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THE SUPREME COURT'S 2022-23 ACCESS TO COURT DECISIONS

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ABSTRACT

The Supreme Court's 2022–23 Term yielded significant decisions bringing about goals long-sought by conservatives. This debut Term for the first Black woman Justice also included some results welcomed by progressives, including decisions on voting rights, Native American sovereignty, and individual enforcement of Spending Clause enactments. In this Article, we discuss significant decisions that have implications for access to court for civil litigants, focusing on those affecting access for low-income and marginalized litigants. We also look ahead to what the 2023–24 Term may bring for those seeking access to the courts.

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I. INTRODUCTION

The 2022-2023 Supreme Court Term ended dramatically with significant decisions on major political and cultural issues.[1] Unsurprisingly, the six-Justice conservative supermajority held together in many decisions, which, in some cases, achieved goals conservatives have long sought.[2] Yet this Term was not a complete right-wing triumph. While decisions on college admissions and equal rights for LGBTQ+ people were devastating losses for progressive causes, decisions in cases on voting rights, enforcement of Spending Clause enactments, and Native American sovereignty saved the term from being a disaster for liberals.[3] Moreover, in her first term, the first Black woman to serve as a Justice, Ketanji Brown Jackson, made a "forceful debut," speaking more frequently during oral arguments than any other brand new justice in recent memory and authoring important opinions and dissents.[4]

Many of this Term's decisions will have implications for access to court for civil litigants and their ability to vindicate their civil and constitutional rights. In this Article, we discuss several significant decisions, focusing on those that may affect access to low-income and marginalized litigants. This includes decisions on religious freedom,[5] workers' rights,[6] voting rights,[7] considerations of race in college admissions,[8] and Native American sovereignty.[9] We focus not only on the substantive rulings, but also on aspects of the decisions that have more general applicability to civil litigants, including standing, jurisdiction, statutory stare decisis, and statutory interpretation. Finally, we look ahead to the 2023-2024 Supreme Court Term.

II. EXHAUSTION

Many federal statutes contain administrative schemes that allow parties to contest an agency decision and, if dissatisfied with the outcome, appeal the final

1. *See* Groff v. DeJoy, 600 U.S. 447 (2023); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); Allen v. Milligan, 599 U.S. 1 (2023); Haaland v. Brackeen, 599 U.S. 255 (2023).

2. *See* Adam Liptak & Eli Murray, *Along with Conservative Triumphs, Signs of New Caution at the Supreme Court*, N.Y. TIMES (Jul. 1, 2023), https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html.

3. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); *303 Creative,* 600 U.S.; *Milligan*, 599 U.S.; Health and Hospital Corporation of Marion County v. Talevski, 599 U.S. 166 (2023); *Brackeen*, 599 U.S..

4. Ann M. Marimow, *Justice Ketanji Brown Jackson's Bold Debut and Independent Streak*, WASH. POST (Jul. 2, 2023), https://www.washingtonpost.com/politics/2023/07/02/ketanji-brown-jackson-first-term/; *see also Talevski*, 599 U.S. at 171; *Students for Fair Admissions*, 600 U.S. at 384 (Jackson, J., dissenting).

5. *Groff*, 600 U.S. at 453, 454–56; *303 Creative*, 600 U.S. at 580.

6. *Groff*, 600 U.S. at 455–56.

7. *Milligan*, 599 U.S. at 9–10.

8. *Students for Fair Admissions*, 600 U.S. at 197–98.

9. *Brackeen*, 599 U.S. at 264.

agency decision to a federal court, which reviews the agency decision while affording due deference to the administrative record. The law may require individuals to exhaust such administrative remedies before filing suit under the statute. Exhaustion refers to the doctrine limiting a plaintiff's ability to bring suit in federal court "until the plaintiff has exhausted the remedies available to her through a separate judicial or non-judicial process."[10] The Court this Term considered several cases which favored narrow readings of statutory exhaustion requirements.

In *Luna Perez v. Sturgis Public Schools,* the Court considered the scope of the Individuals with Disabilities Education Act's (IDEA) exhaustion requirement.[11] The IDEA requires states to ensure that children with disabilities receive a free appropriate public education (FAPE).[12] The law authorizes grants to states for providing special education and related services and provides administrative remedies.[13] Among these remedies, the law allows a family who believes their child has been denied a FAPE the right to an administrative hearing to review the denial.[14] If the family is not satisfied with the outcome of that hearing, IDEA provides families with a right of action to federal district court to review the outcome of that hearing, but only after the administrative process has been exhausted.[15] The IDEA provides for injunctive relief but not compensatory money damages.[16]

Miguel Luna Perez, who is deaf, filed an administrative complaint with the Michigan Department of Education, alleging that his school district failed to provide him with a FAPE.[17] The parties settled the complaint before the hearing, with Mr. Perez receiving the prospective equitable relief that he sought.[18] He then filed suit in federal district court under the Americans with Disabilities Act, seeking compensatory money damages for the school district's earlier failures.[19] The school district moved to dismiss the case, invoking IDEA's exhaustion requirement, which requires exhaustion of administrative remedies before filing

10. *Litigation, Overview - Exhaustion of Remedies*, BLOOMBERG LAW, https://www.bloomberglaw.com/external/document/X6O8S78G000000/litigation-overview-exhaustion-of-remedies (last visited Feb. 21, 2024).

11. Luna Perez v. Sturgis Pub. Schs., 598 U.S. 142 (2023).

12. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401–1450.

13. *Id*.

14. *Id*. at § 1415(f)(1)(A).

15. *Id*. at § 1415(f), (i).

16. *Id*. at § 1415(i)(2)(A).

17. Luna Perez v. Sturgis Pub. Schs., 598 U.S. 142, 145.

18. *Id*.

19. *Id*.

suit "seeking relief that is also available under [the IDEA]."[20] The district court dismissed the case, and the Sixth Circuit affirmed.[21]

In a decision written by Justice Gorsuch, a unanimous Court reversed, holding that the exhaustion requirement did not bar this suit.[22] The Court observed that IDEA only requires exhaustion in claims "seeking *relief* that is also available under" IDEA.[23] Because the law does not provide for the specific relief sought by the plaintiff—compensatory damages—the Court held that exhaustion was not required.[24]

This Term, the Court also considered whether an exhaustion requirement is jurisdictional. Answering this question for litigants and courts is crucial, as jurisdictional rules cannot be waived or forfeited, meaning courts must address them *sua sponte* and may not grant equitable exceptions to jurisdictional rules.[25] Because of these potential "harsh consequences,"[26] the Court adopted a clear statement rule in the 2006 case *Arbaugh v. Y & H Corp.* to determine whether a particular statute creates a jurisdictional rule or merely a claims-processing rule.[27]

The Court applied that clear statement rule in two cases this Term, each written by Justice Jackson and each reversing a lower court ruling interpreting a statutory exhaustion requirement as jurisdictional. In *Santos-Zacaria v. Garland*, the Court examined a requirement that a noncitizen who seeks to challenge an order of removal must first "exhaust all administrative remedies available to [them] as of right."[28] The Fifth Circuit found that this requirement was jurisdictional and further held that, before seeking judicial review, a noncitizen must seek discretionary reconsideration from the Board of Immigration Appeals.[29] The Court rejected both conclusions.[30] First, it explained that a jurisdictional requirement sets the bounds of the court's adjudicatory authority, while "non-jurisdictional rules govern how courts and

20. *Id*.; 20 U.S.C. § 1415(l).

21. Perez v. Pub. Schools, No. 1:18-CV-1134, 2019 WL 6907138 (W.D. Mich. Dec. 19, 2019), *aff'd,* Perez v. Sturgis Pub. Schools, 3 F.4th 236. *rev'd and remanded sub nom. Perez*, 598 U.S..

22. *Perez*, 598 U.S. at 151.

23. *Id*. at 147 (emphasis added).

24. *Id.* at 147–48. This decision builds on the 2017 holding in *Fry v. Napoleon Community Schools*, which held that the exhaustion requirement does not apply unless the plaintiffs seeks relief for a denial of FAPE. 580 U.S. 154, 165, 168 (2017). *Fry* left for another day the question presented here—what happens when a plaintiff seeks a remedy for denial of FAPE that IDEA does not provide.

25. Santos-Zacaria v. Garland, 598 U.S. 411, 416 (2023) (citation omitted).

26. *Id.*

27. Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006).

28. *Santos-Zacaria*, 598 U.S. at 413; 8 U.S.C. § 1252(d)(1).

