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Supreme Court Term October 2021: A Review of Selected Major Rulings

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SUMMARY

During the Supreme Court term that began on October 4, 2021, the Court issued a number of decisions concerning high-profile issues such as abortion, firearms regulation, climate change, school prayer, and immigration. Many of the Court's opinions also brought about important jurisprudential changes on these issues. Looking solely at the Court's last week before its summer recess beginning June 30, 2022, the Court issued decisions weighing in on the Controlled Substances Act, Congress's power to raise and support the Armed Forces, the prosecution of crimes committed on tribal lands, the scope of the First Amendment's Establishment Clause, and Congress's ability to delegate significant discretionary authority to executive agencies. In addition, in that last week, Justice Stephen Breyer retired after 28 years on the Court, and his successor, Justice Ketanji Brown Jackson, was sworn in.

This report focuses on four cases, discussing their relevance to Congress. Specifically, the report explains the Court's rulings in (1) *New York State Rifle & Pistol Ass'n v. Bruen*, invoking the Second Amendment to strike down a New York firearms restriction; (2) *Kennedy v. Bremerton School District*, ruling in favor of a high school football coach who sought First Amendment protections for his post-game prayers; (3) *Biden v. Texas*, upholding the Biden Administration's termination of the Remain in Mexico policy; and (4) *West Virginia v. EPA*, invalidating the EPA's Clean Power Plan after invoking the "major questions doctrine." Other significant cases from the October 2021 term, such as *Dobbs v. Jackson Women's Health Organization*, in which the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* to conclude there is no federal constitutional right to an abortion, are addressed in other CRS products.

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

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Supreme Court commentators characterized the Supreme Court's October 2021 term as one of the most momentous in history.[1] The term began on October 4, 2021, and the Court issued its last merits opinion of the term on June 30, 2022.[2] During that period, the Court confronted a number of high-profile issues such as abortion, firearms regulation, climate change, school prayer, and immigration. The opinions not only dealt with matters of political salience but in some cases brought about significant jurisprudential changes. For instance, the Court seemed to require an originalist analysis in at least three constitutional contexts, saying courts should look to the Constitution's original meaning to determine the scope of the First Amendment's Establishment Clause, the Second Amendment's right to keep and bear arms, and the Fourteenth Amendment's Due Process Clause.[3] The term also saw a highly unusual leak of a draft opinion[4] as well as Justice Stephen Breyer's retirement.[5] Justice Breyer's replacement, Justice Ketanji Brown Jackson, was sworn in on June 30, 2022.[6]

The October 2021 term saw fewer unanimous opinions and more 6-3 opinions than any other term in the past decade.[7] In cases where the Court issued a merits opinion after oral arguments, about 14% were decided by a 5-4 vote, and 22% were decided by a 6-3 vote with Republican-appointed Justices in the majority and Democratic-appointed Justices in dissent.[8] Chief Justice John Roberts and Justice Brett Kavanaugh were in the majority 95% of the time, and the Chief Justice wrote the largest number of majority opinions this term.[9]

Likely the term's highest profile ruling was *Dobbs v. Jackson Women's Health Organization*, in which the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* to conclude there is no federal constitutional right to an abortion.[10] That decision is discussed in other CRS products.[11]

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[1] *See, e.g.*, Angie Gou, *As Unanimity Declines, Conservative Majority's Power Runs Deeper Than the Blockbuster Cases*, SCOTUSBLOG (July 3, 2022, 8:21 PM).

[2] J. OF THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2021, at 1 (Oct. 4, 2021), https://www.supremecourt.gov/orders/journal/Jnl21.pdf; *id.* at 709 (June 30, 2022).

[3] "Originalism" refers to a mode of constitutional analysis that focuses on how the Constitution was understood at the time of the Founding. CRS Legal Sidebar LSB10677, *The Modes of Constitutional Analysis: Original Meaning (Part 3)*, by Brandon J. Murrill.

[4] *See* Press Release, Supreme Court (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22. *See also* CRS Legal Sidebar LSB10741, *Is Unauthorized Dissemination of a Draft Supreme Court Opinion a Federal Crime?*, by Michael A. Foster.

[5] Letter from Justice Breyer to President Biden (June 29, 2022), https://www.supremecourt.gov/publicinfo/press/2022-06-29_SGB_Letter.pdf.

[6] Press Release, Supreme Court, Ketanji Brown Jackson Oath Ceremony (June 29, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_06-29-22c.

[7] Angie Gou et al., STAT PACK FOR THE SUPREME COURT'S 2021-22 TERM 3 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf.

[8] Nine of the Court's 63 merits opinions issued after oral argument were decided 5-4, and 14 were divided along these 6-3 ideological lines. *Id.* at 4, 12.

[9] *Id.* at 8, 17. With 13 dissents, Justice Sotomayor wrote the most opinions overall. *Id* at 9–10.

[10] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (U.S. June 24, 2022).

[11] CRS Legal Sidebar LSB10768, *Supreme Court Rules No Constitutional Right to Abortion in Dobbs v. Jackson Women's Health Organization*, by Jon O. Shimabukuro; *see also, e.g.*, CRS Legal Sidebar LSB10787, *Congressional Authority to Regulate Abortion*, by Kevin J. Hickey and Whitney K. Novak; CRS Legal Sidebar LSB10820, *Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity*, by Kelsey Y. Santamaria.

This report primarily focuses on four other significant decisions from this term: (1) *New York State Rifle & Pistol Ass'n v. Bruen*, involving Second Amendment restrictions on firearms regulation; (2) *Kennedy v. Bremerton School District*, involving First Amendment protections for school prayer; (3) *Biden v. Texas*, involving the Biden Administration's termination of the Remain in Mexico policy; and (4) *West Virginia v. EPA*, involving the U.S. Environmental Protection Agency's (EPA's) Clean Power Plan and congressional delegations of authority to executive agencies more generally. The **Appendix** provides a list of all the Court's merits decisions this term, with summaries of the decisions' holdings and references to CRS resources that address selected cases in more detail.

For more background on Justice Breyer's retirement and Justice Jackson's jurisprudence prior to joining the Court, see CRS Legal Sidebar LSB10691, *Justice Breyer Retires: Initial Considerations*, by Valerie C. Brannon et al.; and CRS Report R47050, *The Nomination of Judge Ketanji Brown Jackson to the Supreme Court*, coordinated by David Gunter.

New York State Rifle & Pistol Ass'n v. Bruen: Second Amendment Restrictions on Firearms Regulation[12]

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court held unconstitutional a portion of New York's firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home.[13] In a 6-3 decision, the Court struck down New York's requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish "proper cause," ruling that the requirement is at odds with the Second Amendment (as made applicable to the states through the Fourteenth Amendment).[14] In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation, rejecting a "two-step" methodology employed by many of the lower courts.[15] Going forward, the ruling will guide lower courts in evaluating Second Amendment challenges to laws regulating firearms at the federal, state, and local levels.

Background

The Second Amendment provides in full: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed."[16] In its 2008 decision in *District of Columbia v. Heller*, a majority of the Supreme Court held, after a lengthy historical analysis, that the Amendment protects an individual right to possess firearms for historically lawful purposes, including at least self-defense in the home.[17] The *Heller* majority also provided some guidance on the scope of the right, explaining that it "is not unlimited" and that "nothing in [the] opinion should be taken to cast doubt" on "longstanding prohibitions" like "laws forbidding the carrying of firearms in sensitive places such as schools and government

[12] Michael A. Foster, CRS Acting Section Research Manager, authored this section of the report.

[13] 142 S. Ct. 2111, 2122 (2022).

[14] *Id.*

[15] *Id.* at 2126, 2134–35.

[16] U.S. CONST. amend. II.

[17] 554 U.S. 570, 595 (2008).

buildings," among other "presumptively lawful" regulations.[18] Nevertheless, the *Heller* Court struck down the District of Columbia's prohibition on the private possession of operative handguns in the home, specifying that the home is where the need for self-defense is "most acute."[19] In a later case, *McDonald v. City of Chicago*, the Court concluded that the right to keep and bear arms is a "fundamental" right that is incorporated through the Fourteenth Amendment against the states, meaning that the Second Amendment constrains not just the federal government but state and local governments as well.[20]

Before *Bruen*, the Court had not meaningfully elaborated on the Second Amendment beyond *Heller* and *McDonald*,[21] leaving key questions unanswered. First, the Court in *Heller* did not establish which level of scrutiny or methodology should ordinarily apply to laws implicating the Second Amendment right to keep and bear arms. Whether a law will withstand a constitutional challenge often depends on the level of "scrutiny" a court applies to that law, which can vary depending on the circumstances. For example, laws that restrict political speech based on its content typically receive "strict scrutiny," meaning that the government must show that the law is narrowly tailored to achieve a compelling government interest.[22] Other laws may receive "intermediate scrutiny" or "rational basis" review and are more likely to be upheld under those standards.[23] In *Heller*, the Court concluded that the D.C. regulations at issue failed constitutional muster under "any of the standards of scrutiny" the Court has traditionally applied.[24] Second, the Court in *Heller* left unclear how far Second Amendment protections extend, if at all, beyond keeping firearms for self-defense in the home.[25]

With no further Supreme Court guidance prior to *Bruen*, lower federal courts generally adopted a two-step framework for reviewing federal, state, and local gun regulations.[26] At step one, a court would ask whether the law at issue burdens conduct protected by the Second Amendment, which would typically involve an inquiry into the historical meaning of the right.[27] If the law did not

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[18] *Id.* at 626–27, 627 n.26.

[19] *Id.* at 628–36.

[20] 561 U.S. 742, 778, 791 (2010) (plurality opinion); *id.* at 806 (Thomas, J., concurring in part and concurring in judgment). The provisions at issue in *McDonald* were "similar" to the provisions the Court struck down in *Heller*. *Id.* at 750 (majority opinion).

[21] In *Caetano v. Massachusetts*, the Court issued a brief, per curiam order vacating a Massachusetts Supreme Court decision that upheld a law prohibiting the possession of stun guns, reiterating that the Second Amendment applies to the states and extends to "bearable arms" that "were not in existence at the time of the founding." 136 S. Ct. 1027, 1027 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582) (internal quotation mark omitted). In 2019, the Court also granted review in another case challenging portions of New York City's handgun licensing regime, but changes to the laws at issue prompted the Court to effectively dismiss the case as moot in April 2020 without ruling on the merits. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020) (per curiam).

[22] *See* Nat'l Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). Because of this connection between the government's interest and the regulatory means by which it chooses to advance that interest, legal standards such as strict scrutiny and intermediate scrutiny are also sometimes called "means-end scrutiny."

[23] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (applying intermediate scrutiny to regulations restricting commercial speech).

[24] *Heller*, 554 U.S. at 628. The *Heller* majority suggested in a footnote that "rational-basis" review would be inappropriate in analyzing laws under the Second Amendment. *Id.* at 628 n.27.

[25] *Id.* at 628; *see* United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) ("[A] considerable degree of uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.").

[26] *See, e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases).

[27] *E.g.*, Silvester v. Harris, 843 F.3d 816, 820–21 (9th Cir. 2016); Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011). Courts at step one sometimes recognized a safe harbor for the kinds of "longstanding" and "presumptively

burden protected conduct, it would be upheld.[28] If the challenged law did burden protected conduct, a court would next apply either intermediate or strict scrutiny to determine whether the law was nevertheless constitutional.[29] Whether a court would apply intermediate or strict scrutiny would ordinarily depend on whether the law severely burdened the "core" protection of the Second Amendment.[30] What precisely constituted the "core" of the Second Amendment, however, produced some disagreement among the circuit courts, particularly with respect to whether such protections extended beyond the home.[31] Nonetheless, using the two-step framework, the federal circuit courts upheld many firearms regulations, often after concluding that the "core" of the Second Amendment was not severely burdened and thus intermediate scrutiny should be applied.[32]

In one of those cases, *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court agreed[33] to consider the constitutionality of a portion of New York's handgun licensing regime that relates to concealed-carry licenses for self-defense. New York had long made it a crime to possess a handgun without a license.[34] In general, a New York resident who wanted to possess a handgun in public lawfully was required to get a "carry" license authorizing concealed carry.[35] Among other things, prior to *Bruen*, "carry" licenses were limited to those holding certain types

lawful" regulations that the Supreme Court in *Heller* appeared to insulate from doubt. *E.g.*, United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."). In a variation, some courts treated such regulations not as *per se* constitutional but merely as being entitled to a presumption of constitutionality. *See, e.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 686 (6th Cir. 2016) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.").

[28] *E.g.*, Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019) (concluding that, based on historical evidence, "a felony conviction removes one from the scope of the Second Amendment").

[29] Under this two-step analysis, courts would sometimes go on to step two in an "abundance of caution" even if it is doubtful that a challenged law burdens conduct protected by the Second Amendment. Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185, 204 (5th Cir. 2012); *see* Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) ("[W]e and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step[.]").

[30] *E.g.*, *Nat'l Rifle Ass'n*, 700 F.3d at 195.

[31] *Compare* Kachalsky v. County of Westchester, 701 F.3d 81, 94 (2d Cir. 2012) ("The state's ability to regulate firearms ... is qualitatively different in public than in the home."), Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018) (stating that the right "is at its zenith inside the home" and "is plainly more circumscribed outside the home"), *and* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."), *with* Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (recognizing that the right of law-abiding citizens to carry a concealed firearm is a core component of the Second Amendment), *and* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.").

[32] *E.g.*, *Gould*, 907 F.3d at 676–77; *Bonidy*, 790 F.3d at 1128–29; Kanter v. Barr, 919 F.3d 437, 450–51 (7th Cir. 2019). Not all firearms regulations have been upheld, however. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 264 (2d Cir. 2015) (concluding that a law limiting the number of rounds that could be loaded into a firearm did not survive intermediate scrutiny on the record before the court); *Wrenn*, 864 F.3d at 667 (holding that restrictions on obtaining a concealed carry license effectively banned exercise of core Second Amendment right and were thus unconstitutional); *but see Kachalsky*, 701 F.3d at 94 (applying intermediate scrutiny and upholding similar restrictions after concluding that possession of firearms outside the home is outside the core of Second Amendment).

[33] 141 S. Ct. 2566 (2020) (mem.) (granting petition for certiorari).

[34] N.Y. PENAL LAW §§ 265.01–265.04, 265.20(a)(3).

[35] *See id.* § 400.00(2).

of employment or who could show "proper cause."[36] State and federal courts in New York interpreted the phrase "proper cause" to mean that either (1) the applicant wanted to use the handgun for target practice or hunting, in which case the license could be restricted to those purposes; or (2) the applicant had a "special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[37]

In 2018, the New York State Rifle & Pistol Association, a firearms advocacy organization composed of individuals and clubs throughout the state, and two of its individual members (collectively "the petitioners") filed suit in federal court against relevant New York licensing officials, alleging that the denial of licenses to carry firearms outside the home for self-defense was a violation of the Second Amendment.[38] Specifically, the petitioners asserted that although they had been issued restricted licenses to carry for purposes of hunting and target shooting, they had been denied unrestricted licenses because they had only a generalized desire to carry for self-defense outside the home and thus could not establish "proper cause" under New York law.[39] The Second Circuit[40] summarily affirmed dismissal of the petitioners' claims, relying on a previous decision in which the court applied the two-step inquiry described above to New York's proper cause requirement.[41]

The Supreme Court's Opinion

In a 6-3 decision, the Supreme Court reversed the Second Circuit's judgment, holding that New York's licensing regime violates the Constitution.[42] Justice Clarence Thomas's majority opinion began by addressing the proper standard for evaluating Second Amendment challenges to firearm regulations and rejecting the two-step framework that "combines history with means-end scrutiny."[43] In the majority's view, the two-step approach was inconsistent with *Heller*, which focused on text and history and did not invoke any means-end test such as strict or intermediate scrutiny.[44] Consistent with that exclusive focus on text and history, the Court stated the test as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm

[36] *Id.* § 400.00(2)(c)–(f).

[37] Kachalsky v. County of Westchester, 701 F.3d 81, 86 (2d Cir. 2012) (quoting Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980) (internal quotation mark omitted)).

[38] *See* N.Y. State Rifle & Pistol Ass'n v. Beach, 354 F. Supp. 3d 143, 145 (N.D.N.Y. 2018).

[39] *See id.* at 146–47 (stating that the individual petitioners sought unrestricted licenses based on their experience and training handling firearms and, in one petitioner's case, robberies in his neighborhood). In the case of the organization, it alleged that at least one of its members would carry a firearm outside the home for self-defense but could not satisfy the proper cause requirement. *Id.* at 146.

[40] For purposes of brevity, references to a particular circuit in this memorandum (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Second Circuit).

[41] N.Y. State Rifle & Pistol Ass'n v. Beach, 818 F. App'x 99, 100 (2d Cir. 2020) (summary order); *see Kachalsky*, 701 F.3d at 89, 94.

[42] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[43] *Id.* at 2125–26.

[44] *Id.* at 2127–29.

> regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[45]

Turning, then, to the first question in the analysis—whether the Second Amendment's text covers the conduct at issue—the majority opinion concluded that it did, as the word "bear" in the text "naturally encompasses public carry."[46] As such, according to the majority, the Second Amendment "presumptively guarantees ... a right to 'bear' arms in public for self-defense."[47]

On the next question of consistency with the country's "historical tradition of firearm regulation," the majority opinion provided some further guidance, acknowledging that the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[48] For this reason, the majority explained that historical analysis of modern-day gun laws may call for reasoning by analogy to determine whether historical and modern firearm regulations are "relevantly similar."[49]

To determine what qualifies as relevantly similar, the majority opinion identified "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[50] As an example of modern laws that could pass muster by means of historical analogy, the majority opinion pointed to laws prohibiting firearms in "sensitive places" such as schools or government buildings, though the majority rejected the proposition that the "sensitive place" category could apply so broadly as to cover "all places of public congregation that are not isolated from law enforcement."[51]

Throughout the majority opinion, the Court provided further guideposts as to what sort of historical evidence would be most valuable, cautioning, among other things, against reading too much into early English law that did not necessarily "survive[] to become our Founders' law" or ascribing too much significance to post-enactment history, at least where that history was inconsistent with the original meaning of the constitutional text.[52] The majority declined to decide whether the prevailing historical understanding for analytical purposes should be that of 1791, when the Second Amendment was adopted, or 1868, when the Fourteenth Amendment was ratified. Instead, it concluded that the public understanding was the same at both points for relevant purposes with respect to public carry.[53]

With this framework and guidance in place, the majority opinion turned to its historical analysis, assessing whether a variety of laws from England and the United States proffered by the respondents met the burden of establishing that New York's laws were consistent with the country's historical tradition of firearms regulation.[54] Ultimately, the majority concluded that the respondents did not meet the burden "to identify an American tradition justifying the State's proper-cause requirement."[55] While acknowledging that history reflected restrictions on public

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[45] *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961)).

[46] *Id.* at 2134.

[47] *Id.* at 2135.

[48] *Id.* at 2132.

[49] *Id.*

[50] *Id.* at 2133.

[51] *Id.* at 2133–34.

[52] *Id.* at 2136–37.

[53] *Id.* at 2138.

[54] *Id.* at 2138–56.

[55] *Id.* at 2156.

carry, which limited "the intent for which one could carry arms, the manner by which one carried arms," or the particular circumstances "under which one could not carry arms," the majority opinion concluded that "American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense" or made public carry contingent on a showing of a special need.[56] The few historical laws that the majority viewed as extending that far were, according to the opinion, "late-in-time outliers."[57] As such, the majority held that New York's proper cause requirement violated the Second Amendment (by way of the Fourteenth Amendment) in preventing "law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."[58]

Concurring and Dissenting Opinions

Justice Samuel Alito joined the Court's majority opinion "in full" but wrote separately to respond primarily to points made by the dissent.[59] Justice Alito emphasized in his concurrence that the majority opinion did not disturb *Heller* or *McDonald* and said nothing about who may be prohibited from possessing a firearm, what kinds of weapons may be possessed, or the requirements for purchasing a firearm.[60]

Justice Kavanaugh, joined by Chief Justice Roberts, also wrote separately to underscore that the decision in *Bruen* would not prohibit states from imposing licensing requirements for public carry based on objective criteria so long as the requirements "do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense."[61] Justice Kavanaugh, quoting from *Heller*, reiterated that the Second Amendment right is not unlimited and may allow for many kinds of gun regulations.[62]

Justice Amy Coney Barrett wrote a solo concurrence to highlight two open methodological questions regarding the role of post-ratification practice in historical inquiry and whether 1791 or 1868 should be the relevant benchmark year.[63] She underscored that both questions were unnecessary to resolve in the present case but may have a bearing on a future case.[64]

Justice Breyer authored a dissent, joined by Justices Elena Kagan and Sonia Sotomayor.[65] The dissent objected to deciding the case on the pleadings without an evidentiary record as to how New York's standard was actually being applied.[66] More fundamentally, Justice Breyer disagreed with the majority of the Court's "rigid history-only approach," which he argued unnecessarily disrupted consensus in federal circuit courts, misread *Heller*, and put the Second Amendment on a different footing than other constitutional rights.[67] The dissent also viewed the history-focused approach as "deeply impractical" because it imposed on judges without historical expertise—and

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2156–57 (Alito, J., concurring).

[60] *Id.* at 2157.

[61] *Id.* at 2162 (Kavanaugh, J., concurring).

[62] *Id.*

[63] *Id.* at 2162–63 (Barrett, J., concurring).

[64] *Id.* at 2163.

[65] *Id.* at 2163 (Breyer, J., dissenting).

[66] *Id.* at 2164, 2170–74.

[67] *Id.* at 2174–77.

courts without needed resources—the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would "often fail to provide clear answers to difficult questions" while giving judges "ample tools to pick their friends out of history's crowd."[68] The dissent viewed the majority's historical analysis regarding public carry as an embodiment of these impracticalities. Justice Breyer identified numerous historical regulations that, in his view, were similar to New York's under the majority's reasoning but that the majority discounted.[69]

Considerations for Congress

Most immediately, the Supreme Court's decision in *Bruen* casts substantial constitutional doubt on other state public carry laws that require a showing of cause or a special need to carry in public. According to the majority opinion, at least five states have discretionary public carry licensing regimes analogous to New York's "proper cause" standard.[70] Following *Bruen*, the Court vacated a Ninth Circuit decision that had upheld Hawaii's open-carry licensure requirements, which include demonstrating "the urgency or the need" to carry a firearm.[71] The governor of Maryland, which had required a "good and substantial reason" for seeking a concealed-carry permit, also ordered Maryland State Police to immediately suspend that provision following *Bruen*.[72]

In a footnote, the majority opinion in *Bruen* emphasized that its decision with respect to New York's regime did not suggest that licensing regimes in other states imposing objective requirements would be unconstitutional. For example, the Court suggested that requirements such as a background check or completion of a firearms safety course may be permissible, although circumstances such as "lengthy wait times" or "exorbitant fees" might be subject to challenge if they "deny ordinary citizens their right to public carry."[73] In response to the *Bruen* decision, New York passed new concealed-carry provisions that did not include a "proper cause" requirement but added new requirements and restrictions, including mandating firearm safety training, and prohibited concealed carry in particular locations such as subway stations, stadiums, and Times Square.[74] A court challenge was quickly filed and, on October 6, 2022, the district court granted a temporary restraining order prohibiting enforcement of a number of the provisions.[75] Among other things, the court ruled that several of the location restrictions (including in Times Square and the subway) and a provision requiring an applicant to establish "good moral character" were likely unconstitutional under *Bruen*.[76]

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[68] *Id.* at 2177–81.

[69] *Id.* at 2181–90.

[70] *Id.* at 2124 (majority opinion).

[71] *See* Young v. Hawaii, 142 S. Ct. 2895, 2895–96 (2022) (mem.).

[72] Paul Duggan & Ovetta Wiggins, *Hogan orders relaxed rules for Maryland concealed handgun permits*, WASH. POST (July 6, 2022), https://www.washingtonpost.com/dc-md-va/2022/07/05/maryland-handgun-rules-relaxed-hogan/.

[73] *Bruen*, 142 S. Ct. at 2138 n.9.

[74] Press Release, Governor of N.Y., Governor Hochul Announces New Concealed Carry Laws Passed in Response to Reckless Supreme Court Decision Take Effect September 1, 2022 (Aug. 31, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-new-concealed-carry-laws-passed-response-reckless-supreme-court. California failed to enact similar provisions at the end of August 2022. Ben Christopher, *Misfire: Behind the California Concealed Carry Bill's Big Fail*, CALMATTERS (Sept. 2, 2022), https://calmatters.org/politics/california-legislature/2022/09/california-concealed-carry-bill/.

[75] Antonyuk v. Hochul, No. 22-CV-986, 2022 U.S. Dist. LEXIS 182965, at *54–*57 (N.D.N.Y. Oct. 6, 2022).

[76] *Id.* at *22–*26, *42, *45.

Beyond public-carry licensure requirements, the Court's decision in *Bruen* could also have significant implications for other existing and potential firearm laws. Many firearm laws at the federal, state, and local levels have been upheld under the "two-step" methodology, and decisions upholding firearm regulations that apply in public have sometimes relied on the proposition that firearm restrictions beyond the home do not strike at the "core" of the Second Amendment right.[77] Following *Bruen*, a number of provisions that were previously upheld could be subject to renewed constitutional challenge, though the majority in *Bruen* did indicate that the approach it endorsed is "neither a regulatory straightjacket nor a regulatory blank check."[78]

For instance, some states and localities have restrictions or prohibitions on certain so-called "semiautomatic assault weapons," and multiple federal Courts of Appeals have upheld such laws using the two-step approach.[79] In a 2012 case, the D.C. Circuit applied that approach to uphold the District of Columbia's version of a ban on certain semiautomatic rifles. However, Justice Kavanaugh, who was then a judge on the D.C. Circuit, wrote a dissenting opinion in the case, arguing that the court should instead use a "text, history, and tradition" approach (which appears similar to the historical approach ultimately endorsed by the Court in *Bruen*) and strike down the law.[80] Following *Bruen*, it appears that at least one challenge to an assault weapon ban is poised to be re-examined: On June 30, 2022, the Court vacated a lower-court decision that had upheld Maryland's prohibition on "assault long guns" in light of *Bruen*.[81]

The Supreme Court's express holdings that the Second Amendment applies outside the home and that the proper test for analyzing the constitutionality of gun regulations is historical analogy may also guide legislators in considering future gun legislation. In particular, Congress and other lawmakers may wish to consider and express whether particular measures under consideration could be viewed as part of a "historical tradition" of regulation such that they would meet the *Bruen* standard. As the majority opinion acknowledged, "[h]istorical analysis can be difficult" and can call for "nuanced judgments about which evidence to consult and how to interpret it."[82] That poses a challenge for legislative judgment, but legislative findings may also assist courts that cannot draw on the same historical expertise or resources that are available to Congress.

Kennedy v. Bremerton School District: School Prayer and the Religion Clauses[83]

The Supreme Court's opinion in *Kennedy v. Bremerton School District* implicates three separate clauses of the First Amendment: the Establishment and Free Exercise Clauses, collectively known

[77] *See supra* note 32 and accompanying text.

[78] *Bruen*, 142 S. Ct. at 2133.

[79] *See* Worman v. Healey, 922 F.3d 26, 41 (1st Cir. 2019) (addressing Massachusetts ban on semiautomatic assault weapons and large-capacity magazines); Kolbe v. Hogan, 849 F.3d 114, 135–37 (4th Cir. 2017) (en banc) (addressing Maryland ban on "assault weapons" and large capacity magazines); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261–64 (2d Cir. 2015) (addressing New York and Connecticut bans on semiautomatic assault weapons and large-capacity magazines); Friedman v. City of Highland Park, 784 F.3d 406, 410–12 (7th Cir. 2015) (addressing a city ordinance banning semiautomatic assault weapons and large capacity magazines); Heller v. District of Columbia, 670 F.3d 1244, 1260–64 (D.C. Cir. 2011) (addressing D.C.'s ban on semiautomatic rifles and large-capacity magazines).

[80] *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

[81] Bianchi v. Frosh, 142 S. Ct. 2898, 2898–99 (2022) (mem.).

[82] *Bruen*, 142 S. Ct. at 2130 (cleaned up) (quoting McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)).

[83] Valerie C. Brannon, CRS Legislative Attorney, authored this section of the report.

as the Religion Clauses, as well as the Free Speech Clause.[84] *Kennedy* clarified free exercise and free speech protections for school prayer by ruling in favor of a high school football coach who wanted to pray on the field after games.[85] The majority opinion also significantly altered Establishment Clause jurisprudence by announcing that the Court had broadly abandoned use of the *Lemon* test,[86] which had been the basis for church-and-state decisions over several decades but had seemed to fall into disfavor with many Justices on the Court in more recent years.[87] The *Kennedy* opinion described the *Lemon* test as "abstract" and "ahistorical" and said that courts should instead interpret the Establishment Clause by reference to "original meaning and history."[88] In that sense, the decision contributed to the term's broader trend of requiring an originalist analysis of constitutional guarantees.

Background

Facts and Procedural History

The plaintiff, Joseph Kennedy, was a high school football coach employed by Bremerton High School from 2008 to 2015. While the parties disputed how to view the facts of this case, they agreed that the school suspended Kennedy because he engaged in post-game prayers in which he knelt at the 50-yard line of the football field and prayed audibly.[89] The conflict began in 2015, when the school learned about this post-game prayer practice and also discovered that Kennedy had led students in prayer before games and conducted overtly religious inspirational talks with students after games.[90] According to the principal, one parent said his son "felt compelled to participate" in those prayers out of concern for his playing time.[91] Although Kennedy stopped these additional practices after the school expressed concerns about them, the school emphasized that he continued his midfield prayers and raised awareness about the practice through media appearances.[92] At one game, the school said this led to spectators rushing the field and Kennedy leading a large group in prayer.[93] Kennedy, by contrast, stressed that he had stopped the earlier prayers with students and did not expressly invite his students or others to join his later post-game prayers.[94]

The school placed Kennedy on paid administrative leave based on his "overt, public and demonstrative religious conduct while still on duty as an assistant coach."[95] Kennedy received a poor performance evaluation that advised against his rehiring, and he did not reapply for a

[84] Specifically, the First Amendment prohibits the government from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I.

[85] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

[86] *Id.* at 2427.

[87] *See generally* CRS, *Establishment Clause Tests*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-4-3/ALDE_00013073/ (last visited Oct. 11, 2022).

[88] *Kennedy*, 142 S. Ct. at 2427–28.

[89] *Id.* at 2416, 2418–19.

[90] Joint Appendix at 40, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

[91] *Id.* at 234.

[92] Brief for Respondent at 6, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

[93] *Id.*

[94] Brief for Petitioner at 10, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

[95] Joint Appendix at 102, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

coaching position.[96] Kennedy sued the school, arguing it had violated his constitutional rights under the First Amendment's Free Speech and Free Exercise Clauses by punishing him for this religious speech.[97] He sought injunctive relief that included his reinstatement and an order allowing him to resume his 50-yard-line prayer.[98] Lower courts denied his motion seeking a preliminary injunction.[99] The Supreme Court declined to review those rulings in 2019.[100]

The trial court then granted summary judgment to the school, concluding that although the school suspended Kennedy because of his religious conduct, its actions were justified because the school would have violated the Establishment Clause if it allowed the coach to continue his prayer practice.[101] The Ninth Circuit affirmed this ruling,[102] although an order denying en banc review by the full panel of circuit court judges drew separate opinions by several members of the panel, including three dissents.[103]

Free Exercise and Free Speech Clause Protections for Religious Speech

Kennedy argued that his religious speech was protected under the First Amendment's Free Exercise and Free Speech Clauses. These two constitutional provisions are not coextensive: The Free Exercise Clause protects religious activity, while the Free Speech Clause protects expressive activity.[104] Nonetheless, the Court has long recognized the "close parallels"[105] between the two clauses and has concluded in a number of cases that religious communication was protected under both the Free Exercise and Free Speech Clauses.[106] However, the clauses use different tests to

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[96] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1014 (9th Cir. 2021).

[97] *Kennedy*, 142 S. Ct. at 2419.

[98] Joint Appendix at 165, *Kennedy*, 142 S. Ct. 2407 (No. 21-418). Based on the nature of the relief sought, Bremerton High School argued the case became moot after Kennedy moved to Florida in 2020, saying that because he had bought a home in Pensacola and registered to vote there, it seemed unlikely he would "move approximately 2,800 miles back to Bremerton, Washington, for a $5,304 part-time coaching job." Suggestion of Mootness at 6, *Kennedy*, 142 S. Ct. 2407 (No. 21-418). The Supreme Court did not address this issue.

[99] Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 815 (9th Cir. 2017).

[100] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 634 (2019) (mem.). Justice Alito wrote separately to state that the lower court's "understanding of the free speech rights of public school teachers is troubling and may justify review in the future" and to note open questions under the Free Exercise Clause. *Id.* at 636–37 (Alito, J., statement respecting the denial of certiorari).

[101] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1240 (W.D. Wash. 2020).

[102] *Kennedy*, 991 F.3d at 1010.

[103] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 911 (9th Cir. 2021) (mem.). Although summary judgment and subsequent appellate review are generally based on facts that are not in dispute, the judges reviewing the case held somewhat divergent views of the facts, particularly the question of whether Kennedy's prayers should be considered private. *Compare, e.g.*, *id.* at 912 (Smith, J., concurring in the denial of rehearing en banc) (saying that although the post-game prayers "were initially silent and private," Kennedy made the prayers public and involved students as part of a "mission to intertwine religion with football"), *with, e.g.*, *id.* at 932 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (describing Kennedy's prayer practice as private).

[104] The First Amendment protects both pure speech and expressive conduct. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969). Conduct is sufficiently communicative "to bring the First Amendment into play" if the speaker intends "to convey a particularized message" and "the likelihood was great that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)) (internal quotation mark omitted). Accordingly, it is possible that a person could engage in private religious conduct that triggers Free Exercise Clause protections but is not sufficiently communicative to qualify for free speech protections.

