide lower courts in determining if recently enacted state election laws[7] comply with the VRA.

Background

Section 2 of the VRA allows private citizens or the federal government to challenge state discriminatory voting practices or procedures, including those alleged to diminish or weaken minority voting power.[8] Under Section 2, challengers can prove violations under an "intent test" or under a "results test."[9] Coextensive with the Fifteenth Amendment, the "intent test" requires a challenger to prove that a voting procedure was enacted with an intent to discriminate.[10] As a

[1] In this report, "merits decisions" refers to cases for which the Supreme Court granted certiorari, received briefing or heard oral argument from the parties on the merits, and issued a written opinion on the questions presented. The Court issued the last merits decision of its 2020–2021 Term on July 1, 2021.

[2] L. Paige Whitaker, CRS Legislative Attorney, authored this section of the report.

[3] 141 S. Ct. 2321 (2021).

[4] *See id.* at 2343–44.

[5] *Id.* at 2337.

[6] *Id.* at 2336.

[7] *See* Nat'l Conf. of State Legislatures, *2021 Election Enactments* (Aug. 3, 2021), https://www.ncsl.org/research/elections-and-campaigns/2021-election-enactments.aspx (tracking recently enacted election laws across the nation).

[8] 52 U.S.C. §§ 10301, 10303(f).

[9] DNC v. Hobbs, 948 F.3d 989, 1038 (9th Cir. 2021) ("A violation of Section 2 may now be shown under either the results test or the intent test.").

[10] *See id.* at 1037–39.

consequence of the 1982 amendments to the VRA, Section 2 also provides for a "results test."[11] Section 2 currently provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[12]

The portions of this language most relevant here are the prohibition against voting practices that result in the "denial or abridgement" of the right to vote based on race, color, or membership in a language minority,[13] and the establishment of a "totality of circumstances" standard for proving a violation.[14] In the landmark decision *Thornburg v. Gingles*,[15] the Supreme Court held that the totality of circumstances test includes several factors that originated in the legislative history accompanying enactment of Section 2.[16]

Historically, Section 2 has been invoked primarily to challenge redistricting maps, also known as "vote dilution" cases.[17] In certain circumstances, the Supreme Court has interpreted Section 2 to require the creation of one or more "majority-minority" districts, which can ensure that a racial or language minority group is not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.[18]

More recently, plaintiffs have invoked Section 2 to challenge other types of state voting and election administration laws, also known as "vote denial" cases.[19] The 2013 Supreme Court ruling in *Shelby County v. Holder*[20] has likely contributed to the expanded reliance by plaintiffs on Section 2.[21] In *Shelby County*, the Court invalidated the coverage formula in Section 4(b) of the VRA, thereby rendering the Section 5 preclearance requirements inoperable.[22] Under the

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[11] Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982) (codified at 52 U.S.C. § 10301).

[12] 52 U.S.C. § 10301.

[13] *Id.* § 10301(a).

[14] *Id.* § 10301(b).

[15] 478 U.S. 30 (1986).

[16] *Id.* at 44 (quoting S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177).

[17] *See, e.g.*, CRS Report R44798, *Congressional Redistricting Law: Background and Recent Court Rulings*, by L. Paige Whitaker, at 3 (discussing vote dilution cases).

[18] Bartlett v. Strickland, 556 U.S. 1, 13 (2009) ("In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts.")

[19] Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 440 (2015).

[20] 570 U.S. 529 (2013).

[21] *See* Tokaji, *supra* note 19, at 440 ("Although preclearance was of limited use in stopping vote denial, *Shelby County* shifted the focus to § 2 of the VRA.")

[22] *See Shelby Cnty.*, 570 U.S. at 557. The Court held that the application of the coverage formula to certain states and

coverage formula, nine states and jurisdictions within six additional states were required under Section 5 to obtain prior approval or "preclearance" before implementing any proposed change to a voting law.[23] In order to be granted preclearance, the covered state had the burden of proving that the proposed law would have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group.[24] Since *Shelby County* was decided, plaintiffs have increasingly turned to Section 2 to challenge state voting laws.[25] As a result of this relatively new application of Section 2 to vote denial claims, *Brnovich* is the first time that the Supreme Court has addressed this issue.

This case began in 2016 when the DNC, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party brought suit in federal district court seeking to enjoin two Arizona voting rules. The first was an Arizona policy whereby ballots that a voter casts outside their designated precinct are discarded instead of being fully or partially counted, otherwise known as the out-of-precinct (OOP) policy. The second was an Arizona statute that criminalizes the collection of another person's early ballot (with some exceptions, such as collection by a family member), also known as H.B. 2023.[26] Among other things, the challengers argued that the Arizona voting rules (OOP and H.B. 2023) violate Section 2 of the VRA "by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American" citizens, and that H.B. 2023 violates Section 2 and the Fifteenth Amendment because the Arizona legislature enacted the law "with the intent to suppress voting by Hispanic and Native American voters."[27] The district court held that the challengers did not prove that the Arizona voting rules violate the VRA or the Constitution,[28] and a Ninth Circuit three-judge panel agreed.[29] The Ninth Circuit, sitting en banc, reversed and enjoined both Arizona voting rules as violations of Section 2.[30]

The Supreme Court's Decision

In a 6-3 decision written by Justice Samuel Alito, the Supreme Court in *Brnovich v. DNC* reversed the Ninth Circuit ruling and held that the two Arizona voting rules do not violate Section 2 of the VRA.[31] The Court began its analysis by focusing on the text of Section 2. After observing that most of the Court's Section 2 case law relies on *Gingles*—a redistricting case

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jurisdictions departed from the "fundamental principle of equal sovereignty" among the states without justification "in light of current conditions." *Id.* at 544, 554.

[23] Dep't of Justice, *Jurisdictions Previously Covered By Section 5*, https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (Sept. 11, 2020).

[24] 52 U.S.C. § 10303(a).

[25] *See, e.g.*, Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. F. 799, 801 (2018) ("In order to contend with the resurgence of registration and ballot restrictions sweeping the country after *Shelby County* was decided, voting rights litigators were faced with the formidable task of establishing a clear and robust test for vote denial liability under Section 2, and litigated a flurry of new vote denial cases under Section 2 in the 2014 and 2016 election cycles.").

[26] *See* DNC v. Reagan, 329 F. Supp. 3d 824, 831–32 (D. Ariz. 2018).

[27] *Id.* at 832.

[28] *See id.* at 882–83.

[29] *See* DNC v. Reagan, 904 F.3d 686, 731–32 (9th Cir. 2018).

[30] *See* DNC v. Reagan, 948 F.3d 989, 1046 (9th Cir. 2020) (en banc); *see also*, CRS Legal Sidebar LSB10583, *Supreme Court Considers Standard for Voting Rights Act Claims*, by L. Paige Whitaker (discussing the lower court ruling in this case).

[31] *See* Brnovich v. DNC, 141 S. Ct. 2321, 2350 (2021).

involving vote dilution—the Court explained that *Brnovich* marks the first time that the Court has considered how Section 2 applies to "generally applicable time, place or manner voting rules."[32] Therefore, the Court reasoned that "a fresh look" at the statute was needed.[33]

Although the operative phrase in Section 2(a) prohibits state voting rules operating "in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color," the Court explained that Section 2(b) sets forth what must be proved to establish a violation.[34] Under Section 2(b), the Court determined that a violation exists where "the political processes leading to nomination or election are not equally open to participation by members of the relevant protected group in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[35] According to the Court, the phrase "in that" in Section 2(b) means that the standards of "equal openness and equal opportunity are not separate requirements," and that "equal opportunity helps to explain the meaning of equal openness."[36] The Court further explained that the term "opportunity" means "a combination of circumstances, time, and place suitable or favorable for a particular activity or action."[37] The Court determined that, in "putting [all of] these terms together . . . the core of §2(b) is the requirement that voting be 'equally open'" and that "[t]he statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to use the means that are equally open. But equal openness remains the touchstone."[38]

The Court also interpreted Section 2(b)'s command that courts evaluate "the totality of circumstances" in assessing a plaintiff's challenge.[39] Cautioning that the list is not exhaustive, the Court outlined five circumstances for courts to consider:

1. The "size of the burden" placed by the challenged voting rule is "highly relevant" and there must be an "absence of obstacles and burdens that block or seriously hinder voting."[40] "Mere inconvenience" is insufficient to prove a violation, and "the 'usual burdens of voting'" that accompany an equally open process must be permitted.[41]
2. The "degree to which a voting rule departs" from voting practices that were in effect in 1982—when Section 2 was last amended—should be considered because it is "doubt[ful]" that Congress meant to displace "facially neutral time, place, and manner regulations" with "a long pedigree" or "in widespread use."[42]
3. The "size of any disparities" in a voting rule's effect on "members of different racial or ethnic groups" should be taken into account because small disparities have less probability than large disparities to signify that an election system is not

[32] *Id.* at 2333.

[33] *Id.* at 2337.

[34] *Id.* at 2337.

[35] *Id.* at 2332 (internal quotations and citations omitted).

[36] *Id.* at 2337–38.

[37] *Id.* at 2338.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 2338–39.

"equally open."[43] To the degree that minorities and non-minorities differ regarding "employment, wealth, and education," even neutral laws may render "some predictable disparities," although "the mere fact there is some disparity in impact does not necessarily" constitute a violation.[44]

4. The opportunities afforded by "a State's entire system of voting" should be considered when evaluating the burden imposed by a challenged voting rule.[45] Where a state offers several methods of voting, the burden on voters who opt for one method "cannot be evaluated without also taking into account the other available means."[46]
5. The "strength of the state interests" served by the challenged voting rule is to be considered because voting rules that are justified by robust state interests "are less likely" to contravene Section 2.[47] The prevention of electoral fraud is a "strong and entirely legitimate state interest" because fraud can affect the results of close elections; fraudulent votes can dilute the value of legal votes; and election fraud can compromise public confidence in elections.[48] In addition, ensuring that votes are cast "without intimidation or undue influence" constitutes "a valid and important state interest."[49]

The Court applied these circumstances to the two Arizona voting rules.[50] With regard to the OOP policy, the Court held that in light of the "modest burdens allegedly imposed" by the restriction, the "small size" of its disparate impact, and the justifications proffered by the State of Arizona, the policy does not violate Section 2.[51] Requiring voters to identify and travel to their correct polling places to vote "does not exceed the 'usual burdens of voting,'" the Court found.[52] Section 2 also does not require states to demonstrate that their chosen voting rules are essential or that less restrictive rules would not sufficiently serve their governmental interests.[53]

With regard to the ballot collection restrictions, the Court held that in view of the limited evidence of a racially disparate burden, taken into consideration with the state's justifications, the restrictions likewise do not violate Section 2.[54] According to the Court, the challengers failed to provide "concrete," "statistical evidence" demonstrating that the law affected minority voters in a disparate manner as compared with non-minority voters.[55] Furthermore, in evaluating the state's justifications for the restrictions, the Court remarked that "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its

[43] *Id.* at 2339.

[44] *Id.*

[45] *Id.* at 2339.

[46] *Id.*

[47] *Id.* at 2339–40.

[48] *Id.* at 2340.

[49] *Id.*

[50] *See id.* at 2343–48.

[51] *Id.* at 2346.

[52] *Id.* at 2344.

[53] *See id.* at 2345–46.

[54] *See id.* at 2348.

[55] *Id.* at 2346–47.

own borders."[56] Section 2 "surely does not demand that 'a State's political system sustain some level of damage before the legislature [can] take corrective action,'" the Court announced.[57]

In addition, the Court held that the restrictions on ballot collection were not enacted with a discriminatory intent.[58] Observing that the district court properly applied precedent, the Court explained that it had considered the events leading to the enactment of the law; searched for any divergence from "the normal legislative process"; examined relevant legislative history; and assessed the impact of the restrictions on various racial groups.[59] Although the Court acknowledged that the record reflected that some opponents of the law had alleged that the proponents had "racially discriminatory motives," the Court underscored that this "view was not uniform."[60] The Court further reasoned that even though a "racially-tinged" video prompted the legislature's debate about ballot collection restrictions, the district court did not find evidence "that the legislature as a whole was imbued with racial motives."[61] While the district court considered evidence on whether one legislator's "enflamed partisanship" may have provided the impetus for the legislative debate, the Court emphasized that "partisan motives are not the same as racial motives."[62]

The Court also expressly rejected the adoption of certain tests for establishing a Section 2 violation, observing that the parties, amici, and lower courts had proposed at least 10 different standards.[63] For example, because the *Gingles* factors were designed to be used in vote dilution cases, their relevance "is much less direct" in cases regarding "neutral time, place, and manner rules"—although the Court cautioned that they should not be disregarded.[64] The Court also refused to adopt the disparate impact test that is used under Title VII of the Civil Rights Act and the Fair Housing Act, as proposed in an amicus brief.[65] Under that test, the Court criticized the "tight fit" that would be required by imposing a "necessity requirement," thereby forcing states to show that their governmental interests can only be effected by the challenged voting rules.[66] In addition, the Court disapproved of the effective "transfer" of election regulation from the states to the federal courts that would result from adopting that test.[67]

In response to the disparate impact test proffered by the dissent, the Court characterized it as "radical," focused "almost entirely" on one circumstance instead of considering the totality of the circumstances, as required by the statute.[68] In the view of the Court, such a "freewheeling" test would restrict any voting rule with "'discriminatory effects,' loosely defined."[69] Further, imposing such a test would require states to prove that a challenged voting rule is the only way that a

[56] *Id.* at 2348.

[57] *Id.*

[58] *See id.* at 2349–50.

[59] *Id.* at 2349 (observing that the district court properly applied Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266–68 (1977)).

[60] *Id.*

[61] *Id.* at 2349–50.

[62] *Id.* at 2349.

[63] *Id.* at 2336.

[64] *Id.* at 2340.

[65] *See id.* at 2340–41.

[66] *Id.* at 2341.

[67] *Id.*

[68] *Id.*

[69] *Id.*

governmental interest can be achieved, an interpretation of Section 2 that is not grounded in the statutory text or Court precedent, the Court determined.[70] The Court also warned that adoption of the dissent's test would potentially "invalidate just about any voting rule a State adopts."[71]

Concurring and Dissenting Opinions

Justice Neil Gorsuch wrote a concurrence, joined by Justice Clarence Thomas,[72] and Justice Elena Kagan wrote a dissent, joined by Justices Stephen Breyer and Sonia Sotomayor.[73] The concurring justices wrote separately to add explicitly that the Court had not addressed whether Section 2 provides "an implied cause of action."[74]

The dissent argued that by ignoring the "promise" of the VRA to protect equal access to elections for all eligible Americans and the "expansive" text of Section 2 that was written to achieve that goal, the Court had "lessen[ed]" the statute, cutting it down to the Court's "preferred size."[75] Instead, the dissent maintained that Section 2 should be construed more broadly. According to the dissent, a proper interpretation of Section 2 would permit courts to invalidate any state voting rule "that contribute[s] to a racial disparity in the opportunity to vote, taking all the relevant considerations into account."[76] In particular, the dissent criticized the Court for establishing five factors for courts to consider in Section 2 cases, characterizing them as "a set of extra-textual exceptions and considerations to sap the Act's strength."[77] For example, denouncing the Court for requiring courts to consider whether a voting rule was in effect in 1982, the dissent argued that "Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."[78] In sum, the dissent maintained that if Section 2 is to be rewritten, Congress "gets to make that call," not the Supreme Court.[79]

Considerations for Congress

The Court's ruling in *Brnovich* will likely have consequences for state election laws across the nation, thereby affecting how federal elections are conducted. Lower courts will likely apply the five factors articulated by the Court in adjudicating challenges to such state laws under Section 2 of the VRA, and it remains to be seen precisely how the Supreme Court's ruling in *Brnovich* will play out in such court cases. Many legal commentators predict that the ruling will make it harder for plaintiffs to establish Section 2 violations.[80] For instance, the decision requires lower courts to

[70] *See id.* at 2342.

[71] *Id.* at 2343.

[72] *See id.* at 2350 (Gorsuch, J., concurring).

[73] *See id.* 2350–73 (Kagan, J., dissenting).

[74] *Id.* at 2350 (Gorsuch, J., concurring).

[75] *Id.* at 2351, 2372 (Kagan, J., dissenting).

[76] *Id.* at 2357 (Kagan, J., dissenting).

[77] *Id.* at 2372–73 (Kagan, J., dissenting).

[78] *Id.* at 2363–64 (Kagan, J., dissenting).

[79] *Id.* at 2373 (Kagan, J., dissenting).

[80] *See, e.g.*, Nina Totenberg, *What The Supreme Court's Arizona Decision Means For The Voting Rights Act*, NPR (July 1, 2021), https://www.npr.org/2021/07/01/1012294417/what-the-supreme-courts-arizona-decision-means-for-the-voting-rights-act (quoting Professor Rick Hasen: "I think it's fair to say that all of the major paths to challenging voting rules in federal court have been severely cut back."); *see also* Richard Luedeman, *Voting as a Genuinely Religious Act in a World of Free Exercise Maximalism*, 55 U.C. DAVIS L. REV. ONLINE 1, 14 (2021) ("*Brnovich v. Democratic National Committee* . . . has set a high and unpredictable bar for plaintiffs.").

consider the "degree to which a voting rule departs" from voting practices that were in effect in 1982. Lower courts could therefore determine that limits on early and absentee voting[81] comport with that principle because, as the Court explains, in 1982 most states required almost all voting to occur on Election Day.[82]

The Supreme Court in *Brnovich* did not identify constitutional limits on Congress's power to address state voting rules, but rather resolved a question of statutory interpretation.[83] Congress remains free to amend the VRA. By way of historical example, following the Court's 1980 decision in *City of Mobile v. Bolden*,[84] Congress amended Section 2 in 1982 to change the effects of that ruling.[85] Any similar legislation would have to be consistent with the Constitution, as interpreted by the Court. In the 117th Congress, H.R. 4, which passed the House of Representatives on August 24, 2021, would respond to the *Brnovich* ruling.[86] Section 2 of H.R. 4 proposes a two-part test for courts to apply in evaluating a vote denial claim.[87] Generally, a violation would be established if the challenged voting rule imposes "greater costs or burdens" in voting on members of the protected class as compared with other voters; and those greater burdens are at least partially "caused by or linked to social and historical conditions that have produced," on the date that the challenge is brought, "discrimination against members of the protected class."[88] Factors relevant to evaluating the totality of circumstances would expressly *not* include, among others, the degree to which the voting rule "has a long pedigree" or was in effect on an earlier date; access to alternative voting methods; and the "[m]ere invocation of interests" in preventing voter fraud.[89]

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[81] For further information see CRS In Focus IF11477, *Early Voting and Mail Voting: Overview & Issues for Congress*, by Sarah J. Eckman and Karen L. Shanton; CRS Legal Sidebar LSB10470, *Election 2020 and the COVID-19 Pandemic: Legal Issues in Absentee and All-Mail Voting*, by L. Paige Whitaker.

[82] *See* Brnovich v. DNC, 141 S. Ct. 2321, 2339 (2021) ("[I]n 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots.").