29. *Santos-Zacaria*, 598 U.S. at 415.

30. *Id.* at 431.

litigants operate within those bounds."[31] Further, the Court explained that it "treat[s] a rule as jurisdictional 'only if Congress clearly states that it is.'"[32] The Court also emphasized that the statute uses the terms "court" and "review," but does not explicitly mention "jurisdiction,"[33] and this language was not the kind of "unmistakable evidence" necessary to create a jurisdictional rule—especially given that Congress has used explicitly jurisdictional language "[o]ver and over again" in other statutes.[34]

Having resolved the jurisdictional question, the Court turned to analyze the specific exhaustion requirements. Reversing the Fifth Circuit, the Court easily concluded that the statute, which demands exhaustion of "administrative remedies available . . . as of right," did not require Santos-Zacaria to petition the Board of Immigration Appeals for discretionary review: "a remedy is not available 'as of right' if it is discretionary."[35] The court also applied the Arbaugh clear statement rule in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, though it did not address exhaustion of administrative remedies.[36]

Axon Enterprise, Incorporated. v. Federal Trade Commission was another case involving statutory interpretation.[37] *Axon Enterprise* involved two consolidated cases filed by plaintiffs that sidestepped the administrative agency review process by filing cases in federal district court.[38] While involving statutory review schemes of different federal agencies—the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC)— the plaintiffs (Axon in the FTC case and Michelle Cochran in the SEC case) brought constitutional separation of powers challenges, arguing that the tenure policies for the agencies' administrative law judges (ALJs) made them insufficiently accountable to the President.[39] The suits alleged that the constitutional violation made the Commissions' entire proceedings unlawful and "being subjected to an illegitimate proceeding caused legal injury (independent of any ruling the ALJ might make)."[40] Jurisdiction was premised on the federal court's authority to resolve "civil actions arising under the Constitution, laws, or treaties of the United States."[41]

31. *Id.* at 416.
32. *Id.* (quoting Boechler v. Comm'r, 596 U.S. 199, 203 (2022)).
33. *Id.* at 418–19.
34. *Santos-Zacaria*, 598 U.S. at 418–19.
35. *Id.* at 424–25, 429.
36. MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 297, 300 (2023).
37. Axon Enterprise, Inc. v. Federal Trade Commission, 598 U.S. 175 (2023).
38. *Id*. at 180.
39. *Id*. at 182–83 (citing 5 U.S.C. §§ 7521(a), 1202(d) and noting that "[t]o foster independence, each Commission's ALJs are removable 'only for good cause' as determined by the Merit Systems Protection Board (MSPB)—a separate agency whose members are themselves removable by the President only for good cause, such as 'neglect of duty' or 'malfeasance.'").
40. *Id*. at 182.
41. *Id*. (quoting 42 U.S.C. § 1331).

At the district court level, both cases were dismissed for lack of jurisdiction because the plaintiffs had not first raised their claims with the federal agencies.[42] The Ninth Circuit, in the FTC case, affirmed the district court, but the Fifth Circuit reversed in the SEC case.[43]

The Supreme Court sided with the Fifth Circuit, holding that Congress did not intend the FTC and SEC administrative review schemes to displace district court jurisdiction over the "far-reaching constitutional claims."[44] The Court relied on *Thunder Basin Coal Co. v. Reich*, which provided three considerations for deciding when a plaintiff can bypass administrative review: (1) whether precluding district court jurisdiction forecloses all meaningful judicial review; (2) whether the claim is wholly collateral to the statute's review provisions; and (3) whether the claim is outside the agency's expertise.[45] When the answer to all three of these questions is yes, the Court "presume[s] that Congress does not intend to limit jurisdiction."[46]

Writing for the Court, Justice Kagan found that "[t]he answer appears from 30,000 feet not very hard."[47] As to the first question, the Court acknowledged that the litigants could eventually obtain judicial review of their constitutional challenges.[48] However, that would be too late because the harm complained of—being subjected to unconstitutional agency proceedings led by illegitimate decision makers—is "impossible to remedy once the proceeding is over."[49] The Court also found that the "collateralism factor" was satisfied: the Axon and Cochran claims "have nothing to do with the enforcement-related matters" that the Commissions typically adjudicate.[50] Lastly, the claims involving the constitutionality of the Commissions' tenure protections were "outside the [Commissions'] expertise."[51] In sum, the claims were not of the type that come within the agencies' respective administrative review schemes, so the district court could review them.

The reach of *Axon Enterprise* remains to be seen. The Court did not rule in any way on the merits of the constitutional questions raised by the plaintiffs, so those answers are outstanding.[52] Regardless of those eventual answers, plaintiffs can be expected to raise claims that go to the very existence of agency authority

42. *Axon*, 598 U.S. at 184.
43. *Id*. at 184–85.
44. *Id*. at 185.
45. *Id*. at 186 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212-13 (1994)).
46. *Id*. (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489 (2010)).
47. *Axon*, 598 U.S. at 188.
48. *Id*. at 190–91.
49. *Id*. at 191.
50. *Id*. at 192–93.
51. *Id.* at 194 (quoting *Thunder Basin*, 510 U.S. at 212).
52. *See Axon*, 598 U.S..

in order avoid administrative enforcement proceedings and be heard by a favorable district court judge.

III. STANDING

Throughout the 2022-2023 Term, the Court had several opportunities to articulate the requirements for standing. Standing demands that plaintiffs show a concrete injury that is both traceable to the defendant's alleged unlawful action and redressable by a court order.[53] The cases this Term reflect disagreement among the Justices over the precise contours of the standard. The most significant area of disagreement was how the Court analyzed injuries to states. The Court considered three cases touching on this issue: *Biden v. Nebraska,*[54] *Haaland v. Brackeen*,[55] and *United States v. Texas*.[56]

In the most divided state standing case, *Biden v. Nebraska*, the Court addressed whether Missouri had standing to challenge the Biden administration's plan to forgive up to $20,000 in federally held student loan debt.[57] Missouri premised its standing on injuries suffered by the loan servicing company MOHELA.[58] At issue was whether MOHELA's injuries could support a showing that Missouri itself had the requisite standing.[59] In a six-to-three opinion, the Court found Missouri had standing by way of MOHELA's injuries.[60] While the Court noted that standing generally requires a plaintiff to have a "'personal stake' in the case" and thus may not rely on the injuries of a third party,[61] the majority reasoned that since MOHELA is a "public instrumentality" of the State of Missouri, its injuries are attributable to the state itself.[62] The Court noted that MOHELA was created by state statute, served an "essential public function of helping Missourians access student loans," is subject to the state's supervision and control based on its board membership, and could be dissolved by the state.[63] Thus, the "harm to MOHELA in the

53. *See* Haaland v. Brackeen, 599 U.S. 255, 291–92 (2023) (quoting California v. Texas, 141 S. Ct. 2104, 2113 (2021)).

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

55. *Brackeen*, 599 U.S. 255 (2023).

56. United States v. Texas*,* 599 U.S. 670 (2023).

57. *Biden,* 143 S. Ct. at 2364–65.

58. *Id*. at 2365.

59. *Id*.

60. *Id*.

61. *Id.* at 2365. In *Students for Fair Admissions v. President & Fellows of Harvard College*, the Court affirmed the well-established principle that an organization may establish organizational standing "as the representative of its members.'" 600 U.S. 181, 199 (2023) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The Court emphasized that once "an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." *Id.* at 201.

62. *Biden*, 143 S. Ct. at 2366.

63. *Id.* at 2366 (internal quotation marks omitted).

performance of its public function is necessarily a direct injury to Missouri itself."[64] It is also worth noting that the Court's reasoning closely parallels the analysis used to identify state actors for purposes of constitutional claims, including that the Court cited some key state action precedents to support its conclusions.[65] Thus, while the holding is specific to standing, the case may have broader implications regarding public entity liability for constitutional violations.

