



# A LOOK AHEAD

**Supreme Court of the United States October Term 2022**

SUPREME COURT INSTITUTE  
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OCTOBER TERM 2022 PREVIEW

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**A LOOK AHEAD AT OCTOBER TERM 2022**

*Cover design by Brent Futrell, Georgetown University Law Center*

# Supreme Court Institute Preview Report

## Supreme Court October Term 2022

This report previews the Supreme Court’s argument docket for October Term 2022 (OT 22). The Court has thus far accepted 32 cases for review. The Court has calendared 8 arguments to be heard in the October Sitting and 10 in the November Sitting.

Section I of the report highlights some especially noteworthy cases the Court will hear. Section II organizes the cases accepted for review by subject matter and provides a brief summary of each.

### SECTION I: TERM HIGHLIGHTS

*Students for Fair Admissions v. President and Fellows of Harvard College, 20-1199*  
*Students for Fair Admissions v. University of North Carolina, 21-707*

In *Grutter v. Bollinger*, the Supreme Court held that universities and colleges may consider the race of an applicant as a plus factor in admissions in order to further the compelling interest in the educational benefits of a diverse student body. In *Fisher v. University of Texas (Fisher II)*, the Court summarized the educational benefits of diversity to include the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry. The composition of the Court has changed dramatically since *Grutter* and *Fisher II*, and the newly constituted Court granted certiorari in these two cases to decide whether *Grutter* should be overruled.

Petitioner is the same in both cases, Students for Fair Admissions. It makes two arguments for overruling *Grutter*. First, petitioner argues that the Equal Protection Clause categorically prohibits any use of race, a theory encapsulated in Justice Harlan’s famous phrase from his dissent in *Plessy v. Ferguson* that our “constitution is color-blind.” Second, petitioner argues that the use of race in admissions to further the educational benefits of diversity does not satisfy strict scrutiny.

In support of its color-blind theory, petitioner relies on the text of the Equal Protection Clause, a snippet of post-enactment history, and the Court’s unanimous decision in *Brown v. Board of Education*. The Equal Protection Clause’s text does not remotely answer the question, however, and neither does the post-enactment snippet. That leaves the Court’s decision in *Brown*. It is almost impossible to read the *Brown* decision and come away with the view that it established that the Constitution is color-blind. Instead, its holding rested on its assessment that segregation stigmatizes Black students as inferior. At a minimum, it left open whether the use of race to further integration and diverse educational experiences for all students would be constitutional. Nonetheless, the Chief Justice, speaking for the plurality in *Parents Involved v. Seattle*, recited the statement of plaintiff’s counsel in *Brown* that “no State has any authority under the equal-protection clause . . . to use race as a factor in affording educational opportunities among its citizens,” and then added that “it was that position that prevailed in this

Court.” That is why petitioner can so confidently assert that “if *Brown* is right, *Grutter* is wrong.”

While as many as six Justices may share the Chief Justice’s view of *Brown*, it is hard to believe they would be willing to overrule *Grutter* on that ground alone. This case therefore likely comes down to whether the Court accepts petitioner’s argument that *Grutter* is inconsistent with the Court’s larger Equal Protection Clause jurisprudence. On that score, petitioner makes the following arguments (among others) about why using race to further the educational benefits of diversity does not satisfy strict scrutiny: (i) the educational benefits of diversity are not sufficiently compelling to satisfy strict scrutiny; (ii) *Grutter* is premised on the impermissible stereotype that race can serve as a proxy for a students’ experiences and views; (iii) the experience in states where racial preferences have been banned (such as California and Michigan) demonstrates that the benefits of diversity can be obtained without the use of racial preferences; and (iv) affirmative action favoring certain minority groups inevitably harms disfavored minority groups, initially Jewish students, today Asian American students.

Petitioner is likely to have a sympathetic audience for these arguments. In *Fisher II*, Justice Alito, joined by the Chief Justice and Justice Thomas, concluded that the educational benefits of diversity do not satisfy strict scrutiny because they are too vague and imprecise and because they resist any limiting principle. Justice Alito also concluded that, under the laws of mathematics, any preference for Black students and Hispanic students inevitably discriminates against Asian American students. And Justice Alito concluded that the university had failed to show that it could not achieve its goals with other approaches, such as intensifying its outreach efforts, or placing greater weight on socioeconomic factors. The other three right-side Justices were not on the Court in *Fisher II*. But it is hard to imagine any one of them staking out a position on these points that is to the left of the Chief Justice.

Perhaps recognizing that they must do something other than defend *Grutter* on its own terms in order to have any chance to prevail, the universities have devoted considerable space to offering an originalist defense of *Grutter*. They argue that the framers expressly rejected a color-blind standard in favor of the more general terms of the Equal Protection Clause, and that, in the immediate wake of the Fourteenth Amendment’s adoption, Congress authorized race-conscious measures to benefit Black citizens, including in the field of education. Petitioner views the evidence differently, and, at this point, it’s hard to evaluate who has the better of the originalist argument. Given the manipulability of the originalist approach, however, it would be surprising if the universities’ originalist argument will prevent the Court from going where it is otherwise inclined to go.

Of course, even if the Court is disposed to agree that the Equal Protection Clause bars consideration of race to further the educational benefits of diversity, it must surmount the force of *stare decisis*. Petitioner has done next to nothing to demonstrate that there has been any significant change in the law or the facts since *Grutter* that would justify its overruling. But that was true in *Dobbs v. Jackson Women’s Health Organization*, and it provided no obstacle to overruling *Roe v. Wade* and *Planned Parenthood v. Casey*. In *Dobbs*, the Court refocused *stare decisis* on the question of how wrong a decision is. As a practical matter, if a majority concludes a prior decision is “egregiously wrong,” that is the end of the *stare decisis* analysis. The rest is window dressing. And, as *Dobbs* demonstrates, this is a Court that finds it relatively easy to say that whatever it disagrees with is not only wrong, but egregiously so (no matter how many other Justices have taken a different view).

While the Court is thus very likely to overrule *Grutter*, how it chooses to do so could make a world of difference. If the Court holds that there is no compelling interest in achieving the educational benefits of diversity, it could call into question other ways to pursue that goal, such as percentage plans, increased emphasis on socioeconomic factors, reduced emphasis on standardized tests, or reduced emphasis on legacy admissions. While each of those approaches is facially race-neutral and serves purposes in addition to promoting racial diversity, if they are adopted in part to further racial diversity, they arguably would be subject to strict scrutiny under *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* So, if the Court holds that diversity can never be a compelling interest, it could call into question the constitutionality of those alternative measures. A decision that a university may not pursue diversity by using race as a factor in admissions would thus be a narrower ground for overruling *Grutter*. This Court has shown that it is prepared to rule broadly on issues that it cares deeply about. But it seems likely that in this case, the Court will condemn the express use of race to further the benefits of educational diversity, without calling into question other facially race-neutral approaches.

### ***303 Creative LLC v. Elenis*, No. 21-476**

In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, the Court granted certiorari to decide whether the application of a public-accommodations law to a wedding cake baker who refused, for religious reasons, to bake a wedding cake for a same-sex wedding compelled speech in violation of the First Amendment. Ultimately, the Court decided the case without resolving that issue, holding that Colorado violated the baker's Free Exercise rights by evincing hostility to his religious beliefs.

This case raises the compelled-speech issue that *Masterpiece* did not resolve. The owner of a graphic design firm called 303 Creative wants to design websites for weddings, but, for religious reasons, does not want to do so for same-sex weddings. Colorado's public-accommodations law treats discrimination against persons planning same-sex weddings as discrimination on the basis of sexual orientation, putting the website designer to the choice of either declining to create any websites for weddings or creating websites for same-sex weddings in contravention of her religious views. The Court formulated the question presented as whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment. Under that formulation, it does not matter whether someone objects to the requirements of a public-accommodations law on religious or non-religious grounds.

Petitioners principally rely on the Court's decision in *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*. In that case, the Court held that Massachusetts violated the compelled-speech doctrine when it applied its public-accommodations law to an organization that excluded from its St. Patrick's Day parade an Irish LGB group that wanted to fly a self-identifying flag. The Court reasoned that requiring the organization to allow the LGB group to participate with its own banner would force the organization to express a message it did not wish to convey.

Petitioners derive from *Hurley* the rule that a state may not apply a public-accommodations law in a way that would require someone to express a message they do not wish to convey. That principle applies here, petitioners argue, because applying Colorado's public-accommodations law to them would require them to create speech that celebrates same-sex weddings, when that is not a message they wish to convey. Petitioners concede that a business

would not have a First Amendment right to refuse service based on the personal characteristics of a consumer, rather than on the nature of the message conveyed. Nor would a business have a right to refuse to sell an off-the-shelf product. Under petitioner's theory, it is only when a business is required to create expression with which it disagrees that the First Amendment kicks in.

The State responds that *Hurley* involves the application of a public-accommodations law to an expressive association where the association's own speech was treated as a public accommodation. By contrast, the State argues, no First Amendment question is presented when a state requires a business not to discriminate in the goods or services it provides to the general public because such a law targets discriminatory commercial conduct, not expression. According to the State, petitioners' argument rests on a misunderstanding about how its law operates. The law leaves to the designer the decision about what messages to create. It simply requires the designer to sell whatever messages it creates on a nondiscriminatory basis. It would not, for example, require a Hindu calligrapher to write flyers proclaiming that Jesus is Lord. It requires only that if a calligrapher chooses to write such a flyer, they sell it to Christian and Hindu customers alike.

Once the scope of the law is properly understood, the State argues, it resembles the statute requiring universities to provide equal access to military recruiters that the Court upheld in *Rumsfeld v. FAIR*. In that case, the Court rejected the universities' First Amendment compelled-speech claim on the ground that the statute targeted discriminatory conduct, and only incidentally speech, and the speech involved would be understood as the recruiter's speech, not the universities' speech. The State argues that the same principle applies here.

Neither *Hurley* nor *FAIR* directly controls the outcome here. The law at issue in *Hurley* targeted a parade, not commercial conduct, and the law at issue in *FAIR* required hosting speech on a nondiscriminatory basis, not creating it. Precedent is therefore unlikely to be determinative. What is more likely to guide the Court is an assessment of the extent to which petitioners' position undercuts traditional public-accommodations law compared to the extent to which the State's position has troubling consequences for free speech. Each side's position has implications that are likely to worry the Court.

At the argument in *Masterpiece*, counsel for Masterpiece received a series of questions on what it means to be an artist. Petitioners here say that artists include painters, photographers, writers, graphic designers, and musicians. But what about the cake maker in *Masterpiece*? And if a cake maker is an artist, why isn't a florist, or a chef, or a custom tailor, or a jewelry maker, or a hair designer, or a makeup artist, or a building designer, or a landscape architect? The further the term artist is extended, the more troubling the implications of petitioners' position become. At the same time, any effort to narrow the term to escape those troubling consequences may be viewed as arbitrary and unprincipled. Similarly, while petitioners draw a distinction between refusals based on the identity of the consumer and refusals based on the message conveyed, that line is not always clear. Which is it when a photographer refuses to photograph a female CEO because the picture will celebrate her appointment as the first female CEO of the company and the photographer believes that a woman's place is in the home? Which is it when a florist refuses to provide a floral arrangement for a gay man's funeral because he does not believe a gay lifestyle should be memorialized?

For the State, leaving the decision to businesses on what messages they will create also does not solve all problems. For example, if a website designer is willing to design a website with the message "May Jesus bless this wedding" for heterosexual weddings, would the designer



also be required to create a website with the same message for same-sex couples? If a Black artist designs crosses for many churches for a fee, is the artist required to design a cross for the Church of the Ku Klux Klan? And if Catholic Legal Services would sue a state official who refuses to provide a marriage license for an opposite-sex couple, would it also be required sue a state official who refuses to provide a marriage license for a same-sex couple? Those consequences are unlikely to strike a majority of the Court as palatable. The State also draws the same unclear line as petitioners between a refusal to serve based on identity and a refusal to serve based on message, posing questions that are hard to answer. For example, which is it when a graphic designer who will tell an opposite-sex couple's unique love story refuses to tell a same-sex couple's unique love story? Perhaps the biggest hurdle the State must overcome is the Court's sympathy for persons who sincerely believe that creating content celebrating same-sex marriages would violate their religious beliefs, together with the Court's likely belief that same-sex couples can readily find the services they need from other commercial actors.

### ***Moore v. Harper*, 21-1271**

The Elections Clause of the U.S. Constitution empowers each state "Legislature" to prescribe regulations governing the manner of holding congressional elections and grants Congress power to make or alter such regulations. The question is whether the Elections Clause incorporates the so-called "independent state legislature theory," *i.e.*, whether it prohibits a state court from invalidating a state legislature's regulation governing federal elections on the ground that it violates the state's constitution. That question arises in the context of a suit challenging the North Carolina legislature's districting map for congressional elections on the ground that it reflects a gerrymander in violation of various provisions in the State Constitution. The North Carolina Supreme Court invalidated the map as a partisan gerrymander, rejecting the claim that the Elections Clause confers on state legislatures power to regulate elections free from constraints imposed by the state constitution.