[83] *But see Restoring the Voting Rights Act After Brnovich and Shelby County: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution*, 117th Cong. (2021) (written testimony of Professor Richard L. Hasen) (suggesting that if Congress amends Section 2 in response to *Brnovich*, Congress will need to consider the portion of the decision where the Court said that the disparate impact test supported by the dissent could infringe on states' authority to enact non-discriminatory time, place and manner voting rules, and characterizing the Court's statement as "appear[ing] like a threat to find new congressional voting rights legislation unconstitutional.")

[84] 446 U.S. 55 (1979).

[85] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982) (codified at 52 U.S.C. § 10301). *See, e.g.*, Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1846 ("As has been well chronicled, Congress in 1982 amended the Voting Rights Act expressly to repudiate *Bolden* and to outlaw electoral practices that "result in" the denial of equal political opportunity to minority groups.").

[86] *See* H.R. 4, 117th Cong. § 2 (2021) (as passed by the House of Representatives). Additional legislation would address the VRA. For example, H.R. 1, 117th Cong. (2021) (as passed by the House of Representatives) and S. 1, 117th Cong. (2021) include findings of a "commitment of Congress to restore the Voting Rights Act." In addition, in the last Congress, H.R. 4, 116th Cong. (2019) (as passed by the House of Representatives); H.R. 1799, 116th Cong. (2019); S. 561, 116th Cong. (2019); and S. 4263, 116th Cong. (2020) would have amended the VRA to establish a new coverage formula for Section 5 preclearance.

[87] *See* H.R. 4, 117th Cong. § 2 (2021) (as passed by the House of Representatives).

[88] *Id.*

[89] *Id.*

Americans for Prosperity Foundation v. Bonta: Freedom of Association and Donor Disclosures[90]

In *Americans for Prosperity Foundation (AFP) v. Bonta*, the Court held that a California requirement that charitable organizations disclose their significant donors to the state violated the First Amendment freedom of association.[91] The Court's ruling is potentially significant because it suggests that any disclosure requirement that burdens associational rights must, at a minimum, be narrowly tailored to advance an important governmental interest.[92] Accordingly, the case has potential implications for disclosure regimes within and outside of the charitable-giving context. These regimes include federal campaign finance requirements, which courts previously have evaluated under an arguably less stringent standard of review.

Background

Although the First Amendment does not explicitly list the "freedom of association," the Supreme Court has long considered association to be an "inseparable aspect" of the freedom of speech.[93] This freedom includes the right to associate to advance particular ideas or beliefs, whether they relate to "political, economic, religious or cultural matters."[94] It also includes, to some extent, the right to speak and associate anonymously.[95] Although requiring disclosure of a person's affiliations does not restrict speech directly, it can dissuade that person from engaging in those associations and thus chill protected speech.[96] Thus, compelling disclosure of an individual's membership in an organization implicates protected associational rights, as the Court recognized in *NAACP v. Alabama* ex rel. *Patterson*.[97]

NAACP involved an Alabama court's contempt order against the NAACP for refusing to produce the names and addresses of its Alabama members in litigation involving the organization's compliance with state business registration requirements.[98] The Court considered whether compelled disclosure of the organization's "rank-and-file members" to the State would violate their freedom to associate "in support of their common beliefs."[99] "Uncontroverted" evidence showed that on past occasions, publicly identified NAACP members experienced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[100] The threat of these harms, the Court concluded, could lead current members to leave

[90] Victoria L. Killion, CRS Legislative Attorney, authored this section of the report.

[91] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021).

[92] *Id.* at 2383 (plurality opinion); *id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment).

[93] NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958). *See generally First Amendment*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/amendment-1/.

[94] *NAACP*, 357 U.S. at 460.

[95] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (explaining that "an author's decision to remain anonymous" is "an aspect of the freedom of speech protected by the First Amendment").

[96] *See* Shelton v. Tucker, 364 U.S. 479, 486–87, 490 (1960) (holding that a statute requiring teachers, as a condition of employment, to disclose all of the organizations to which they belonged or contributed over a five-year period violated the teachers' right of free association).

[97] *NAACP*, 357 U.S. at 460.

[98] *Id.* at 451.

[99] *Id.* at 460.

[100] *Id.* at 462.

the NAACP or discourage others from joining it.[101] The Court held that Alabama had not advanced an interest "sufficient to justify the deterrent effect" of the disclosures because the NAACP had already given the State other records with which it could verify compliance with the registration requirement.[102]

While *NAACP* concerned an organization's *members*, the Supreme Court also has recognized that compelled disclosure of an organization's *donors* can have similar chilling effects on association. In *Buckley v. Valeo*, the Court considered a federal law requiring political committees and candidates to disclose to the Federal Election Commission (FEC) the names, addresses, and contributions of each person who contributed more than $100 in a single year, and required the FEC to make this information publicly available.[103] The Court held that the First Amendment protects contributors' anonymity, reasoning that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'"[104] The Court interpreted *NAACP* and subsequent decisions to require "exacting scrutiny" and a "'substantial relation' between the governmental interest and the information required to be disclosed."[105] Applying this standard, the Court concluded that the disclosure requirements were justified in relation to the burden they placed on individual rights.[106] The Supreme Court continued to apply *Buckley*'s formulation of exacting scrutiny in subsequent cases involving election-related disclosure requirements.[107]

The Supreme Court's reasoning in *NAACP* and *Buckley* informed the arguments and judicial decisions in *AFP v. Bonta*, which concerned a First Amendment challenge to California's donor disclosure requirement for charitable organizations.[108] California law requires charities operating in or soliciting funds in the State to register with the State and to file certain documents with the State Attorney General on an annual basis.[109] These documents include Form 990, which is a federal form that certain tax-exempt organizations file with the Internal Revenue Service (IRS) for tax purposes[110]—along with any applicable "attachments and schedules."[111] Starting in 2010, the State Attorney General began to send deficiency notices to organizations that did not include in their state filing "Schedule B" to Form 990,[112] an IRS schedule which generally lists the names, addresses, and total contributions of donors who gave $5,000 or more to the organization during a single tax year.[113] Facing suspension of their registrations for continued withholding of

[101] *Id.* at 462–63.

[102] *Id.* at 463–65.

[103] Buckley v. Valeo, 424 U.S. 1, 63–64 (1976) (per curiam).

[104] *Id.* at 66.

[105] *Id.* at 64.

[106] *Id.* at 68.

[107] *See* Citizens United v. FEC, 558 U.S. 310, 366 (2010); Doe v. Reed, 561 U.S. 186, 196 (2010).

[108] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

[109] *Id.* at 2379–80.

[110] *Form 990 Resources and Tools*, IRS.GOV (last updated Mar. 4, 2021), https://www.irs.gov/charities-non-profits/form-990-resources-and-tools.

[111] CAL. CODE REGS. tit. 11, § 301; *see also Schedules for Form 990*, IRS.GOV (last updated Mar. 3, 2021), https://www.irs.gov/forms-pubs/about-form-990-schedules.

[112] *Ams. for Prosperity Found.*, 141 S. Ct. at 2380.

[113] 26 C.F.R. § 1.6033-2(a)(2)(ii)(F); *see also About Schedule B*, IRS.GOV (last updated Jun. 17, 2021), https://www.irs.gov/forms-pubs/about-schedule-b-form-990-990-ez-or-990-pf (linking to the current revision of the Schedule B form).

Schedule B information, two organizations filed lawsuits challenging the Schedule B requirement as violating their and their donors' associational rights under the principles of *NAACP* and related precedents.[114]

In both cases, the district court held after a trial that California's Schedule B requirement violates the First Amendment as applied to the plaintiff organizations and permanently enjoined the State Attorney General from enforcing the requirement against them.[115] The U.S. Court of Appeals for the Ninth Circuit reversed in a consolidated appeal.[116] The appellate panel held that the Schedule B requirement survived exacting scrutiny under *Buckley* and its progeny because it is "substantially related to an important state interest in policing charitable fraud."[117]

The Supreme Court's Decision

In a 6-3 decision, the Supreme Court held that California's Schedule B requirement violated the First Amendment and reversed the Ninth Circuit's judgment.[118]

While ultimately reaching the same result, the Justices in the majority disagreed over the level of scrutiny that should apply to this and other disclosure requirements. Chief Justice John Roberts, Jr. and Justices Brett Kavanaugh and Amy Coney Barrett opined that *Buckley*'s exacting scrutiny test applies not just to election-related cases, but to all "compelled disclosure requirements."[119] Three additional Justices joined most of Chief Justice Roberts's opinion, but wrote separately on the question of the appropriate standard to apply.[120] Significantly, though, all six Justices in the majority appeared to agree that exacting scrutiny requires a law to be not only "substantially related" to an important government interest (i.e., the language used in *Buckley*), but also "narrowly tailored" to that interest.[121]

The majority concluded that California's Schedule B requirement failed to meet this exacting scrutiny standard.[122] Writing for the majority, Chief Justice Roberts reasoned that while California has an "important interest in preventing wrongdoing by charitable organizations," there is a "dramatic mismatch" between that interest and its "up-front," "blanket demand" for Schedule Bs.[123] The Court credited the district court's finding that "there was not 'a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance

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[114] *Ams. for Prosperity Found.*, 141 S. Ct. at 2380; *see also* Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment at 12, Americans for Prosperity Foundation v. Harris, No. 14-cv-09448 (C.D. Cal. Dec. 9, 2014), ECF No. 1; First Amended Complaint for Preliminary and Permanent Injunctive Relief, for a Declaratory Judgment, and for Damages and Attorney's Fees and Costs at 1–2, Thomas More Law Center v. Harris, 15-cv-03048 (C.D. Cal. June 11, 2015), ECF No. 25.

[115] Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049 (C.D. Cal. 2016); Thomas More Law Ctr. v. Harris, No. CV 15-3048-R, 2016 U.S. Dist. LEXIS 158851, at *1 (C.D. Cal. Nov. 16, 2016).

[116] Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000 (9th Cir. 2018).

[117] *Ams. for Prosperity Found.*, 903 F.3d at 1004; *see also id.* at 1008 (applying the "substantial relation" standard applied in *Doe v. Reed*, 561 U.S. 186, 196 (2010), which comes from *Buckley*).

[118] *Ams. for Prosperity Found.*, 141 S. Ct. at 2389.

[119] *Id.* at 2383 (plurality opinion).

[120] *See infra* "Concurring and Dissenting Opinions."

[121] *Ams. for Prosperity Found.*, 141 S. Ct. at 2383–84 (majority opinion). The majority concluded that unlike the "strict scrutiny" that applies to some speech restrictions, "narrow tailoring" under exacting scrutiny does not require that disclosure be the "least restrictive means" of achieving the government's interest. *Id.* at 2384.

[122] *Id.* at 2385–87.

[123] *Id.*

the [State] Attorney General's investigative, regulatory or enforcement efforts.'"[124] For the majority, California seemed to have a greater interest in "ease of administration," which was insufficient to justify the burden that the Schedule B requirement placed on donors' associational rights.[125] The Court also concluded that the disclosure requirement was not appropriately tailored to the government's interest, reasoning that California "cast[] a dragnet for sensitive donor information" without exploring narrower alternatives such as subpoenas or audit letters.[126]

Five of the six Justices in the majority also concluded that the Schedule B requirement violated the First Amendment "on its face" because "a substantial number of its applications are unconstitutional."[127] For those Justices, the "lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience."[128]

Concurring and Dissenting Opinions

Justice Thomas joined much of the principal opinion, but he would have applied a strict scrutiny standard, which he views as consistent with the Court's precedents on compelled disclosures of association.[129] He also dissented from the majority's holding that the regulation was overbroad and therefore invalid on its face, questioning whether courts can, consistent with their constitutional authority, invalidate a law beyond its application to the parties and circumstances before the court.[130]

Justices Alito and Gorsuch reasoned that because the Schedule B requirement clearly fails exacting scrutiny, it "necessarily" fails strict scrutiny too.[131] Accordingly, they deemed it unnecessary to decide in *Americans for Prosperity* which standard applies to this or other circumstances involving the compelled disclosure of associations.[132]

Justice Sotomayor wrote a dissent, which Justices Breyer and Kagan joined.[133] The dissent would have upheld California's Schedule B requirement under a more flexible exacting scrutiny test "whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights."[134] In the dissent's view, the majority "discard[ed]" the Court's "decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals."[135] The Court's analysis, the dissent posited, "marks reporting and

[124] *Id.* at 2386 (quoting Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1055 (C.D. Cal. 2016)).

[125] *Id.* at 2387.

[126] *Id.* at 2386–87.

[127] *Id.* at 2387.

[128] *Id.* at 2387.

[129] *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment). Under strict scrutiny, the government must prove that the challenged law furthers a compelling governmental interest and is narrowly tailored to achieve that interest, which, for strict scrutiny, requires the law to be the least restrictive means of furthering that interest. United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

[130] *Ams. for Prosperity Found.*, 141 S. Ct. at 2390–91.

[131] *Id.* at 2391 (Alito, J., concurring in part and concurring in the judgment).

[132] *Id.* at 2392.

[133] *Id.* at 2392 (Sotomayor, J., dissenting).

[134] *Id.*

[135] *Id.*

disclosure requirements with a bull's eye" by presuming that "all disclosure requirements impose associational burdens," thereby requiring "close scrutiny" whenever a litigant expresses "a subjective preference for privacy."[136]

Considerations for Congress

Although the scope of the Court's ruling addressed only California's Schedule B requirement, the *AFP* decision has prompted additional litigation and changes in how some other states regulate charitable organizations.[137] In response to the decision, New York State has suspended its collection of Schedule B forms and donor-identifying information from charities while the State reviews its policies.[138] New Jersey also ceased "upfront" collection of Schedule Bs.[139]

The decision could have implications for donor disclosure requirements in federal tax law as well. Certain nonprofit organizations that are exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code (such as the petitioners in *AFP*) must file Schedule B to Form 990 with the IRS on an annual basis.[140] Additionally, certain political organizations described in Section 527 of the Internal Revenue Code must also report information about their donors who contributed at least $200 in a calendar year on Schedule A of Form 8872.[141] Because the federal government is responsible for enforcing federal income tax laws, it may be able to assert different regulatory or law enforcement interests than California to support its donor disclosure requirements. In an amicus filing in *AFP*, the United States argued that the federal disclosure requirement for Section 501(c)(3) organizations is a permissible condition on a federal benefit; that is, the federal government's subsidization of 501(c)(3)s through tax-exempt status and deductions for charitable contributions.[142]

The decision also may have consequences for campaign finance disclosures. In *Citizens United v. FEC*, the Court upheld the challenged disclaimer and disclosure requirements on electioneering communications as applied to a political documentary.[143] The Court explained that while "[d]isclaimer and disclosure requirements may burden the ability to speak," they "do not prevent anyone from speaking."[144] As such, the Court stated, they are subject to "'exacting scrutiny,'" invoking the *Buckley* standard requiring "a 'substantial relation' between the disclosure

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[136] *Id.* at 2392, 2395.

[137] *See* Jennifer McLoughlin, *New York, New Jersey Face Challenges to Donor Disclosure Policies*, 88 EXEMPT ORG. TAX REVIEW 73 (Aug. 2021) (discussing two cases filed by the Liberty Justice Center to challenge New York and New Jersey's Schedule B requirements) (citing Liberty Justice Center v. James, No. 21-cv-06024 (S.D.N.Y. July 15, 2021) and Liberty Justice Center v. Grewal, No. 21-cv-13616 (D.N.J. July 14, 2021)).

[138] N.Y. State Office of the Att'y Gen., *Schedule B Collection Suspension*, CHARITIESNYS.COM, https://www.charitiesnys.com/ (last visited Aug. 17, 2021); *see also* James Nani, *NY Halts Donor Info Collection After Justices Reject Calif. Rule*, LAW360 (Aug. 3, 2021), https://www.law360.com/tax-authority/articles/1409355/ny-halts-donor-info-collection-after-justices-reject-calif-rule.

[139] N.J. Div. of Consumer Affairs, Office of the Att'y Gen., *Charities Registration Section: Notice*, NJCONSUMERAFFAIRS.GOV, https://www.njconsumeraffairs.gov/charities (last visited Aug. 17, 2021).

[140] 26 U.S.C. § 6033; 26 C.F.R. § 1.6033-2(a)(2)(ii)(F).

[141] 26 U.S.C. § 527; *see also Form 8872—Contents of Report*, IRS.GOV (last updated Mar. 4, 2021), https://www.irs.gov/charities-non-profits/political-organizations/form-8872-contents-of-report.

[142] Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 24, Ams. for Prosperity Found. v. Becerra, Nos. 19-251, 19-255 (U.S. Mar. 1, 2021).

[143] Citizens United v. FEC, 558 U.S. 310, 321 (2010).

[144] *Id.* at 366 (internal quotation marks and citation omitted).

requirement and a 'sufficiently important' governmental interest."[145] The Court rejected Citizen United's argument that disclosing the names of certain contributors to the FEC would chill donations to the organization, because Citizens United had not offered any evidence that its members were reasonably likely to face harassment or retaliation as a result of the disclosure.[146] Several legal commentators have described *AFP* as changing the exacting scrutiny standard as formulated in *Buckley* and applied in *Citizens United* by adding a new requirement that disclosure laws be narrowly tailored to the asserted governmental interest.[147] If so, then the government may face a heavier burden to justify campaign finance disclosures in future litigation.

Because the Court's decision in *AFP* was based on constitutional constraints, Congress has limited ability to address that decision through legislation. Instead, the *AFP* decision could affect pending legislation, both within and outside the area of campaign finance. For example, some Members of the 117th Congress have introduced legislation that would require private foundations to report contributions to donor-advised funds to the IRS.[148] *AFP* suggests that such requirements, if challenged in court, could be subject to a narrow tailoring analysis.

Cedar Point Nursery v. Hassid: The Takings Clause and Union Access[149]

In a case with important implications for property rights and organized labor, the Supreme Court ruled that a California regulation allowing union organizers to enter agricultural employers' property for several hours a day for several months each year was an unconstitutional taking of property in violation of the Takings Clause of the Fifth Amendment.[150] The decision, *Cedar Point Nursery v. Hassid*, may mark a shift toward greater scrutiny of state actions affecting property rights. The Court's majority categorized the union access regulation as a per se taking requiring compensation for property owners, rather than applying the multifactor balancing approach the Court has often used to evaluate property regulations under the Takings Clause. Although it remains to be seen how broadly the *Cedar Point* opinion will be applied, the Court's ruling could have significant effects on other types of state and federal property regulations beyond the labor context.[151]

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[145] *Id.* at 366–67 (quoting Buckley v. Valeo, 424 U.S. 1, 64–66 (1976) (per curiam)).

[146] *Id.* at 370.

[147] *See, e.g.*, Amanda H. Nussbaum & Richard M. Corn, *The Impact of* Americans for Prosperity Foundation v. Bonta *on Donor Disclosure Laws*, PROSKAUER ROSE LLP TAX TALKS BLOG (July 30, 2021), https://www.proskauer.com/blog/the-impact-of-americans-for-prosperity-foundation-v-bonta-on-donor-disclosure-laws; Ian Millhiser, *The Supreme Court Just Made Citizens United Even Worse*, VOX (July 1, 2021), https://www.vox.com/2021/7/1/22559318/supreme-court-americans-for-prosperity-bonta-citizens-united-john-roberts-donor-disclosure.