In a sharply-worded dissent, Justice Kagan critiqued each piece of the majority's reasoning.[66] She noted that while MOHELA was created by state statute, the statute indicates that it is a financially and legally separate entity from the state.[67] Justice Kagan also found it highly relevant that, per state law, MOHELA has the ability to sue or be sued in its own name—an ability which it *chose* not to exercise in this case.[68] MOHELA did not participate in the case in any way, even as an amicus, and refused to cooperate in providing documents to the Missouri Attorney General to establish its revenue loss.[69] Thus, Justice Kagan's dissent warned that the majority's approach deviated from the basic requirement that "the proper party—the party actually affected—challenge an action."[70]

In *Haaland v. Brackeen*, the Court considered Texas's state-level and foster parents' individual-level standing to challenge the placement preferences contained in the Indian Child Welfare Act (ICWA) under two constitutional provisions: the nondelegation doctrine and the equal protection clause.[71] This case received much attention for its significant holding on tribal sovereignty; however, it also addresses standing. The Court easily dispensed with Texas's standing, noting that it "has no equal protection rights of its own."[72] Additionally, the state's concerns about "break[ing] its promises to its citizens" were not concrete or particularized injuries, and any pocketbook harms from the Act's associated recordkeeping requirements were not traceable to the particular challenged provision.[73] "Texas would continue to incur the complained-of costs even if it were relieved of the duty to apply the placement preferences."[74]

64. *Id.*

65. *Id.* at 2367 (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995) and Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 54 (2015)).

66. *See id*. at 2384–2400 (Kagan, J., dissenting).

67. *Biden*, 143 S. Ct. at 2387 (Kagan, J., dissenting).

68. *Id*. (Kagan, J., dissenting).

69. *Id.* (Kagan, J., dissenting).

70. *Id.* at 2388. (Kagan, J., dissenting).

71. Haaland v. Brackeen, 599 U.S. 255, 271 (2023).

72. *Id*. at 294.

73. *Id.* at 295–96.

74. *Id*. at 296.

The Court also noted problems with redressability for both Texas and the individual foster parents.[75] The parties requested "an injunction preventing the federal parties from enforcing the ICWA and a declaratory judgment that the challenged provisions are unconstitutional."[76] But this relief, the Court noted, would not redress their injuries because state courts and agencies, rather than the federal defendants, apply and enforce the placement preferences.[77] The injunction, therefore "would not give petitioners *legally enforceable* protections from the allegedly imminent harm[s]."[78] The Court rejected the plaintiffs' argument that a favorable decision would redress their injuries because the relevant state courts would defer to the federal court's interpretation of federal law.[79] The Court explained that this was the wrong focus for the redressability analysis: it "is a federal court's judgment, not its opinion that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability."[80] In sum, the Court concluded that the particular requested injunctive and declaratory relief would not remedy any of the cognizable injuries raised by the individual petitioners or Texas.

In *United States v. Texas*, the Court considered a claim brought by several states challenging the Department of Homeland Security's ("DHS") immigration enforcement guidelines.[81] The states argued that the guidelines violated certain federal statutes because those statutes would require DHS to arrest more noncitizens.[82] Eight Justices agreed the states lacked standing, but with different reasoning.[83] The majority opinion (written by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Kagan, Sotomayor, and Jackson) found that the states failed at the "injury" stage of the analysis.[84] The majority reasoned that even though the states had shown financial injury stemming from DHS's lower numbers of arrests, which generally suffices to establish injury, precedent established that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[85] The Court found no reason to treat the plaintiff states differently: "that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding

75. *Id*.
76. *Brackeen*, 599 U.S. at 292.
77. *Id*. at 292–93.
78. *Id*. at 293 (emphasis added).
79. *Id*. at 293–94.
80. *Id*. at 294.
81. United States v. Texas, 599 U.S. 670, 673–74 (2023).
82. *Id*.
83. *Id*. at 676, 686 (Gorsuch, J., concurring), 704 (Barrett, J., concurring).
84. *Id*. at 676–67.
85. *Id.* at 674, 677 (quoting Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973)).

otherwise."[86] The Court elaborated that where "the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property," and that "the absence of coercive power over the plaintiff makes a difference."[87]

Justices Barrett, Gorsuch, and Thomas concurred in the judgment, but rejected the majority's reasoning regarding injury.[88] These Justices would have found that the states had an injury traceable to DHS's conduct, but would have found that the injury was not redressable for two reasons. First, they noted a statutory prevision that precludes a court from entering injunctive relief related to the immigration laws the states wanted DHS to enforce.[89] Second, these three Justices would have found that the injury was not reddressable because, in their view, § 706(2) of the Administrative Procedure Act—which instructs courts to "set aside" unlawful agency action—does not grant courts the authority to vacate the challenged Guidelines altogether, but rather permits courts to set aside agency actions only as applied to the particular plaintiffs.[90]

The plaintiffs in *Department of Education v. Brown,* another case challenging the student loan forgiveness program, were not as successful as Missouri.[91] In *Brown*, the plaintiffs were two student loan borrowers who were ineligible for the full relief promised under the program.[92] One borrower was ineligible for forgiveness because her loans were held commercially, not

86. *Texas*, 599 U.S. at 677.

87. *Id.* at 678. *But see* 303 Creative LLC v. Elenis, 600 U.S. 570, 583 (2023) (holding that the plaintiff established "a credible threat" that Colorado would exercise coercive power over her through enforcement of its public accommodation law). The plaintiff explained that she wished to offer wedding websites but did not want to convey messages "inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *Id.* at 580. Her standing was not challenged by any party, but the Court nonetheless recounted the evidence establishing an injury established a traceable to the challenged law, noting that "Colorado has a history of past enforcement against nearly identical conduct—i.e., *Masterpiece Cakeshop*; that anyone in the State may file a complaint against Ms. Smith and initiate a potentially burdensome administrative hearing process; and that Colorado has declined to disavow future enforcement proceedings against her." *Id.* at 583 (cleaned up). Commenters have questioned whether the facts of the case truly satisfied the Supreme Court's doctrine on standing. *See, e.g.*, Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC (Jun. 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court. Nonetheless, the case serves as a reminder that standing will generally be easier to establish when the plaintiff is a person directly regulated by the challenged government conduct.

88. *See* United States v. Texas, 599 U.S. 670, 686 (Gorsuch, J., concurring).

89. *Id.* at 1978 (Gorsuch, J., concurring) (citing 8 U.S.C. § 1252(f)(1)).

90. *Id.* at 693–702.

91. Department of Education v. Brown, 600 U.S. 551, 556 (2023).

92. *Id*. at 556.

federally;[93] the other plaintiff qualified for only $10,000 of forgiveness.[94] The plaintiffs' argument was contradictory: the borrowers' theory of standing was that they were injured by not receiving the full amount of student loan relief, but their theory on the merits was that the loan forgiveness plan was unlawful because it exceeded the Department of Education (ED)'s statutory authority and was not promulgated using the appropriate procedures.[95] In effect, the borrowers were claiming to be injured by a program they do not qualify for that, if struck down, would not affect their ability to petition the ED for student loan forgiveness under a different program.[96] The Court noted this, stating it "would be quite strange to think that a party experiences an Article III injury by *not* being affected by an unlawful action."[97]

Plaintiffs' efforts to address this "strange feature of their argument" did not succeed.[98] They argued that, had the proper procedures been followed, the ED might have chosen to enact a different loan forgiveness program under a different statute.[99] The Court acknowledged and reaffirmed its prior holdings that the traceability and redressability analysis is lessened where the plaintiff claims a procedural injury.[100] Here, the Court emphasized that the cause of the plaintiffs' injury was not the creation of the existing loan forgiveness program, but rather the ED's choice not to offer the separate, additional debt relief the borrowers wanted for themselves.[101] As such, the injury was not traceable to the challenged conduct. The Court also raised additional concerns that the injury was not "particular (since all people suffer it) or concrete (since an as-yet-uncreated benefits plan is necessarily "'abstract'" and not "'real'")."[102] Finally, the Court noted that the borrowers were not necessarily without recourse: they were free to petition the agency to issue a rule creating the program they sought, a denial of which could be reviewed under the Administrative Procedure Act, but only "if the litigant has standing to maintain such a suit."[103]

Overall, the cases this Term demonstrate that standing will remain a significant hurdle for individual plaintiffs. Practitioners should take significant care at the outset of the case to articulate a theory of standing that closely aligns with the specific relief sought.

93. *Id.* at 558–59.
94. *Id.* at 559.
95. *Id.* at 562.
96. *Brown*, 600 U.S. at 565.
97. *Id.* at 564.
98. *Id.* at 563–64.
99. *Id.* at 563.
100. *Id.* at 561.
101. *Brown*, 600 U.S. at 565.
102. *Id.* at 564.
103. *Id.* at 565.

