Syracuse University
College of Law

US SUPREME COURT: 2023-2024 PREVIEW

PROGRAM MATERIALS

Friday, Sept. 29, 2023 | 1:30 to 4:30 p.m.

In Person at Syracuse University College of Law, Dineen Hall,
and Live-Streamed. **Free and open to the public.**

CART will be provided. For questions and to request an accommodation,
please contact Chris Ramsdell at ceramsde@syr.edu.

NORTHERN DISTRICT OF NEW YORK
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"US Supreme Court: The 2023 2024 Term" provides 3 hours of CLE credit for Professional Practice in New York State. The College of Law and NDNY FCBA have been certified by the NYS CLE Board New York State Continuing Legal Education Board as Accredited Providers of continuing legal education in the State of New York. This is a single program; no partial credit will be awarded. There is no charge for this program.

Law Alumni Weekend

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United States Supreme Court: The 2023–2024 Term

Friday, Sept. 29, 2023

Melanie Gray Ceremonial Courtroom, Dineen Hall
Syracuse University College of Law, 950 Irving Avenue
Syracuse, NY 13244

1:15–1:30 p.m. **CLE Registration**

1:30–1:35 p.m. **Welcome: Craig M. Boise,** *Dean and Professor of Law*

1:35–2:55 p.m. **Panel I: Constitutional Law**

Moderator: Keith J. Bybee, *Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor of Law*

Panel participants (in speaking order):

Kareem Crayton, *Brennan Center, Senior Director, Voting Rights and Representation*

Jenny S. Breen, *Associate Professor of Law*

Lisa A. Dolak L'88, *Professor of Law*

Hon. Brenda K. Sannes, *Chief Judge of the United States District Court for the Northern District of New York*

2:55–3:20 p.m. **Break for coffee and conversation**

3:20–4:30 p.m. **Panel II: Crime and Speech**

Moderator: Lauryn P. Gouldin, *Crandall Melvin Professor of Law, Laura J. & L. Douglas Meredith Professor of Teaching Excellence*

Panel participants (in speaking order):

Bhavan Sodhi, *Chief Program Officer, Innocence Project*

Rajit S. Dosanjh, *Chief, Appellate Division, United States Attorney's Office for the Northern District of New York*

Roy S. Gutterman '93, L'00, *Professor, Newhouse School of Communications; Director, Tully Center for Free Speech; Professor of Law (by courtesy appointment)*

PROGRAM PARTICIPANTS

PANELISTS

Kareem Crayton, Brennan Center, Senior Director, Voting Rights and Representation

Kareem Crayton is the Brennan Center's senior director for voting and representation, where he manages the organization's efforts to implement pro-voter reforms, combat suppression and intimidation, and push back against redistricting abuses.

An expert on the intersection of law, politics, and race, Crayton has served on law and political science faculties across the country and written more than two dozen publications that explore the connections between race and politics in representative institutions. The substantive architect of a first-generation video game about redistricting, Crayton is also a digital content creator whose work integrates the scholarly and practical aspects of voting and other civic participation to engage the broader public.

Crayton has served as a consultant to many advocacy groups and public officials, including by representing the Congressional Black, Hispanic, and Asian Pacific Islander Caucuses before the U.S. Supreme Court as amicus counsel. During the 2020 redistricting cycle, he advised nearly a dozen local jurisdictions, commissions, and legislative caucuses. He has also informed public and private institutions regarding election law issues and served as special counsel and chief of staff to the Democratic house leader in the Alabama legislature in its special session on redistricting. He served as executive director of the Southern Coalition for Social Justice, where he hired and trained a litigation team to argue in two key gerrymandering cases before the U.S. Supreme Court.

A native of Montgomery, Alabama, Crayton is a magna cum laude graduate of Harvard College and holds a doctorate in political science and a law degree from Stanford University. He served as a law clerk on the U.S. Court of Appeals for the D.C. Circuit (Judge Harry Edwards) and as a foreign law clerk on the Constitutional Court for the Republic of South Africa (Justice Sandile Ngcobo).

Jenny S. Breen, Associate Professor of Law

Jenny Breen teaches Constitutional Law, Administrative Law, and Labor Law. Her interdisciplinary scholarship is centrally concerned with democratic governance in the United States and pays particular attention to the roles of gender and labor politics. Her current research examines the Supreme Court's relationship to democratic erosion in the United States. She has also written in the areas of immigration and criminal law. Her writing has appeared or is forthcoming in journals including Utah Law Review, New Labor Forum, Berkeley Journal of Employment and Labor Law, the University of Hawai'i Law Review, American Criminal Law Review, and the Journal of Policy History.

Prior to arriving at the College of Law, Breen practiced immigration law and then worked as a judicial law clerk to the Hon. Rosemary S. Pooler on the United States Court of Appeals for the Second Circuit. She also taught Politics at Ithaca College, including courses on U.S. Politics and the Politics of Work.

Breen received her J.D. from Cornell Law School. She received her Ph.D. in Political Science from the University of Pennsylvania and her B.A. from the University of North Carolina at Chapel Hill.

Breen is a member and former Secretary of the Syracuse University chapter of the American Association of University Professors (SU-AAUP).

Lisa A. Dolak L'88 Angela S. Cooney Professor of Law (2009-2022)

Professor Dolak teaches courses on patent law, civil procedure, and the federal courts. Her research interests include issues at the intersections of patent law and judicial procedure and patent law and legal ethics.

In her professional consulting practice, she serves as an expert in patent cases, attorney malpractice cases, and attorney disciplinary proceedings. During a sabbatical leave from Syracuse University, she served as a law clerk to the Hon. Paul R. Michel, Judge (Ret.), United States Court of Appeals for the Federal Circuit.

From 2015 through 2021, Dolak served as Senior Vice President and University Secretary, leading the Office of the Board of Trustees at Syracuse University, which is responsible for coordinating and facilitating the activities of the Board and its various committees to ensure the effective and efficient operation of the University's system of governance.

Prior to attending law school, Dolak worked for several years as a synthetic organic chemist in pharmaceutical research aimed at the development of new drugs at Bristol-Myers and Ayerst Laboratories Research, Inc.

Dolak received a bachelor's degree in chemistry from Duquesne University and a Juris Doctor summa cum laude from the Syracuse University College of Law. She is admitted to practice in New York and before the US Patent and Trademark Office.

Hon. Brenda K. Sannes, Chief U.S. District Judge

Brenda K. Sannes is the Chief United States District Judge for the Northern District of New York. At the time of her appointment in 2014 she was the Appellate Chief in the United States Attorney's Office in that district.

Judge Sannes earned her B.A. degree magna cum laude, with distinction in the English Department, from Carleton College in 1980. She earned her J.D. degree magna cum laude from the University of Wisconsin Law School in 1983 where she was an articles editor for the law review and was elected to the Order of the Coif.

From 1983 to 1984, Judge Sannes clerked for the Honorable Jerome Farris on the Ninth Circuit Court of Appeals. From 1984 to 1988, she was a litigation associate in a law firm in Los Angeles. In 1988, she became an Assistant United States Attorney in Los Angeles. During her time in that office she served as a Deputy Chief in the Narcotics Section and later as the Anti-Terrorism Advisory Council Coordinator. She moved to Central New York in 1994 and was an Assistant United States Attorney in the Northern District of New York from 1995 until her judicial appointment in 2014. She served as the Appellate Chief from 2005 until her appointment to the bench.

Bhavan Sodhi, Chief Program Officer, Innocence Project

Bhavan K. Sodhi is the Chief Program Officer at the Innocence Project (IP). In this capacity, she is responsible for the oversight, management, and supervision of all six programmatic departments: Client Intake and Evaluation, Post-conviction Litigation, Data Science & Research, Strategic Litigation, Social Work, and Public Policy Reform.

Prior to this role, she served as the IP's Director of Intake & Case Evaluation. Bhavan comes to the IP with deep experience in innocence work, having served as the Legal Director at Innocence Canada, where she is now a member of its Case Review Committee and Executive Board. She was also the Executive Director of the Osgoode Innocence Project in Toronto and an Adjunct Professor at Osgoode Hall Law School, teaching wrongful conviction and forensic science. Bhavan also co-founded and instructed the Wrongful Conviction Clinic at the University of Toronto, Faculty of Law for many years.

Bhavan has served as a Board Member of the international Innocence Network and has experience working as both a prosecutor and defense attorney in Toronto. Bhavan has written extensively about

criminal justice and wrongful convictions and regularly presents on these topics. She is deeply passionate about and committed to addressing injustice and the systems that foster it.

Rajit S. Dosanjh, Chief, Appellate Division,
United States Attorney's Office Northern District of New York

Rajit Dosanjh is the Chief of the Appeals Division of the United States Attorney's Office for the Northern District of New York (NDNY). He has worked as an Assistant United States Attorney handling criminal appeals for the NDNY for the last twelve years. Previously, he served as an Assistant Solicitor General for the New York State Attorney General's Office. He clerked for Judge Jed Rakoff in the Southern District of New York and the late Judge Robert Katzmann in the Second Circuit Court of Appeals. He is a graduate of Yale Law School. In a past life, he earned a Ph.D. in English Literature from the University of Edinburgh.

Roy S. Gutterman '93, L'00, Professor,
Newhouse School of Communications; Director, Tully Center for Free Speech

An expert on communications law and the First Amendment, Roy Gutterman is director of the Newhouse School's Tully Center for Free Speech.

He is a graduate of the Newhouse School and the Syracuse University College of Law.

At Newhouse, Gutterman was the 2009-10 director of the Carnegie Legal Reporting Program. He also works with the Society of Professional Journalists student chapter and serves on academic integrity committees.

After graduating from Newhouse, Gutterman worked as a reporter for the Cleveland Plain Dealer, covering local and state government, crime, legal issues and general news. He later clerked for a New Jersey Superior Court judge and practiced business and general litigation.

Gutterman writes and speaks on media law, free speech, the intersection between courts and journalists and legal education issues. He has delivered lectures at the Communication University of China in Beijing, Fudan University in Shanghai and National Chengchi University in Taipei.

Gutterman is a program director for the Burton Foundation for Legal Achievement; on the faculty committee for the Government Accountability Project in Washington, D.C., and on the honorary dinner committee for FIRE, the Foundation for Individual Rights in Education.

As an undergraduate, he worked at The Boston Globe; The Courier-News in Bridgewater, N.J. The Post-Standard in Syracuse; and The Daily Orange. While in law school, he served as editor-in-chief of the law review.

His book, "L.Rev: the Law Review Experience in American Legal Education" (Academica Press 2002), is in law school libraries around the world.

PANEL MODERATORS

Keith J. Bybee, Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor of Law

Keith Bybee is Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor at the College of Law. Vice Dean Bybee holds tenured appointments in the College of Law and in the Maxwell School of Citizenship and Public Affairs. He also directs the Institute for the Study of the Judiciary, Politics, and the Media (IJPM), a collaborative effort between the College of Law, the Maxwell School, and the S.I. Newhouse School of Public Communications. Vice Dean Bybee's areas of research interest include the judicial process, legal theory, political philosophy, LGBT politics, the politics of race and ethnicity, American politics, constitutional law, codes of conduct, and the media.

His books include *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (Princeton, 1998; second printing, 2002), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford, 2007), and *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (Stanford, 2010). His most recent book is *How Civility Works* (Stanford, 2016). He is currently at work on a grant-funded project examining the positive uses of fake news.

Lauryn P. Gouldin, Laura J. & L. Douglas Meredith Professor of Teaching Excellence 2022-2025 & Crandall Melvin Professor of Law, Director, Syracuse Civics Initiative

Lauryn Gouldin teaches Constitutional Criminal Procedure, Criminal Law, Evidence, Constitutional Law, and Criminal Justice Reform. Her scholarship focuses on the Fourth Amendment, pretrial detention and bail reform, and judicial decision-making. Her articles have appeared in the *University of Chicago Law Review, Wake Forest Law Review, BYU Law Review, Denver Law Review, Fordham International Law Journal,* and the *American Criminal Law Review*, among others. In 2017, the AALS Criminal Justice Section recognized her article, "Defining Flight Risk," as the first runner-up in the Section's Junior Scholars Paper Competition. In 2015, in recognition of her excellence in teaching, Gouldin was selected by the Syracuse University Meredith Professors to receive a Teaching Recognition Award. In 2014 and 2015, the College of Law Student Bar Association honored Gouldin with the Outstanding Faculty Award. At their commencement, the Class of 2018 awarded her the College of Law's Res Ipsa Loquitur Award for outstanding service, scholarship, and stewardship.

Professor Gouldin graduated from Princeton University with a major in the Woodrow Wilson School of Public and International Affairs and received her J.D., *magna cum laude*, from New York University School of Law. Following law school, Gouldin clerked for the Hon. Leonard B. Sand in the Southern District of New York and for the Hon. Chester J. Straub of the US Court of Appeals for the Second Circuit. She also spent several years as a Litigation Associate at Wachtell, Lipton,

Rosen & Katz, working on matters involving white collar and regulatory defense, internal investigations and compliance, and securities litigation. Before joining the College of Law faculty, Gouldin served as the Assistant Director of the Center for Research in Crime and Justice at New York University School of Law.

OTHER PROGRAM PARTICIPANTS

Craig M. Boise, Dean and Professor of Law

Craig M. Boise became the 12th Dean and Professor of Law at Syracuse University College of Law in July 2016, where he has continued to build a reputation as one of legal education's leading innovators. During his nearly ten years as a law school dean, he has established the nation's first hybrid online J.D. program to utilize the now-ubiquitous Zoom platform, the first online joint J.D./M.B.A. program, one of the earliest Master of Legal Studies programs for non-lawyers, the nation's first law-school based incubator for solo practitioners, and a "risk-free" J.D. program granting a master's degree in law to students who completing their first year of law school but elect not to pursue a law career.

Before coming to Syracuse, Dean Boise was Dean and Joseph C. Hostetler – Baker & Hostetler Chair in Law at Cleveland State University's Cleveland–Marshall College of Law. He has held faculty positions at DePaul University College of Law, where he was also Director of the Graduate Tax Program, and Case Western Reserve University School of Law, and was a visiting professor at Washington & Lee College of Law. He has taught a variety of tax courses, and his scholarship on US corporate and international tax policy and offshore financial centers has been published in the *Texas International Law Journal*, the *George Mason Law Review*, and the *Minnesota Law Review*, among others.

Preceding the commencement of his academic career, Dean Boise practiced tax law for more than eight years at Cleary Gottlieb LLP and Akin Gump LLP, in New York, and at Thompson Hine LLP, in Cleveland, OH. He clerked for the Hon. Pasco M. Bowman II, of the US Court of Appeals for the Eighth Circuit. Dean Boise earned his LL.M. in Taxation from NYU, his J.D. from the University of Chicago, and his bachelor's degree in political science, *summa cum laude*, from the University of Missouri-Kansas City, where he also completed substantial coursework in piano performance at the university's Conservatory of Music.

Dean Boise is a member of the Council of the ABA Section on Legal Education and Admission to the Bar and previously served on both the ABA's Standards Review Committee and the Steering Committee of the AALS's Deans Forum. He was an inaugural member of the Advisory Council of the Legal Education Police Practices Consortium, which was founded to promote better policing practices throughout the U.S. In 2018, he served as Co-Chair of the transition team for New York Attorney General Tish James. He is a past member of the New York State Judicial Institute on Professionalism in the Law and the New York State Bar Association's COVID-19 Recovery Task Force and is admitted to the bar in New York and Ohio.

PANEL I: CONSTITUTIONAL LAW Moderator: Vice Dean Keith J. Bybee	
PANELIST **(in speaking order)**	**TOPICS/CASES**
Kareem Crayton, *Brennan Center, Senior Director, Voting Rights and Representation*	Overview of recent and upcoming voting/election cases, including *Allen v. Milligan* (2023) and *Alexander v. South Carolina State Conference of the NAACP, No. 22-807*
Jenny S. Breen, *Associate Professor of Law*	*Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited, No. 22-448* *Loper Bright Enterprises v. Raimondo, No. 22-451* *Securities and Exchange Commission v. Jarkesy, No. 22-859*
Lisa A. Dolak L'88, *Professor of Law*	*Moore v. United States, No. 22-800*
Hon. Brenda K. Sannes, *Chief Judge of the United States District Court for the Northern District of New York*	*Acheson Hotels, LLC v. Laufer, No. 22-429* *Muldrow v. City of St. Louis, Missouri, No. 22-193*

PANEL II: CRIME AND SPEECH

Moderator: Professor Lauryn P. Gouldin

PANELIST (in speaking order)	**TOPICS/CASES**
Bhavan Sodhi, *Chief Program Officer, Innocence Project*	Overview of modern challenges litigating innocence; reflecting on *Jones v. Hendrix, No. 21-857* and *Shinn v. Ramirez, No. 20-1009*
Rajit S. Dosanjh, *Chief, Appellate Division, United States Attorney's Office Northern District of New York*	*Pulsifer v. United States, No. 22-340*
Roy S. Gutterman '93, L'00, *Professor, Newhouse School of Communications; Director, Tully Center for Free Speech*	*O'Connor-Ratcliff v. Garnier, No. 22-324* *Lindke v. Freed, No. 22-611* *Vidal v. Elster, No. 22-704*

SCOTUS CASE *listed in same order as above	CASE DESCRIPTION *taken from SCOTUSblog
Allen v. Milligan *(consolidated with Allen v. Caster)* **No. 21-1086 [Arg: 10.4.2022]** **[Op: 6.8.2023]**	**Holding:** Plaintiffs demonstrated a reasonable likelihood of success on their claim that the districting plan adopted by the state of Alabama for its 2022 congressional elections likely violated Section 2 of the Voting Rights Act. **Judgment:** Affirmed, 5-4, in an opinion by Chief Justice Roberts on June 8, 2023. Chief Justice Roberts delivered the opinion of the court, except as to part III-B-1. Justices Sotomayor, Kagan, and Jackson joined the opinion in full, and Justice Kavanaugh joined except for Part III-B-1. Justice Kavanaugh filed an opinion concurring in all but Part III-B-1. Justice Thomas filed a dissenting opinion, in which Justice Gorsuch joined, in which Justices Barrett joined as to Parts II and III, and in which Justice Alito joined as to Parts II-A and II-B. Justice Alito filed a dissenting opinion, in which Justice Gorsuch joined.
Alexander v. South Carolina State Conference of the NAACP **No. 22-807 [Arg: 10.11.2023]** **Lower Court Decision**	**Issue(s):** (1) Whether the district court erred when it failed to apply the presumption of good faith and to holistically analyze South Carolina Congressional District 1 and the South Carolina General Assembly's intent; (2) whether the district court erred in failing to enforce the alternative-map requirement in this circumstantial case; (3) whether the district court erred when it failed to disentangle race from politics; (4) whether the district court erred in finding racial predominance when it never analyzed District 1's compliance with traditional districting principles; (5) whether the district court clearly erred in finding that the General Assembly used a racial target as a proxy for politics when the record showed only that the General Assembly was aware of race, that race and politics are highly correlated, and that the General Assembly drew districts based on election data; and (6) whether the district court erred in upholding the intentional-discrimination claim when it never even considered whether—let alone found that—District 1 has a discriminatory effect.
Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited **No. 22-488 [Arg: 10.3.2023]** **Lower Court Decision**	**Issue(s):** Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau, 12 U.S.C. § 5497, violates the appropriations clause in Article I, Section 9 of the Constitution, and in vacating a regulation promulgated at a time when the Bureau was receiving such funding.

SCOTUS CASE *listed in same order as above	CASE DESCRIPTION *taken from SCOTUSblog
Loper Bright Enterprises v. Raimondo **No. 22-451 [Arg: TBD]** Lower Court Decision	**Issue(s):** Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.
Securities and Exchange Commission v. Jarkesy **No. 22-859 [Arg. TBD]** Lower Court Decision	**Issue(s):** (1) Whether statutory provisions that empower the Securities and Exchange Commission to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment; (2) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and (3) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.
Moore v. United States **No. 22-800 [Arg: TBD]** Lower Court Decision	**Issue(s):** Whether the 16th Amendment authorizes Congress to tax unrealized sums without apportionment among the states.
Acheson Hotels, LLC v. Laufer **No. 22-429 [Arg: 10.4.2023]** Lower Court Decision	**Issue(s):** Whether a self-appointed Americans with Disabilities Act "tester" has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation.
Muldrow v. City of St. Louis, Missouri **No. 22-193 [Arg: TBD]** Lower Court Decision	**Issue(s):** Whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a signification disadvantage.

SCOTUS CASE *listed in same order as above	CASE DESCRIPTION *taken from SCOTUSblog
Jones v. Hendrix **No.** 21-857 **[Arg: 11.1.2022] [Op: 6.22.2023]**	**Holding:** The saving clause in 28 U.S.C. § 2255(e) does not allow a prisoner asserting an intervening change in the interpretation of a criminal statute to circumvent the Antiterrorism and Effective Death Penalty Act of 1996's restrictions on second or successive Section 2255 motions by filing a habeas petition under Section 2241. **Judgment:** Affirmed, 6-3, in an opinion by Justice Thomas on June 22, 2023. Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined. Justice Jackson filed a dissenting opinion.
Shinn v. Ramirez **No.** 20-1009 **[Arg: 12.8.2021] [Op: 5.23.2022]**	**Holding:** Under 28 U.S.C. § 2254(e)(2), 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. **Judgment: Reversed**, 6-3, in an opinion by Justice Thomas on May 23, 2022. Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan joined.
Pulsifer v. United States **No.** 22-340 **[Arg: 10.2.2023]** **Lower Court Decision**	**Issue(s):** Whether a defendant satisfies the criteria in 18 U.S.C. § 3553(f)(1) as amended by the First Step Act of 2018 in order to qualify for the federal drug-sentencing "safety valve" provision so long as he does not have (a) more than four criminal history points, (b) a three-point offense, and (c) a two-point offense, or whether the defendant satisfies the criteria so long as he does not have (a), (b), or (c).

O'Connor-Ratcliff v. Garnier **No.** 22-324 **[Arg: 10.31.2023]** **Lower Court Decision**	**Issue(s):** Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.
Lindke v. Freed **No.** 22-611 **[Arg: 10.31.2023]** **Lower Court Decision**	**Issue(s):** Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.
Vidal v. Elster **No.** 22-704 **[Arg: 11.1.2023]** **Lower Court Decision**	**Issue(s):** Whether the refusal to register a trademark under **15 U.S.C. § 1052(c)** violates the free speech clause of the First Amendment when the mark contains criticism of a government official or public figure.
United States v. Rahimi **No.** 22-195 **[Arg: 11.7.2023]** **Lower Court Decision**	**Issue(s):** Whether **18 U.S.C. § 922(g)(8),** which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

** The full October term can be found **here**, courtesy of SCOTUSblog.

ANALYSIS

Chief Justice Roberts Delivers a Surprise on the Voting Rights Act

After a decade of dismantling the law, the Supreme Court gave it an unexpected boost.