Petitioners stake their independent state legislature theory on the text of the Elections Clause, which confers power not on the state, as prior drafts did, but on a state's "Legislature." Petitioners argue that "Legislature" was defined at the time of the framing, as it is now, as the representative body that makes the law. That understanding, petitioners argue, leaves no room for state courts to enforce state constitutional constraints. Courts interpret the law; they are not a representative body that makes it.

Respondents counter that a state legislature was defined at the time of framing as an entity created and constrained by its state constitution. And they argue it was widely understood at the time of the framing that state courts had authority to enforce those constraints. It therefore makes no difference, respondents argue, that courts are not legislatures. The critical point is that the Elections Clause incorporates the background understanding that a legislature, properly defined, has no authority to legislate in a way that transgresses the state's constitution, and state courts have authority to enforce that constraint. Just as the Elections Clause confers power on Congress subject to the constraints of the Federal Constitution, respondents argue, it confers power on state legislatures subject to the constraints of their state constitutions.

The parties also debate the meaning of the Court's previous precedents on the Elections Clause. In *Davis v. Hildebrandt*, the Court held that a referendum rejecting a legislature's proposed redistricting did not violate the Elections Clause. In *Smiley v. Holm*, the Court held that the governor's veto of a state legislature's redistricting plan did not violate the Elections Clause,

reasoning that the Election Clause did not give state legislatures “power to enact laws in any manner other than that in which the constitution of the State provided.” Most recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that the Elections Clause did not prohibit the people of Arizona by initiative from delegating congressional redistricting to an independent commission. The Court reasoned that “nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.” Respondents argue that these cases could not be clearer in establishing that the Elections Clause does not confer power on the state’s representative body to regulate congressional elections in violation of their own state’s constitution.

Petitioners see these cases differently. According to petitioners, those cases were all based on the conclusion that the relevant acts—the referendum, the governor’s veto, and the initiative—were part of the state’s process for making law. It follows, petitioners argue, that if a state entity *outside* the state’s legislative process interferes with the legislature’s regulation of elections, it violates the Elections Clause. And courts interpreting the law are outside the legislative process.

Respondents also rely on *Rucho v. Common Cause*. In that case, in an opinion by the Chief Justice joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Court held that the Federal Constitution does not empower federal courts to address claims of political gerrymandering. But it went on to say that its conclusion “does not condone excessive partisan gerrymandering or condemn complaints about districting to echo into a void,” in part because “provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” The Court then elaborated on various state constitutional provisions that address partisan gerrymandering. While petitioners are surely right that this part of the Court’s decision is dicta, it would be beyond embarrassing for the Court to entirely disown it.

Whatever the Justices think of text and precedent, petitioners’ argument faces an uphill battle on logic and history. Petitioners argue that it makes perfect sense for the framers to have allocated to the state’s most representative body the decision about what rules should govern elections. But that is the standard argument for conferring lawmaking power on a representative body. Such a conferral of power has never meant that legislatures could legislate in a manner that violates the charter that created them and that otherwise constrains them. Petitioners explain the difference as the difference between power conferred by state law and power conferred by federal law. But missing from that presentation is any explanation for why the framers would have radically altered the usual understanding of the nature of legislative power. Also missing is any logical explanation (or textual basis) for petitioners’ distinction between a state constitution’s procedural constraints and its substantive constraints on the legislature’s lawmaking power.

Some examples test the logic of petitioners’ position. If a state’s constitution calls for vote by secret ballot, did the Elections Clause really empower legislatures to require public voting? If a state’s constitution requires contiguous and compact districts as a check on political gerrymandering, did the Elections Clause empower the legislatures to gerrymander to their hearts’ content by drawing districts stretching far and wide with thin fingers to grab preferred voters?

Petitioners’ theory also runs up against history. Today, state constitutions govern such matters as voting by ballot or secret ballot, voter registration, absentee voting, vote counting, and victory thresholds. And as noted above, several states have constitutional provisions that directly



prohibit partisan gerrymandering. Under petitioners' theory, the state's legislature would be free to upend each of those rules.

Those concerns have petitioners looking for a narrower theory. It is one thing, petitioners argue, for a state court to enforce specific and judicially manageable standards, such as contiguousness and compactness requirements. It is another to for a court to interpret an open-ended guarantee for "free elections" to discover rules governing the inescapably political question of when gerrymandering goes too far.

A version of that narrower theory appears in Justice Alito's dissent from the Court's order refusing to grant a stay in this case. The dissent said the text of the Elections Clause must set some limit on the ability of state courts to countermand the legislature's rules for federal elections. And it concluded that the line was crossed in this case based on certain reasons the North Carolina Supreme Court gave for its decision—that the State Constitution is difficult to amend, there is no citizen referendum process, and the only way that partisan gerrymandering can be addressed is through the courts. According to the dissent, these explanations have all the hallmarks of legislation.

The notion that the Elections Clause gives the Supreme Court authority to tell state courts what methods they may use to interpret their own constitutions may strike some as dubious. Some may also question Justice Alito's characterization of the North Carolina's Supreme Court's analysis. For example, the North Carolina Supreme Court grounded its analysis of the State's Free Elections Clause on its understanding that it was based on a provision in the English Bill of Rights, which was a response to efforts to dilute the vote in certain areas to attain electoral advantage. The North Carolina Supreme Court also relied on precedent interpreting the State Constitution's equal protection guarantee more expansively than its federal counterpart to reach any practice that denies the fundamental right to equality in voting. The interpretation of both clauses was informed by the Declaration of Rights' requirement that government must reflect the will of the people. The court reasoned that partisan gerrymandering makes that impossible, in part for the structural reasons identified by Justice Alito's dissent.

Judges can disagree about the persuasiveness of the state court's interpretation of the Free Elections Clause, the Equal Protection Clause, and the requirement that government must reflect the will of the people. But the court's analysis looks an awful lot like conventional constitutional interpretation, rather than lawmaking. It is also striking that the line Justice Alito found most troubling was a clipped quotation. Rather than saying that "the only way that partisan gerrymandering can be addressed is through the courts," full stop, the court said, "the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution."

Still, it is not beyond the realm of possibility that five or even six Justices would adopt Justice Alito's theory. It may be telling that Justice Alito was only able to persuade the two other Justices (Justices Thomas and Gorsuch) to join his dissent at the stay stage. But only time will tell whether full briefing and argument will enable Justice Alito to pick up two more votes.

### ***Merrill v. Milligan, 21-1086***

### ***Merrill v. Caster, 21-1087***

Section 2 of the Voting Rights Act prohibits election practices that result in a denial or abridgment of the right to vote on account of race. A violation is established when the totality of the circumstances establish that the political processes are not equally open to minority voters in

that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The question in this case is what standard governs Section 2 vote-dilution challenges to single-member districting plans.

The Court previously has spoken to that issue. In *Thornburg v. Gingles*, the Court described a vote-dilution claim as a claim that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and white voters to elect their preferred representatives. It then identified three preconditions for a claim: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to allow it to usually defeat the minority's preferred candidate. If those preconditions are satisfied, the court must then go on to assess the totality of circumstances to determine whether districting schemes leave minority voters with less opportunity than white voters to elect representatives of their choice. While *Gingles* involved multimember districts, the Court has since extended it to challenges to single-member district plans.

This case involves a challenge to Alabama's redistricting plan for congressional elections. That plan contains a single majority-Black district out of seven. Plaintiffs claim that the plan's failure to create a second district in which Black voters would have an opportunity to elect a candidate of their choice violates Section 2. According to plaintiffs, the plan created one rather than two minority opportunity districts by dividing the Black population in the southern half of the State among several districts. Those voters, plaintiffs alleged, constitute a reasonably compact community of interest stemming from common history and culture and would have been able to elect a candidate of their choice if united in a single district. Because of racial block voting, and their division into three districts, however, Black voters in that community lack any opportunity to elect candidates of their choice. Applying the *Gingles* analysis, the district court agreed.

The State's lead argument is startling: To establish a violation of Section 2, a plaintiff must show as a part of the totality of circumstances that the State's enacted district diverges from neutrally drawn redistricting plans. Not only that, but the plaintiff must show that irregularities in the State's enacted plan can be explained only by racial discrimination. While the State does not expressly say so, it is proposing that a plaintiff must prove intentional discrimination. In fact, the State's standard is one of intentional discrimination on steroids. Even when a plaintiff must prove intentional racial gerrymandering to establish an Equal Protection violation, they are not required to show that the state has deviated from neutral districting principles or that such deviations are unexplainable on grounds other than race. They may rely on any kind of circumstantial and direct evidence that may be available.

If one thing is clear about Section 2, it is that it does not require proof of intentional discrimination, much less the State's souped-up version. Indeed, the whole point of the amendment to Section 2 was to eliminate the intentional-discrimination requirement that a plurality of the Court had established in *Bolden*. That is not only all over Section 2's legislative history; it is reflected in Section 2's results language, and in the language equating a results violation with proof that minority voters have less opportunity than majority voters to elect candidates of their choice. It is therefore not surprising that the Court has repeatedly held that Section 2 does not require proof of discriminatory intent. The chance of the Court adopting the State's first argument should therefore be approximately zero.

While the State makes a passing and unconvincing effort to tie its standard to the “on account of” and “equally open” language in Section 2, its real argument is that, unless its standard is adopted, Section 2 is doubly unconstitutional. First, absent the state’s proposed limiting construction, Section 2 would require states to place voters in districts based on their race without a compelling interest. And second, it would exceed Congress’ power to enforce the Fourteenth and Fifteenth Amendments, both of which prohibit only intentional discrimination. Each of these arguments is likely to resonate with a majority of the Court. But it seems unlikely that a majority of the Court will be willing to adopt an implausible interpretation of Section 2 to placate these concerns. And it also seems unlikely that the Court will use this case to invalidate Section 2 when it did not grant review to resolve that question.

The State’s alternative argument is the one they featured at the stay stage: to satisfy the first *Gingles* precondition, a plaintiff must show the minority group is sufficiently large and geographically compact to constitute a majority in a neutrally drawn plan. The Court has held that satisfaction of the first *Gingles* precondition requires a plaintiff to show that its proposed districts are reasonably compact and are otherwise reasonably configured. But it has never suggested that a plaintiff must proffer districts that have been drawn without any consideration of race. And when tasked with drawing a district in which the minority group constitutes a majority, experts have understandably always drawn districts with a goal of satisfying that requirement. They do not stumble around hoping that random map-drawing produces a majority-minority district.

Nonetheless, the State’s alternative argument is likely to hold appeal for the right side of the Court. They are apt to view any deliberate effort to create a majority-minority district as constitutionally suspect (if not per se unconstitutional) when drawn by a legislature; they are likely to view the first precondition as requiring the plaintiff to show that the districts they draw could be adopted by the legislature; and they are likely to view satisfaction of the first precondition through race-neutral means as good way to prevent Section 2 from injecting an excessive reliance on race into the redistricting process, and of ensuring that it condemns only practices as to which there is a real risk of purposeful discrimination. While *Gingles* does not contain any hint of such a requirement, the Court can easily view the question as one they have not previously considered or resolved.

Plaintiffs have three answers. First, under current precedent, the intent to draw a majority-minority district does not trigger strict scrutiny. Second, the use of race as a predominant factor satisfies strict scrutiny when, as here, the illustrative districts are reasonably compact and conform to traditional districting principles, and plaintiffs have shown, under the totality of circumstances, that the State’s plan violates Section 2. Indeed, under Court precedent, the predominant use of race is constitutional as long as a state has good reason to conclude that each of the three *Gingles* preconditions has been satisfied. And third, Section 2 does not, in any event, require the state to adopt a plaintiff’s illustrative districts. A state could, for example, draw a cross-over district in which the minority group is less than a majority in a district, but can elect the candidate of their choice through white cross-over voting.

Plaintiffs’ best chance of fending off the State’s new rule, however, would be to convince the Court that it is not workable or would have alarming consequences. Presumably, the only way to persuasively satisfy this new rule would be to run computer simulations that account for traditional districting principles but are programmed not to take race into account. The sophisticated technology necessary to run such programs may not be available to everyone. Even if it were, its use would raise a host of questions, including how to assess whether the program

has adequately accounted for traditional factors, including the difficult-to-measure “community of interest” factor; how many simulations to perform; and how many simulations must end up producing an additional majority-minority district. The consequence of adding the State’s new requirement, moreover, may not only be to deprive minority voters of an additional district in which they can elect the candidate of their choice; it may be to eliminate any district in which the minority could elect candidates of their choice. Indeed, that may well be true in Alabama and it is perhaps true in many other states. These concerns may give the Court pause.

All things considered, though, plaintiffs have an uphill battle. The Court granted a stay, and while the Chief Justice dissented, even he signaled his willingness to reconfigure *Gingles*. The Court’s track record in voting rights cases is also not one that is encouraging for voting rights plaintiffs. In *Shelby County v. Holder*, the Court effectively invalidated Section 5 of the Voting Rights Act. In *Brnovich v. Democratic National Committee*, the Court effectively neutered Section 2 as applied to time, plan, and manner restrictions. A betting person would not bet against the Court finding some way to complete the trifecta in this case.