IV. STATUTORY INTERPRETATION

The Court's decisions this Term reflect the proliferation of clear statement rules in interpreting statutes. The Court is asking Congress to speak unambiguously and unequivocally in an increasing number of areas: when creating privately enforceable rights,[104] establishing jurisdictional rules,[105] drafting criminal statutes,[106] abrogating sovereign immunity,[107] and, most controversially, when delegating to administrative agencies.[108]

In *Biden v. Nebraska*, the Court engaged in a showdown over the major questions doctrine, which counsels courts against inferring that agencies have delegated authority over "major questions" absent a clear statement from Congress.[109] The Court considered whether the Secretary of Education's authority to "waive or modify" statutory provisions governing student loans in response to national emergencies permitted the Secretary to forgive up to $20,000 of debt for all low- to middle-income borrowers in response to the COVID-19 national emergency.[110] The majority began, as usual, with a textual analysis. Starting with the word "modify," the Court noted that this term inherently means some sort of incremental, minor, or moderate change.[111] In their view, the forgiveness program was "novel and fundamentally different" rather than mere modification.[112]

After this discussion, however, the Court's approach deviated from a strict textual approach. When discussing the term "waive," the Court did not address the usual meaning of that term, but focused instead on how the waiver authority had been used in the past, explaining that the Secretary's use of the waiver power here deviated from how it had been used previously.[113] The Court also dismissed a provision authorizing the Secretary to "include the terms and conditions to be applied in lieu of" the waived provisions as a "humdrum reporting requirement."[114] The Court found that this "in lieu of" language contains only

104. *See* discussion *infra* Section V.

105. *See infra* text accompanying notes 28–36.

106. Dubin v. United States, 599 U.S. 110, 129 (2023) (refusing to read criminal statute defining "identity theft" to include Medicaid provider's overbilling conduct). The Court noted that clear statement rules in criminal contexts are not new: "Time and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Id.* at 130. The Court's emphasis on the role of clear statement rules in other statutory contexts, however, may further expand the reach of cases interpreting criminal statutes.

107. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 387 (2023).

108. Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).

109. *Id*. at 2375.

110. *Id.* at 2363–65.

111. *Id.* at 2368–69.

112. *Id.* at 2369.

113. *Biden*, 143 S. Ct. at 2370.

114. *Id.* at 2371.

an "implicit" delegation—one which is still "limited to [the] authority to 'modify' existing law," and thus "no new term or condition reported . . . may distort the fundamental nature of the provision it alters."[115] The Court emphasized that reading a broader delegation into the statute would run afoul of the "major questions" doctrine, which says that decisions of significant "magnitude and consequence…must rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[116] The Court determined that the loan forgiveness program qualified as a major question because of its large economic impact, large number of borrowers impacted, and the fact that the issue generates "sharp debates" that "raise[] questions that are personal and emotionally charged."[117] Accordingly, it declined to interpret the statute in a way that would grant the Secretary authority to make decisions with "staggering" economic and political significance.[118]

Both the concurrence and dissent discussed the major question doctrine at length, revealing deep divisions in how the Justices understand Congress's approach to drafting statutes.[119] Justice Barrett wrote separately to defend the major question doctrine as consistent with textualism.[120] In her view, the major question doctrine is simply a form of "context" that helps courts "interpreting the scope of a delegation," by importing things that "go without saying," such as the "basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies," which is rooted in the "Constitution's structure."[121] The dissent, written by Justice Kagan and joined by Justices Sotomayor and Jackson, attacked both the underpinnings of the major question doctrine as a whole, and the majority's application of it in this case. According to Justice Kagan, the "new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation."[122] Contrary to Justice Barrett's "basic premise," Justice Kagan

115. *Id.*

116. *Id.* at 2374 (citation omitted).

117. *Id.* at 2373–74.

118. *Biden*, 143 S. Ct. at 2373.

119. *See id.* at 2374–84 (Barrett, J., concurring); *see also id*. at 2391–400 (Kagan, J., dissenting).

120. *Id.* at 2378–79 (Barrett, J., concurring).

121. *Id*. at 2379–80 (Barrett, J., concurring). This approach to statutory context stands in contrast to the Court's usual approach to contextual analysis, which typically focuses on the statute's surrounding words, other provisions of the same statute, prior versions of the relevant provision, or common law principles that Congress is presumably aware of. *See, e.g.*, Dubin v. United States, 599 U.S. 110, 118–29 (2023) (discussing surrounding words and the title of the relevant provision); Slack Tech., LLC v. Pirani, 598 U.S. 759, 766–67 (2023) (discussing related provision's use of definite article as a context clue and how similar term is used in other provisions of the same statute); Bartenwerfer v. Buckley, 598 U.S. 69, 77–78, 80–81 (2023) (discussing surrounding provisions, common-law principles, and the statute's amendment history).

122. *Biden*, 143 S. Ct. at 2397 (Kagan, J., dissenting).

noted that "Congress delegates to agencies often and broadly. And it usually does so for sound reasons."[123] Yet, "[i]n wielding the major-questions sword . . . this Court overrules those legislative judgments."[124] Finally, Justice Kagan criticized the majority for relying on historical use of the waiver power and the "controversy surrounding the program" to justify application of the major questions doctrine in this case.[125] These reasons are not the "indicators from our previous major questions cases," and thus, she argued that the court has "move[d] the goalposts for triggering the major-questions doctrine."[126]

On the other hand, the Court found a clear statement rule satisfied in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*.[127] There, Justice Jackson, writing for the Court, concluded that the bankruptcy code's abrogation of sovereign immunity for "governmental units" extended to tribes, notwithstanding the fact that tribes were not explicitly mentioned in the definition of "governmental unit."[128] The Court nonetheless found the tribes were "unmistakably" covered by the abrogation of sovereign immunity for "other foreign or domestic government[s]."[129] According to the majority, the definition of governmental unit "exudes comprehensiveness from beginning to end."[130] The provision includes a long list of governments of various types, and ends with a catchall phrase pairing "two extremes . . . 'foreign' with 'domestic.'"[131] Thus, the Court reasoned, "Congress unmistakably intended to cover all governments . . . whatever their location, nature, or type."[132] The Court also found the definition's broad sweep reinforced by other provisions of the bankruptcy code which also "sweep broadly."[133] The Court acknowledged that tribes were not specifically mentioned in the list, by emphasizing that a clear statement rule is not a "magic-words requirement."[134] Congress's *intent* must be clear, but can get to that destination through any number of paths.[135]

Justice Gorsuch dissented.[136] In light of the omission of tribes from the text, he would have invoked the rule that "when Congress includes so many items within "'[an] associated group,'" we assume the omission of another means that

123. *Id.* (Kagan, J., dissenting).
124. *Id.* (Kagan, J., dissenting).
125. *Id.* at 2399.
126. *Id.* at 2398–99.
127. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 394 (2023).
128. *Id.* at 387, 388.
129. *Id.* at 389, 390.
130. *Id*. at 388.
131. *Id*. at 389–90.
132. Lac du Flambeau, 599 U.S. at 390.
133. *Id.* at 391–92.
134. *Id*. at 393–94.
135. *Id*. at 394.
136. *See id* at 402–418 (Gorsuch, J., dissenting).

it has been deliberately "'exclude[d].'"[137] As to the catchall phrase, Justice Gorsuch rejected the argument that the phrase "foreign or domestic" captures the full range of governmental entities.[138] In his view, tribes are "*sui generis* entities falling outside the foreign/domestic dichotomy."[139] Had Congress wanted to include "any and every" government, it could have said so.[140]

V. STATUTORY STARE DECISIS

Stare decisis—a Latin phrase meaning "let the decision stand"—ties courts to the precedent-setting decisions of previous courts.[141] Adherence to precedent has been described by Supreme Court Justices as "fundamental to the American judicial system" and particularly to "the stability of American law."[142] Precedent that establishes the meaning of a statute has traditionally received a "special, heightened form of *stare decisis*."[143] This is because the Court's statutory decisions are filtered into congressional expectations about how the statute will operate, and "Congress is free to change th[e] Court's interpretation."[144]

Statutory *stare decisis* was at the heart of two of the Court's decisions this past Term. The first was *Health and Hospital Corporation of Marion County v. Talevski*, which addressed whether provisions of federal safety net programs can be enforced by individuals pursuant to 42 U.S.C. § 1983 and, if so, whether nursing facility residents can enforce provisions of the Medicaid Nursing Home Reform Act.[145] The Court ruled for Talevski by a comfortable margin on both questions.[146]

As with most safety net programs enacted pursuant to the Spending Clause authority, Congress did not include an express cause of action for beneficiaries

137. *Lac du Flambeau*, 599 U.S. at 416 (Gorsuch, J., dissenting) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002)).