Kareem Crayton

June 14, 2023

Morry Gash/AP

The Supreme Court delivered a surprise last Thursday to many of us in the voting rights and redistricting communities with its decision in *Allen v. Milligan*, which affirmed that the Voting Rights Act remains an active tool for civil rights enforcement. The law has been described at times as super-legislation because of its bipartisan pedigree and its effectiveness in bringing long-awaited, fundamental change for voters of color in our political system. Despite the Court's recent rulings showing decided hostility to other federal tools to protect equal representation — by effectively ending the special oversight provisions of the Voting Rights Act and by refusing to regulate partisan gerrymandering — *Milligan* cut against the grain. The Court found that the State of Alabama had violated federal law by underrepresenting Black voters in its 2021 congressional district map.

Black voters are about a quarter of Alabama's voting age population, and a straightforward application of Section 2 (which guarantees voters an equal opportunity to elect candidates of choice) would mean that two of Alabama's seven districts should reflect that community's preferences for political candidates. But the state legislature enacted a map with just one of seven districts with a Black majority — the basic configuration the state had also used in 2020. The map illustrates a classic case of "vote dilution," in which a community's ability to use political power is limited due to district lines.

The above is not simply a statement of the governing law — it's an assessment based on my personal experience. I am a native of Montgomery, a member of Alabama's bar, and I served as counsel to the Democrats in the legislature through Alabama's two most recent redrawing efforts. (The last time was to remedy a different constitutional violation back in 2017.) This time around, the Republican supermajority insisted that they understood the law

and even invited lawsuits to test the matter, perhaps believing the Roberts Court would extend its pattern of cutting back on voting rights enforcement.

But siding with Black voters who challenged this map, the Court ordered that a second district was justified in light of the size of the Black population and the prolonged patterns of racially polarized voting in the state. The surprising part of this decision was the Court's strong embrace of the history behind Congress's passage of Section 2 along with four decades of well-established judicial interpretation of the law.

The Roberts Court appeared poised to issue a final blow to what was left of the Voting Rights Act, yet this decision represents the Supreme Court's first formal endorsement of a vote dilution claim since 2006. While this decision means that Alabama and other states in the Black Belt (Louisiana and Georgia have analogous pending cases) will soon be drawing new district maps to improve representational opportunities for Black voters, this welcome news is also tempered by two stark realities.

First, Black voters will have endured a full congressional term waiting on the Court to finally strike down a patently illegal map — because of the Court's use of the "shadow docket," they had to vote in illegal districts that they knew were underrepresenting them. The second point is just as sobering. Section 2 remains on the books, but the provision emerges in a severely weakened state — and not out of danger. Over the last 10 years, the Roberts Court has taken a newly renewed Voting Rights Act that was on the march and left it an anemic tool whose future carries uncertainty. For example, a pending case about whether civil rights advocates have a right to sue under Section 2 threatens to rob Black voters of pursuing claims on their own.

But for now, a win is a win, and there is good reason to celebrate the promise of improved political representation for communities in the Deep South, where the need for federal protection is most pronounced.

BRENNAN CENTER FOR JUSTICE

A Rare Win for Voting Rights at the Supreme Court

Michael Li

June 9, 2023

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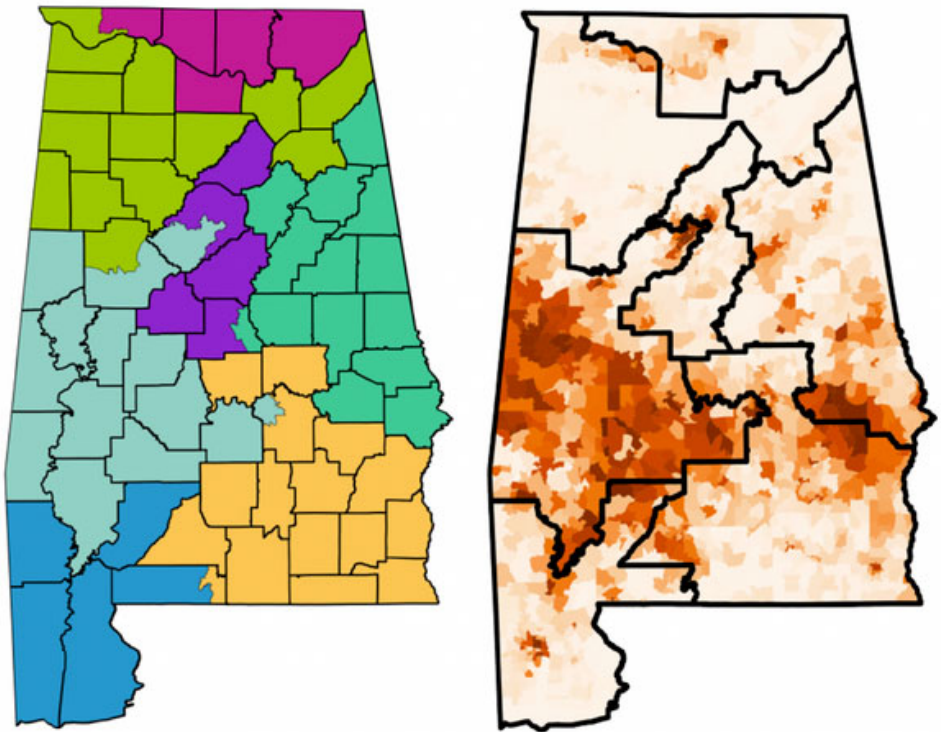
Black voters in Alabama won a victory at the Supreme Court Thursday with a narrow 5–4 ruling written by Chief Justice John Roberts holding that state lawmakers violated the Voting Rights Act when they redrew Alabama's congressional map after the 2020 census.

The decision is an important, if qualified, win for voting rights advocates. If the high court had done what Alabama and conservative groups had asked — and what the dissenting justices wanted — it would have radically rewritten or even eliminated one of the few remaining protections of the Voting Rights Act.

At the heart of the case, *Allen v. Milligan*, was the question of whether the congressional map adopted by lawmakers illegally diluted Black political power when it divided communities in Alabama's mostly rural and heavily impoverished Black Belt region among five different districts.

Under Section 2 of the Voting Rights Act, minority voters can sue to force states or localities to change voting maps if they can show that racially polarized voting interacts with the design of maps to make it impossible for minority communities to win political power. That's exactly what Black voters argued happened in Alabama.

Under the legislature's map, although Black voters are a substantial majority in the 7th Congressional District on the western side of the state, represented by Democrat Terri Sewell, they are 30 percent or less of the population in the region's other four districts. Given Alabama's long history of starkly racially polarized voting, this careful "packing and cracking" has the effect of ensuring that Black voters are always shut out of power except where they are a majority or near majority. While in many other parts of the country, a lack of racially polarized voting means minority voters can win power through the hard work of building multiracial coalitions, that simply isn't possible under current circumstances in Alabama. Six decades after the end of Jim Crow, white and Black Alabamians continue to prefer completely different candidates — strongly and unwaveringly so.



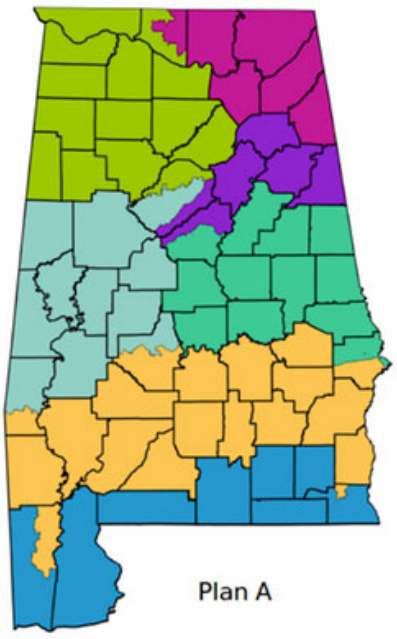
Source: Declaration of Moon Duchin filed by plaintiffs in Milligan v. Merrill.

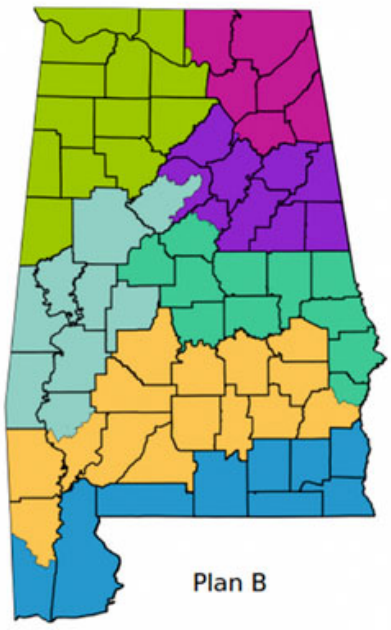
A three-judge trial court that included two appointees of President Trump unanimously agreed with Black voters, ordering Alabama to redraw its map to create two districts "where Black voters either comprise a voting-age majority or something quite close to it."

Alabama appealed, claiming that it could not create a second Black district without violating lawmakers' stated policy preference for changing districts as little as possible in redistricting, including making sure counties along the state's Gulf Coast were kept whole within the same district. It also urged the high court to throw out long-established precedents and adopt a "race-neutral benchmark" for judging what the appropriate number of minority districts should be.

Chief Justice John Roberts, joined by Justice Brett Kavanaugh and the court's three liberal justices, forcefully rejected what they described as "Alabama's attempt to remake our §2 jurisprudence anew." Under Alabama's approach, the court said "a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." The Court also noted that evidence in the case did not establish that keeping Gulf Coast counties together should be a higher priority than keeping the Black Belt together, describing the region as a community of interest with "a high proportion of black voters who 'share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare,' and a lineal connection to 'the many enslaved people brought there to work in the antebellum period.'"

Instead, the Court said that the trial court had "faithfully applied our precedents and correctly determined" that the Voting Rights Act required creation of a second district where Black voters had a reasonable opportunity to be politically successful. Roberts suggested this should be easy to do given that the "plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria" and that were more compact, on average than the state's map. (The yellow districts in the maps below from an expert report presented to the trial court are just four examples of how the new district could be configured.)





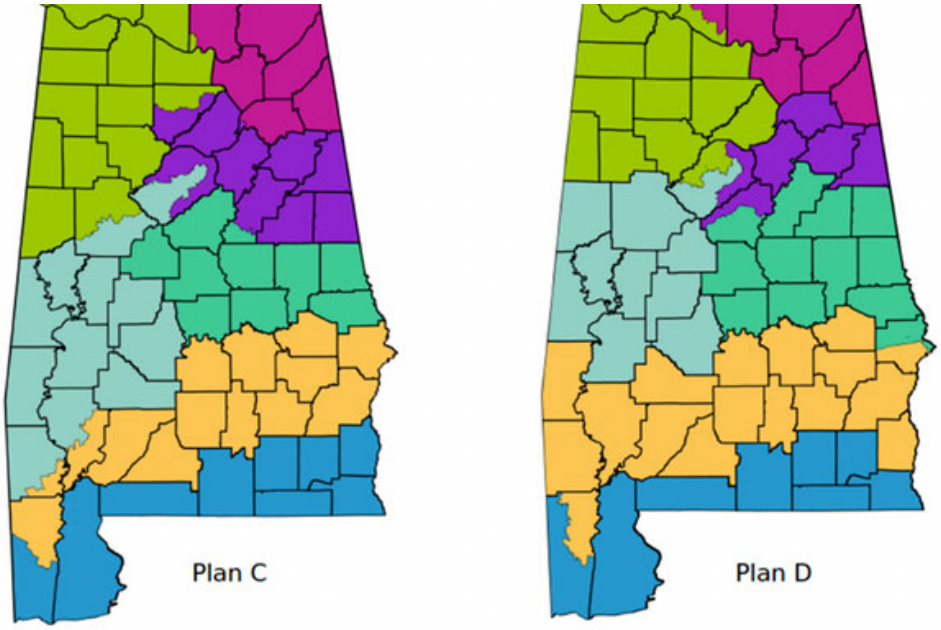


Figure 2: The four alternative plans presented in this report.

Source: Declaration of Moon Duchin filed by plaintiffs in Milligan v. Merrill.

The ruling will reverberate across the country. The most immediate impact is likely to be in Louisiana, where last year a federal district court ordered the state's congressional map to be redrawn to create an additional Black district. The Supreme Court put that ruling on hold pending resolution of the Alabama case, but is expected in the coming days to send the case back to the trial court. Likewise, in Georgia, a court will hold hearings this fall on claims that the Voting Rights Act requires redrawing of Georgia's congressional map to create an additional Black district. Along with Alabama, these states could see new maps in time for the 2024 elections.

The ruling will also affect roughly three dozen other ongoing Section 2 cases around the country, ranging from challenges to Texas's congressional map to lawsuits over city council districts in Dodge City, Kansas, and county commission districts in Thurston County, Nebraska. However, many of these cases are not as far along as the cases in Louisiana and Georgia, and it remains to be seen whether this second group of cases, including their inevitable appeals, can be resolved before the next election.

But if the decision didn't further dismantle voting rights protections, it also didn't strengthen them. In many ways, in fact, the win in *Milligan* spotlights how thin the tools for fighting discriminatory line drawing have become. The *Milligan* opinion itself notes that in recent years, Section 2 lawsuits have only "rarely been successful," with fewer than a dozen Section 2 victories since 2010 at any level of government, including school boards and city councils.

Indeed, for years, the Supreme Court has been slowly but steadily eroding the robustness of Section 2, for example by imposing compactness and demographic requirements that act in tandem to make it harder for plaintiffs to win relief from racially discriminatory maps in the diverse, multi-ethnic communities where Americans increasingly live.

And, even where Section 2 plaintiffs succeed, as Alabama and Louisiana illustrate, courts often use the so-called *Purcell* principle and the excuse of an upcoming election to delay the redrawing of maps, effectively giving discriminatory line drawers one free election and term of office to enact policy. While districts may ultimately be struck down, people must live with the consequences of elections under illegal maps. In short, even if the Supreme Court didn't do as many feared and further whittle away at the Voting Rights Act, the status quo for voters, and minority voters in particular, remains deeply inadequate.

While *Milligan* should be celebrated as a win for fair representation, it cannot be an excuse for congressional inaction. This month marks the 10-year anniversary of the Supreme Court's decision in *Shelby County v. Holder*, a decision that gutted another key provision of the Voting Rights Act. In the decade since, Congress has tried and repeatedly failed to overcome legislative inertia to respond. Section 2 lives to fight another day, but the provision by itself is not — and never has been — enough. It is well past time to not only restore but strengthen the Voting Rights Act for a 21st-century America. Nothing less than the future of the country's emerging multiracial democracy is at stake. Congress must act.

BRENNAN CENTER FOR JUSTICE

Corrected September 14, 2023

September 13, 2023

Richard F. Allen
Special Master
150 South Perry Street
Montgomery, Alabama 36104

Re: *Milligan v. Allen*, Case No. 2:21-cv-01530 (N.D. Ala.)
Caster v. Allen, Case No. 2:21-cv-01536 (N.D. Ala.)

Dear Mr. Allen,

Thank you for this opportunity to comment on behalf of the Brennan Center for Justice at New York University School of Law on the main remedial proposals submitted by parties and non-parties in the above cases.

Founded in 1995 to honor the extraordinary contributions of U.S. Supreme Court Justice William J. Brennan, Jr. to American law and society, the Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as amicus curiae, including filing amicus briefs at the United States Supreme Court in *Alabama Legis. Black Caucus v. Alabama* (2015), *Cooper v. Harris* (2016), and *Allen v. Milligan* (2023).

The Brennan Center submits these comments (a) to address the concerns raised by the State and parties in related litigation that certain configurations of a map with two performing Black opportunity districts would result in an unconstitutional racial gerrymander and (b) to offer an independent, expert comparison of the main remedial proposals before the special master.

As set forth in this letter, it is the considered view of the Brennan Center that the illegal vote dilution found by the three-judge panel can be addressed only by adopting a robust remedy along the lines proposed by the *Milligan* and *Caster* plaintiffs and that, contrary to assertions by others, applying such a remedy in this case would not violate any constitutional limits on map drawing. By contrast, our assessment is that other proposed

remedies, even some that have arguable merit, either would fail to provide a meaningful opportunity to elect Black-preferred candidates in two districts, as ordered by the district court, or would be less likely to perform consistently over time.

Given that Alabama politics is likely to continue to be characterized by highly racially polarized voting patterns – especially in rural regions and particularly so when a Black candidate is Black voters' preferred candidate – we strongly believe that selecting or creating a map with two *majority* Black districts would provide the best assurance of a complete remedy for the vote dilution injury and, at the same time, would afford a greater share of Black voters in Alabama with a meaningful chance to elect preferred candidates.

We would be happy to respond to any questions you may have.

Opening Observations on Racial Gerrymandering

Both the State and the plaintiffs in *Singleton v. Allen*, Case No. 2:21-cv-01291 (N.D. Ala.), contend that dividing certain counties in a plan would result in an unconstitutional racial gerrymander, although they disagree somewhat on which counties cannot be divided. The State's concerns focus on the division of Mobile County, while the *Singleton* plaintiffs focus their racial gerrymandering arguments primarily on the longstanding division of Jefferson County, home to the City of Birmingham.

However, the arguments of both the State and the *Singleton* plaintiffs assign to Alabama counties a special protected status in congressional redistricting that they have never enjoyed under Alabama law. Provisions of the Alabama Constitution only refer to keeping counties whole for state legislative line drawing, not for congressional districts. Ala. Const., art. IX, § 199-200. And in almost every level of map drawing, the state's practice has not treated counties as indivisible units. Under Alabama's longstanding practice, many counties (including larger ones like Jefferson County and Mobile County) are regularly split in maps.

For example, the State's 2021 and 2023 enacted congressional plans, like the *Milligan* and *Caster* plaintiffs' joint proposed plan, the Singleton plan, and the Pringle plan, all divide Tuscaloosa County. Likewise, until 2023, the City of Montgomery along with the rest of Montgomery County, was divided (between 2010 and 2020, even divided twice) in all of the state's congressional redistricting plans since 1992. And the state's 2021 and 2023 plans, like the *Milligan* and *Caster* plaintiffs' proposed map, all divide Jefferson County, placing the much of Birmingham in a different district than its southern suburbs.

For its part, Mobile County is currently divided among districts more than required for compliance with equal population requirements in multiple state maps drawn after the 2020 Census. These include the State House, State Senate and, most notably, the Alabama's State Board of Education. The SBOE map divides the county much in the way that the *Milligan* and *Caster* plaintiffs recommended in their map. Neither the State nor the *Singleton* plaintiffs have criticized this laundry list of county divisions that have existed for decades for good reason. Aside from the fact they themselves are responsible

for endorsing most of them, none of the aforementioned divisions per se qualify as racial gerrymanders under existing law.

Although racial gerrymandering jurisprudence places some limits on what map drawers can do when remedying vote dilution, the Supreme Court has never endorsed nor imposed limits anywhere near as expansive or radical as those that the State and *Singleton* plaintiffs ask to be applied in this case.

To start, racial gerrymandering case law does not forbid all consideration of race or attention to racial effects in districting. Far from it. Disparities between and within geographic communities often fall heavily along racial lines, especially in the South where officially sanctioned racial segregation shaped public and private decisions alike for decades. Acknowledging those heavily racialized disparities and taking them into account is perfectly legitimate when deciding which overlapping communities of interest are most important to prioritize in a district map and which can, when necessary, yield to accommodate competing demands.

Nor is the mere fact that a map drawer's selection of communities to locate in a given district shifts the demographic composition of that district enough, by itself, to establish a racial gerrymander. In much of the South, the pattern of longstanding of residential segregation means that communities that may have clearly recognizable, non-race based representational needs and interests are also often disproportionately populated by members of one racial group or another. A map drawer is not prohibited from putting a city that is marked by significant social and economic disadvantages in the same district as other similarly situated communities merely because doing so would make the district population more Black. *Miller*, 515 U.S. at 916 ("legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process").

The Supreme Court's racial gerrymandering jurisprudence is clear on the relevant inquiry. In assessing a map, the question is not whether a district divides a county, or even whether the division affected the racial composition of districts. Instead, the inquiry focuses on whether decisions about how and where to divide a county (or another geographic unit) can be rationally explained only as an effort to sort voters by race *and nothing more*. For example, in rejecting Alabama's 2010 era state legislative maps, which divided vote tabulation districts (VTD's) in stubborn pursuit of specific percentages of Black voters, the Supreme Court observed that pursuing "mechanical racial targets" in this manner was unjustifiable. See *Alabama Legis. Black Caucus v. Alabama,* 575 U.S. 254, 266-268. Under the Supreme Court's racial gerrymandering jurisprudence, what is prohibited is not the mere act of joining minority communities together, but rather the haphazard grouping of people who have nothing in common other than their race based on crude, stereotyped assumptions that "members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 629, 647-648 (1993). The State's and *Singleton* plaintiffs' constrictive, alternative interpretation of racially gerrymandering law has never been endorsed by any court.

Viewed with a proper understanding of the law, the attacks levied by both the State and the *Singleton* plaintiffs on the *Milligan* and *Caster* plaintiffs' plan are perplexing. To start, none of the limited number of county splits in the VRA plaintiffs' proposed plan mirror the sort of ruthless surgical, block-by-block separation of white and Black voters that have led courts to conclude that race predominated in the drawing of a district. In *Bush v. Vera*, for example, the court faced a Texas congressional map (shown below) where line drawers hopscotched across three counties in the Dallas-Fort Worth Metroplex to put any sizeable pocket of Black voters in a new Black majority district, bypassing white and Latino precincts along the way and creating a non-compact, bizarrely shaped district that the Supreme Court found "unexplainable in terms other than race." *Bush*, 517 U.S. at 972; *Cooper*, 581 U.S. at 295 (discussing "finger-like" appendages closely tracking racial lines used to create packed Black districts in North Carolina's congressional map).

Similarly, in a recent racial gerrymandering case challenging South Carolina's congressional map, the court found that Republican map drawers committed a racial gerrymander when they made changes to the state's First Congressional District at the voting tabulation district (VTD) level, moving VTDs within the city of Charleston in and out of the district depending on how many Black voters they had. *South Carolina State Conf. of NAACP v. Alexander*, -- F.Supp.3d --, 2023 WL 118775 *6-8 (D.S.C. January 6, 2023).

By contrast, in the VRA plaintiffs' proposed map, when county splits occur, tracks closely to the boundaries of functional and easily identifiable non-racial communities of interest. For example, in dividing Jefferson County, the VRA plaintiffs' proposed map, like the state's 2021 and 2023 redistricting plans, places all but small parts of the city of Birmingham, which is nearly a quarter white and more than 30 percent non-Black, in CD-07. While including Birmingham in CD-07 adds a significant number of Black voters to the district, it also adds sizable numbers of white and other non-Black voters.

Likewise, the maps all leave significant areas with Black voters in the non-Birmingham parts of Jefferson County in CD-06, along with their white neighbors.