[148] Accelerating Charitable Efforts Act, S. 1981, 117th Cong. § 5 (as introduced, June 9, 2021). *See* CRS Report R45922, *Tax Issues Relating to Charitable Contributions and Organizations*, by Jane G. Gravelle, Donald J. Marples, and Molly F. Sherlock (explaining that, with a donor-advised fund, an individual makes a gift to a fund in a sponsoring organization that administers payment of grants to charities based on recommendations from the donor).

[149] Kevin J. Hickey, CRS Legislative Attorney, authored this section of the report.

[150] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021).

[151] *See, e.g.*, Jeffrey Braun & James Greilsheimer, *The Supreme Court Further Expands the Definition of a Physical "Taking" of Property That Violates Fifth Amendment Protections*, KRAMERLEVIN.COM (July 30, 2021), https://www.kramerlevin.com/en/perspectives-search/the-supreme-court-further-expands-the-definition-of-a-physical-taking-of-property-that-violates-fifth-amendment-protections.html ("[*Cedar Point*] expands the concept of what is a

Background

The Takings Clause

The final clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[152] The Takings Clause thus recognizes the right of the government to appropriate property in some cases, such as the exercise of its eminent domain power.[153] At the same time, the Clause puts limits on that power. First, government takings of property must be for "public use"—the government may not, for example, simply transfer property from one private party to another without a public purpose.[154] Second, if the government takes property for a public use, it must provide "just compensation" to the owner.[155] Although originally limited to the federal government, the Takings Clause applies to state governments as well through the Fourteenth Amendment.[156]

A recurring issue in Takings Clause cases is determining when government actions that affect property rights suffice to effect a "Taking" of property within the meaning of the Fifth Amendment. The Supreme Court's Takings Clause jurisprudence distinguishes between *physical appropriations* of property by the government, and *regulations restricting uses* of private property. For physical appropriations, the Court applies a per se rule: such appropriations, even if minor, are takings that the government must compensate.[157] Property use regulation that falls short of physical appropriation, however, is only a taking (and thus only requires compensation) when the regulation goes "too far."[158] To determine whether a so-called "regulatory taking" has occurred, courts typically weigh the factors that the Supreme Court listed in *Penn Central Transportation Co. v. New York City*: the "economic impact of the regulation," its interference with "investment-backed expectations," and "the character of the governmental action."[159] Because of the "essentially ad hoc, factual" nature of the *Penn Central* test,[160] property owners

physical taking and raises questions about the further expansions of takings law that may follow.").

[152] U.S. CONST. amend. V.

[153] *See, e.g.*, United States v. Miller, 317 U.S. 369, 370–71 (1943) (involving condemnation of land by federal government for a railroad); Kohl v. United States, 91 U.S. 367, 372–73 (1876) (interpreting Takings Clause as an "implied assertion" of federal eminent domain power). *See generally Takings Clause: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-5-1-1/ALDE_00000920/.

[154] *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B* [but] a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking. . . .").

[155] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[156] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984); Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

[157] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [under the Takings Clause]."); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that "a minor but permanent physical occupation of an owner's property authorized by government" is a per se taking).

[158] *See Tahoe-Sierra*, 535 U.S. at 325–26 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[159] 438 U.S. 104, 124 (1978). There is an exception to this rule when a government regulation destroys *all* economic value of the property; such regulations are treated as per se takings despite being regulatory in nature. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) ("[W]e have found categorical treatment appropriate [under the Takings Clause] where regulation denies all economically beneficial or productive use of land." (citations omitted)).

[160] *Penn Central*, 438 U.S. at 124.

often seek to characterize governmental actions as per se physical takings, which the government must compensate regardless of the *Penn Central* factors.

For example, the Court has found a per se taking when the government mandates installation of rooftop cable lines for apartment tenants,[161] takes title to a share of a farm's agricultural output,[162] or causes recurring flooding of a property.[163] On the other hand, the Court has applied the *Penn Central* test when the government regulates land use through temporary building moratoria,[164] rent controls,[165] or limitations on mining rights.[166]

Some of the Court's Takings Clause precedents, like *Cedar Point*, concern rights of access to private property. In *PruneYard Shopping Center v. Robins*, the Court applied the *Penn Central* test to hold that California's requirement that private shopping malls allow citizens to exercise their rights of petition and free speech on their property was not a regulatory taking.[167] In *Nollan v. California Coastal Commission*, the Court addressed whether California could condition a grant of permission to rebuild a house on a transfer from the owner to the public of an easement across a beachfront property.[168] The Court explained that a governmental seizure of such an easement, outside of the building permit context, would be a per se physical taking because it grants a "permanent and continuous right to pass to and fro . . . even though no particular individual is permitted to station himself permanently upon the premises."[169]

The Dispute in *Cedar Point*

Under the California Agricultural Labor Relations Act of 1975, it is an "unfair labor practice" for an agricultural employer to interfere with the right of its employees to self-organize and bargain collectively.[170] To "encourage and protect" the right of self-organization, the California Agricultural Labor Relations Board promulgated a regulation that permits union organizers to access the property of an agricultural employer for up to four 30-day periods per year.[171] To exercise this right, a labor organization must file a written notice of its "intention to take access" with the employer and the Board.[172] The organizers may then enter the employer's property to meet and talk with employees for up to one hour before work, one hour during the lunch break, and one hour after work during each 30-day period.[173]

Cedar Point Nursery is a strawberry grower in California that employs around 400 seasonal workers and 100 full-time workers.[174] After union organizers entered their property without notice, Cedar Point and other agricultural employers sued, arguing that California's regulation

[161] *Loretto*, 458 U.S. at 421.

[162] Horne v. Dep't of Agric., 576 U.S. 351, 361 (2015).

[163] United States v. Cress, 243 U.S. 316, 327–29 (1917).

[164] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341–42 (2002).

[165] Yee v. City of Escondido, 503 U.S. 519, 529 (1992).

[166] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987).

[167] 447 U.S. 74, 82–84 (1980).

[168] 483 U.S. 825, 827 (1987).

[169] *Id.* at 832.

[170] CAL. LABOR CODE §§ 1152, 1153(a).

[171] CAL. CODE REGS., tit. 8, § 20900(a), (e)(1)(A).

[172] *Id.* § 20900(e)(1)(B).

[173] *Id.* § 20900(e)(3)(A)–(B).

[174] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

mandating union access to their property without compensation violated the Taking Clause.[175] In the litigation, Cedar Point argued that the union access right effected a per se physical taking and made no attempt to satisfy the *Penn Central* test for regulatory takings.[176] The district court and a divided Ninth Circuit panel rejected Cedar Point's argument, holding that California's regulation was not a physical taking because the access granted was not "permanent and continuous" within *Nollan*'s definition of a physical occupation.[177]

The Supreme Court's Decision

By a vote of 6 to 3, the Supreme Court reversed the Ninth Circuit, holding that California's union access right was a per se physical taking.[178] Chief Justice Roberts wrote the opinion for the Court, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. In the view of the Court, California's union access regulation grants labor organizers a "right to invade the grower's property" and is therefore a per se physical taking.[179] The Court's analysis emphasizes that the right to exclude others is fundamental to property ownership, and that (as in *Nollan*) its cases have treated "government-authorized invasions of property" as per se takings.[180]

The majority rejected the argument that the temporary nature of the union access regulation—three hours a day, four months a year—meant it did not constitute a per se taking. The Court reasoned that there is "no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364."[181] Relying on *Nollan* and other precedents, that Court found that its cases have recognized that "physical invasions constitute takings even if they are intermittent,"[182] and regardless of whether the union access right would constitute an easement under state property law.[183] Finally, the Court distinguished the public access afforded in *PruneYard* by noting that, unlike the shopping malls at issue in that case, the agricultural farms are not generally "open to the public."[184]

Responding to the dissent's claim that the majority's rule would endanger "a host of state and federal government activities involving entry onto private property," the majority set forth several explicit limitations on its holding.[185] First, the Court noted that the holding does not disturb "the distinction between trespass and takings," so that "[i]solated physical invasions, not undertaken pursuant to a granted right of access" are not appropriations of property.[186] Second, the Court clarified that government-authorized physical invasions will not be takings if "consistent with longstanding background restrictions on property rights," such abatements of nuisances or

[175] *Id.* at 2070.

[176] *Id.*

[177] Cedar Point Nursery v. Shiroma, 923 F.3d 524, 532 (9th Cir. 2019), *rev'd sub nom.*, *Cedar Point Nursery*, 141 S. Ct. 2063.

[178] *Cedar Point Nursery*, 141 S. Ct. at 2072.

[179] *Id.*

[180] *Id.* at 2072–74.

[181] *Id.* at 2074.

[182] *Id.* at 2075.

[183] *Id.* at 2075–76.

[184] *Id.* at 2076–77.

[185] *Id.* at 2078.

[186] *Id.*

reasonable searches and seizures.[187] Third, the government may constitutionally require an owner to cede a right of access as a condition of receiving a regulatory benefit, if consistent with precedents like *Nollan*.[188] The majority observed that this final exception would generally allow, among other things, "government health and safety inspection regimes."[189]

Concurring and Dissenting Opinions

Justice Kavanaugh wrote a brief concurrence to express his view that *NLRB v. Babcock & Wilcox Co*., a 1954 case interpreting the National Labor Relations Act, also supported the Court's decision.[190]

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. In Justice Breyer's view, the union access regulation is not a per se taking because it "does not 'appropriate' anything," but merely "regulates the employers' right to exclude others."[191] Looked at "through the lens of ordinary English," Justice Breyer maintained that the union access provision is regulatory "in both label and substance" and "only awkwardly" fits with the term "physical appropriation."[192] In the view of the dissent, the California regulation was not a physical appropriation as it did not *take* the owner's right to exclude, but merely limited that right temporarily against certain third parties.[193]

Turning to the Court's precedents, Justice Breyer argued that the Court had previously stated that "'[n]ot every physical invasion is a taking," and had distinguished the "permanence and absolute exclusivity of a physical occupation" from "temporary limitations on the right to exclude."[194] Justice Breyer further observed that *PruneYard*—which "fits this case almost perfectly"—was an example of a temporary physical invasion not treated as a per se taking.[195]

Finally, the dissent argued that the majority's elimination for the "permanent/temporary distinction" creates practical problems for government regulation.[196] Governments may require "access to private property" for reasons as varied as restaurant inspections, environmental regulations, or compliance with preschool licensing requirements.[197] Although the majority's limitations on its holding may limit these "adverse impact[s]," the dissent argued that the majority's "new system" raises "complex" questions about the scope of those exceptions.[198]

Considerations for Congress

Cedar Point represents the latest case in the Court's centuries-long development of its Takings Clause jurisprudence. *Cedar Point* is particularly significant for its application of the per se rule to temporary, government-authorized invasions of private property, which raises questions about

[187] *Id.* at 2079.

[188] *Id*.

[189] *Id.*

[190] *Id.* at 2080–81 (Kavanaugh, J., concurring).

[191] *Id.* at 2081 (Breyer, J., dissenting).

[192] *Id.* at 2082.

[193] *Id.* at 2083.

[194] *Id.* at 2083 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)).

[195] *Id.* at 2085.

[196] *Id.* at 2087.

[197] *Id.* at 2087–88.

[198] *Id.* at 2088–89.

whether courts will find other types of property regulations to be physical takings. When crafting laws that affect property rights, Congress may wish to be mindful of the Takings Clause, as its laws may require compensation for property owners when government actions appropriate property.

Legislative drafters may also consider the various exceptions that the majority identified in *Cedar Point*. For example, a statute may be less vulnerable to Takings Clause challenges if Congress includes statutory language or legislative findings that connect property regulations to the acceptance of government benefits or to longstanding background restrictions on property rights.

TransUnion v. Ramirez: Standing in Consumer Protection Litigation[199]

In a decision that could have widespread implications for future consumer privacy legislation, *TransUnion LLC v. Ramirez*, the Supreme Court examined the Constitution's limits on Congress's ability to confer standing on private individuals.[200] The case concerned whether thousands of consumers, who were members of a class action lawsuit alleging violations of the Fair Credit Reporting Act (FCRA),[201] had suffered concrete injuries sufficient to recover damages in federal court.[202] In a 5-4 decision, the Supreme Court held that only those class members whose inaccurate credit reports had been provided to third-party businesses had suffered concrete reputational harm sufficient to establish standing to recover retrospective damages.[203] The Court's decision may effectively prevent Congress from conferring standing on plaintiffs to recover damages in federal court for harms, such as procedural violations of privacy laws, that were not traditionally recognized as providing a basis for a lawsuit in American courts.[204]

Background

Article III of the Constitution limits the power of federal courts to resolving "cases" and "controversies."[205] The concept of "standing" derives from Article III and broadly refers to a litigant's right to have a court rule upon the merits of particular claims for which he seeks judicial relief.[206] The Supreme Court has held that, as a threshold procedural matter,[207] and during each

[199] Brandon J. Murrill, CRS Legislative Attorney, authored this section of the report.

[200] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

[201] 15 U.S.C. §§ 1681–1681x. FCRA distinguishes between a "credit report," which is communicated to third parties, and a "credit file," which is maintained internally by the credit reporting agency. *Id.* § 1681a(d), (g).

[202] *TransUnion*, 141 S. Ct. at 2200–01.

[203] *Id.*

[204] For further analysis, see CRS Legal Sidebar LSB10629, *Privacy Law and Private Rights of Action: Standing After TransUnion v. Ramirez*, by Eric N. Holmes. The Supreme Court has also previously recognized certain *prudential* limitations on the exercise of federal courts' jurisdiction, which, although lacking constitutional status, may nonetheless result in a court's refusal to hear a case. United States v. Windsor, 570 U.S. 744, 760 (2013). Congress, through express legislation, may abrogate these prudential standing requirements, to the extent that they remain viable and are not mandated by the Constitution. Warth v. Seldin, 422 U.S. 490, 501 (1975).

[205] U.S. CONST. art. III, § 2.

[206] *Warth*, 422 U.S. at 498; BLACK'S LAW DICTIONARY 1536 (9th ed. 2009) (defining "standing" as "a party's right to make a legal claim or seek judicial enforcement of a duty or right"). *See generally Standing Requirement: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-2-5-1/ALDE_00001197/.

[207] Federal courts must necessarily resolve standing inquiries before proceeding to the merits of a lawsuit. *See, e.g.*, Davis v. FEC, 554 U.S. 724, 732 (2008). Even if no party to the lawsuit contests standing, a court may raise the issue of

stage of the litigation,[208] a litigant must have standing in order to invoke the jurisdiction of a federal court so that the court may exercise its "remedial powers on his behalf."[209] In general, for a party to establish Article III standing, it must prove that it has a genuine stake in the outcome of the case because it has personally suffered (or will imminently suffer) (1) a concrete and particularized injury (2) that is traceable to the allegedly unlawful actions of the opposing party, and (3) that is redressable by a favorable judicial decision.[210]

The Supreme Court has also held that Article III constrains Congress's ability to confer standing on private individuals through the enactment of "citizen-suit" provisions that authorize private individuals to enforce federal laws against the government or private parties.[211] Congress has some ability to expand standing beyond the Court's traditional conception by granting a litigant a separate concrete interest, apart from a bare procedural right,[212] that could serve as the basis for an injury-in-fact if violated.[213] At the same time, Congress must respect the limits that Article III establishes, and it cannot elevate certain categories of harm to the status of concrete injuries. For example, Congress likely cannot elevate a trivial injury, such as a company reporting an incorrect zip code for an individual, to the status of an Article III injury.[214] When Congress creates a right, the question for courts is whether the violation of that right causes the kind of harm that "has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[215] In considering this question, courts must give at least some weight to Congress's judgments about which intangible harms amount to concrete Article III injuries.[216]

In *TransUnion*, the named plaintiff, Sergio Ramirez, went to a car dealership in California with family members.[217] After Ramirez and his wife had chosen a car, the dealership ran a credit check on them.[218] The dealership informed Ramirez that his credit report, which TransUnion had provided, listed him as a potential match with an individual in a U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) database of known terrorists and criminals.[219] The car

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standing *sua sponte* (i.e., of its own accord) in order to ensure that it has jurisdiction. *See, e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam).

[208] Hollingsworth v. Perry, 570 U.S. 693, 705 (2013).

[209] Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (quoting *Warth*, 422 U.S. at 498–99). *See also Davis*, 554 U.S. at 732; *Simon*, 426 U.S. at 37 ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation.") (citation omitted).

[210] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (listing the elements of standing).

[211] *Id.* at 577.

[212] In *Summers v. Earth Island Institute*, the Supreme Court reaffirmed that the deprivation of a litigant's procedural right–the right to use a federal administrative appeals process to challenge certain actions of the U.S. Forest Service–without injury to any separate concrete interest cannot support Article III standing to sue. 555 U.S. 488, 496 (2009).

[213] Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007).

[214] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016).

[215] *Id.* at 1549. In *Spokeo v. Robins*, the Court clarified that Congress cannot confer standing on plaintiffs who do not face at least a material risk of injury from the defendant's violation of statutory rights. *Id*. at 1550.

[216] *Id.* at 1549.

[217] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201–02 (2021).

[218] *Id.*

[219] *Id.* TransUnion identified a "potential match" with names on OFAC's database by comparing the consumer's first and last name to the first and last names in the database. *Id*. This process generated many false positive OFAC alerts. *Id.*

salesman declined to sell the car to Ramirez because his name appeared on a "terrorist list."[220] Ramirez's wife purchased the car in her name.[221]

Exercising his rights under FCRA, Ramirez obtained a copy of his credit file from TransUnion.[222] The first mailing he received from the company did not list the OFAC alert; instead, a letter notifying him of the potential OFAC database match arrived in the mail separately.[223] However, this letter did not include a copy of the "summary of rights" that FCRA requires.[224] Subsequently, TransUnion removed the OFAC alert from Ramirez's credit file.[225]

Ramirez sued TransUnion for statutory and punitive damages, alleging that the company had violated FCRA by failing to (1) "follow reasonable procedures to ensure the accuracy of information in his credit file";[226] (2) furnish him with a complete credit file upon request;[227] and (3) provide him with the statutorily required "summary of rights" with the second mailing.[228] Ramirez also sought the certification of a class of "all people in the United States to whom TransUnion sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received."[229]

To recover damages at the final judgment stage in federal court, each member of the class action had to have standing.[230] In *TransUnion*, the U.S. District Court for the Northern District of California certified the class,[231] holding that all 8,185 members had Article III standing.[232] Of these members, 1,853 had credit reports that had been disseminated to third parties.[233] Defendant TransUnion argued unsuccessfully before the lower courts that more than 75 percent of the class action plaintiffs had not suffered any concrete injuries for standing purposes because the misleading information in their credit files had not been disclosed to a third party.[234] After trial, the jury awarded the plaintiff class $60 million in statutory and punitive damages, which amounted to over $7,000 per plaintiff.[235] The U.S. Court of Appeals for the Ninth Circuit reduced the damages award to $40 million, or about $4,000 per class member.[236] The circuit court

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[220] *Id.* OFAC regulations generally prohibit transactions with such "specially designated nationals." 31 C.F.R. pt. 501 App. A.

[221] *TransUnion*, 141 S. Ct. at 2201–02.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id. See also* 15 U.S.C. §1681e(b).

[227] *TransUnion*, 141 S. Ct. at 2201–02. *See also* 15 U.S.C. § 1681g(a)(1).

[228] *TransUnion*, 141 S. Ct. at 2201–02. *See also* 15 U.S.C. § 1681g(c)(2).