138. *Id.* at 402 (Gorsuch, J., dissenting).

139. *Id*. at 414.

140. *Id.* at 418.

141. *Stare decisis*, CORNELL LAW INSTITUTE (last updated Dec. 2021), https://www.law.cornell.edu/wex/stare_decisis.

142. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 341 (2022) (Kavanaugh, J., concurring).

143. Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring).

144. Pearson v. Callahan, 555 U.S. 223, 233 (2009); *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring) (*stare decisis* applies more "rigidly" in statutory cases).

145. Health and Hospital Corporation of Marion County v. Talevski, 599 U.S. 166, 171–72 (2023).

146. *Id*. at 172. This discussion of the *Talevski* case relies heavily upon a previous National Health Law Program publication. *See* Jane Perkins, *Case Explainer: Health & Hospital System of Marion County, Indiana v. Talevski,* NATIONAL HEALTH LAW PROGRAM (Aug. 2023), https://healthlaw.org/resource/case-explainer-health-hospital-system-of-marion-co-indiana-v-talevski/.

to enforce the Medicaid Act.[147] From the beginning, however, beneficiaries enforced the Act through a civil rights statute, 42 U.S.C. § 1983.[148] Section 1983 provides a cause of action against any person who, acting "under color of" state law, deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[149] In 1980, the Supreme Court decided *Maine v. Thiboutot*, squarely holding that § 1983 "undoubtedly" means what it says and applies to any federal law.[150]

Nevertheless, a majority of the Court has taken a skeptical view of individual's ability to enforce Spending Clause laws. In *Pennhurst State School & Hospital v. Halderman*, the Court analogized Spending Clause enactments to contracts because states can decide whether or not to participate and accept the funding conditions.[151] Justice Rehnquist's majority opinion said the "typical remedy" for state noncompliance should be an action to terminate federal funding to the state—not an enforcement action by program beneficiaries using § 1983.[152] In *Blessing v. Freestone*, the Court stated a three-part test for determining whether a federal law creates an enforceable right: (1) Is the provision in question intended to benefit the plaintiff; (2) Is the provision written with enough clarity so that a court knows what it is being asked to enforce; and (3) Does the provision create a binding obligation on the state?[153] If these questions are answered in the affirmative, the statute is presumed to be enforceable.[154] However, this is a rebuttable presumption that can be overcome by showing that Congress foreclosed § 1983 enforcement expressly or by including a comprehensive remedial scheme in the underlying federal statute.[155] The Court's ruling in the 2002 case *Gonzaga University v. Doe* further restricted § 1983 enforcement when it clarified that Congress must unambiguously confer rights upon the plaintiff.[156] For this to occur, the statute must be "phrased in terms of the persons benefited" and contain "rights- or duty-creating language"

147. *See* JANE PERKINS, FACT SHEET: PRIVATE ENFORCEMENT OF THE MEDICAID ACT UNDER 42 U.S.C. § 1983 1, 1–2 (2022), https://healthlaw.org/resource/fact-sheet-private-enforcement-of-the-medicaid-act-under-42-u-s-c-sec-1983/.

148. *Id.* at 2, 9 (summarizing Court action). For an in-depth discussion, *see* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS UNIV. J. HEALTH L. & POL.'Y 207, 217 (2016).

149. 42 U.S.C. § 1983.

150. Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

151. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

152. *Id.* at 17, 28 ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

153. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997) (citation omitted).

154. *Id*. at 341.

155. *Id.* at 341, 346 (stating this is a "difficult showing").

156. Gonzaga University v. Doe, 536 U.S. 273, 283 (2002).

with an "unmistakable focus on the benefitted class" as opposed to an "aggregate" focus.[157]

For twenty years after *Gonzaga*, the Court denied numerous petitions seeking reversal of § 1983 enforcement decisions.[158] Thus, the Court's grant of certiorari in *Health and Hospital Corporation of Marion County v. Talevski* was particularly significant,[159] and surprising given that all three of the federal circuits to have decided the question held that beneficiaries could enforce the Federal Nursing Home Reform Act (FNHRA).[160]

The facts of *Talevski* are disturbing. With his dementia progressing, Mr. Talevski's family placed him in a Health and Hospital Corporation (HHC) nursing facility.[161] Once there, nursing facility staff chemically restrained him with six powerful psychotropic medications.[162] Claiming he was harassing female residents, the facility began sending him to a psychiatric hospital for days at a time.[163] At the end of one of these transfers, the facility refused to take him back.[164] The Talevskis filed an administrative complaint against the nursing facility and obtained relief, but the facility ignored the decision.[165] The family then filed a lawsuit in an Indiana federal district court.[166] They alleged that HHC had violated two of Mr. Talevski's rights under the FNHRA: the right to be free from unnecessary chemical restraints and the right to be discharged or transferred only in certain circumstances.[167] After the Seventh Circuit ruled that the FNRA provisions could be enforced through § 1983, HHC successfully petitioned the Supreme Court for review.[168]

HHC presented two questions to the Court: (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 § 1983; and (2) Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via § 1983, FNHRA's transfer and

157. *Id*. at 283, 284 n.3, 290 (2002) (reviewing provisions of the Family Educational Rights and Privacy Act of 1974).

158. *See* PERKINS, *supra* note 147, at 9; Perkins, *supra* note 148, at 222.

159. Health & Hosp. Corp. of Marion Cnty v. Talevski, 599 U.S. 166 (2023).

160. Talevski by next friend Talevski v. Health and Hosp. Corp. of Marion Cnty., 6 F.4th 713 (7th Cir. 2021), aff'd sub nom. Health and Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166 (2023); Grammer v. John J. Kane Reg. Ctr., 570 F.3d 520, 532 (3d Cir. 2009); Rolland v. Romney, 318 F.3d 42, 53 (1st Cir. 2003).

161. *Talevski*, 599 U.S. at 172.

162. *Id*. at 172–73.

163. *Id*. at 173.

164. *Id*.

165. *Id*.

166. *Talevski*, 599 U.S. at 174.

167. *See id.* at 174 (summarizing the treatment Mr. Talevski received); *see also* 42 U.S.C. § 1396r(c)(1)(A)(ii) (regarding restraints); *id.* at § 1396r(c)(2)(A) (regarding discharge and transfer).

168. *Talevski*, 599 U.S. at 174.

medication rules do so.[169] In Justice Jackson's first opinion as a Supreme Court Justice, the Court ruled for the Talevskis on both questions.[170]

A ruling that Spending Clause legislation *never* gives rise to privately enforceable rights under § 1983 would have reversed more than fifty years of precedent, including *Maine v. Thiboutot*.[171] Such a ruling would not only have barred private enforcement of *any* Medicaid Act provision, but would also have barred enforcement of federal safety net legislation writ large, from housing and nutrition to education and disability laws.

Picking up on the *Pennhurst* Court's contract analogy, HHC took the position that Spending Clause enactments are contracts between the government and a willing state and that private individuals are third party beneficiaries of those contracts.[172] From here, HHC argued that private individuals could not rely on § 1983 to enforce Spending Clause laws because when § 1983 was enacted in the 1870s, third party beneficiaries were barred from enforcing contractual obligations.[173]

All the Justices, except Justice Thomas, rejected this argument based on "two well-established principles."[174] First, a key point of HHC's argument—that third party beneficiaries could not sue to enforce contract obligations is the 1870s—was "at a minimum, contestable," and something more than "ambiguous historical evidence" was needed to overrule prior decisions.[175] Second, the majority noted that because claims under § 1983 have always been regarded as tort claims, HHC's "particular focus on 1870's law governing third-party-beneficiary suits in contract is, at the very least, perplexing."[176] Although HHC wished for a different conclusion, the Court concluded that HHC's wishes were "better directed to Congress."[177]

On the second question, HHC argued that the FNHRA provisions could not be enforced through § 1983 because they focused on what states and nursing facilities must do, not on individual program beneficiaries.[178] Once again, all of the Justices, except Justice Thomas, rejected this argument. Citing *Gonzaga*'s "demanding bar" requiring the statute to "*unambiguously* confer individual federal rights," the Court held "the bar has been cleared" with respect to the

169. Petition for a Writ of Certiorari at i–ii, Health & Hosp. Corp. of Marion Cnty v. Talevski, 599 U.S. 166 (2023).

170. *Talevski*, 599 U.S. at 174.

171. Maine v. Thiboutot, 448 U.S. 1 (1980).

172. *Talevski*, 599 U.S. at 177–78.

173. *Id.* at 178.