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## *Civil Rights*

### **Section 1983 — Enforceability of Spending Clause Legislation**

#### *Health & Hospital Corp. of Marion County, Indiana v. Talevski, No. 21-806*

#### **Questions Presented:**

- (1) Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.
- (2) Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, the Federal Nursing Home Reform Act’s transfer and medication rules do so.

#### **Summary:**

The Supreme Court has held that Spending Clause legislation may create rights that are enforceable under Section 1983. The Federal Nursing Home Reform Act (FNHRA) was enacted pursuant to the Spending Clause. It conditions Medicaid funding to nursing homes on compliance with “requirements relating to residents’ rights.” A nursing home must protect a patient’s “right to be free from physical or chemical restraints” unless medically required and may “not transfer or discharge” a patient except under certain conditions. The first question presented is whether the Court should overrule its holdings that Spending Clause legislation may create rights enforceable under Section 1983. The second question is whether the FNHRA restraint and transfer provisions are enforceable by nursing home patients under Section 1983.

Respondent Gorgi Talevski suffers from dementia and was placed in a nursing home owned by the Health and Hospital Corporation of Marion County (HHC). Respondent filed suit in district court against HHC, its nursing home, and the entity operating the home (petitioners) under Section 1983, alleging violations of the FNHRA chemical restraint and transfer provisions. The district court dismissed for failure to state a claim.

The Seventh Circuit reversed, holding that the FNHRA requirements on restraints and transfers create rights that nursing home residents may enforce under Section 1983. The court reasoned that: (1) Congress used rights-creating language; (2) the requirements pose inquiries that courts are competent to resolve; and (3) the provisions use mandatory rather than precatory terms. The court further concluded that the Act’s alternative remedies were not geared towards individuals or comprehensive enough to foreclose Section 1983 claims.

Petitioners contend that Spending Clause legislation is never enforceable under Section 1983. Petitioners argue that Spending Clause statutes result in contracts between the federal government and federal fund recipients, and that third party beneficiaries have no right to enforce such contracts. Even assuming Spending Clause statutes may create rights enforceable under Section 1983, petitioners counter that the restraint and transfer provisions do not do so. Petitioners contend that the provisions focus on regulated states and nursing homes, not on the benefitted class of patients, and that the use of the term “rights” cannot overcome that focus. Petitioners further argue that the FNHRA provides comprehensive remedies that implicitly foreclose access to Section 1983.

**Decision Below:**

6 F.4th 713 (7th Cir. 2021)

**Petitioner’s Counsel of Record:**

Lawrence S. Robbins, Kramer Levin Robbins Russell LLP

**Respondent’s Counsel of Record:**

Andrew T. Tutt, Arnold & Porter Kaye Scholer LLP

**Voting Rights Act — Redistricting**

*Merrill v. Milligan*, No. 21-1086

*Merrill v. Caster*, No. 21-1087

**Question Presented:**

Whether the state of Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U.S.C. § 10301.21.

**Summary:**

Section 2 of the Voting Rights Act prohibits election practices that result in a denial or abridgment of the right to vote because of race. A violation is established when the totality of the circumstances establish that the political processes are not equally open to minority voters in that they have less opportunity than other members of the electorate to elect representatives of their choice. In *Thornburg v. Gingles*, the Court held that the first of three preconditions for stating a Section 2 claim is that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. The question posed by the Supreme Court is whether Alabama’s redistricting plan for the U.S. House of Representatives violated Section 2. The principal subsidiary questions are (1) whether a Section 2 violation requires proof that a state’s redistricting plan does not resemble neutrally drawn districting plans, and (2) whether satisfaction of the first *Gingles* precondition requires proof that race-neutral maps would result in an additional majority-minority district.

Alabama’s 2021 congressional district map contains a single majority-black district. Black voters (plaintiffs) alleged that the plan’s failure to create a second district in which Black voters could elect their preferred candidate violated Section 2.

The district court issued a preliminary injunction, holding that plaintiffs were likely to establish that Alabama’s redistricting plan violated Section 2. The court found that plaintiffs met the first *Gingles* precondition by presenting maps with two majority-minority districts that are reasonably compact, taking into account traditional districting principles. The court further found that plaintiffs satisfied the other two *Gingles* preconditions (minority cohesion and white block voting) and that the totality of circumstances established that the State’s plan offered Black voters less opportunity than white voters to elect their preferred candidates. The court held that the first *Gingles* precondition did not require plaintiffs to proffer race-neutral maps, and it found that race did not predominate in the plaintiffs’ drawing of their maps. The court concluded that even if the maps were subject to strict scrutiny, it would be satisfied. The court reasoned that because plaintiffs’ majority-minority districts were consistent with traditional districting principles, they were narrowly tailored to the compelling interest in ensuring compliance with Section 2.

Alabama argues that its redistricting plan did not violate Section 2. The State contends that a districting plan ensures that the political process is “equally open” when it resembles neutrally drawn districting plans. The State also argues that satisfaction of the first *Gingles* precondition requires plaintiffs to proffer race-neutral maps. Those two requirements, the State argues, are necessary to ensure that Section 2 stays within constitutional bounds. Otherwise, the State argues, Section 2 would violate the Constitution’s prohibition against the drawing of race-based districts and exceed Congress’ authority to remedy intentional discrimination that violates the Fifteenth Amendment. The State contends that, because its plan resembles numerous race-neutral maps, and because plaintiffs failed to proffer any race-neutral map that would result in a second majority-minority district, plaintiffs failed to establish a violation of Section 2.

**Decision Below:**

No. 2:21-cv-1530 (N.D. Ala. 2022) (21-1086)

No. 2:21-cv-1536 (N.D. Ala. 2022) (21-1087)

**Petitioners’ Counsel of Record:**

Edmund G. LaCour Jr., Solicitor General, Office of the Alabama Attorney General

**Respondents’ Counsel of Record:**

Deuel Ross, NAACP Legal Defense & Educational Fund, Inc. (21-1086)

Abha Khanna, Elias Law Group LLP (21-1087)

## ***Constitutional Law***

### **Commerce Clause — Extraterritoriality**

#### ***National Pork Producers Council v. Ross, No. 21-468***

**Questions Presented:**

- (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant Commerce Clause, or whether the extraterritoriality principle described in this Court’s decisions is now a dead letter.
- (2) Whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a *Pike [v. Bruce Church]* claim.

**Summary:**

The Supreme Court has held that the Commerce Clause implicitly prohibits state regulation of commerce that takes place wholly outside the state’s borders (the extraterritoriality principle). The Court also held in *Pike v. Bruce Church* that the Commerce Clause implicitly prohibits state regulation that burdens interstate commerce in a way that is clearly excessive in relation to its benefits. A California statute prohibits any business from selling “pork meat” in California that it knows, or should know, is the meat of an animal that was confined in a cruel manner or is the meat of the offspring of an animal that was confined in a cruel manner. The stated purpose of the law is to prevent animal cruelty and the risk of foodborne illness. The first question presented is whether the California statute violates the extraterritoriality principle. The second question presented is whether the statute violates *Pike*.

Petitioners, two pork industry groups, filed suit alleging that the California statute violates the extraterritoriality principle and *Pike*. In support of that assertion, petitioners alleged that the overwhelming percentage of “pork meat” affected by the statute is from pigs slaughtered outside California, and that the statute furthers no legitimate state interest. The district court dismissed for failure to state a claim.

The Ninth Circuit affirmed. First, the court held that petitioner failed to plausibly allege that the statute has an impermissible extraterritorial effect. The court reasoned that the extraterritoriality principle concerns only price-control or price-affirmation statutes, and that the California statute is neither. The court also concluded that statutes regulating only in-state sales, like California’s, are not impermissibly extraterritorial even when they have significant effects outside the state, and even when they primarily burden out-of-state businesses. Second, the court held that petitioners failed to state a claim under *Pike*. The court reasoned that a business’ increased costs do not constitute a significant burden on interstate commerce.

Petitioners argue that the California statute violates the extraterritoriality principle. Because California produces so little commercial pork, they contend that the practical effect of the law is to govern sow housing outside the state and cause massive and costly changes across the entire pork industry—a practical effect, they assert, that constitutes a per se extraterritorial violation. Petitioners further argue that even if the statute is not per se invalid, it is invalid under the extraterritoriality principle because its extraterritorial effects are not justified by any legitimate state interest: California lacks police power to address the welfare of farm animals in other states, petitioners argue, and any concern over foodborne illness is baseless. Petitioners also argue that the California statute violates *Pike*. Petitioners contend that increased costs on producers outside the state do impose a significant burden on interstate commerce that is not outweighed by any legitimate state interest.

**Decision Below:**

6 F.4th 1021 (9th Cir. 2021)

**Petitioner’s Counsel of Record:**

Timothy S. Bishop, Mayer Brown LLP

**Respondents’ Counsel of Record:**

Samuel T. Harbourt, California Department of Justice

Bruce A. Wagman, Riley Safer Holmes & Cancila LLP

**Elections Clause — State Court Authority**

***Moore v. Harper*, 21-1271**

**Question Presented:**

Whether a State’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,” U.S. Const. art. I, § 4, cl. 1, and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.



**Summary:**

The Elections Clause of the U.S. Constitution empowers each state “Legislature” to prescribe regulations governing the manner of holding federal elections and grants Congress power to make or alter such regulations. A congressional redistricting plan falls within the scope of the Elections Clause. The question presented is whether the Elections Clause prohibits a state court from invalidating a state legislature’s regulation governing federal elections on the ground that it violates the state’s constitution.

The North Carolina legislature enacted a new congressional district map for the 2022 election. The State of North Carolina, voting-rights groups, and individual voters (respondents) filed suit against leaders of the state legislature (petitioners), alleging that the new map reflected a partisan gerrymander in violation of the State Constitution’s guarantee of free and fair elections. The district court ruled in favor of petitioners.

The North Carolina Supreme Court reversed. The court reasoned that Supreme Court precedent establishes that a legislature’s authority to enact regulations under the Elections Clause is subject to the constraints on legislative authority imposed by the state’s constitution. Applying that understanding, the court invalidated the state legislature’s congressional redistricting plan. The court held that the plan constituted a partisan gerrymander in violation of the State Constitution’s guarantee of free and fair elections.

Petitioners argue that the Elections Clause prohibits a state court from invalidating a state legislature’s regulation governing federal elections on the ground that it violates the state’s constitution. Under the text of the Election Clause, petitioners contend, only Congress may set aside a state legislature’s regulation. Petitioners acknowledge that Supreme Court precedent establishes that another branch of state government may override the legislature when it has a role in the making of state laws, and that the state judiciary may enforce federal constitutional guarantees. They contend, however, that neither of those lines of authority applies here. Even if a state court may enforce a specific state constitutional limitation like compactness, petitioners argue, it may not enforce an open-ended guarantee of fairness to resolve the inherently political question of the permissible degree of partisan gerrymandering.

**Decision Below:**

868 S.E.2d 499 (N.C. 2022)

**Petitioner’s Counsel of Record:**

David H. Thompson, Cooper & Kirk PLLC

**Respondents’ Counsel of Record:**

Sarah G. Boyce, North Carolina Department of Justice

Neal Kumar Katyal, Hogan Lovells US LLP

Abha Khanna, Elias Law Group LLP

Zachary C. Schauf, Jenner & Block LLP

## Equal Protection Clause — Affirmative Action

*Students for Fair Admissions v. President and Fellows of Harvard College*, 20-1199

*Students for Fair Admissions v. University of North Carolina*, 21-707

### Questions Presented:

- (1) Should the Court overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions?
- (2) Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?
- (3) Can [the University of North Carolina] reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

### Summary:

In *Grutter v. Bollinger*, the Supreme Court held that the Equal Protection Clause does not bar colleges and universities from considering race in admissions when doing so is narrowly tailored to further the compelling interest in the educational benefits of a diverse student body. Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally assisted programs. Because this prohibition incorporates the constitutional standard, *Grutter's* holding applies to Title VI. The first question presented is whether the Court should overrule *Grutter*. The second question presented is whether Harvard's use of race as a factor in its admissions process is narrowly tailored to further the compelling interest in the educational benefits of diversity. The third question presented is whether the use of race in admissions by the University of North Carolina (UNC) is narrowly tailored to that interest.

Respondent Harvard considers race in its admissions process to achieve diversity in its student body. Petitioner Students for Fair Admissions filed suit against Harvard, alleging that Harvard's use of race violates Title VI. The district court ruled in favor of Harvard, and the First Circuit affirmed, holding that Harvard's admissions process is narrowly tailored to the compelling interest in achieving the educational benefits of diversity. The court reasoned that Harvard uses race as a "plus factor" in the context of individual consideration of each application, and that there is no effective race-neutral alternative for achieving the educational benefits of diversity. The court concluded that petitioner's proposed alternative of increasing the preference for socially disadvantaged students would be unworkable because it would significantly lower average SAT scores and significantly decrease the representation of Black students. Finally, the court concluded that Harvard does not intentionally discriminate against Asian Americans.