[229] *TransUnion*, 141 S. Ct. at 2202.

[230] *See* Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017). In *TransUnion*, the Supreme Court confirmed that each class member must have standing to recover damages, but it declined to address "the distinct question [of] whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 141 S. Ct. at 2208 n.4.

[231] Ramirez v. Trans Union, LLC, 301 F.R.D. 408, 426 (N.D. Cal. 2014).

[232] *See TransUnion*, 141 S. Ct. at 2202.

[233] *See id.*

[234] *See* Brief for Petitioner at 1–3, TransUnion v. Ramirez, No. 20-297 (2021).

[235] *TransUnion*, 141 S. Ct. at 2202.

[236] *See id.*

affirmed that all of the class members had Article III standing to bring all of their claims.[237] The court determined that the class members had standing because "TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA."[238]

The Supreme Court's Decision

In a 5-4 opinion authored by Justice Kavanaugh, the Supreme Court held that more than 75 percent of the class members lacked standing.[239] In its decision, the Court specifically relied on *Spokeo v. Robins*, confirming *Spokeo*'s holding that all litigants—even those asserting a right created by Congress—must have a concrete harm sufficient to establish standing.[240] The Court again held that any such "concrete harm" must have a "close relationship" to "a harm traditionally recognized as providing a basis for a lawsuit in American courts."[241]

Applying this standard to the *TransUnion* plaintiffs, the Court held that the 1,853 class members whose misleading credit reports were provided to prospective creditors had standing to recover damages for their "reasonable-procedures" claim because they had suffered a harm that bore a close relationship to the tort of defamation (i.e., publication of a false, defamatory statement about somebody to a third party).[242] However, the remaining 6,332 class members whose misleading credit files were not disclosed to a third party lacked standing to recover damages because their information had not been published.[243] In addition, the court held that none of the plaintiffs other than Ramirez had standing to recover damages for FCRA claims concerning formatting defects in TransUnion mailings.[244]

The Court also held that the class members who sought damages because of the risk that their credit file might be disclosed to a third party at some future time had failed to demonstrate concrete harm.[245] There was not a sufficient likelihood that the harm would materialize in the future, and the plaintiffs had not alleged that exposure to the risk of that future harm amounted to a separate, concrete injury (e.g., emotional injury).[246] The Court reversed the Ninth Circuit's judgment and remanded the case, instructing the circuit court to "consider in the first instance whether class certification is appropriate in light of our conclusion about standing."[247]

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[237] Ramirez v. TransUnion, 951 F.3d 1008, 1037 (9th Cir. 2020).

[238] *Id.*

[239] *TransUnion*, 141 S. Ct. at 2200.

[240] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016).

[241] *TransUnion*, 141 S. Ct. at 2200, 2206.

[242] *Id.* at 2208–09. Although the statements identifying class members as "potential" matches with the OFAC database were arguably misleading rather than false, the Court held that FCRA's cause of action was close enough to the tort of defamation to constitute a concrete harm. *Id.*

[243] *Id.* at 2212–13. The Court compared such harm to a situation in which "someone wrote a defamatory letter and then stored it in her desk drawer." *Id.* at 2210.

[244] *Id.* at 2214.

[245] *Id.* at 2210–11. Similarly, the court rejected the theory that consumers (other than Ramirez) who received information about the OFAC alert in their credit file in a separate mailing had suffered a concrete injury from a risk of future harm because the consumers might not have known to ask for corrections to their file in time. *Id.* at 2213–14.

[246] *Id.* at 2211–12.

[247] *Id.* at 2214.

Dissenting Opinions

Four Justices dissented, reasoning that the Supreme Court should have given more weight to the judgment of Congress in applying Article III. Justice Thomas authored a dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.[248] Justice Thomas argued that when Congress enacted FCRA, it granted individual consumers private statutory rights.[249] It also conferred standing on consumers to seek redress in federal court for violations of those rights even in the absence of actual damages.[250] Consequently, Justice Thomas would have held that the class members had standing because they sought to vindicate an individual right and not an abstract duty owed to the community at large.[251] Furthermore, Justice Thomas argued, the majority should have "accord[ed] proper respect for the power of Congress . . . to define legal rights" instead of attempting to decide for itself which injuries were sufficiently "concrete."[252]

Justice Kagan wrote a separate dissent in which Justices Breyer and Sotomayor joined.[253] Justice Kagan disagreed to some extent with Justice Thomas, arguing that that Congress lacked *plenary* authority to recognize new individual legal rights and confer standing on private parties to sue to vindicate those rights.[254] However, she agreed that the majority should have accorded deference to Congress's judgment about "when something causes a harm or risk of harm in the real world."[255] She wrote that "overriding an authorization to sue is appropriate . . . only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue."[256]

Considerations for Congress

The Supreme Court's decision in *TransUnion* may inform any potential future federal legislation that creates new rights, including consumer privacy legislation.[257] Relying on *Spokeo*, the Court held that although Congress may "elevate" real-world harms to the status of Article III injuries, federal courts must independently review whether such harms are in fact "concrete injuries" sufficient for standing purposes.[258] Also, in *TransUnion*, the Court provided some additional guidance on what types of harms to consumers may constitute concrete injuries in federal court. The decision appears to limit the category of plaintiffs who may recover damages for procedural violations of a future privacy law to those who can demonstrate concrete injuries resulting from such violations.[259] Consequently, the Court's decision may effectively prevent Congress from

[248] *Id.* at 2214 (Thomas, J., dissenting).

[249] *Id.* at 2218.

[250] *Id.* at 2217–18.

[251] *Id.* at 2218–19.

[252] *Id.* at 2218.

[253] *Id.* at 2225 (Kagan, J., dissenting).

[254] *Id.* at 2226.

[255] *Id.*

[256] *Id.*

[257] It may also have implications for litigation under existing federal consumer protection laws that provide private rights of action, such as the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p, and Telephone Consumer Protection Act, 47 U.S.C. § 227.

[258] *TransUnion*, 141 S. Ct. at 2204–05 (majority opinion).

[259] *See id.* at 2200. The Court did not address the extent to which its holding may prohibit consumers from seeking injunctive relief to prevent an imminent and substantial harm from occurring. *Id.* at 2210.

conferring standing on plaintiffs to recover damages in federal court for some kinds of violations of privacy laws.[260]

In addition, the Court determined that the mere risk that a consumer's credit file might be disclosed to a third party at some future time was insufficient to demonstrate concrete harm to recover damages.[261] This determination may have implications for federal privacy laws that provide a damages remedy for the risk of future harm from a data breach when the data has not been disclosed to a third party. The Court's decision suggests that plaintiffs could have standing to recover damages in those circumstances only if the exposure to the risk of that future harm amounts to a separate, concrete injury (e.g., emotional injury)[262] or if there is a "sufficient likelihood" of disclosure of the plaintiff's information.[263]

After *TransUnion*, Congress must closely consider how any rights that it creates by statute will fare in a standing analysis when litigants assert those rights.[264] Previously, Congress may have determined that authorizing plaintiffs to sue defendants for violations of newly created rights would deter certain harmful conduct, even if some of those plaintiffs had not yet incurred actual damages as a result of that conduct.[265] By requiring that plaintiffs have suffered a past concrete harm in order to have standing to recover damages for violations of statutory rights in federal court, the *TransUnion* majority may have limited this deterrent effect.[266] Nonetheless, the Court did not specifically hold that the Constitution prohibits Congress from *creating a cause of action* for a violation of statutory rights.[267] Consequently, it is possible that the Court's decision will lead plaintiffs who have not suffered concrete harm to file more lawsuits in state courts, which may have their own standing rules that are more flexible than the rules that federal courts apply.[268]

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[260] For further analysis, see CRS Legal Sidebar LSB10629, *Privacy Law and Private Rights of Action: Standing After TransUnion v. Ramirez*, by Eric N. Holmes.

[261] *TransUnion*, 141 S. Ct. at 2210–14.

[262] *See id.*

[263] *See id.* For recent circuit court cases addressing standing to sue third-party companies for allegedly retaining a consumer's data in violation of federal law, see Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 912 (7th Cir. 2017) ("Violations of rights of privacy are actionable, but . . . there is no indication of any violation of the plaintiff's privacy because there is no indication that [the cable company] has released, or allowed anyone to disseminate, any of the plaintiff's personal information in the company's possession."); Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016) (stating that "the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts").

[264] For example, in recent Congresses, Members have introduced privacy legislation that would have provided damages remedies to consumers for violations of various newly created individual rights with respect to covered information held by certain entities. *See* CRS Legal Sidebar LSB10441, *Watching the Watchers: A Comparison of Privacy Bills in the 116th Congress*, by Jonathan M. Gaffney. Even if Congress had enacted this legislation, the Supreme Court's decision in *TransUnion* could effectively prevent consumers who have suffered violations of these statutory rights from maintaining a lawsuit in federal court.

[265] *See TransUnion*, 141 S. Ct. at 2226 (Kagan, J. dissenting).

[266] Furthermore, in the context of class action lawsuits, a consumer who has suffered concrete harm from a defendant's statutory violations cannot aggregate his claims with other consumers who are potentially harmed, but have not actually suffered harm, in order to make a lawsuit economically viable. *See id.* at 2214 (majority opinion) ("On remand, the Ninth Circuit may consider in the first instance whether class certification is appropriate in light of our conclusion about standing.").

[267] Rather, the Court held that Congress could not *confer standing in federal court* on plaintiffs who had not suffered concrete harm as the result of such violations. *See id*. at 2200.

[268] *See id*. at 2224 n.9 (Thomas, J., dissenting). *See also* Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989).

United States v. Arthrex: The Appointments Clause and Administrative Patent Judges[269]

In *United States v. Arthrex*, the Court held that the authority exercised by the administrative patent judges of the Patent Trial and Appeal Board (PTAB) to issue final decisions on the validity of previously issued patents was inconsistent with the Constitution's Appointments Clause.[270] To address this constitutional defect, the Court granted the Director of the U.S. Patent and Trademark Office (the Director) unilateral power to review PTAB decisions.[271] *Arthrex* has potential implications for other proceedings and agencies because it suggests that administrative adjudicators whose agency heads cannot remove them at will may not issue final, unreviewable decisions on behalf of the government, unless they are appointed by the President with the Senate's advice and consent.

Background

The Appointments Clause

The Appointments Clause—Article II, Section 2, Clause 2 of the Constitution—provides the method of appointment for "Officers of the United States," which include cabinet-level officials, agency heads, and, in some circumstances, federal employees who preside over agency adjudications.[272] The Clause does not apply to those who are "simply employees" of the federal government[273]—only to "officers" who "occupy a 'continuing' position established by law" and exercise "significant authority pursuant to the laws of the United States."[274] The Clause's default method of appointment for such officers is presidential appointment with the advice and consent of the Senate.[275] However, the Clause also creates an exception to that procedure, providing that Congress may vest the appointment of "inferior [o]fficers" in "the President alone, in the Courts of Law, or in the Heads of Departments."[276] Thus, department heads (such as the Secretary) may appoint *inferior officers*, when Congress grants that authority by statute. Only the President, however, may appoint non-inferior "Officers of the United States"—whom the Supreme Court calls *principal officers*—with the Senate's advice and consent.[277]

The Supreme Court has not set forth an "exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[278] That said, in recent years, the Court has applied the approach outlined in *Edmond v. United States*.[279] *Edmond* stated that "[w]hether

[269] Kevin J. Hickey, CRS Legislative Attorney, authored this section of the report.

[270] United States v. Arthrex, 141 S. Ct. 1970, 1985 (2021).

[271] *Id.* at 1986–87 (opinion of Roberts, C.J.); *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part).

[272] *See generally Article II, Section II, Clause 2*, THE CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/article-2/section-2/clause-2/.

[273] Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

[274] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).

[275] *See* U.S. CONST. art. 2, § 2, cl. 2.

[276] *Id.*

[277] *See Lucia*, 138 S. Ct. at 2051 n.3; Edmond v. United States, 520 U.S. 651, 659 (1997).

[278] *Edmond*, 520 U.S. at 661.

[279] *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199 n.3 (2020) ("More recently, we have focused on whether the

one is an 'inferior' officer depends on whether he has a superior."[280] Thus, "inferior officers" are those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[281] *Edmond* itself concluded that certain military judges had the requisite supervision to qualify as inferior officers.[282] The Court noted that a higher-level official could remove military judges from their judicial assignments "without cause"—a "powerful tool for control."[283] Additionally, military judges had "no power to render a final decision" on the federal government's behalf "unless permitted to do so by other Executive officers."[284]

Administrative Patent Judges, the PTAB, and *Inter Partes* Review

In 2011, Congress enacted a major patent reform bill, the Leahy-Smith America Invents Act.[285] Among other things, the Act created new adversarial administrative proceedings within the Patent and Trademark Office to review the validity of already issued patents and cancel those that should not have been issued.[286] The PTAB, which is primarily composed of administrative patent judges (APJs,) conducts these proceedings, which include adjudications on the validity of issued patent claims through *inter partes* review (IPR).[287] IPR allows third parties to challenge the validity of an existing patent granted to another person.[288] If a PTAB panel (usually, three APJs) rules that a patent claim is invalid, a party may appeal that determination directly to the U.S. Court of Appeals for the Federal Circuit.[289] Unless the Federal Circuit overturns the PTAB decision, the Director cancels the patent claims at issue; that is, they no longer have legal effect.[290]

The Secretary of Commerce (the Secretary) appoints APJs, in consultation with the Director.[291] The President appoints both the Secretary and the Director with the advice and consent of the Senate.[292] The Director is a member of the PTAB,[293] and maintains a degree of authority over the APJs. The Director may, among other things, determine the composition of APJs on each PTAB panel; issue regulations governing the conduct of PTAB proceedings; or designate a PTAB decision as precedential and thus binding on future panels.[294] Prior to *Arthrex*, the Director lacked statutory authority to overturn APJs' decisions in IPR proceedings, as the statute allows review of

officer's work is 'directed and supervised' by a principal officer." (quoting *Edmond*, 520 U.S. at 663)).

[280] *Edmond*, 520 U.S. at 662.

[281] *Id.* at 663.

[282] *Id.* at 666.

[283] *Id.* at 664.

[284] *Id.* at 665.

[285] Pub. L. No. 112-29, 125 Stat. 284 (2011).

[286] *Id.* at §§ 6–7, 18 (codified at 35 U.S.C. §§ 6, 311–329, 321 note).

[287] 35 U.S.C. § 6(b)(4).

[288] *Id.* § 311.

[289] *Id.* § 319.

[290] *Id.* § 318(a)–(b).

[291] *Id.* § 6(a).

[292] 15 U.S.C. § 1501; 35 U.S.C. § 3(a)(1).

[293] 35 U.S.C. § 6(a).

[294] *Id.* §§ 2(b)(2), 6(c); PATENT TRIAL & APPEAL BD., STANDARD OPERATING PROCEDURE 2 (REV. 10): PRECEDENTIAL OPTION PANEL TO DECIDE ISSUES OF EXCEPTIONAL IMPORTANT INVOLVING POLICY OR PROCEDURE (2018), https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf; *see generally* 37 C.F.R. pt. 42 (PTAB regulations).

IPR decisions only by the PTAB itself or by appeal to the Federal Circuit.[295] In addition, neither the Secretary nor the Director can remove an APJ without cause.[296]

The Dispute in *Arthrex*

Arthrex, Inc. owns a patent relating to a knotless suture securing assembly used in medical surgery.[297] Arthrex accused Smith & Nephew, Inc., of infringing its patent.[298] In response, Smith & Nephew sought the cancellation of Arthrex's patent through IPR.[299] A panel of three APJs heard the IPR and determined Arthrex's patent was invalid and therefore should be canceled.[300] Arthrex appealed to the Federal Circuit, arguing that the decision was invalid because APJs were not properly appointed under the Appointments Clause.[301]

The Federal Circuit agreed with Arthrex. It found that two factors from *Edmond* weighed in favor of finding that APJs are principal officers: the Director cannot "single-handedly review, nullify or reverse" a panel decision or unilaterally rehear a decision;[302] and the Director could only remove an APJ for "such cause as will promote the efficiency of the service."[303] The other factor weighed in favor of inferior officer status, as the Federal Circuit determined that the Director had significant supervisory power APJs through regulations and policy interpretations governing how APJs conduct IPRs.[304] On balance, though, the Federal Circuit concluded that APJs are principal officers who were not appointed in the constitutionally required manner (i.e., appointment by the President with the Senate's advice and consent).[305]

To remedy the violation, the Federal Circuit took what it perceived to be the "narrowest viable approach" to correcting the constitutional defect while preserving the statutory scheme Congress enacted.[306] It severed statutory for-cause removal protections as applied to APJs, vacated the underlying PTAB decision, and remanded the case for a decision by a panel of properly appointed APJs.[307] Arthrex, Smith & Nephew, and the federal government all petitioned for Supreme Court review.[308] The Court granted the petitions to review both the Federal Circuit's merits holding on the appointments issue and its choice of remedy.[309]

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[295] *See* 35 U.S.C. §§ 6(c), 319.

[296] *See* 5 U.S.C. § 7513(a); 35 U.S.C. § 3(c).

[297] United States v. Arthrex, 141 S. Ct. 1970, 1978 (2021).

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] Arthrex v. Smith & Nephew, Inc., 941 F.3d 1320, 1325 (Fed. Cir. 2019), *vacated sub nom.*, *Arthrex*, 141 S. Ct. 1970.

[302] *Id.*

[303] *Id.* at 1333.

[304] *Id.* at 1332.

[305] *Id.* at 1335.

[306] *Id.* at 1337.

[307] *Id.* at 1338–40.

[308] United States v. Arthrex, 141 S. Ct. 1970, 1978 (2021).

[309] *Id.*

The Supreme Court's Opinions

Opinions on the Appointments Clause Issue

Chief Justice Roberts (joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett) delivered the Court's opinion on the merits of the Appointments Clause issue. Unlike the Federal Circuit, the Court did not explicitly find that APJs were principal officers under the PTAB structure that Congress enacted. Rather, the majority found a constitutional violation in the mismatch between APJs' unreviewable decisionmaking authority and their appointment to an inferior office, holding that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in [an IPR]."[310]

The Supreme Court relied primarily on *Edmond* in considering whether APJs are inferior or principal officers. In contrast to *Edmond*, in which the work of the military judges was "directed and supervised at some level by" presidentially appointed executive officers,[311] Chief Justice Roberts found that "review by a superior executive officer" was lacking with respect to APJs.[312] The majority reasoned that because only the PTAB itself (and not the Director) can grant rehearing of PTAB decisions, APJs effectively have the final word in the executive branch on patentability decisions in IPRs.[313] Although the Director has a variety of tools to control APJs (e.g., setting their pay, panel assignment, the decision to institute IPR, and IPR regulations), the Court found that these less-direct means of control, if exploited as "machinations" to affect IPR outcomes, would only "blur the lines of accountability" for PTAB decisions within the executive branch.[314] As a result, the majority held that "the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers."[315]

Justice Thomas (joined by Justices Breyer, Sotomayor, and Kagan) dissented on the merits issue, arguing that the PTAB's structure adhered to the Appointments Clause.[316] In Justice Thomas's view, APJs are plainly inferior officers for two main reasons. First, they are "lower in rank to at least two different officers"—the Director and the Secretary.[317] Second, APJs are "functionally" inferior because the Director has many tools to supervise and control APJs.[318] Comparing the oversight of APJs to the judges at issue in *Edmond*, Justice Thomas argued that the Director's functional control over APJs was "greater" than in *Edmond*: the Director decides in the first instance whether to institute an IPR at all, controls which APJs hear an IPR, and can add additional members (including himself) to PTAB panels.[319]

Justice Breyer (joined by Justices Sotomayor and Kagan) joined most of Justice Thomas's dissent, but also wrote separately to emphasize his view that the Court's recent separation-of-powers jurisprudence had taken what he viewed as a "mistake[n]" turn toward inflexible

[310] *Id.* at 1985.