[105] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[106] *See* CRS, *Relationship Between Religion Clauses and Free Speech Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-7/ALDE_00000040/ (last visited Oct. 11, 2022).

determine whether the government has unconstitutionally infringed on protected activity—tests that also vary depending on the nature of the law and the regulated activity.

Most Free Exercise Clause analyses depend largely on whether a government action is neutral toward religion or whether instead the government has discriminated against religion.[107] If a policy is neutral and generally applicable, the Supreme Court has held that any "incidental effect" on religion will not violate the Free Exercise Clause.[108] By contrast, a policy that discriminates against religion will generally be subject to heightened constitutional scrutiny.[109] Bremerton High School conceded in the lower courts that its policy was not neutral and generally applicable under this analysis, given that the school restricted Kennedy's activities because they were religious.[110] However, the school believed it could satisfy strict constitutional scrutiny because it needed to avoid an Establishment Clause violation, as discussed below.[111]

The Free Speech Clause analysis implicated by Kennedy's claims was more complicated. Constitutional speech claims brought by public employees are generally evaluated under a rubric set out in *Pickering v. Board of Education*.[112] In that case, the Supreme Court recognized that when public employees speak in the course of their official duties, the government can exercise some control over their speech in order to provide public services efficiently.[113] Accordingly, courts have held that governments may discipline their employees for statements that were made as part of their ordinary job responsibilities.[114] However, the Court also ruled in *Pickering* that when public employees speak as citizens, on issues of public concern, they do not completely "relinquish the First Amendment rights they would otherwise enjoy."[115] If employees speak outside the course of their ordinary job duties on an issue of public concern, *Pickering* instructs courts to engage in a balancing test, weighing the government's operational interests against the interests of the employee and the public in the protected speech.[116]

Bremerton High School's principal arguments were that it could regulate Kennedy's speech because his post-game responsibilities were "an essential part of his job as coach," but it also argued that even if the coach had spoken as a citizen, the school's interests in avoiding an Establishment Clause violation "outweighed Kennedy's desire to pray with students at the 50-yard line."[117] In response, Kennedy argued that while *some* post-game speech might be "commissioned" by the school, he did not act "as the school's mouthpiece every moment he remained on the field."[118] Kennedy said the school would have allowed him to look at his phone

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[107] *See generally* CRS, *The Free Exercise Clause Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-5-1/ALDE_00013221/ (last visited Oct. 11, 2022).

[108] Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

[109] *See generally* CRS, *Laws that Discriminate Against Religious Practice*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-5-3-6/ALDE_00000733/ (last visited Oct. 11, 2022).

[110] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1020 (9th Cir. 2021).

[111] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022); *see also infra* "Establishment Clause Limitations on School Prayer."

[112] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[113] *Id.*

[114] *E.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[115] *Pickering*, 391 U.S. at 568.

[116] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 142 (1983).

[117] Brief for Respondent at 19, 23, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

[118] Brief for Petitioner at 38, *Kennedy*, 142 S. Ct. 2407 (No. 21-418).

or greet his spouse in that post-game period and asserted that the school could not discriminatorily prohibit only his private religious activity.[119]

Establishment Clause Limitations on School Prayer

The Supreme Court has described the Establishment Clause as "a specific prohibition on forms of state intervention in religious affairs."[120] The Court has further recognized that if a public school would violate the Establishment Clause by hosting or sponsoring religious speech, that violation provides a compelling justification to restrict that speech.[121]

Broadly, the Supreme Court has said that for the Framers, laws respecting "the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[122] More specifically, the Court has used a variety of tests over time to determine whether any given government action violates the Establishment Clause.[123] The primary analysis has looked to three factors that were compiled (but not first announced) in a 1971 case, *Lemon v. Kurtzman*.[124] The eponymous *Lemon* test says that for a government action to be constitutional, (1) it "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster 'an excessive government entanglement with religion.'"[125] The Court has sometimes also applied a variation on *Lemon* that asks whether a "reasonable observer" would think that a government practice "has the purpose or effect of 'endorsing' religion."[126] Although the Court described the *Lemon* factors as "no more than helpful signposts"[127] and the test faced significant criticism from scholars and judges,[128] the Court continued to apply these factors through the early 2000s.[129]

In 2019's *American Legion v. American Humanist Ass'n*, the Supreme Court limited the applicability of *Lemon* in a split decision.[130] Three Justices would have ruled that the *Lemon* test no longer applies in any circumstances,[131] but the plurality opinion more narrowly ruled that *Lemon* would not apply to Establishment Clause review of "monuments, symbols, and practices

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[119] *Id.* at 29.

[120] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[121] Widmar v. Vincent, 454 U.S. 263, 271 (1981).

[122] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[123] CRS, *Establishment Clause Tests*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-4-3/ALDE_00013073/ (last visited Oct. 11, 2022).

[124] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). For a discussion of how the Supreme Court applied the first two factors during the 1960s, see CRS, *Purpose and Effect Before Lemon*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-4-5-3/ALDE_00013082/ (last visited Oct. 11, 2022).

[125] *Lemon*, 403 U.S. at 612–13 (quoting *Walz*, 397 U.S. at 674).

[126] Allegheny Cnty. v. ACLU, 492 U.S. 573, 592 (1989).

[127] Hunt v. McNair, 413 U.S. 734, 741 (1973).

[128] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081 (2019) (plurality opinion).

[129] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002) (applying the purpose and effect prongs to reject an Establishment Clause challenge); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 861, 881 (2005) (declining to abandon *Lemon*'s focus on purpose and instead concluding that a religious display failed *Lemon*'s purpose prong). Most recently, a plurality of the Court applied the endorsement test to uphold a Latin cross war memorial in *Salazar v. Buono*, 559 U.S. 700, 705–06 (2010) (plurality opinion), although there was not a majority for this ruling.

[130] CRS Legal Sidebar LSB10315, *No More Lemon Law? Supreme Court Rethinks Religious Establishment Analysis*, by Valerie C. Brannon.

[131] *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring); *id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

with a longstanding history."[132] The plurality said longstanding monuments and practices should instead be upheld so long as they are consistent with historical practices and traditions.[133]

A number of Supreme Court cases have specifically considered the constitutionality of prayer in public schools, applying a variety of analyses. The Court has previously held that policies encouraging prayer in public grade schools violate the First Amendment when they have an impermissible purpose of sponsoring or endorsing religion,[134] when they are unduly coercive,[135] or when they violate historical understandings of the Establishment Clause.[136] In particular, the Court said in a 1992 decision that there are "heightened concerns" about "subtle coercive pressure" in the context of "elementary and secondary public schools."[137]

As one example, in its 2000 decision in *Santa Fe Independent School District v. Doe*, the Court held that a school policy permitting student-led prayer at football games violated the Establishment Clause.[138] Again, the question of coercion was important: The Court noted that some students were required to attend football games.[139] However, even if all students attended voluntarily, the Court concluded that delivering a pregame prayer "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer" nonetheless had "the improper effect of coercing those present to participate in an act of religious worship."[140] Bremerton High School cited *Santa Fe* to argue that Kennedy, a coach with "authority and influence over" his students, placed impermissible coercion on the students' religious exercise.[141] The school also asserted that by allowing Kennedy to continue his prayer practice, it would be seen as impermissibly endorsing religion and "engaging in religious favoritism."[142]

The Supreme Court's Opinion

The Supreme Court ruled for Kennedy in a 6-3 decision. The majority opinion, authored by Justice Neil Gorsuch, first held that Kennedy's religious speech was protected under both the Free Exercise Clause and the Free Speech Clause.[143] Under the Free Exercise Clause, the school did not contest that Kennedy sought "to engage in a sincerely motivated religious exercise."[144] The Court also concluded that Kennedy was speaking as a private citizen on a matter of public concern, triggering Free Speech Clause protections.[145] Although Kennedy was still on the job and

[132] *Id.* at 2081–82 (plurality opinion).

[133] *Id.* at 2089.

[134] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000); Wallace v. Jaffree, 472 U.S. 38, 59 (1985); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

[135] Lee v. Weisman, 505 U.S. 577, 592 (1992).

[136] Engel v. Vitale, 370 U.S. 421, 430–33 (1962).

[137] *Lee*, 505 U.S. at 592.

[138] *Santa Fe*, 530 U.S. at 317.

[139] *Id.* at 311. In addition to coercion, the Court also ruled the policy invalid due to an impermissible perceived purpose of sponsoring prayer. *Id.* at 309–10.

[140] *Id.* at 310, 312.

[141] Brief for Respondent at 37, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

[142] *Id.*

[143] *Kennedy*, 142 S. Ct. at 2426.

[144] *Id.* at 2422.

[145] *Id.* at 2424.

on the field while praying, the Court decided that the prayer was not offered "within the scope of his duties as a coach," observing that coaching staff were "free to engage in all manner of private speech" during this specific post-game time period.[146]

The majority opinion next noted that the parties disputed which First Amendment test should apply.[147] Kennedy sought strict scrutiny under the Free Exercise or Free Speech Clauses because the school's policy was not neutral toward religious speech, while the school advocated for *Pickering* balancing because the coach was a public employee.[148] However, the Court concluded that it did not need to resolve this issue because the school failed either test.[149] The sole justification that the Court considered for the school's decision was avoiding an Establishment Clause violation—and because the Court ultimately held that Kennedy's prayer did not violate the Establishment Clause, the school could not justify its actions under either First Amendment test.[150]

The Supreme Court rejected the school's arguments that by allowing the coach's prayers, the school would impermissibly appear to endorse them.[151] In a development likely to be significant in Establishment Clause jurisprudence, the Court disclaimed "*Lemon* and its endorsement test offshoot."[152] The Court stated that it had "long ago abandoned" the "abstract" and "ahistorical" *Lemon* test.[153] Instead, the Court instructed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" using an "analysis focused on original meaning and history."[154] The majority seemed to accept a coercion analysis as consistent with this approach, saying coercive religious observance "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[155] However, the majority concluded that Kennedy's prayer practice was not as coercive as school prayer practices the Court had previously invalidated.[156] The Court decided evidence about the coercion stemming from times when the coach prayed with students was irrelevant because the suspension decision focused on later instances when the coach "did not seek to direct any prayers to students."[157] In comparison to *Santa Fe*, the Court stated that the coach's prayers "were not publicly broadcast ... to a captive audience," and students were not "expected to participate."[158]

Accordingly, the Court held Kennedy was entitled to summary judgment on his First Amendment claims.[159] This effectively granted Kennedy the injunctive relief he sought—reinstatement as a coach at the high school—although he has apparently not returned to the high school.[160] More

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[146] *Id.* at 2424–25.

[147] *Id.* at 2426.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 2426, 2432.

[151] *Id.* at 2427.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[155] *Id.* at 2429.

[156] *Id.*

[157] *Id.* at 2429–30.

[158] *Id.* at 2431–32.

[159] *Id.* at 2433.

[160] Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal*, SEATTLE TIMES (Sept. 17, 2022, 6:00 AM), https://www.seattletimes.com/seattle-news/the-story-of-the-praying-bremerton-coach-keeps-getting-

broadly, the Court ruled that the school could not require teachers to "eschew any visible religious expression," because that would impermissibly "preference secular activity."[161] Certain portions of the Court's opinion could be read to limit earlier opinions saying the government can restrict religious speech if the government's support would violate the Establishment Clause.[162] Rejecting the idea that the school's "interest in avoiding an Establishment Clause violation 'trump[ed]' Mr. Kennedy's rights to religious exercise and free speech," the Court said that instead, the three clauses should be read to complement one another.[163] The Court said that if the school were required to "prohibit teachers from engaging in any demonstrative religious activity," that "would be a sure sign that our Establishment Clause jurisprudence had gone off the rails."[164] This provided support for its belief that the Establishment Clause should be read more narrowly.

Concurring and Dissenting Opinions

Justices Thomas and Alito both joined the majority opinion in full but also wrote separately to emphasize open questions not definitively resolved by the majority opinion—including what standard of review courts should apply to determine whether a public employer can restrict an employee's religious speech.[165]

Three Justices dissented. Writing on behalf of herself and Justices Breyer and Kagan, Justice Sotomayor claimed the majority opinion paid "almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion."[166] Taking issue with the majority's view of which facts were relevant, Justice Sotomayor argued that Kennedy's prayers at the 50-yard line had to be viewed in light of their full history and context, which revealed "a longstanding practice of the employee ministering religion to students as the public watched."[167] In her view, Kennedy's practice violated the Establishment Clause due to endorsement and coercion.[168] Further, she claimed the majority's approach to evaluating coercion was inconsistent with prior school prayer cases, saying Kennedy's prayers raised "precisely the same concerns" as the practice in *Santa Fe*.[169]

The dissent also contested the majority's assertion that the Court had "long ago abandoned *Lemon* and its endorsement offshoot."[170] She stated that *American Legion* limited *Lemon*'s applicability

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more-surreal/. As discussed *supra* note 98, Kennedy moved to Florida in 2020.

[161] *Kennedy*, 142 S. Ct. at 2431.

[162] *See generally* Widmar v. Vincent, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations [under the Establishment Clause] may be characterized as compelling.").

[163] *Kennedy*, 142 S. Ct. at 2426 (quoting Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1017 (9th Cir. 2021)) (alteration in original).

[164] *Id.* at 2431.

[165] *Id.* at 2433 (Thomas, J., concurring). Justice Thomas highlighted that the Court did not resolve the appropriate level of scrutiny applicable to Free Exercise Clause claims brought by public employees against their employers and did "not decide what burden a government employer must shoulder to justify restricting an employee's religious expression." *See also id.* at 2433–34 (Alito, J., concurring) (emphasizing that the Court did not resolve "what standard applies" under the Free Speech Clause to private expression that occurs during "a brief lull in ... duties").

[166] *Id.* at 2434 (Sotomayor, J., dissenting).

[167] *Id.* at 2434, 2441.

[168] *Id.* at 2443.

[169] *Id.* at 2451.

[170] *Id.* at 2449.

only in certain contexts, and other decisions merely "not applying" the test did not amount to an "implicit overruling."[171] Justice Sotomayor claimed that "the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools."[172] She also doubted the practical value of the Court's "history-and-tradition test," believing it offered "essentially no guidance for school administrators."[173]

Considerations for Congress

The Court's analysis in *Kennedy v. Bremerton School District* makes this more than a simple school prayer case. The decision made a clear break with earlier Establishment Clause precedent, both by finding a school prayer practice constitutional for the first time and by expressly announcing for the first time that the Court had broadly abandoned the *Lemon* test in all contexts.[174] The opinion contains a strong requirement for government accommodation of religious practices and a clear statement in favor of an originalist approach to interpreting the Establishment Clause. Further, the Court's suggestion that government policies insisting on secularity show *hostility* to religion elevates similar concerns voiced in earlier concurring and dissenting opinions.[175]

The opinion leaves open a number of questions about how these principles will play out in future cases. Although the Court announced that "*Lemon* and its endorsement test offshoot" were "abandoned," it has never (including in *Kennedy*) overruled that case or a number of other Supreme Court rulings concluding that specific government actions were unconstitutional because their purpose or effect was to support religion.[176] Accordingly, it is unclear how courts will apply those rulings as precedent in the future. The Court has instructed lower courts to follow controlling Supreme Court precedent even if a case "appears to rest on reasons rejected in some other line of decisions."[177] Lower courts must leave to the Supreme Court "the prerogative of overruling its own decisions."[178] Some lower courts might attempt to integrate decisions based on *Lemon* into a historical practices analysis that follows *Kennedy*, but the precedential status of those decisions will likely be disputed until the Supreme Court revisits the issue.

Kennedy announced that in the future, courts should evaluate Establishment Clause challenges by reference to historical practices and original meaning, and further suggested that coercion is an appropriate factor to consider.[179] However, the majority noted that the Justices "have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."[180] Justice Sotomayor's dissent argued that the Court focused too much on direct coercion and did not properly account for earlier Supreme Court precedent recognizing

[171] *Id.* at 2449 & n.14.

[172] *Id.* at 2450.

[173] *Id.*

[174] *See id.* at 2427 (majority opinion).

[175] *Id.* at 2431; Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); Allegheny Cnty. v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[176] *See Kennedy*, 142 S. Ct. at 2427.

[177] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

[178] *Id.*

[179] *Kennedy*, 142 S. Ct. at 2428–29.

[180] *Id.* at 2429.

that "indirect coercion may [also] raise serious establishment concerns."[181] Future Establishment Clause cases will likely litigate these open questions about what types of coercion run afoul of historical understandings of the Establishment Clause.

Congress and state governments concerned about possible Establishment Clause violations stemming from government support of religion may now face judicial review that relies more directly upon original understandings of the clause as well as historical traditions. While this mode of analysis has long been employed in Supreme Court cases interpreting the Establishment Clause, as discussed, it has not always been the *primary* mode of analysis. In addition to cases upholding legislative prayer practices,[182] there are scattered examples of government actions the Court previously considered using a historical practice analysis, including religious test oaths (ruled unconstitutional),[183] laws prescribing the forms of prayer (ruled unconstitutional),[184] and tax exemptions (ruled constitutional).[185] Outside those contexts, courts faced with Establishment Clause claims will have to determine what historical analysis may be relevant considering the varied and evolving historical approaches to religious establishments. That kind of inquiry is already the subject of scholarly debates,[186] and it appears likely those debates will continue.