Respondent UNC also considers race in its admissions process to achieve diversity in its student body. Petitioner filed suit against UNC, alleging that UNC's use of race violates the Equal Protection Clause and Title VI. The district court ruled in favor of UNC, holding that its use of race is narrowly tailored to achieving the educational benefits of diversity. The court reasoned that UNC's use of race is one factor in its holistic admissions process and that there is no race-neutral alternative that would effectively achieve the educational benefits of diversity. The court concluded that petitioner's proposed alternative would not allow UNC to enroll a

student body that is as diverse and academically qualified. Petitioner sought review before judgement on its pending appeal in the Fourth Circuit.

Petitioner argues that *Grutter*'s holding that race may be used as a factor in higher education admissions should be overruled. Petitioner contends that *Grutter* is "grievously wrong" because, as a matter of original meaning, the Equal Protection Clause prohibits all racial distinctions. Petitioner further argues that *Grutter*'s diversity rationale rests on the impermissible racial stereotype that race is a legitimate proxy for a person's experiences or views. The relevant stare decisis considerations also support overruling *Grutter*, petitioner contends, because the decision invites discrimination against Asian Americans, perpetuates racial divisions on campus, and makes campuses less ideologically diverse. Petitioner alternatively argues that Harvard's and UNC's use of race in admissions is not narrowly tailored. Petitioner contends that Harvard's admissions process relies on race more than any other diversity factor and penalizes Asian Americans by giving them lower personal-rating scores. Petitioner also argues that both Harvard and UNC impermissibly rejected the race-neutral alternative of increasing their preference for socially disadvantaged students and eliminating their preferences that largely benefit white, wealthy applicants.

**Decisions Below:**

980 F.3d 157 (1st Cir. 2020) (No. 20-1199)

No. 1:14CV954 (M.D.N.C. Oct. 18, 2021) (No. 21-707)

**Petitioner's Counsel of Record:**

William S. Consovoy, Consovoy McCarthy PLLC

**Respondents' Counsel of Record:**

Seth P. Waxman, Wilmer Cutler Pickering Hale & Dorr LLP (No. 20-1199)

Ryan Y. Park, Solicitor General, North Carolina Department of Justice (No. 21-707)

**First Amendment — Compelled Speech**

***303 Creative LLC v. Elenis*, No. 21-476**

**Question Presented:**

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

**Summary:**

The Free Speech Clause of the First Amendment generally forbids the government from compelling individuals to speak messages with which they disagree. Public-accommodations laws that prohibit commercial actors from discriminating in the services they offer generally do not violate the First Amendment. The Colorado Anti-Discrimination Act (CADA) prohibits public accommodations from refusing services to customers based on their membership in a protected class, including sexual orientation. The CADA also prohibits public accommodations from publishing messages that indicate that they refuse to offer services to people because of their membership in a protected class. The question presented is whether applying those prohibitions to a website designer who offers services to the public compels speech in violation of the Free Speech Clause.

Petitioner 303 Creative is a website design company owned by petitioner Lorie Smith. Petitioners intend to offer wedding-website design services to opposite-sex couples. Petitioners do not intend to offer those services to same-sex couples because same-sex marriage violates Smith's religious beliefs. Petitioners also plan to publish a statement on their website regarding their religious reason for refusing to offer services for same-sex weddings. Petitioners filed suit against the state official responsible for enforcing the CADA, seeking to enjoin its enforcement as applied to them as a violation of the Free Speech Clause. The district court dismissed the action.

The Tenth Circuit affirmed, holding that applying the CADA's prohibitions to petitioners' website design services does not violate the Free Speech Clause. The court found that the CADA's prohibition on refusing website design services for same-sex weddings compels speech that is contrary to petitioners' views and therefore triggers strict scrutiny. It further concluded, however, that the prohibition satisfies strict scrutiny because it is narrowly tailored to the state's compelling interest in ensuring that same-sex couples receive equal access to publicly available goods and services. The court reasoned that granting an exception to petitioners would undermine the state's compelling interest because petitioners offer a unique service. The court also concluded that the CADA's prohibition on publishing discriminatory services does not violate the Free Speech Clause because it prohibits only speech that promotes unlawful conduct, and such speech is not protected by the First Amendment.

Petitioners argue that applying the CADA's prohibitions against discrimination based on sexual orientation to their website design services compels speech in violation of the Free Speech Clause. Petitioners contend that because their website design services are speech, and the CADA's prohibition against denying services for same-sex weddings compels them to create messages that are contrary to their views, the CADA's application to them triggers strict scrutiny. Petitioners further contend that the CADA's application to them does not satisfy strict scrutiny because there is no evidence that same-sex couples lack access to wedding-website design services, and there is no compelling interest in ensuring access to a single website designer's service, no matter how unique. Because the CADA's prohibition against discrimination based on sexual orientation is unconstitutional as applied to them, petitioners argue, the CADA's prohibition on publishing discriminatory services cannot be justified as incidental to a constitutional prohibition on illegal conduct.

**Decision Below:**

No. 19-1413 (10th Cir. Jul. 26, 2021)

**Petitioners' Counsel of Record:**

Kristen K. Waggoner, Alliance Defending Freedom

**Respondent's Counsel of Record:**

Eric R. Olson, Solicitor General, Office of the Colorado Attorney General

**Indian Child Welfare Act — Equal Protection and Anticommandeering**

**Note:** The Court granted four consolidated petitions regarding the Indian Child Welfare Act. Because they present a host of distinct questions, we include here two summaries. The first concerns the government's petition, *Haaland v. Brackeen*, No. 21-376, which presents questions similar to *Cherokee Nation v. Brackeen*, No. 21-377. The second concerns Texas' petition, *Texas v. Haaland*, No. 21-378, which presents questions similar to *Brackeen v. Haaland*, 21-380.

***Haaland v. Brackeen, No. 21-376***  
***Cherokee Nation v. Brackeen, No. 21-377***

**Questions Presented:**

- (1) Whether various provisions of the Indian Child Welfare Act – namely, the minimum standards of 25 U.S.C. § 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) – violate the anticommandeering doctrine of the Tenth Amendment.
- (2) Whether the individual plaintiffs have Article III standing to challenge ICWA’s placement preferences for “other Indian families,” Section 1915(a)(3), and for “Indian foster home[s],” Section 1915(b)(iii).
- (3) Whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

**Summary:**

The Indian Child Welfare Act of 1978 (ICWA) establishes federal rules governing child custody proceedings in state court that involve the removal of Indian children from their families and their placement in foster and adoptive homes. Several rules concern parental rights: A party in a custody proceeding must give “notice” to the parents and tribe of the proceeding and satisfy the court that “active efforts” have been made to avoid removing the child from its family. No placement or termination of rights may be ordered without “qualified expert” testimony that removing the child is needed. ICWA also establishes recordkeeping provisions that require States to “maintain” records of any placements and provide the Secretary of the Interior with a copy of any adoption decree. The first question presented is whether these parental rights and recordkeeping provisions validly preempt state law or instead commandeer States to administer federal law in violation of the Tenth Amendment. ICWA’s placement preferences direct state courts, in the absence of good cause, to place Indian children into adoption or foster care first with immediate family, second with families or foster homes in their tribes, and third with “other Indian families” or “Indian foster home[s]”. The second question presented is whether three non-Indian couples seeking to adopt or foster Indian children have Article III standing to challenge the third-ranked preferences. If the couples do have standing, the third question presented is whether the third-ranked preferences violate the equal protection component of the Fifth Amendment.

Three non-Indian couples are parties in state court proceedings seeking to adopt or foster Indian children. Relying on ICWA, the tribes of the children objected to the couples’ requests. The private plaintiffs, along with the States of Texas, Louisiana, and Indiana, sued the federal government in federal district court, arguing that portions of ICWA are unconstitutional because they commandeer state agencies and state courts in violation of the Tenth Amendment or discriminate against non-Indian persons in violation of the Fifth Amendment. Several tribes intervened to defend the law. The district court ruled for the plaintiffs.

As relevant here, the Fifth Circuit, en banc, affirmed. On commandeering, a majority held that the “active efforts” and “qualified expert” testimony requirements unconstitutionally commandeer state agencies to administer federal law. An equally divided court affirmed the invalidation of the “notice” requirement, with half the judges concluding that it also commandeers state agencies to enforce federal law. An equally divided court also affirmed the invalidation of the preference provisions. Half the judges read the provisions to require state

agencies to identify and assist individuals entitled to preferences, and therefore concluded that they violate the anticommandeering doctrine. On the recordkeeping requirements, a majority held that the requirement for states to maintain records violates the anticommandeering doctrine. An equally divided court also invalidated the requirement to provide the Secretary with a copy of any adoption decree, with half the judges concluding that it too violates the anticommandeering doctrine. On standing, a majority of the court held that private plaintiffs can challenge ICWA's third-ranked placement preferences because they make it more difficult for them to adopt or foster Indian children, and because a declaratory judgment against federal officials would likely make it easier to overcome the preferences. On the merits, an equally divided court affirmed the invalidation of the third-ranked preferences, with half the judges concluding that they do not rationally further an interest in maintaining the child's ties with their tribe or culture.

The government argues that the "notice," "active efforts," and "qualified expert" testimony requirements validly preempt state law and do not pose a commandeering problem because they do not directly order state agencies to do anything, but instead direct state courts not to order a child's removal unless an agency that decides to seek removal satisfies federal standards. The government argues that the preference provisions do not violate the anticommandeering doctrine because they are not properly interpreted to require state agencies to identify and assist individuals entitled to preferences. And the government argues that the recordkeeping requirements do not violate the anticommandeering doctrine because they resemble Founding-era statutes that imposed recordkeeping and reporting requirements on state court judges. The government next maintains that private plaintiffs lack standing to challenge the third-ranked placement preferences because they failed to show that those preferences (as opposed to the first and second-ranked preferences) prevent them from adopting or fostering an Indian child. It also argues that a declaratory judgment against federal defendants could not redress any injury because a state court would not be bound by that judgment. Finally, the government contends that ICWA's third-ranked preferences do not violate equal protection. The government argues that because cultural standards may transcend tribal lines, the third-ranked preferences rationally further a child's connections to his tribe's culture.

**Decision Below:**

994 F.3d 249 (5th Cir. 2021)

**Petitioners' Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Ian H. Gershengorn, Jenner & Block LLP

**Respondents' Counsel of Record:**

Matthew D. McGill, Gibson Dunn & Crutcher LLP

Judd E. Stone, Solicitor General, Office of the Texas Attorney General

***Texas v. Haaland*, No. 21-378**

***Brackeen v. Haaland*, No. 21-380**

**Questions Presented:**

- (1) Whether Congress has the power under the Indian Commerce Clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian.



- (2) Whether the Indian classifications used in the Indian Child Welfare Act and its implementing regulations violate the Fifth Amendment's equal-protection guarantee.
- (3) Whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring states to implement Congress's child-custody regime.
- (4) Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

**Summary:**

The Indian Child Welfare Act of 1978 (ICWA) establishes federal rules governing child custody proceedings in state court that involve the removal of Indian children from their families and their placement in foster and adoptive homes. The rules include several parental-rights provisions: A party in a custody proceeding must give “notice” to the parents and tribe of the proceeding and satisfy the court that “active efforts” have been made to avoid removing the child from its family. No placement or termination of rights may be ordered without satisfying certain evidentiary requirements. ICWA also includes placement preferences that direct state courts, in the absence of good cause, to place Indian children into adoption or foster care first with immediate family, second with families or foster homes in their tribes, and third with other Indian families or other Indian foster homes. The first question presented is whether ICWA exceeds Congress’ power under the Constitution to regulate Indian affairs by intruding on state authority over domestic relations. The Act defines a child as “Indian” if they are (i) “a member of a tribe” or (ii) “eligible for tribal membership and are the biological child of a member.” The second question presented is whether ICWA’s definition of “Indian” violates the equal protection component of the Fifth Amendment. The third question presented is whether ICWA’s parental rights provisions and placement preferences validly preempt state law or instead violate the anticommandeering doctrine to the extent they direct the actions of state courts. Finally, ICWA allows individual tribes to alter the statute’s placement preferences “so long as the placement is the least restrictive setting appropriate to the particular needs of the child.” The fourth question presented is whether that allowance violates the nondelegation doctrine.

Three non-Indian couples are parties in state court proceedings seeking to adopt or foster Indian children. Relying on ICWA, the tribes of the children objected to the couples’ requests. Private plaintiffs, along with the States of Texas, Louisiana, and Indiana, sued the federal government in federal district court, arguing that portions of ICWA are unconstitutional because they exceed the powers granted to Congress over Native affairs, commandeer state agencies and state courts in violation of the Tenth Amendment, discriminate against non-Indian persons in violation of the Fifth Amendment, and allow tribes to alter the statute in violation of the nondelegation doctrine. Several tribes intervened to defend the law. The district court ruled for the plaintiffs.

