The Supreme Court's 2023 Term: Return to Original Meaning or a Dangerous "Paradigm Shift"?*

Donald A. Daugherty, Jr. & Zack Smith**

Each Supreme Court term over the past several years seems to produce more momentous decisions than the last. And the October 2023 Term was no exception. Donald Trump loomed as a major presence in the Term—and rightly so, given the various actions state and federal officials brought against him and his supporters as he mounted his bid to once again become president. Colorado officials tried to keep him off the ballot through a novel reading of Section 3 of the Fourteenth Amendment, and prosecutors brought four separate criminal cases against him in state and federal courts. Two of those cases made their way to the U.S. Supreme Court, raising important separation of powers questions about the extent to which a president—*any* president—enjoys immunity from prosecution for his official actions.

But beyond its Trump-related cases, the Court also confronted important questions involving elections, Big Tech and the First Amendment, and the proper role of courts vis-à-vis administrative agencies in determining what certain statutes and regulations mean. In the process of reaching these decisions, differing approaches continued to emerge among the Justices—even among those labeled as "conservative"—over whether, when, and how text, history, and tradition should be applied to particular cases dealing with various legal issues. And while cases involving arcane matters of administrative law might not sound compelling, in recent years and in the Term, they have

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. To join the debate, please email us at info@fedsoc.org.

** Donald A. Daugherty is Senior Litigation Counsel at the Defense of Freedom Institute for Policy Studies. Zack Smith is Senior Legal Fellow and Manager of the Supreme Court and Appellate Advocacy Program in the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation.

implicated some of the most important constitutional issues decided by the Court, and they may have the farthest-reaching, most lasting impact going forward.

I. Challenges to the Administrative State

Although the Court's "Trump docket," along with cases involving high-profile social issues like abortion, received the most public attention, its decisions about the administrative state, particularly *Loper Bright v. Raimondo*, will likely have the greatest long-term effect.[1] Some critics warn that these cases spell the end of the modern administrative state, but political realities may interfere with its demise. Nonetheless, it's certain that, in the immediate future, these cases will serve as useful tools to begin the necessary work of paring back a federal government that today sprawls far beyond what was contemplated at the time of the New Deal, let alone at the Founding. The modern administrative state was not built in a day, and it likely will not be dismantled in a day either.

In four of the Term's major administrative agency cases—*Loper Bright*, *SEC v. Jarkesy*, *Garland v. Cargill* and *Corner Post v. Board of Governors of the Federal Reserve System*—the Justices' votes broke down 6-3 along ideological lines.[2] The six conservative Justices ruled in favor of challenges to agency authority, while the three liberal Justices would have rejected them. Yet in a fifth case—*Consumer Financial Protection Bureau v. Community of Financial Services Association of America*—four conservatives joined the three liberals to find that an agency had proper legislative authority to act.[3] And in a sixth—*Ohio v. EPA*—Justice Amy Coney Barrett again joined the liberal bloc.[4]

In *Loper Bright*, four family-owned fishing companies contested an order from the National Marine Fisheries Service (NMFS) that they pay the costs of enforcing an agency regulation. The regulation was based on the agency's interpretation of the Magnuson-Stevens Act and required fishing companies to carry government observers on their boats to monitor for overfishing and, in addition, to pay the observers' costs and salaries. The four companies did not challenge the agency's statutory authority to force them to carry

[1] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[2] *Id.*; Sec. and Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024); Garland v. Cargill, 602 U.S. 406 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024).

[3] 601 U.S. 416 (2024).

[4] 603 U.S. 279 (2024).

government observers on board, but they argued that it had no authority to force them to pay for the observers.[5]

Under the long-standing precedent of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, courts were required to defer to an agency's reasonable interpretation of a statute that was silent or ambiguous regarding the legal issues raised in a lawsuit.[6] That was the situation with the statutory provision relied on by the NMFS for the regulation challenged by the fishermen.[7] However, in a 35-page opinion by Chief Justice John Roberts, the Court overruled *Chevron*, holding that the *Chevron* doctrine was "fundamentally misguided."[8]

Citing Section 706 of the Administrative Procedure Act, the Court insisted that judges, not agency officials, must decide "all relevant questions of law" arising out of the review of an agency's action, even those involving ambiguous laws, and must set aside any agency action inconsistent with the law as they interpret it.[9] The APA had been enacted in 1946 and was, according to Roberts, the "fundamental charter of the administrative state."[10] Section 706 requires courts to "decide legal questions by applying their own judgment," he wrote.[11] Although Section 706 expressly mandates that judicial review of agency policymaking and fact-finding be deferential, *Loper Bright* held that this does not hold true for legal interpretations. The Court allowed that judges may look for assistance from agencies responsible for administering a statute but said they could not defer to their understanding of the law. Roberts observed that such a conclusion should be unremarkable, as it reflects judicial practice since *Marbury v. Madison* (1803).[12]

While originalists welcomed *Loper Bright*, *Chevron* had been considered a victory for political conservatives when it was first decided. The agency action there was opposed by environmentalists who argued that it would increase pollution, and who suspected that President Ronald Reagan's appointees at the EPA did not share their policy views and that judges might be persuaded to go along. It will be interesting to see whether progressives today will embrace *Loper Bright* as they work to thwart now-President Trump's plans to implement his agenda. But regardless of which political party tries to wield

---

[5] *Loper Bright*, 144 S. Ct. at 2255-57.
[6] 467 U.S. 837 (1984).
[7] *Loper Bright*, 144 S. Ct. at 2256.
[8] *Id*. at 2270.
[9] *Id.* at 2260 (citing 5 U.S.C. § 706).
[10] *Id.* at 2261 (citing Kisor v. Wilkie, 588 U.S. 558, 580 (2019) (plurality opinion)).
[11] *Id.*
[12] *Id.* at 2257 (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).

the *Loper Bright* decision for its short-term political advantage, as a legal matter, the Court reached the correct conclusion.