Biden v. Texas: Termination of the Remain in Mexico Policy[187]

Bruen and *Kennedy* addressed constitutional issues that are frequently important to lawmakers, and the Court in those cases renewed its emphasis on historical reasoning in constitutional interpretation. The Court also, however, addressed significant statutory and regulatory issues involving more recent legal provisions that Congress has the direct authority to reconsider or address through legislation.

On June 30, 2022, the Supreme Court issued a decision in *Biden v. Texas*, in which the States of Texas and Missouri challenged the Department of Homeland Security's (DHS's) termination of the Migrant Protection Protocols (MPP).[188] The MPP, also known as the "Remain in Mexico" policy, began during the Trump Administration and authorized the return of some asylum seekers arriving at the U.S. southern border to Mexico during the pendency of their formal removal proceedings.[189] The Supreme Court held that DHS has the discretionary authority to rescind the MPP and that nothing in federal statute concerning the processing of arriving non-U.S. nationals—aliens, as the term is used in the Immigration and Nationality Act (INA)[190]—mandates

[181] *Id.* at 2451 (Sotomayor, J., dissenting).

[182] Marsh v. Chambers, 463 U.S. 783, 786 (1983) (saying opening legislative sessions with prayer "is deeply embedded in the history and tradition of this country"); *see also* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) (similar).

[183] Torcaso v. Watkins, 367 U.S. 488, 490–92, 496 (1961).

[184] Engel v. Vitale, 370 U.S. 421, 425–30 (1962).

[185] Walz v. Tax Comm'n, 397 U.S. 664, 676–78 (1970).

[186] *See generally, e.g.*, Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505 (2021).

[187] Hillel R. Smith, CRS Legislative Attorney, authored this section of the report.

[188] Biden v. Texas, 142 S. Ct. 2528, 2536 (2022).

[189] Press Release, Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[190] 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States."). *See* Trump v. Hawaii, 138 S. Ct. 2392, 2443 n. 7 (2018) (Sotomayor, J., dissenting) ("It is important to note ... that many

the agency's use of that policy.[191] Following the Court's decision, a federal district court lifted the nationwide injunction that had required DHS to continue the MPP, thereby enabling the agency to proceed with the MPP rescission.[192]

Background

Statutory Framework

The INA contains different avenues through which aliens can be denied entry or removed from the United States. INA Section 235(b) concerns applicants for admission, which include aliens arriving in the United States (whether or not at a designated U.S. port of entry) and those apprehended after entering the country without inspection by immigration authorities.[193]

Under INA Section 235(b)(1), arriving aliens and recent unlawful entrants who lack valid entry documents are generally subject to "expedited removal" and may not obtain any review of a determination that the alien should be removed from the United States.[194] If the alien expresses an intent to seek asylum or a fear of persecution if removed to a particular country (among other exceptions), the alien may pursue administrative review of that claim by an asylum officer within DHS's U.S. Citizenship and Immigration Services.[195] If the alien shows a "credible fear" of persecution or torture, the alien may apply for asylum and related protections from removal before an immigration judge in formal removal proceedings or potentially have that application adjudicated by the asylum officer.[196] INA Section 235(b)(1) provides that the alien "shall be detained" pending consideration of the asylum application.[197]

Under INA Section 235(b)(2)(A), applicants for admission who are not initially screened for expedited removal (e.g., because they do not meet the criteria or DHS decides not to place them in expedited removal[198]) are placed in formal removal proceedings under INA Section 240. The statute provides that they "shall be detained" during those proceedings.[199] Unlike expedited removal, aliens placed directly into formal removal proceedings have more procedural protections, including the right to counsel at no expense to the government and the ability to

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consider 'using the term "alien" to refer to other human beings' to be 'offensive and demeaning.' I use the term here only where necessary 'to be consistent with the statutory language' that Congress has chosen and 'to avoid any confusion in replacing a legal term of art with a more appropriate term.'" (quoting Flores v. United States Citizenship & Immigration Servs., 718 F.3d 548, 551 n. 1 (6th Cir. 2013))).

[191] *Texas*, 142 S. Ct. at 2544.

[192] Texas v. Biden, No. 2:21-CV-00067 (N.D. Tex. Aug. 8, 2022) (order granting motion to vacate permanent injunction). *See also* Press Release, Dep't of Homeland Sec., DHS Statement on U.S. District Court's Decision Regarding MPP (Aug. 8, 2022), https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp.

[193] 8 U.S.C. § 1225(b); *see also id.* § 1225(a)(1) ("An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.").

[194] *Id.* § 1225(b)(1)(A)(i).

[195] *Id.* § 1225(b)(1)(A)(ii), (b)(1)(B)(i); 8 C.F.R. § 235.3(b)(4).

[196] 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

[197] 8 U.S.C. § 1225(b)(1)(B)(ii).

[198] *See* Matter of E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 524 (BIA 2011) (holding that DHS may in its discretion place aliens otherwise subject to expedited removal directly into formal removal proceedings instead).

[199] 8 U.S.C. § 1225(b)(2)(A).

pursue relief from removal without having to satisfy any threshold screening requirement.[200] The Supreme Court has interpreted both INA Sections 235(b)(1) and 235(b)(2)(A) as mandating detention during the applicable proceedings.[201]

As a potential alternative to detention, INA Section 235(b)(2)(C) provides that the DHS Secretary "may return" applicants for admission covered by Section 235(b)(2)(A) to "a foreign territory contiguous to the United States" pending the outcome of their formal removal proceedings if the alien is "arriving on land" from that territory.[202] Before implementation of the MPP, DHS and its predecessor agency, the former Immigration and Naturalization Service, applied this authority on a fairly limited, ad hoc basis to return certain Mexican and Canadian nationals arriving at U.S. ports of entry.[203]

INA Section 212(d)(5)(A) authorizes another option. It permits the "parole" of applicants for admission, thus enabling them to be temporarily released from DHS custody into the interior of the country during the pendency of their removal proceedings.[204] Under Section 212(d)(5)(A), parole may be granted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[205] Based on this authority, implementing DHS regulations allow parole for certain categories of aliens, including those who present neither a flight nor safety risk and for whom "continued detention is not in the public interest."[206] In the *Texas* litigation, DHS has provided some data concerning the number of applicants for admission who are paroled into the United States. For example, in June 2022, the agency reportedly paroled nearly 90% of aliens seeking admission who were encountered at designated ports of entry.[207]

The *Texas* Litigation

During the Trump Administration, DHS implemented the MPP in January 2019 to address a "security and humanitarian crisis on the Southern border."[208] With the cooperation of Mexican authorities, immigration officials could return arriving asylum seekers to Mexico while U.S. immigration courts processed their cases in formal removal proceedings.[209] The MPP applied to

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[200] *Id.* § 1229a(b)(4); 8 C.F.R. §§ 1240.8(d), 1240.10, 1240.11(a)(1).

[201] Jennings v. Rodriguez, 138 S. Ct. 830, 845 (2018) ("In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin.").

[202] 8 U.S.C. § 1225(b)(2)(C).

[203] Biden v. Texas, 142 S. Ct. 2528, 2535 (2022); *see also* Matter of M-D-C-V-, 28 I. & N. Dec. 18, 25–26 (BIA 2020). The Board of Immigration Appeals has held that DHS may use its return authority under INA § 235(b)(2)(C) "regardless of whether the alien arrives at or between a designated port of entry." *Matter of M-D-C-V-*, 28 I. & N. Dec. at 27.

[204] 8 U.S.C. § 1182(d)(5)(A).

[205] *Id.*; *see also* Texas v. Biden, 20 F.4th 928, 947 (5th Cir. 2021) ("[T]he § 1182(d)(5) parole power gives the executive branch a limited authority to permit incoming aliens to stay in the United States without formal authorization when their particular cases demonstrate an urgent humanitarian need or that their presence will significantly benefit the public."), *rev'd on other grounds*, 142 S. Ct. 2528 (2022).

[206] 8 C.F.R. § 212.5(b). DHS has taken the position that detention is not in the public interest if an alien's detention would limit the agency's ability to detain other aliens who pose a greater flight risk or danger to the community. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078, 18,108 (Mar. 29, 2022).

[207] Defendant's Monthly Report for June 2022, Texas v. Biden, No. 2:21-cv-00067-Z (N.D. Tex. July 15, 2022).

[208] Press Release, Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter *DHS Press Release*].

[209] *See id.*; Memorandum from Kirstjen M. Nielsen, DHS Secretary, to L. Francis Cissna, Director, U.S. Citizenship and Immigration Servs., et al., Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019).

aliens arriving in the United States by land from Mexico, including those apprehended between designated ports of entry.[210]

Under the Biden Administration in January 2021, DHS announced the suspension of new enrollments of aliens in the MPP.[211] DHS Secretary Alejandro Mayorkas issued a memorandum formally rescinding the MPP in June 2021.[212]

Texas and Missouri ("the States") sued to challenge the MPP rescission in the U.S. District Court for the Northern District of Texas.[213] The States argued that the MPP had reduced unlawful migration at the southern border and that the release of most arriving aliens into the interior of the United States would force states to expend more money and resources for them.[214] In August 2021, the district court ruled that the MPP rescission violated INA Section 235(b)(2)'s mandatory detention requirements for applicants for admission.[215] The court also held that the MPP rescission was "arbitrary and capricious" in violation of the Administrative Procedure Act because DHS had failed to consider the program's benefits, the costs to the states, and the implications of terminating it.[216] The court issued a nationwide injunction ordering DHS to resume the MPP until it was lawfully rescinded and DHS had sufficient detention space for arriving aliens placed in removal proceedings.[217]

While the government's appeal was pending, Secretary Mayorkas in October 2021 issued a new memorandum terminating the MPP, along with a supplemental "explanation" addressing the factors found to be inadequately considered in the earlier rescission.[218] Among other findings, Secretary Mayorkas acknowledged that the MPP "likely contributed to reduced migratory flows" but concluded that its benefits were outweighed by the "substantial and unjustifiable human costs

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The MPP did not apply to certain aliens, including unaccompanied minors and those who expressed a fear of returning to Mexico and were found to be more likely than not to face persecution or torture in that country. *See DHS Press Release*, *supra* note 208.

[210] *DHS Press Release*, *supra* note 208. Following an initial round of litigation, the U.S. District Court for the Northern District of California issued a preliminary injunction barring implementation of the MPP, and the Ninth Circuit affirmed that ruling. Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1130 (N.D. Cal. 2019), *vacated*, Innovation Law Lab v. Mayorkas, 5 F.4th 1099 (9th Cir. 2021); Innovation Law Lab v. Wolf, 951 F.3d 1073, 1077, 1084–85 (9th Cir. 2020), *vacated*, Innovation Law Lab v. Mayorkas, 5 F.4th 1099 (9th Cir. 2021). In March 2020, the Supreme Court stayed the injunction pending the government's appeal, thereby allowing DHS to continue implementation and enforcement of the MPP. Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (mem.) (2020).

[211] Press Release, Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

[212] Memorandum from Alejandro N. Mayorkas, DHS Secretary, to Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, et al., Termination of the Migrant Protection Protocols Program (June 1, 2021).

[213] Texas v. Biden, 554 F. Supp. 3d 818, 828–29 (N.D. Tex. 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022).

[214] *See* Plaintiffs' Motion for Preliminary Injunction, Texas v. Biden, No. 2:21-cv-00067-Z (N.D. Tex. June 8, 2021).

[215] *Texas*, 554 F. Supp. 3d at 851–52.

[216] *Id.* at 848–51. *See also* 5 U.S.C. § 706(2)(A) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[217] *Texas*, 554 F. Supp. 3d at 857–58.

[218] Memorandum from Alejandro Mayorkas, DHS Secretary, to Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, et al., Termination of the Migrant Protection Protocols (Oct. 29, 2021) [hereinafter *Mayorkas Memorandum*]; U.S. Dep't of Homeland Sec., Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021) [hereinafter *Supplemental Explanation*].

on the individuals who were exposed to harm while waiting in Mexico."[219] Secretary Mayorkas stated that the MPP termination would occur only after a final court decision vacating the district court's injunction.[220]

In December 2021, the Fifth Circuit affirmed the district court's ruling, holding that the June 2021 MPP rescission violated INA Section 235(b)(2).[221] The court construed that provision as mandating the detention of an alien seeking admission during formal removal proceedings and allowing only two other options: (1) the alien's return to contiguous territory or (2) the alien's release on parole on a limited, case-by-case basis.[222] Noting that DHS lacks the resources to detain most aliens seeking admission, the court held that the MPP rescission violated Section 235(b)(2)'s statutory scheme because it would result in the release of aliens "en masse" into the United States.[223] For that reason, the court determined, Section 235(b)(2) required the agency to apply its discretionary return authority.[224] The Fifth Circuit also agreed with the district court that DHS had inadequately considered the MPP's benefits and other factors.[225]

The Fifth Circuit rejected the government's argument that the October 2021 memorandum was the final agency action rescinding the MPP and that it thus mooted the States' legal challenge to the June 2021 memorandum.[226] The court explained that the termination decision itself, and not any particular memorandum explaining that decision, constituted the final agency action subject to judicial review.[227]

The government petitioned for review to the Supreme Court.[228] The Supreme Court granted the petition and expedited review of the case.[229]

The Supreme Court's Opinion

On June 30, 2022, in a 5-4 decision, the Supreme Court reversed the Fifth Circuit's decision.[230] In the majority opinion written by Chief Justice Roberts (joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh), the Court held that DHS's rescission of the MPP did not violate INA Section 235(b)(2) and that the October 2021 memorandum was the final agency action ending the program.[231]

The Court first considered whether it had jurisdiction in light of INA Section 242(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" certain INA provisions concerning the inspection, detention,

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[219] *Mayorkas Memorandum*, *supra* note 218, at 2; *see also Supplemental Explanation*, *supra* note 218, at 2, 12–14, 16–18, 23–24.

[220] *Mayorkas Memorandum*, *supra* note 218, at 4.

[221] Texas v. Biden, 20 F.4th 928, 993 (5th Cir. 2021), *rev'd*, 142 S. Ct. 2528 (2022).

[222] *Id.* at 995–96.

[223] *Id.* at 996–97.

[224] *Id.*

[225] *Id.* at 989.

[226] *Id.* at 950.

[227] *Id.* at 950–51. Further, the court noted, the October memorandum merely continued, rather than reopened, the termination decision. *Id.* at 955.

[228] Petition for Writ of Certiorari, *Biden v. Texas*, 142 S. Ct. 2528 (No. 21-954).

[229] Biden v. Texas, 142 S. Ct. 2528, 2538 (2022).

[230] *Id.* at 2548.

[231] *Id.*

and removal of aliens, including INA Section 235(b)(2)(C)'s return authority, "other than with respect to the application of such provisions to an individual alien" in formal removal proceedings.[232] In the 2022 decision *Garland v. Gonzalez*, the Court held that Section 242(f)(1) prohibits class-wide injunctions by lower courts that require the government "to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions."[233] Applying *Gonzalez* here, the Court determined that the district court acted outside its authority in violation of Section 242(f)(1) when it issued a nationwide injunction requiring DHS to continue the MPP.[234] Nonetheless, the Court determined that Section 242(f)(1)'s limitation on injunctive relief does not constrain lower courts from adjudicating the merits of a case.[235] Thus, because Section 242(f)(1) did not remove the lower courts' subject matter jurisdiction over the case, the Supreme Court was not barred from reaching the merits.[236] The Court also noted that it had jurisdiction because the statute preserves the Supreme Court's power to enter injunctive relief.[237]

Turning to the merits of the case, the Court held that the MPP rescission did not violate INA Section 235(b)(2).[238] Noting that Section 235(b)(2)(C) states that the DHS Secretary "may" return aliens seeking admission, the Court explained that this provision "plainly confers a *discretionary* authority to return aliens to Mexico during the pendency of their removal proceedings" but does not mandate the use of that authority.[239] The Court rejected the Fifth Circuit's reasoning that, because Section 235(b)(2)(A) states that applicants for admission "shall be detained," the otherwise-discretionary return authority in Section 235(b)(2)(C) becomes mandatory when DHS fails to detain them.[240] According to the Court, Section 235(b)(2)(C)'s unambiguous grant of discretion conflicts with any mandatory return requirement.[241]

The Court determined that the historical context of Section 235(b)(2)(C) also confirmed its discretionary nature.[242] The Court observed that this provision was created more than 90 years after the original mandatory detention language currently found in Section 235(b)(2)(A) first appeared in statute.[243] The Court also noted that Section 235(b)(2)(C) essentially codified a "longstanding practice" of the former INS to require some aliens arriving at land ports of entry to return to Canada or Mexico pending the outcome of their proceedings.[244] The Court also observed

[232] *Id.* at 2538; *see also* 8 U.S.C. § 1252(f)(1) ("Limit on injunctive relief").

[233] 142 S. Ct. 2057, 2065 (2022).

[234] *Texas*, 142 S. Ct. at 2538.

[235] *Id.* at 2539.

[236] *Id.* at 2539–40.

[237] *Id.* at 2539.

[238] *Id.* at 2541–44.

[239] *Id.* at 2541.