As relevant here, the Fifth Circuit, en banc, reversed. First, the court held that Congress had authority to enact ICWA, reasoning that the Treaty, Property, Supremacy, Indian Commerce, and Necessary and Proper Clauses give Congress plenary power over Indian affairs. Second, the court held that ICWA’s definition of “Indian” does not violate equal protection. The court reasoned that the definition constitutes a political, rather than racial, classification and rationally furthers the government’s trust obligations to Indian tribes. Third, the court held that ICWA’s evidentiary requirements and placement preferences validly preempt state law and do not violate the anticommandeering doctrine to the extent they apply to state courts. Finally, the court held

that allowing tribes to alter the Act’s placement preferences does not violate the nondelegation doctrine because Congress may incorporate the laws of another sovereign into federal law.

Texas first argues that Congress lacked authority under the Constitution to enact ICWA. It contends that children are not articles of commerce under the Indian Commerce Clause, ICWA does not implement any treaty obligations, and any other power Congress has to regulate Indian affairs does not extend to domestic relations. Second, Texas argues that ICWA’s definition of “Indian” violates equal protection. It contends that the definition involves an unconstitutional racial classification because tribal membership is tied to race and because the definition encompasses children who are not members of a tribe. The State maintains that ICWA’s definition of “Indian” fails even rational basis review, because it seeks to promote the illegitimate purpose of preventing the integration of Indian children into non-Indian families. Third, Texas argues that the Act’s evidentiary requirements and placement preferences violate the anticommandeering doctrine to the extent that they direct state courts to apply federal standards. The State contends that there is no constitutional distinction between requiring state agencies to administer federal law and requiring state courts to enforce federal commands to state agencies. Finally, Texas maintains that allowing tribes to alter ICWA’s placement preferences violates the nondelegation doctrine. The State argues that the principle that Congress may incorporate the law of another sovereign is inapplicable because tribes have no sovereignty over persons who neither reside on a tribe’s land nor are members of the tribe.

**Decision Below:**

994 F.3d 249 (5th Cir. 2021)

**Petitioners’ Counsel of Record:**

Judd E. Stone, Solicitor General, Office of the Texas Attorney General  
Matthew D. McGill, Gibson Dunn & Crutcher LLP

**Respondents’ Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice  
Ian H. Gershengorn, Jenner & Block LLP

***Criminal Law***

**Denial of Post-Conviction Relief — State-Law Ground**

***Cruz v. Arizona*, No. 21-846**

**Question Presented:**

Whether the Arizona Supreme Court’s holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

**Summary:**

In *Simmons v. South Carolina*, the Court held that when the future dangerousness of a capital defendant is at issue, a defendant is entitled to inform the jury of his ineligibility for parole. In *Lynch v. Arizona*, the Court summarily reversed an Arizona Supreme Court decision refusing to apply *Simmons*. Under Arizona law, “a significant change in law” is a prerequisite for post-conviction relief. Applying that rule, the Arizona Supreme Court held that a capital

defendant could not obtain post-conviction relief based on *Lynch* because it did not constitute a significant change in law. The question is whether that ruling constitutes an independent and adequate state-law ground for the judgment, precluding Supreme Court review of petitioner’s *Lynch* claim.

Petitioner John Montenegro Cruz was convicted of murdering a Tucson, Arizona police officer and sentenced to death. The Arizona Supreme Court affirmed. The trial court denied petitioner’s initial petition for post-conviction relief. Following the Supreme Court’s decision in *Lynch*, Cruz filed a successive petition, seeking a new sentencing proceeding based on *Lynch*. The trial court denied relief.

The Arizona Supreme Court affirmed, holding that, under Arizona law, a significant change in law is a prerequisite for post-conviction relief, and that *Lynch* did not constitute a significant change in law. The court reasoned that *Lynch* was dictated by *Simmons*.

Petitioner contends that the Arizona Supreme Court’s holding that its significant-change-in-law rule precluded post-conviction relief is not an independent and adequate state-law ground supporting the judgment. Petitioner first argues that a state rule cannot be an independent and adequate state-law ground when it discriminates against a federal right, and Arizona’s significant-change-in-law rule does precisely that: While federal law requires a state court to give effect to settled federal law on collateral review, petitioner argues, the Arizona rule prohibits its courts from giving effect to such decisions. Second, petitioner argues that the Arizona significant-change-in-law rule is not an adequate state-law ground because Arizona has not consistently followed it. Finally, petitioner argues that the state court’s ruling was not independent of federal law because the court attempted to distinguish its holding from federal precedent.

**Decision Below:**

251 Ariz. 203 (Ariz. 2021)

**Petitioner’s Counsel of Record:**

Neal Kumar Katyal, Hogan Lovells US LLP

**Respondent’s Counsel of Record:**

Jeffrey L. Sparks, Office of the Arizona Attorney General

**Habeas Corpus — Savings-Clause Relief**

*Jones v. Hendrix*, 21-857

**Question Presented:**

Whether federal inmates who did not—because established circuit precedent stood firmly against them—challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under [28 U.S.C.] § 2241 after the Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

**Summary:**

Under 28 U.S.C. § 2255, federal inmates have one opportunity to collaterally attack their convictions on any ground cognizable on collateral review. Successive challenges are limited to claims indicating factual innocence or relying on constitutional-law decisions made retroactive

by the Supreme Court. Under the Section 2255(e) “safety valve”, however, federal inmates may bring a traditional habeas action under 28 U.S.C. § 2241 when a Section 2255 motion is “inadequate” or “ineffective” to “test” the legality of their detention. The question presented is whether federal inmates can bring a claim under Section 2241 after the Supreme Court retroactively determines circuit precedent interpreting the statute of conviction was wrong, and they are legally innocent of the crime of conviction.

Petitioner Marcus Jones was convicted on two counts of being a felon in possession of a firearm. Petitioner filed a first habeas petition under Section 2255, which ultimately led to the vacatur of one of his convictions. At the time of petitioner’s first habeas action, circuit precedent did not require the government to prove that the defendant knew he was a felon to sustain a felon-in-possession conviction. The Supreme Court subsequently held in *Rehaif v. United States* that a felon-in-possession conviction requires proof that the defendant knew he was a felon. Petitioner then filed a habeas petition under Section 2241, seeking invalidation of his conviction under *Rehaif*. The district court dismissed the petition.

The Eighth Circuit affirmed, holding that federal inmates cannot bring a claim under Section 2241 based on a statutory decision made retroactive by the Supreme Court. The court reasoned that petitioner had the opportunity to “test” the legality of his detention under Section 2255 because he could have raised his statutory argument in his first Section 2255 motion, even if that motion would not have succeeded. The court also concluded that Section 2255 was neither “inadequate” nor “ineffective” because that mechanism was capable of providing relief, even if circuit law precluded it. The court added that permitting a habeas petitioner to bring a statutory claim under Section 2241 would circumvent the limitation on second and successive petitions to constitutional claims.

Petitioner argues that federal inmates can bring a claim under Section 2241 based on statutory decisions made retroactive by the Supreme Court. Petitioner argues the Section 2255 remedy cannot “test” the legality of a detention at all when courts apply incorrect, binding, substantive law. Even if the remedy “test[s]” the legality of one’s detention, petitioner contends, it does so “inadequate[ly]” because, under the historical understanding of the term, a remedy is inadequate when, as here, an alternative remedy is better. Finally, petitioner argues that the Section 2255 safety valve would serve no practical purpose unless it applies to claims based on statutory decisions made retroactive by the Supreme Court.

**Decision Below:**

8 F.4th 683 (8th Cir. 2021)

**Petitioner’s Counsel of Record:**

Daniel R. Ortiz, University of Virginia School of Law

**Respondents’ Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

## **Honest Services Fraud — Private Individuals**

### ***Percoco v. United States*, No. 21-1158**

#### **Question Presented:**

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

#### **Summary:**

The federal mail- and wire-fraud statutes prohibit schemes to deprive the public of the intangible right to honest services. The question presented is whether private individuals who hold no elected office or government employment can be convicted of honest-services fraud when they are relied on by the government and control some aspect of government business.

Petitioner Joseph Percoco, a former aide to New York Governor Andrew Cuomo, left that role to serve as Cuomo’s reelection campaign manager. While petitioner was working on the campaign, he received \$35,000 from a developer to pressure a state agency to award funding to the developer. By the time petitioner made the call to the agency, he had access to his old government office, and had told people he intended to return to government service after the election. Petitioner was charged with honest-services fraud. The district court denied petitioner’s motion to dismiss, and a jury found petitioner guilty.

The Second Circuit affirmed, holding that private individuals who are not government officials or employees can be convicted of honest-services fraud when they are relied on by the government and control some aspect of government business (reliance-and-control theory). The court reasoned that the textual reference to schemes to deprive another of the intangible right to honest services is broad enough to cover fiduciaries who lack a government title or salary. The court also concluded that when Congress adopted the honest-services amendment, it intended to reinstate honest-services caselaw that the Supreme Court had rejected in *McNally v. United States*, including decisions adopting the reliance-and-control theory.

Petitioner contends that private citizens who hold no elected office or government employment do not owe a fiduciary duty to the public and therefore cannot be convicted of honest-services fraud. Petitioner argues that background fiduciary-duty law does not impose a fiduciary duty on private individuals to act in the public interest, but instead expects them to act in their own interest. The Court’s decision in *United States v. Skilling* limits the honest-services statute to heartland pre-*McNally* cases, petitioner contends, and applying the statute to a private citizen on a reliance-and-control theory falls well outside that heartland. Finally, petitioner argues that applying the honest-services statute to private individuals on a reliance-and-control theory would violate the rule of lenity, intrude on the states’ primary role in setting ethical standards, and chill commonplace political behavior and protected speech.

#### **Decision Below:**

13 F.4th 180 (2d Cir. 2021)

#### **Petitioner’s Counsel of Record:**

Yaakov M. Roth, Jones Day LLP

#### **Respondent’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

## **Property Fraud — “Right-to-Control” Theory**

*Ciminelli v. United States*, No. 21-1170

### **Question Presented:**

Whether the Second Circuit’s “right-to-control” theory of fraud—which treats the deprivation of complete and accurate information bearing on a person’s economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute.

### **Summary:**

The federal wire-fraud statute prohibits fraudulent schemes “for obtaining money or property.” Under the right-to-control theory, property fraud can occur when a defendant’s scheme deprives a victim of potentially valuable economic information necessary to make discretionary economic decisions, regardless of whether the victim paid more or received less than it otherwise would have absent the fraud. The question presented is whether the right-to-control theory states a valid basis for liability under the wire-fraud statute.

A non-profit corporation in New York had authority under state law to award contracts for development projects in Buffalo. One of its board members intentionally drafted selection criteria to favor petitioner Louis Ciminelli’s company. Applying those criteria, the board subsequently awarded petitioner’s company a \$750 million project. Petitioner was charged with wire fraud for his role in rigging the bidding process in his favor. A jury convicted petitioner of that charge.

The Second Circuit affirmed, holding that the right-to-control theory states a valid basis for liability under the wire-fraud statute. The court reasoned that the right to control assets is a property interest protected by the statute, and that a defendant deprives a victim of that property interest when the defendant deprives the victim of potentially valuable economic information.

Petitioner contends that the right-to-control theory is not a valid basis for liability under the wire-fraud statute. Petitioner argues that the only property interests protected by the wire-fraud statute are those protected by the common law, and that the common law did not establish a property interest in accurate information that is relevant to economic decision-making. Petitioner also argues that the right-to-control theory fails to satisfy the requirement in the statute that the scheme must aim to “obtain” money or property. Even if a victim is deprived of all the information it might wish to have, petitioner argues, a property holder retains its right to control its assets; the defendant never obtains that right.

### **Decision Below:**

13 F.4th 158 (2d Cir. 2021)

### **Petitioner’s Counsel of Record:**

Michael R. Dreeben, O’Melveny & Myers LLP

### **Respondent’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

## **Statute of Limitations — DNA Testing**

***Reed v. Goertz*, No. 21-442**

### **Question Presented:**

Whether the statute of limitations for a [Section] 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals (as the 11th Circuit has held), or whether it begins to run at the moment the state trial court denies DNA testing, despite any subsequent appeal (as the 5th Circuit, joining the 7th Circuit, held below).

### **Summary:**

In *Skinner v. Switzer*, the Court held that a convicted state prisoner may pursue a procedural-due-process claim seeking DNA testing of evidence under Section 1983. The question presented is whether the statute of limitations for a Section 1983 action seeking DNA testing begins to run at the end of state-court litigation denying DNA testing, including any appeals, or at the moment the state trial court denies DNA testing.

Petitioner Rodney Reed was convicted of murdering a 19-year-old woman and sentenced to death. On appeal, his conviction was affirmed. Petitioner later moved for DNA testing of several items found near the victim under the Texas DNA-testing statute. The trial court denied the motion, and the Texas Court of Criminal Appeals (TCCA) affirmed. Petitioner then brought an action under Section 1983 against respondent Bastrop County District Attorney Bryan Goertz in federal district court, challenging the constitutionality of the TCCA's authoritative construction of the DNA testing statute. The district court dismissed petitioner's claim.

The Fifth Circuit affirmed, holding that the statute of limitations for a DNA-testing claim under Section 1983 begins to run from the date the trial court denies DNA testing. The court reasoned that the statute of limitations for Section 1983 claims begins to run the moment the plaintiff has sufficient information to know that he has been injured, and that a plaintiff seeking DNA testing becomes aware of his injury when a trial court denies access to the evidence.