174. *Id.*

175. *Id*. at 179 (citing Contract Law Professors' *amicus* brief stating that a majority of jurisdictions permitted third party enforcement in the early 1870s).

176. *Id*.

177. *Talevski*, 599 U.S. at 180 (citation omitted).

178. *Id*. at 183.

contested FNHRA provisions.[179] Reviewing the language used by Congress in the provisions, the Court noted, among other things, that they are describing protections for "residents" and referring to them as "resident's rights."[180] While acknowledging HHC's argument that the provisions also establish who must respect these rights (the nursing facilities), the Court said "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held)."[181]

Continuing with the enforcement test, the Court next addressed whether HHC had overcome the presumption that the FNHRA provisions are enforceable through a § 1983 action. As noted above, HHC had to establish that Congress included a comprehensive statutory enforcement scheme to displace resort to § 1983. By a seven-to-two margin (with Justices Alito and Thomas dissenting), the Court held that Congress had not done so: "Our precedents make clear that the *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under § 1983 is incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted."[182] HHC pointed to the FNHRA's enforcement provisions authorizing government agencies to survey and investigate nursing facilities and to impose sanctions or terminate facilities from Medicaid participation. However, the Court discerned no incompatibility: "In focusing on what the FNHRA contains, they ignore what it lacks—a private judicial right of action, a private federal administrative remedy, or any careful congressional tailoring."[183]

The other statutory *stare decisis* case involved Section 2 of the Voting Rights Act. Section 2 prohibits voting prerequisites, standards, or practices that result in "a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[184] The case, *Allen v. Milligan*, involved Alabama's 2021 redistricting map.[185] As had been the case since 1992, the 2021 map had only one majority-Black district, even though according to the 2020 census, 27.16% of the State's population, and 25.9% of its voting-age population, was Black.[186] Black voters and civil rights organizations challenged

179. *Id*. at 180 (emphasis in original). Justice Barrett's concurring opinion, joined by Chief Justice Roberts, similarly emphasized that "[c]ourts must tread carefully" before allowing Spending Clause statutes to be privately enforced because the "bar is high" and "§ 1983 actions are the exception—not the rule . . . ." *Id.* at 193–94, 195.

180. *Id*. at 180–81.

181. *Id*. at 185. *Gonzaga* quotes *Blessing* when deciding whether the provision at issue created an individual right. 536 U.S. at 281–82.

182. The *Talevski* majority did not mention the *Blessing* three-part test. *Id.* at 189 (citing Blessing v. Freestone, 520 U.S. 329 at 347–48 (1997)).

183. *Id*. at 189–90 (cleaned up).

184. 52 U.S.C. § 10301(a).

185. Allen v. Milligan, 599 U.S. 1, 16 (2023).

186. *Id*. at 55 (Thomas, J., dissenting).

the redistricting map's single majority-Black district, arguing that the map disbursed the rest of the Black population among the other six districts such that the preferences of white voters would always defeat those of Black voters.[187] The plaintiffs sought creation of a second majority-Black district to remedy this vote dilution.[188]

A three-judge district court panel convened to hear the case and heard testimony from numerous witnesses, reviewed significant briefing and exhibits, and "considered arguments from the 43 different lawyers who had appeared in the litigation."[189] Thereafter, it concluded that the likelihood of success was not "a close one" and enjoined the 2021 map.[190]

The Supreme Court quickly granted Alabama's request for a stay of the District Court's injunction.[191] On the merits, Alabama made statutory and constitutional arguments against section 2.[192] Given the Supreme Court's conservative composition, civil rights advocates braced for the worst, but the worst never came: the Court affirmed the district court's grant of the injunction.[193]

Writing for a five-member majority, Chief Justice Roberts stated that the Court has applied Section 2 to states' districting maps "in an unbroken line of decisions stretching for decades."[194] Under these precedents, plaintiffs do not need to establish discriminatory intent; a violation can occur if the districting map has a discriminatory impact.[195] A nearly forty-year-old case, *Thornburg v. Gingles*, established the three-part framework for reviewing a Section 2 discriminatory impact claim: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district; (2) the minority group must be able to show it is politically cohesive; and (3) the minority group must be able to demonstrate that the white majority votes as a block to enable it to defeat minority-preferred candidates.[196] If these factors are established, the plaintiff must show, under the "totality of the

187. *Id.* at 16.

188. *See id.* at 19–20.

189. *Id*. at 16.

190. Singleton v. Merrill, 582 F. Supp. 3d 924, 1026 (N.D. Ala. 2022).

191. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022). Four justices would not have granted the stay: Chief Justice Roberts, dissenting separately, and Justices Kagan, Breyer, and Sotomayor. Justice Kagan's dissent criticized the Court's decision as "one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument." *Id*. at 889 (Kagan, J., dissenting). Justice Kavanaugh retorted that the "principal dissent's catchy but worn-out rhetoric about the 'shadow docket'" was "off target." *Id*. at 879 (Kavanaugh, J., concurring).

192. *See* Allen v. Milligan, 599 U.S. 1.

193. *Id*. at 10.

194. *Id*. at 38.

195. *Id*. at 19 (collecting cases).

196. *Id.* at 18 (citing Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986)).

circumstances," that the political process is not "equally open" to them: for example, by pointing to a history of official discrimination that has affected the right to register, vote, or otherwise participate in the political process.[197] The Court found ample evidence that the plaintiffs had met the standard.[198] By contrast, Alabama's approach was unacceptable because it:

> would require abandoning this precedent, overruling the interpretation of § 2 as set out in nearly a dozen of our cases. We decline to take that step. Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course.[199]

VI. BALANCING RELIGIOUS RIGHTS

The inclusion of *Groff v. DeJoy*[200] on the Court's 2022-2023 docket marked a return to one of this Court's favorite topics: freedom of religion. *Dejoy* is an exception, however, to the recent pattern of "conservative" decisions in the Court's free exercise cases.[201] This was not a closely-divided decision with the conservative Justices in the majority; rather, *Groff* is a unanimous opinion.[202] In addition to vindicating the rights of an evangelical Christian plaintiff, it is a victory for followers of "minority faiths" and amici, including a diverse set of churches and faith-based organizations. Most importantly, it expands protection of workers requesting religious accommodations, following the reasoning of a dissent by Justice Marshall in the 1977 case *Hardison v. Trans World Airlines*.[203]

Groff, an Evangelical Christian whose religious beliefs compel him to devote Sundays to worship and rest, worked as a mail carrier for the U.S. Postal Service (USPS) for several years until his employer began requiring him to work on Sundays.[204] After his requests for accommodation were rejected, he received multiple citations for insubordination and eventually resigned.[205] Following his resignation, Groff sued the USPS under Title VII of the Civil Rights Act of 1964,

197. *Id.* (applying Thornburg v. Gingles, 478 U.S. 30 (1986).

198. Allen, 599 U.S. 1 at 19–23.

199. *Id.* at 39. Statutory *stare decisis* also comes up in a brief concurrence by Justice Sotomayor in *Groff v. DeJoy*, 600 U.S. 447 (2023), joined by Justice Jackson, as additional support for the decision. "The justification for statutory stare decisis is especially strong here, because "Congress has spurned multiple opportunities to reverse [Hardison] – openings as frequent and clear as this court ever sees." Moreover, Justice Sotomayor noted, Congress has revised Title VII multiple times without addressing the extent to which an accommodation may burden an employer. *Id.* at 475.

200. 600 U.S. 447 (2023).

201. For discussion of the recent trend to the right in "religious freedom" decisions, *see* Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and Politics of Grievance,* 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 555 (Spring 2022).

202. *See* Groff, 600 U.S..

203. *See* 423 U.S. 63, 85–97 (Marshall, J., dissenting).