[240] *Id.*

[241] *Id.* The Court added that "[i]f Congress had intended [Section 235(b)(2)(C)] to operate as a mandatory cure of any noncompliance with the Government's detention obligations," it would "have coupled that grant of discretion with some indication of its sometimes-mandatory nature—perhaps by providing that the Secretary 'may return' certain aliens to Mexico, 'unless the government fails to comply with its detention obligations, in which case the Secretary must return them.'" *Id.*

[242] *Id.* at 2542.

[243] *Id.*

[244] *Id.*

that, since its enactment, every presidential Administration has construed Section 235(b)(2)(C) as discretionary.[245]

The Court also held that mandating the return of aliens to Mexico interferes with the executive's authority to conduct foreign affairs.[246] In the Court's view, ordering DHS to continue the MPP "imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico" by requiring a U.S.-Mexico agreement over a policy neither country intends to continue.[247] The Court declared that "Congress did not intend [Section 235(b)(2)(C)] to tie the hands of the Executive in this manner."[248]

The Court also noted that, apart from detaining applicants for admission or returning them to Mexico pending their removal proceedings, the INA authorized a third option of paroling applicants for admission on a case-by-case basis.[249] The Court recognized that every presidential Administration "has utilized this authority to some extent."[250] In the majority's view, the availability of parole undercut the Fifth Circuit's conclusion that, absent detention, DHS's only remaining option was to return arriving migrants to Mexico while awaiting their proceedings.[251]

Finally, the Court held that the October 2021 rescission memorandum was a new and separately reviewable final agency action.[252] Instead of merely supplementing the original June 2021 memorandum, the Court explained, the October 2021 memorandum was "a new rescission" supported by its own reasons.[253] The Court determined that the fact that DHS proceeded with the October 2021 decision with a preference for ending the MPP did not mean it was not a final agency action.[254] Thus, the Court reversed the Fifth Circuit's decision and remanded the case to allow the district court to decide, in the first instance, whether the October 2021 rescission memorandum complied with federal law.[255]

Concurring and Dissenting Opinions

In a concurring opinion, Justice Kavanaugh suggested that the district court on remand should also consider whether, if there is insufficient detention capacity, DHS's decision to release most arriving aliens into the United States on parole rather than returning them to Mexico would meet the "significant public benefit" standard under INA Section 212(d)(5)(A)'s parole provision.[256]

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[245] *Id.* at 2543.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.* at 2544. The Court recognized that DHS's parole authority "is not unbounded" and that it may be exercised "'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'" *Id.* at 2543 (quoting 8 U.S.C. § 1182(d)(5)(A)). The Court, however, did not consider whether DHS has been lawfully exercising its parole authority. *Id.* at 2544.

[252] *Id.*

[253] *Id.* at 2545–46.

[254] *Id.* at 2547.

[255] *Id.* at 2548; *see also* 5 U.S.C. § 706(2)(A) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[256] *Texas*, 142 S. Ct. at 2548–49 (Kavanaugh, J., concurring); *see also* 8 U.S.C. § 1182(d)(5)(A) (authorizing parole of applicants for admission "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."). Justice Kavanaugh noted that DHS's lack of sufficient detention facilities for aliens seeking to enter the United States

In a dissenting opinion, Justice Alito (joined by Justices Thomas and Gorsuch) agreed with the majority opinion that INA Section 242(f)(1) barred the district court's nationwide injunction requiring DHS to resume the MPP but argued that the Court should not have decided whether the statute permitted review of the merits of the case.[257] Justice Alito argued that the parties had insufficient opportunity to address that issue during the Court's expedited review of the case.[258] In Justice Alito's view, the Court should have remanded the case to consider whether Section 242(f)(1) precluded judicial review of the MPP rescission itself.[259]

Justice Alito also argued that the Court's analysis of the merits of the case was "seriously flawed."[260] Justice Alito emphasized that INA Section 235(b)(2)(A) provides that covered aliens "shall be detained" during their removal proceedings.[261] According to Justice Alito, if DHS cannot comply with this mandate, its only statutory alternatives are either to return aliens to contiguous territory or to parole them "on an individualized, case-by-case basis."[262] Justice Alito asserted that the limited scope of INA Section 212(d)(5)(A)'s parole provision "cannot justify the release of tens of thousands of apparently inadmissible aliens each month."[263] Justice Alito thus argued that DHS's policy of paroling arriving aliens "en masse" because of a shortage of detention facilities, rather than returning them to Mexico, "violates the clear terms of the law."[264]

Additionally, Justice Alito disagreed with the majority's conclusion that the October 2021 memorandum was a new, final agency action.[265] Justice Alito noted that the October 2021 memorandum had no legal effect while DHS remained bound by the district court's injunction.[266] Thus, because the MPP rescission could not occur until there was a final court decision vacating the injunction, Justice Alito argued, the October memorandum could not be construed as final agency action.[267]

In a separate dissenting opinion, Justice Barrett (joined in part by Justices Thomas, Alito, and Gorsuch) contended that, because INA Section 242(f)(1) barred the district court from issuing injunctive relief, the lower courts arguably lacked subject matter jurisdiction to decide the merits of the case.[268] Justice Barrett argued that the Court should have remanded the case to the lower courts to address that issue in the first instance.[269] Justice Barrett otherwise agreed with the majority's analysis of the merits of the case.[270]

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was a "larger policy story behind this case." *Texas*, 142 S. Ct. at 2549 (Kavanaugh, J., concurring).

[257] *Texas*, 142 S. Ct. at 2552 (Alito, J., dissenting).

[258] *Id.* at 2552–53.

[259] *Id.*

[260] *Id.* at 2553.

[261] *Id.* at 2553–54.

[262] *Id.* at 2555–56.

[263] *Id.* at 2555.

[264] *Id.* at 2550, 2553.

[265] *Id.* at 2557.

[266] *Id.* at 2558–59.

[267] *Id.*

[268] *Id.* at 2560–61.

[269] *Id.* at 2560, 2563.

[270] *Id.* at 2560.

Considerations for Congress

The Supreme Court's decision in *Biden v. Texas* underscores that DHS has broad authority to determine how to process arriving asylum seekers and that the agency's decision whether to return such aliens to Mexico pending adjudication of their cases is entirely discretionary. That said, the implementation and termination of the MPP has sparked debate in Congress over how immigration officials should manage the increasing flow of migrants at the southern border. Supporters of the MPP argue that the program reduces unlawful migration, decreases detention facility overcrowding, and prevents the release of asylum seekers into the United States while their cases are still pending.[271] Critics of the policy claim that the MPP offers inadequate protections to asylum seekers who are subject to dangerous conditions in Mexico and lack the resources to obtain counsel.[272] Over the past few years, legislative proposals concerning DHS's return authority under INA Section 235(b)(2)(C) have mirrored this debate. For example, in the 117th Congress, introduced bills would require immigration officials to return applicants for admission not placed in expedited removal to contiguous territory pending the outcome of their removal proceedings or, in the alternative, to detain them while their cases are being considered.[273] Conversely, in the 116th Congress, there was proposed legislation that would have repealed DHS's return authority under Section 235(b)(2)(C).[274]

Congress may also consider the extent to which DHS may parole applicants for admission rather than detain them pending adjudication of their cases—an issue left unresolved by the Supreme Court in *Texas*.[275] INA Section 212(d)(5)(A) authorizes parole "for urgent humanitarian reasons or significant public benefit" but provides no criteria to determine whether an alien's release from custody would meet that standard.[276] DHS regulations give immigration officials broad discretion to parole aliens, including when detention is found to be "not in the public interest."[277] Recently proposed legislation would authorize parole in narrower, more specific circumstances, such as when there is a medical emergency or if the alien's release is necessary for purposes of a criminal investigation.[278]

[271] *See e.g.*, 167 CONG. REC. H5129-02 (daily ed. Sept. 23, 2021) (statement of Rep. Chip Roy); 168 CONG. REC. H4854-01 (daily ed. May 11, 2022) (statement of Rep. Glenn Grothman); 167 CONG. REC. S1675-09 (daily ed. Mar. 22, 2021) (statement of Sen. Rob Portman).

[272] *See e.g.*, S.Res. 484, 116th Cong., 166 Cong. Rec. S641-01 (2020); 166 CONG. REC. H645-04 (daily ed. Jan. 29, 2020) (statement of Rep. Veronica Escobar); 165 CONG. REC. H8599-04 (daily ed. Oct. 30, 2019) (statement of Rep. Filemón Vela).

[273] *See* Solving the Border Crisis Act, S. 4518, 117th Cong. § 6 (2022); Make the Migrant Protection Protocols Mandatory Act of 2021, S. 1580, 117th Cong. (2021).

[274] End the Migrant Protection Protocols Act, H.R. 5207, 116th Cong. (2019).

[275] *See* Biden v. Texas, 142 S. Ct. 2528, 2544 (2022) (declining to decide "whether the Government is lawfully exercising its parole authorities" under the INA).

[276] 8 U.S.C. § 1182(d)(5)(A).

[277] 8 C.F.R. § 212.5(b).

[278] S. 959, 117th Cong. § 2(d)(1) (2021).

West Virginia v. EPA: Greenhouse Gas Regulation and the Major Questions Doctrine[279]

Finally, the Court decided a case with significant implications for U.S. environmental policy and, more broadly, Congress's ability to delegate authority over significant policy decisions to executive agencies. In *West Virginia v. EPA*, the Court held that EPA exceeded its authority under Section 111(d) of the Clean Air Act (CAA) in its 2015 emission guidelines for existing fossil-fuel-fired power plants, which were based in part on "generation shifting," or shifting electricity generation from higher-emitting sources to lower-emitting ones.[280] Under the decision, EPA retains the ability to regulate greenhouse gas (GHG) emissions from power plants and other sources, but it now faces more constraints in how it does so. Perhaps more significantly, the Court's articulation and application of the "major questions doctrine" could present further hurdles for EPA or other agencies that wish to implement novel regulatory programs to address climate change or other significant policy issues.[281]

Background

West Virginia v. EPA addresses two EPA rules: the 2015 Clean Power Plan (CPP) and the 2019 Affordable Clean Energy Rule (ACE Rule), which replaced the CPP.[282] EPA issued both rules under Section 111 of the CAA. As part of the CAA's overall scheme to limit the emission of pollutants from stationary sources, EPA must take regulatory action with respect to categories of new and existing stationary sources once it finds that a category of sources causes or contributes significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare" (the "endangerment finding").[283] For existing sources, Section 111(d) directs EPA to establish emission guidelines for states to set "standards of performance" for pollutants that are not already regulated under other specific CAA programs.[284] EPA sets emission standards under Section 111(d) based on the emissions reductions achievable through "application of the best system of emission reduction" (BSER).[285]

Much of the legal debate surrounding the CPP and the ACE Rule centers on the scope of EPA's authority to determine the BSER for existing power plants. Under Section 111, EPA identifies and evaluates the "adequately demonstrated" systems of emission reduction for a particular source category to determine which is the "best" and sets emission standards based on that best system, "taking into account" both "cost ... [and] nonair quality health and environmental impact and

[279] Kate R. Bowers, CRS Legislative Attorney, authored this section of the report.

[280] 142 S. Ct. 2587 (2022).

[281] For further analysis, see CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers.

[282] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter *Clean Power Plan*]; Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) [hereinafter *Affordable Clean Energy Rule*].

[283] 42 U.S.C. § 7411(b).

[284] *Id.* § 7411(d).

[285] *Id.* § 7411(a)(1).

energy requirements."[286] EPA also sets emission standards under Section 111(d) based on the selected BSER.

In the CPP, EPA determined that the BSER was a combination of three "building blocks": (1) improving the heat rate (i.e., efficiency of energy generation) at coal-fired units, (2) shifting generation to lower-emitting natural gas units, and (3) shifting generation from fossil fuel units to renewable energy generation.[287] EPA reasoned that the best "system" was one that applied to the "overall source category."[288] The Supreme Court stayed the implementation of the CPP before any court considered its merits, and the rule never took effect.[289]

In 2019, EPA adopted a narrower interpretation of its authority in the ACE Rule. EPA asserted that the "only permissible reading" of Section 111 limited the agency to identifying source-specific measures as the BSER—that is, control measures that could be applied at a specific source to reduce emissions from that source.[290] The agency thus concluded that it was prohibited from selecting as the BSER measures that apply to the source category as a whole or that consider entities entirely outside the regulated source category.[291]

Various states and stakeholders challenged the ACE Rule and CPP repeal. On January 19, 2021, a three-judge panel of the D.C. Circuit vacated the ACE Rule and the CPP repeal in a split decision, though it later granted EPA's request not to reinstate the CPP until EPA considers a new rulemaking action.[292] In *American Lung Association v. EPA*, the majority held that CAA Section 111 does not "constrain" EPA's authority in determining the BSER to considering control methods that "apply physically 'at' and 'to' the individual source."[293] The majority specifically rejected EPA's argument that Congress would not have delegated to EPA a "major question" of economic and political significance without a clear statement of its intent to do so.[294] Judge Walker, writing separately, disagreed with that conclusion and argued that EPA's exercise of authority in the CPP raised "major questions" that were not clearly delegated by Congress to EPA.[295]

The Supreme Court's Opinion

The Supreme Court reversed and remanded the D.C. Circuit's decision in a 6-3 opinion authored by Chief Justice Roberts.[296] Even though neither the CPP nor the ACE Rule was in effect, the majority held as a threshold matter that the case was reviewable.[297]

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[286] *Id.*; *see also* Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 433–34 (D.C. Cir. 1973).

[287] *Clean Power Plan*, 80 Fed. Reg. at 64,723; see also CRS Report R44480, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, by Linda Tsang.

[288] *Clean Power Plan*, 80 Fed. Reg. at 64,725–64,726.

[289] West Virginia v. EPA, 577 U.S. 1126 (2016) (mem.).

[290] *Affordable Clean Energy Rule*, 84 Fed. Reg. at 32,529.

[291] *Id.*

[292] Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021); Order, Am. Lung Ass'n v. EPA, No. 19-1140 (D.C. Cir. Feb. 22, 2021).

[293] *Am. Lung Ass'n*, 985 F.3d at 415.

[294] *Id.* at 430–39.

[295] *Id.* at 466, 473 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[296] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[297] *Id.* at 2606–07.

The majority proceeded to analyze EPA's interpretation of Section 111 under the "major questions doctrine."[298] Prior to *West Virginia*, the Court had never referred to that doctrine by name in a majority opinion.[299] In a handful of cases involving challenges to agency actions over the past three decades, however, the Court has rejected agency claims of regulatory authority under the major questions doctrine when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency to address that issue.[300] In recent cases, the Court has signaled its heightened interest in applying the major questions doctrine to the review of agency actions.[301]

The Court in *West Virginia* provided more detail about the major questions doctrine. The majority explained that, in general, courts interpret statutory language "in [its] context and with a view to [its] place in the overall statutory scheme."[302] Where there is something extraordinary about the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion, courts should "hesitate before concluding that Congress meant to confer such authority."[303] In those cases, the majority explained that, because Congress rarely provides an extraordinary grant of regulatory authority through language that is modest, vague, subtle, or ambiguous, an agency must identify "clear congressional authorization" for its action to demonstrate that Congress "in fact meant to confer the power the agency has asserted."[304]

The majority held that these principles applied to EPA's assertion of authority in the CPP.[305] It described Section 111(d) as a "previously little-used backwater" within the CAA and underscored that prior limits under Section 111 had been based on source-specific pollution control technology.[306] According to the majority, the CPP fundamentally revised the statute.[307] Because EPA's generation shifting-based approach implicated coal-fired plants' share of national electricity generation, the Court cautioned that EPA could extend its authority under Section 111(d) to force coal plants to cease generating power altogether.[308]

The Court concluded that it was unlikely Congress would task EPA with "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy," such as deciding the optimal mix of energy sources nationwide over time and identifying an acceptable level of energy price increases.[309] In support of this conclusion, the majority pointed to EPA's own description of its expertise in a funding request and the fact that Congress

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[298] *Id.* at 2609.

[299] CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers.

[300] *See, e.g.*, Util. Air. Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[301] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" (quoting *Util. Air. Reg. Grp.*, 573 U.S. at 324); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam) (same).

[302] *West Virginia*, 142 S. Ct. at 2607.

[303] *Id.* at 2608.

[304] *Id.* at 2609.

[305] *Id.* at 2610.

[306] *Id.* at 2610, 2613.

[307] *Id.* at 2612.