Far from cherry picking Black precincts for inclusion in a district, as the map drawers in *Bush*, *Cooper,* and *Alexander* did, the VRA plaintiffs' plan recognizes that the city of Birmingham is a significant community of interest with common concerns and representational needs that cut across racial lines and, accordingly, keeps it substantially whole. The division of Mobile County in the VRA plaintiffs' map similarly corresponds closely to choices the state itself has made in other redistricting plans, most notably its plan for the State Board of Education, which places the part of the city of Mobile, but not the rest of Mobile County, in a district joined to Montgomery and portions of the state's Black Belt. *Singleton v. Merrill*, 582 F.Supp.3d 924, 978 & fn. 8 (2022) (three-judge panel). To be sure, in each instance, there might well be policy arguments for not splitting Mobile or Jefferson counties in this way. But those are the state's policy goals, not constitutional concerns. The Constitution does not require giving priority to a state's policy preferences nor can a state's policy desires or goals outweigh the federal mandate of the Voting Rights Act with respect to remedying vote dilution.[1]

Comparison of Proposed Plans

To assist the special master in preparing three proposed maps for consideration by the district court, the Brennan Center analyzed the electoral performance of districts in the principal remedial plans submitted to the special master and calculated the percentage of Black Alabamians who would be included in an opportunity district under each plan. We view these considerations as important factors that ought to weigh heavily in evaluating the merit of a given plan.

Our quantitative analysis of the mapping proposals shows that the VRA plaintiffs' proposed map stands out because it sets out a full and effective remedy. Specifically, measures of how well preferred candidates perform in competing plans and the extent to which each plan covers the class of plaintiffs in this case reveal only one leading plan in this case.

A. Performance Analysis

The most common way to assess compliance with Section 2 is to measure the extent to which a district map will produce an opportunity to elect for candidates preferred by the plaintiff class. This is commonly derived using a performance analysis, taking returns from multiple prior statewide election returns to gauge the likelihood that minority-preferred candidates in a given district would succeed if an election were held using proposed district boundaries. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006) (using statewide elections to assess whether a district was an effective Latino opportunity district).

[1] To the extent the VRA plaintiffs' map makes some choices based on race, those choices are narrowly tailored to address the vote dilution found by the district court and to ensure that Black voters in a state with some of the most extreme rates of racially polarized voting in the country have reasonable opportunities to elect their preferred candidates.

To examine differences in proposals for redrawing Alabama's congressional map, the Brennan Center conducted a performance analysis using precinct-level results for statewide elections in Alabama between 2016 and 2020 (a total of fifteen elections), comparing (1) the 2023 legislatively enacted plan, (2) the Pringle plan[2], (3) the VRA plaintiffs' joint plan,[3] and (4) the Singleton plan.[4]

Utilizing election data as far back as 2016, we were able to include multiple contests for federal and state offices and assess how variations in turnout behavior during presidential and midterm election cycles could shift a district's performance. This election set includes both elections where the Black-preferred candidate was white and, more probative ones, where the Black-preferred candidate was Black.

Figure 1

Black-Preferred Candidates' Election Performance by Congressional Plan

PLAN	BLACK OPPORTUNITY DISTRICT(S)	NUMBER OF RECENT ELECTIONS WHERE THE BLACK-PREFERRED CANDIDATE WINS	AVERAGE PERCENTAGE OF VOTES RECEIVED BY BLACK-PREFERRED CANDIDATES
2021 (Struck Down)	AL-07	15/15	67.9%
2023 (Struck Down)	AL-07	15/15	63.6%
VRA Plaintiffs (Proposed)	AL-02 AL-07	15/15 15/15	57.7% 67.5%
Singleton (Proposed)	AL-06 AL-07	15/15 15/15	57.4% 56.2%
Pringle (Proposed)	AL-02 (Alleged) AL-07	4/15 15/15	49.5% 64.4%

Source: Brennan Center analysis of proposed congressional plans

The Legislature's 2023 Plan

Unsurprisingly, the State's invalidated 2023 plan was a decided failure in terms of the directive to provide Black voters with the ability to elect their preferred candidates in two districts.

[2] Case No. 2:23-mc-01181, Doc. #6.

[3] Case No. 2:23-mc-01181, Doc. #7.

[4] Case No. 2:23-mc—01181, Doc. #3.

Under the 2023 plan, CD-02 was redrawn with a Black voting age population of just over 40 percent, which the State contended was adequate to meet its obligation to remedy the vote dilution found by the district court.

However, CD-02 would have elected just one Black-preferred candidate in the recent fifteen elections we examined. The lone exception was the 2017 special election for U.S. Senate, which was atypical due to its off-schedule date, a high-profile and controversial campaign, lower overall turnout, but higher-than-average participation among Black voters. In the each of the remaining fourteen contests, the Black-preferred candidates would only receive between 44 and 48 percent of the district's vote.

The Pringle Plan

The Pringle plan does only marginally better. Like the state's 2023 plan, the Pringle plan purports to respond to the district court's order by redrawing CD-02, in this case to be a district that is 42.5 percent Black.[5]

However, Black-preferred candidates in the Pringle plan's version of CD-02 would prevail in only four of the fifteen recent elections that we examined: the 2017 special election for U.S. Senate, the 2020 election for U.S. Senate, the 2018 election for Chief Justice of the Alabama Supreme Court, and the 2018 election for Attorney General. Except for the 2017 Senate special election (which is exceptional for reasons described above), Black-preferred candidates prevailed in the other contests by less than two percentage points. Notably, none of the three races where Black-preferred candidates would prevail in this proposed district featured a Black candidate as the preferred candidate, which is relevant in evaluating the ability of voters to elect candidates when the preferred candidate who emerges from the primary is Black.

The Milligan and Caster Plaintiffs' Plan and the Singleton Plan

By contrast, the *Milligan* and *Caster* plaintiffs' joint plan and the Singleton plan both would allow Black-preferred candidates to prevail in two districts in all fifteen of the recent elections we analyzed. However, we found some key performance differences which, on balance, suggest that the *Milligan* and *Caster* plaintiffs' plan would be a more effective and sure-footed remedy if applied in practice.

The Singleton plan would address the vote dilution found by the district court by creating two *non-majority* Black districts: CD-06 redrawn to include the whole of Jefferson County, including Birmingham, and CD-07, which it would transform into a more solidly rural district covering much of the Black Belt. Under the Singleton plan, heavily urban CD-06 would have a BVAP of 39.6 percent, while the more rural CD-07 would have a BVAP of 49.4 percent.[6]

[5] Doc. #6, Exhibit 2.

[6] Doc. #3 at 7.

On average, Black-preferred candidates would win an average of vote share of 56 percent in CD-07 and 57 percent in CD-06 under the Singleton plan. But, worryingly, the average performance in CD-07, the Singleton plan's much more rural configuration of a Black Belt district, is slightly lower than the average performance in its CD-06, anchored by the urban center of Birmingham. Given that the Black Belt has some of the highest levels of racially polarized voting in Alabama and relatively lower levels of Black voter turnout, this lagging measure of performance in CD-07 suggests the possibility that the district might not, in fact, perform as an opportunity district in a hyper-polarized climate where white voters are exceptionally motivated and mobilized. This concern is all the more pressing insofar as CD-07 is drawn with no current Black-preferred incumbent running for the seat.

Unlike the Singleton plan, the proposal from the *Milligan and Caster* plaintiffs would remedy the vote dilution much more completely by creating two Black *majority* districts (CD-02 and CD-07).[7] As with the Singleton plan, our analysis of this plan shows that the preferred candidates of Black voters would consistently win all fifteen contests in both these districts. However, the average vote share won by Black-preferred candidates under the *Milligan* and *Caster* plaintiffs' plan is consistently higher than the Singleton plan, with Black-preferred candidates winning on average nearly 58 percent of the vote in the plan's version of CD-02 and nearly 68 percent in its CD-07. The higher average performance levels for this plan are important because they provide greater assurance that the opportunity to elect in both these districts will be consistent and effective across multiple of elections and all reasonably foreseeable variations in voter turnout.

B. Percentage of Black Alabamians Included in the Remedy

In addition to assessing how consistently a district will yield a successful preferred candidate, it is also important to consider in a quantitative way how well each of the maps extend a meaningful remedy to the plaintiff class in question, *i.e.*, how many Black voters in Alabama would directly benefit from the adopted remedy. We assert that the share of the Black voters who can exercise an equal opportunity to elect in a district is a key point of comparison for how "complete" a given remedy might be and that it should significantly inform the special master's review of the proposals.

As a baseline for this analysis, we began with the invalidated 2021 map that included only one opportunity district (CD-07, a district with a BVAP under 56 percent). In the decidedly racially polarized landscape in Alabama, six of the state's seven congressional districts each had a Black voting age population far too low for Black voters' preferred candidates to have any reasonable chance of electoral success. More than two of every three Black voters in Alabama were located in a congressional district with no cognizable opportunity to elect preferred candidates, a high rate of exclusion for a state with a Black population of almost 30 percent.[8]

[7] Doc. #7, Exhibit 3 at 3.

[8] Of course, some of the excluded population is either geographically dispersed (e.g., rural counties northeast of the Black Belt) or in distant urban areas (*e.g.,* Madison County). Nonetheless, almost 70 percent of Alabama's Black voters are excluded from political opportunity in the illegal map.

We also examined Alabama's recently invalidated 2023 plan, a supposed remedial map that shockingly manages to exclude even more Black voters from directly enjoying political opportunity. Under the 2023 map, the reconfigured CD-07 remains the lone majority Black district (with a notably lower BVAP of 50.7 percent), joined by a second 40 percent BVAP district that pairs eastern Black Belt counties including Montgomery County with counties of the Wiregrass region. Due to the smaller Black population in the adjusted version of CD-07 and the state's refusal to create meaningful political opportunity in the new CD-02, the share of excluded Black voters statewide in this plan actually increases to nearly 71.5 percent.

The Pringle plan, likewise, also would leave the vast majority of Black Alabamians in districts where they have no realistic opportunity to elect preferred candidates. Only 29 percent of Alabama's Black voters would live in an opportunity district under the Pringle plan.

The Singleton plan, by contrast, would do slightly better on this metric, but even still, more than half of Alabama's Black voters, including some of the *Milligan* and *Caster* plaintiffs, would continue to live outside of an opportunity district.

Of all the maps we reviewed, only the *Milligan* and *Caster* Plaintiffs map extends a meaningful remedy to a majority of Alabama's Black voters, with 58 percent of the state's Black voters living either in the Black majority CD-02 or in Black majority CD-07. That the performance analysis also reveals that these districts provide a more reliable and effective opportunity to Black voters to elect preferred candidates.

Figure 2

Black Voting Age Population (BVAP) in Alabama Congressional Plans

PLAN	BLACK OPPORTUNITY DISTRICT(S)	DISTRICT BVAP	SHARE OF STATEWIDE BVAP INSIDE OPPORTUNITY VOTING DISTRICTS
2021 (Struck Down)	AL-07	55.0%	31.0%
2023 (Struck Down)	AL-07	50.4%	28.5%
VRA Plaintiffs (Proposed)	AL-02 AL-07	49.7% 54.2%	58.0%
Singleton (Proposed)	AL-06 AL-07	39.6% 49.4%	49.1%
Pringle (Proposed)	AL-07	50.8%	29.0%

Source: Brennan Center analysis of proposed congressional plans. Revised 9/14/2023.

Conclusion

It is vital that the remedial map adopted by the district court offer Black Alabamians a full, sustainable, and meaningful remedy for the vote dilution created by the State's 2021

congressional districting plan. After enduring a complete election cycle without a legal map, voters in the state are entitled to a map that addresses the identified harms in a complete, not piecemeal manner. Based on the Brennan Center's assessment, of the main maps submitted to the special master, only the *Milligan* and *Caster* plaintiffs would provide this type of robust remedy and, at the same time, apply a remedy that directly affects a majority of the state's Black voters. While some proposals are not without their merits, they also exclude most Black Alabamians from directly enjoying equal opportunity and carry greater risk of non-performance at some point this decade. Accordingly, the Brennan Center urges the special master to base his three map proposals for the district court on the proposal offered by the *Milligan* and *Caster* plaintiffs.

Respectfully,

Kareem U. Crayton
Michael C. Li

Addendum

Analysis of Black Voting Age Population by Plan

2021 Plan						
Voting Age Population						
district	vap	white	latino	any_black	black_share	
1	557,535	367,960	18,014	141,586	25.39%	Black opportunity districts
2	557,677	345,900	19,933	166,597	29.87%	District 7
3	564,281	382,226	17,334	139,801	24.78%	Statewide Black population living outside opportunity districts
4	556,133	458,324	31,463	42,234	7.59%	693,764 68.96%
5	561,187	397,809	29,646	99,872	17.80%	
6	552,286	393,028	29,711	103,674	18.77%	
7	568,067	219,297	20,755	312,319	54.98%	

2023 Plan						
Voting Age Population						
district	total	white	latino	any_black	black_share	
1	557,393	373,897	18,188	136,085	24.41%	Black opportunity districts
2	559,067	293,496	20,932	221,455	39.61%	District 7
3	564,595	405,145	17,599	115,858	20.52%	Statewide Black population living outside opportunity districts
4	555,217	459,881	33,850	39,581	7.13%	719,665 71.53%
5	560,406	393,794	29,677	101,270	18.07%	
6	552,230	395,669	25,834	105,416	19.09%	
7	568,258	242,662	20,776	286,418	50.40%	

VRA						
Voting Age Population						
district	vap	white	latino	any_black	black_share	
1	558,142	423,469	22,343	82,197	14.73%	Black opportunity districts
2	557,855	241,133	16,239	277,488	49.74%	Districts 2 and 7
3	565,115	402,042	16,664	120,869	21.39%	Statewide Black population living outside opportunity districts
4	556,133	458,324	31,463	42,234	7.59%	422,740 42.02%
5	561,187	397,809	29,646	99,872	17.80%	
6	554,731	422,414	27,692	77,568	13.98%	
7	564,003	219,353	22,809	305,855	54.23%	

Singleton						
Voting Age Population						
district	vap	white	latino	any_black	black_share	
1	559,860	376,170	18,211	136,199	24.33%	Black opportunity districts
2	553,805	360,646	21,907	144,213	26.04%	Districts 6 and 7
3	556,784	414,815	23,021	95,811	17.21%	Statewide Black population living outside opportunity districts
4	550,055	457,838	33,839	33,419	6.08%	511,475 50.84%
5	569,546	406,312	28,251	101,833	17.88%	
6	562,843	285,649	23,232	231,961	41.21%	
7	564,273	263,114	18,395	262,647	46.55%	

Pringle						
Voting Age Population						
district	vap	white	latino	any_black	black_share	
1	559,028	375,378	18,196	136,122	24.35%	
2	565,112	284,945	20,540	237,000	41.94%	Black opportunity districts
3	572,525	407,759	16,856	121,999	21.31%	District 7
4	566,539	467,384	31,735	42,825	7.56%	Statewide Black population living outside opportunity districts
5	564,246	400,356	29,733	100,067	17.73%	723,956 71%
6	569,915	427,483	28,656	85,943	15.08%	
7	581,091	244,371	23,429	295,286	50.82%	

Analysis of Performance by Black-Preferred Candidates in Recent Statewide Elections by Plan

VRA Plaintiffs Plan

		D1	D2	D3	D4	D5	D6	D7
2016 Pres	Dem	22.56%	55.53%	28.35%	18.60%	32.57%	25.02%	64.84%
2016 Pres	GOP	77.44%	44.47%	71.65%	81.40%	67.43%	74.98%	35.16%
2016 Sena	Dem	23.24%	54.37%	29.39%	21.94%	32.72%	25.23%	63.34%
2016 Sena	GOP	76.76%	45.63%	70.61%	78.06%	67.28%	74.77%	36.66%
2017 Sena	Dem	36.42%	66.19%	42.99%	31.79%	49.82%	44.05%	75.77%
2017 Sena	GOP	63.58%	33.81%	57.01%	68.21%	50.18%	55.95%	24.23%
2018 Gove	Dem	27.23%	56.28%	32.00%	25.19%	38.50%	33.36%	67.89%
2018 Gove	GOP	72.77%	43.72%	68.00%	74.81%	61.50%	66.64%	32.11%
2018 Lt. G	Dem	25.79%	56.58%	30.89%	22.11%	36.70%	29.53%	66.87%
2018 Lt. G	GOP	74.21%	43.42%	69.11%	77.89%	63.30%	70.47%	33.13%
2018 ATG	Dem	28.43%	59.12%	32.98%	25.64%	38.95%	32.26%	68.34%
2018 ATG	GOP	71.57%	40.88%	67.02%	74.36%	61.05%	67.74%	31.66%
2018 SoS	Dem	26.03%	56.73%	31.14%	22.36%	37.36%	29.88%	66.64%
2018 SoS	GOP	73.97%	43.27%	68.86%	77.64%	62.64%	70.12%	33.36%
2018 Audi	Dem	26.64%	57.55%	31.48%	23.15%	37.91%	30.40%	67.04%
2018 Audi	GOP	73.36%	42.45%	68.52%	76.85%	62.09%	69.60%	32.96%
2018 SSC	Dem	29.10%	59.90%	34.28%	26.25%	40.05%	36.33%	69.26%
2018 SSC	GOP	70.90%	40.10%	65.72%	73.75%	59.95%	63.67%	30.74%
2018 SSC	Dem	26.16%	57.13%	31.38%	23.56%	37.94%	29.99%	67.44%
2018 SSC	GOP	73.84%	42.87%	68.62%	76.44%	62.06%	70.01%	32.56%
2018 PSC	Dem	26.36%	57.61%	31.61%	23.05%	37.84%	30.11%	67.54%
2018 PSC	GOP	73.64%	42.39%	68.39%	76.95%	62.16%	69.89%	32.46%
2018 PSC	Dem	26.52%	57.65%	31.93%	23.77%	38.55%	30.55%	67.64%
2018 PSC	GOP	73.48%	42.35%	68.07%	76.23%	61.45%	69.45%	32.36%
2020 Pres	Dem	24.86%	56.05%	29.44%	18.80%	36.23%	29.96%	66.02%
2020 Pres	GOP	75.14%	43.95%	70.56%	81.20%	63.77%	70.04%	33.98%
2020 Sena	Dem	28.48%	58.23%	31.87%	22.06%	39.49%	32.68%	67.60%
2020 Sena	GOP	71.52%	41.77%	68.13%	77.94%	60.51%	67.32%	32.40%
2020 PSC	Dem	25.82%	56.60%	30.47%	20.56%	36.68%	30.70%	66.55%
2020 PSC	GOP	74.18%	43.40%	69.53%	79.44%	63.32%	69.30%	33.45%

Pringle Plan

		D1	D2	D3	D4	D5	D6	D7
2016 Pres	Dem	33.90%	47.08%	28.37%	18.60%	32.57%	26.12%	61.39%
2016 Pres	GOP	66.10%	52.92%	71.63%	81.40%	67.43%	73.88%	38.61%
2016 Sena	Dem	33.64%	46.61%	29.39%	21.94%	32.72%	26.30%	60.13%
2016 Sena	GOP	66.36%	53.39%	70.61%	78.06%	67.28%	73.70%	39.87%
2017 Sena	Dem	48.39%	58.46%	43.00%	31.79%	49.82%	45.05%	72.93%
2017 Sena	GOP	51.61%	41.54%	57.00%	68.21%	50.18%	54.95%	27.07%
2018 Gove	Dem	38.46%	47.78%	32.01%	25.19%	38.50%	34.30%	64.95%
2018 Gove	GOP	61.54%	52.22%	67.99%	74.81%	61.50%	65.70%	35.05%
2018 Lt. G	Dem	36.69%	48.55%	30.90%	22.11%	36.70%	30.55%	63.73%
2018 Lt. G	GOP	63.31%	51.45%	69.10%	77.89%	63.30%	69.45%	36.27%
2018 ATG	Dem	39.18%	50.98%	32.99%	25.64%	38.95%	33.23%	65.50%
2018 ATG	GOP	60.82%	49.02%	67.01%	74.36%	61.05%	66.77%	34.50%
2018 SoS	Dem	36.87%	48.60%	31.15%	22.36%	37.36%	30.87%	63.63%
2018 SoS	GOP	63.13%	51.40%	68.85%	77.64%	62.64%	69.13%	36.37%
2018 Audi	Dem	37.63%	49.30%	31.48%	23.15%	37.91%	31.04%	64.10%
2018 Audi	GOP	62.37%	50.70%	68.52%	76.85%	62.09%	68.96%	35.90%
2018 SSC	Dem	40.84%	50.83%	34.28%	26.25%	40.05%	37.25%	66.40%
2018 SSC	GOP	59.16%	49.17%	65.72%	73.75%	59.95%	62.75%	33.60%
2018 SSC	Dem	37.09%	48.88%	31.39%	23.56%	37.94%	31.03%	64.39%
2018 SSC	GOP	62.91%	51.12%	68.61%	76.44%	62.06%	68.97%	35.61%
2018 PSC	Dem	37.26%	49.42%	31.62%	23.05%	37.84%	31.13%	64.52%
2018 PSC	GOP	62.74%	50.58%	68.38%	76.95%	62.16%	68.87%	35.48%
2018 PSC	Dem	37.40%	49.50%	31.94%	23.77%	38.55%	31.53%	64.66%
2018 PSC	GOP	62.60%	50.50%	68.06%	76.23%	61.45%	68.47%	35.34%
2020 Pres	Dem	34.79%	47.97%	29.45%	18.80%	36.23%	30.91%	62.51%
2020 Pres	GOP	65.21%	52.03%	70.55%	81.20%	63.77%	69.09%	37.49%
2020 Sena	Dem	38.17%	50.24%	31.88%	22.06%	39.49%	33.58%	64.28%
2020 Sena	GOP	61.83%	49.76%	68.12%	77.94%	60.51%	66.42%	35.72%
2020 PSC	Dem	35.47%	48.60%	30.48%	20.56%	36.68%	31.65%	63.23%
2020 PSC	GOP	64.53%	51.40%	69.52%	79.44%	63.32%	68.35%	36.77%