204. Groff, 600 U.S. at 454–55.

205. *Id.* at 455.

alleging that USPS could have accommodated his religious practice without "undue hardship" to its business.[206] The district court held that an accommodation was an undue hardship or burden if the employer had to bear "more than a de minimus cost."[207] This decision followed the undue burden test the Court established in *Hardison*, which held that "requir[ing] [the employer] to bear more than a *de minimus* cost . . . is an undue hardship."[208] Lower courts interpreted this language to indicate that showing a *de minimus* cost was all that was required to establish the accommodation as an undue burden.[209]

In a decision authored by Justice Alito, a unanimous Court reversed the Third Circuit, clarifying both the definition of 'undue hardship' and the standard for granting accommodations.[210] The Court concluded that *Hardison* stood for the proposition that "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business" and emphasized that a court must make this determination by balancing all relevant factors.[211] The Court remanded for the lower courts "to apply our clarified context-specific standard, and to decide whether any further factual development is needed."[212]

In *303 Creative LLC v. Elenis*, a free speech case that also invoked the plaintiff's religious beliefs, the Court heard a pre-enforcement challenge to Colorado's public accommodations law by Lorie Smith, who had decided to start selling wedding websites.[213] Smith sought a court order to "clarify her rights," since she was worried that, "if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[214] In a six-to-three decision, the Court held that "Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance" in violation of Smith's freedom of speech.[215]

The Court did not state what test it used to evaluate whether the Colorado laws at issue ran afoul of the First Amendment, simply stating that the "the First Amendment does not tolerate" state action that "seeks to force an individual to "'utter what is not in her mind' about a question of political and religious

206. *Id.* at 456. Title VII outlaws employer discrimination by prohibiting covered employers from "fail[ing] or refus[ing] to hire or to discharge any individuals, or otherwise discriminat[ing] against any individual with respond to his . . . employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1).

207. *Groff*, 600 U.S. at 456.

208. *Id.* (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

209. *Id.* at 465.

210. *Id.* at 474.

211. *Id.* at 468.

212. Groff, 600 U.S. at 473.

213. 303 Creative LLC v. Elenis, 600 U.S. 570, 577–79 (2023).

214. *Id.* at 580.

215. *Id.* at 602–03.

significance."[216] The Court distinguished prior cases that had applied intermediate scrutiny in similar contexts, basing its decision to apply more stringent scrutiny on the basis that the law would regulate "pure speech" rather than "incidentally" burdening speech.[217] Justice Sotomayor, writing for the dissent, would have applied intermediate scrutiny and upheld the Colorado laws, since "[p]reventing the 'unique evils' caused by 'acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages' is a compelling state interest 'of the highest order.'"[218]

The dissent emphasized the "humiliation, frustration, and embarrassment" that LGBTQ+ people will experience upon clicking onto Smith's website and encountering a "notice that says: Wedding websites will be refused to gays and lesbians."[219] The majority attempted to downplay the discriminatory impact of allowing Smith to exclude same-sex couples from her services by emphasizing that she "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate her beliefs."[220]

Justice Sotomayor's dissent also lamented that "[a]lthough the consequences of today's decision might be most pressing for the LGBTQ+ community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services."[221] Dismissing these concerns, the majority noted that, "[d]oubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions," but it concluded that, given the parties' stipulations, "this case presents no complication of that kind."[222]

VII. CIVIL RIGHTS

In *Students For Fair Admissions*, a consolidated pair of cases revisited the Court's jurisprudence relating to the use of race as a factor in admissions in higher educational institutions.[223] In an opinion disappointing to racial justice advocates, the Court found the admissions policies at issue violated the Equal

216. *Id.* at 596. The Court notes that the District Court in the case applied strict scrutiny, but it does not explicitly endorse this test. *See id.*

217. *303 Creative,* 600 U.S. at 599.

218. *Id.* at 608 (Sotomayor, J., dissenting) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 624, 628 (1984)).

219. *Id.* at 604, 607.

220. *Id.* at 594–95.

221. *Id.* at 638.

222. *303 Creative,* 600 U.S. at 599.

223. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 197–98 (2023). Justice Jackson did not participate in the challenge to Harvard's policies. *Id.* at 231.

Protection Clause.[224] Justice Roberts, writing for the six conservative Justices, repeatedly called on Justice Harlan's statement in dissent from *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[225]

The majority interpreted the "color-blind constitution" to mean that any policy that uses a race-based classification, even where it is used to provide favorable consideration to applicants of one or more races, necessarily "restrict[s] the rights of citizens on account of race."[226] Writing for the dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, called the majority's equating of race-conscious classifications with racist ones into question, detailing the history of the use of race-conscious classifications to achieve race equity and arguing that the Equal Protection clause's "guarantee of racial equality. . . . can be enforced through race-conscious means in a society that is not, and has never been, colorblind."[227] The majority, however, found that the admissions policies at issue, both of which "award[ed] a 'tip' or a 'plus' to applicants from certain racial groups," constitutionally suspect.[228]

Applying strict scrutiny, the Court held that neither Harvard nor UNC had articulated a sufficiently compelling governmental interest for using race in the admissions process.[229] Each school articulated several reasons that their processes helped to maintain the diversity of their student bodies—an interest that the Court had previously found to be a compelling interest.[230] Despite this, the majority found the goals articulated by the schools were too amorphous to measure and did not withstand strict scrutiny.[231] Justice Sotomayor's dissent chastised the idea "that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling."[232]

224. *Id*. at 213. Justice Kavanaugh, joined by Justice Thomas, opined that the admissions programs at issue also ran afoul of Title VI. *See id.* at 287–88 (Kavanaugh, J., concurring).

225. *Id.* at 230 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting)). Justice Thomas's concurring opinion explicates his understanding of the "colorblind" Constitution. *See Students for Fair Admissions*, 600 U.S. at. at 232 (Thomas, J., concurring).

226. *Id.* at 205 (quoting Loving v. Virginia, 388 U.S. 1, 11–12 (1967)).

227. *Id.* at 318 (Sotomayor, J., dissenting); *see also id.* at 385 (Jackson, J., dissenting) (citation omitted).

228. *Id.* at 294 (Gorsuch, J., concurring).

229. Students for Fair Admissions, 600 U.S. at 226–27.

230. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978); Grutter v. Bollinger, 539 U.S. 306, 333 (2003); Gratz v. Bollinger, 539 U.S. 244, 268 (2003); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013). In *Bakke*, the Court held that the school had a compelling interest in "obtaining the educational benefits that flow from an ethnically diverse student body." 438 U.S. at 305–06 (Opinion of Justice Powell) (cleaned up). Institutions of higher education have since focused on diversity as the reason for using race as a consideration in their admissions programs.

231. *Students for Fair Admissions*, 600 U.S. at 214.

232. *Id.* at 357–58 (Sotomayor, J., dissenting).

The Court also found that the schools' admissions programs were not narrowly tailored because there was a "mismatch" between the goals and the way they worked in practice.[233] The Court emphasized that the racial categories the schools used were "imprecise," noting that the admissions programs could result in "a class with 15% of students from Mexico," instead of "a class with 10% of students from several Latin American countries, simply because the former contains more" Latine students—even though the latter is arguably more diverse.[234] Both Justices Sotomayor and Jackson sharply critiqued the majority for failing to credit the factual findings of the district courts after hearing from "dozens of fact witnesses, expert testimony, and documentary evidence," that the programs were narrowly tailored and that proffered alternatives were insufficient to achieve the schools' interests in creating diverse student bodies.[235]

Finally, the Court interpreted its prior decision in *Grutter* to require race-conscious admissions programs to have a "logical end point."[236] Neither Harvard nor UNC had set a date at which point they would cease using race in admissions; instead, each stated that the use of race in admissions would appropriately end when the schools could achieve their diversity goals, both in the composition of their student bodies and in educational benefits of diversity offered to their students.[237] The majority did not find the schools' articulations of their programs' endpoints sufficient, suggesting that any attempt to ascertain whether a student body was sufficiently diverse amounted to unconstitutional "racial balancing" and that it was impossible to measure whether the schools had realized the educational benefits of diversity.[238] Justice Sotomayor critiqued the majority for imposing "[a] temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour."[239]

Thus, while the majority found that Harvard's and UNC's admissions programs violated the Equal Protection clause, Justice Jackson called the decision an "affront to the dignity of those students for whom race matters [and] condemns our society to never escape the past that explains how and why race matters to the very concept of who 'merits' admission."[240]

233. *Id.* at 217.

234. *Id.* at 216–17. As the dissent points out, the categories used by the schools "resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau." *Id*. at 367 (Sotomayor, J., dissenting).

235. *Students for Fair Admissions*, 600 U.S. at 343–44.

236. *Id*. at 212 (*quoting* Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

237. *Id*. at 223–24.

238. *Id*.

239. *Id*. at 370.

240. *Students for Fair Admissions*, 600 U.S. at 397–98. Justice Jackson did not participate in the challenge to Harvard's policies, so her dissent concerns only the challenge to UNC's policies. *See id.* at 231.