[308] *Id.*

[309] *Id.*

considered and rejected legislation to create an emissions trading program or enact a carbon tax.[310]

The Court clarified that it was not deciding whether the phrase "system of emission reduction" referred solely to source-specific pollution control measures and excluded all other actions from qualifying as the BSER.[311] While the Court recognized that, "[a]s a matter of 'definitional possibilities,'" generation shifting could constitute a "'system' ... capable of reducing emissions," it held that emissions trading systems are not "the kind of 'system of emission reduction' referred to in Section 111."[312] The Court distinguished Section 111 from CAA programs that contemplate trading systems in order to comply with an *already established* emissions limit and where Congress "went out of its way ... to make absolutely clear" that cap-and-trade programs were authorized.[313] Because the "vague statutory grant" of Section 111 was "not close to the sort of clear authorization required by [the Court's] precedents," the Court concluded that the BSER identified in the CPP was not within the authority granted to EPA in Section 111(d).[314]

Concurring and Dissenting Opinions

Justice Gorsuch wrote a concurring opinion, in which Justice Alito joined.[315] Justice Gorsuch viewed the major questions doctrine more broadly, rooting it in separation of powers principles and describing the doctrine as the clear-statement rule for Article I's Vesting Clause.[316] He also identified several circumstances—generally relating to the economic or political significance of an agency's action or its relationship to state law—in which courts should apply the major questions doctrine.[317] Justice Gorsuch argued that, to evaluate whether there is clear congressional authorization for a challenged agency action, courts should consider (1) the "legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme,'" (2) "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address," (3) an agency's past interpretations of the relevant statue, and (4) whether there is a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[318]

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented.[319] Justice Kagan contended that neither the CAA nor other statutes conflicted with EPA's reading of Section 111, arguing in particular that a textualist reading of the term "system" in Section 111(d) appears to grant EPA broad authority to choose the BSER.[320] Describing generation shifting as a well-established "tool in the pollution-control toolbox," and emphasizing the significance of Section 111(d) as a "backstop or catch-all provision" to reach otherwise unregulated pollution, she would have concluded that Section 111's broad delegation of authority permitted the generation shifting

[310] *Id.* at 2614.

[311] *Id.* at 2615.

[312] *Id.*

[313] *Id.*

[314] *Id.* at 2614.

[315] *Id.* at 2616 (Gorsuch, J., concurring).

[316] *Id.* at 2619.

[317] *Id.* at 2620–22.

[318] *Id.* at 2622–23.

[319] *Id.* at 2626 (Kagan, J., dissenting).

[320] *Id.* at 2636.

provided in the CPP.[321] She criticized the majority's approach to the major questions doctrine as a "magically appear[ing] get-out-of-text free card[ ]" and articulated different parameters for the major questions doctrine.[322] She argued for a more limited application of the doctrine when, after considering "the fit between the power claimed, the agency claiming it, and the broader statutory design," there is a "mismatch between the agency's usual portfolio and a given assertion of power."[323]

Considerations for Congress

In one sense, the Court in *West Virginia* addressed a relatively narrow question. It struck down only the CPP's identification of generation shifting as a "building block" in regulating existing coal-fired power plants pursuant to CAA Section 111(d). That holding affects *how* EPA regulates those plants, not *whether* it may regulate them under Section 111(d) or at all. In 2007, the Court held in *Massachusetts v. EPA* that EPA had the authority to regulate GHGs from motor vehicles because GHGs qualify as an "air pollutant" under the CAA's general definition.[324] The Court did not revisit that ruling in *West Virginia*. The Court's ruling does not bar EPA from regulating power plant GHG emissions under the CAA, does not address EPA's regulation of GHG emissions from other sources, and does not affect EPA's ability to regulate other air pollutants—such as ozone, particulate matter, sulfur oxides, or nitrogen oxides—where such regulation would have a co-benefit of reducing GHG emissions.[325] Additionally, states retain the ability under *West Virginia* to allow regulated sources to participate in emissions trading programs as a means for complying with the plans developed under Section 111(d).

Although EPA can regulate GHG emissions from coal-fired power plants pursuant to Section 111(d), the Court's decision limits the tools it may use to do so, and it leaves unanswered many questions about the details of the agency's regulatory options.[326] Reading the decision narrowly, the Court held that EPA may not issue regulations under Section 111(d) that both are premised on generation shifting and would dictate the nationwide mix of energy sources. That distinction may leave EPA with meaningful authority under Section 111(d) to issue a different rule "that may end up causing an incidental loss in coal's market share."[327] However, the Court did not draw a clear line between such permissible regulation and "simply announcing what the market share of coal, natural gas, wind, and solar must be."[328] Additionally, the Court's skepticism toward what it perceived to be a novel application of CAA Section 111 suggests that EPA may again face a high

[321] *Id.* at 2629, 2637.

[322] *Id.* at 2641.

[323] *Id.* at 2633–34.

[324] 549 U.S. 497, 528–32 (2007).

[325] EPA has issued a proposed Section 111 rule for GHG emissions from the oil and natural gas industry. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (proposed Nov. 15, 2021). EPA has also issued several proposed or final rules for GHG emissions from mobile sources. *See Regulations for Emissions from Vehicles and Engines, Regulations for Greenhouse Gas (GHG) Emissions*, EPA, https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-ghg-emissions (last visited Oct. 11, 2022).

[326] Shortly before the Court issued its decision, EPA indicated that it intends to propose a Section 111(d) rule governing GHG emissions from existing coal-fired power plants in March 2023. *Emission Guidelines for Greenhouse Gas Emissions from Fossil Fuel-Fired Existing Electric Generating Units*, OFFICE OF MGMT. & BUDGET, OFFICE OF INF. & REGUL. AFFS., REGINFO.GOV, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2060-AV10 (last visited Oct. 11, 2022).

[327] *West Virginia*, 142 S. Ct. at 2613 n.4 (majority opinion).

[328] *Id.*

degree of judicial skepticism if it seeks to address GHG emissions under statutes that it has not previously used for that purpose.

Beyond the Court's CAA holding, its reliance on the major questions doctrine could have broader implications. The Court did not provide a clear test for when an agency action presents a major question that would invite closer review. The decision nevertheless suggests that the Court might closely review agency actions that address novel problems, rely on statutory provisions that are infrequently used (or use those provisions in a way that deviates from past practice), or could have significant economic or political repercussions. The Court's major questions reasoning could give EPA and other agencies pause before regulating in areas that implicate major policy decisions, particularly through novel applications of statutory authority. Those agencies must now discern whether the actions they propose would raise "major questions" and, if so, whether they can identify "clear congressional authorization," and not simply a general statutory delegation of authority, for those actions.[329]

West Virginia may also portend a shift in the process for judicial review of agency action. The Supreme Court and lower courts have frequently reviewed agency actions under the so-called *Chevron* framework, which directs courts to defer to an agency's reasonable interpretation of ambiguous language in a statute the agency administers.[330] In its decisions this past term applying the major questions doctrine, the Court made no reference to the *Chevron* framework.[331] That silence leaves unanswered questions about how to determine which doctrine applies or whether courts should undertake a major questions inquiry prior to or as part of a *Chevron* analysis. At the same time that lower courts will need to grapple with those issues, litigants and judges have invoked the doctrine with increasing frequency in other recent lawsuits both within and beyond the environmental sphere.[332]

Congressional action—or its absence—will likely play an important role in future regulatory efforts to address climate change and other significant issues. In addition to considering the statutory language authorizing other CAA programs, the majority opinion pointed out that Congress "conspicuously and repeatedly declined to enact" a regulatory program similar to the CPP.[333] While the Court looked beyond the statutory text in its analysis of Section 111, it did not

[329] *Id.* at 2609.

[330] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); *see also* CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[331] *See* Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam); *West Virginia*, 142 S. Ct. 2587.

[332] *E.g.*, Louisiana v. Biden, No. 2:21-cv-01074, 2022 WL 438313, at *16 (W.D. La. Feb. 11, 2022) (relying in part on major questions doctrine to issue preliminary injunction against federal agencies' use of estimates of the "social cost" of GHG emissions in their regulatory process); Doug Obey, *Foes of EPA Auto GHG Rule Raise EV, 'Major Questions' in Court Claims*, CLIMATE EXTRA (April 4, 2022), https://insideepa.com/climate-news/foes-epa-auto-ghg-rule-raise-ev-major-questions-court-claims; Robert Iafolla, *Biden's $15 Contractor Minimum Wage Weighed as 'Major Question,'* BLOOMBERG LAW NEWS (Sept. 28, 2022), https://news.bloomberglaw.com/daily-labor-report/bidens-15-contractor-minimum-wage-weighed-as-major-question; Emily Peck, *Chamber Sues CFPB Over Its Anti-Discrimination Policy*, AXIOS (Sept. 28, 2022), https://www.axios.com/2022/09/28/chamber-sues-cfpb-over-its-anti-discrimination-policy; *see also* Ellie Borst, *Supreme Court Climate Ruling Ignites Deregulatory Challenges*, GREENWIRE (Aug. 16, 2022), https://www.eenews.net/articles/supreme-court-climate-ruling-ignites-deregulatory-challenges/.

[333] *West Virginia*, 142 S. Ct. at 2610. In dissent, Justice Kagan criticized the majority's consideration of Congress's failure to enact legislation and underscored that Congress also introduced but did not enact bills that would have barred EPA from implementing the CPP. *Id.* at 2631 (Kagan, J., dissenting).

specify what legislative acts, or even omissions, could bear on the question of clear congressional authorization.

To address the specific issues considered in *West Virginia*, Congress may clarify the scope of EPA's authority under Section 111 in determining the BSER.[334] Congress could also identify a specific mix of electricity generation that it believes should be achieved and direct EPA to implement regulations to effectuate that mix. Congress could further continue to consider other measures to reduce GHG emissions, such as a border carbon adjustment or clean energy tax incentives and subsidies.[335]

The more significant questions for Congress arising from *West Virginia* go beyond the CAA and the regulation of GHGs. Where Congress can anticipate a major question, it can explicitly state the latitude it intends to grant to an administrative agency to address that question. Both Justice Gorsuch and Justice Kagan acknowledged that broad statutory delegations of authority have historically allowed administrative agencies to also address issues that Congress did *not* anticipate when it enacted a statute.[336] The Court's decision in *West Virginia* leaves open the question of how, or even whether, Congress may grant agencies the authority to act when such unanticipated issues raise major questions.

[334] *E.g.*, EPA Regulatory Authority Act of 2022, H.R. 8395, 117th Cong. (2022).

[335] For example, the Clean Competition Act would impose a border carbon adjustment on certain carbon-intensive imported and exported goods. S. 4335, 117th Cong. (2022). For additional information about border carbon adjustments, see CRS Report R47167, *Border Carbon Adjustments: Background and Recent Developments*, by Jonathan L. Ramseur, Brandon J. Murrill, and Christopher A. Casey. *See also* H.R. 5376, 117th Cong. §§ 136107(h), 136109, 136204 (2021).

[336] *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *id.* at 2642 (Kagan, J., dissenting).

Appendix. List of Cases[337]

This appendix includes cases listed on the Supreme Court's website as "Opinions of the Court" for its October 2021 Term, with the exception of cases dismissed by the Court as improvidently granted.[338] Cases are listed in the order in which they were decided. The questions presented are adapted from the Supreme Court's statement of the questions presented, which itself often restates the question as framed by the petitioner in the case. The holdings are adapted in some cases from the syllabus published by the Supreme Court's Reporter of Decisions. CRS legislative attorneys have analyzed many of the Court's decisions in detail in other products, which are listed with the applicable case.

Rivas-Villegas v. Cortesluna, 20-1539

Argued: N/A
Decided: 10/18/2021
Topics: Civil Rights

Question Presented: In a suit under 42 U.S.C. § 1983, did the Ninth Circuit err in denying qualified immunity to a police officer defendant who allegedly placed his knee on a suspect's back while the suspect was lying face down?

Holding: The police officer was entitled to qualified immunity because no precedent clearly established that his specific conduct violated the suspect's constitutional rights.

Opinions: Per Curiam

City of Tahlequah v. Bond, 20-1668

Argued: N/A
Decided: 10/18/2021
Topics: Civil Rights

Question Presented: In a suit under 42 U.S.C. § 1983, did the Tenth Circuit err in denying qualified immunity to police officers who were alleged to have recklessly created a situation in which deadly force was necessary?

Holding: The police officers were entitled to qualified immunity because no precedent clearly established that their specific conduct violated the suspect's constitutional rights.

Opinions: Per Curiam

Mississippi v. Tennessee, Orig. 143

Argued: 10/4/2021
Decided: 11/22/2021
Topics: Environmental Law

Question Presented: Should the Court sustain Mississippi's claims of error in the report the Special Master issued on November 5, 2020, recommending that the Supreme Court dismiss Mississippi's complaint?

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[337] David Gunter, CRS Acting Section Research Manager, authored this section of the report.

[338] *See Opinions of the Court - 2021*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/opinions/slipopinion/21 (last visited Oct. 11, 2022).

Holding: The underground aquifer beneath Tennessee and Mississippi is subject to equitable apportionment. Mississippi's claims of error are overruled, the Special Master's report is sustained, and Mississippi's complaint is dismissed.

Opinions: Chief Justice Roberts (for the Court)

Whole Woman's Health v. Jackson, 21-463

Argued: 11/1/2021
Decided: 12/10/2021
Topics: Civil Procedure; Constitutional Law

Question Presented: May a state insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions?

Holding: A pre-enforcement constitutional challenge to a statute could not proceed against state court judges or clerks who might handle cases under the statute, a private defendant who disclaimed any intent to sue under the challenged law, or the Texas attorney general. However, the suit could proceed against state medical licensing officials.

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

CRS Resources: CRS Legal Sidebar LSB10651, *The Texas Heartbeat Act (S.B. 8), Whole Woman's Health v. Jackson, and United States v. Texas: Frequently Asked Questions*, by Joanna R. Lampe and Jon O. Shimabukuro; CRS Legal Sidebar LSB10668, *Texas Heartbeat Act (S.B. 8) Litigation: Supreme Court Identifies Narrow Path for Challenges to Texas Abortion Law*, by Joanna R. Lampe

Babcock v. Kijakazi, 20-480

Argued: 10/13/2021
Decided: 1/13/2022
Topics: Social Security; Statutory Interpretation

Question Presented: Is a civil-service pension payment based on dual-status military technician service to the National Guard "a payment based wholly on service as a member of a uniformed service" for purposes of the Social Security Act, 42 U.S.C. § 415(a)(7)(A)(III)?

Holding: Civil-service pension payments based on employment as a dual-status military technician are not payments based on service as a member of a uniformed service within the meaning of the statute.

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

National Federation of Independent Business v. OSHA, 21A244
Ohio v. Department of Labor, 21A247 (consolidated)

Argued: 1/7/2022
Decided: 1/13/2022
Topics: Administrative Law; Statutory Interpretation

Question Presented: The Court was asked to issue a stay, pending further judicial review in the lower courts, of an emergency temporary standard of the Occupational Safety and Health

Administration that imposed COVID-19 vaccination-or-testing requirements on employers with more than 100 employees.

Holding: The Court granted the stay, holding that OSHA's emergency temporary standard exceeds its authority under the Occupational Safety and Health Act and that the stay applicants were therefore likely to succeed on the merits of their claims.

Opinions: Per Curiam; Justice Gorsuch (concurring); Justices Breyer, Sotomayor, and Kagan (dissenting)

CRS Resources: CRS Legal Sidebar LSB10689, *Supreme Court Stays OSHA Vaccination and Testing Standard*, by Jon O. Shimabukuro

Biden v. Missouri, 21A240
Becerra v. Louisiana, 21A241 (consolidated)

Argued: 1/7/2022
Decided: 1/13/2022
Topics: Administrative Law; Health Care; Statutory Interpretation

Question Presented: The Court was asked to stay, pending further review in the lower courts, district court orders that enjoined a rule promulgated by the Secretary of Health and Human Services. The rule imposed COVID-19 vaccination requirements on facilities that receive Medicare or Medicaid funding.

Holding: The Court stayed the district court injunctions and allowed the vaccination requirements to go into effect, holding that the vaccination requirement falls within the Secretary's statutory authority and that the stay applicants were therefore likely to succeed on the merits of their claims.

Opinions: Per Curiam; Justice Thomas (dissenting); Justice Alito (dissenting)

Hemphill v. New York, 20-637

Argued: 10/5/2021
Decided: 1/20/2022
Topics: Constitutional Law; Criminal Law

Question Presented: Under New York common law, a litigant at trial may introduce evidence that "opens the door" for other responsive evidence that would ordinarily be barred by the rules of evidence. Under what circumstances, if any, may a criminal defendant "open the door" to evidence that would otherwise be barred by the Confrontation Clause of the Constitution?

Holding: Although a state may adopt procedural rules governing the exercise of the right to cross-examine, New York's "door-opening" doctrine is a substantive principle of evidence that cannot be applied to admit evidence that would violate the Confrontation Clause.

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

Hughes v. Northwestern University, 19-1401

Argued: 12/6/2021
Decided: 1/24/2022
Topics: Employee Benefits

Question Presented: Where a plaintiff alleges that a defined-contribution retirement plan violated its duty of prudence by paying or charging its participants fees that substantially exceeded fees for alternative available investment products or services, are those allegations sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under the Employee Retirement Income Security Act, 29 U.S.C. § 1104(a)(1)(B)?

Holding: A defined-contribution retirement plan may breach its duty of prudence by failing to remove imprudent investments, even if its array of available investment options includes more prudent investments. This is a context-dependent inquiry, and the court of appeals therefore erred in dismissing the plaintiffs' claims.

Opinion: Justice Sotomayor (for the Court)

CRS Resources: CRS Legal Sidebar LSB10636, *Supreme Court Rules on Retirement Plan Fiduciary Duty in Hughes v. Northwestern University*, by Jennifer A. Staman

Unicolors, Inc. v. H&M Hennes & Mauritz, LLP, 20-915

Argued: 11/8/2021
Decided: 2/24/2022
Topics: Intellectual Property

Question Presented: A district court considering a copyright-infringement case may, in some circumstances, determine the validity of the underlying copyright registration by making a referral to the Copyright Office under 17 U.S.C. § 411. Does that statute require referral to the Copyright Office in the absence of any indicia of fraud or material error as to the underlying copyright registration?