While the Court reasserted the judiciary's role in the separation of powers in *Loper Bright*, *Jarkesy* upheld fundamental due process rights in the face of the administrative state. There, the Court ruled that when the Securities and Exchange Commission seeks penalties for alleged securities fraud, the action constitutes a "Suit[] at common law" under the Seventh Amendment.[13] Thus, the Chief wrote for the majority, the accused is constitutionally entitled to a jury trial in federal court, and the SEC cannot compel them to defend themselves before one of its in-house administrative law judges instead of an Article III tribunal.[14]

The majority and dissent split on the application of the "public rights" exception to Article III jurisdiction, a judicially created concept under which Congress may in certain circumstances (e.g., revenue collection, relations with Indian tribes, immigration law) assign an action to an agency tribunal without triggering the Seventh Amendment right to a jury trial. Because the Court's articulation of the public rights exception had been imprecise and the constitutional presumption is in favor of an individual's explicit due process rights, Roberts easily concluded that the exception did not apply.[15]

For the dissenters, Justice Sonia Sotomayor warned of "the chaos today's majority would unleash" by recognizing the right to a jury trial in such cases.[16] Invoking the separation of powers, she characterized the majority's decision as a power grab that encroached upon Congress's constitutional authority to set up agency procedures, not a recognition of due process rights of individuals expressly provided for in the Bill of Rights.[17] As Sotomayor noted in her dissent, in-house adjudications are certainly more efficient and less costly from the government's perspective, but that perspective did not control in *Jarkesy*.[18]

Leaving aside the elusive distinction between public and private rights, as a matter of common sense, it was entirely reasonable for accused persons to doubt the impartiality of the SEC's in-house forum. Agency enforcement staff and adjudication staff work closely together and, unsurprisingly, from 2010

---

[13] *Jarkesy*, 144 S. Ct. at 2145-55.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2155 (Sotomayor, J., dissenting).
[17] *Id. at* 2155-73.
[18] *Id.*

to 2015, the SEC won more than 90% of its in-house prosecutions, compared to 69% in federal court.[19]

Next, in a straightforward dispute over statutory interpretation, the *Garland v. Cargill* Court ruled that the Bureau of Alcohol, Tobacco, Firearms, and Explosives had exceeded its authority when it issued its 2018 rule classifying bump stocks as "machine guns" under the National Firearms Act, which reversed the agency's earlier interpretation responding to the 2017 Las Vegas mass shooting.[20] Citing the statutory definition of "machine gun," the Court found that a semiautomatic rifle equipped with a bump stock cannot fire more than one shot "by a single function of the trigger," even if the device reduces the time that elapses between separate "functions" of the trigger.[21]

In the fourth of the 6-3 administrative law decisions, the Court in *Corner Post* ruled that the APA's six-year statute of limitations to challenge a final agency rule is triggered when the party is injured by the rule, which is when "the right of action first accrues" under the statute.[22] For the dissenters, Justice Ketanji Brown Jackson wrote that the trigger date should be when a rule is first promulgated and warned that the holding could jeopardize well-settled regulations.[23]

Breaking out of its ideological mold in the *CFPB* case, the Court upheld by a 7-2 vote a novel funding device for an administrative agency created during the Obama administration. Rejecting a challenge to the CFPB's funding mechanism, Justice Clarence Thomas wrote for the majority that the mechanism fell squarely within the definition of a congressional "appropriation" in Article I because Congress specified the funding's source (namely, the Federal Reserve), as well as how the agency should use it.[24] Only Justices Samuel Alito and Neil Gorsuch dissented. Thomas's opinion employed his characteristically originalist approach to interpreting the Constitution, demonstrating that originalism does not necessarily lead to a politically conservative outcome. This contrasts with the liberal Justices' steadfast defense of the current administrative state.

In *Ohio v. EPA*, Barrett joined this liberal bloc in dissenting from the Court's decision. For a five-Justice majority, Justice Gorsuch wrote that the

---

[19] *Id.* at 2141.
[20] *Cargill*, 602 U.S. at 406.
[21] *Id.*
[22] *Corner Post*, 603 U.S. at 812.
[23] *Id.* at 843-65 (Jackson, J., dissenting).
[24] *CFPB*, 601 U.S. at 426.

EPA likely violated the APA by failing to explain satisfactorily its national plan for controlling ozone, and thus the Court enjoined enforcement of the plan until litigation challenging it brought by a group of states was completed.[25] For the dissenters, Barrett characterized the majority's position as based on "an underdeveloped theory that is unlikely to succeed on the merits."[26]

II. BEFORE GETTING TO THE MERITS

Characteristic of the Roberts Court is its reticence to reach out to decide cases, which is consistent with the passive virtues extolled by Professor Alexander Bickel.[27] By avoiding broad constitutional decisions and deciding cases only when dispositive issues have been made clear and concrete, the Court seeks to maintain its legitimacy, which, according to Bickel, is essential given its lack of purse or sword powers possessed by the other two branches.[28] While some praise this judicial restraint, others criticize it as an abdication of the Court's duty to say what the law is, sparking renewed conversations about the appropriateness and nature of judicial review and judicial restraint.[29] The Court's reticence to reach out to decide issues was especially evident in the Term in two cases involving the contentious political issue of abortion: *Moyle v. United States* and *FDA v. Alliance for Hippocratic Medicine*.[30]

In *Moyle*, the federal government claimed that an Idaho law permitting abortions only when "necessary to prevent the death of the pregnant woman" was preempted by the federal Emergency Medical Treatment and Labor Act. EMTALA requires that Medicare-funded hospitals stabilize patients experiencing health care emergencies before transferring them in order to prevent "serious jeopardy" to their health and is intended to prevent hospitals from "dumping" patients who may be unable to pay for medical services in such circumstances.[31]

---

[25] *Ohio*, 603 U.S. at 293-94.