Singleton Plan 1

		D1	D2	D3	D4	D5	D6	D7
2016 Pres	Dem	33.80%	31.47%	25.20%	15.34%	33.51%	53.39%	53.82%
2016 Pres	GOP	66.20%	68.53%	74.80%	84.66%	66.49%	46.61%	46.18%
2016 Sena	Dem	33.57%	31.89%	26.69%	18.37%	34.10%	51.78%	52.44%
2016 Sena	GOP	66.43%	68.11%	73.31%	81.63%	65.90%	48.22%	47.56%
2017 Sena	Dem	48.27%	44.68%	40.86%	26.66%	51.25%	68.61%	65.34%
2017 Sena	GOP	51.73%	55.32%	59.14%	73.34%	48.75%	31.39%	34.66%
2018 Gove	Dem	38.38%	33.69%	30.75%	21.05%	39.70%	58.55%	55.96%
2018 Gove	GOP	61.62%	66.31%	69.25%	78.95%	60.30%	41.45%	44.04%
2018 Lt. G	Dem	36.61%	33.72%	28.47%	18.12%	38.16%	55.97%	55.09%
2018 Lt. G	GOP	63.39%	66.28%	71.53%	81.88%	61.84%	44.03%	44.91%
2018 ATG	Dem	39.10%	35.95%	30.95%	21.06%	40.69%	58.02%	57.57%
2018 ATG	GOP	60.90%	64.05%	69.05%	78.94%	59.31%	41.98%	42.43%
2018 SoS	Dem	36.79%	34.10%	28.62%	18.44%	38.76%	56.19%	54.87%
2018 SoS	GOP	63.21%	65.90%	71.38%	81.56%	61.24%	43.81%	45.13%
2018 Audi	Dem	37.54%	34.40%	29.25%	19.07%	39.38%	56.44%	55.81%
2018 Audi	GOP	62.46%	65.60%	70.75%	80.93%	60.62%	43.56%	44.19%
2018 SSC	Dem	40.75%	36.00%	32.93%	22.04%	41.45%	61.36%	58.22%
2018 SSC	GOP	59.25%	64.00%	67.07%	77.96%	58.55%	38.64%	41.78%
2018 SSC	Dem	37.01%	34.12%	29.11%	19.32%	39.44%	56.35%	55.88%
2018 SSC	GOP	62.99%	65.88%	70.89%	80.68%	60.56%	43.65%	44.12%
2018 PSC	Dem	37.18%	34.54%	29.23%	18.76%	39.46%	56.71%	55.99%
2018 PSC	GOP	62.82%	65.46%	70.77%	81.24%	60.54%	43.29%	44.01%
2018 PSC	Dem	37.32%	34.70%	29.62%	19.47%	40.14%	57.01%	56.08%
2018 PSC	GOP	62.68%	65.30%	70.38%	80.53%	59.86%	42.99%	43.92%
2020 Pres	Dem	34.69%	33.12%	27.29%	16.05%	36.77%	56.02%	54.40%
2020 Pres	GOP	65.31%	66.88%	72.71%	83.95%	63.23%	43.98%	45.60%
2020 Sena	Dem	38.07%	35.84%	29.87%	19.06%	40.12%	58.00%	56.32%
2020 Sena	GOP	61.93%	64.16%	70.13%	80.94%	59.88%	42.00%	43.68%
2020 PSC	Dem	35.37%	34.02%	28.56%	17.69%	37.49%	56.12%	55.02%
2020 PSC	GOP	64.63%	65.98%	71.44%	82.31%	62.51%	43.88%	44.98%

2021 Plan

		D1	D2	D3	D4	D5	D6	D7
2016 Pres	Dem	34.95%	33.24%	32.14%	18.60%	32.57%	29.87%	65.72%
2016 Pres	GOP	65.05%	66.76%	67.86%	81.40%	67.43%	70.13%	34.28%
2016 Sena	Dem	34.58%	33.62%	32.97%	21.94%	32.72%	29.79%	64.12%
2016 Sena	GOP	65.42%	66.38%	67.03%	78.06%	67.28%	70.21%	35.88%
2017 Sena	Dem	49.14%	45.61%	47.03%	31.79%	49.82%	48.76%	76.12%
2017 Sena	GOP	50.86%	54.39%	52.97%	68.21%	50.18%	51.24%	23.88%
2018 Gove	Dem	39.40%	35.70%	35.44%	25.19%	38.50%	38.05%	68.04%
2018 Gove	GOP	60.60%	64.30%	64.56%	74.81%	61.50%	61.95%	31.96%
2018 Lt. G	Dem	37.69%	35.61%	34.65%	22.11%	36.70%	34.41%	67.16%
2018 Lt. G	GOP	62.31%	64.39%	65.35%	77.89%	63.30%	65.59%	32.84%
2018 ATG	Dem	40.31%	38.76%	36.40%	25.64%	38.95%	36.86%	68.66%
2018 ATG	GOP	59.69%	61.24%	63.60%	74.36%	61.05%	63.14%	31.34%
2018 SoS	Dem	37.89%	35.78%	34.85%	22.36%	37.36%	34.68%	66.98%
2018 SoS	GOP	62.11%	64.22%	65.15%	77.64%	62.64%	65.32%	33.02%
2018 Audi	Dem	38.61%	36.72%	35.07%	23.15%	37.91%	35.12%	67.38%
2018 Audi	GOP	61.39%	63.28%	64.93%	76.85%	62.09%	64.88%	32.62%
2018 SSC	Dem	41.91%	38.43%	37.83%	26.25%	40.05%	40.97%	69.58%
2018 SSC	GOP	58.09%	61.57%	62.17%	73.75%	59.95%	59.03%	30.42%
2018 SSC	Dem	38.13%	36.03%	35.09%	23.56%	37.94%	34.90%	67.69%
2018 SSC	GOP	61.87%	63.97%	64.91%	76.44%	62.06%	65.10%	32.31%
2018 PSC	Dem	38.31%	36.53%	35.31%	23.05%	37.84%	35.01%	67.87%
2018 PSC	GOP	61.69%	63.47%	64.69%	76.95%	62.16%	64.99%	32.13%
2018 PSC	Dem	38.44%	36.70%	35.60%	23.77%	38.55%	35.39%	67.98%
2018 PSC	GOP	61.56%	63.30%	64.40%	76.23%	61.45%	64.61%	32.02%
2020 Pres	Dem	35.71%	35.11%	32.77%	18.80%	36.23%	34.77%	66.27%
2020 Pres	GOP	64.29%	64.89%	67.23%	81.20%	63.77%	65.23%	33.73%
2020 Sena	Dem	39.10%	37.69%	35.18%	22.06%	39.49%	37.32%	67.82%
2020 Sena	GOP	60.90%	62.31%	64.82%	77.94%	60.51%	62.68%	32.18%
2020 PSC	Dem	36.46%	35.99%	33.83%	20.56%	36.68%	35.38%	66.74%
2020 PSC	GOP	63.54%	64.01%	66.17%	79.44%	63.32%	64.62%	33.26%

2023 Plan

		D1	D2	D3	D4	D5	D6	D7
2016 Pres	Dem	33.93%	44.39%	28.40%	18.46%	32.68%	28.93%	60.66%
2016 Pres	GOP	66.07%	55.61%	71.60%	81.54%	67.32%	71.07%	39.34%
2016 Sena	Dem	33.67%	44.08%	29.78%	21.49%	32.81%	28.85%	59.41%
2016 Sena	GOP	66.33%	55.92%	70.22%	78.51%	67.19%	71.15%	40.59%
2017 Sena	Dem	48.42%	56.03%	43.79%	31.84%	49.69%	47.08%	72.19%
2017 Sena	GOP	51.58%	43.97%	56.21%	68.16%	50.31%	52.92%	27.81%
2018 Gov	Dem	38.51%	45.30%	32.58%	25.35%	38.60%	36.24%	63.94%
2018 Gove	GOP	61.49%	54.70%	67.42%	74.65%	61.40%	63.76%	36.06%
2018 Lt. G	Dem	36.73%	45.92%	31.21%	22.16%	36.76%	32.83%	62.92%
2018 Lt. G	GOP	63.27%	54.08%	68.79%	77.84%	63.24%	67.17%	37.08%
2018 ATG	Dem	39.22%	48.46%	33.31%	25.31%	39.16%	35.57%	64.72%
2018 ATG	GOP	60.78%	51.54%	66.69%	74.69%	60.84%	64.43%	35.28%
2018 SoS	Dem	36.91%	46.01%	31.49%	22.24%	37.44%	33.16%	62.89%
2018 SoS	GOP	63.09%	53.99%	68.51%	77.76%	62.56%	66.84%	37.11%
2018 Aud	Dem	37.67%	46.79%	31.77%	23.09%	37.99%	33.73%	63.16%
2018 Audi	GOP	62.33%	53.21%	68.23%	76.91%	62.01%	66.27%	36.84%
2018 SSC	Dem	40.88%	48.33%	34.88%	26.05%	40.13%	39.25%	65.76%
2018 SSC	GOP	59.12%	51.67%	65.12%	73.95%	59.87%	60.75%	34.24%
2018 SSC	Dem	37.13%	46.28%	31.82%	23.52%	38.03%	33.32%	63.50%
2018 SSC	GOP	62.87%	53.72%	68.18%	76.48%	61.97%	66.68%	36.50%
2018 PSC	Dem	37.30%	46.84%	32.00%	22.95%	37.90%	33.49%	63.70%
2018 PSC	GOP	62.70%	53.16%	68.00%	77.05%	62.10%	66.51%	36.30%
2018 PSC	Dem	37.44%	46.91%	32.36%	23.57%	38.66%	33.89%	63.85%
2018 PSC	GOP	62.56%	53.09%	67.64%	76.43%	61.34%	66.11%	36.15%
2020 Pres	Dem	34.82%	45.59%	29.29%	19.13%	36.21%	33.24%	61.69%
2020 Pres	GOP	65.18%	54.41%	70.71%	80.87%	63.79%	66.76%	38.31%
2020 Sena	Dem	38.19%	47.91%	31.85%	22.33%	39.45%	35.81%	63.44%
2020 Sena	GOP	61.81%	52.09%	68.15%	77.67%	60.55%	64.19%	36.56%
2020 PSC	Dem	35.49%	46.23%	30.44%	20.89%	36.65%	33.87%	62.39%
2020 PSC	GOP	64.51%	53.77%	69.56%	79.11%	63.35%	66.13%	37.61%

The New York Times | https://www.nytimes.com/2023/05/15/us/politics/supreme-court-south-carolina-voting-map.html

Supreme Court to Consider South Carolina Voting Map Ruled a Racial Gerrymander

A unanimous three-judge panel found that a congressional voting district anchored in Charleston, S.C., violated the Constitution's equal protection clause.

By Adam Liptak

May 15, 2023

WASHINGTON — The Supreme Court said on Monday that it would decide whether a congressional voting district in South Carolina should be restored after a lower court struck it down as an unconstitutional racial gerrymander.

A unanimous three-judge panel of the Federal District Court in Columbia, S.C., ruled in January that the state's First Congressional District, drawn after the 2020 census, violated the Constitution by making race the predominant factor.

The district, anchored in Charleston, had elected a Republican every year since 1980, with the exception of 2018. But the 2020 race was close, with less than one percentage point separating the candidates, and Republican lawmakers "sought to create a stronger Republican tilt" in the district after the 2020 census, the panel wrote.

The lawmakers achieved that goal, the panel found, in part by the "bleaching of African American voters out of the Charleston County portion of Congressional District No. 1."

The new House map moved 62 percent of Black voters in Charleston County from the First District to the Sixth District, a seat that Representative James E. Clyburn, a Black Democrat, has held for 30 years.

The move helped make the new First District a Republican stronghold. In November, Nancy Mace, the Republican incumbent, won re-election by 14 percentage points.

Republican lawmakers acknowledged that they had redrawn the First District for partisan gain. But they said they had not considered race in the process.

The panel ruled that the district's boundaries must be redrawn before future elections are held. But the panel rejected challenges to two other House voting districts, saying that civil rights groups had failed to demonstrate that the districts had been predominantly drawn to dilute Black voting power.

The Supreme Court has called for very close scrutiny of a state's actions when race was shown to be the predominant reason in drawing legislative districts. That principle, rooted in the Constitution's equal protection clause, is often invoked to limit the creation of districts that empower minority voters.

In the new case, Alexander v. South Carolina State Conference of the N.A.A.C.P., No. 22-807, the challenge came from the opposite direction, saying that the map hurt Black voters by moving them from one congressional district to another.

The Supreme Court will soon decide whether to allow a congressional map drawn by Republican lawmakers in Alabama. A lower court had said the map diluted the power of Black voters, violating the Voting Rights Act. The South Carolina case poses different questions, centered on the Constitution's equal protection principles.

In their Supreme Court appeal, South Carolina Republicans argued that the panel should have presumed that they had acted in good faith, as required by Supreme Court precedent, and analyzed the district as a whole.

"The result," the lawmakers wrote, quoting from an earlier decision, "is a thinly reasoned order that presumes bad faith, erroneously equates the purported racial effect of a single line in Charleston County with racial predominance across District 1, and is riddled with 'legal mistakes' that improperly relieved plaintiffs of their 'demanding' burden to prove that race was the 'predominant consideration.'"

The challengers, represented by the American Civil Liberties Union and the N.A.A.C.P. Legal Defense and Educational Fund, told the justices that "the panel correctly found that race was the gerrymander's primary vehicle."

"That predominant reliance on race is impermissible even if mapmakers used race as a proxy for politics," the challengers' brief said.

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

A version of this article appears in print on , Section A, Page 21 of the New York edition with the headline: Justices Will Weigh Racial Bias Allegations in South Carolina Map

Justices take up challenge to purported racial gerrymander in South Carolina's congressional map

amy-howe

SCOTUS NEWS

on May 15, 2023 at 1:57 pm

The South Carolina State House building in Columbia. In *Alexander v. South Carolina Conference of the NAACP*, Republican legislators argue that they had focused on politics, not race, when drawing new district lines. (Farragutful via Wikimedia)

The court will hear oral argument next term in a challenge to the congressional redistricting plan that

South Carolina's Republican-controlled legislature enacted in the wake of the 2020 census. The justices added *Alexander v. South Carolina Conference of the NAACP* to their merits calendar for the 2023-24 term as well as three other cases, including a dispute arising from former President Donald Trump's lease of a government-owned building in Washington, D.C., and two cases involving the Armed Career Criminal Act.

The South Carolina case began as part of a broader challenge, filed by the South Carolina NAACP and an individual voter, to three of the state's seven congressional districts. A three-judge panel ruled in January that one of the districts was an unconstitutional racial gerrymander because the legislators had deliberately moved tens of thousands of Black voters to a different district, making the district a safe seat for Republicans. The panel ordered the state to draw a new map.

The legislators appealed to the Supreme Court. They stressed that the three-judge panel presumed that they had acted in bad faith, with a focus on race in drawing the district. But in fact, they emphasized, they had focused on politics – specifically, trying to ensure "a stronger Republican tilt" in the district. They cautioned that if the panel's decision is allowed to stand, it would "place state legislatures in an impossible bind: it would improperly turn the purported racial *effect* . . . of pursuing political goals and traditional criteria into racial *predominance* across an entire district."

The challengers urged the justices to leave the panel's ruling in place. They told the court that "[w]hether partisanship was the Legislature's ultimate goal (though Defendants disclaimed it at the time) or a post-hoc rationale, the panel correctly found that race was the gerrymander's primary vehicle." The legislators' reliance on race "is impermissible even if mapmakers used race as a proxy for politics," they insisted.

The South Carolina case falls under the Supreme Court's mandatory jurisdiction – that is, the narrow category of appeals in which it must take some action. On Monday, the justices noted "probable jurisdiction," a step that puts the case on their merits docket for argument sometime next term.

The court granted the Biden administration's request to weigh in on a dispute dating back to the Trump administration, involving efforts by a group of Democratic members of Congress to obtain information from the General Services Administration. The members contended that a 2013 lease for the Old Post Office, a government-owned building in Washington, D.C., between the GSA and a company owned in part by former President Donald Trump posed "numerous issues" requiring "congressional oversight." Relying on 5 U.S.C. § 2954, a federal law enacted in 1928 that directs executive agencies to respond to requests for information from at least seven members of the House Oversight Committee, in 2017 they asked the GSA for documents – such as correspondence with Trump's company and reports showing the hotel's revenue and expenses – related to the lease.

When the GSA declined to turn over some of the requested documents, the members went to federal court. U.S. District Judge Amit Mehta dismissed the case. He agreed with the government that the

members lacked standing – that is, a legal right to bring the case.

On appeal, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed. In an opinion by Judge Patricia Millett, the majority compared the members' right to go to court to challenge the denial of information under Section 2954 to standing to sue for the denial of requests under laws like the Freedom of Information Act.

Millett also "rejected the government's claim that the members of Congress do not have standing to sue because any injury from the denial of their request would only harm Congress as an institution, rather than them personally. "Section 2954 vested them specifically and particularly with the right to obtain information," she reasoned. "The 34 other members of the Committee who never sought the information suffered no deprivation when it was withheld" – nor did the other members of the House of Representatives who did not sit on the committee.

The government went to the Supreme Court last fall, asking the justices to weigh in, and after considering the case at seven consecutive conferences, the justices agreed to take up the case.

The justices also agreed to take up a pair of cases involving the Armed Career Criminal Act, which extends the minimum sentence – from 10 years to 15 – for an individual who had been convicted of a felony and possesses a firearm when that person has at least three "serious drug offenses." The question that the court agreed to decide is whether the definition of "serious drug offense" in the ACCA incorporates the federal drug schedules that were in effect when the individual committed the firearm offense, or instead the schedules that were in effect at the time of the state drug offenses. The justices granted review in two cases presenting this question, *Brown v. United States* and *Jackson v. United States*, and consolidated them for one hour of oral argument.

Eight years ago, the Supreme Court ruled that a prisoner who challenges the method that the state plans to use to execute him must show that another method is feasible and "readily implemented." Last year the U.S. Court of Appeals for the 11th Circuit ruled that Kenneth Smith, a prisoner in Alabama, had met that requirement by pointing to a state law adopting nitrogen hypoxia as an alternative to lethal injection. Alabama asked the court to reverse the lower court's decision, arguing that the mere existence of the law was not enough, but on Monday the justices – over a dissent from Justice Clarence Thomas, joined by Justice Samuel Alito – rejected that request.

Smith was convicted of the 1988 robbery and murder of Elizabeth Sennett. Prosecutors contended that Sennett's husband, a minister, paid both Smith and John Forrest Parker $1,000 each to kill Sennett so that he could collect the life insurance for her death. Sennett's husband died by suicide shortly after her death; Parker was executed in 2010 for his role in her murder. The jury that convicted Smith voted 11-1 to sentence him to life in prison, but the trial judge overrode that determination (a power the court no longer has) and sentenced him to death.

Smith filed a federal civil rights lawsuit last year challenging the lethal injection protocol that Alabama planned to use to execute him. He cited the July 2022 botched execution of Joe Nathan James, which took prison officials more than three hours to carry out because of problems starting an IV line. Smith himself came within a few hours of being executed in November, but prison officials were unable to start either a regular IV line or a "central line" under his collarbone.

In its petition for review, the state insisted that nitrogen hypoxia was not actually an available method of execution. Indeed, the state noted, even "Smith himself alleges that a workable protocol for" nitrogen hypoxia "has not [been] established" and "remains unknown." The state warned that the lower court's decision in Smith's case was a "headlong attack" on Supreme Court's cases that has "foisted years of meritless litigation on Alabama." The ruling was so wrong, the state argued, that the justices should summarily reverse it – that is, overturn it without calling for additional briefing on the merits or oral argument.

Smith countered that, at least in this case, he has met his burden of showing a feasible and readily implemented alternative to lethal injection, as Glossip requires. The state "currently plans to execute at least" 48 inmates by nitrogen hypoxia, he noted. And not only does the state continue to offer nitrogen hypoxia as a method of execution for people who are sentenced to death, but it in fact settled a lawsuit filed by Alan Miller, whose Sept. 2022 execution the state called off when prison officials were unable to start an IV before the death warrant expired, by agreeing to execute him using nitrogen hypoxia.

In a five-page opinion, Thomas indicated that he would have granted the state's request to reverse the 11th Circuit's ruling. That decision, he explained, was based on other "flawed" cases in the 11th Circuit that are "irreconciliable with our method-of-execution case law." In particular, Thomas emphasized, the "focus" of the Supreme Court's requirement that an alternative method of execution be "feasible and readily implemented" is "*practical* availability." But in this case, he wrote, Smith only alleged that the state had adopted nitrogen hypoxia as another method of execution – which is not enough, for Thomas, to make out a viable claim.

More broadly, Thomas complained, the requirement that an inmate show an alternative method of execution "remains an essential element of an Eighth Amendment" claim, and courts should review them carefully to ensure that inmates do not attempt to use them as a delay tactic. The lower court's "approach of treating any statutorily authorized method as available as a matter of law — even an entirely novel method that may not be readily implementable in reality — only heightens that danger," Thomas added.

The justices sought the Biden administration's view in a pair of cases arising from the 2019 bankruptcy filing of Highland Capital Management, a Texas-based investment management fund. In September 2022, the U.S. Court of Appeals for the 5th Circuit largely upheld the bankruptcy court's

order confirming a reorganization plan, but both Highland Capital and NexPoint, one of the firm's clients, asked the Supreme Court to review aspects of that ruling. The justices instead asked the Biden administration to weigh in; there is no deadline for U.S. Solicitor General Elizabeth Prelogar to file her response.

The justices will meet again for another private conference on Thursday, May 18. We expect orders from that conference on Monday, May 22, at 9:30 a.m.

This article was originally published at Howe one the Court.

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The New York Times https://www.nytimes.com/2023/02/27/us/supreme-court-cfpb-consumer-watchdog.html

Supreme Court to Take Up Case on Fate of Consumer Watchdog

A decision against the bureau could cast doubt on every rule and enforcement action the Consumer Financial Protection Bureau has taken.

By Adam Liptak

Feb. 27, 2023

WASHINGTON — The Supreme Court agreed on Monday to hear a case that could hobble the Consumer Financial Protection Bureau and advance a key project of the conservative legal movement: to limit the power of independent agencies.

A ruling against the bureau, created as part of the 2010 Dodd-Frank Act after the financial crisis, could cast doubt on every regulation and enforcement action it took in the dozen years of its existence. That includes extensive rules — and punishments against companies that flout them — that the agency has written to govern mortgages, credit cards, consumer loans and banking.

The central question in the case, Consumer Financial Protection Bureau v. Community Financial Services Association of America, No. 22-448, is whether the way Congress chose to fund the agency violated the Appropriations Clause of the Constitution, which says that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."

A unanimous three-judge panel of the U.S. Court of Appeals for the Fifth Circuit, in New Orleans, ruled in October that the bureau's funding mechanism ran afoul of that clause.

"Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it," Judge Cory T. Wilson wrote in an opinion joined by Judges Don R. Willett and Kurt D. Engelhardt in the ruling. President Donald J. Trump appointed all three judges on the panel.

The bureau is funded by the Federal Reserve System, in an amount determined by the bureau so long as it does not exceed 12 percent of the system's operating expenses. In the 2022 fiscal year, the agency requested and received $641.5 million of the $734 million available. The 2010 law said the bureau's funding requests "shall not be subject to review by" the House and Senate Appropriations Committees.

The Fifth Circuit's decision was at odds with ones from other courts. In 2018, for instance, the District of Columbia Circuit said there was nothing unusual about the funding mechanism.

In urging the Supreme Court to hear the Biden administration's appeal, Solicitor General Elizabeth B. Prelogar said the ruling "threatens to inflict immense legal and practical harms on the C.F.P.B., consumers and the nation's financial sector."

A decision against the consumer bureau could imperil other agencies.

"If the Supreme Court accepts this deeply flawed argument against C.F.P.B. funding, it would set a dangerous precedent that would be used to challenge agencies with legally indistinguishable funding, including the Federal Reserve, F.D.I.C., Medicare and Social Security," said Nadine Chabrier, a senior policy and litigation counsel at the nonpartisan research group Center for Responsible Lending.

But opponents of the bureau, including Republican lawmakers, countered that the agency was uniquely problematic and hoped the case would resolve a recurring question.

In 2020, the Supreme Court ruled that a different part of the law creating the consumer bureau was unconstitutional, saying that Congress could not insulate the bureau's director from presidential oversight given the scope of the job's authority.