Holding: Mistakes of fact or law made in a copyright registration application do not invalidate the copyright registration if the applicant lacked knowledge of the factual or legal error.

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

United States v. Zubaydah, 20-827

Argued: 10/6/2021
Decided: 3/3/2022
Topics: Civil Procedure; National Security

Question Presented: Did the court of appeals err when it rejected the United States' assertion of the state secrets privilege based on the court's own assessment of potential harms to national security and required discovery to proceed further under 28 U.S.C. § 1782(a) against former Central Intelligence Agency contractors on matters concerning alleged clandestine CIA activities?

Holding: The state secrets privilege, which prevents disclosure of information when the disclosure would harm national security interests, applies to information that would confirm or deny the existence of a CIA site in Poland.

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

CRS Resources: CRS Legal Sidebar LSB10764, *Abu Zubaydah and the State Secrets Doctrine*, by Jennifer K. Elsea

Cameron v. EMW Women's Surgical Center, 20-601

Argued: 10/12/2021
Decided: 3/3/2022
Topics: Civil Procedure

Question Presented: May a state attorney general vested with the power to defend state law intervene after a federal court of appeals invalidates a state law and no other state actor will defend the law?

Holding: The court of appeals erred in denying the attorney general's petition to intervene to defend the law; a state's opportunity to defend its own laws should not be lightly cut off, and a state has sovereign authority to structure its executive branch in a way adequate to defend its interests.

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

Federal Bureau of Investigation v. Fazaga, 20-828

Argued: 11/8/2021
Decided: 3/4/2022
Topics: Evidence; National Security

Question Presented: The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f), establishes in camera and ex parte procedures to determine the admissibility of information obtained or derived from electronic surveillance for foreign-intelligence purposes. Does that statutory process displace the state secrets privilege and authorize a district court to resolve the merits of an action challenging the lawfulness of government surveillance by considering the evidence in question?

Holding: The in camera review procedure of 50 U.S.C. § 1806(f) does not displace the state secrets privilege.

Opinion: Justice Alito (for the Court)

CRS Resources: CRS Legal Sidebar LSB10683, *FBI v. Fazaga: Supreme Court Examines Interplay of State Secrets Privilege and the Foreign Intelligence Surveillance Act*, by Edward C. Liu

United States v. Tsarnaev, 20-443

Argued: 10/13/2021
Decided: 3/4/2022
Topics: Criminal Law

Questions Presented: (1) Did the court of appeals err in concluding that the criminal defendant's capital sentences must be vacated because the district court did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about the case? (2) Did the district court err at the penalty phase of the trial by excluding evidence that the defendant's older brother was allegedly involved in different crimes two years before the offenses for which the defendant was convicted?

Holdings: (1) The district court did not abuse its discretion by declining to ask about the content and extent of each juror's media consumption regarding the crime. (2) The district court did not err in excluding evidence of other potential crimes, by the defendant's brother, from the sentencing proceedings.

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

Wooden v. United States, 20-5279

Argued: 10/4/2021
Decided: 3/7/2022
Topics: Criminal Law

Question Presented: What is the correct interpretation of the phrase "committed on occasions different from one another" in 18 U.S.C. § 924(e)(1), a provision of the Armed Career Criminal Act providing for sentencing enhancement?

Holding: The defendant's 10 burglary offenses were part of a single criminal episode and therefore count as one "occasion" for purposes of the Armed Career Criminal Act.

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

Wisconsin Legislature v. Wisconsin Elections Commission, 21A471

Argued: N/A
Decided: 3/23/2022
Topics: Constitutional Law; Elections Law

Question Presented: Did the Wisconsin Supreme Court correctly interpret the Voting Rights Act in choosing a state redistricting map that created an additional majority-black district, and did that redistricting map violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution?

Holding: Although a state can satisfy strict scrutiny review of a race-based redistricting decision by proving that its decision was narrowly tailored to comply with the Voting Rights Act, the state here misapplied Supreme Court precedents interpreting the Act and committed error.

Opinions: Per Curiam; Justice Sotomayor (dissenting)

Houston Community College System v. Wilson, 20-804

Argued: 11/2/2021
Decided: 3/24/2022
Topics: Constitutional Law

Question Presented: Does the First Amendment restrict the authority of an elected Board of Trustees to issue a censure resolution in response to a member's speech?

Holding: The Board of Trustees' purely verbal censure did not give rise to a First Amendment claim.

Opinion: Justice Gorsuch (for the Court)

Ramirez v. Collier, 21-5592

Argued: 11/9/2021
Decided: 3/24/2022
Topics: Civil Rights

Question Presented: Is the state's decision to allow the petitioner's pastor to enter the execution chamber, but not to lay his hands on the petitioner or pray audibly as he dies, a substantial burden on the petitioner's free exercise of religion under the Religious Land Use and Institutionalized Persons Act (RLUIPA)?

Holding: The state's restrictions on religious touch and audible prayer in the execution chamber likely violate RLUIPA because they substantially burden religious exercise and are not the least restrictive means of furthering the state's compelling interests.

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

Badgerow v. Walters, 20-1143

Argued: 11/2/2021
Decided: 3/31/2021
Topics: Civil Procedure; Statutory Interpretation

Question Presented: Do federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 9–10, where the only basis for jurisdiction is that the underlying dispute involved a federal question?

Holding: The "look-through" approach to federal jurisdiction, in which federal courts examine their jurisdiction under the FAA by considering the underlying substantive controversy, does not apply to requests to confirm or vacate arbitral awards under Sections 9 and 10 of the act.

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

Thompson v. Clark, 20-659

Argued: 10/12/2021
Decided: 4/4/2022
Topics: Civil Rights

Question Presented: Before a plaintiff may bring an action under 42 U.S.C. § 1983 alleging unreasonable seizure, that plaintiff must await favorable termination of the criminal proceeding against him. Does that rule require the plaintiff to show that the criminal proceeding has "formally ended in a manner not inconsistent with his innocence," *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020), or that the proceeding "ended in a manner that affirmatively indicates his innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018)?

Holding: To demonstrate a favorable termination of a prosecution for purposes of a Fourth Amendment claim under Section 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction.

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

United States v. Vaello Madero, 20-303

Argued: 11/9/2021
Decided: 4/21/2022
Topics: Constitutional Law

Question Presented: Did Congress violate the equal protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income, a benefits

program, in the 50 states and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico?

Holding: The Constitution does not require Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to the same degree as those benefits are made available to residents of the states.

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

CRS Resources: CRS Legal Sidebar LSB10737, *Equal Protection Does Not Mean Equal SSI Benefits for Puerto Rico Residents, Says Supreme Court*, by Mainon A. Schwartz

City of Austin v. Reagan National Advertising of Texas, 20-1029

Argued: 11/10/2021
Decided: 4/21/2022
Topics: Constitutional Law

Question Presented: The Austin city code makes a distinction between on-premise signs, which may be digitized, and off-premises signs, which may not. Is that distinction a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)?

Holding: The city's sign code, which set different rules for signs advertising things at the location and signs advertising things off-premises, was facially a content-neutral regulation under the First Amendment that was not subject to strict scrutiny review.

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

CRS Resources: CRS Legal Sidebar LSB10739, *Refining Reed: City of Austin Updates Test for Content-Based Speech Restrictions*, by Victoria L. Killion

Brown v. Davenport, 20-826

Argued: 10/5/2021
Decided: 4/21/2022
Topics: Criminal Law

Question Presented: May a federal court conducting habeas review of a state conviction grant relief based solely on its conclusion that the actual-prejudice test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), is satisfied, or must the federal court also find that the state court's application of the harmless error rule outlined in *Chapman v. California*, 386 U.S. 18 (1967), was unreasonable under the Antiterrorism and Effective Death Penalty Act (AEDPA)?

Holding: When a state court has ruled on a prisoner's challenge to his or her conviction, a federal court cannot grant habeas relief unless it applies both the test set forth in *Brecht v. Abrahamson* and the one established by AEDPA.

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

Boechler, P.C. v. Commissioner of Internal Revenue, 20-1472

Argued: 1/12/2022
Decided: 4/21/2022
Topics: Tax Law

Question Presented: 26 U.S.C. § 6330(d)(1) establishes a 30-day time limit to file a petition for the Tax Court to review a notice of determination from the commissioner of internal revenue. Is that time limit a jurisdictional requirement or a claim-processing rule subject to equitable tolling?

Holding: The 30-day time limit to petition the Tax Court to review a collection due process hearing is not a limit on federal court jurisdiction and therefore is subject to equitable tolling.

Opinion: Justice Barrett (for the Court)

Cassirer v. Thyssen-Bornemisza Collection Foundation, 20-1566

Argued: 1/18/2022
Decided: 4/21/2022
Topics: Civil Procedure; International Law

Question Presented: In hearing state law claims brought under the Foreign Sovereign Immunities Act, must a federal court apply the forum state's choice-of-law rules to determine what substantive law governs the claims at issue, or may it apply federal common law?

Holding: When a federal court hears a state law claim against a foreign government or instrumentality under the Foreign Sovereign Immunities Act, it must apply the same choice-of-law rules that apply in similar suits against private parties.

Opinion: Justice Kagan (for the Court)

Cummings v. Premier Rehab Keller PLLC, 20-219

Argued: 11/30/2021
Decided: 4/28/22
Topics: Civil Rights

Question Presented: Do the damages available under Title VI of the Civil Rights Act of 1964 for victims of discrimination, and the statutes that incorporate Title VI remedies, include compensation for emotional distress?

Holding: Emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act.

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

Shurtleff v. City of Boston, 20-1800

Argued: 1/18/2022
Decided: 5/2/22
Topics: Constitutional Law

Questions Presented: Petitioner, a religious organization, was denied permission to display a flag containing a cross on a flagpole the City of Boston had previously allowed third parties to use. (1) Did the court of appeals err by failing to apply the Supreme Court's public forum doctrine and strict scrutiny to petitioner's First Amendment challenge? (2) Did the court of appeals err by classifying the potential display of the flag as government speech? (3) Did the court of appeals err in finding that the city's approval requirement transforms private speech by the religious organization into government speech?

Holding: Boston's flag-raising program did not qualify as government speech. Boston neither actively controlled these flag raisings nor shaped the messages the flags sent. Accordingly,

Boston's refusal to allow petitioners to raise their flag because of its religious viewpoint violated the Free Speech Clause.

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

Federal Election Comm'n v. Ted Cruz for Senate, 21-12

Argued: 1/19/2022
Decided: 5/16/2022
Topics: Constitutional Law; Elections Law

Questions Presented: When a candidate for federal office lends money to his own election campaign, 52 U.S.C. § 30116(j) imposes a $250,000 limit on the amount of post-election contributions that the campaign may use to repay the debt owed to the candidate. (1) Do a campaign and a candidate have standing to challenge the statutory loan-repayment limit? (2) Does the loan-repayment limit violate the Free Speech Clause of the First Amendment?

Holdings: (1) The appellees have standing to challenge the threatened enforcement of the statutory loan-repayment limit; and (2) the loan-repayment limit burdens core political speech without proper justification in violation of the First Amendment.

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

CRS Resources: CRS Legal Sidebar LSB10734, *Campaign Finance and the First Amendment: Supreme Court Considers Constitutionality of Limits on Repayment of Candidate Loans*, by L. Paige Whitaker; CRS Legal Sidebar LSB10796, *Supreme Court Invalidates Cap on Repayment of Candidate Loans Under the First Amendment: Considerations for Congress*, by L. Paige Whitaker

Patel v. Garland, 20-979

Argued: 12/6/2021
Decided: 5/16/2022
Topics: Immigration Law

Question Presented: Does 8 U.S.C. § 1252(a)(2)(B)(i) preserve the jurisdiction of federal courts to review a nondiscretionary determination by the Board of Immigration Appeals that a noncitizen is ineligible for certain types of discretionary relief?

Holding: Federal courts lack jurisdiction to review facts found as part of discretionary-relief procedings under 8 U.S.C. § 1255 and the other provisions enumerated in Section 1252(a)(2)(B)(i).

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

CRS Resources: CRS Legal Sidebar LSB10762, *No Judicial Review of Fact Findings for Certain Discretionary Immigration Relief, Rules Supreme Court*, by Kelsey Y. Santamaria

Morgan v. Sundance, Inc., 21-328

Argued: 3/21/2022
Decided: 5/23/2022
Topics: Commercial Law; Statutory Interpretation

Question Presented: The Federal Arbitration Act governs situations in which one party in litigation invokes a right to compel arbitration, and the other party alleges that right has been

waived. Is the party asserting waiver required to show that it has suffered prejudice from the alleged waiver, and if so, does such a requirement violate the Supreme Court's holding that lower courts must place arbitration agreements on an equal footing with other contracts?

Holding: Because the usual federal rule of waiver does not include a prejudice requirement, prejudice is also not a condition of finding that a party has waived its right to compel arbitration under the FAA.

Opinion: Justice Kagan (for the Court)

Shinn v. Martinez Ramirez, 20-1009

Argued: 12/8/2021
Decided: 5/23/2022
Topics: Criminal Law

Question Presented: In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that a federal court on habeas review may excuse a defendant's procedural default in failing to raise a claim of ineffective assistance of counsel that was not presented in state court due to an attorney's errors. The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(e), precludes a federal court from considering evidence outside the state court record when reviewing the merits of a habeas claim. Does the application of the equitable rule of *Martinez* render Section 2254(e) inapplicable to a federal court's review of a claim for habeas relief?

Holding: Under Section 2254(e), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel.

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

Gallardo v. Marstiller, 20-1263

Argued: 1/10/2022
Decided: 6/6/2022
Topics: Health Care

Question Presented: When Medicaid recipients receive a personal injury judgment or settlement compensating them for medical expenses, 42 U.S.C. §§ 1396a(a)(25)(H) and 1396k require that the Medicaid program be reimbursed out of those funds. Does the federal Medicaid Act provide for a state Medicaid program to recover reimbursement for its payment of a beneficiary's past medical expenses by taking funds from the portion of a beneficiary's tort recovery that compensates for future medical expenses?

Holding: The Medicaid Act permits a state to seek reimbursement from settlement payments allocated for future medical care.

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

Southwest Airlines Co. v. Saxon, 21-309

Argued: 3/28/2022
Decided: 6/2/2022
Topics: Commercial Law; Statutory Interpretation

Question Presented: Are workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, interstate transportation workers for purposes of an exemption from the Federal Arbitration Act, 9 U.S.C. § 1?

Holding: Airplane cargo loaders are a "class of workers engaged in interstate or foreign commerce," and the exemption in Section 1 of the FAA therefore applies to them.

Opinions: Justice Thomas (for the Court)

Siegel v. Fitzgerald, 21-441

Argued: 4/18/2022
Decided: 6/6/2022
Topics: Bankruptcy Law; Constitutional Law

Question Presented: By statute, Congress has divided the nation's bankruptcy courts into two programs, the U.S. Trustee Program and the Bankruptcy Administrator program. Does a statute increasing quarterly fees in the U.S. Trustee Program violate the uniformity requirement of the Constitution's Bankruptcy Clause?

Holding: Congress's enactment of a significant fee increase that exempted debtors in two states violated the uniformity requirement of the Bankruptcy Clause.

Opinion: Justice Sotomayor (for the Court)

CRS Resources: CRS Legal Sidebar LSB10782, *Siegel v. Fitzgerald: Supreme Court Makes Rare Comment on the Bankruptcy Clause's Uniformity Requirement*, by Michael D. Contino

Egbert v. Boule, 21-147

Argued: 3/2/2022
Decided: 6/8/2022
Topics: Civil Rights; Constitutional Law

Questions Presented: (1) Is a cause of action available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for First Amendment retaliation claims? (2) Is a cause of action available under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights?

Holding: Bivens does not extend to create causes of action for the excessive-force claim or First Amendment retaliation claim alleged here.

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

Kemp v. United States, 21-5726

Argued: 4/19/2022
Decided: 6/13/2022
Topics: Civil Procedure

Question Presented: Does Federal Rule of Civil Procedure 60(b)(1), which authorizes relief from a final judgment based on mistake, inadvertence, surprise, or excusable neglect, authorize relief based on a district court's error of law?

Holding: The term "mistake" under Rule 60(b)(1) includes a judge's errors of law, so a motion alleging legal error by a judge is subject to a one-year limitations period.

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

Garland v. Gonzalez, 20-322

Argued: 1/11/2022
Decided: 6/13/2022
Topics: Immigration Law

Questions Presented: (1) When an alien is detained under 8 U.S.C. § 1231, is that alien entitled to a bond hearing within six months at which the government must prove that the noncitizen is a flight risk or a danger to the community? (2) Under 8 U.S.C. § 1252(f)(1), did the courts below have jurisdiction to grant classwide injunctive relief?

Holding: Injunctive relief may be granted only to a particular alien against whom removal proceedings have been initiated. 8 U.S.C. § 1252(f) bars lower courts from entering class-wide injunctions ordering federal officials to take or refrain from taking action when carrying out certain Immigration and Nationality Act provisions governing the detention and removal of aliens.