[26] *Id.* at 300 (Barrett, J., dissenting).

[27] Alexander M. Bickel, *Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1961).

[28] *See id.* at 42-43.

[29] *See, e.g.*, Joel Alicea, *Real Judicial Restraint*, NAT'L AFF. (Winter 2025), https://www.nationalaffairs.com/publications/detail/real-judicial-restraint; Josh Blackman, *Trump Must Pick Judges Who Have Publicly Demonstrated Their Courage*, CIVITAS OUTLOOK (Jan. 23, 2025), https://www.civitasinstitute.org/research/trump-must-pick-judges-who-have-publicly-demonstrated-their-courage.

[30] Moyle v. United States, 144 S. Ct. 2015 (2024); Food and Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).

[31] *Moyle*, 144 S. Ct. at 349, 352.

In 2022, a district court had preliminarily enjoined Idaho's law, compelling Idaho hospitals to perform abortions when the state's life-of-the-mother exception is narrower than EMTALA's definition of "emergency medical condition," thereby permitting abortions otherwise prohibited under state law.[32] In September 2023, a Ninth Circuit panel granted Idaho's motion to stay the preliminary injunction while the state appealed,[33] but in November, the en banc court overruled the panel's decision and lifted the stay.[34] At the same time, it expedited the merits appeal of the injunction and set argument for late January 2024. However, on January 5, the Supreme Court not only granted Idaho's stay motion, but sua sponte chose to treat the motion like a certiorari petition before any judgment in the lower courts, granted the "petition," and ordered the case argued in April.[35] Because the agreement of at least five Justices was needed to grant the stay, along with the unusual grant of certiorari, most observers believed that a solid majority was ready to rule in Idaho's favor.

The case had reached the Court through its emergency docket (sometimes referred to misleadingly as the "shadow docket"), where the Justices deal with questions that need resolution faster than the many months required on its regular docket to submit briefs, hear argument, and draft formal opinions. This case demonstrated the difficulty of deciding complex legal issues on an expedited basis and without proper development of the parties' respective positions or an evidentiary record; some Justices apparently reconsidered their initial decision to grant expedited review.

In a one-sentence per curiam decision issued on June 27, the Court reversed its January order by dismissing the appeal as improvidently granted, returning it to the Ninth Circuit and reinstating the injunction.[36] As Barrett wrote in her concurrence (joined by the Chief Justice and Justice Kavanaugh), the "shape of these cases has substantially shifted" since the grant of review, "render[ing] the scope of the dispute unclear, at best."[37]

During briefing and oral argument, the United States had backed off some of its previous positions in the case. Importantly, it conceded that EMTALA did not override federal "conscience laws," which protect hospitals and

---

[32] United States v. Idaho, 623 F. Supp. 3d 1096 (D. Idaho 2022).

[33] United States v. Idaho, 83 F.4th 1130 (9th Cir. 2023), *rev'd en banc*, 82 F.4th 1296 (9th Cir. 2023).

[34] *Id.*

[35] Idaho v. United States, 144 S. Ct. 541 (2024).

[36] *Moyle*, 144 S. Ct. at 2015.

[37] *Id.* at 2019 (Barrett, J., concurring).

doctors who do not want to perform abortions allegedly required by EMTALA.[38] And it stated that EMTALA did not require abortions to stabilize patients' mental health conditions.[39] Undoubtedly, the government's concessions were a strategic response to the unusual grant of review and intended to encourage the Court to dismiss the case before it weighed in against current federal abortion policy.

As with their defense of the administrative state, the liberals stood together in support of abortion. The real divergence was between Barrett's concurrence and Alito's dissent (joined by Thomas and Gorsuch). Alito wrote that the United States' preemption theory was "plainly unsound" and could be rejected without further lower court proceedings.[40]

Similar to its dismissal without reaching the merits in *Moyle*, the Court concluded unanimously in *FDA v. Alliance for Hippocratic Medicine* that the pro-life challengers lacked standing to bring their claim.[41] For proper standing, plaintiffs must show that they have been or will be injured in some nonspeculative, concrete way that is traceable to the defendant and can be remedied by a court.

Alliance for Hippocratic Medicine was consistent with the Roberts Court's longstanding emphasis on the threshold elements (e.g., jurisdiction, ripeness, and standing) that must be satisfied in order to bring a claim in federal court. This emphasis follows its approach to judicial restraint, as it helps ensure that courts do not step out of the powerful but narrow lane delineated for them in the Constitution. Of course, as became apparent in other cases this Term (such as *Murthy v. Missouri*), not all Justices—even those labeled conservative—always agree on how to apply these principles. In the past, critics of strict applications of standing requirements contended that those decisions reflected a pro-business agenda and were intended to frustrate individuals wanting to sue corporations;[42] in the Term, standing was most often used to turn away actions brought by political conservatives.

In *Alliance for Hippocratic Medicine*, pro-life physicians and medical associations challenged agency rule changes that made the abortion drug mifepristone more easily accessible. The FDA had approved mifepristone in 2000,

---

[38] Transcript of Oral Argument at 90, Moyle v. United States, 144 S. Ct. 2015 (2024) (No. 23-726).

[39] *Id.* at 77.

[40] *Moyle*, 144 S. Ct. at 2027 (Alito, J., dissenting).

[41] *All. for Hippocratic Med.*, 602 U.S. at 372.