VIII. ADMINISTRATIVE LAW

Many cases involving the interpretation of regulations focus on whether the agency's interpretations of the applicable statutory provisions are permissible. In *Helix v. Hewitt,* Justice Kagan, writing for a six-member majority, skipped this step (stating the argument had been waived by the parties) and dug into the regulatory provisions, using several familiar canons of construction to interpret them.[241] The case interpreted the Department of Labor's regulations exempting "bona fide executives" from the overtime pay requirements of the Fair Labor Standards Act of 1938 as applied to Mr. Hewitt, "a high-earning employee… [whose] paycheck is based solely on a daily rate," where the answer hinged on whether Mr. Hewitt was paid on a salary basis under the regulations."[242]

Justice Kagan's approach to the Court's interpretation of the regulatory text to determine whether Mr. Hewitt was paid on a salary or an hourly basis will be familiar to those who study the Court's case law on statutory interpretation. The Court began with the text of the regulation, reviewing the plain language, dictionary definitions, and neighboring regulations, concluding that the regulation meant that to qualify as a salaried worker paid on a weekly basis, Mr. Hewitt's "paycheck [would] reflect[] how many weeks—not days or hours—he has worked."[243] Next, the Court turned to "broader regulatory structure" and found that it confirmed its interpretation.[244] Finally, the Court rejected Helix's policy arguments for a different reading, emphasizing that "'even the most formidable policy arguments cannot overcome a clear' textual directive."[245] Thus, using this textual approach to interpreting the applicable regulations, the Court determined that Hewitt was entitled to overtime pay since he was not paid on a salary basis.[246]

IX. INTERLOCUTORY APPEALS

In *Coinbase v. Bielski*, the Court addressed one of the conservative Justices' favorite issues: mandatory arbitration.[247] Unsurprisingly, the Court ruled in favor of Coinbase, the corporation seeking to block consumers attempting to

241. *See* Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39, 49 n.2 (2023).

242. *Id*. at 43–44; *see* 29 U.S.C. § 213(a)(1).

243. *Hewitt*, 598 U.S. at 50–54.

244. *Id.* at 55–56.

245. *Id.* at 59 (*quoting* BP P.L.C. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1533 (2021)). *Cf.* Slack Technologies, LLC v. Pirani, 598 U.S. 759, 769 (2023) ("This Court does not 'presume . . . that any result consistent with [one party's] account of the statute's overarching goal must be the law.'") (*quoting* Henson v. Santander Consumer USA Inc., 582 U.S. 79, 89 (2017)).

246. *Hewitt*, 598 U.S. at 61–62.

247. Coinbase, Inc. v. Bielski, 599 U.S. 736, 738 (2023); *see also* Alison Frankel, *Arbitration Wins, Again, at the U.S. Supreme Court*, REUTERS (Jun. 27, 2023), https://www.reuters.com/legal/government/column-arbitration-wins-again-us-supreme-court-2023-06-26/.

bring a class action against them.[248] The decision also has broader implications for stays and interlocutory appeals, so lawyers should be familiar with the holdings and dicta in this case and watch for attempts to expand upon them.

A group of consumers filed a would-be class action against Coinbase, a cryptocurrency platform, alleging that the company failed to replace fraudulently obtained funds.[249] Coinbase filed a motion to compel arbitration, which the district court denied.[250] Coinbase filed an interlocutory appeal and motion for stay pending appeal.[251] The district court denied the motion for stay, and the Ninth Circuit affirmed.[252] In a decision authored by Justice Kavanaugh and joined by Justices Roberts, Alito, Gorsuch, and Barrett, the Supreme Court reversed, concluding that a stay should be mandatory following interlocutory appeals on arbitrability questions.[253]

The majority relied on a forty-year-old opinion, *Griggs v. Provident Consumer Discount Co.*, in which the Court held that any appeal, including an interlocutory one, "divests the district court of its control over those *aspects of the case* involved in the appeal."[254] The majority reasoned that *all* aspects of the case are involved, rather than just the question of whether the case is arbitrable.[255] As Justice Kavanaugh articulated, "[i]t makes no sense for trial to go forward while the [lower court] cogitates on whether there should be one."[256]

The Court disagreed that its decision would encourage frivolous appeals, noting that courts have tools to deter them, such as summarily affirming or dismissing the interlocutory appeal.[257] The majority was also unconvinced that discretionary stays would sufficiently protect parties' rights to an interlocutory determination of arbitrability.[258] The Court remanded the case to the Ninth Circuit, "anticipat[ing] that the Ninth Circuit . . . will proceed with appropriate expedition when considering" the interlocutory appeal.[259]

Justice Jackson, joined by Justices Sotomayor and Kagan, dissented, seeing "no basis for wresting away the discretion traditionally entrusted to the judge closest to the case" and imposing a mandatory stay rule.[260] Justice Jackson

248. *Coinbase*, 599 U.S. at 738.
249. *Id.* at 738–39.
250. *Id.* at 739.
251. *Id.*
252. *Id.*
253. *Coinbase*, 599 U.S. at 744.
254. *Id.* at 740 (emphasis added) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).
255. *Id.* at 741.
256. *Id.* at 741.
257. *Id.* at 744–45.
258. *Coinbase*, 599 U.S. at 746.
259. *Id.* at 747.
260. *Id.* at 748 (Jackson, J., dissenting).

decried this rule as having basis neither in statute or Supreme Court rule.[261] Moreover, she warned of the broad consequences that this rule could unleash and "upend federal litigation as we know it."[262] In Justice Jackson's view, the Court mandated a general stay in this case "simply because an interlocutory appeal poses the question whether the litigation may go forward in the district court…. And a wide array of appeals seemingly fits that bill."[263]

In *Dupree v. Younger* addressed whether a purely legal issue decided on summary judgment must be raised in a post-trial motion in order to be preserved.[264] This case arose from Younger's suit against prison officials, seeking damages for excessive use of force against him while he was detained awaiting trial.[265] Among other defenses, the correctional officers argued in a motion for summary judgment that he had failed to exhaust administrative remedies.[266] The District Court disagreed, holding that an internal prison inquiry satisfied the exhaustion requirement.[267] The Fourth Circuit affirmed, following Circuit precedent establishing that claims or defenses rejected at summary judgment were not preserved for appellate review unless they were renewed in a post-trial motion pursuant to Rule 50(b).[268]

The Court reversed in a unanimous opinion by Justice Barrett, holding that a litigant need not renew purely legal arguments that were denied at summary judgment in a post-trial motion to preserve them for appeal.[269] The Court was not persuaded by Younger's citation to *Ortiz v. Jordan*, which held that a denial of summary judgment on sufficiency-of-evidence grounds is not appealable after trial, meaning a post-trial motion must be made.[270] The opinion explained that it is not necessary to have a uniform rule on these two issues. Instead, the Court reasoned that it is preferable to allow a district court to reconsider whether there is sufficient evidence in the record to sustain summary judgment because the record continues to develop at trial; there are no similar considerations for a purely legal holding.[271] Thus, the Court reversed and remanded to the Fourth Circuit to determine whether the correctional officer's claim was a purely legal one.[272]

261. *Id.* (Jackson, J., dissenting).
262. *Id.* at 760.
263. *Coinbase*, 599 U.S. at 760.
264. Dupree v. Younger, 598 U.S. 729, 731 (2023).
265. *Id.* at 732.
266. *Id.*
267. *Id*.
268. *Id.* at 733.
269. *Dupree*, 598 U.S. at 736.
270. *Id.* at 734.
271. *Id.* at 735–36.
272. *Id.* at 738.

X. CONCLUSION

As of this writing, the Court has granted certiorari in two dozen cases for the 2023-2024 Term. Questions presented include whether the court should end *Chevron* deference to agency action,[273] whether "testers" of accessibility for people with disabilities in public accommodations have Article III standing,[274] the constitutionality of appropriations for the Consumer Financial Protection Bureau,[275] and whether a South Carolina congressional redistricting map constitutes an "impermissible racial gerrymander."[276] Will victories for conservative causes dominate next Term or will the liberal wing eke out more victories? It remains to be seen.

273. Loper-Bright Enters. v. Raimondo, 45 F.4th 359 (1st Cir. 2022), *cert. granted* 143 S. Ct. 2429 (2023).

274. Acheson Hotels, LLC v. Laufer, 50 F.4th 259 (1st Cir. 2022), *cert. granted* 143 S. Ct. 1053 (2023).

275. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 51 F.4th 616 (5th Cir. 2022), *cert. granted* 143 S. Ct. 978 (2023).

276. Alexander v. S.C. State Conf. of the NAACP, 143 S. Ct. 2456 (2023).