"The director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans," Chief Justice John G. Roberts Jr. wrote for the majority.

He mentioned the bureau's funding in passing, noting that its budget had exceeded half a billion dollars in recent years.

"Unlike most other agencies," the chief justice wrote, "the C.F.P.B. does not rely on the annual appropriations process for funding. Instead, the C.F.P.B. receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments."

Chief Justice Roberts made the same point when the case was argued. "They don't even have to go to Congress to get their money," he said.

In the administration's petition seeking review, Ms. Prelogar wrote that "the C.F.P.B.'s funding mechanism is entirely consistent with the text of the Appropriations Clause, with longstanding practice and with this court's precedent."

She added that barring congressional committees from reviewing the funding "simply allocates authority among different congressional bodies" and that "the Appropriations Clause is not concerned with such matters of internal congressional housekeeping."

The case was brought by two trade groups representing payday lenders. They challenged a regulation limiting the number of times lenders can try to withdraw funds from borrowers' bank accounts. The Fifth Circuit struck down the regulation, saying it was "wholly drawn through the agency's unconstitutional funding scheme."

The Supreme Court turned down a request from the Biden administration to decide the case in its current term, which ends in late June or early July. The justices will instead hear arguments in the fall and probably not issue a decision until 2024.

That could complicate the agency's operations as other challenges mount. More than a dozen companies have cited the Fifth Circuit ruling in seeking to have lawsuits or penalties the bureau has filed against them thrown out.

"A delay in hearing this case only hurts consumers, as this is an urgent issue that has horrifying implications for consumers and our entire financial system," Senator Sherrod Brown, Democrat of Ohio and the chairman of the Senate Banking Committee, said in a statement.

House Republicans have previously introduced legislation that would bring the C.F.P.B. into the traditional appropriations process and remain committed to passing such a bill, Representative Patrick T. McHenry of North Carolina, the chairman of the Financial Services Committee, said in a statement.

Ephrat Livni and Stacy Cowley contributed reporting.

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

A version of this article appears in print on , Section B, Page 1 of the New York edition with the headline: Justices Face Case to Limit A Watchdog

Court will review constitutionality of consumer-watchdog agency's funding

scotusblog.com/2023/02/supreme-court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb/

February 27, 2023

SCOTUS NEWS

By Amy Howe
on Feb 27, 2023 at 11:27 am

The court will likely hear the challenge to the Consumer Financial Protection Bureau's funding scheme in the fall. (Payton Chung via Flickr)

The Supreme Court on Monday agreed to take up a major case involving funding for the Consumer Financial Protection Bureau, which was formed in response to the 2008 financial crisis. A federal appeals court ruled in October that the funding mechanism for the CFPB violates the Constitution, but the Biden administration, which had asked the justices to weigh in, says that allowing the lower court's decision to stand could raise "grave concerns" for "the entire financial industry."

The announcement came as part of a list of orders from the justices' private conference last week.

The case involving the CFPB began as a challenge by the payday-lending industry to a 2017 rule that (as relevant here) barred lenders from making additional efforts to withdraw payments from borrowers' bank accounts after two consecutive failed attempts due to a lack of funds.

A three-judge panel of the U.S. Court of Appeals for the 5th Circuit rejected most of the groups' challenges to the rule, but it ultimately struck down the rule based on the CFPB's unique funding scheme, which operates outside the normal congressional appropriations process. Instead of receiving money allocated to it each year by Congress, the CFPB receives funding directly from the Federal Reserve, which collects fees from member banks. And that scheme, the court of appeals concluded, violates the Constitution's appropriations clause, which directs that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The appropriations clause, the court of appeals explained, "ensures Congress's exclusive power over the federal purse," which is in turn essential to ensure that other branches of government don't overstep their authority. The court of appeals vacated the 2017 rule on the ground that the CFPB was receiving funding through that unconstitutional funding mechanism when it adopted the rule.

The CFPB came to the Supreme Court in November, asking the justices to take up the case and overrule what it characterized as the lower court's "unprecedented and erroneous understanding of the Appropriations Clause." The appropriations clause, the CFPB argued, means "simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress." In the case of the CFPB, the government contends, "Congress enacted a statute explicitly authorizing the CFPB to use a specified amount of funds from a specified source for specified purposes. The Appropriations Clause requires nothing more."

Review is warranted, the CFPB contended, because the lower court's ruling "calls into question virtually every action the CFPB has taken in the 12 years since it was created" and, as a result, "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector." The CFPB urged the justices to take up the case during the 2022-23 term, so that they could issue a decision before their summer recess.

The challengers countered that if the CFPB were correct about Congress's powers under the appropriations clause, "a single Congress could effectively nullify the Clause by passing a law authorizing the Executive Branch to spend as much public funds as desired in perpetuity for virtually any purpose, unless and until a future Congress could overcome a Presidential veto to retake its power over the purse." The groups downplayed the CFPB's concerns about the effect of leaving the 5th Circuit's decision in place, noting that the ruling below "simply vacated a single regulation that has never been in effect."

In a brief order on Monday, the justices agreed to review the CFPB's appeal but declined to fast-track the proceeding.

The justices also granted review in *Pulsifer v. United States*, involving the interpretation of the federal sentencing law that allows a defendant convicted of some nonviolent drug crimes to avoid what would otherwise be a mandatory minimum sentence.

Both the CFPB case and *Pulsifer* likely will be argued in the fall, with decisions to follow sometime in 2024.

This article was originally published at Howe on the Court.

Posted in Merits Cases

Cases: Pulsifer v. United States, Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited

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The New York Times https://www.nytimes.com/2023/05/01/us/supreme-court-business-regulation-agencies.html

Supreme Court Takes Up Case That Could Curtail Agency Power to Regulate Business

The court's Republican-appointed majority appears poised to chip away again at the authority of the administrative state to issue rules for the economy.

By Charlie Savage

May 1, 2023

WASHINGTON — The Supreme Court agreed on Monday to take up a case that could make it easier to curtail the power of administrative agencies, a long-running goal of the conservative legal movement that could have far-reaching implications for how American society imposes rules on businesses.

In a terse order, the court said it would hear a case that seeks to limit or overturn a unanimous 1984 precedent, Chevron v. Natural Resources Defense Council. According to the decision, if part of the law Congress wrote empowering a regulatory agency is ambiguous but the agency's interpretation is reasonable, judges should defer to it.

At issue in the case, Loper Bright Enterprises v. Raimondo, is a rule that requires fishing vessels to pay for monitors who ensure that they comply with regulations meant to prevent overfishing. The National Marine Fisheries Service established the rule, and a group of companies has challenged whether the agency had the authority to do so.

When the Supreme Court decides on the case, most likely in its next term, the outcome could have implications that go beyond fisheries.

If the court overturns or sharply limits the Chevron precedent, it would become easier for business owners to challenge regulations across the economy. Those include rules aimed at ensuring that the air and water are clean; that food, drugs, cars and consumer products are safe; and that financial firms do not take on too much risk.

In the fishing dispute, a divided three-judge panel of the Court of Appeals for the District of Columbia Circuit had upheld the rule. Citing the Chevron precedent, Judge Judith W. Rogers wrote, "When Congress has not 'directly spoken to the precise question at issue,' the agency may fill this gap with a reasonable interpretation of the statutory text."

Justice Ketanji Brown Jackson recused herself from the Supreme Court's decision to hear the case, apparently because she had participated in the arguments while still on the appeals court.

Libertarian-minded conservatives have long sought to overturn the Chevron precedent as part of a broader campaign to curtail the administrative state. Regulatory agencies have been a target since the New Deal, when Congress created many specialized regulatory agencies and charged them with studying complex problems and issuing technical rules to address them.

In an opinion in November related to a separate case, Justice Neil M. Gorsuch said the judiciary had overread Chevron's deference and abdicated its responsibility to independently determine the best interpretation of laws.

"Rather than provide individuals with the best understanding of their rights and duties under law a neutral magistrate can muster, we outsource our interpretive responsibilities," he wrote. "Rather than say what the law is, we tell those who come before us to go ask a bureaucrat."

Advisers to President Donald J. Trump prioritized skepticism toward the administrative state in picking judges and justices, and the court's Republican-appointed majority has in recent years chipped away at the ability of the administrative state to impose regulations on business interests.

In a 2020 ruling, the five Republican appointees on the court at the time struck down a provision of the law Congress enacted to create the Consumer Financial Protection Bureau that had protected its chief from being fired by a president without good cause, like misconduct.

Two years later, the six-justice conservative majority struck down a proposal by the Environmental Protection Agency to curtail carbon emissions from power plants. The ruling strengthened a doctrine that courts should overturn regulations that raise "major questions" if Congress was not explicit enough in authorizing such actions.

Charlie Savage is a Washington-based national security and legal policy correspondent. A recipient of the Pulitzer Prize, he previously worked at The Boston Globe and The Miami Herald. His most recent book is "Power Wars: The Relentless Rise of Presidential Authority and Secrecy." More about Charlie Savage

A version of this article appears in print on , Section A, Page 11 of the New York edition with the headline: Court Case Could Limit Regulations On Business

OPINION | REVIEW & OUTLOOK Follow

The Next Supreme Court Landmark

The Justices agree to hear a case challenging the constitutionality of SEC administrative law judges.

By The Editorial Board Follow

July 2, 2023 4:02 pm ET

Securities and Exchange Commission headquarters in Washington. PHOTO: ANDREW HARNIK/ASSOCIATED PRESS

The Supreme Court showed again this year it is willing to police the excesses of the administrative state, and on Friday it teed up another case for next term: a potentially landmark challenge to the Securities and Exchange Commission's internal tribunals.

SEC v. Jarkesy began a decade ago as a garden-variety securities fraud enforcement action. The SEC charged hedge-fund founder George Jarkesy and an investment adviser in its administrative court. An administrative law judge (ALJ) ruled against them. The SEC commissioners affirmed the ruling, ordered them to pay a penalty, and barred Mr. Jarkesy from the securities industry.

Mr. Jarkesy argues that a provision in the Dodd-Frank Act allowing the SEC to adjudicate enforcement actions and seek civil penalties in its in-house courts violates his Seventh Amendment right to a trial by jury. Before Dodd-Frank, the SEC had to litigate fraud claims in Article III federal courts where defendants enjoy more procedural rights

enjoy more procedural rights.

He also says Congress improperly delegated to the SEC unreviewable power to choose whether to bring charges either in its in-house or federal court. The SEC has increasingly chosen the former because it has a home-court advantage. At the time of Mr. Jarkesy's trial in 2014, the agency had won 100% of 200 contested cases compared to 61% in federal courts.

The SEC is part of the executive branch whose powers are defined by Article II of the Constitution. Mr. Jarkesy claims that the multiple layers of for-cause tenure protections for ALJs violate Article II's imperative that the President "take care that the laws be faithfully executed." The Supreme Court has interpreted this to mean that Presidents must have power over officers' appointment and removal. All of these features of the SEC's in-house courts violate defendants' due process rights.

The fundamental constitutional problem is that the SEC combines enforcement and judicial power, acting as prosecutor, judge and jury. This constitutional danger was underscored last month by the SEC's disclosure that its enforcement staff had improperly gained access to information intended for commission officials who were adjudicating cases. This included information about Mr. Jarkesy.

The Fifth Circuit Court of Appeals ruled for Mr. Jarkesy on all counts last May. The Justice Department has appealed and contends that the Fifth Circuit ignored Supreme Court precedent. But the rulings it cites don't bear directly on Mr. Jarkesy's claims, which build on the Court's 7-2 *Lucia v. SEC* (2018) decision requiring ALJs to be appointed by SEC commissioners.

The Justices have ruled in several recent cases against administrative agencies for overstepping their authority and violating the separation of powers. This is another opportunity to bolster individual liberty against an oppressive administrative state.

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SEC’s Use of In-House Judges Will Get US Supreme Court Review

By Greg Stohr2023-06-30T12:01:56046-04:00

The US Supreme Court will review a ruling that cast a constitutional cloud over the use of in-house judges to handle cases pressed by the Securities and Exchange Commission.

The justices said they will hear a Biden administration appeal that contends the federal appeals court ruling will have “massive practical consequences” across the government if not overturned. The decision by the 5th US Circuit Court of Appeals found multiple flaws with a system the SEC uses for hundreds of cases a year.

The case adds to a 2023-24 term that was already set to have broad implications for federal regulators. The justices are also planning to consider whether the Consumer Financial Protection Bureau’s funding system is constitutional and whether to overturn a precedent that gives agencies leeway when they interpret ambiguous congressional commands.

The 5th Circuit said in a 2-1 decision that Congress violated the Seventh Amendment, which protects the right to a jury trial in civil lawsuits, by letting the SEC ask an administrative law judge to impose penalties rather than going to federal court. The 5th Circuit also said Congress gave the commission too much leeway to decide which cases will go before its in-house judges.

In addition, the 5th Circuit panel said the judges’ job protections leave them too insulated from presidential control.

The decision stemmed from an SEC complaint against George Jarkesy, a hedge fund manager accused in 2013 of misleading investors about who served as the funds’ prime broker and auditor and about their investment strategies and holdings. An administrative law judge found Jarkesy had committed securities fraud, and the SEC eventually ordered him to pay almost $1 million.

Jarkesy’s lawyers said he was “put to trial before a captive agency judge sitting unconstitutionally, with no right to a jury, and no way to escape to court.” They urged the Supreme Court to reject the

appeal without a hearing.

Administration Appeal

The SEC has become a prime target for critics of federal agencies. In a 2018 ruling, the court said the agency's administrative law judges had been unconstitutionally appointed and needed to be named directly by the commission.

Since then, the commission has begun sending more cases to court. The agency also took steps on June 2 to whittle away its in-house caseload, announcing it was wiping the slate clean for about 90 administrative enforcement matters, some of which had been open for years. The SEC has about a dozen administrative law judges.

US Solicitor General **Elizabeth Prelogar**, the Biden administration's top Supreme Court lawyer, is representing the SEC. She contends that Congress may authorize an agency to handle certain types of cases in house rather than going into federal court, where the Seventh Amendment jury-trial right would apply.

The administration also faults the 5th Circuit for invoking the "nondelegation doctrine," a rarely used constitutional rule that says Congress must give clear guidance to an agency before handing off its legislative responsibilities. The appeals court said Congress violated that doctrine by giving the SEC "unfettered authority" to choose where to press its cases.

Prelogar argued that the nondelegation doctrine doesn't apply because SEC officials aren't making a legislative decision. "The commission's decision whether to pursue an administrative or judicial remedy in a particular case is a core executive function, not the exercise of legislative power," she wrote.

The job-protection issue is connected to one the court confronted in 2010, when it said members of the Public Company Accounting Oversight Board were too insulated from presidential oversight. Both the PCAOB members and the SEC commissioners who appointed the board could be fired only under limited circumstances.

Writing for the majority in that case, Chief Justice John Roberts faulted Congress for "committing

substantial executive authority to officers protected by two layers of for-cause removal." But Roberts also held out the possibility the protections for SEC administrative law judges might be constitutional because their jobs are different from those of board members.

"Unlike members of the board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions," he wrote.

The case is Securities and Exchange Commission v. Jarkesy, 22-859.

--With assistance from Lydia Beyoud.

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Sara Forden

What's On Tap For The October 2023 Supreme Court Term? | National Law Journal

Jimmy Hoover

The U.S. Supreme Court will reconvene Oct. 2 for its 2023-2024 term, which at the outset will have fewer of the hot-button social issues akin to those that dominated newspaper headlines during the prior two sessions, including abortion, affirmative action and LGBTQ discrimination.

Instead, the cases on the docket so far this coming term have a more legalistic quality.

A common theme throughout is the power—and independence—of administrative agencies. The 2023-2024 term could therefore be the most significant one for the state of administrative law in many years, particularly if the Supreme Court overturns its landmark 1984 holding in *Chevron USA Inc. v. Natural Resources Defense Council*, which gave rise to one of the most cited doctrines in modern court history.

The National Law Journal highlights some of the major cases that the Supreme Court is expected to decide by July 2024.

CFPB Fights To Save Independence, Past Actions

Consumer Financial Protection Bureau v. Community Financial Services Association of America Ltd. No. 22-448.

On Oct. 3, the justices will hear oral arguments in yet another challenge to the structure of the embattled Consumer Financial Protection Bureau, which was created in the aftermath of the 2008 financial crisis.

The U.S. Court of Appeals for the Fifth Circuit held below that the agency's independent funding mechanism is unconstitutional. The appeals court also said that flawed structure rendered invalid a 2017 rule taking aim at "unfair" and "abusive" practices by the payday loan industry.

The high court will consider the U.S. government's plea to reverse that ruling in a case which strikes at the heart of the financial regulator's independence and could upset many of its previously issued rules. The case comes less than four years after the Supreme Court struck down provisions insulating the CFPB's director from removal by the president in *Seila Law LLC v. CFPB*.

At issue now is whether Congress violated the appropriations clause of the Constitution when, in passing the 2010 Dodd Frank Act, lawmakers allowed the CFPB to secure funding directly from the Federal Reserve rather than through the annual congressional appropriations process. The payday

loan industry argued, and the Fifth Circuit agreed, that this structure flouts the separation of powers principle embodied in a clause stating that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Noel Francisco, partner in charge with Jones Day, speaking at a panel discussion during the "Law Symposium: Justice Thomas's Thirty-Year Legacy on the Court," Co-hosted by The C. Boyden Gray Center for the Study of the Administrative State and The Heritage Foundation, in Washington, D.C., on Thursday, October 21, 2021. Photo: Diego M. Radzinschi/ALM

The industry is being represented by former U.S. Solicitor General Noel Francisco of the firm Jones Day.

On behalf of the CFPB, U.S. Solicitor General Elizabeth Prelogar stated in a brief that the Fifth Circuit is the only federal court to have ever held that a law passed by Congress violates the appropriations clause. She added the agency's funding is "not materially distinct" from other financial regulators.

If the Supreme Court were to disagree, it should instead "sever" the problematic funding provision and otherwise leave the agency's past actions, such as its payday lending rule, in place, Prelogar wrote. Failing to do so would jeopardize all manner of past CFPB actions and throw markets into chaos.

"Any judicial remedy here should seek to avoid those sorts of calamitous consequences," Prelogar wrote.

In 'Chevron,' Justices Confront Giant Of Administrative Law

Loper Bright Enterprises v. Raimondo. No. 22-451.

Few Supreme Court cases of the modern era have been as influential, or as controversial, as the 1984 decision in *Chevron*. But instead of a 40th birthday, funeral arrangements might soon be in order if a group of fishermen have their way.

In *Loper Bright Enterprises v. Raimondo*, Atlantic herring fishermen successfully petitioned the

Supreme Court to review the *Chevron* decision and the bedrock doctrine of administrative law it established.

The *Chevron* doctrine has long stood for the proposition that when a law is unclear, judges should defer to expert agencies so long as they are being reasonable. Over the last four decades, courts have extended "*Chevron* deference" to federal agencies in hundreds, if not thousands, of legal battles with industry groups and other regulated entities.

In *Loper*, the U.S. Court of Appeals for the D.C. Circuit invoked *Chevron* to rule against the herring fishermen's challenge to a new federal rule requiring them to pay the cost of fishing monitors on their vessels, which has been estimated at $710 per day, or around 20% of daily revenue. The appeals court said federal law was silent with respect to whether the government could require such fees but added that the National Marine Fisheries Service was "reasonable" to impose them.

In their opening brief, the fishermen called *Chevron* "egregiously wrong several times over," borrowing a phrase Justice Samuel Alito Jr. used in his landmark opinion overturning *Roe v. Wade*.

Justice Ketanji Brown Jackson, who heard the case as a D.C. Circuit judge, has recused herself.

Still, some administrative law experts say it's too early to ring the death knell for *Chevron* and have suggested the court could narrow, without overruling entirely, the longstanding doctrine.

Do Enforcement Actions Violate The Right To A Jury?

SEC v. Jarkesy. No. 22-859.

The U.S. Securities and Exchange Commission is fighting to save its in-house enforcement regime, a battle that could determine the fate of administrative actions across the federal government.
SEC v. Jarkesy asks a fairly straightforward question: Do regulators that use an internal enforcement system to dole out fines and other civil penalties violate the Seventh Amendment's guarantee of the right to trial by jury?

The Fifth Circuit—in yet another sweeping administrative law decision being reviewed by the justices this term—held that they do.

Moore Cert Spurs Bets on Supreme Court's Intention

By JONATHAN CURRY
Contact Author

POSTED ON JULY 20, 2023

The Supreme Court's choice to hear *Moore v. United States* has observers wondering what piqued the Court's interest and envisioning everything from nightmare scenarios for the tax code to a modest judicial rebuke.

Taking the case (Sup. Ct. Dkt. No. 22-800) could e ectively be a preemptive shot at wealth tax proponents, potentially making it clear that such a future tax would be held unconstitutional by rmly establishing that income must be realized to be taxable.

The case could also inadvertently upend a wide swath of tax law, and — as some envision it — launch a rewrite of the tax code.

Or, the Court may have taken the case simply to reassert its place at the top of the legal pecking order.

At least four justices would have needed to vote for certiorari to take the case, and a wide range of observers agreed that those justices wouldn't have done so if their intention was simply to a rm the Ninth Circuit (36 F.4th 930 (2022)) and district court (No. 2:19-cv-01539 (W.D. Wash. 2020)) in rejecting a constitutional challenge to the transition tax imposed by the Tax Cuts and Jobs Act. They also agreed it's a good bet those four or more justices came from the conservative wing of the Court.

Which particular gripe those justices had at the forefront of their minds when they took the case remains the key, unanswered question.

"To hear the case, in my mind, is about reversing the case," said Steven M. Rosenthal of the Urban-Brookings Tax Policy Center, who was convinced those justices had future progressive tax reforms squarely in their sights when they voted to take the case. He noted that eight di erent groups led amicus briefs, all making the same argument, that the 16th Amendment requires income to be realized to be taxable.

Rosenthal further observed that the Court isn't addressing a split in the lower courts, that the amount of money at stake for the petitioners — just under $15,000 — is a relative pittance, and that the repatriation tax is a temporary transition rule, not a long-term, ongoing problem that would need to be recti ed.

"So the case itself is rather modest, other than does it breathe fresh life into the realization doctrine?" Rosenthal said.

If that's so, the consequences could be enormous, not just for future progressive policymaking, but for many areas of existing tax law.

Case in Point

The case was brought by the conservative Competitive Enterprise Institute and Baker & Hostetler LLP on behalf of Kathleen and Charles Moore, who own shares in KisanKraft, a controlled foreign corporation that provides agricultural equipment to rural farmers in India. They have yet to directly receive any income from the investment because the company has reinvested all pro ts back into the business.

However, the section 965 repatriation tax — a transitional tax structure enacted as part of the TCJA — imposed a roughly $15,000 tax bill on the Moores' share of KisanKraft's reinvested pro ts.