[42] *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENVER UNIV. L. REV. 317 (2012).

but only with safety precautions designed to protect women taking the drug.[43] However, in 2016 and 2021, the challengers said, the FDA removed those restrictions without the scientific warrant and public notice required by law.[44] The case was brought as a challenge to agency action similar to the administrative law cases discussed above.[45]

For the majority, Kavanaugh expounded on the requirements of Article III standing: "As Justice Scalia memorably said, 'Article III requires a plaintiff to first answer a basic question: "What's it to you?"'"[46] He continued that "[f]or a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff cannot be a mere bystander, but instead must have a 'personal stake' in the dispute."[47] The majority characterized what the individual physicians and associations offered as a complicated, attenuated causal chain between the FDA's actions and their alleged injuries. As Kavanaugh wrote, the "FDA has not required plaintiffs to do anything or to refrain from doing anything."[48]

As the government had done in *Moyle*, the FDA conceded that federal conscience laws would "definitively" protect plaintiffs from having to perform abortions or provide other treatments that would violate their consciences.[49] Although the United States' concessions may at the time have merely been part of a cynical, short-term litigation strategy, after the November 2024 presidential election, they likely reflect the actual position of the federal government.

Standing was also the basis for rejecting claims by politically conservative challengers in *Murthy v. Missouri*.[50] There, the Court found 6-3 that two states and five social-media users did not have standing to assert their claims for injunctive relief against the Surgeon General and many executive branch officials and agencies for violating the First Amendment.[51] Plaintiffs alleged that defendants had pressured social-media platforms to suppress protected speech about the Covid-19 pandemic and sought an injunction to prevent similar

---

[43] *All. for Hippocratic Med.*, 602 U.S. at 375.

[44] *Id.*

[45] *See supra* Section I.

[46] *All. for Hippocratic Med.*, 602 U.S. at 379 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

[47] *Id.* (citation omitted).

[48] *Id.* at 385.

[49] *Id.* at 387.

[50] 603 U.S. 43.

[51] *Id.* at 47.

suppression in the future.[52] Reversing the Fifth Circuit's ruling for the plaintiffs, Justice Barrett's majority opinion concluded that the plaintiffs failed to demonstrate a substantial risk that, in the near future, they would suffer an injury traceable to a government defendant and redressable by the injunction sought.[53] The lack of causal evidence tying previous restrictions on plaintiffs' social-media postings to any discrete instances of content moderation meant that their past injuries could not be traced to defendants' communications with the platforms. In other words, since plaintiffs didn't prove the government caused their injuries, they were ineligible for prospective relief.

As in *Moyle*, Alito dissented with Thomas and Gorsuch, concluding that plaintiffs had standing.[54] Alito believed the majority was applying a new and heightened traceability standard in the case, effectively requiring plaintiffs to prove that they were censored *solely* because of defendants' conduct.[55] This standard exceeded that applied in a 2019 challenge to an agency's action, *Department of Commerce v. New York*, in which the Court found that de facto causality was sufficient for New York to have standing to assert a claim that a census question about citizenship might cause it to lose a seat in the House of Representatives.[56] On the merits, the *Murthy* dissenters believed that the plaintiffs had shown that Biden administration officials had exerted enormous pressure on Facebook to suppress plaintiffs' speech, thereby infringing on their constitutional rights.[57]

III. Pre-Election Altercations

With the 2024 election looming, parties asked the Justices to consider several important election-related issues. Foremost among those issues was redistricting. The proper standard courts must apply in deciding whether states improperly considered race in drawing legislative districts has been hotly contested.[58] But what the Constitution requires—and prohibits—in this context has been difficult for courts to decipher, in part because courts are often asked to decide a host of statutory and constitutional claims at the same time. In *Alexander v. South Carolina NAACP*, though, the parties

[52] *Id.* at 54.
[53] *Id.* at 56.
[54] *Id.* at 73 (Alito, J., dissenting).
[55] *Id.* at 92.
[56] 588 U.S. 752 (2019).
[57] *Murthy*, 603 U.S. at 102.
[58] *See, e.g.*, Allen v. Milligan, 599 U.S. 1 (2023).

presented the Justices with a purely constitutional challenge to the congressional maps South Carolina's legislature drew in the wake of the 2020 census.[59] Essentially, the Republican-dominated South Carolina legislature wanted to increase the Republican tilt in one of the state's seven congressional districts. To do that, the legislators moved the boundaries around, and as a result, they slightly increased the black voting-age population (BVAP) in one of the districts. The NAACP and other private plaintiffs alleged that this change violated the "one person, one vote" requirement.[60] And the three-judge district court which considered the case agreed, reasoning that the legislature had a particular BVAP in mind when drawing the district, and that that diluted the vote of the state's black citizens and thus violated the Equal Protection Clause.[61]

But in a 6-3 opinion written by Justice Alito, the Supreme Court disagreed, holding that the district court's findings of facts were clearly erroneous. Alito made clear that "[r]edistricting constitutes a traditional domain of state legislative authority"[62] and that the Fourteenth Amendment imposes one constraint on that authority: it prohibits "a State from engaging in a racial gerrymander unless it can satisfy strict scrutiny."[63] He then explained that courts must "exercise extraordinary caution"[64] when considering racial gerrymandering claims because of the intrusion on state sovereignty such claims can present and the difficulty courts can have in untangling permissible from impermissible considerations. After all, the Court had previously said that while it's unconstitutional to gerrymander predominantly based on race, it's not unconstitutional to gerrymander based on political considerations. For this reason, Alito explained, unless plaintiffs can show through either direct or circumstantial evidence that race served as the "predominant factor motivating the legislature's decision," their claims must fail.[65] He also noted that the Court has "never invalidated an electoral map in a case in which the plaintiff failed to adduce any direct evidence" of discrimination (such as legislators' statements), though it has in theory left the door open for such a claim.[66] Moreover, he said, a "circumstantial-evidence-only case is especially difficult

[59] 602 U.S. 1 (2024).
[60] *Id.* at 15.
[61] *Id.*
[62] *Id.* at 7 (citations omitted).
[63] *Id.*
[64] *Id.* (citations omitted).
[65] *Id.*
[66] *Id.* at 8.