[311] Edmond v. United States, 520 U.S. 651, 663 (1997).

[312] *Arthrex*, 141 S. Ct. at 1981.

[313] *Id.*

[314] *Id.* at 1982.

[315] *Id.* at 1983.

[316] *Id.* at 1997–98 (Thomas, J., dissenting)

[317] *Id.* at 2000.

[318] *Id.* at 2000–01.

[319] *Id.* at 2001–02.

formalism.[320] Justice Breyer argued that the Appointments Clause grants Congress "a degree of leeway" in establishing and empowering federal offices, and that the Court should "take account of, and place weight on, why Congress enacted a particular statutory limitation" and consider the "practical consequences" of that choice.[321] In this case, Justice Breyer argued that the Court should have considered the "technical nature of patents, the need for expertise, and the importance of avoiding political interference" as reasons supporting Congress's decision to give APJs a degree of independence from politics.[322]

Opinions on the Remedial Issue

A different group of Justices formed a majority in selecting a remedy for the constitutional violation that the Court identified. Chief Justice Roberts delivered a plurality opinion (joined by Justices Alito, Kavanaugh, and Barrett) rejecting Arthrex's request to hold the entire IPR regime unconstitutional. Instead, the Court opted to "sever[] the unconstitutional portion" of the statute while preserving the rest.[323] Because APJs are inferior officers "[i]n every respect save the insulation of their decisions from review within the Executive Branch," the Court reasoned, the proper course was to allow the Director to review final PTAB decisions.[324] The Court accomplished this by holding that 35 U.S.C. § 6(c)—which limits the power to rehear PTAB decisions—was unenforceable as applied to the Director.[325] The Court's remedy thus differed both from the Federal Circuit's solution (allowing the Secretary to remove APJs at will) and the more sweeping remedy urged by Arthrex.

To provide a majority on the appropriate remedy, Justices Breyer (joined by Justices Sotomayor and Kagan) concurred in that part of the Court's judgment. Although these Justices did not agree that there was a constitutional violation at all, they did agree that granting the Director power to review PTAB decisions would address the constitutional violation identified by the majority.[326]

Justice Gorsuch dissented on the remedial issue. In Justice Gorsuch's view, the Supreme Court's "severance" doctrine—in which the Court excises part of a statute to cure a constitutional problem—is inappropriate when there is more than "one possible way" to cure the constitutional problem and Congress has provided no specific direction.[327] Justice Gorsuch urged the Court to follow the "traditional" approach of declining to enforce the statute in the case before it—effectively allowing for challengers to vacate PTAB decisions until the constitutional problem is fixed—so that the Court would not have to guess "what a past Congress would have done if confronted with a contingency it never addressed."[328]

Considerations for Congress

The consequences of *Arthrex* for the PTAB appear straightforward. APJs will continue to conduct and decide IPR proceedings, but the Director has discretion to review their decisions. Shortly

[320] *Id.* at 1996 (Breyer, J., concurring in the judgment in part and dissenting in part).

[321] *Id.* at 1994–95.

[322] *Id.* at 1996.

[323] *Id.* at 1986 (opinion of Roberts, C.J.).

[324] *Id.*

[325] *Id.* at 1987.

[326] *Id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part).

[327] *Id.* at 1990 (Gorsuch, J., concurring in part and dissenting in part).

[328] *Id.* at 1990, 1992.

after the *Arthrex* decision, the Patent and Trademark Office implemented an interim procedure for the Director to review PTAB decisions.[329] A party may request review by the Director within 30 days of a final written PTAB decision, or the Director may initiate review on his own accord.[330] Review by the Director is de novo and may address any issue of fact or law.[331] The acting Director has already denied the first requests for review under *Arthrex*.[332]

While the *Arthrex* ruling was limited to IPR, the case raises several broader questions of possible interest to Congress because of its potential effects on agency adjudications outside of the patent context.[333]

First, the *Arthrex* majority identified two boards that are similar to the PTAB.[334] The first is the Civilian Board of Contract Appeals, an "independent tribunal" within the General Services Administration that "resolve[s] contract disputes between government contractors and agencies."[335] Board members are appointed by the Administrator of General Services (i.e., not through advice and consent) and can be removed only for cause.[336] The second board named in the decision is the Postal Service Board of Contract Appeals, whose judges are appointed by the Postmaster General.[337] Both boards are authorized to issue "final" written decisions.[338] Although these decisions may be appealed to the Federal Circuit, the relevant statute does not authorize review by a principal officer in the executive branch.[339] Thus, "[w]hatever distinct issues" these boards might present, the absence of principal officer review may lead to legal challenges based on the reasoning of *Arthrex*.

Second, although the Supreme Court did not mention it in the *Arthrex* opinion, the Federal Circuit repeatedly compared APJs to Copyright Royalty Judges (CRJs) in its decision.[340] In 2012, the D.C. Circuit ruled that CRJs, who "set the terms of exchange for musical works" through royalty rate determinations, were principal officers.[341] In that case, *Intercollegiate Broadcasting System v. Copyright Royalty Board*, the court reasoned that CRJs were "supervised in some respects" by the Librarian of Congress (who appoints them) and by the Register of Copyrights, "but in ways that

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[329] *USPTO Implementation of an Interim Director Review Process Following* Arthrex, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/uspto-implementation-interim-director-review (last visited Sept. 2, 2021).

[330] *Id.*

[331] Arthrex *Q&As*, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas (last updated July 20, 2021).

[332] Ryan Davis, T*emporary USPTO Chief Rejects First 2* Arthrex *Review Bids*, LAW360 (Aug. 2, 2021), https://www.law360.com/ip/articles/1409172/temporary-uspto-chief-rejects-first-2-arthrex-review-bids.

[333] A panel of the U.S. Court of Appeals for the Federal Circuit already has rejected an Appointments Clause challenge to the Trademark Trial and Appeal Board (TTAB) based on *Arthrex*, reasoning that the Director's authority to review TTAB decisions is comparable to the Director's post-*Arthrex* authority with respect to IPR proceedings. Piano Factory Grp., Inc. v. Schiedmayer Celesta GMBH, No. 2020-1196, 2021 U.S. App. LEXIS 26344, at *8–20 (Fed. Cir. Sept. 1, 2021).

[334] United States v. Arthrex, 141 S. Ct. 1970, 1984 (2021).

[335] *United States Civilian Board of Contact Appeals*, U.S. CIVILIAN BD. OF CONTRACT APPEALS, https://www.cbca.gov/ (last visited Sept. 2, 2021).

[336] 41 U.S.C. § 7105(b)(2)–(3).

[337] *Id.* § 7105(d).

[338] *Id.* § 7107(a)(1).

[339] *See id.*

[340] *See* Arthrex v. Smith & Nephew, Inc., 941 F.3d 1320, 1331, 1334–35 (Fed. Cir. 2019), *vacated sub nom.*, *Arthrex*, 141 S. Ct. 1970.

[341] Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1338–41 (D.C. Cir. 2012).

leave broad discretion."[342] Additionally, the Librarian (a principal officer) could only remove CRJs for "misconduct or neglect of duty."[343] The D.C. Circuit chose to remedy the Appointments Clause violation by granting the Librarian power to remove CRJs without cause, thus rendering them, in that court's view, inferior officers.[344] The Federal Circuit in *Arthrex* modeled its remedy after this approach, allowing the Director to remove APJs without cause to render APJs "inferior" officers.[345] The Supreme Court chose a different remedy, however, identifying the constitutional problem as the failure to subject APJs' decisions to meaningful executive review.[346] At least one federal court has read the *Arthrex* decision to suggest that removal at will may be insufficient to make an officer inferior to a principal officer in such circumstances (although the Supreme Court expressly declined to decide that question).[347] Accordingly, while the direction and control over CRJs' rate determinations might be distinguishable from APJs in IPR,[348] there could be a renewed focus on the constitutionality of CRJs' appointments as inferior officers as a result of *Arthrex*.

Third, the *Arthrex* opinion may have ramifications for other types of agency decisions. In *Lucia v. SEC*, the Court clarified that administrative law judges (ALJs) need not have the authority to render final, binding decisions in order to be "officers"—their duties and discretion in presiding over adversarial hearings were enough to make them inferior officers.[349] *Arthrex* implies that adjudicators whose decisions are not only potentially final, but also *unreviewable* within the executive branch, may be principal officers.[350] At the same time, the majority cautioned that "[m]any decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner" and did not opine on "supervision outside the context of adjudication."[351] In these circumstances, it is unclear whether this rule would apply in agency proceedings that do not share the trial-like procedures of IPR. For example, within the Social Security Administration (SSA), the Appeals Council issues the "final action" for the agency in appeals from certain benefits determinations.[352] According to SSA, at least since July 2018, administrative appeals judges on the Appeals Council have been appointed by the Commissioner or Acting Commissioner of the SSA.[353] Because these administrative appeals judges are

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[342] *Id.* at 1338.

[343] *Id.* at 1340.

[344] *Id.* at 1334.

[345] *See Smith & Nephew, Inc.*, 941 F.3d at 1338 ("The narrowest remedy here is similar to the one adopted in *Intercollegiate*, the facts of which parallel this case.").

[346] *See Arthrex*, 141 S. Ct. at 1988 ("[T]he source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary.") (opinion of Roberts, J.); *but see id.* at 1987 (declining to decide "whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem").

[347] Villarreal-Dancy v. U.S. Dep't of the Air Force, No. 19-2985 (RDM), 2021 U.S. Dist. LEXIS 138551, at *33 n.5 (D.D.C. July 26, 2021) ("[*Arthrex*] casts constitutional doubt on any statutory scheme that grants unreviewable authority to inferior officers, regardless of how easily those inferior officers can be removed." (internal citations omitted)).

[348] *Cf.* 17 U.S.C. § 802(f).

[349] *See* Lucia v. SEC, 138 S. Ct. 2044, 2052–53 (2018).

[350] *See Arthrex*, 141 S. Ct. at 1983 ("[T]he unreviewable executive power exercised by APJs is incompatible with their status as inferior officers.").

[351] *Id.* at 1985–86.

[352] *See Brief History and Current Information about the Appeals Council*, SOC. SECURITY ADMIN., https://www.ssa.gov/appeals/about_ac.html (last visited Sept. 2, 2021); *see generally* CRS Report R44948, *Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI): Eligibility, Benefits, and Financing*, by William R. Morton, at 47–50.

[353] *See SSR 19-1p: Titles II and XVI: Effect of the Decision in* Lucia v. Securities and Exchange Commission *(SEC) on*

appointed as inferior rather than principal officers, further litigation could test the validity of their SSA benefits determinations under *Arthrex*.[354]

Thus, while open questions remain, *Arthrex* emphasizes the importance of final decisionmaking authority when differentiating between principal and inferior officers in the agency adjudication context.

Collins v. Yellen: Separation of Powers and the FHFA[355]

The President's ability to control or remove federal officers was an important issue in a second major case last Term. In *Collins v. Yellen*, the Supreme Court ruled 7-2 that the structure of the Federal Housing Finance Agency (FHFA) violates the Constitution's separation of powers.[356] The decision has already had practical effects, as President Biden removed the FHFA Director from office the day after the Court's decision,[357] and subsequently removed the head of the SSA[358] (a position protected by a similar statutory removal provision).[359] The FHFA is headed by a single Director who, under the statute establishing the agency, could be removed by the President only for cause, rather than at will.[360] The single-headed structure of the FHFA contrasts with the multimember structure of most other agencies headed by officials that are similarly insulated from presidential control through for-cause removal protections.[361] The Court's ruling, which comes on the heels of a decision last year invalidating the similarly structured Consumer

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Cases Pending at the Appeals Council, SOC. SEC. ADMIN., https://www.ssa.gov/OP_Home/rulings/oasi/33/SSR2019-01-oasi-33.html (Mar. 15, 2019); *Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process*, SOC. SEC. ADMIN., https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM (last updated Aug. 6, 2018).

[354] *See* Carr v. Saul, 141 S. Ct. 1352, 1356 (2021) (holding that claimants did not forfeit Appointments Clause challenge to ALJs' denial of disability benefits); Jimmy Hoover, *In* Arthrex, *Justices Deal New Blow to Agency Independence*, LAW360, https://www.law360.com/articles/1396489/in-arthrex-justices-deal-new-blow-to-agency-independence (June 22, 2021) (discussing potential implications for *Arthrex* on the Social Security Administration and other federal agencies).

[355] Jared P. Cole, CRS Legislative Attorney, authored this section of the report.

[356] Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021).

[357] *See* Matthew Goldstein et al., *Biden Removes Chief of Housing Agency After Supreme Court Ruling*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/biden-housing-agency-supreme-court.html; Andrew Ackerman & Brent Kendall, *Biden Administration Removes Fannie, Freddie Overseer After Court Ruling*, WALL ST. J. (June 23, 2021), https://www.wsj.com/articles/supreme-court-issues-mixed-ruling-on-government-seizure-of-fannie-freddie-profits-11624459222.

[358] *See* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html; Andrew Restuccia & Richard Rubin, *Biden Ousts Social Security Chief*, WALL ST. J. (July 9, 2021), https://www.wsj.com/articles/biden-ousts-social-security-chief-11625871710.

[359] *See* 42 U.S.C. § 902(a)(3).

[360] 12 U.S.C. § 4512(b)(2).

[361] *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (characterizing the Consumer Financial Protection Bureau, an agency with a single head protected by a statutory removal provision, as "almost wholly unprecedented"); *see also* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010) ("Independent agencies have other structural features that distinguish them from executive-branch agencies. They are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President and thus will likely depart with a change of administration, if not before.").

Financial Protection Bureau (CFPB), could inform Congress's ability to configure agencies in the executive branch with relative independence from the President.[362]

Background

The Supreme Court in recent years has examined the relationship between the President and the heads of executive agencies, probing whether statutory limitations on the President's ability to control executive officers are consistent with the Constitution's placement of executive power with the President.[363] In *Seila Law LLC v. CFPB*, the Court ruled that a statutory provision insulating the Director of the CFPB from removal by the President except for "inefficiency, neglect of duty, or malfeasance" was unconstitutional.[364] The Court explained in that case that, while it had on occasion upheld legislative restrictions on the President's power to remove executive officers under Article II of the Constitution,[365] those restrictions were permissible only because they fell within two narrow exceptions to the President's otherwise "unrestricted removal power": "one for multimember expert agencies that do not wield substantial executive power," and the other for inferior officers "with limited duties and no policymaking or administrative authority."[366] The Court characterized these exceptions as constituting the "outermost constitutional limits" on Congress's authority to restrict the President's removal power.[367] In *Seila Law*, the Court declined to "extend these precedents" to the context of the CFPB, an independent agency led by a single director with "significant executive power."[368] The Court in that case concluded that the CFPB's structure "lacks a foundation in historical practice and clashes with

[362] *See Seila Law*, 140 S. Ct. at 2197 ("We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.").

[363] U.S. CONST. art. 2, § 1, cl. 1. *See* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 505 (2019) (asserting that "the constitutional theory of the unitary executive has gained ground both in the Supreme Court and in legal scholarship"). *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4 (1994) (asserting that the Framers did not envision a unitary executive), *with* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 547–50 (1994) (arguing that the theory of a unitary executive flows from an originalist interpretation of the Constitution's meaning). *See generally Removing Officers: Current Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-5-2/ALDE_00001143/.

[364] *Seila Law*, 140 S. Ct. at 2192. *See* 12 U.S.C. § 5491(c)(3).

[365] The *Seila Law* Court explained that Article II of the Constitution vests the executive power in the President, which includes the authority to remove executive officials. *Seila Law*, 140 S. Ct. at 2197–98; U.S. CONST. art. II, § 1, cl. 1. The Court acknowledged this power in *Myers v. United States*, which concluded that Article II provides the President with "general administrative control of those executing the laws, including the power of appointment and removal of executive officers." 272 U.S. 52, 163–64 (1926). *See Seila Law*, 140 S. Ct. at 2197–98 (discussing how precedent and history confirm the President's general power of removal).

[366] *Seila Law*, 140 S. Ct. at 2198, 2199–200. In *Seila Law*, the Court noted that the first exception stemmed from its decision in *Humphrey's Executor v. United States*, in which the Court upheld removal protections for the Commissioners of the Federal Trade Commission (FTC). *See* 295 U.S. 602, 631–32 (1935). The second exception is illustrated in the case of *Morrison v. Olson*, where the Court upheld removal restrictions for an independent counsel appointed to investigate and prosecute specific crimes by high-level government officials. 487 U.S. 654, 662–63, 696–97 (1988). *But see Seila Law*, 140 S. Ct. at 2233–344, 2239 n.10 2240–41 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (criticizing the majority opinion's characterization of these cases and arguing that the FTC's powers in 1935 were much more substantial than the majority opinion acknowledged).

[367] *Seila Law*, 140 S. Ct. at 2200 (quoting PHH Corp. v. CFPB, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

[368] *Id*. at 2192.

constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."[369]

The principal legal question in *Collins* closely mirrored the issues addressed in *Seila Law*. The dispute arose from a financing arrangement the FHFA, acting as a conservator for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), reached with the Treasury Department.[370] Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs) that provide liquidity to banks and credit unions to help support the home mortgage market.[371] The Housing and Economic Recovery Act of 2008 (Recovery Act), among other things, established the FHFA to oversee Fannie Mae and Freddie Mac and authorized the FHFA to act as a conservator for them in certain situations.[372] Not long after the FHFA was established, the agency placed both GSEs into a conservatorship and negotiated agreements on their behalf with the Treasury Department.[373] Subsequently, the agencies agreed to a series of amendments, the third of which (Third Amendment) led to this litigation.[374]

A group of shareholders challenged the Third Amendment on both statutory and constitutional grounds.[375] Because the government took the position that the Director's statutory removal protection was unconstitutional, the Court appointed an amicus curiae to defend the constitutionality of the statute.[376] An additional question for the Court, however, was what should happen to the Third Amendment if the Director had been exercising authority pursuant to an unconstitutional statute. The shareholders contended that the Third Amendment should be invalidated entirely, and all dividend payments made pursuant to the Amendment returned to Fannie Mae and Freddie Mac.

The Supreme Court's Decision

Opinions on the Question of Removal Protection

In an opinion by Justice Alito, the Supreme Court ultimately held that the statutory restriction on the President's power to remove the FHFA Director was unconstitutional.[377] The Court explained

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[369] *Id*.

[370] Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).

[371] 12 U.S.C. § 2512. *See History of Fannie Mae and Freddie Mac Conservatorships*, FED. HOUS. FIN. AGENCY (last visited Aug. 19, 2021), https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx.

[372] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4501 *et seq*.).