Petitioner contends that the statute of limitations for a Section 1983 claim seeking DNA testing of evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals. Petitioner argues that a statute of limitations begins to run only when a plaintiff has a complete and present cause of action, and for a claim alleging that state-law procedures violate due process, that moment does not occur until the state's appellate court authoritatively construes the state statute. Until then, petitioner argues, a plaintiff cannot definitively know what a state statute means and whether it is adequate to protect his constitutional rights. Petitioner further contends that a trial-court-denial rule would encourage parallel state and federal litigation and potentially result in federal courts adjudicating constitutional issues they might not otherwise need to decide, while an end-of-litigation rule would avoid those consequences.

### **Decision Below:**

995 F.3d 425 (5th Cir. 2021)

### **Petitioner's Counsel of Record:**

Parker Rider-Longmaid, Skadden, Arps, Slate, Meagher, Flom LLP

**Respondent’s Counsel of Record:**

Matthew Ottoway, Office of the Texas Attorney General

***Federal Practice and Procedure*****Civil Procedure — Personal Jurisdiction*****Mallory v. Norfolk Southern Railway Co., No. 21-1168*****Question Presented:**

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

**Summary:**

In *Daimler AG v. Bauman* and *Goodyear Tires v. Brown*, the Supreme Court held that the Due Process Clause permits states to exercise general personal jurisdiction over a corporation where it is “essentially at home” – typically its state of incorporation or principal place of business. States may also exercise general jurisdiction based on a corporation’s voluntary consent. The question presented is whether the Due Process Clause prohibits a state from requiring corporations to consent to general jurisdiction as a condition of doing business in the state.

Petitioner Robert Mallory, a former employee of respondent Norfolk Southern, filed suit against respondent in Pennsylvania state court for allegedly exposing him to harmful carcinogens. Petitioner did not allege that he was exposed to carcinogens in Pennsylvania or that respondent was incorporated or had its principal place of business in Pennsylvania. Instead, petitioner asserted that respondent was subject to personal jurisdiction based on a Pennsylvania statute that treats registration to do business in the State as consent to suit. The trial court determined that exercising jurisdiction on that basis would violate due process and therefore dismissed the action.

The Pennsylvania Supreme Court affirmed, holding that the Due Process Clause prohibits a state from requiring corporations to consent to general jurisdiction as a condition of doing business in the state. The court reasoned that permitting a court to exercise jurisdiction on that basis would conflict with *Daimler* and *Goodyear*. The court further concluded that such an assertion of jurisdiction would violate principles of federalism because it would allow states with no connection to a controversy (here, Pennsylvania) to adjudicate claims at the expense of states with legitimate interests in the suit (here, Virginia or Ohio). Finally, the court concluded that cases holding that corporations may voluntarily consent to jurisdiction are inapplicable because conditioning doing business on consent to suit constitutes compulsion and violates the doctrine of unconstitutional conditions.

Petitioner argues that the Due Process Clause does not prohibit a state from requiring corporations to consent to general jurisdiction as a condition of doing business in the state. Petitioner relies on Supreme Court decisions predating *Daimler* and *Goodyear* that recognize the constitutionality of that state practice. Nothing in *Daimler* and *Goodyear*, petitioner argues, overrides those earlier decisions. Petitioner contends that the earlier decisions comport with the principle that consent is a separate ground for a court’s exercise of personal jurisdiction and reflect the original public meaning of the Due Process Clause.



**Decision Below:**

266 A.3d 542 (Pa. 2021)

**Petitioner’s Counsel of Record:**

Ashley C. Keller, Keller Postman LLC

**Respondent’s Counsel of Record:**

Carter G. Phillips, Sidley Austin LLP

**Jurisdiction — Constitutional Challenges to Agency Structure*****Axon Enterprise, Inc. v. Federal Trade Commission, No. 21-86*****Question Presented:**

Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission’s structure, procedures, and existence by granting the courts of appeals jurisdiction to “affirm, enforce, modify, or set aside” the Commission’s cease-and-desist orders.

**Summary:**

An act of Congress empowers the Federal Trade Commission (FTC) to order entities to cease and desist from violating the federal antitrust laws. The Act grants federal courts of appeals exclusive jurisdiction to review such orders. The question presented is whether that grant of exclusive jurisdiction implicitly precludes federal district courts from exercising jurisdiction over constitutional challenges to the FTC’s structure.

After petitioner Axon Enterprise acquired a competitor, the FTC initiated an investigation to determine whether the acquisition violated the antitrust laws. Petitioner sued in federal district court, raising constitutional challenges to the FTC’s structure, including the statutory protection against removal of administrative law judges (ALJs). That same day, the FTC initiated an administrative proceeding against petitioner before an ALJ. The district court dismissed petitioner’s complaint for lack of jurisdiction.

The Ninth Circuit affirmed, holding that the grant of exclusive jurisdiction to courts of appeals to review cease-and-desist orders implicitly precludes federal district courts from exercising jurisdiction over constitutional challenges to the FTC’s structure. The court first concluded that the Act implicitly precludes district court jurisdiction over at least some claims. It then concluded that structural challenges to the FTC fall within the type of claims that Congress intended to preclude. The court reasoned that (i) petitioner may obtain meaningful review of such structural challenges through an appeal of a cease-and-desist order, (ii) the issues are not collateral to the enforcement proceeding because they are the means by which petitioner seeks to avoid that proceeding, and (iii) while the FTC has no expertise over constitutional issues, that factor is outweighed by the other two.

Petitioner argues that the statute’s grant of exclusive jurisdiction to courts of appeals to review cease-and-desist orders does not implicitly preclude federal district courts from exercising jurisdiction over constitutional challenges to the FTC’s structure. Petitioner contends that the Act’s text does not strip district courts of such jurisdiction because a challenge to the FTC’s structure does not constitute a challenge to a cease-and-desist order. Such a claim is not the kind of claim that Congress would have sensibly channeled through the FTC, petitioner argues, because the FTC has neither the authority nor the expertise to resolve it. Finally,

petitioner contends that review of a cease-and-desist order does not afford an adequate remedy because parties forced to endure unconstitutional agency authority suffer an immediate injury that cannot be undone.

**Decision Below:**

986 F.3d 1173 (9th Cir. 2021)

**Petitioner’s Counsel of Record:**

Paul D. Clement, Clement & Murphy PLLC

**Respondent’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

***Securities and Exchange Commission v. Cochran, No. 21-1239***

**Question Presented:**

Whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding.

**Summary:**

An act of Congress empowers the Securities and Exchange Commission (SEC) to bring an enforcement proceeding before an administrative law judge (ALJ) to determine whether a person has violated the securities laws. ALJ decisions are appealable to the SEC, which may either issue an order stating that the ALJ’s decision has become final or issue its own final decision. A person adversely affected by a final decision may seek review in the court of appeals, which have exclusive jurisdiction over the appeal. The question presented is whether a federal district court has jurisdiction to enjoin an administrative proceeding based on a constitutional challenge to the statutory restriction on the removal of ALJs.

The SEC brought an action against respondent Michelle Cochran. Respondent filed suit in district court, challenging the restriction on the removal of ALJs. The district court dismissed for lack of jurisdiction.

The Fifth Circuit, en banc, reversed, holding that federal district courts have jurisdiction to review constitutional challenges to the statutory restriction on the removal of ALJs. The court reasoned that the Act’s text says nothing about people who have not yet received a final order. Even assuming the Act bars district court jurisdiction over some claims, the court concluded it does not bar constitutional challenges to the restriction on the removal of ALJs. The court reasoned that precluding district court review could foreclose all meaningful review, that the challenge to the restriction on removal is collateral to the substance of the administrative proceeding, and that constitutional claims are outside the agency’s expertise.

The government argues that district courts lack jurisdiction to review a constitutional challenge to the restriction on ALJ removal. The government contends that Congress provided for review of SEC decisions only at the end of the administrative process and only in the courts of appeals. Invoking the principle that the specific controls the general, the government argues that those limitations on judicial review may not be evaded by suing the SEC in district court before agency proceedings conclude. The government further argues that the Administrative

Procedure Act (APA) confirms that district courts may not review ongoing SEC proceedings based on a constitutional challenge to the ALJ because the APA limits review to final agency actions, and the assignment of a case to an ALJ is a preliminary rather than a final agency action. Finally, the government contends that even if there were jurisdiction in district court to hear a constitutional challenge to the statutory restriction on ALJ removal, Congress did not provide a cause of action for such a suit, and a court may not invoke equitable authority to supply a cause of action that Congress deliberately withheld.

**Decision Below:**

20 F.4th 194 (5th Cir. 2021)

**Petitioner’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

**Respondent’s Counsel of Record:**

Gregory G. Garre, Latham & Watkins LLP

**Quiet Title Act — Statute of Limitations**

***Wilkins v. United States, No. 21-1164***

**Question Presented:**

Whether the Quiet Title Act’s statute of limitations is a jurisdictional requirement or a claim-processing rule.

**Summary:**

The Quiet Title Act (QTA) authorizes claimants to sue the United States to adjudicate title to real property in which the United States claims an interest. The Act provides that such an action “shall be barred unless it is commenced within twelve years of the date upon which it accrued.” The question presented is whether that twelve-year statute of limitations is a jurisdictional requirement or a claim-processing rule.

Petitioners Larry Wilkins and Jane Stanton own property burdened by an easement granted by their predecessors-in-interest to the United States. Petitioners brought suit under the QTA in federal district court to determine the lawful scope of the easement. The district court treated the QTA’s statute of limitations as jurisdictional and dismissed the action on that basis.

The Ninth Circuit affirmed, holding that the QTA’s statute of limitations is a jurisdictional requirement. The court viewed as controlling the Supreme Court’s statement in *Block v. North Dakota* that the QTA’s statute of limitations is jurisdictional. The court acknowledged that there is some tension between *Block* and subsequent Supreme Court decisions holding that a statute of limitations should be treated as a claim-processing rule absent a clear statement that it is jurisdictional. It concluded, however, that it was bound to follow the directly controlling decision in *Block*.

Petitioners contend that the QTA’s statute of limitations is a claim-processing rule. Petitioners argue that the Supreme Court’s recent cases establish that a statute of limitations is a claim-processing rule unless there is a clear statement that it is jurisdictional, and the QTA does not provide such a clear statement. Petitioners further argue that the Court’s passing statement in *Block* that the QTA’s statute of limitations is jurisdictional was made at a time when the Court used the term jurisdictional imprecisely, and therefore lacks any precedential effect.

**Decision Below:**

13 F.4th 791 (9th Cir. 2021)

**Petitioner’s Counsel of Record:**

Jeffrey W. McCoy, Pacific Legal Foundation

**Respondent’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

**Sale Orders — Limits on Appellate Review*****MOAC Mall Holdings LLC v. Transform Holdco LLC*, No. 21-1270****Question Presented:**

Whether Bankruptcy Code Section 363(m) limits the appellate courts’ jurisdiction over any sale order or order deemed “integral” to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.

**Summary:**

Section 363(m) of the Bankruptcy Code provides that, in certain specified circumstances, “the reversal or modification on appeal of an authorization . . . of a sale . . . does not affect the validity of [the] sale” to a good-faith purchaser. A defining feature of a jurisdictional provision is that it is not subject to waiver or estoppel. The question presented is whether Section 363(m) is a jurisdictional limit on appellate review and therefore not subject to waiver or estoppel.

Petitioner MOAC operates the Mall of America in Minnesota. Sears, a Mall of America tenant, filed for bankruptcy. The bankruptcy court ordered a sale of a substantial portion of Sears’ assets to respondent Transform. The sale order did not include the Mall of America lease, but respondent acquired a right to have the lease assigned to it if the assignment satisfied the applicable statutory requirements. The bankruptcy court subsequently approved the assignment of the lease to respondent. The district court initially reversed on the merits. On motion for rehearing, however, respondent argued for the first time that Section 363(m) is jurisdictional. The district court agreed and dismissed the appeal for lack of jurisdiction.

The Second Circuit affirmed, holding that Section 363(m) is jurisdictional and therefore not subject to waiver or estoppel. The court reasoned that the provision is jurisdictional because it creates a rule of statutory mootness when a court is unable to grant effective relief without impacting the validity of the sale at issue.

Petitioner contends that Section 363(m) is not jurisdictional and is therefore subject to waiver and estoppel. Under Supreme Court precedent, a provision is not jurisdictional absent a clear statement to that effect, petitioner maintains, and Section 363(m) contains no such clear statement. Petitioner argues that, by referencing “the reversal or modification on appeal of a sale,” Section 363(m) expressly recognizes that appellate courts have jurisdiction over such sales. The only textual limit, petitioner contends, goes to the effect of such a reversal or modification—it does not affect the validity of the sale to a good-faith purchaser.