[for plaintiffs] when the State raises a partisan-gerrymandering defense."[67] This is so, he said, because when "partisanship and race correlate, it naturally follows that a map that has been gerrymandered to achieve a partisan end can look very similar to a racially gerrymandered map."[68] He said that if "either politics or race could explain a district's contours," the plaintiffs have not carried their burden on the racial gerrymandering claims.[69] This is especially so because courts are supposed to presume that "the legislature acted in good faith" when drawing the maps.[70]

Justice Thomas concurred in the judgment and wrote separately primarily "to address whether [the Court's] voting-rights precedents are faithful to the Constitution";[71] in his view, they are not. Thomas argued that the Court "has no power to decide" racial gerrymandering claims because "[d]rawing political districts is a task for politicians, not federal judges" given that there "are no judicially manageable standards for resolving" such claims and that "the Constitution commits those issues exclusively to the political branches."[72] Moreover, he said, the "Court's insistence on adjudicating these claims has led it to develop doctrines that indulge in race-based reasoning inimical to the Constitution."[73]

Justice Kagan, joined by Sotomayor and Jackson, dissented, primarily objecting to the majority's application of clear error review.[74]

The Court confronted similar issues in two sets of cases on its emergency motions docket. In each instance, by a 6-3 vote—with Kagan, Sotomayor, and Jackson on the losing side—the Court explicitly or implicitly invoked the *Purcell* principle (the idea that courts shouldn't alter election rules or procedures or upset the status quo too close to an election) in deciding whether to stay lower federal court rulings or overturn stays.[75] In *Robinson v. Callais* and *Landry v. Callais*, the Court stayed a three-judge district court's order requiring Louisiana to redraw its congressional map.[76] Justice Jackson penned a dissent arguing that "*Purcell* has no role to play here" because there is "little

[67] *Id.*
[68] *Id.*
[69] *Id.* at 9.
[70] *Id.*
[71] *Id.* at 39 (Thomas, J., concurring).
[72] *Id.* at 40
[73] *Id.*
[74] *Id.* at 68.
[75] *See* Purcell v. Gonzalez, 549 U.S. 1 (2006).
[76] Robinson v. Callais, 144 S. Ct. 1171 (2024).

risk of voter confusion from a new map being imposed this far [May 2024] from the November election."[77] And in *Petteway v. Galveston County, Texas*, the Court declined to vacate a stay the Fifth Circuit had entered against judicially imposed changes to the Galveston County, Texas, county commission district map.[78] There, Kagan, joined by Sotomayor and Jackson, penned a short dissent saying that the Fifth Circuit stay "itself disrupted the status quo" contrary to the *Purcell* principle, and that she would have vacated the stay.[79]

IV. The First Amendment and Big Tech

The Court confronted important issues about the intersection of technology and the First Amendment during the Term. In two pairs of cases involving social media, *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier* and *Moody v. NetChoice* and *Paxton v. NetChoice*, the Justices reached unanimous results but issued a host of concurring opinions explaining their own views.[80]

In *Lindke* and *O'Connor-Ratcliff*, the Justices confronted the question of whether a government official violates a citizen's First Amendment rights by blocking the citizen from accessing the official's social media page or by removing the citizen's comments from the official's page. Justice Barrett, writing for the unanimous Court, noted that for someone's constitutional rights to be violated, there must be state action. Private action, however heinous, does not violate the Constitution. Thus, if the government officials acted in their private capacities when blocking and deleting social media comments, Barrett said, they "did not violate [the plaintiffs'] First Amendment rights—instead, [they] exercised [their] own."[81] Deciding whether an official acted in his or her personal or governmental capacity, though, often "demands a fact-intensive inquiry."[82] To aid courts in making that determination, the Court held that "a public official's social-media activity constitutes state action . . . only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[83] The Court said that no matter how authoritative a statement or social media

---

[77] *Id.* at 1172 (Jackson, J., dissenting).

[78] 144 S. Ct. 36 (2023).

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

[80] Lindke v. Freed, 601 U.S. 187 (2024); O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024); Moody v. NetChoice, LLC, 603 U.S. 707 (2024).

[81] *Lindke*, 601 U.S. at 197.

[82] *Id.*

[83] *Id.* at 198.

page might look, unless the official's statements are "connected to speech on a matter within [the official's] bailiwick," there is no First Amendment violation.[84] In promulgating this test, Barrett emphasized that context is key. The same statement made in two settings (compare an official government meeting with a backyard barbecue) could lead to different results. Where an official's social media page is ambiguous as to whether it's a private or government account, courts must conduct "a fact-specific undertaking in which the post's content and function are the most important considerations."[85] Barrett finally noted that when an official deletes a citizen's comment from their social media page, "the only relevant posts are those from which . . . [the] comments were removed."[86] By contrast, categorically blocking someone from commenting altogether could an expose an official to greater liability because a "court would have to consider whether [the official] had engaged in state action with respect to any post on which [someone] wished to comment."[87] The Court vacated the judgments in both *Lindke* and *O'Connor-Ratcliff* and remanded for further proceedings consistent with this test.