[373] *Collins*, 141 S. Ct. at 1770.

[374] As explained in *Collins*, "Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends." *Id.* "Four years later, the FHFA and Treasury amended the agreements and replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve." *Id.* This "Third Amendment" "caused the companies to transfer enormous amounts of wealth to Treasury" and "resulted in a slew of lawsuits." *Id.* For more details on these arrangements, see CRS Report R44525, *Fannie Mae and Freddie Mac in Conservatorship: Frequently Asked Questions*, by Darryl E. Getter.

[375] *Collins*, 141 S. Ct. at 1770.

[376] *Id*. at 1775.

[377] *Id*. at 1783. The Court also dismissed the claim that the FHFA "exceeded its statutory authority" in adopting the Third Amendment. *Id*. at 1775. The Recovery Act limits judicial review of the FHFA's actions as conservator,

that its reasoning from last year's decision in *Seila Law* essentially decided the constitutional question.[378] The FHFA, like the CFPB, is an agency with a single Director, and the statute establishing the FHFA, like the law establishing the CFPB, restricts the President's power to remove that Director.[379] The Court rejected various arguments raised by the Court-appointed *amicus* to distinguish the two agencies.

First, Justice Alito's majority opinion rejected the argument that the FHFA Director exercises less authority than the CFPB director, and that Congress should therefore have more flexibility to insulate the FHFA Director from the President. The majority opinion explained that the "nature and breadth" of an agency's power does not control whether Congress may restrict the President's removal power.[380] The President's power of removal is essential to exercising some measure of control over the executive branch in accordance with the policies the President was elected to advance.[381] As the people elect the President, but not agency officials, the removal power maintains electoral accountability for executive branch actions.[382] In addition, the majority opinion noted the "severe practical problems" attendant to establishing a workable standard to distinguish those agency heads whose authority is substantial enough to require presidential control from those whose power is not; while the CFPB might wield more authority than the FHFA in some ways, the situation might be reversed in others.[383] For instance, while the CFPB has regulatory authority over various private interests, the FHFA oversees entities that "dominate the secondary mortgage market and have the power to reshape the housing sector."[384]

The *amicus* also argued that when the FHFA steps into the shoes of an entity as a conservator, it assumes the status of a private entity and does not wield executive power.[385] The Court disagreed, explaining that the FHFA does not always act in that capacity, and even when it does so, its authority stems from a specific federal statute, the Recovery Act, not the background laws that govern conservatorships.[386] The majority opinion stressed that the FHFA's task—interpreting a law passed by Congress and implementing a legislative mandate—is the essence of exercising executive power.[387]

Justice Alito's majority opinion also disposed of the argument that because of the nature of the entities the FHFA regulates, there was no separation-of-powers violation.[388] The *amicus* argued

providing that courts may not restrain the agency's actions unless review is specifically authorized by one of its provisions or requested by the Director. 12 U.S.C. § 4617(f). The Court joined the consensus view of the federal courts of appeals below and concluded that the statute prohibits judicial relief where an FHFA action falls within its authority as a conservator, but judicial relief is available if the FHFA exceeds its authority. *Collins*, 141 S. Ct. at 1776. The Court ultimately ruled that "the FHFA did not exceed its authority as a conservator," and the statutory challenge to the agency's action was therefore barred. *Id*. at 1778.

[378] *Collins*, 141 S. Ct. at 1783 ("Indeed, our decision last Term in *Seila Law* is all but dispositive.").

[379] *Id*.

[380] *Id*.

[381] *Id*.

[382] *Id*.

[383] *Id*.

[384] *Id*. at 1784–85.

[385] *Id*. at 1785.

[386] *Id*. The Court also observed that the agency's authority under the Recovery Act differs from those of most other conservatorships. The FHFA can, for instance, "subordinate the best interests of the company to its own best interests and those of the public." *Id*. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

[387] *Collins*, 141 S. Ct. at 1785–86.

[388] *Id*. at 1786.

that because the FHFA regulates GSEs, rather than private parties, the individual liberty interests protected by separation-of-powers principles are not implicated.[389] The majority disagreed, contending that the President's removal power is crucial regardless of whether the relevant agency regulates the public directly or takes actions that have important indirect effects.[390]

Last, the Court dismissed the argument that the removal protection for the FHFA Director only offered a modest tenure protection that did not create a constitutional problem.[391] The *amicus* argued that, if the Director refused to follow an order from the President, then the for-cause standard would be satisfied and the President could remove the Director.[392] This feature, according to the reasoning of the *amicus*, preserved presidential control over the Director.[393] The majority opinion acknowledged that the Recovery Act's for-cause provision likely gave the President more discretion to remove the Director than other statutory provisions insulating officials from removal, such as the standard of "inefficiency, neglect of duty, or malfeasance" that applied to the CFPB Director.[394] Even so, the Court ruled that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[395]

Justice Kagan wrote separately, joining the majority opinion in most aspects but concurring only in the judgment on the constitutional question.[396] First, she disputed the majority's assertion that because at-will presidential removal is crucial to ensure that the executive branch is subject to a degree of electoral accountability, "courts should grant the President that power in cases like this one."[397] Instead, she argued, the correct method of achieving accountability is to let decisions about the government's structure rest with the branches that are accountable to the people, such as Congress.[398] Second, she objected to what she characterized as the "majority's extension of *Seila Law*'s holding."[399] That case, Justice Kagan wrote, emphasized that its rule was limited to barring removal protections for a single-director agency that exercises "significant executive power."[400] However, the majority opinion in *Collins*, she remarked, ignored that limitation on *Seila Law*'s reasoning to instead conclude that the constitutionality of a removal restriction does not turn on "the nature and breadth of an agency's authority."[401]

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[389] *Id*. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202–03 (2020) (observing that "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.") (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)).

[390] *Collins*, 141 S. Ct. at 1786.

[391] *Id*. at 1786–87.

[392] *Id*. at 1786.

[393] *See id*. at 1786.

[394] *Id*.

[395] *Id*. at 1787.

[396] Justice Kagan had dissented from the majority opinion in *Seila Law* as to the constitutionality of the removal restriction for the CFPB, *Seila Law*, 140 S. Ct. at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part), but concluded that principles of *stare decisis* compelled application of its reasoning here as the FHFA was not legally distinguishable from the CFPB. *Collins*, 141 S. Ct. at 1799–800 (Kagan, J., concurring in part and concurring in the judgment).

[397] *Collins*, 141 S. Ct. at 1800 (Kagan, J., concurring in part and concurring in the judgment).

[398] *Id*.

[399] *Id*.

[400] *Id*. at 1800–01.

[401] *Id*. at 1801 (quoting *id*. at 1784).

Justice Sotomayor, in an opinion joined by Justice Breyer, dissented from the Court's decision on this constitutional question.[402] Echoing the point raised by Justice Kagan, she argued that *Seila Law* limited its holding to a single-director agency entrusted with "significant executive power."[403] For Justice Sotomayor, the FHFA's authority over GSEs did not rise to this level. In addition, *Seila Law* distinguished one of the situations in which the Court has approved removal protections—that of an independent counsel—on the grounds that the independent counsel's authority was "trained inward" to high-level government officials identified by others.[404] Likewise, Justice Sotomayor wrote, the FHFA's power is "trained inward" toward GSEs, which are distinct from purely private entities due to their ties to the government.[405] Finally, she argued that independence for the FHFA was supported by historical tradition, pointing to the examples of single-director agencies with limited executive power, such as the Office of Special Counsel and the SSA, as well as the independence enjoyed by other federal financial regulators.[406]

Opinions on the Remedy

While the shareholders succeeded in their constitutional challenge to the removal restriction on the FHFA Director, they did not obtain their preferred remedy of undoing the Third Amendment in its entirety.[407] The Court focused on the fact that an Acting Director of the FHFA—and not a Senate-confirmed Director—completed the agreement.[408] An Acting FHFA Director, the Court ruled, was not protected from removal as a Senate-confirmed FHFA Director would be.[409] Therefore, there was no constitutional violation that harmed shareholders when the agreement was adopted. The Court thus ruled that it would only consider a remedy for actions taken by subsequent Senate-confirmed FHFA Directors (who were protected from removal under the statute) to implement the agreement.[410]

The Court noted another wrinkle in the claim for relief—while the *removal* restriction protecting an FHFA Director was unconstitutional, the FHFA Directors that followed the Acting Director and implemented the Third Amendment were *appointed* consistent with the Constitution.[411] Because there was no constitutional defect with their manner of appointment, they had authority to carry out the functions of that office, and there was thus no reason to void their actions simply because the statute included an improper removal restriction.[412] Instead, in order to obtain retrospective relief, the shareholders needed to show that they were *harmed* by the removal protection.[413] For instance, the Court offered, if the President stated publicly that he disagreed

[402] *Id*. at 1802 (Sotomayor, J., concurring in part and dissenting in part).

[403] *Id*. at 1804–05.

[404] *Id*. at 1806–07.

[405] *Id*. at 1807.

[406] *Id*.

[407] *Id*. at 1787 (Alito, J., majority opinion).

[408] *Id*. at 1787.

[409] *Id*. at 1783.

[410] *Id*. at 1787.

[411] *Id*.

[412] *Id*. at 1787–88. *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (ruling that the proper "remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official") (quoting Ryder v. United States, 515 U.S. 177, 188 (1995)). *Cf*. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021) (plurality opinion) ("Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs.").

[413] *Collins*, 141 S. Ct. at 1788–99.

with a decision of the Director and would have removed him were it not for the for-cause protection, that statement might show that the unconstitutional provision caused harm.[414] The Court decided that whether such a harm occurred here was unclear and remanded the matter to the lower courts to resolve.[415]

The Court's decision to remand the case without setting aside the Third Amendment (the shareholders' requested remedy) sparked three separate opinions. Justice Kagan wrote separately to reflect her agreement with the majority's approach on this point.[416] She argued that this line of reasoning, if applied in future cases, could also prevent the unnecessary upheaval of an agency's past decisions by preventing the courts from retroactively invalidating various routine agency actions that "would never have risen to the President's notice."[417]

Justice Thomas, though joining the majority opinion in full, wrote separately to emphasize a related point—that "[t]he government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract."[418] The parties here had assumed that "the lawfulness of agency action turns on the lawfulness of the removal restriction."[419] As the majority had also observed, the officials here were properly appointed and validly exercised their statutory authority. Therefore, in order for a court to invalidate the Third Amendment, it must conclude that either the implementation or adoption of the Third Amendment itself was unlawful.[420] Because the parties did not raise these issues, Justice Thomas concluded that the majority opinion correctly resolved the questions presented.[421] He encouraged courts to, in future cases, "ensure not only that a provision is unlawful but also that unlawful *action* was taken."[422]

By contrast, Justice Gorsuch, who otherwise joined the rest of the majority opinion, was the only Justice who disagreed with the Court's remedy.[423] He argued that the task assigned on remand to the lower courts was indeterminate, questioning "*how* . . . judges and lawyers [are] supposed to construct the counterfactual history" to determine "whether the President would have removed the Director had he known he was free to do so."[424]

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[414] *Id*. at 1789.

[415] *Id*.

[416] *Id*. at 1801; *id*. (Kagan, J., concurring in part and concurring in the judgment) ("The majority's remedial holding limits the damage of the Court's removal jurisprudence. As the majority explains, its holding ensures that actions the President supports—which would have gone forward whatever his removal power—will remain in place."). Justice Sotomayor, joined by Justice Breyer, joined Justice Kagan's opinion as to the proper remedy. *Id*. at 1803 n.1 (Sotomayor, J., concurring in part and dissenting in part).

[417] *Id*. at 1801–02.

[418] *Id*. at 1789 (Thomas, J., concurring).

[419] *Id*. at 1791.

[420] *Id*. at 1790.

[421] *Id*. at 1795.

[422] *Id*. (emphasis in original).

[423] *Id*. at 1795 (Gorsuch, J., concurring in part). Justice Sotomayor's separate opinion, which was joined by Justice Breyer, while dissenting on the constitutional question of the removal restriction, nonetheless joined the majority opinion's analysis as to the proper remedy in the case. *Id*. at 1803 n.1 (Sotomayor, J., concurring in part and dissenting in part).

[424] *Id*. at 1798 (Gorsuch, J., concurring in part) (emphasis in original).

Considerations for Congress

Collins represents another development in the Court's separation-of-powers jurisprudence that recently has tended to look with skepticism at statutory restrictions on the removal of agency officials.[425] Given the reasoning of *Seila Law* and *Collins*, Congress's future ability to shield an executive branch agency headed by a single Director from presidential control seems likely foreclosed, at least so long as those entities wield "significant executive power."[426] Whether the Court would hold that the few existing agencies—such as the Office of Special Counsel and the SSA—with a single head protected by a for-cause removal protection comport with the Constitution remains to be seen.[427] Following the Court's decision in *Collins*, President Biden removed the head of the SSA even though the position is protected by a statutory removal restriction.[428] A memorandum from the Department of Justice's Office of Legal Counsel concluded that "the best reading" of *Collins* and *Seila Law* is that the statutory removal restriction for the head of the SSA is unconstitutional, and the President may therefore remove the Commissioner at will.[429]

Future litigation will likely address how the principles of these cases might apply to other agency officials with removal protections,[430] such as ALJs.[431] Justices Kagan and Sotomayor both criticized the majority opinion in *Collins* for what they viewed as an improper expansion of *Seila Law*'s holding.[432]

Although the Court's recent decisions in cases challenging removal restrictions identify limits on Congress's power to shape the executive branch, Congress still has a wide assortment of tools to shape and influence executive branch activities.[433] The Court's approach to crafting a remedy for

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[425] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010) (ruling that the *combination* of a removal restriction for principal officers, who in turn are restricted from removing inferior officers below them, is unconstitutional); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020).

[426] *See Seila Law*, 140 S. Ct. at 2201 (ruling that "an independent agency led by a single Director and vested with significant executive power . . . has no basis in history and no place in our constitutional structure"). *Compare* Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) ("But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."); *with id*. at 1800–01 (Kagan, J., concurring in part and concurring in the judgment) (criticizing the majority opinion for improperly extending *Seila Law*'s holding, which was limited to single-director agencies that wield "significant executive power").

[427] *See* 42 U.S.C. § 902(a)(3) (Social Security Commissioner); 5 U.S.C. § 1211(b) (Office of Special Counsel).

[428] *See* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html; Andrew Restuccia & Richard Rubin, *Biden Ousts Social Security Chief*, WALL ST. J. (July 9, 2021), https://www.wsj.com/articles/biden-ousts-social-security-chief-11625871710.

[429] Constitutionality of the Commissioner of Social Security's Tenure Protections, Dep't of Justice, Office of Legal Counsel 10 (July 8, 2021) (slip op.), https://www.justice.gov/olc/file/1410736/download.

[430] *See, e.g.*, Petition for Writ of Certiorari at 29–31, 32 n.4, Axon Enterprise, Inc. v. Federal Trade Commission, No. 21-86 (U.S. July 20, 2021) (arguing that removal protections for ALJs at the Federal Trade Commission (FTC) are unconstitutional and noting that, because the petitioner preserved a challenge to the protections for the FTC Commissioners, the case also affords the Court an opportunity to revisit the reasoning of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). In *Humphrey's Executor*, the Court upheld removal restrictions for the Commissioners of the FTC. Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

[431] 5 U.S.C. § 7521 (stating that an employing agency can take certain actions against an ALJ, including removal, "only for good cause established and determined by the Merit Systems Protection Board" after an opportunity for a hearing).

[432] Collins v. Yellen, 141 S. Ct. 1761, 1800–01 (2021) (Kagan, J., concurring in part and concurring in the judgment); *id*. at 1808 (Sotomayor, concurring in part and dissenting in part).

[433] See CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

the plaintiffs in *Collins* suggests that, even if litigants identify a constitutional problem in an agency's statutory structure, they may not be able to obtain the wholesale invalidation of that agency's actions. The Court remanded the case to the lower courts to determine whether the shareholders suffered harm as a result of the unconstitutional removal restriction.[434] Limiting the remedy in this way, as Justice Kagan observed, will likely curb the potential impact of an adverse judicial decision on an agency's previous actions, at least for those that would not "capture a President's attention."[435]

[434] *Collins*, 141 S. Ct. at 1789 (majority opinion).

[435] *Id*. at 1802 (Kagan, J., concurring in part and concurring in the judgment).

Index of Cases

This Index includes cases listed on the Supreme Court's "granted and noted" list as of July 2, 2021,[436] with the following exceptions: (1) cases in which the Court granted certiorari but remanded a case, without a merits opinion, for further consideration in light of a decision in a different case; 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. Cases that the Court consolidated for argument or decided together in the same opinion are listed together.

The "questions presented" in the Index are adapted from the Supreme Court's statement of the questions presented.[437] The holdings are summarized from the Supreme Court's syllabus for the case, which is prepared by the Supreme Court's Reporter of Decisions. The docket for each case can be found by entering the docket number in the *Docket Search* bar on the Supreme Court's website.[438] The Court provides hyperlinks to its opinions on the dockets themselves and lists them by month of issuance on its *Opinions of the Court* page.[439]

The American Law Division of CRS has followed selected cases throughout the Court's term. Where a prior CRS product offers a description of the lower court's decision, a preview of the case as it was presented in the Supreme Court, or analysis of the Supreme Court's decision, those products are noted.[440] Resources related to non-merits cases and general topics involving the Court are also identified at the end of the report. Further analysis is available to Congress by contacting CRS using the contact information on the first page of this report, or by accessing the *Constitution of the United States of America: Analysis and Interpretation* ("*Constitution Annotated*") at https://constitution.congress.gov/.

Tanzin v. Tanvir, No. 19-71

Argued: 10/6/20
Decided: 12/10/20
Topics: Constitutional Law, Civil Rights

Question Presented: Does the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq*., permit suits seeking money damages against individual federal employees?

Holding: The Religious Freedom Restoration Act permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities.

Opinion: Justice Thomas (for the Court)

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[436] *Supreme Court of the United States Granted & Noted List: October Term 2020 Cases for Argument As of July 2, 2021*, SUPREMECOURT.GOV (July 29, 2021), https://www.supremecourt.gov/orders/20grantednotedlist.pdf. This list excludes some cases in which the Supreme Court simultaneously granted certiorari and reversed a lower court in a published per curiam opinion, but did not take merits briefing or hear oral argument.

[437] The Supreme Court in many cases restates the question presented as framed by the party advocating for a writ of certiorari. For some of the listed cases, CRS has adapted this statement of the question for a general audience (for example, by providing context or detail based on reporting by http://www.SCOTUSBlog.com).

[438] *Docket Search*, SUPREMECOURT.GOV, https://www.supremecourt.gov/docket/docket.aspx (last visited Sept. 13, 2021).

[439] *Opinions of the Court*, SUPREMECOURT.GOV, https://www.supremecourt.gov/opinions/slipopinion/20 (last visited Sept. 13, 2021).

[440] CRS Reports and CRS Legal Sidebars are available for review and download at https://www.crs.gov/. This report also refers to some products that are available only to congressional clients, who may request a copy of that product at https://www.crs.gov/PlaceARequest/Index.

Carney v. Adams, No. 19-309

Argued: 10/5/20
Decided: 12/10/20
Topics: Constitutional Law

Questions Presented: (1) Does the First Amendment invalidate a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the state's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"? (2) Did the Third Circuit err in holding that the provision of the Delaware Constitution in question is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party"?