There were two issues at the core of the Moores' complaint: rst, that taxable income must be distributed to comply with the 16th Amendment's realization principle; and second, that Congress improperly applied the transition tax retroactively. Both the U.S. District Court for the Western District of Washington and the Ninth Circuit acknowledged that the tax was retroactive, but they argued that it was justi ed, and the Moores' petition to the Supreme Court doesn't challenge that aspect.

Instead, the focus of the Moores' petition before the Supreme Court is the realization argument. The four dissenting judges on the Ninth Circuit's rehearing panel were all Republican appointees, and one of them — Patrick J. Bumatay — argued in the dissent that the core issue is the unfairness of taxing income before it's realized and the constitutional limitation on that, which they argue was reinforced by *Eisner v. Macomber,* 252 U.S. 189 (1920).

In that case, which involved the taxability of a pro rata stock dividend, the Court majority concluded that realization of income is a constitutional requirement of an income tax under the 16th Amendment.

"I nd it very hard to believe that they took this case to say the [Ninth Circuit] majority was right and that this very conservative, Federalist Society-type dissent was wrong," said Mitchell Gans of Hofstra University's Maurice A. Deane School of Law. He cited Chief Justice John G. Roberts Jr. himself, who in writing the majority opinion for the 2012 A ordable Care Act case, referenced the Court's decision in *Eisner*.

"A lot of people have thought that *Eisner* had e ectively been overruled," including the Ninth Circuit, which cited a series of cases that the judges argued showed a retreat from *Eisner*, said Gans. He wrote an article in 2021 predicting that the constitutional arguments for realization could nd a receptive audience among at least some on the Court's conservative wing.

But the Court has never explicitly overruled *Eisner*, Gans continued, and with Roberts's reference to it in 2012, "I certainly inferred he was at least interested in exploring the rami cations of that case and wasn't prepared to say it was entirely overruled."

Rosenthal counted himself among those who believed *Eisner* was dead. "It was a pretty dumb decision from the start," he said.

In *Cottage Savings Association v. Commissioner*, 499 U.S. 554 (1991), the Supreme Court majority described the realization doctrine as a matter of administrative convenience. And subsequently, Rosenthal recalled, as a sta er for the Joint Committee on Taxation in the 1990s, he drafted tax legislation involving nancial products with the expectation that the realization principle was indeed an administrative consideration, not a constitutional limitation.

Rosenthal noted that it was Roberts himself who tried to breathe life into the realization doctrine in *Cottage Savings*. As acting solicitor general on that case, Roberts argued — on behalf of the IRS — that there was no realization on the mortgage swaps at issue in the case.

"He lost 7-2 in 1991, and I don't think he ever forgot it," Rosenthal said.

The constitutional originalism argument is also likely to hold a lot of sway with the conservative majority on the Supreme Court, Gans observed. The 16th Amendment was adopted in 1913, and with *Eisner* coming just seven years later, an originalist could argue that was a contemporary decision. It was also one that relied on the dictionary de nition of income, and using contemporary dictionaries is a common precept of originalism, he noted.

"I think the stars are aligned here," Gans said. "It's hard for me to believe that this group of justices took this case to make it clear that all these progressive kinds of taxes are going to be OK."

However, one former congressional tax sta er interpreted those same stars di erently, telling *Tax Notes* that they believed a conservative, originalist Court would be philosophically inclined to be deferential to Congress. Upending settled legislative principles could open a legal can of worms, they warned.

"I'm a creature of the legislature. I don't like regulators to overstep. I don't like courts to overstep. If Congress says something, they're accountable to the people," the former sta er said.

Know Your Place

Not all observers agree that the Court had the tax code on its mind when it granted cert.

"I imagine there's a substantial chance they're reacting more to the language than the holding itself," said David Gamage of the Indiana University Maurer School of Law. The language and reasoning in the Ninth Circuit's majority opinion "went much further than was needed to get the results they wanted," and the Supreme Court could be concerned primarily with that rather than the question of when taxable income is realized, he said.

The Ninth Circuit "came out with guns blazing," agreed Andy Grewal of the University of Iowa College of Law, pointing out that the lower court concluded that the Supreme Court's decision in *Eisner* had e ectively been overruled over the past century.

That kind of thinking is nothing new for the Ninth Circuit. When asked about the Supreme Court's frequent reversals of Ninth Circuit holdings, Judge Stephen Reinhardt from that circuit famously replied that the Supreme Court "can't catch them all," Grewal noted.

But as recently as 2016, the Supreme Court reminded litigants that "it is this Court's prerogative alone to overrule one of its precedents."

According to Grewal, the Supreme Court's justices may have decided it was time to send another message.

Collateral Damage

Requiring realization for income to be taxable could have implications for far more than just the section 965 transition tax.

If the Supreme Court decides to reinvigorate the realization principle as a constitutional requirement, "I think it'll blow up a lot of the nancial products statutes that I helped draft," Rosenthal said. And that's just the start.

A broad interpretation of the realization principle could also upend partnership taxation. Subchapter K is predicated on taxing partners' income before it's actually distributed — a point emphasized by the dissent in *Eisner,* Rosenthal noted. And if partnership taxation falls, so too would the taxation of controlled foreign corporations and S corporations under subparts F and S, he added.

It would also put a major dent in e orts to enact a wealth tax and other progressive tax proposals, like the mark-to-market proposal envisioned by Senate Finance Committee Chair Ron Wyden, D-Ore. Wyden said in a statement he was con dent his proposal could survive legal challenges.

The best outcome, according to Rosenthal, would be for the Court to simply announce this fall that it had changed its mind and decided not to hear the case after all. That being unlikely, he said his next best hope — and expectation — was that the Court's decision would be narrow, although he admitted he wasn't sure what exactly that would look like.

"The Court may rule against the Moores in terms of requiring a cash distribution, but in describing the realization doctrine, they could take Congress to task and say that it still has life in it," Rosenthal suggested.

That could conceivably leave taxation of partnerships, CFCs, S corps, and the like alone but still have implications for capital markets rules regarding constructive sales, zero-coupon bonds, and more, which were drawn up to prevent investors from deferring income and converting it to lower-taxed capital gains, Rosenthal observed.

"That upsets me, but I think that it heartens the Supreme Court justices," Rosenthal added.

Gamage similarly predicted a narrow holding, one that perhaps rules against the Moores but includes language in dicta "hand waving at all the broader stu ." To him, *Moore* is an international corporate tax law case, and since the corporate income tax both precedes the 16th Amendment and has been upheld as an excise tax, that could make the case di erent from the wider question of what is considered taxable income to an individual under the 16th Amendment.

"Are they planning on blowing up subchapter K? I doubt it," he said, adding that that would be "unprecedentedly dramatic" in tax.

Grewal also predicted that the justices would shy away from stomping all over the tax code.

"Every party before the Court, in every case, says the world is going to end if they lose," so merely listing a "parade of horribles" that could come from a decision won't be enough to sway the justices, Grewal said. However, he predicted the Court would receive a litany of briefs on the case explaining the potential consequences, and if those arguments are convincingly presented, that could shape the outcome, he said.

Congressional Audience

If the Court went big and opted to broadly require realization for income to be taxable, it would undoubtedly get the attention of lawmakers.

One potential scenario is that Congress could unite to resolve the issue. Something akin to that happened in the aftermath of *Gitlitz v. Commissioner,* 531 U.S. 206 (2001).

In *Gitlitz*, the Court approved 8 to 1 the deduction of the petitioner's phantom S corporation losses. Congress promptly responded later that year by amending section 108, and lawmakers went further by including a subtle jab at the Court in their conference committee

report on the legislative x, in which they said that when the plain text of a tax statute creates an ambiguity, "the provision should be read as closing, not maintaining, a loophole."

But where xing *Gitlitz* required tweaking a tax statute, xing a broad ruling in *Moore* to clarify the taxability of income could require a constitutional amendment, and that's not something observers think is probable.

"Anything's possible, I guess," Jorge Castro of Miller & Chevalier Chtd. told *Tax Notes*. "But given current political dynamics . . . probably unlikely."

The former congressional tax sta er observed that Congress has shown it can sometimes move quickly in response to judicial decisions, as it did after *Gitlitz,* or in its legislative response to the Ninth Circuit when that court limited the parsonage allowance in 2002. But the constitutional question at the heart of *Moore* makes it a much di erent consideration, the sta er said.

For now, lawmakers have yet to unite behind a message. Wyden's statement in response to the grant of certiorari warned that the petitioners' desire to reverse the Ninth Circuit would upend settled law and interfere with congressional authority. He added that he had expected his billionaire's tax proposal to face a well-funded legal challenge but maintained that he was "totally con dent that it's constitutional."

Other Senate taxwriters weren't so certain when asked by *Tax Notes* about their reaction to *Moore*. Both Finance Committee members Mark Warner, D-Va., and Ron Johnson, R-Wis., said they weren't aware of the case yet, although Johnson suggested he wouldn't mind seeing the Court drop a bomb on the tax code.

"The Supreme Court generally doesn't like disruptive things too much, which in some respects is unfortunate," Johnson said. "When it comes to taxes, we gotta blow up the status quo."

Follow Jonathan Curry (@jtcurry005) on Twitter for real-time updates.

Doug Sword contributed to this article.

Supreme Court to Hear Dispute Between Maine Hotel and Disability Activist

The hotel argues that the activist, Deborah Laufer, was not entitled to sue it over inadequate disclosures because she did not intend to stay there.

By Adam Liptak

March 27, 2023

WASHINGTON — The Supreme Court agreed on Monday to decide whether a disability rights activist may sue hotels for violating a federal disability law, despite having no intention of staying at the properties.

The activist, Deborah Laufer, combed through websites looking for violations of regulations under the law, the Americans With Disabilities Act, that require hotels to disclose information about their accessibility. According to court papers, Ms. Laufer, who lives in Florida, has filed more than 600 lawsuits across the nation over such infractions, typically seeking a declaration that the hotel had broken the law, an injunction ordering it to comply — and legal fees.

Among the companies she sued was Acheson Hotels, which operates the Coast Village Inn and Cottages in Wells, a small town on the southern coast of Maine. She said its website did not identify accessible rooms, provide an option for booking an accessible room or supply enough information to determine whether the rooms and features of the inn were accessible to her. (Ms. Laufer uses a wheelchair, and has impaired vision and limited use of her hands.)

The hotel moved to dismiss the case, saying that Ms. Laufer had not suffered the sort of direct and concrete injury that gave her standing to sue because she had no intention of visiting. The trial judge agreed.

But the U.S. Court of Appeals for the First Circuit, in Boston, reversed, saying the situation was akin to one in a 1982 Supreme Court decision that allowed Black “testers” to sue for race discrimination over being denied access to housing despite not actually looking for a place to live.

“The denial of information to a member of a protected class alone can suffice to make an injury in fact — that person’s intended use of the information is not relevant,” Judge O. Rogeriee Thompson wrote for a unanimous three-judge panel of the appeals court, noting that other federal appeals courts disagreed.

Recent Supreme Court decisions in other areas, Judge Thompson acknowledged, had taken

restrictive views of standing.

In its petition seeking Supreme Court review, the hotel questioned Ms. Laufer's litigation strategy.

"Laufer's lawsuits typically target small hotels and bed-and-breakfasts," the petition said. "For these small businesses, the cost of litigating an A.D.A. case — plus a potential fee award — could push them into bankruptcy. So most of Laufer's defendants are forced to settle."

The hotel's lawyers added: "A five-minute telephone call to Coast Village could have answered all of Laufer's accessibility questions. But Laufer did not actually want or need this information — the purpose of visiting the website was to lay the groundwork for a lawsuit."

In an unusual move, Ms. Laufer's lawyers agreed that the Supreme Court should grant review in the case, Acheson Hotels v. Laufer, No. 22-429. But they rejected the hotel's suggestions that their client's suits were opportunistic or abusive.

"Although tens of millions of disabled Americans visit places of public accommodation or attempt to book rooms at hotels and all suffer the same discriminatory barriers, the A.D.A. does not provide for any award of damages," the brief said. "It is for this reason that the A.D.A. is enforced by only a small handful of plaintiff advocates."

In a separate development on Monday, the Supreme Court turned down an appeal from Steven Donziger, a disbarred environmental lawyer at the center of a long and bitter legal saga. The fight started with a lawsuit against Texaco over accusations that it had polluted rainforests and rivers in South America and ended with his conviction in federal court in New York for criminal contempt for failing to comply with court orders.

Justice Neil M. Gorsuch, joined by Justice Brett M. Kavanaugh, dissented from the court's decision to turn away Mr. Donziger's appeal, saying the trial court had violated separation of powers principles by appointing its own prosecutors after the Justice Department refused to pursue the case.

"However much the district court may have thought Mr. Donziger warranted punishment, the prosecution in this case broke a basic constitutional promise essential to our liberty," Justice Gorsuch wrote in his dissent in the case, Donziger v. United States, No. 22-274. "In this country, judges have no more power to initiate a prosecution of those who come before them than prosecutors have to sit in judgment of those they charge."

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

A version of this article appears in print on , Section A, Page 14 of the New York edition with the headline: Court Agrees To Hear Case On Disability And Hotels

Litigation
June 30, 2023, 12:14 PM

SCOTUS to Hear Female St. Louis Police Sergeant's Job Bias Case

By Patrick Dorrian

- Forced transfer, denial of transfer were actionable, she says
- Title VII doesn't require harm beyond discriminatory act

The US Supreme Court agreed Friday to hear a St. Louis police sergeant's claims that her forced transfer out of the intelligence unit and the denial of her subsequent transfer request was sex bias.

The justices will address a circuit split on the proper standard for evaluating whether alleged incidents of workplace discrimination are actionable under federal civil rights laws. The court limited the question presented: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"

At issue is the US Court of Appeals for the Eighth Circuit's ruling that Jatonya Clayborn Muldrow couldn't hold St. Louis accountable under Title VII of the 1964 Civil Rights Act because her rank, pay, and responsibilities remained the same. Muldrow claims the court imposed a judicially created "adverse employment action" standard that's at odds with Title VII's text.

Muldrow got the US government's support. The justices should hear the case to decide whether Title VII's prohibition against discrimination in the terms, conditions, or privileges of employment is limited to employer actions that cause a worker to experience "a materially significant disadvantage," the government said.

The government said that the Eighth Circuit's holding lacked any foundation in Title VII's text, purpose, or history and failed to give "terms, conditions, or privileges" of employment its ordinary meaning. All forced job transfers and denials of job transfers based on a protected trait such as sex are actionable under Title VII, a view that's supported by Equal Employment Opportunity Commission guidance and Supreme Court precedent, it said.

Circuit Split

The Eighth Circuit's ruling "contributes to a longstanding, deepening circuit conflict over" the types of discriminatory conduct that are actionable under federal workplace bias law, Muldrow said in her petition seeking high court review. The split has grown out of a misunderstanding of Supreme Court precedent, with just two circuits properly applying "the statutory text as written," she said.

On the other hand, the full D.C. Circuit correctly held that a worker isn't required to prove "some additional harm over and above" an employer's discriminatory job decision to establish a Title VII claim, Muldrow said.

That ruling overturned the circuit's erroneous "objectively tangible harm" standard and recognized that Title VII prohibits bias in all of a job's terms, conditions, and privileges, the government said.

Most other circuits have strayed from or ignored Title VII's text, which makes no mention of an adverse employment action requirement, Muldrow said.

The government filed briefs in *Muldrow* and in *Davis v. Legal Services Alabama Inc.* at the justices' invitation. *Davis* seeks review of an Eleventh Circuit ruling that former US Rep. Artur Davis (D)'s lawsuit alleging an Alabama legal services group unlawfully suspended him because he is Black didn't violate Title VII because his suspension was paid and thus didn't change his job terms or conditions.

A resolution by the justices "would also have beneficial effects beyond Title VII" as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and various federal whistleblower laws include similar language regarding the terms and conditions of employment, the government said.

St. Louis initially waived its right to oppose Muldrow's request for Supreme Court review but filed a brief at the court's request. There isn't a circuit split over the adverse job action requirement, it said.

No circuit has ever ruled that Title VII plaintiffs don't need to show "a harm" to hold an employer liable, the city said. The decisions by the circuits that Muldrow argues disavowed an adverse employment action requirement involved "different factual circumstances, not materially different legal standards," it said.

Georgetown Law Appellate Courts Immersion Clinic represents Muldrow. The city's law department represents St. Louis. The US solicitor general represents the government.

The case is Muldrow v. City of St. Louis, U.S., No. 22-193, cert. granted 6/30/23.

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Court blocks pathway for federal prisoners to raise legal innocence claims

Noam Biale

SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

OPINION ANALYSIS

The justices ruled in *Jones v. Hendrix* on Thursday. (Mark Fischer via Flickr)

On Thursday, the Supreme Court held that a federal prisoner cannot raise a claim of legal innocence if he has already challenged his conviction – even if that claim was unavailable at the time he filed his challenge. The court's decision in *Jones v. Hendrix* turns on the interpretation of the federal habeas statute, as amended by the Anti-Terrorism and Effective Death Penalty Act

of 1996. It is the latest in a string of cases construing AEDPA in which the court has held, as Justice Clarence Thomas put it in his majority opinion, that "Congress has chosen finality over error correction."

To understand that decision, a bit of statutory history is needed: Prior to 1948, federal prisoners could challenge their convictions through a petition for a writ of habeas corpus – the "Great Writ" that traces its origins to the Magna Carta – in the judicial district in which they were imprisoned. That setup had practical problems: It meant that districts with larger numbers of prisoners were inundated with habeas petitions, and it was sometimes difficult to obtain the court record from the district where the person had been convicted and sentenced. Thus, in 1948, Congress passed 28 U.S.C. § 2255, which routed all habeas petitions into a "motion to vacate" the conviction or sentence, to be filed in the original sentencing court. The statute replaced the habeas remedy with the motion to vacate, unless the "remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention." This provision, known as the "saving clause," preserved habeas for those prisoners.

Fast forward to 1996: In the wake of the Oklahoma City bombing, Congress passed AEDPA. That law restricted prisoners' ability to bring "second or successive" motions to vacate under Section 2255, effectively giving them one bite at the apple to challenge a conviction, except under two circumstances: (1) when newly discovered evidence would be sufficient to establish that no reasonable factfinder would have found the person guilty; and (2) when a new rule of constitutional law, which was previously unavailable, was made retroactive by the Supreme Court. AEDPA left the saving clause intact.

This statutory past is prologue to the case of Marcus DeAngelo Jones. Jones was convicted in 2000 of being a felon in possession of a firearm and sentenced to over 27 years in prison. Nearly two decades later, the Supreme Court decided in *Rehaif v. United States* that the government had to prove

that the defendant *knew* he was an unlawful possessor of a firearm, an element not proven at Jones's trial. The *Rehaif* decision established that Jones was legally innocent based on the court's interpretation of the felon-in-possession statute. But he had already long ago filed and lost his Section 2255 motion and was therefore barred under AEDPA from bringing another one. Jones accordingly argued that the saving clause permitted him to file a habeas petition, because Section 2255's bar on second and successive petitions rendered the motion to vacate an "inadequate or ineffective" vehicle to challenge his detention.

By a vote of 6-3, the Supreme Court disagreed. The court held that the historical understanding of the saving clause is limited to "unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court." These circumstances included situations in which the sentencing court had been dissolved or the prisoner otherwise could not be transported there – the saving clause, Thomas noted, was enacted before the construction of the Interstate Highway System. They could also include challenges to the conditions of detention, rather than the legality of the sentence.

The court went on to hold that because AEPDA carves out only two exceptions for the bar on successive motions for newly discovered evidence and previously unavailable constitutional claims, by "negative implication," Congress intended the bar to apply to previously unavailable *statutory* claims, like the one Jones raised. To hold otherwise, Thomas reasoned, would be an "end-run around AEDPA" and would produce the perverse result that prisoners with "nonconstitutional claims," who would be able to pursue habeas petitions free from AEDPA's procedural hurdles, would have a "superior remedy" to those with constitutional ones.

The court rejected arguments by *both* Jones and the government to preserve a remedy for individuals who, although having been convicted, are rendered legally innocent by subsequent developments in statutory

interpretation. The inability of such an individual with a statutory claim to satisfy one of Section 2255's two exceptions "does not mean that he can bring his claim in a habeas petition under the saving clause," the court said, "It means that he cannot bring it at all."

In a methodical and sharp dissent, Justice Kentaji Brown Jackson pulled apart the majority's reasoning piece by piece. Taking on its historical analysis, she noted that the purpose of the 1948 statute – which was undisturbed by AEDPA – was to afford prisoners the same rights they were entitled to pursue through a habeas petition, just in a more convenient forum. In her view, "[t]he saving clause expresses a congressional intent to maintain *equivalence* between what a prisoner could claim before and after" the statute was enacted; yet, the majority's reasoning shrinks "the universe of previously available claims — the opposite of what Congress set out to do when it set up §2255."

Jackson also took aim at the court's textual analysis of both the saving clause and AEDPA. As to the former, she argued that the majority effectively interpreted "inadequate or ineffective" to mean "impossible or impracticable," a reading that is "entirely atextual." As to the latter, Jackson looked at the historical backdrop in which AEDPA was passed, which provided clues that statutory claims were inadvertently omitted from the exceptions to successive Section 2255 motions. She also cited prior cases in which the court had held that Congress could restrict the habeas remedy only with a "clear statement" that it intended to do so — not, as the majority would have it, by "negative implication." Jackson contended that the majority's reading produces its own perverse result: A prisoner who decides not to file a Section 2255 motion or misses the deadline to do so would be able to raise a statutory claim later (because his motion would not be successive), while a prisoner who diligently pursues his rights would not. This result, she suggested, undermines Congress's supposed preference for finality, because "a prisoner whose conviction became final *30 years ago* can assert a *Rehaif* claim if he never previously filed a §2255 motion, whereas

someone whose conviction became final 2 years ago cannot if he has already had a §2255 petition adjudicated."

Jackson concluded with an "observation" that the court's ruling "follows a recent series of troubling AEDPA interpretations" that "have now collectively managed to transform a statute that Congress designed to provide for a rational and orderly process of federal postconviction judicial review into an aimless and chaotic exercise in futility." Throughout her dissent, Jackson repeatedly referenced the stakes of the decision for people, like Jones, who are serving time in prison despite being legally innocent of their crimes of conviction – a result she called "stunning in a country where liberty is a constitutional guarantee and the courts are supposed to be dispensing justice." She noted that the majority only once used the word "innocence," and that was in describing the government's position. "If the majority has spared a thought for the appropriate standard when a petitioner is claiming legal innocence," Jackson wrote, "I could not find it in the Court's opinion."

Justices Sonya Sotomayor and Elena Kagan filed a separate dissent, agreeing with Jackson's assessment of the "disturbing results" of the court's decision. They lamented that "[a] prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred … from raising that claim, merely because he previously sought postconviction relief. It does not matter that an intervening decision of this Court confirms his innocence. By challenging his conviction once before, he forfeited his freedom." Although their brief opinion – only two pages compared to Jackson's 39 (and the majority's 25) – urged a narrower remand to the U.S. Court of Appeals for the 8th Circuit to apply the standard the government advanced, Sotomayor and Kagan took the unusual step of both signing the dissent (as they did in *Dobbs v. Jackson Women's Health Organization*), signaling the widening gap between the court's conservative majority and its liberal dissenters.