In the *NetChoice* cases, the Court confronted the question of whether states can "restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users."[88] Both Florida and Texas passed laws that differed in some respects but that both contained "content-moderation provisions, restricting covered platforms' choices about whether and how to display user-generated content to the public. And both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices."[89] NetChoice, "an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications."[90] The Eleventh Circuit had upheld an injunction prohibiting the Florida law from taking effect, finding that it likely violated the First Amendment, but the Fifth Circuit had rejected an injunction prohibiting the Texas law from taking effect, "reasoning that the Texas law does not regulate any speech and so does not implicate the First Amendment."[91] Kagan, writing for a unanimous Court, said that both decisions had

[84] *Id.* at 201.
[85] *Id.* at 203.
[86] *Id.* at 204.
[87] *Id.*
[88] *NetChoice*, 603 U.S. at 717.
[89] *Id.* at 720.
[90] *Id.* at 717.
[91] *Id.*

to be vacated "for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge."[92] Kagan explained that to prevail on a First Amendment facial challenge, those challenging a statute must show that "a law's unconstitutional applications are substantial compared to its constitutional ones."[93] Here, she said, the courts below had myopically focused on a few narrow applications of the law more appropriately considered in an as-applied challenge.[94]

Still, Kagan said it was "necessary to say more about how the First Amendment relates to the laws' content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below."[95] She said that the Fifth Circuit "was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression."[96] She elaborated that the Fifth Circuit "was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds."[97]

Barrett agreed with Kagan's analysis and wrote separately to highlight the "dangers of bringing a facial challenge," which "forces a court to bite off more than it can chew."[98] By contrast, as-applied challenges "enable courts to home in on whether and how specific functions—like feeds versus direct messaging—are inherently expressive and answer platform- and function-specific questions that might bear on the First Amendment analysis."[99] Jackson concurred in part and concurred in the judgment, cautioning the lower courts not to treat either case "like an as-applied challenge" and urging her own colleagues to "avoid deciding more than is necessary."[100] Thomas (writing only for himself) and Alito (joined by Thomas and Gorsuch) also wrote separately, agreeing that the lower courts did not adequately consider the facial nature of the NetChoice's challenges, but criticizing the Court for substantively addressing the First Amendment issues in the main opinion even though it was declining to apply its analysis to the cases.[101]

---

[92] *Id.* at 717-18.
[93] *Id.* at 718.
[94] *Id.* at 717-18.
[95] *Id.* at 718.
[96] *Id.* at 727.
[97] *Id.* at 725.
[98] *Id.* at 745 (Barrett, J., concurring).
[99] *Id.* at 747-48.
[100] *Id.* at 749 (Jackson, J., concurring).
[101] *Id.* at 749-50. (Thomas, J., concurring).

There was one other unanimous decision in a First Amendment case: *National Rifle Association v. Vullo*. Sotomayor wrote for the unanimous Court, reaffirming that "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."[102] The NRA alleged that Maria Vullo, head of the New York Department of Financial Services, pressured regulated entities such as insurance companies not to do business with the NRA because of the NRA's views on the gun ownership and the Second Amendment.[103] Such actions, Sotomayor wrote, violate the First Amendment.[104] The decision was not earth-shattering, but it was noteworthy for being unanimous despite the controversial nature of the parties involved and the speech at issue.

V. Debating Originalism

Originalism/textualism continues to be the prevalent method among members of the Court for interpreting legal texts, and its critics have yet to put forth a coherent alternative. The Justices stand along a spectrum in their fealty to originalism. At one end are Kagan and Jackson who, as they professed in their confirmation hearings, accept originalism as the leading interpretive methodology, but openly depart from it regularly; on the other end stands Thomas, insisting on its strict application. The rest are somewhere in between, with Sotomayor alone appearing to have little regard for originalism. This broad acceptance of originalism contrasts with earlier iterations of the Roberts Court, as well as with its predecessors.

Many critics of originalism thought that its weaknesses were exposed in *United States v. Rahimi*, where the conservative Justices splintered among a majority opinion, three concurrences, and a dissent.[105] However, the more accurate view is that the several opinions simply showed a fine-tuning that is an inevitable part of the ongoing originalist project. Disagreement among the Justices largely related to details about *how* to apply originalist methodology, not whether to apply it at all. As Gorsuch noted in his concurrence, the majority and dissent may disagree on the particulars of originalism, but they "at least agree that is the only proper question a court may ask."[106]

---

[102] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024).
[103] *Id.* at 180-81.
[104] *Id.*
[105] 602 U.S. 680 (2024).
[106] *Id.* at 711 (Gorsuch, J., concurring).

In *Rahimi*, eight Justices rejected a facial challenge to a federal statute allowing individuals subject to domestic violence restraining orders to be disarmed—18 U.S.C. § 922(g)(8)—reversing a Fifth Circuit decision finding the law unconstitutional. Seven joined the Chief's majority opinion in full, while six wrote or joined in five separate concurrences, including one from Sotomayor and one from Jackson. Thomas wrote the lone dissent.

In 2020, a Texas state court had entered a civil protective order against Rahimi after he dragged his girlfriend through a parking lot to his car and pushed her inside, causing her to hit her head on the dashboard. Rahimi had also fired a gun at a bystander witnessing the altercation. The protective order issued based on a judicial finding that Rahimi presented a "credible threat" and, among other actions, suspended his gun license for two years. A few months after the order, the defendant was suspected in a series of unrelated shootings. Police obtained a warrant to search his home, where they found a rifle and a pistol, prompting prosecutors to charge him with violating § 922(g)(8). Hardly a sympathetic defendant, Rahimi did not contend that the statute was unconstitutional only as applied to him, but instead contended that it was unconstitutional in all its applications.

The opinions reflected the Court's conscious effort to clarify the originalist approach articulated in its most recent Second Amendment case, *New York State Rifle & Pistol Association v Bruen*.[107] *Bruen* itself was a long overdue follow-up to 2008's *District of Columbia v. Heller*, which saw Justice Antonin Scalia's majority opinion and Justice John Paul Stevens' dissent both dive deeply into historical evidence to determine whether the Second Amendment was originally meant to protect an individual or a collective right to bear arms.[108] Otherwise, Second Amendment jurisprudence was skimpy and, unlike with other provisions in the Bill of Rights, little direct precedent constrained the lower courts as they interpreted and applied it to cases.

Roberts wrote, "some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber."[109] According to the majority, the Fifth Circuit had made two errors when it struck down § 922(g)(8). The first was to require that the government show a "historical twin" to the domestic violence-related provision in order to uphold it as consistent with the Second Amendment;

---

[107] 597 U.S. 1 (2022).