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

CRS Resources: CRS Legal Sidebar LSB10793, *High Court Limits Ability of Aliens Ordered Removed to Challenge Prolonged Detention*, by Hillel R. Smith

Johnson v. Arteaga-Martinez, 19-896

Argued: 1/11/2022
Decided: 6/13/2022
Topics: Immigration Law

Question Presented: When an alien is detained under 8 U.S.C. § 1231, is that alien entitled to a bond hearing within six months at which the government must prove that the alien is a flight risk or a danger to the community?

Holding: 8 U.S.C. § 1231(a)(6) does not compel the government to offer noncitizens detained for six months bond hearings in which the government bears the burden of proving that the noncitizen presents a flight risk or danger to the community.

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

CRS Resources: CRS Legal Sidebar LSB10793, *High Court Limits Ability of Aliens Ordered Removed to Challenge Prolonged Detention*, by Hillel R. Smith

Denezpi v. United States, 20-7622

Argued: 2/22/2022
Decided 6/13/2022
Topics: Constitutional Law; Criminal Law; Indian Law

Question Presented: Does the Double Jeopardy Clause of the Constitution bar the federal prosecution of an individual for violations of 18 U.S.C. §§ 1153(a) and 2241(a)(1) and (2) based on his previous conviction on a tribal law charge of assault and battery in the Court of Indian Offenses?

Holding: The Double Jeopardy Clause does not bar successive prosecutions of distinct offenses defined by separate sovereigns arising from a single act, even if a single sovereign prosecutes them.

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

CRS Resources: CRS Legal Sidebar LSB10763, *Double Jeopardy, Dual Sovereignty, and Enforcement of Tribal Laws*, by Mainon A. Schwartz

ZF Automotive US, Inc. v. Luxshare Ltd., 21-401
AlixPartners, LLP v. Fund for Protection of Investors' Rights, 21-518 (consolidated)

Argued: 3/23/2022
Decided: 6/13/2022
Topics: Commercial Law

Question Presented: Does 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in a "foreign or international tribunal," encompass private commercial arbitration proceedings?

Holding: Section 1782 applies only to proceedings before governmental or intergovernmental adjudicative bodies, which does not include the foreign arbitration panels at issue in this case.

Opinion: Justice Barrett (for the Court)

Viking River Cruises, Inc. v. Moriana, 20-1573

Argued: 3/30/2022
Decided: 6/15/2022
Topics: Commercial Law

Question Presented: Does the Federal Arbitration Act require courts to enforce a bilateral arbitration agreement providing that an employee may not raise representative claims on behalf of other employees, including claims allowed under state law?

Holding: The FAA preempts a state-law rule that precludes the division, in an agreement to arbitrate, of certain state-law actions into individual and non-individual claims.

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

Golan v. Saada, 20-1034

Argued: 3/22/2022
Decided: 6/15/2022
Topics: International Law

Question Presented: The Hague Convention on the Civil Aspects of International Child Abduction requires return of a child to his or her country of habitual residence unless, among other things, the district court finds that there is a grave risk that his or her return would expose the child to physical or psychological harm. Is a district court also required to consider ameliorative measures that would facilitate the return of the child notwithstanding that finding?

Holding: Once a court has found that return of a child would expose the child to a grave risk of harm, it is not categorically required to examine all possible ameliorative measures before denying a Hague Convention petition.

Opinion: Justice Sotomayor (for the Court)

Ysleta del Sur Pueblo v. Texas, 20-493

Argued: 2/22/2022
Decided: 6/15/2022
Topics: Indian Law; Statutory Interpretation

Question Presented: Did the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act provide the Pueblo with sovereign authority to regulate non-prohibited gaming activities on its lands, or is the Pueblo subject to all Texas gaming regulations?

Holding: The Restoration Act bans as a matter of federal law on tribal lands only those gaming activities also banned in Texas.

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

American Hospital Ass'n v. Becerra, 20-1114

Argued: 11/30/2021
Decided: 6/15/2022
Topics: Administrative Law; Health Care; Statutory Interpretation

Questions Presented: (1) Does judicial deference to agency statutory interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), permit the Department of Health and Human Services (HHS) to set Medicare reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data? (2) Is the plaintiff's suit challenging HHS's reimbursement rate adjustments precluded by 42 U.S.C. § 13951(t)(12)?

Holdings: (1) The text and structure of the statute preclude HHS from varying the reimbursement rates only for certain hospitals without conducting a survey of hospitals' acquisition costs. (2) The statute does not preclude judicial review of HHS's reimbursement rates.

Opinion: Justice Kavanaugh (for the Court)

CRS Resources: CRS Legal Sidebar LSB10821, *Supreme Court Overturns HHS Regulation Reducing the Medicare Outpatient Drug Reimbursement Rate for 340B Hospitals*, by Edward C. Liu and Hannah-Alise Rogers

George v. McDonough, 21-234

Argued: 4/19/2022
Decided: 6/15/2022
Topics: Administrative Law

Question Presented: When the Department of Veterans Affairs (VA) denies a veteran's claim for benefits in reliance on an agency interpretation that is later deemed invalid under the plain text of the statutory provisions in effect at the time of the denial, is that the kind of "clear and unmistakable error" that the veteran may invoke to challenge VA's decision?

Holding: A court's subsequent invalidation of a VA regulation cannot be used as the basis to establish clear and unmistakable error in a VA decision that became final prior to the invalidation.

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

Carson v. Makin, 20-1088

Argued: 12/8/2021
Decided: 6/21/2022
Topics: Constitutional Law

Question Presented: Does a state violate the Religion Clauses or the Equal Protection Clause of the Constitution by prohibiting students participating in an otherwise generally available student aid program from choosing to use their aid to attend schools that provide religious instruction?

Holding: The state's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause.

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

CRS Resources: CRS Legal Sidebar LSB10785, *Carson v. Makin: Using Government Funds for Religious Activity*, by Valerie C. Brannon

Shoop v. Twyford, 21-511

Argued: 4/26/2022
Decided: 6/21/2022
Topics: Criminal Law

Questions Presented: (1) Under the All Writs Act, may federal courts order the transportation of state prisoners for reasons other than those enumerated in 28 U.S.C. § 2241(c)? (2) Before a court grants an order allowing a habeas petitioner to develop new evidence, must it determine whether that evidence could aid the petitioner in proving his entitlement to habeas relief and whether the evidence may permissibly be considered by a habeas court?

Holding: A transportation order that allows a prisoner to search for new evidence is not necessary or appropriate in aid of a federal court's adjucation of a habeas corpus action when the prisoner had not shown that the new evidence would be admissible in connection with a particular claim for relief.

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

United States v. Washington, 21-404

Argued: 4/18/2022
Decided: 6/21/2022
Topics: Constitutional Law; Statutory Interpretation

Question Presented: Is a state workers' compensation law that applies to federal contract workers at a specific federal facility barred by principles of intergovernmental immunity, or is such a law authorized by 40 U.S.C. § 3172(a), which permits the application of state workers' compensation laws to federal facilities?

Holding: The state workers' compensation law facially discriminates against the federal government and its contractors, and Section 3172 does not unambiguously waive the federal

government's immunity from discriminatory state laws. The state workers' compensation law therefore violates the Supremacy Clause of the Constitution.

Opinion: Justice Breyer (for the Court)

United States v. Taylor, 20-1459

Argued: 12/7/2021
Decided: 6/21/2022
Topics: Criminal Law

Question Presented: Does the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(A) exclude attempted robbery under the Hobbs Act, 18 U.S.C. § 1951(a)?

Holding: Attempted Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3)(A), because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force.

Opinion: Justice Gorsuch (for the Court); Justice Thomas (dissenting); Justice Alito (dissenting)

Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc., 20-1641

Argued: 3/1/2022
Decided: 6/21/2022
Topics: Health Care

Question Presented: Does a health plan unlawfully discriminate against persons with end-stage renal disease, in violation of assorted provisions of the Medicare Secondary Payer Act and the Employee Retirement Income Security Act, by uniformly reimbursing kidney dialysis for plan participants at lower rates than many other medical treatments?

Holding: The Medicare Secondary Payer statute does not authorize disparate impact liability, and the coverage terms of the plan at issue here do not violate that statute because they apply uniformly to all covered individuals.

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

CRS Resources: CRS Legal Sidebar LSB10819, *Supreme Court Allows Health Plans to Limit Dialysis Benefits*, by Jennifer A. Staman

New York State Rifle & Pistol Ass'n v. Bruen, 20-843

Argued: 11/3/2021
Decided: 6/23/2022
Topics: Constitutional Law

Question Presented: Did New York's denial of the petitioners' applications for concealed carry licenses for self-defense violate the Second Amendment?

Holding: New York's proper cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

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

CRS Resources: CRS Legal Sidebar LSB10773, *The Second Amendment at the Supreme Court: New York State Rifle & Pistol Ass'n v. Bruen*, by Michael A. Foster

Vega v. Tekoh, 21-499

Argued: 4/20/2022
Decided: 6/23/22
Topics: Civil Rights; Constitutional Law; Criminal Law

Question Presented: May a plaintiff state a claim for relief against a law enforcement officer under 42 U.S.C. § 1983 based simply on an officer's failure to provide the warning prescribed in *Miranda v. Arizona*, 384 U.S. 436 (1966)?

Holding: A violation of the Miranda rules does not provide the basis for a claim under Section 1983.

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

Nance v. Ward, 21-439

Argued: 4/25/2022
Decided: 6/23/2022
Topics: Criminal Law

Questions Presented: (1) Where an inmate challenging a state's method of execution alleges that there is an alternative method of execution not currently authorized by state law, must that challenge be raised in a habeas petition rather than an action under 42 U.S.C. § 1983? (2) If such a challenge must be raised in a habeas petition, does it constitute a successive petition if the challenge would not have been ripe at the time of the inmate's first petition?

Holding: Section 1983 is an appropriate vehicle for a prisoner's method-of-execution claim where the prisoner proposes an alternative method not authorized by the state's death-penalty statute.

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

Berger v. North Carolina NAACP, 21-248

Argued: 3/21/2022
Decided: 6/23/2022
Topics: Civil Procedure

Questions Presented: (1) In a case in which the defendant is a state official, must a different state agent, authorized by state law to defend the state's interests in litigation, overcome a presumption that the defendant adequately represents the state's interests in order to intervene in the case as of right? (2) Does a court of appeals review a district court's determination of adequate representation de novo or for abuse of discretion? (3) Is the state agent entitled to intervene as of right in this litigation?

Holding: A state may choose to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law. Under North Carolina law and the Federal Rules of Civil Procedure, North Carolina's legislative leaders are entitled to intervene in this litigation.

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

Dobbs v. Jackson Women's Health Organization, 19-1392

Argued: 12/1/2021
Decided: 6/24/2022
Topics: Constitutional Law

Question Presented: Are all pre-viability prohibitions on elective abortions unconstitutional?

Holding: The Constitution does not confer a right to an abortion. The authority to regulate abortion is for the people and their elected representatives.

Opinions: Justice Alito (for the Court); Justice Thomas (concurring); Justice Kavanaugh (concurring); Chief Justice Roberts (concurring in the judgment); Justices Breyer, Sotomayor, and Kagan (dissenting)

CRS Resources: CRS Legal Sidebar LSB10669, *Supreme Court Considers Mississippi Abortion Law*, by Jon O. Shimabukuro; CRS Legal Sidebar LSB10768, *Supreme Court Rules No Constitutional Right to Abortion in Dobbs v. Jackson Women's Health Organization*, by Jon O. Shimabukuro

Becerra v. Empire Health Foundation, 20-1312

Argued: 11/29/2021
Decided: 6/24/2022
Topics: Health Care

Question Presented: Under 42 U.S.C. § 1395ww, a hospital that serves a "significantly disproportionate number of low-income patients" may receive an additional payment for treating Medicare patients. Did the Secretary permissibly apply this provision by considering all of the hospital's patient days of individuals who satisfy the requirements to be entitled to Medicare Part A benefits regardless of whether Medicare paid the hospital for those particular days?

Holding: HHS's regulation is consistent with the text, history, and structure of the statute. In calculating the Medicare fraction, individuals entitled to benefits include all individuals who qualify for the program regardless of whether they receive Medicare benefits for all or part of their hospital stays.

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

Ruan v. United States, 20-1410
Kahn v. United States, 21-5261 (consolidated)

Argued: 3/1/2022
Decided: 6/27/22
Topics: Criminal Law

Questions Presented: A provision of the Controlled Substances Act, 21 U.S.C. § 841(a)(1), prohibits the unlawful distribution of controlled substances pursuant to prescriptions that fall outside the usual course of professional practice. (1) For a conviction under this provision, must the government prove that the doctor knew or intended that the prescription be outside the usual course of professional practice? (2) May physicians be convicted under this provision without regard to whether, in good faith, they reasonably believed or subjectively intended that their prescriptions fall within the usual course of professional practice? (3) Should the "usual course of professional practice" and the "legitimate medical purpose" prongs of 21 C.F.R. § 1306.04 be read in the conjunctive or the disjunctive?

Holding: 21 U.S.C. § 841 criminalizes "knowingly or intentionally" manufacturing, distributing, or dispensing a controlled substance, "[e]xcept as authorized." The mens rea requirement of that provision applies to the "except as authorized" clause. This means that once a defendant produces evidence that his or her conduct was "authorized," the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

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

Concepcion v. United States, 20-1650

Argued: 1/19/2022
Decided: 6/27/2022
Topics: Criminal Law

Question Presented: When deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, must or may a district court consider intervening legal and factual developments?

Holding: The First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.

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

Kennedy v. Bremerton School District, 21-418

Argued: 4/25/2022
Decided: 6/27/2022
Topics: Constitutional Law

Questions Presented: (1) Is a public school employee who says a brief, private prayer by himself, while at school and visible to students, engaging in government speech that lacks First Amendment protection? (2) If such religious expression is private and protected by the First Amendment, does the Establishment Clause compel the school district to prohibit it?

Holding: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal. The Constitution neither mandates nor permits the government to suppress such religious expression.

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

CRS Resources: CRS Legal Sidebar LSB10780, *Kennedy v. Bremerton School District: School Prayer and the Establishment Clause*, by Valerie C. Brannon

Torres v. Texas Department of Public Safety, 20-603

Argued: 3/29/2022
Decided: 6/29/2022
Topics: Constitutional Law; Military Law

Question Presented: Do the War Powers Clauses of the Constitution authorize Congress to abrogate state sovereign immunity for claims of employment discrimination based on military service, thus allowing claims against states under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)?

Holding: By ratifying the Constitution, the states agreed their sovereignty would yield to the national power to raise and support the Armed Forces. Congress may exercise this power to authorize private damages suits against nonconsenting states, as in USERRA.

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

Oklahoma v. Castro-Huerta, 21-429

Argued: 4/27/2022
Decided: 6/29/2022
Topics: Criminal Law; Indian Law

Question Presented: Does a state have the authority to prosecute non-Indians who commit crimes against Indians in Indian country?

Holding: The federal government and the state have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

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

CRS Resources: CRS Legal Sidebar LSB10778, *SCOTUS Bolsters State Criminal Jurisdiction on Tribal Lands*, by Mainon A. Schwartz

West Virginia v. EPA, 20-1530
North American Coal Corp. v. EPA, 20-1531
Westmoreland Mining Holdings v. EPA, 20-1778
North Dakota v. EPA, 20-1780 (consolidated)

Argued: 2/28/2022
Decided: 6/30/2022
Topics: Administrative Law; Environmental Law

Questions Presented: The Clean Air Act Section 111(d), 42 U.S.C. § 7411(d), addresses the regulation of emissions from existing stationary sources of air pollutants. (1) In that section, did Congress authorize EPA to impose emissions standards based only on technology and methods that can be applied at and achieved by a particular source, or may EPA also develop industry-wide emissions control? (2) If Congress did authorize EPA to impose such industry-wide emissions standards, was that authorization constitutional?

Holding: In Section 111(d), Congress did not grant EPA the authority to devise emissions caps based on the generation shifting approach that EPA took in the Clean Power Plan. Given that EPA's interpretation of Section 111 would constitute a transformative expansion of its regulatory authority, clear congressional authorization would be required.

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

CRS Resources: CRS Legal Sidebar LSB10666, *Congress's Delegation of "Major Questions": The Supreme Court's Review of EPA's Authority to Regulate Greenhouse Gas Emissions May Have Broad Impacts*, by Linda Tsang and Kate R. Bowers; CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers

Biden v. Texas, 21-954

Argued: 4/26/2022
Decided: 6/30/2022
Topics: Immigration Law

Questions Presented: (1) Does 8 U.S.C. § 1225 require the Department of Homeland Security to implement the Migrant Protection Protocols? (2) Did the court of appeals err in determining that the Secretary's decision terminating the Migrant Protection Protocols had no effect?

Holding: The government's rescission of the Migrant Protection Protocol did not violate Section 1225, and the Secretary's decision was a final agency action.

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

CRS Resources: CRS Legal Sidebar LSB10798, *Supreme Court Rules That Migrant Protection Protocols Rescission Was Not Unlawful*, by Hillel R. Smith

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