**Decision Below:**

20-1846-bk (2d Cir. Dec. 17, 2021)

**Petitioner’s Counsel of Record:**

Douglas H. Hallward-Driemeier, Ropes &amp; Gray LLP

**Respondent’s Counsel of Record:**

George E. Brunstad Jr., Dechert LLP

**Veterans Benefits — Equitable Tolling*****Arellano v. McDonough*, No. 21-432****Questions Presented:**

- (1) Does *Irwin*[ *v. Department of Veteran’s Affairs*]'s rebuttable presumption of equitable tolling apply to the one-year statutory deadline in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits, and, if so, has the Government rebutted that presumption?
- (2) If 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling, should this case be remanded so the agency can consider the particular facts and circumstances in the first instance?

**Summary:**

A veterans’ benefits statute specifies that, unless provided otherwise, the effective date of an award on a claim for veterans’ benefits shall not be earlier than the date of receipt of the application. One specified exception among many provides that the effective date of an award of disability compensation shall be the day after discharge or release if the application is received within one year from the discharge or release. In *Irwin v. Dep’t of Veterans Affairs*, the Supreme Court held that the rebuttable presumption of equitable tolling of statutory deadlines that applies to suits against private parties also applies in suits against the United States. The principal question presented is whether the rebuttable presumption of equitable tolling applies to the one-year deadline for obtaining retroactive benefits, and, if so, whether the presumption is rebutted.

Petitioner Adolfo Arellano is a veteran who suffers from prolonged schizoaffective disorder and bipolar disorder with post-traumatic stress disorder. Petitioner applied for disability benefits more than 30 years after his date of discharge from military service. The Court of Appeals for Veterans Claims denied his claim for equitable tolling of the one-year statutory deadline, limiting his disability benefits to the date his application was received by the VA.

The Federal Circuit, en banc, affirmed but was equally divided on the rationale. Six judges concluded that the equitable tolling presumption does not apply to the one-year deadline for obtaining retroactive benefits because the deadline does not function like a statute of limitations. Unlike a statute of limitations, they reasoned, the exception does not bar claims after the one-year period expires, but instead determines one of the elements that affects the amount of the award. The same six judges also concluded that any presumption was rebutted because the many statutory exceptions implicitly preclude recognition of an additional equitable exception. While the other six judges disagreed with each of those points, they concluded that petitioner’s circumstances did not justify equitable tolling.

Petitioner contends that the equitable tolling presumption applies to the one-year deadline for obtaining retroactive disability benefits and that the presumption is not rebutted. Petitioner argues that *Irwin* does not limit the presumption to traditional statutes of limitations, but instead uses language that is broad enough to cover statutory deadlines that function as statutes of limitations. The one-year deadline satisfies that standard, petitioner contends, because it prescribes a period in which veterans must exercise their right to receive retroactive disability

compensation or lose that right forever. Petitioner further argues that the presumption is not rebutted because the text of the one-year limitations period does not have technical or complex features, and because veterans' claims require numerous other individualized determinations.

**Decision Below:**

1 F.4th 1059 (Fed. Cir. 2021)

**Petitioner's Counsel of Record:**

James R. Barney, Finnegan, Henderson, Farabow, Garrett, & Dunner LLP

**Respondent's Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

## *Miscellaneous Business*

### **Bankruptcy — Fraud Exception to Discharge of Debt**

*Bartenwerfer v. Buckley*, No. 21-908

**Question Presented:**

Whether an individual may be subject to liability for the fraud of another that is barred from discharge under Bankruptcy Code [Section] 523(a)(2)(A), by imputation, without any act, omission, intent, or knowledge of her own.

**Summary:**

The Bankruptcy Code generally gives the court power to discharge a debtor from all preexisting debts. Under the fraud exception, however, a debt is not subject to discharge when it was obtained by “false pretenses, a false representation, or actual fraud.” The question presented is whether the fraud exception applies when the debt was obtained through a business partner’s fraud if the debtor did not know and had no reason to know of the fraud.

Petitioner Kate Bartenwerfer and her husband sold a house to respondent Kieran Buckley. Respondent sued petitioner and her husband for misrepresentation in connection with the sale, and a judgment was entered in respondent’s favor. Petitioner filed for bankruptcy, and respondent objected to discharge of the judgment based on the fraud exception. The bankruptcy court held that the fraud exception applied because the fraud committed by petitioner’s husband could be legally imputed to her. The Ninth Circuit Bankruptcy Appellate Panel (BAP) reversed and remanded on the ground that petitioner’s liability depended on whether she knew or had reason to know of her husband’s fraud. On remand, the bankruptcy court found that petitioner did not know and had no reason to know of the fraud, and the BAP affirmed.

The Ninth Circuit reversed, holding that the fraud exception applies to debts obtained through a partner’s fraud even when the debtor did not know and had no reason to know of the fraud. The court relied on the basic partnership principle that a person is liable for a partner’s fraud regardless of whether they knew or should have known of the fraud.

Petitioner argues that the fraud exception applies only when the debtor knew or should have known of a partner’s fraud. Petitioner contends that the Bankruptcy Code’s textual reference to fraud incorporates the common-law understanding that some level of personal scienter is required, and that legal imputation is not sufficient. Petitioner further argues that a

rule providing for the nondischarge of a debt based on another's fraud is incompatible with bankruptcy law's purpose of giving relief to the honest but unfortunate debtor.

**Decision Below:**

860 F. App'x 544 (9th Cir. 2021)

**Petitioner's Counsel of Record:**

Lisa S. Blatt, Williams & Connolly LLP

**Respondent's Counsel of Record:**

Zachary D. Tripp, Weil, Gotshal & Manges LLP

**Copyright — Transformative Use**

***Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-869***

**Question Presented:**

Whether a work of art is “transformative” when it conveys a different meaning or message from its source material (as the Supreme Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material (as the Second Circuit has held).

**Summary:**

The Copyright Act protects original works, including visual art and photography. The Act provides that fair use is a defense to copyright-infringement claims. When determining if a secondary work constitutes fair use, courts consider “the purpose and character of the use,” including the extent to which the secondary work is “transformative.” The question presented is whether a work is “transformative” when it conveys a different meaning or message from its source material, but is recognizably derived from, and retains the essential elements of, its source material.

Respondent Lynn Goldsmith photographed the musician Prince and licensed one of her photographs to Vanity Fair magazine. The magazine commissioned Andy Warhol to create a work of art depicting Prince based on respondent's photograph, and then ran that work in one of its issues with an attribution to respondent. Warhol independently created multiple additional works (the Prince Series), and Vanity Fair ran one of those additional works in a later issue commemorating Prince without an attribution to respondent. Respondent contacted petitioner Andy Warhol Foundation for the Visual Arts, Inc., holder of the Prince Series' copyright, claiming that the Series infringed her copyright on the original photograph. Petitioner sued for declaratory judgment that the Prince Series constitutes fair use of respondents' photograph. The district court concluded that the Series was “transformative” and therefore fair use because it transformed Prince from a vulnerable person to an iconic figure.

The Second Circuit reversed, holding that a secondary work is not transformative when it is recognizably derived from, and retains the essential elements of, its source material. The court reasoned that if adding a new meaning or message were sufficient to make a secondary work transformative, it would undermine the statutory protection for derivative works, such as when a novel is made into a movie. The court also concluded that judges are ill equipped to ascertain the meaning of artistic works because such judgments are inherently subjective.

Petitioner argues that a work of art is “transformative” when it conveys a different meaning or message from its source material. Petitioner contends that the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.* that a work that conveys a new meaning or message is transformative even when it is recognizably derived from its source material. Petitioner also argues that if a work cannot be transformative when it is recognizably derived from its source material, it would eliminate fair-use protection when it is most needed – when innovators create new works building on the insights and imagery of others.

**Decision Below:**

11 F.4th 26 (2d Cir. 2021)

**Petitioner’s Counsel of Record:**

Roman Martinez, Latham & Watkins LLP

**Respondents’ Counsel of Record:**

Lisa S. Blatt, Williams & Connolly LLP

**Fair Labor Standards Act—Highly Compensated Employees**

***Helix Energy Solutions Group, Inc. v. Hewitt, No. 21-984***

**Question Presented:**

Whether a supervisor making over \$200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29 C.F.R. § 541.601 remains subject to the detailed requirements of 29 C.F.R. § 541.604 when determining whether highly compensated supervisors are exempt from the [Fair Labor Standards Act]’s overtime-pay requirements.

**Summary:**

The Fair Labor Standards Act (FLSA) exempts from its overtime requirements executive, administrative, and professional employees. To qualify for one of those exemptions, an employee must be paid on a “salary basis.” Under Department of Labor (DOL) regulations, an employee is paid on a “salary basis” if the employee is paid, weekly or less frequently, a predetermined amount that cannot be reduced based on the number of hours actually worked. Under the Minimum Guarantee (MG) regulation, employees paid on a “salary basis” remain exempt when they are also paid additional compensation calculated on a daily basis if the employee is (1) guaranteed the minimum required weekly salary (\$463), and (2) the employee’s salary constitutes a majority of the total compensation (the reasonable-relationship requirement). The question in this case concerns the relationship between that regulation, and a separate regulation that establishes an exemption for highly compensated employees (the HCE regulation). Under the HCE regulation, an employee qualifies for exemption when the employee receives at least \$100,000 annually and the required \$463 minimum payment per week on a “salary basis”. The question presented is whether a person who earns the amounts specified by the HCE regulation qualifies for an exemption even if he does not also satisfy the MG regulation’s requirements, including the reasonable-relationship requirement.

Respondent Michael Hewitt worked for petitioner Helix Energy Solutions. Petitioner paid respondent every two weeks, calculated on a daily basis. Respondent received more than \$200,000 annually. After respondent was fired, he sued for overtime under the FLSA. The



parties agree that respondent did not qualify as an exempt employee if eligibility depends on satisfying not only the compensation minimums in the HCE regulation, but also all the MG regulation's requirements. The district court ruled for petitioner.

The en banc Fifth Circuit reversed, holding that an employee whose compensation is determined on a daily basis qualifies for the exemption under the HCE regulation only if the employee meets all the requirements of the MG regulation. The court reasoned that the HCE regulation's text requires payment "on a salary basis," and the MG regulation specifies that, for a person whose compensation is computed on a daily basis, the salary-basis test is satisfied only when all the MG regulation's requirements are met.

Petitioner argues that employees who are highly compensated in accordance with the HCE regulation qualify for the exemption even when they do not satisfy the MG's reasonable-relationship requirement. Petitioner argues that the text of the HCE regulation makes its standalone nature clear by providing that an employee satisfying its terms is "deemed exempt." Petitioner further contends that the HCE's cross-reference to other DOL regulations, and the absence of any cross-reference to the MG regulation, confirm it is not subject to the MG regulation's requirements. Finally, petitioner argues that it makes little sense to require overtime pay for employees who make as much money as respondent did.

**Decision Below:**

15 F.4th 289 (5th Cir. 2021)

**Petitioner's Counsel of Record:**

Paul D. Clement, Clement & Murphy PLLC

**Respondent's Counsel of Record:**

Edwin Sullivan, Oberti Sullivan LLP

## *Other Public Law*

### **Bank Secrecy Act**

#### ***Bittner v. United States, No. 21-1195***

**Question Presented:**

Whether a "violation" under the [Bank Secrecy] Act is the failure to file an annual FBAR [Report of Foreign Bank and Financial Accounts] (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported.

**Summary:**

The Bank Secrecy Act (BSA) instructs the Treasury Secretary to require U.S. citizens or residents to file reports concerning transactions or relations with a foreign financial agency. The Secretary's implementing regulations require a person with a financial interest in a foreign account to file a yearly form known as an FBAR (Report of Foreign Bank and Financial Accounts) that provides specified information on each account. The BSA authorizes the Secretary to impose a civil penalty of not more than \$10,000 for any non-willful violation of the BSA. The question presented is whether a "violation" arises on a "per-form" or "per-account" basis.

Petitioner Alexandru Bittner is a dual Romanian-U.S. citizen who has multiple non-U.S. financial accounts and did not file FBARs for five years. Petitioner and the government agree petitioner’s violations were non-willful but dispute whether petitioner committed five violations (one per missed form) or 272 violations (one per account not reported in each of the five years). The district court granted summary judgment for petitioner, finding that a BSA violation arises on a per-form basis.

The Fifth Circuit reversed, holding that a violation under the BSA arises on a per-account basis. The court reasoned that the BSA’s text focuses on a violation of the Act itself, not a violation of its implementing regulations, and a violation of the BSA is most naturally read as the failure to report each account. The court also noted that the BSA’s willful-violation provision and reasonable-cause exception both frame a violation in terms of the failure to report an account. Relying on the principle that identical terms within an act bear the same meaning, the court concluded that a non-willful violation must also consist of a failure to report an account.

Petitioner argues that a violation under the BSA arises on a per-form basis. Petitioner argues that the Supreme Court’s decision in *California Bankers Association v. Shultz* equated a “violation” with a violation of the Secretary’s regulations, and the regulations impose a single duty: filing an annual FBAR form. Petitioner further contends that because “accounts” are referenced in the BSA’s willful-violation provision and reasonable-cause exception, but not in the non-willful violation provision, and Congress generally acts intentionally when it includes language in one provision but omits it in another, the overwhelming inference is that a non-willful violation does not arise per-account. Petitioner also contends that a per-account interpretation leads to the unlikely conclusion that Congress intended to authorize staggering penalties for non-willful violations.