[108] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* McDonald v. City of Chicago, 561 U.S. 742 (2010).

[109] *Rahimi*, 602 U.S. at 691.

Roberts explained that courts should look to whether the law being challenged was "relevantly similar" to contemporaneous laws, not nearly identical.[110] The second error was to dwell on "hypothetical scenarios" not involved in the case, such as the possibility that a person could be denied their Second Amendment rights based on a flawed restraining order.[111] According to Roberts, those errors "left the panel slaying a straw man."[112]

As historical analogues for § 922(g)(8) demonstrating that the Framers would not have thought the Second Amendment precluded such laws, Roberts cited surety laws, under which a threatening person could be ordered to post a bond, and "going armed" laws against using firearms to menace others.[113] The challenged statute, Roberts wrote, "fits comfortably within this tradition."[114] Thomas, who had authored *Bruen*, countered: "Not a single historical regulation justifies the statute at issue."[115] For example, he wrote, "[s]urety laws were, in a nutshell, a fine on certain behavior," and "imposed a far less onerous burden."[116]

Besides the matter of how closely a historical analogue has to track the statute at issue, much of the originalist disagreement in *Rahimi* related to the relevance of post-enactment history: does a law passed a year—or a century—after the Second Amendment was ratified show that an analogous modern law should pass muster under the Second Amendment? Concurring, Barrett wrote, "For an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function."[117] Barrett acknowledged that post-enactment history can be a useful tool to, for example, "reinforce our understanding of the Constitution's original meaning"; however, originalism alone could not justify the use of such evidence without some additional reason like stare decisis.[118] In *Bruen*, Barrett had similarly questioned the timeframe for historical evidence used by Thomas to interpret the Second Amendment. Besides expressing

[110] *Id.* at 692.
[111] *Id.* at 701.
[112] *Id.*
[113] *Id.* at 698.
[114] *Id.* at 690.
[115] *Id.* at 747 (Thomas, J., dissenting).
[116] *Id.* at 753.
[117] *Id.* at 737-38 (Barrett, J., concurring).
[118] *Id.*

doubt about the probative value of post-ratification evidence,[119] she also questioned whether the relevant date for determining which evidence is probative for original meaning should come from 1791, when the Second Amendment was ratified, or 1868, when the Fourteenth Amendment (through which the Second Amendment was later incorporated) was ratified.[120] In *Rahimi*, she wrote that her doubts "were *not* about whether 'tradition,' standing alone, is dispositive. . . . [E]vidence of 'tradition' unmoored from original meaning is not binding law."[121] Barrett noted that the Court uses history not only to determine the meaning of words as used in the Constitution, but also to understand the "contours of the right."[122] As with Roberts's rejection of requiring a historical twin to justify a challenged law, Barrett looked to "[h]istorical regulations" for a

> principle, not a mold. . . . To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.[123]

Kavanaugh's concurrence described in detail "how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text."[124] He was more bullish than Barrett on the use of post-enactment evidence, which he referred to as evidence of tradition, noting the critical role assigned to it in Madison's *Federalist* 37, as well as in decisions by Chief Justice John Marshall and Scalia.[125] Kavanaugh also argued that unless they looked to history to determine the precise meaning of broadly-worded constitutional rights, judges would instead rely on their own policy judgments, which was entirely improper.[126] He criticized means-end scrutiny and various other balancing tests adopted by courts (largely by accident) in the 1950s and 1960s, which he described as "policy by another name."[127] Nearly all the Supreme Court's Second Amendment decisions post-date the rise of such tests, which has allowed the Court to anchor its jurisprudence on the

---

[119] *Bruen*, 597 U.S. at 82-83.
[120] *Id.* at 82.
[121] *Rahimi*, 602 U.S. at 738 (citations omitted).
[122] *Id.* at 739.
[123] *Id.* at 740.
[124] *Id.* at 718 (Kavanaugh, J., concurring).
[125] *Id.* at 719.
[126] *Id.* at 736.
[127] *Id.* at 731.

right to bear arms more firmly in originalist interpretation. Although Kavanaugh did not call for overruling decisions that rely on such balancing tests, he "challeng[ed] the notion that those tests are the ordinary approach to constitutional interpretation. And [he argued] against extending those tests to new areas, including the Second Amendment."[128]

As the originalist project proceeds, courts will continue to consider and refine standards for weighing post-enactment practice and other types of evidence of original meaning. The process of "analogic reasoning" initiated in *Bruen* will need to be clarified. Related issues—such as whether courts should look to a text's original meaning among the public generally, or its original *legal* meaning—will also need to be addressed. Critically, however disparate the Justices' conclusions may be in cases like *Rahimi*, the Court continues to focus on determining the original meaning of constitutional provisions and other legal texts, and on finding out the best ways to do so.

The *Rahimi* Court was unanimous on one point about Second Amendment rights. At oral argument, the government asserted that "Congress may disarm those who are not law-abiding, responsible citizens."[129] Both the majority opinion and Thomas's dissent rejected that notion. Given that the words of the Second Amendment do not give the government authority to determine which citizens would be "responsible" gun owners, the Court unanimously rebuked this constitutionally unmoored attempt to augment government power.

Rahimi was not the only case in which the Justices disagreed about originalism's application. Another example was *Vidal v. Elster*, which the Court released a week before *Rahimi*.[130] There, the Court upheld unanimously the Patent and Trademark Office's rejection of a trademark application for a T-shirt design mocking Donald Trump. The Court held that the "names" clause of the Lanham Act, which prohibits the trademark registration of an individual's name without their consent, does not violate the First Amendment.[131]

In his opinion for the Court, Thomas relied on the history of trademark law's content-based distinctions to uphold its current content-based restriction on incorporating a living person's name into a mark. In a

---

[128] *Id.* at 732.