Holding: The plaintiff challenging the political balance requirement of the Delaware Constitution lacked standing, because he had not shown that he was able and ready to apply for a judicial vacancy in the imminent future.

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

United States v. Briggs, No. 19-108; United States v. Collins, No. 19-184 (consolidated)

Argued: 10/13/20
Decided: 12/10/20
Topics: Criminal Law, Military Law

Question Presented: Did the Court of Appeals for the Armed Forces err in concluding that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years?

Holding: The prosecutions were timely under the Uniform Code of Military Justice because that Code does not impose a statute of limitations for offenses that the Code makes punishable by death.

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

CRS Resources: CRS Legal Sidebar LSB10557, *Supreme Court Considers Statute of Limitations for Military Rape Cases* (discussion of decision)

Rutledge v. Pharmaceutical Care Management Ass'n, No. 18-540

Argued: 10/6/2020
Decided: 12/10/2020
Topics: Employee Benefits

Question Presented: Did the Eighth Circuit err in holding that Arkansas's statute regulating pharmacy benefit managers' drug-reimbursement rates, which is similar to laws enacted by a substantial majority of states, is preempted by ERISA?

Holding: ERISA does not preempt the Arkansas statute.

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

CRS Resources: CRS Legal Sidebar LSB10587, *Supreme Court Decision Sheds Light on State Authority to Regulate Health Care Costs* (discussion of decision)

Texas v. New Mexico, No. 22O65

Argued: 10/5/20
Decided: 12/14/20
Topics: Environmental Law

Questions Presented: (1) Did the River Master clearly err in retroactively amending the River Master Manual and his final accounting for 2015 without Texas's consent and contrary to this Court's decree? (2) Did the River Master clearly err by charging Texas for evaporative losses without authority under the Compact?

Holding: New Mexico's motion for credit for the evaporated water was timely, and neither party may object to the River Master's procedure. New Mexico is entitled to delivery credit for the evaporated water.

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

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview)

Trump v. New York, No. 20-366

Argued: 11/30/20
Decided: 12/18/20
Topics: Constitutional Law

Questions Presented: (1) Did the three-judge district court have Article III jurisdiction to enjoin the Secretary of Commerce from including, within a decennial census report, information that would enable the President to implement a policy excluding illegal aliens from the base population number for purposes of congressional apportionment? (2) Was the President's directive to the Secretary of Commerce a permissible exercise of the President's discretion?

Holding: The district court lacked Article III jurisdiction to enjoin the President's directive, which was a general statement of policy. Because substantial uncertainties exist about the possible future implementation of that policy, judicial resolution of the dispute is premature.

Opinions: Per Curiam; Justice Breyer (dissenting)

City of Chicago v. Fulton, No. 19-357

Argued: 10/13/20
Decided: 1/14/21
Topics: Bankruptcy Law

Question Presented: Does the Bankruptcy Code's automatic stay, 11 U.S.C § 362, require an entity that is passively retaining possession of property in which a bankruptcy estate has an interest to return that property to the debtor or trustee when the bankruptcy petition is filed?

Holding: Merely retaining estate property after a bankruptcy petition is filed does not violate 11 U.S.C. § 362, which prohibits affirmative acts that would disturb the status quo of the estate property as of the time when the bankruptcy petition was filed.

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

Federal Republic of Germany v. Philipp, No. 19-351[441]

Argued: 12/7/20
Decided: 2/3/21
Topics: International Law

Questions Presented: (1) Does the "expropriation exception" of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provide jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders? (2) Is the doctrine of international comity unavailable in cases against foreign sovereigns under the circumstances presented here?

Holding: The phrase "rights in property taken in violation of international law" refers to the international law of expropriation, and not international human rights law.

Opinion: Chief Justice Roberts (for the Court)

CRS Resources: CRS Memo, *Supreme Court's October 2020 Term: Examining Selected Cases*, available upon request to congressional clients (discussion of decision)

Salinas v. Railroad Retirement Board, No. 19-199

Argued: 11/2/20
Decided: 2/3/21
Topics: Administrative Law; Employee Benefits

Question Presented: Under the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and the Railroad Retirement Act, 45 U.S.C. § 231g, is the Railroad Retirement Board's denial of a request to reopen a prior benefits determination a "final decision" subject to judicial review?

Holding: The Railroad Retirement Board's refusal to reopen a prior benefits determination is a "final decision" within the meaning of Section 355(f) that renders the Board's decision reviewable.

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

Brownback v. King, No. 19-546

Argued: 11/9/20
Decided: 2/25/21
Topics: Torts, Civil Rights

Question Presented: Does a final judgment in favor of the United States in an action under the Federal Tort Claims Act, 28 U.S.C. § 1346, on the grounds that state tort law does not establish liability for the injuries alleged, bar a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees?

Holding: The Federal Tort Claims Act's judgment bar applies because the district court's decision considering whether the undisputed facts established the elements of a Federal Tort Claims Act claim was simultaneously a jurisdictional decision and a judgment on the merits.

[441] *Republic of Germany v. Philipp* was argued on the same day as *Republic of Hungary v. Simon*, No. 18-1447. The Court decided *Republic of Hungary* by per curiam order on February 3, 2021, vacating the judgment below and remanding for further proceedings consistent with its opinion in *Republic of Germany*.

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

Pereida v. Wilkinson, No. 19-438

Argued: 10/14/20
Decided: 3/4/21
Topics: Criminal Law, Immigration Law

Question Presented: Does a criminal conviction bar a noncitizen from applying for relief from removal, when the record of that conviction is ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act?

Holding: A nonpermanent resident seeking relief from a lawful removal order bears the burden of showing that he has not been convicted of a disqualifying offense. The applicant does not meet that burden by showing that the record is ambiguous as to which of multiple crimes, some of which are disqualifying, formed the basis for his conviction.

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

United States Fish & Wildlife Service v. Sierra Club, No. 19-547

Argued: 11/2/20
Decided: 3/4/21
Topics: Administrative Law, Environmental Law

Question Presented: Does the deliberative process privilege contained within Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), protect a federal agency from being compelled to disclose draft documents that it prepared as part of a formal interagency consultation process under the Endangered Species Act, 16 U.S.C. § 1536, when the agency action later modified the proposed action in the consultation process?

Holding: The deliberative process privilege protects an agency from disclosing in-house draft biological opinions that are predecisional and deliberative, even if the drafts reflect the agency's last views about a proposal.

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

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview)

Uzuegbunam v. Preczewski, No. 19-968

Argued: 1/12/21
Decided: 3/8/21
Topics: Constitutional Law

Question Presented: Does a government's post-filing change of an unconstitutional policy moot a plaintiff's claim, or deprive a plaintiff of standing, for an award of nominal damages to remedy the government's past, completed violation of the plaintiff's constitutional right?

Holding: A request for nominal damages satisfies the redressability element of constitutional standing where the plaintiff's claim is based on a completed violation of a legal right.

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

Torres v. Madrid, No. 19-292

Argued: 10/14/20
Decided: 3/25/21
Topics: Constitutional Law, Criminal Law

Question Presented: Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment, or must physical force be successful in detaining a suspect to constitute a "seizure"?

Holding: Applying physical force to a person's body with intent to restrain is a seizure even if the person does not submit and is not subdued.

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

Ford Motor Co. v. Montana Eighth District Court, No. 19-368; Ford Motor Co. v. Bandemer, No. 19-369 (consolidated)

Argued: 10/7/20
Decided: 3/25/21
Topics: Constitutional Law, Civil Procedure

Question Presented: For purposes of "specific" personal jurisdiction, is the "arise out of or relate to" requirement, *see e.g.*, *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), met when none of the defendant's contacts with the forum caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts?

Holding: The contacts between Ford and the forum states were sufficient to exercise specific jurisdiction based on Ford's admission that it purposely availed itself of the privilege of conducting activities in those states. Subjecting Ford to personal jurisdictional based on those contacts is consistent with due process.

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

Facebook, Inc. v. Duguid, No. 19-511

Argued: 12/8/20
Decided: 4/1/21
Topics: Telecommunications Law

Question Presented: Does the definition of an automatic telephone dialing system in the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(a)(1), encompass any device that can store and automatically dial telephone numbers, even if the device does not "us[e] a random or sequential number generator"?

Holding: To qualify as an "automatic telephone dialing system," a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator.

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

CRS Resources: CRS Legal Sidebar LSB10594, *What Is an Autodialer (Part II)? The Supreme Court (Mostly) Resolves a Robocall Enforcement Question* (discussion of decision)

Federal Communications Commission v. Prometheus Radio Project, No. 19-1231; National Ass'n of Broadcasters v. Prometheus, No. 19-1241 (consolidated)

Argued: 1/19/21
Decided: 4/1/21
Topics: Administrative Law, Telecommunications Law

Questions Presented: (1) Under Section 202(h) of the Telecommunications Act of 1996, may the Federal Communications Commission (FCC) repeal or modify media ownership rules that it determines are no longer "necessary in the public interest as the result of competition" without statistical evidence about the prospective effect of its rule changes on minority and female ownership? (2) Did the court of appeals err in vacating the FCC orders under review, which, among other things, relaxed the agency's cross-ownership restrictions to accommodate changed market conditions?

Holding: The FCC's decision to repeal or modify its media ownership rules was not arbitrary or capricious under the Administrative Procedure Act. The agency considered the record evidence, acknowledged the gaps in the evidence it relied on, and reached a reasonable conclusion.

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

Florida v. Georgia, No. 22O142

Argued: 2/22/21
Decided: 4/1/21
Topics: Environmental Law

Question Presented: Should the Court sustain the State of Florida's exceptions to the Report of the Special Master issued on December 11, 2019, concerning a dispute over the apportionment of interstate waters?

Holding: Florida's exceptions to the Special Master's Report are overruled, and the case is dismissed. Florida has not proved by clear and convincing evidence that Georgia's overconsumption of water caused the collapse of its oyster fisheries or other harm to river wildlife and plant life.

Opinion: Justice Barrett (for the Court)

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview)

Google LLC v. Oracle America, Inc., No. 18-956

Argued: 10/7/20
Decided: 4/5/21
Topics: Intellectual Property

Questions Presented: (1) Does copyright protection extend to a software interface? (2) Does petitioner's use of a software interface in the context of creating a new computer program constitute fair use?

Holding: Google's use of the Java SE Application Programming Interface constituted fair use of that material as a matter of law. Fair use is a mixed question of fact and law, and each of the four

guiding factors set forth in the Copyright Act's fair use provision favor the application of the fair use doctrine on the facts of this case.

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

CRS Resources: CRS Legal Sidebar LSB10543, *Copyright in Code: Supreme Court Hears Landmark Software Case in Google v. Oracle* (case preview); CRS Memo, *Supreme Court October 2020 Term Preview: Selected Cases and Implications for Congress*, available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10597, *Google v. Oracle: Supreme Court Rules for Google in Landmark Software Copyright Case* (discussion of decision)

AMG Capital Management, LLC v. Federal Trade Commission, No. 19-508

Argued: 1/13/21
Decided: 4/22/21
Topics: Consumer Protection Law

Question Presented: Does the Federal Trade Commission Act, 15 U.S.C. § 53(b), by authorizing the Federal Trade Commission to seek an "injunction," also authorize the Commission to demand monetary relief such as restitution, and if so, what is the scope of the limits or requirements for such relief?

Holding: The statute does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement.

Opinion: Justice Breyer (for the Court)

CRS Resources: CRS Legal Sidebar LSB10596, *AMG Capital Management v. FTC: Supreme Court Holds FTC Cannot Obtain Monetary Relief in Section 13(b) Suits* (discussion of decision)

Carr v. Saul, No. 19-1442; Davis v. Saul, No. 20-105 (consolidated)

Argued: 3/3/21
Decided: 4/22/21
Topics: Administrative Law

Question Presented: Must a claimant seeking disability benefits under the Social Security Act exhaust any Appointments Clause challenges before the Administrative Law Judge as a prerequisite to obtaining judicial review based on those challenges?

Holding: The courts of appeals erred in imposing an issue-exhaustion requirement on the claimants' Appointments Clause claims.

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

CRS Resources: CRS Legal Sidebar LSB10579, *Carr v. Saul: Supreme Court to Decide When Social Security Claimants Must First Raise Appointments Clause Challenges* (case preview); CRS Legal Sidebar LSB10595, *Carr v. Saul: Issue Exhaustion Not Required for Social Security Claimants' Appointments Clause Challenges* (discussion of decision)

Jones v. Mississippi, No. 18-1259

Argued: 11/3/20
Decided: 4/22/21
Topics: Constitutional Law, Criminal Law

Question Presented: Does the Eighth Amendment require the sentencing authority to find that a juvenile is "permanently incorrigible" before imposing a sentence of life without parole?

Holding: In the case of a defendant who committed a homicide before the age of 18, the applicable precedents do not require the sentencer to make a separate factual finding that the defendant is permanently incorrigible before sentencing the defendant to life without parole. In such cases, a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.

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

CRS Resources: CRS Legal Sidebar LSB10548, *Jones v. Mississippi: Juvenile Life Without Parole Back at the Supreme Court* (case preview); CRS Legal Sidebar LSB10593, *Jones v. Mississippi, the Eighth Amendment, and Juvenile Life Without Parole* (discussion of decision)

Niz-Chavez v. Garland, No. 19-863

Argued: 11/9/20
Decided: 4/29/21
Topics: Immigration Law

Question Presented: To trigger the "stop-time" rule under 8 U.S.C. § 1229b, is the government required to serve a specific document that includes all of the information specified in 8 U.S.C. § 1229(a), or may the government serve that information over the course of as many documents and as much time as it chooses?

Holding: A notice to appear that is sufficient to trigger the "stop-time" rule is a single document containing all the information about an individual's removal hearing specified in Section 1229(a)(1).

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

Caniglia v. Strom, No. 20-157

Argued: 3/24/21
Decided: 5/17/21
Topics: Constitutional Law, Criminal Law

Question Presented: Does the "community caretaking" exception to the Fourth Amendment's warrant requirement extend to the home?

Holding: The applicable precedent related to the "community caretaking" function of law enforcement does not justify a warrantless search and seizure in the home.

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

CIC Services, LLC v. Internal Revenue Service, No. 19-930

Argued: 12/1/20
Decided: 5/17/21
Topics: Administrative Law, Tax Law

Question Presented: Does the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bar challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes?

Holding: A suit to enjoin a regulatory mandate does not trigger the Anti-Injunction Act even though a violation of the mandate may result in a tax penalty.

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

CRS Resources: CRS Legal Sidebar LSB10576, *CIC Services v. Internal Revenue Service: Interpreting the Tax Anti-Injunction Act* (case preview); CRS Legal Sidebar LSB10619, *Supreme Court's Decision in CIC Services, LLC v. Internal Revenue Service Impacts Pre-Enforcement Challenges to IRS Reporting Mandates* (discussion of decision)

BP P.L.C. v. Mayor & City Council of Baltimore, No. 19-1189

Argued: 1/19/21
Decided: 5/17/21
Topics: Civil Procedure, Environmental Law

Question Presented: Where a federal district court has remanded an order of removal to state court, and the removing defendants premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or on the civil rights removal statute, 28 U.S.C. § 1443, does 28 U.S.C. § 1447(d) permit a federal court of appeals to review any issue encompassed in that remand order?

Holding: Section 1447(d) permits appellate review of the district court's entire remand order, and the court of appeals has jurisdiction to consider all of the defendants' grounds for removal.

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

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview); CRS Legal Sidebar LSB10605, *Supreme Court Ruling May Affect the Fate of Climate Change Liability Suits* (discussion of decision)

Edwards v. Vannoy, No. 19-5807

Argued: 12/2/20
Decided: 5/17/21
Topics: Constitutional Law, Criminal Law

Question Presented: Does the Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), holding that the Sixth Amendment and Fourteenth Amendment of the U.S. Constitution require a unanimous verdict to convict a defendant of a serious offense, apply retroactively to cases on federal collateral review?

Holding: The *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review. The rule announced in *Ramos* does not qualify as a "watershed" procedural rule. Moreover, the

"watershed" exception is moribund and no new rules of criminal procedure can satisfy that purported exception.

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

Guam v. United States, No. 20-382

Argued: 4/26/21
Decided: 5/24/21
Topics: Environmental Law

Questions Presented: (1) Can a settlement of claims under a statute other than the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) trigger a contribution claim under CERCLA Section 113(f)(3)(B)? (2) Can a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability trigger a contribution claim under CERCLA Section 113(f)(3)(B)?

Holding: A settlement of environmental liabilities must resolve a CERCLA-specific liability to give rise to a contribution claim under CERCLA Section 113(f)(3)(B).

Opinion: Justice Thomas (for the Court)

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview); CRS Legal Sidebar LSB10609, *Supreme Court Clarifies CERCLA Provisions for Recouping Cleanup Costs* (discussion of decision)

United States v. Palomar-Santiago, No. 20-437

Argued: 4/27/21
Decided: 5/24/21
Topics: Immigration Law

Question Presented: When a defendant is charged with unlawful reentry into the United States following removal, may he meet the statutory criteria for asserting the invalidity of the original removal order as an affirmative defense by showing that he was removed for a crime that would not be considered a removable offense under current circuit law?

Holding: Each of the three statutory requirements of 8 U.S.C. § 1326(d) is mandatory. The first two of those requirements are not satisfied just because a noncitizen was removed for an offense that should not have rendered him removable.

Opinion: Justice Sotomayor (for the Court)

City of San Antonio v. Hotels.com, L.P., No. 20-334

Argued: 4/21/21
Decided: 5/27/21
Topics: Civil Procedure

Question Presented: Does a district court lack discretion to "deny or reduce" costs deemed "taxable" in the district court under Federal Rule of Appellate Procedure 39(e)?

Holding: Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in Rule 39(e).

Opinion: Justice Alito (for the Court)

United States v. Cooley, No. 19-1414

Argued: 3/23/21
Decided: 6/1/21
Topics: Criminal Law, Indian Law

Question Presented: Did the lower courts err in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law?

Holding: A tribal police officer has authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law.

Opinion: Justice Breyer (for the Court); Justice Alito (concurring)

CRS Resources: CRS Legal Sidebar LSB10561, *High Court to Review Tribal Police Search and Seizure Case* (case preview); CRS Legal Sidebar LSB10608, *Supreme Court Rules on Authority of Tribal Police to Stop Non-Indians* (discussion of decision)

Garland v. Ming Dai, No. 19-1155; Garland v. Alcaraz-Enriquez, No. 19-1156 (consolidated)

Argued: 2/23/21
Decided: 6/1/21
Topics: Immigration Law

Questions Presented: (1) May a court of appeals conclusively presume that an asylum applicant's testimony is credible and true whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination? (2) Did the court of appeals violate the remand rule as set forth in *INS v. Ventura*, 537 U.S. 12 (2002), when it determined in the first instance that respondent was eligible for asylum and entitled to withholding of removal?

Holding: The Ninth Circuit's rule, which requires an immigration judge to treat the noncitizen's testimony as true and credible in the absence of an explicit adverse credibility determination, cannot be reconciled with the terms of the Immigration and Nationality Act.