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SCOTUS Conviction Ruling Already Harming Innocent People, Lawyers Say

Elizabeth Weill-Greenberg Jul 20, 2023

U.S. Supreme Court Justice Clarence Thomas (right)U.S. Department of Agriculture / Flickr

In June, the U.S. Supreme Court ruled that, in some instances, incarcerated people can be barred from filing multiple claims of innocence, even if they did not commit the crime for which they're in prison. Federal defense attorneys told The Appeal the ruling is already causing harm.

Before last month, it was already difficult for federal prisoners to prove their

innocence in court. But now, after the U.S. Supreme Court's June decision in *Jones v. Hendrix*, many innocent people may find it next to impossible to have their sentences reduced or convictions overturned. In the 6-3 ruling, the nation's highest court restricted the right of *habeas corpus*—the right to not serve unlawful imprisonment—by stating that imprisoned people who have already filed for post-conviction relief can be barred from filing a second time, even if they're innocent of the crime for which they've been incarcerated.

"People who are legally innocent of a crime—or legally innocent of a sentencing enhancement—are now destined to serve the entirety of their sentence in prison," Alison Guernsey, the director of the Federal Criminal Defense Clinic at the University of Iowa College of Law, told The Appeal.

In 1996, during the tough-on-crime era, President Bill Clinton signed the sweeping Antiterrorism and Effective Death Penalty Act (AEDPA). That law dramatically limits people's right to challenge their sentences and convictions. Over the years, the Court has repeatedly interpreted AEDPA in ways that narrow an incarcerated person's already slim avenues for relief. Now with *Jones*, the Court has eliminated opportunities for some innocent prisoners.

The Court ruled that if a person has already filed for post-conviction relief, they cannot file another petition based on a change in how courts interpret a statute. This restriction applies even if a person is imprisoned for conduct that is no longer considered a crime or if a person received a much longer sentence than they would if they committed the crime today.

"A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred…from raising that claim, merely because he previously sought post-conviction relief," Justices Elena Kagan and Sonia Sotomayor wrote in their dissent. "By challenging his conviction once before, he forfeited his freedom."

Geremy Kamens, the Federal Public Defender for the Eastern District of Virginia, told The Appeal that, before *Jones*, whenever the Supreme Court issued a decision that "narrows the scope of the federal criminal statute," attorneys in his office would check to see if the ruling impacted any of their clients. But in light of *Jones*, those people are likely barred from returning to court, despite their innocence.

"If you have filed [a post-conviction challenge] already, then you're out of luck," Kamens said. "So you are actually statutorily innocent of your alleged crime, but the Supreme Court said, 'Too bad for you. You were convicted at a time when we hadn't recognized that.'"

It's difficult to determine how many people will be affected, but it's likely in the hundreds, Guernsey said. She added that some prisoners are serving sentences that would be decades shorter if convicted today.

"The *Jones v. Hendrix* decision really values finality over accuracy," she said. "It values efficiency over fairness."

For appellate attorneys and their clients, the impact is not hypothetical.

Guernsey says one of her clients, Samuel Hogsett, is serving a 30-year sentence in federal prison and, in her professional opinion, was eligible for resentencing before *Jones*.

In 2005, an East Alton, Illinois police officer pulled over Hogsett, a 22-year-old Black man, for allegedly not having his license plate illuminated. According to the officer's later testimony in court, the cop ordered Hogsett out of the car. Hogsett complied, and the cop then asked to search the vehicle. Hogsett consented. The officer says he then found "two small little rocks" of what he believed to be crack cocaine and a gun in the car.

Hogsett was found guilty of being a felon in possession of a firearm, possession with intent to distribute 0.5 grams of crack cocaine, and possession of a firearm in furtherance of a drug-trafficking crime. The court classified him as an Armed Career Criminal based on his three prior violent felonies. That determination meant that the judge would be required to sentence him to between 15 years to life on the felon in possession of a gun charge; he received 24.5 years on that count alone.

In the years since his conviction, he's filed several unsuccessful challenges. Then, in 2021, a possibility for relief appeared to open. That year, the U.S. Supreme Court's ruling in *Borden v. United States* narrowed the definition of what can be considered a violent felony.

Based on that decision, Hogsett filed a habeas petition, which argued that one of his prior convictions no longer qualified. Therefore, he believes he did not have the three prior violent felonies required to qualify as an Armed Career Criminal.

Hogsett is now 40 years old. According to court documents, he has plenty of support on the outside, including his sister, who has promised him a home. Two community organizations have committed to helping him adjust to life outside of prison.

But in light of *Jones*, those plans may never come to pass. The U.S. Court of Appeals for the Seventh Circuit, the federal court that handles cases for Wisconsin, Indiana, and Illinois, ruled that based on *Jones*, Hogsett was barred from filing his habeas petition and sent the case back to the lower court with instructions to dismiss. On Tuesday, the lower court dismissed the case.

Attorney Colin Prince has a strikingly similar case—that of Harry Whitman. In 1995, Whitman's wife was in a car accident that paralyzed her. Whitman, now in his mid-60s, became overwhelmed with medical bills and robbed two banks at gunpoint. He was sentenced to 52 years. Based on his prior convictions from more than a decade and a half before the robberies, the Court classified him as an Armed Career Criminal, which subjected him to a mandatory minimum sentence of 15 years.

Whitman filed a habeas petition in 2002, but it was denied. Like Hogsett, the Supreme Court's subsequent rulings called into question the legitimacy of his status as an Armed Career Criminal. He filed another habeas petition last year.

"Harry Whitman's sentence is illegal," Prince, the chief appellate attorney for the Federal Defenders of Eastern Washington and Idaho, wrote in that filing. "The question before the Court is whether he'll die in prison serving it."

Prince said he felt optimistic about Whitman's chances before the *Jones* ruling occurred. On June 15, the U.S. District Court for the Eastern District of Washington held a hearing in Spokane about Whitman's case. Several of Whitman's supporters attended.

"I thought there were very solid indications that the court intended to release Harry," Prince told The Appeal. "And then *Jones*."

On July 12, the judge asked Whitman to show why the case should not be

dismissed in light of *Jones*.

“He can’t. Dismissal is required,” Prince wrote in his response to the court. “With that said, it is nonetheless important to mark the grotesque outcome.”

Whitman has few options left. He’s filed a federal clemency petition asking President Joe Biden for relief. Prince says the case’s original sentencing judge has written a letter of support. But since President Biden took office, he’s granted just 111 requests for sentence reductions out of thousands of petitions. Prince added that the upcoming changes to the federal sentencing guidelines may also offer a “glimmer of hope.” But these possibilities don’t lessen the potentially catastrophic impact of *Jones*.

“Absolutely, without question, 100 percent—Americans will serve time in American prisons who are innocent,” Prince said.

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Innocence Project Responds to Release of Barry Jones

"While we celebrate Mr. Jones's freedom, it does not change the fact that the Supreme Court's ruling in Shinn vs. Ramirez and Jones will have a devastating impact on thousands of innocent people."

06.16.23 By Christina Swarns

INNOCENCE PROJECT

After nearly 30 years on death row for a crime he did not commit, Barry Jones was released from prison yesterday. The Pima County Superior Court vacated his capital murder conviction and death sentence after the Arizona Attorney General acknowledged that Mr. Jones did not receive a fair trial and was wrongfully convicted of capital murder and wrongfully sentenced to

death in Arizona for fatally assaulting Rachel Gray, a four-year-old child.

In 2022, the United States Supreme Court denied Mr. Jones the opportunity to prove to the federal courts that the jury that convicted him in 1995 never heard the available medical, forensic and witness testimony that would have undermined the prosecution's case against him because of his trial attorneys' ineffective failure to investigate. The Court held that the federal courts could not consider his evidence of ineffective assistance of counsel because it was not first presented to state courts. With this decision, *Shinn vs. Ramirez and Jones*, the Supreme Court left thousands of people in the nightmarish position of having no court to hear their credible claims of innocence.

After his conviction at trial, Mr. Jones received appointed counsel for post-conviction review — this was the one and only opportunity to prove wrongful conviction based on incompetent trial representation afforded to him by Arizona state law. Unfortunately, Mr. Jones's post-conviction counsel never challenged the adequacy of his trial representation and his post-conviction petitions were denied.

Years after Mr. Jones's state post-conviction proceedings, four bipartisan federal judges reviewed his conviction and concluded that a minimally competent defense investigation would have uncovered extensive forensic evidence demonstrating that the victim's fatal injury could not have been inflicted when she was in Mr. Jones's care. The federal judges also found that the state's investigation had failed to follow basic standards to preserve potentially exonerating evidence or investigate other suspects. However, the United States Supreme Court reversed that decision in 2022. Dissenting Justice Sonia Sotomayor called the decision "perverse" and "illogical."

Although the Supreme Court's 2022 decision left Mr. Jones on death row, at the urging of counsel for Mr. Jones, the State of Arizona reconsidered the evidence in his case. After a careful review, the Arizona Attorney General agreed that Mr. Jones's conviction for assaulting Rachel and the resulting

death sentence should be vacated. The Arizona Attorney General joined Mr. Jones in asking the Pima County Superior Court to vacate his convictions and death sentence.

While we celebrate Mr. Jones's freedom, it does not change the fact that the Supreme Court's ruling in *Shinn vs. Ramirez and Jone*s will have a devastating impact on the thousands of innocent people in our criminal legal system seeking post-conviction relief. Mr. Jones is incredibly fortunate to have had attorneys who sought every possible avenue of relief and a prosecutor willing to reconsider his case. Many equally innocent people will not have such opportunities and, as a result, they will remain behind bars when they should be home with their friends and families.

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Barry JonesChristina SwarnsShinn v. RamirezUnited States Supreme Court

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Innocence Project Statement From Executive Director Christina Swarns on Shinn v. Ramirez and Jones

05.24.22 By Christina Swarns

INNOCENCE PROJECT

United States Supreme Court Building. Photographs in the Carol M. Highsmith Archive, Library of Congress, Prints and Photogra... Read more

The United States Supreme Court decision in the case of *Shinn v. Ramirez and Jones* closed the federal courthouse doors to evidence of ineffective assistance of counsel that was not first presented to the state courts. This

decision will leave thousands of people in the nightmarish position of having no court to hear their very real claims of innocence. As Justice Sotomayor observed, "The decision is perverse. It is illogical … It is hard to imagine a more 'extreme malfunctio[n]' … than the prejudicial deprivation of a right that constitutes the 'foundation for our adversary system.'"

In this ruling, the Supreme Court set aside the judgments of four federal judges – on both the federal district court and the federal court of appeals – that Barry Jones was represented by a trial attorney whose failure to investigate and challenge the prosecution evidence caused Mr. Jones to be wrongfully convicted. Because the Supreme Court has held that the federal courts cannot consider this evidence of innocence, Mr. Jones now faces execution. This case is hardly an anomaly. Since 1989, more than 3,000 people have been wrongfully convicted of crimes in the United States – including 186 who were condemned to death. Bad lawyering, including poor preparation, inadequate investigation and intrinsic bias, is a leading cause of these injustices.

The vast majority of criminal cases in the United States are handled by state public defenders. Unfortunately, our public defender systems are chronically underfunded, poorly paid and overloaded with cases. Because the Court's emphasis on finality blinks this reality, it exacerbates the intolerable risk of innocent people languishing in prison and even being executed. It is therefore now incumbent upon the states to ensure that people charged with crimes have qualified and resourced counsel and there is a meaningful opportunity to litigate claims of trial counsel ineffectiveness.

There is no doubt that by stripping back people's constitutional rights to effective counsel, this decision increases the risks of wrongful conviction and sentencing innocent people to death.

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Supreme Court Report: Pulsifer v. United States, 22-340

Volume 30, Issue 6: This *Report* summarizes opinions issued on February 22 and 28, 2023 (Part I); and cases granted review on February 27 and March 6, 2023 (Part II).

Case Granted Review: *Pulsifer v. United States*, 22-340

Pulsifer v. United States, 22-340. This case involves 18 U.S.C. §3553(f), the "safety valve" provision of the federal sentencing statute. If a defendant satisfies the five sets of criteria in subsections (f)(1) through (f)(5), the district court is not required to impose a mandatory-minimum sentence. A defendant meets (f)(1) if he "does not have—(A) more than 4 criminal history points . . .; (B) a prior 3-point offense . . .; *and* (C) a prior 2-point violent offense." 18 U.S.C. §3553(f)(1) (emphasis added). The Court will decide whether a defendant satisfies (f)(1) only if he does not have all three of (A), (B), and (C).

Petitioner Mark Pulsifer pleaded guilty to distributing 50 grams or more of methamphetamine. Given his criminal history, he faced a mandatory-minimum sentence of 15 years' imprisonment. At sentencing, Pulsifer argued that he was entitled to safety-valve relief under §3553(f). Regarding (f)(1), Pulsifer acknowledged that he did not meet (A) or (B), because has more than 4 criminal history points and two prior 3-point offenses. But Pulsifer does not have a prior 2-point violent offense, as described in (C). Reading the statute as disqualifying a defendant only if he has all three of (A), (B), and (C), Pulsifer contended that he satisfied (f)(1). The district court rejected Pulsifer's argument and sentenced him to 162 months of imprisonment after

applying the mandatory minimum. The Eighth Circuit affirmed. 39 F.4th 1018.

The Eighth Circuit interpreted §3553(f)(1) as precluding eligibility for safety-valve relief if the defendant has any one of (A), (B), or (C). The court agreed with Pulsifer that the statute uses the word "and" in the conjunctive. But it favored a "distributive" reading of "and" over a "joint" reading, meaning "that the requirement that a defendant 'does not have' certain elements of criminal history is distributed across the three subsections, and a defendant is ineligible if he fails any one of the three conditions." The court reasoned that there was a "strong textual basis to prefer a distributive reading of 'and' in §3553(f)" because if "and" is read jointly, subsection (A) is rendered superfluous. That is, under a joint reading, a "defendant who has a prior three-point offense under subsection (B) and a prior two-point violent offense under subsection (C) would *always* meet the criterion in subsection (A), because he would always have more than four criminal history points." "Only the distributive interpretation avoids surplusage," the court concluded.

Pulsifer argues that "and" means "and," such that "a defendant remains eligible for safety-valve relief unless he has (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense." He submits that it is the ordinary-English view of the word "and." Pulsifer also invokes the "conjunctive negative proof," under which the phrase "you must not do A, B, and C" forbids doing the combination of all three things. Further, he utilizes the "presumption of consistent usage"—that "and" in one place in the statute means the same thing as "and" somewhere else." Pulsifer notes that in "§3553(f), Congress used 'and' to join both subsections (2) through (5) and conditions (A) through (C) in subsection (1)—all in the very same sentence." He questions, "Why would 'and' mean 'or' in (f)(1) but 'and' when connecting (f)(1) through (f)(5)?" As for whether his reading of the statute creates surplusage, Pulsifer contends that that canon cannot override the "ordinary, plain meaning" of "and." Finally, he maintains that the Court must resolve any ambiguity in the statute in his favor under the rule of lenity.

The Government endorses the Eighth Circuit's analysis. It argues that "Section 3553(f)(1)'s prefatory phrase—"the defendant does not have"—is best read to modify subparagraphs (A), (B), and (C) 'severally.'" In other words, "a defendant is eligible for safety-valve relief if he does not have (A), does not have (B), and does not have (C)." Like the Eighth Circuit, the Government invokes the surplusage canon to support its interpretation of the statute. The Government also suggests that Pulsifer's reading would lead to absurd results, as a defendant with a couple dozen criminal-history points would be eligible for safety-valve relief so long as he does not have a prior two-point violent offense.

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Garnier v. O'Connor-Ratcliff

Ninth Circuit Finds First Amendment Violation in School District Officials' Blocking of Parents on Social Media.

March 2023

HARVARD LAW REVIEW

The Internet has changed the way we speak — and also the way we disrupt speech. In the ever-protean First Amendment jurisprudence of free speech, novel forms of communication on the web should make us proceed with caution as we pour new wine into old skins. Recently, in *Garnier v. O'Connor-Ratcliff*,[1] the Ninth Circuit held that the First Amendment restricts the ability of public officials to block private individuals on social media. While the court reached the right outcome, its analysis of relevant government interest hinged too heavily on analogizing to situations arising in physical fora. Such reasoning leaves little room for acknowledging unprecedented speech disruptions enabled by social media. Shifting attention toward the "felicity conditions" of speech — conditions that must be satisfied in order for speech to achieve its intended effect — may facilitate a more precise understanding of speech disruption.

Michelle O'Connor-Ratcliff and T.J. Zane ("Trustees") were elected to the Poway Unified School District (PUSD) Board of Trustees in November 2014.[2] While running for election, they each created public Facebook pages to promote their campaigns.[3] They continued to use the pages to announce PUSD-related information and solicit public opinion about the Board's decisions after assuming office.[4] In 2016, O'Connor-Ratcliff created a public Twitter page for similar uses.[5] These social media spaces, which were identified as official pages of government officials, allowed members of the public to reply to original posts made by the Trustees in the form of comments or to register nonverbal reactions.[6]

Christopher and Kimberly Garnier, parents of children in PUSD schools, began leaving comments on these pages sometime in 2015.[7] The Garniers had been active critics of the Board for years, participating in public meetings and emailing the Board to express concerns about race relations in the District and the financial misconduct of PUSD's superintendent at the time.[8] Frustrated by the PUSD's lack of response, the Garniers posted lengthy and repetitive comments on the Trustees' Facebook and Twitter pages.[9] For example, Christopher Garnier left nearly identical comments on 42 separate posts on O'Connor-Ratcliff's Facebook page; he also posted 226 identical replies to her Twitter page within ten minutes.[10] The Trustees initially responded by deleting or hiding these comments individually; around October 2017, they blocked the Garniers from their social media pages.[11] Later, the Trustees used the "word filter" function on their Facebook pages to prevent com-ments containing designated words from being posted.[12] The broad list of filtered words practically disabled any viewer from posting new comments.[13]

The Garniers then filed suit in federal court under 42 U.S.C. § 1983, claiming that the Trustees could not block them on social media consistent with the First Amendment.[14] After a bench trial, Judge Benitez found for the Garniers.[15] He held that the Trustees acted under color of state law and that their social media pages were designated public fora.[16] Judge Benitez found that the *initial* blocking of the Garniers served the substantial government interest of "facilitat[ing] transparency in government" and "promoting online interaction with constituents through social media."[17] In his view, the blocking also constituted a narrowly tailored content-neutral regulation because it was based on the repetitive nature of the Garniers' comments, rather than on their criticism of the Board.[18] However, he concluded that the *continued* blocking of the Garniers for the next three years was no longer narrowly tailored to the transparency interest.[19] He cautioned that the defendants may legitimately reblock the Garniers should they repeat their "repetitive and largely unreasonable behavior"[20] and that the defendants may also adopt content-neutral rules of decorum.[21] Both parties appealed.[22]

The Ninth Circuit affirmed.[23] Writing for a unanimous panel, Judge Berzon[24] ruled that the Trustees "violate[d] the First Amendment by creating a publicly accessible social media page related to [their] official duties and then blocking certain members of the public from that page."[25] Noting that a successful § 1983 claim requires state action, she chose the "nexus test" — which asks whether there exists "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself" — as the appropriate test in the instant case.[26] She applied the three-pronged test announced in *Naffe v. Frey*[27] to demonstrate that the Trustees' "use of their social media pages qualifie[d] as state action under § 1983."[28] First, the Trustees "purport[ed] . . . to act in the performance of [their] official duties," as evidenced by their self-identification as government officials and the chief use of the social media pages to announce PUSD-related information.[29] Second, the significant number of followers on the pages and the Trustees' active solicitation of "constituent input about official PUSD matters"[30] illustrated "the purpose and effect of influencing the behavior of others."[31] Third, the informative function of the social media pages related meaningfully to the Trustees' "governmental status" and "to the performance of [their] duties."[32]

Next, the court held that the Trustees "violated the First Amendment when they blocked the Garniers from their social media pages."[33] Judge Berzon analyzed the issue through the lens of the public forum doctrine, which scrutinizes speech regulation based on the category of forum regulated.[34] Focusing on the pages' open access to the public and the initial lack of any content regulation policy, she found the Facebook pages prior to the implementation of the word filter and O'Connor-Ratcliff's Twitter page to be *designated* public fora — in which restrictions must be both content neutral and "narrowly tailored to serve a significant government interest."[35] However, once the Trustees disabled comments via the word filter, she found that the pages turned into *limited* public fora, in which all reasonable viewpoint-neutral restrictions are permissible.[36] According to Judge Berzon,

whether the initial blocking of the Garniers was content neutral posed "a close question."[37] Even if content neutral, however, the blocking served no significant government interest because the technical features of the Facebook and Twitter pages minimized the extent of disruption caused by the repetitive comments, either by trimming lengthy comments or limiting their visibility.[38] Judge Berzon cited the holding from *Norse v. City of Santa Cruz*[39] that a significant government interest in forum maintenance required a showing of "actual disruption" on the forum, which does not encompass "constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."[40] The visual clutter of the Garniers' comments fell short of the regulation-worthy disruption that may be caused by an unruly speaker in a physical city hall meeting.[41]

Neither was the blocking narrowly tailored, given that the Trustees could have pursued alternative solutions, such as deleting individual comments or establishing rules of decorum.[42] In addition, the continued blocking of the Garniers after the use of the word filter exceeded the bounds of permissible speech restrictions in a limited public forum.[43] By effectively eliminating all comments, the word filter rendered the continued ban superfluous and, therefore, unreasonable.[44]

While the Ninth Circuit reached the correct outcome, its analytic approach is limited to recognizing forms of speech disruption in physical spaces. The features of social media that distinguish it from traditional fora should require a recalibration of the philosophical assumptions underlying speech. The court's treatment of the significant-government-interest prong in its forum analysis overfocused on analogizing to disruptions of speech in physical fora and failed to consider novel forms of "actual disruption" that social media enables. A more precise understanding of speech disruption might pay attention to speech that thwarts the conditions necessary for other speech to be successful.