**Decision Below:**

19 F.4th 734 (5th Cir. 2021)

**Petitioner’s Counsel of Record:**

Daniel L. Geysler, Haynes and Boone LLP

**Respondent’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

**Clean Water Act — Regulation of Wetlands**

***Sackett v. Environmental Protection Agency*, No. 21-454**

**Question Presented:**

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

**Summary:**

The Clean Water Act (CWA) authorizes the Environmental Protection Agency (EPA) to regulate “navigable waters.” The CWA defines “navigable waters” as “waters of the United States.” In *Rapanos v. United States*, a plurality of the Court concluded that wetlands are regulable as “waters of the United States” only when they have a continuous surface-water connection to bodies ordinarily understood as waters, such as streams, oceans, rivers, or lakes. Justice Kennedy’s concurrence concluded that the CWA regulates wetlands with a “significant

nexus” to traditional navigable waters. The question presented is whether the plurality’s continuous-connection test, Justice Kennedy’s significant-nexus test, or some other test is the proper test for determining when wetlands are “waters of the United States.”

Petitioners Michael and Chantell Sackett own property with wetlands that have no surface connection to any body of water. The EPA sent petitioners an administrative compliance order concluding that petitioners’ property contained wetlands subject to regulation under the CWA. Petitioners brought suit under the Administrative Procedure Act (APA), challenging the compliance order. The district court dismissed the complaint for lack of finality. The Ninth Circuit affirmed, but the Supreme Court reversed. On remand, the district court granted summary judgement to the EPA.

The Ninth Circuit affirmed. Relying on a prior decision, the court held that Justice Kennedy’s significant-nexus test governs when wetlands are regulable as “waters of the United States” under the CWA. That prior decision reasoned that the significant-nexus test was controlling under *Marks v. United States* because it constituted the narrowest ground supporting the judgment in *Rapanos*.

Petitioners argue that wetlands are waters of the United States only when they have a continuous surface-water connection to bodies ordinarily understood as waters, such as streams, oceans, rivers, or lakes. Petitioners contend this conclusion is compelled by the text of the CWA, which regulates “waters” not land. Because of that textual distinction, petitioners argue, it is only permissible to treat wetlands as waters when there is a practical difficulty in drawing the boundary between true waters and wetlands immediately adjacent to them. Petitioners further contend that wetlands can be waters “of the United States” only when they are subject to Congress’ authority over the channels of interstate commerce. Finally, petitioners argue that Justice Kennedy’s opinion is not controlling under *Marks*, and even if it were, the absence of any textual support for its substantial-nexus test counsels against affording the opinion stare decisis effect.

**Decision Below:**

8 F.4th 1075 (9th Cir. 2021)

**Petitioner’s Counsel of Record:**

Damien M. Schiff, Pacific Legal Foundation

**Respondent’s Counsel of Record:**

Brian H. Fletcher, Deputy Solicitor General, Department of Justice  
(The Solicitor General is recused in this case.)

**False Claims Act — Government Dismissal after Declining to Intervene**

*United States, ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052

**Question Presented:**

Whether the government has authority to dismiss a [False Claims Act] suit after initially declining to proceed with the action, and what standard applies if the government has that authority.

**Summary:**

The False Claims Act (FCA) authorizes private individuals (relators) to file qui tam civil actions in the name of the United States to redress wrongs done to the government in exchange for a share of the money recovered. When a relator files a qui tam action, the government may either intervene and proceed with the action, or decline to intervene, in which case the relator “shall have the right to conduct the action.” When the government initially declines to intervene, it may intervene later upon a showing of good cause, but such intervention does not “limit[]” the “rights” of the relator. In a provision whose meaning is contested here, the FCA provides that the government may dismiss the action if the relator has notice and an opportunity to be heard. The question presented is whether the government has authority to dismiss an FCA action after declining to intervene initially, and, if so, what standard for dismissal applies.

Petitioner Dr. Jesse Polansky was a consultant for respondent Executive Health Resources, Inc., a company that assists healthcare providers in billing the United States for covered healthcare services. Petitioner filed an FCA qui tam action alleging that respondent caused its clients to submit false claims for payment. The government initially declined to intervene, and petitioner proceeded with his qui tam claim. The government later sought to dismiss the action against respondent, and the district court granted the motion.

The Third Circuit affirmed, holding that the government has authority to obtain dismissal of an FCA action after initially declining to intervene if the government establishes good cause for intervention and satisfies the standards for dismissal set forth in Fed. R. Civ. P. 41. Under Rule 41, when no responsive pleading has been filed, dismissal is automatic; when a responsive pleading has been filed, dismissal must be supported by a proper justification. The court rejected petitioner’s reliance on the FCA provision specifying that later intervention does not limit a relator’s rights, on the ground that a relator’s rights are always subject to the government’s right as a party to seek dismissal.

Petitioner contends that once the government initially declines to intervene, it lacks authority to later obtain dismissal. Petitioner argues that when the government defers to a private relator, the government cannot later limit the relator’s right to control the action, even as a belated intervener. The government’s decision to unilaterally dismiss the action after a later intervention, petitioner contends, would clearly “limit” the relator’s “rights” contrary to the FCA. Petitioner further asserts that even if the government cannot use its dismissal authority, it has other ample means to participate in the case and advance its interests.

**Decision Below:**

17 F.4th 376 (3d Cir. 2021)

**Petitioner’s Counsel of Record:**

Daniel L. Geyser, Haynes and Boone, LLP

**Respondents’ Counsel of Record:**

Mark W. Mosier, Covington & Burling, LLP

Elizabeth B. Prelogar, Solicitor General, Department of Justice

## **State Challenge to Immigration Policy**

### ***United States v. Texas, No. 22-58***

#### **Questions Presented:**

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

#### **Summary:**

The Immigration and Naturalization Act (INA) authorizes the Department of Homeland Security (DHS) to set national immigration enforcement policies and priorities. Relying on that authority, DHS issued Guidelines that prioritize “apprehension and removal” of noncitizens who pose a threat to national security, border security, or public safety. The first question presented is whether Texas and Louisiana have Article III standing to challenge the Guidelines. Federal immigration law contains two mandatory detention provisions. The first directs that DHS “shall take into custody” noncitizens convicted of certain offenses, and “may release” them only in limited circumstances. The second directs that DHS “shall remove” a noncitizen within 90 days of a final removal order and “shall detain” the person during that period. The second question presented is whether the Guidelines violate either of the mandatory detention provisions, were improperly issued without the notice and comment the Administrative Procedure Act (APA) requires for substantive regulations, or are arbitrary and capricious under the APA. A provision of the INA deprives lower federal courts of jurisdiction to “enjoin or restrain the operation of” provisions governing the arrest, detention, and removal of noncitizens. The third question presented is whether that provision strips a federal district court of jurisdiction to vacate DHS’s Guidelines under the APA.

Texas and Louisiana filed suit in federal district court, challenging the Guidelines on the grounds that they violate the two mandatory detention provisions, were improperly issued without notice and comment, and are arbitrary and capricious. The district court ruled for the States and vacated the Guidelines.

The district court held that Texas has standing to challenge the Guidelines because they increase the number of noncitizens Texas incarcerates and provides public benefits, both of which cause Texas financial injury. On the merits, the court first held that the Guidelines violate the mandatory detention provisions because they replace the mandatory detention categories with individualized decisions based on the totality of circumstances. Second, the court held that the Guidelines are arbitrary and capricious because DHS failed to consider the recidivism and abscondment rates of mandatory detainees or the costs to and reliance interests of the States. Third, the court held that the Guidelines are substantive regulations requiring notice and comment because they bind DHS front-line officers and give noncitizens a right to challenge enforcement actions. In a subsequent order, the court held that the INA’s jurisdictional bar does not preclude a court from vacating the Guidelines because doing so does not “enjoin” or “restrain” the operation of the provisions on arrest, detention, and removal.

The government argues that the States lack standing to challenge the Guidelines because they have no judicially cognizable interest in the enforcement of federal immigration laws, and downstream economic effects are insufficient to establish standing. On the merits, the government first argues that the Guidelines do not violate either of the mandatory detention provisions. The government contends that the requirement to take certain noncitizens convicted of a crime into custody comes into play only after DHS decides to institute or maintain removal proceedings. And it argues that the requirement to detain noncitizens subject to removal does not create any legally enforceable right and does not address the arrest of noncitizens who are not already in detention. Second, the government argues that the Guidelines are neither arbitrary nor capricious because DHS adequately considered the rates of abscondment and recidivism among mandatory detainees as well as the costs and reliance interests of the States. Third, the government argues that the Guidelines did not require notice and comment because they fall within the exemptions for general statements of policy and rules of agency practice. Those exemptions are applicable, the government argues, even when a rule binds lower-level personnel. Finally, the government contends that the jurisdictional bar on enjoining or restraining the operation of the provisions governing arrest, detention, and removal strips district courts of jurisdiction to vacate the Guidelines. The government argues that the district court’s labelling of its judgment as a vacatur does not take its judgment outside the jurisdictional bar because a vacatur renders the Guidelines void, and thus bars the government from relying on them.

**Decision Below:**

No. 6:21-CV-00016 (S.D. Tex. Jun. 10, 2022)

**Petitioner’s Counsel of Record:**

Elizabeth B. Prelogar, Solicitor General, Department of Justice

**Respondent’s Counsel of Record:**

Judd E. Stone, Solicitor General, Office of the Texas Attorney General

***Original Jurisdiction***

**Abandoned Property — Unclaimed Financial Instruments**

*Delaware v. Pennsylvania and Wisconsin*, No. 22O145

*Arkansas v. Delaware*, No. 22O146

**Questions Presented:**

- (1) Whether “agent checks” and “teller’s checks” issued by MoneyGram are “money orders” under the Federal Disposition of Abandoned Money Orders and Traveler’s Checks Act (FDA).
- (2) Whether, if those products are not “money orders,” they are “similar written instruments” under the FDA.
- (3) Whether, if those products are “similar written instruments,” they fall within the FDA’s exclusion for “third party bank checks.”

**Summary:**

States assume title to abandoned property through a process known as escheatment. The Federal Disposition of Abandoned Money Orders and Traveler’s Checks Act (FDA) governs escheatment of sums payable on a “money order, traveler’s check, or other similar written instrument (other than a third party bank check).” When the FDA applies, unclaimed financial instruments generally escheat to the state where they were purchased. When the FDA does not apply, unclaimed financial instruments generally escheat to the state of the issuer’s incorporation. MoneyGram issues financial products known as “agent checks” and “teller’s checks.” The first question presented is whether those products constitute “money order[s]” under the FDA. The second question presented is whether those products constitute “similar written instrument[s]” under the FDA. The third question presented is whether, if those products constitute “similar written instrument[s],” they fall within the exclusion for “third party bank check[s].”

Delaware sought leave to file an original action in the Supreme Court against Pennsylvania and Wisconsin, seeking a declaration that MoneyGram’s agent checks and teller’s checks fall outside the FDA and are therefore subject to escheatment in Delaware as the place of MoneyGram’s incorporation. A coalition of States (claimant States) sought leave to file an original action seeking a declaration that MoneyGram’s products are subject to escheatment under the FDA as either money orders or similar written instruments, entitling the States of purchase to their escheatment value. The Court granted leave to both Delaware and to the claimant States, consolidated the two actions, and appointed a Special Master to hear them.

The Special Master recommended a ruling that MoneyGram’s products fall within the FDA. The Special Master first concluded that agent checks and teller’s checks are money orders under the FDA. The Special Master noted that those products fall within the definition of money orders: prepaid drafts used to safely transmit money. The Special Master concluded that while not every instrument falling within that definition is necessarily a money order under the FDA, apart from insignificant differences, MoneyGram’s products are indistinguishable from the products that are universally regarded as money orders. For essentially the same reason, the Special Master determined that if MoneyGram’s products are not money orders, they are similar written instruments. Finally, the Special Master determined that MoneyGram’s products are not excluded from the FDA as third party bank checks because that exclusion covers only personal checks.

Delaware contends that MoneyGram’s agent checks and teller’s checks are not money orders under the FDA because Congress used that term to refer to instruments labelled as money orders. Delaware further argues that MoneyGram’s products are not similar written instruments because that phrase refers only to instruments that use alternative spellings of money order or traveler’s checks. Finally, Delaware contends that MoneyGram’s products are excluded from the category of similar written instruments as third party bank checks because they are paid through a third party.

**Petitioner’s Counsel of Record:**

Neal Kumar Katyal, Hogan Lovells US LLP

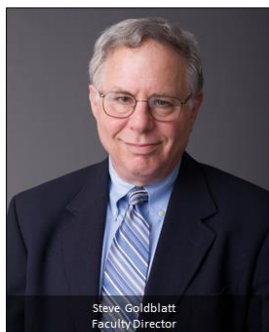
**Respondents’ Counsel of Record:**

Nicholas J. Bronni, Solicitor General, Office of the Arkansas Attorney General

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