Opinion: Justice Gorsuch (for the Court)

Van Buren v. United States, No. 19-783

Argued: 11/30/20
Decided: 6/3/21
Topics: Criminal Law

Question Presented: Does a person who is authorized to access information on a computer for specific purposes violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2), if he accesses that information for an unauthorized purpose?

Holding: The Computer Fraud and Abuse Act does not cover individuals who obtain information on a computer for an improper purpose that they are otherwise authorized to access. An individual "exceeds authorized access," and thus violates the statute, when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off-limits to him.

Opinion: Justice Barrett (for the Court); Justice Thomas (dissenting)

CRS Resources: CRS Memo, *Supreme Court's October 2020 Term: Examining Selected Cases,* available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10423, *From Clickwrap to RAP Sheet: Criminal Liability Under the Computer Fraud and Abuse Act for Terms of Service Violations* (case preview); CRS Legal Sidebar LSB10616, *Van Buren v. United States: Supreme Court Holds Accessing Information on a Computer for Unauthorized Purposes Not Federal Crime* (discussion of decision)

Sanchez v. Mayorkas, No. 20-315

Argued: 4/19/21
Decided: 6/7/21
Topics: Immigration Law

Question Presented: Does a grant of Temporary Protected Status under 8 U.S.C. § 1254a(f)(4) authorize eligible noncitizens to obtain lawful-permanent-resident status under 8 U.S.C. § 1255?

Holding: A grant of Temporary Protected Status to a noncitizen who entered the United States unlawfully does not render the noncitizen eligible for lawful-permanent-resident status under Section 1255.

Opinion: Justice Kagan (for the Court)

CRS Resources: CRS Legal Sidebar LSB10607, *Supreme Court: Unlawful Entrants with Temporary Protected Status Cannot Adjust to Lawful Permanent Resident Status* (discussion of decision)

Borden v. United States, No. 19-5410

Argued: 11/3/20
Decided: 6/10/21
Topics: Criminal Law

Question Presented: Does the "use of force" clause in the Armed Career Criminal Act, 18 U.S.C. § 24(e)(2)(B)(i), encompass crimes with a mens rea of mere recklessness?

Holding: The judgment against the defendant is reversed because the use-of-force clause does not reach the state law offense of reckless aggravated assault.[442]

Opinions: Justice Kagan (announcing the judgment of the Court); Justice Thomas (concurring in the judgment); Justice Kavanaugh (dissenting)

Terry v. United States, No. 20-5904

Argued: 5/4/21
Decided: 6/14/21
Topics: Criminal Law

Question Presented: For offenses committed before August 3, 2010, does a defendant sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense" that is eligible for resentencing under Section 404 of the First Step Act?

[442] A plurality of the Court concluded that a crime with a mens rea of recklessness is not a "violent felony" under the Armed Career Criminal Act.

Holding: A defendant convicted of a crack cocaine offense is eligible for a sentence reduction under the First Step Act only if the offense triggered a mandatory minimum sentence.

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

CRS Resources: CRS Legal Sidebar LSB10611, *Crack Cocaine Offenses and the First Step Act of 2018: Overview and Implications of Terry v. United States* (discussion of decision)

Greer v. United States, No. 19-8709; United States v. Gary, No. 20-444

Argued: 4/20/21
Decided: 6/14/21
Topics: Criminal Law

Question Presented: When applying plain-error review based upon an intervening United States Supreme Court decision, may a court of appeals review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

Holding: In felon-in-possession cases, a claim of error under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not know he was a felon. An appellate court conducting plain-error review may consider the entire record, not just the particular proceedings where the error occurred.

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

Fulton v. City of Philadelphia, No. 19-123

Argued: 1/4/20
Decided: 6/17/21
Topics: Constitutional Law

Questions Presented: (1) May free exercise plaintiffs succeed only by proving that the government would allow the same conduct by someone who held different religious views, or must courts consider other evidence that a law is not neutral and generally applicable? (2) Should *Employment Division v. Smith*, 494 U.S. 872 (1990), be revisited? (3) Does a government violate the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

Holding: Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. The case falls outside *Smith* because the City has burdened CSS's religious exercise through policies that are not neutral and generally applicable.

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

CRS Resources: CRS Legal Sidebar LSB10551, *Supreme Court Considers Overruling Free Exercise Precedent in Fulton v. Philadelphia* (case preview); CRS Memo, *Supreme Court's October 2020 Term: Examining Selected Cases*, available upon request to congressional clients

(case preview); CRS Legal Sidebar LSB10612, *Fulton v. Philadelphia: Religious Exemptions from Generally Applicable Laws* (discussion of decision)

Nestle USA, Inc. v. Doe I, No. 19-416; Cargill Inc. v. Doe I, No. 19-453 (consolidated)

Argued: 12/1/20
Decided: 6/17/21
Topics: International Law, Torts

Questions Presented: (1) Under the Alien Tort Statute, 28 U.S.C. § 1350, does the extraterritoriality bar apply to a claim that a domestic corporation has aided and abetted conduct that occurred abroad at the hands of unidentified foreign actors? (2) Is the general presumption against extraterritorial application of the Alien Tort Statute displaced by allegations that a domestic company generally oversaw foreign operations at its headquarters and made operational and financial decisions there? (3) Is a domestic corporation subject to liability in a private action under the Alien Tort Statute?

Holding: The judgment of the U.S. Court of Appeals for the Ninth Circuit is reversed because the plaintiffs impermissibly sought extraterritorial application of the Alien Tort Statute.

Opinions: Justice Thomas (announcing the judgment of the Court and partially writing for the Court); Justice Gorsuch (concurring); Justice Sotomayor (concurring in part and concurring in the judgment); Justice Alito (dissenting)

California v. Texas, No. 19-840; Texas v. California, No. 19-1019 (consolidated)

Argued: 11/10/20
Decided: 6/17/21
Topics: Constitutional Law, Health Law

Questions Presented: (1) Do the individual and state plaintiffs in this case have Article III standing to challenge the minimum coverage provision of the Affordable Care Act, 26 U.S.C. § 5000A? (2) In reducing the coverage amount specified in 26 U.S.C. § 5000A to zero, did Congress render that provision unconstitutional? (3) If the minimum coverage provision is unconstitutional, is it severable from the rest of the Affordable Care Act?

Holding: Plaintiffs do not have standing to challenge the minimum coverage provision because they have not shown a past or future injury fairly traceable to the defendants' enforcement of the specific statutory provision they challenge as unconstitutional.

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

CRS Resources: CRS Legal Sidebar LSB10547, *California v. Texas: The Fate of the Affordable Care Act* (case preview); CRS Memo, *Supreme Court October 2020 Term Preview: Selected Cases and Implications for Congress*, available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10610, *Supreme Court Dismisses Challenge to the Affordable Care Act in California v. Texas* (discussion of decision)

United States v. Arthrex, Inc., No. 19-1434; Smith & Nephew, Inc. v. Arthrex, Inc., No. 19-1452; Arthrex, Inc. v. Smith & Nephew, Inc., No. 19-1458 (consolidated)

Argued: 3/1/21
Decided: 6/21/21
Topics: Administrative Law, Constitutional Law

Questions Presented: (1) For purposes of the Appointments Clause of the Constitution, are administrative patent judges of the U.S. Patent and Trademark Office principal officers who must be appointed by the President with the Senate's advice and consent, or inferior officers whose appointment Congress has permissibly vested in a department head? (2) If administrative patent judges are principal officers, did the court of appeals properly cure any appointments clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. § 7513(a) to those judges?

Holding: The unreviewable authority wielded by administrative patent judges to decide the validity of issued patents is inconsistent with their appointment by the Secretary of Commerce to an inferior office. Granting the Director of the U.S. Patent and Trademark Office the authority to review the administrative patent judges' decisions resolves the Appointments Clause defect.

Opinions: Chief Justice Roberts (for the Court in part); Justice Gorsuch (concurring in part and dissenting in part); Justice Breyer (concurring in part and dissenting in part); Justice Thomas (dissenting)

CRS Resources: CRS Legal Sidebar LSB10580, *Supreme Court to Consider Whether Patent Judges' Appointments Are Constitutional* (case preview); CRS Legal Sidebar LSB10615, *Supreme Court Preserves Patent Trial and Appeal Board, but with Greater Executive Oversight* (discussion of decision)

Note: This case is discussed in more detail in this report.

National Collegiate Athletic Ass'n v. Alston, No. 20-512; American Athletic Conference v. Alston, No. 20-520 (consolidated)

Argued: 3/31/21
Decided: 6/21/21
Topics: Antitrust Law

Question Presented: Did the Ninth Circuit err in holding that the National Collegiate Athletic Association (NCAA) eligibility rules regarding compensation of student athletes violate federal antitrust law?

Holding: The district court's injunction, finding unlawful and enjoining certain NCAA rules limiting the education-related benefits that schools may make available to student-athletes, was consistent with established antitrust principles.

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

CRS Resources: CRS Memo, *Supreme Court's October 2020 Term: Examining Selected Cases*, available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10613, *National Collegiate Athletic Association v. Alston and the Debate over Student Athlete Compensation* (discussion of decision); CRS Report R46828, *Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress*

Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, No. 20-222

Argued: 3/29/21
Decided: 6/21/21
Topics: Civil Procedure, Securities Law

Questions Presented: (1) May a defendant in a securities class action rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality? (2) Does a defendant seeking to rebut the *Basic* presumption have only a burden of production or also the ultimate burden of persuasion?

Holdings: (1) The generic nature of a misrepresentation often is important evidence that courts should consider at class certification, including in inflation-maintenance cases. (2) Defendants bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence at class certification.

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

Cedar Point Nursery v. Hassid, No. 20-107

Argued: 3/22/21
Decided: 6/23/21
Topics: Constitutional Law

Question Presented: Does the uncompensated appropriation of an easement that is limited in time constitute a per se physical taking under the Fifth Amendment?

Holding: The California regulation at issue here, which grants labor organizers a right to access an agricultural employer's property in order to solicit support for unionization, constitutes a per se physical taking.

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

Note: This case is discussed in more detail in this report.

Mahanoy Area School District v. B.L., No. 20-255

Argument: 4/28/21
Decided: 6/23/21
Topics: Constitutional Law

Question Presented: Does *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, apply to student speech that occurs off campus?

Holding: Although public schools may have a special interest in regulating some off-campus student speech, the leeway the First Amendment grants to schools in regulating speech is diminished with respect to off-campus speech. In this case, the special interests offered by the school are not sufficient to overcome the student's interest in free expression.

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

Collins v. Yellen, No. 19-422; Yellen v. Collins, No. 19-563 (consolidated)

Argued: 12/9/20
Decided: 6/23/21
Topics: Constitutional Law, Statutory Interpretation

Questions Presented: (1) Does the Federal Housing Finance Agency's structure violate the constitutional separation of powers, and if so, must the courts set aside an action that the agency took during the time it was unconstitutionally structured? (2) Do specific statutory provisions of the 2008 Housing and Economic Recovery Act preclude the shareholders' challenge to the agency action?

Holdings: (1) The Recovery Act precludes the shareholders' statutory challenge to the FHFA's action. (2) The Recovery Act's restriction on the President's power to remove the FHFA's Director is unconstitutional. (3) There is no basis to conclude that the challenged actions taken by the FHFA are void, but the lower courts may consider further whether the shareholders are entitled to retrospective relief.

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

CRS Resources: CRS Memo, *Supreme Court October 2020 Term Preview: Selected Cases and Implications for Congress*, available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10614, *Supreme Court: Structure of Federal Housing Finance Agency Violates Constitution* (discussion of decision)

Note: This case is discussed in more detail in this report.

Lange v. California, No. 20-18

Argued: 2/24/21
Decided: 6/23/21
Topics: Constitutional Law, Criminal Law

Question Presented: Does the pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant?

Holding: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always—that is, categorically—justify a warrantless entry into a home.

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

CRS Resources: CRS Legal Sidebar LSB10630, *Hot Pursuit Doctrine and Fleeing Misdemeanor Suspects: Case-by-Case Analysis Required* (discussion of decision)

Yellen v. Confederated Tribes of the Chehalis Reservation, No. 20-543; Alaska Native Village Corp. v. Confederated Tribes of the Chehalis Reservation, No. 20-544 (consolidated)

Argument: 4/19/21
Decision: 6/25/21
Topics: Indian Law

Question Presented: Do Alaska Native regional and village corporations, established pursuant to the Alaska Native Claims Settlement Act, constitute "Indian tribes" for purposes of the Coronavirus Aid, Relief, and Economic Security Act, 42 U.S.C. § 801(g)(1)?

Holding: Alaska native corporations are "Indian tribes" under the Indian Self-Determination and Education Assistance Act, and thus are eligible for funding under Title V of the Coronavirus Aid, Relief, and Economic Security Act.

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

CRS Resources: CRS Legal Sidebar LSB10598, *Justices Consider Whether Treasury May Distribute CARES Act Funds for "Indian Tribes" to Alaska Native Corporations* (case preview); CRS Legal Sidebar LSB10626, *Supreme Court Holds Alaska Native Corporations Are "Indian Tribes" Entitled to CARES Act Funds* (discussion of decision)

Hollyfrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, No. 20-472

Argued: 4/27/21
Decided: 6/25/21
Topics: Environmental Law

Question Presented: In order to qualify for a Renewable Fuel Standards hardship exemption under 42 U.S.C. § 7545(o)(9)(B)(i), must a small refinery have received uninterrupted, continuous hardship exemptions for every year since 2011?

Holding: A small refinery that previously received a hardship exemption may obtain an "extension" under 42 U.S.C. § 7545(o)(9)(B)(i) even if it saw a lapse in exemption coverage in a previous year.

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

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview); CRS Legal Sidebar LSB10418, *Supreme Court Holds Small Refineries Remain Eligible for Renewable Fuel Standard Exemptions After Lapse* (discussion of decision)

TransUnion LLC v. Ramirez, No. 20-297

Argued: 3/30/21
Decided: 6/25/21
Topics: Civil Procedure, Constitutional Law

Question Presented: Does Article III or Federal Rule of Civil Procedure 23 permit a class action for damages in which the vast majority of the class suffered no actual injury or no injury similar to that of the class representative?

Holding: Only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court.

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

CRS Resources: CRS Legal Sidebar LSB10629, *Privacy Law and Private Rights of Action: Standing After TransUnion v. Ramirez* (discussion of decision)

Note: This case is discussed in more detail in this report.

PennEast Pipeline Co., LLC v. New Jersey, No. 19-1039

Argued: 4/28/21
Decided: 6/29/21
Topics: Constitutional Law, Environmental Law

Question Presented: Does the Natural Gas Act delegate to Federal Energy Regulatory Commission certificate holders authority to exercise the federal government's eminent domain power to condemn land in which a state claims an interest?

Holding: The Natural Gas Act authorizes a FERC certificate holder to condemn all necessary rights-of-way, whether owned by private parties or states.

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

CRS Resources: CRS Report R46667, *Supreme Court Preview of 2020-2021 Environmental and Energy Law Cases and Review of 2019-2020 Rulings* (case preview); CRS Legal Sidebar LSB10634, *PennEast Pipeline Company v. New Jersey: Can a Natural Gas Pipeline Company Bring a Condemnation Suit Against a State?* (discussion of decision)

Johnson v. Guzman Chavez, No. 19-897

Argued: 1/11/21
Decided: 6/29/21
Topics: Immigration Law

Question Presented: Is the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal governed by 8 U.S.C. § 1231 or by 8 U.S.C. § 1226?

Holding: Section 1231, not Section 1226, governs the detention of aliens subject to reinstated orders of removal.

Opinions: Justice Alito (for the Court with the exception of one footnote); Justice Thomas (concurring in part and concurring in the judgment); Justice Breyer (dissenting)

CRS Resources: CRS Legal Sidebar LSB10620, *Johnson v. Chavez: Aliens with Reinstated Removal Orders May Be Detained Without Bond Hearings* (discussion of decision)

Minerva Surgical, Inc. v. Hologic, Inc., No. 20-440

Argued: 4/21/21
Decided: 6/29/21
Topics: Intellectual Property

Question Presented: May a defendant in a patent infringement action who assigned the patent, or is in privity with an assignor of the patent, raise a defense that the patent is invalid?

Holding: The doctrine of "assignor estoppel," which limits an inventor's ability to assign a patent and later contend that the patent is invalid, is well-grounded in centuries-old fairness principles. However, it applies only when the assignor's claim of invalidity contradicts express or implicit representations he made in assigning the patent.

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

Americans for Prosperity Foundation v. Bonta, No. 19-251; Thomas More Law Center v. Bonta, No. 19-255 (consolidated)

Argued: 4/26/21
Decided: 7/1/21
Topics: Constitutional Law

Questions Presented: (1) Does a California law requiring disclosure of private nonprofit organizations' major donors violate charities' and their donors' freedom of association and speech, facially or as applied? (2) Does exacting scrutiny or strict scrutiny apply to disclosure requirements that burden non-electoral, expressive association rights? (3) May exacting scrutiny be satisfied without a showing that the disclosure requirement is narrowly tailored to an asserted law-enforcement interest?

Holding: California's disclosure requirement is facially invalid because it burdens donors' First Amendment rights and is not narrowly tailored to an important government interest.

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

CRS Resources: CRS Legal Sidebar LSB10621, *Supreme Court Invalidates California Donor Disclosure Rule on First Amendment Grounds* (discussion of decision)

Note: This case is discussed in more detail in this report.

Brnovich v. Democratic National Committee, No. 19-1257; Arizona Republican Party v. Democratic National Committee, No. 19-1258 (consolidated)

Argued: 3/2/21
Decided: 7/1/21
Topics: Constitutional Law, Election Law, Civil Rights

Questions Presented: (1) Does Arizona's out-of-precinct policy, which does not count provisional ballots cast in person on Election Day outside of the voter's designated precinct, violate Section 2 of the Voting Rights Act? (2) Does Arizona's ballot-collection law, which permits only certain persons to handle another person's completed early ballot, violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

Holding: Arizona's out-of-precinct policy and ballot-collection law do not violate Section 2 of the Voting Rights Act, and the ballot-collection law was not enacted with a racially discriminatory purpose.

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

CRS Resources: CRS Legal Sidebar LSB10583, *Supreme Court Considers Standard for Voting Rights Act Claims* (case preview); CRS Memo, *Supreme Court's October 2020 Term: Examining Selected Cases*, available upon request to congressional clients (case preview); CRS Legal Sidebar LSB10624, *Voting Rights Act: Supreme Court Provides "Guideposts" for Determining Violations of Section 2 in Brnovich v. DNC* (discussion of decision)

Note: This case is discussed in more detail in this report.

Selected Additional Resources

CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*

CRS Legal Sidebar, CRS Legal Sidebar LSB10637, *The "Shadow Docket": The Supreme Court's Non-Merits Orders*

CRS Legal Sidebar, CRS Legal Sidebar LSB10638, *Supreme Court Blocks Enforcement of the CDC's Eviction Moratorium*

CRS Legal Sidebar LSB10602, *Supreme Court Declines Request to Revisit Precedent Barring Military Cadet's Sexual Assault Claim Against United States*

CRS Legal Sidebar LSB10343, *Is Mandatory Detention of Unlawful Entrants Seeking Asylum Constitutional?*

For more information on topics in constitutional law and related Supreme Court decisions, see the *Constitution Annotated*, which is available online at https://constitution.congress.gov/.

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