Judge Berzon's attempt to transplant existing free speech rules onto social

media is symptomatic of a general tendency to treat the virtual forum as just another species of the physical forum. In *Packingham v. North Carolina*,[45] the Supreme Court characterized social media as the contemporary version of the quintessential public forum for exchanging views, such as "a street or a park."[46] Lower courts have interpreted this language as establishing the presumption that "social media is entitled to the same First Amendment protections as other forms of media."[47]

This inclination toward doctrinal consistency should not, however, ignore the caveat that certain forms of speech disruption are unique to cyberspace. The suggested equivalency between physical and virtual fora focuses on the nature of activities — *what things people do* — and not on the mechanism of communication — *how people do things*. While *Packingham* astutely observed that platforms such as Facebook, LinkedIn, and Twitter allow members of the public to "debate religion[,] . . . advertise for employees, . . . [and] petition their elected representatives,"[48] the issue in that case — the constitutionality of a law banning sex offenders from even viewing, rather than posting on, social media[49] — did not require noting that communication on these platforms occurs asynchronously or that algorithms may influence page accessibility.[50]

Similarity in the nature of communicative activities does not entail similarity in the modes of disruption to which those activities are vulnerable. The visual-clutter effect contemplated by *Garnier* itself is telling. While it may be tempting to treat this effect as a virtual analog of the unruly speaker in a city hall meeting, as the court did, visual clutter constitutes a different kind of disturbance altogether from auditory bombardment. For example, comments on a webpage remain in space, whereas spoken words dissipate.[51] In a matter of a few minutes, a single commenter can create lasting disruption; the city hall interrupter can sustain only a temporary disturbance. *Garnier* neglected to explore such differences, apparently deeming the meaning of "actual disruption" self-evident even in the virtual context.[52]

Sketching the criteria for actual disruption, in fact, deserves more attention. The task requires moving past imperfect analogies to the brick-and-mortar forum. The fundamental question of how speech gets disrupted can be recast to ask how speech fails, which in turn demands an understanding of how speech succeeds. Philosopher of language J.L. Austin's seminal speech act theory can aid this enterprise. Challenging the traditional view that speech primarily states propositions, Austin observed that we *do* many other things with words — promising, commanding, betting, and so forth.[53] This view of speech as the performance of speech acts enables a more precise assessment of the success or failure of speech by examining a speech act's felicity conditions — conditions that must be satisfied in order for a speech act to achieve its intended effect.[54] For example, the speech act of commanding requires, among other things, the commander's authority as a felicity condition, in much the same way that the act of signing a contract must be performed by the correct signer to take effect. A low-ranking soldier uttering the word "Charge!" at a captain fails to command.

The dearth of discussion on what qualifies as actual disruption — in both cyberspace *and* physical space[55] — is bound to cause thorny issues as online speech outruns comparisons to traditional speech. Given this uncertainty, Austin's framework offers an analytic schema worth exploring: any speech act that thwarts the felicity condition of someone else's speech act can plausibly be described as actually disrupting, or even silencing, that speech act. The prima facie plausibility of this schema lies in its explanatory capacity to account for traditional speech disruptions. One obvious way in which the city hall interrupter disrupts is by preventing other speakers from being heard. After all, most communicative statements share the felicity condition that the audience hear them; these speech acts must "secure uptake."[56]

This flexible conception of speech disruption would invite courts and scholars to contemplate the unique felicity conditions of speech acts on social media. *Garnier* hints at one such condition by entertaining the

defendants' argument that the repetitive comments had "a net effect of slightly pushing down" other posts.[57] The Trustees' speech acts of informing and announcing, as well as other viewers' speech acts of opining via comments, all depend on the felicity condition that their text be visible. In other words, the security of uptake on social media depends on visibility, which may be impaired by repetitious comments. Of course, the act of *posting* a comment does not depend on visibility; a mouse click accomplishes the posting, whether that comment reaches an audience or not. The natural assumption, however, is that the Trustees' social media pages differ from, say, a YouTube comment section, in that they were meant to facilitate dialogue rather than merely allow unilateral self-expression, whether the speakers are the Trustees announcing news or parents criticizing the Trustees.

Social media is also especially vulnerable to trolling, spamming, and disinformation. Trolls, people "who post[] deliberately inflammatory messages online,"[58] take advantage of the unsupervised, anonymous, and asynchronous nature of online forum discussions. While a physical forum is better equipped to handle such comments — by concurrent feedback from other participants, for example — an online forum lacks similar measures. By inciting irrelevant discussions, trolling not only dilutes the substance of the intended discussion hosted by a forum but also risks creating the perception that all comments on a forum are insincere.[59] An observer will have difficulty distinguishing trolls from sincere participants and thereby attribute "a generalized gross insincerity" to the forum.[60] Hence, trolling attacks the felicity condition that speakers on a forum be trusted with some minimal level of sincerity. More invidious means of speech disruption might capitalize on social media algorithms. For instance, spam comments can cause Instagram's algorithm to recognize a page as "spammy" and decrease the likelihood of the page appearing to new viewers.[61]

Still more problematic are disinformation campaigns, which pose grave threats in virtual space: "[Social media] does not possess the filters and

vetting systems of traditional news media to process what is true and what is false. Thus, the platforms enable false information to spread widely and quickly."[62] Given the current First Amendment doctrine's general tolerance of false speech,[63] the speech act framework might equip courts with an alternative justification for regulating some types of disinformation by considering its disruptive effect on free speech. When fake news targets a specific individual, for example, it can undermine her credibility, disabling her from securing the minimal amount of trust necessary to perform basic speech acts.[64] In these cases, the problem of disinformation can be construed not as a conflict between liberty and truth, but as "a conflict between liberty and liberty."[65]

These examples may raise concerns about aggressive government regulation of speech. However, the analysis of actual disruption goes only to the prong of significant government interest and leaves intact the other prong of narrow tailoring, which requires that the government exhaust "easily available alternative modes of regulation."[66] Indeed, *Garnier*'s analysis that the Trustees could have "delet[ed] only repetitive comments rather than blocking the Garniers entirely" would preserve the holding in favor of the Garniers, even had the court acknowledged a significant government interest in forum maintenance.[67]

Today, social media and other cyber platforms are increasingly the dominant venues of public discourse. The characterization of these platforms as the "modern public square,"[68] when taken too literally, risks missing the unique attributes of online speech that render it vulnerable to new forms of disruption. Going forward, courts should be prepared to recalibrate the philosophical assumptions underlying speech so as to entertain a broader array of speech disruptions.

Supreme Court Grants Cert in Lindke and O'Connor-Ratcliff

Olivia B. Hoff, Angela Nguyen, Derek Webber

Wednesday, May 24, 2023, 8:00 AM

The two cases involve the First Amendment implications of public officials blocking others on social media.

Defendant James Freed served as City Manager in Port Huron, Michigan. (Michigan Municipal League, https://tinyurl.com/mr3jv9c4; CC BY-ND 2.0, https://tinyurl.com/y7aj84py)

The Supreme Court agreed to hear two cases about whether government officials

violate the First Amendment when they block citizens from private social media accounts that are also used to convey government information. The questions posed by the cases bring to a head a split between the circuits over when a public official's social media activity equates to state action. The parties argue whether the Court should examine social media pages in their totality or focus solely on the government authority invoked by the pages.

In *Lindke v. Freed*, James Freed, city manager for Port Huron, Michigan, used his Facebook page to communicate about city public health measures during the coronavirus pandemic. When Kevin Lindke commented on Freed's posts to criticize the city's coronavirus measures, Freed deleted Lindke's comments and eventually blocked Lindke from his page. The U.S. Court of Appeals for the Sixth Circuit found that Freed did not violate Lindke's First Amendment rights, ruling that Freed was not performing a duty of his office and therefore was not engaging in state action when he blocked Lindke and deleted his posts.

In *O'Connor-Ratcliff v. Garnier*, two Southern California school board officials, Michelle O'Connor-Ratcliff and T.J. Zane, blocked parents Christopher and Kimberly Garnier from their Facebook and Twitter accounts, after the Garniers inundated the school board members' posts with "repetitive comments and replies." The U.S. Court of Appeals for the Ninth Circuit found that the school board officials violated the Garniers' First Amendment rights.

The Supreme Court agreed to hear the two cases to resolve the circuit split. Both cases, as well as the potential implications of the Supreme Court's ruling, are described in more detail below.

Lindke v. Freed

In his petition for certiorari, Lindke focuses on the circuit split, noting that while four circuits examine the totality of the circumstances to determine whether a public official is engaging in state action, the Sixth Circuit uses the duty-or-authority test. The duty-or-authority test examines whether the official was performing a "duty of [their] office" or invoking the "authority of [their] office," which would be the case only if Freed's actions were controlled by the government or entwined with its policies. Lindke states the Sixth Circuit expressly parted ways with other circuits that examine a broader range of factors, such as a "social media page's purpose and appearance" where the page conveys the "impression that the page operated under the state's imprimatur."

While Freed used his Facebook page to share Bible verses and pictures of his family, he also posted administrative directives and press releases relating to his job. Freed's page reflected his government title in the name, the page categorization was "public official," the city government's website was linked on his page, and a general administrative staff email was listed under the page contacts.

Despite the appearance of the page, the Sixth Circuit stated that Lindke's argument's "focus on the page's appearance seems akin to considering whether an officer is on duty, wears his uniform, displays his badge, identifies himself as an

officer, or attempts to arrest anyone." The court further stated that in cases of police authority, "appearance is relevant to the question whether an officer could have acted as he did without the authority of his office." The court held, in contrast, that "Freed gains no authority by presenting himself as city manager on Facebook." The court argued Freed's "posts do not carry the force of law simply because the page says it belongs to a person who's a public official." The court used this reasoning to part from the other circuits, holding that the appropriate focus is the actor's official duties and use of government resources or state employees, which are the "anchors" of the Sixth Circuit's precedents on state action. The court concluded its opinion by stating that this test provides a predictable application for public officials and is a bright line in an otherwise blurry context.

O'Connor-Ratcliff v. Garnier

Inversely, the government officials in *O'Connor-Ratcliff v. Garnier* take issue with the Ninth Circuit's use of the appearance-and-purpose test, as opposed to the duty-or-authority test adopted by the Sixth Circuit in *Lindke v. Freed*.

When the Ninth Circuit found the government officials' actions equated to state action, the court noted the officials had "clothed their pages in the authority of their offices and used their pages to communicate about their official duties." In so finding, the court emphasized the board members identified themselves as government officials, listed their official titles in prominent places, and one had also included her official email address in the contact information section of her Facebook page. The court treated all of the above as indicia of apparent authority, while acknowledging that the school district had not authorized the pages. The Ninth Circuit further noted that the social media accounts were "overwhelmingly geared toward providing information to the public about the Board's official activities" and "soliciting input from the public on policy issues relevant to Board decisions." As a result, the court concluded, "both through appearance and content, [the officials] held their social media pages out to be channels of communication with the public about the work of the Board."

The government officials argue that application of the appearance-and-purpose test, as opposed to the Sixth Circuit's more narrow duty-or-authority test, undermines the individual liberty that the state action requirement exists to protect. Individual liberty, they argue, includes the freedom of individuals holding public office to communicate with the public about their jobs in the manner in which they see fit, using their personal social media accounts.

Implications

The Supreme Court's ruling in these cases will impact how public officials communicate with their constituents; it will also indicate how this Court views social media more broadly. These cases will also be the first time the Court fully examines the social media activity of public officials since the U.S. Court of Appeals for the Second Circuit ruled that President Trump acted in a governmental capacity when blocking citizens on his personal Twitter account.

If the Supreme Court comes out in favor of the appearance-and-purpose test, government officials may stop posting information relating to their official duties on their personal social media accounts. Should an official's social media account come to be, through appearance and content, a mode of communication with the public, that official runs the risk of violating any commenter's First Amendment rights by blocking their access to the account. We are likely to see officials attempt to avoid that risk by replacing such posts on personal accounts with ones on official social media accounts. By contrast, should the Court follow the duty-or-authority test, members of the public may lose access to vital government information simply based on the government official choosing to relay information through unofficial channels. Either outcome will drive shifts in how government officials communicate with the public. We could see a shift back to traditional, non-social media communications, reducing the overall amount of communication at a time when many Americans engage in political discourse solely through social media.

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Justices take up "Trump Too Small" trademark case

Amy Howe

SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

SCOTUS NEWS

It has been more seven years since Sen. Marco Rubio, a Republican from Florida, claimed in a presidential debate that then-candidate Donald Trump had "small hands." On Monday the justices agreed to weigh in on a trademark dispute that arises indirectly from that comment – specifically, from Steve Elster's efforts to register the phrase "Trump Too Small" so that he could print and sell t-shirts bearing that phrase. The case, *Vidal v. Elster*, was the only grant on the list of orders released from the justices' private conference last week.

Elster contended that the phrase was intended to "convey[] that some features of President Trump and his policies are diminutive." But the Patent and Trademark Office rejected Elster's application. It relied on a federal trademark law, Section 2(c) of the Lanham Act, that prohibits the registration of a trademark that uses the name of another living person without that individual's permission.

The PTO's Trademark Trial and Appeal Board upheld the PTO's decision, but the U.S. Court of Appeals for the Federal Circuit reversed. It ruled that relying on Section 2(c) to prohibit Elster from registering the "Trump Too Small"

phrase would violate the First Amendment. When it comes to trademarks, the court of appeals explained, the government does not have an interest "in restricting speech critical of government officials or public figures."

The Biden administration came to the Supreme Court in January, asking the justices to review the Federal Circuit's decision. U.S. Solicitor General Elizabeth Prelogar argued both that the lower court's ruling is wrong and that the Supreme Court normally grants review when a federal appeals court strikes down a federal statute.

The case will likely be argued in the fall, with a decision to follow sometime next year.

The justices denied review in the case of Heather Leavell-Keaton, who was sentenced to death for her role in helping her boyfriend kill his two young children. Leavell-Keaton was originally sentenced in 2015, but the Alabama Court of Criminal Appeals – the state's highest court for criminal cases – lifted that sentence in 2020 because she had not been given an opportunity to make a statement on her own behalf at her sentencing hearing. At her new sentencing hearing, the trial judge declined to consider any of the evidence that Leavell-Keaton offered about her good behavior during her five years in prison, and he sentenced her to death again.

After the Alabama Court of Criminal Appeals upheld her new sentence, Leavell-Keaton came to the Supreme Court, asking the justices to review her case. She argued that under the justices' 1986 ruling in *Skipper v. South Carolina*, she had a constitutional right to present evidence of her good behavior in prison. But after considering Leavell-Keaton's case at four conferences and requesting the state-court record (a sign that at least one justice was looking closely at the case), the court turned down her request without comment.

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Justices take up major Second Amendment dispute

amy-howe

SCOTUS NEWS

on Jun 30, 2023 at 1:03 pm

The Supreme Court will hear oral argument next fall in a major gun-rights case challenging the constitutionality of a federal ban on the possession of guns by individuals who are subject to domestic violence restraining orders. The Biden administration had asked the justices to weigh in after a federal appeals court struck down the ban earlier this year, and on Friday the justices agreed to do so.

The announcement that the justices had granted review in *United States v. Rahimi* came on a list of orders released by the justices on Friday at noon. The justices held their last regularly scheduled conference before their summer recess on Thursday, June 22, and issued orders from that conference on Monday, June 26. But the justices traditionally hold another conference, colloquially known as the "clean-up" conference, after they release all of their decisions for the term, to dispose of any petitions for review that have been on hold awaiting the outcome of related cases on the merits. In recent years, the justices have also added new cases to their docket for the upcoming term, and they did so again on Friday, granting review in seven new cases, including *Rahimi*.

The challenge to the gun-possession ban comes to the court in the case of Zackey Rahimi, a Texas man who during a 2019 argument in a parking lot knocked his girlfriend to the ground and dragged her back to his car, causing her to hit her head on the car's dashboard. In a telephone call after the incident, Rahimi told the woman that he would shoot her if she told anyone about the assault.

A few months later, a Texas state court entered a domestic violence restraining order against Rahimi. The order also barred Rahimi from possessing a gun and warned him that doing so while the order was in effect could be a federal felony.

Roughly a year later, while the order was still in effect, Rahimi was a suspect in a series of shootings.

When police officers searched his home pursuant to a warrant, they found (among other things) a pistol, a rifle, and ammunition – along with a copy of the restraining order.

Rahimi was charged with violating the federal ban on the possession of a firearm by anyone who is the subject of a domestic violence restraining order. He pleaded guilty and was sentenced to just over six years in prison, followed by three years of supervised release.

The conservative U.S. Court of Appeals for the 5th Circuit initially upheld his conviction. But after the Supreme Court's June 2022 decision in *New York State Rifle & Pistol Association v. Bruen*, striking down New York's handgun-licensing scheme, the court of appeals issued a new opinion that threw out Rahimi's conviction. Despite the restraining order, the court reasoned, Rahimi was still retained his right to bear arms under the Second Amendment unless, as the Supreme Court explained in *Bruen*, the federal government could show that the ban was consistent with the country's historical tradition of regulating firearms. Because it was not, the court of appeals concluded, the law is unconstitutional.

The Biden administration came quickly to the Supreme Court, asking the justices to grant review and reverse the 5th Circuit's ruling. Emphasizing that "[g]overnments have long disarmed individuals who pose a threat to the safety of others," and that the law "falls comfortably within that tradition," U.S. Solicitor General Elizabeth Prelogar told the justices that allowing the 5th Circuit's decision to stand would "threaten[] grave harms for victims of domestic violence."

Rahimi urged the justices to deny review and leave the 5th Circuit's ruling in place. He depicted the decision of the court of appeals as a "faithful application of *Bruen*." But in any event, he continued, it has been only a short time since the Supreme Court's decision in *Bruen*, and the lower courts are "now hard at work applying the new historical framework and re[e]valuating firearm restrictions that were previously upheld under" the less stringent test in place before *Bruen*. The justices should wait to step in until more lower courts have had a chance to interpret federal and state gun laws in light of *Bruen*, Rahimi concluded.

After considering the case at two consecutive conferences, the justices granted review without comment. The case will likely be argued in the fall, with a decision to follow sometime next year.

This article was originally published at Howe on the Court.

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SIDEBAR

Do People Subject to Domestic Abuse Orders Have the Right to Be Armed?

The Supreme Court will soon consider whether to hear an appeal of a ruling striking down a domestic-violence law under the Second Amendment.

By Adam Liptak
Reporting from Washington

June 12, 2023

Zackey Rahimi, a drug dealer in Texas with a history of armed violence, is “hardly a model citizen,” a federal appeals court judge wrote in March, with considerable understatement. But the court vacated Mr. Rahimi’s conviction under a federal law that makes it a crime for people subject to domestic-violence orders to possess guns, ruling that the law violated the Second Amendment.

Next week, the Supreme Court is set to consider whether to hear an appeal of that decision, which applied a history-based test to rule that the government was powerless to disarm Mr. Rahimi under the domestic-violence law. The chances that the justices will agree to hear the case are good.

The case started in 2019, when Mr. Rahimi assaulted his girlfriend and threatened to shoot her if she told anyone, leading her to obtain a restraining order. The order suspended Mr. Rahimi’s handgun license and prohibited him from possessing firearms.

Mr. Rahimi defied the order in flagrant fashion, according to court records.

He threatened a different woman with a gun, leading to charges of assault with a deadly weapon. Then, in the space of two months, he opened fire in public five times.

Upset about a social media post from someone to whom he had sold drugs, for instance, he shot an AR-15 rifle into his former client’s home. When a fast-food restaurant declined a friend’s credit card, he fired several bullets into the air.

The shootings led to a search warrant of Mr. Rahimi’s home, which uncovered weapons, and he was charged with violating the federal law.

After a judge rejected his Second Amendment challenge to the law, he pleaded guilty and was sentenced to more than six years in prison. The U.S. Court of Appeals for the Fifth Circuit at first affirmed his conviction in a short decision, rejecting the argument that the law violated the

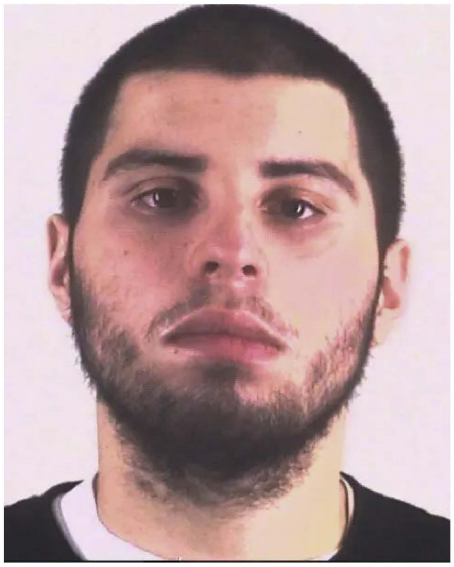
Second Amendment in a footnote.

But the appeals reversed course after the Supreme Court issued a decision last June establishing a new test to decide whether gun control laws are constitutional, one focused on history.

Under that test, a unanimous three-judge panel of the Fifth Circuit ruled, the law prohibiting people subject to domestic-violence orders from possessing firearms violated the Second Amendment because there was no historical support for it.

Next week, almost a year to the day after the Supreme Court announced the new approach in New York State Rifle & Pistol Association v. Bruen, the justices are set to meet to discuss whether to hear the Biden administration's appeal. The court often hears appeals of decisions holding federal laws unconstitutional.

The case, United States v. Rahimi, No. 22-915, would give the court a chance to explore the scope of its new test, which requires the government to identify historical analogues to justify laws limiting Second Amendment rights.



Zackey Rahimi was sentenced to more than six years in prison, but a court vacated his conviction.
Tarrant County Sheriff's Office

As a general matter, Justice Clarence Thomas wrote in his majority opinion in Bruen, the Second Amendment protects the rights of "an ordinary, law-abiding citizen." And there is, the Biden administration told the justices in the new case, "strong historical evidence supporting the general principle that the government may disarm dangerous individuals."

But the Fifth Circuit rejected a variety of old laws identified by the government as possible analogues, saying they did not sufficiently resemble the one concerning domestic-violence orders. Many of them, Judge Cory T. Wilson wrote for the panel, "disarmed classes of people considered to be dangerous, specifically including those unwilling to take an oath of allegiance, slaves and Native Americans." That was different, he wrote, from domestic-violence orders, which make case-by-case judgments about a particular individual's dangerousness.

Lawyers for the administration questioned that distinction. “It would be bizarre,” they wrote, “if legislatures could disarm dangerous individuals based on categorical presumptions, but not based on individualized judicial findings after notice and a hearing.”

Judge Wilson, who was appointed by President Donald J. Trump, wrote that the government’s insistence that it can disarm people who are not law-abiding “admits to no true limiting principle.”

“Could speeders be stripped of their right to keep and bear arms?” he asked. “Political nonconformists? People who do not recycle or drive an electric vehicle?”

Judge Wilson conceded that the challenged law “embodies salutary policy goals meant to protect vulnerable people in our society.” But he said the approach required by the Bruen decision did not allow courts to weigh the benefits of the law against its burdens. What was important, he wrote, quoting that decision, was that “our ancestors would never have accepted” the law on domestic-violence orders.

Judge James C. Ho, who was also appointed by Mr. Trump, issued a concurring opinion saying there were better ways to protect victims of domestic abuse.

“Those who commit violence, including domestic violence,” he wrote, “shouldn’t just be disarmed — they should be detained, prosecuted, convicted and incarcerated. And that’s exactly why we have a criminal justice system — to punish criminals and disable them from engaging in further crimes.”

But Judge Ho said domestic-violence orders were products of the civil justice system and were subject to abuse.

“Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings — and issued without any actual threat of danger,” he wrote. “That makes it difficult to justify” the law Mr. Rahimi challenged “as a measure to disarm dangerous individuals.”

In a brief urging the Supreme Court to deny review, lawyers for Mr. Rahimi said domestic violence was not a new phenomenon. “The founders could have adopted a complete ban on firearms to combat intimate-partner violence,” their brief said. “They didn’t.”

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

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