[129] Transcript of Oral Argument at 4, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915).

[130] 602 U.S. 286 (2024).

[131] *Id.* at 310.

concurrence joined by Kagan and Sotomayor, Barrett criticized "history and tradition" tests as an unnecessarily abstract method of constitutional interpretation.[132] She preferred a test rooted in functional principles, like whether restrictions on trademarks would undermine First Amendment purposes. "The views of preceding generations can persuade, and, in the realm of stare decisis, even bind. But tradition is not an end in itself—and I fear that the Court uses it that way here," Barrett wrote.[133] The Court "presents tradition itself as the constitutional argument. . . . Yet what is the theoretical justification for using tradition that way?"[134] "Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test."[135]

Finally, the Court ruled 6-3 in *City of Grants Pass v. Johnson* that a municipality does not violate the Eighth Amendment's ban on "cruel and unusual punishment" when it enforces against homeless individuals a generally applicable ordinance barring camping on public property.[136] For the majority, Justice Gorsuch wrote that since the Founding, the constitutional ban has always been understood to be directed at the kind of punishment imposed for violating criminal statutes. Grants Pass's ordinance provided for a civil fine and, after repeated offenses, the possibility of a criminal punishment of up to thirty days in jail and a larger fine, which the Court concluded were neither cruel, as they were not calculated to gratuitously heighten "terror, pain or disgrace," nor unusual, now or at the time of the Eighth Amendment's enactment.[137] Dissenting, Sotomayor wrote for herself, Kagan, and Jackson that because sleeping "is a biological necessity," and "sleeping outside is [the] only option" for the homeless, the ordinance punished the status of homelessness, and that punishment based on status should be held to violate the Eighth Amendment.[138]

VI. Adjudicating Trump

Even out of office, Donald Trump played a major part in the Court's 2023 Term across a range of issues areas—from the First Amendment trademark

[132] *Id.* at 311 (Barrett, J., concurring in part).
[133] *Id.* at 323.
[134] *Id.* at 323-24
[135] *Id.* at 324.
[136] 144 S. Ct. 2202 (2024).
[137] *Id.* at 2215.
[138] *Id.* at 2228 (Sotomayor, J., dissenting).

claims mentioned above to the proper scope of certain criminal laws to the ability of states to enforce Section 3 of the Fourteenth Amendment. Most significantly, in *Trump v. United States*, the Supreme Court considered the scope of immunity former presidents enjoy from criminal prosecution based on actions they took while in office.[139] *Trump v. United States* will likely serve as one of the seminal Supreme Court cases on the scope of executive power for years to come. It allowed the Justices to consider issues that hadn't been raised since the Watergate Era—or even earlier.

The facts stem from Special Counsel Jack Smith's prosecution of Donald Trump for actions he took after the 2020 election but before leaving office. The entire prosecution was controversial from the start, and it raised important secondary issues such as the constitutionality of Smith's appointment and whether certain statutes were used appropriately to charge crimes. But the central question revolved around whether presidents—including Trump—enjoy immunity from prosecution for actions they take in office.[140] By a 6-3 vote, in an opinion by Chief Justice Roberts, the Court said yes—so long as those actions were part of a president's official duties.[141] Roberts explained that, "under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office."[142] With "respect to the President's exercise of his core constitutional powers, this immunity must be absolute."[143] The Court said other official but non-core acts by a president are a separate question, and that it was not deciding whether presidents have only a presumption of immunity or absolute immunity for those actions.[144] But"[a]s for a President's unofficial acts," the Court said "there is no immunity."[145]

In reviewing the facts specific to the charges against Trump, the Court held that he enjoyed absolute immunity "from prosecution for the alleged conduct involving his discussions with Justice Department officials,"[146] and

---

[139] 603 U.S. 593 (2024).

[140] *Id.* at 602.

[141] *See id.* at 636-37.

[142] *Id.* at 606.

[143] *Id.*

[144] *Id*. The Court said that "the separation of powers principles . . . necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility." *Id.* at 614.

[145] *Id.* at 615 (citing Clinton v. Jones, 520 U.S. 681, 684 (1997)).

[146] *Id.* at 621.

that he enjoyed presumptive immunity related to the "indictment's allegations that [he] attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding."[147] The Court remanded to the lower courts to determine whether other crimes alleged by the special counsel fell into the official or private categories. The Court also made clear that in prosecuting a president for his unofficial actions, a prosecutor could not even introduce evidence related to his official conduct.[148]

Justice Thomas concurred in the judgment but wrote separately to question the constitutionality of the special counsel's appointment.[149] Justice Barrett also concurred in the judgment, but she did not join the part of the Chief Justice's opinion prohibiting the introduction of any evidence related to official acts for which the president enjoyed immunity.[150]

Sotomayor, joined by Kagan and Jackson, dissented, "[w]ith fear for our democracy."[151] She used strident language to essentially argue that the Court's decision "reshapes the institution of the Presidency"[152] by placing him above the law. In rebuttal, Roberts pointed out that "since the founding, no President has ever faced criminal charges—let alone for his conduct in office. And accordingly no court has ever been faced with the question of a President's immunity from prosecution. All that our Nation's practice establishes on the subject is silence."[153] Jackson also wrote a separate dissent to explain what the Court's "paradigm shift means for our Nation moving forward."[154]

In *Fischer v. United States*, by a 6-3 vote with an unusual lineup, the Court held that 18 U.S.C. § 1512(c)(2)—part of the Sarbanes-Oxley Act of 2002—could not be interpreted broadly to impose criminal liability on Joseph Fischer for his actions on January 6, 2021.[155] The first part of the statute "imposes criminal liability" on anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in any official proceeding."[156] The next part of the statute—the clause at issue in *Fischer*—

[147] *Id.* at 623.
[148] *Id.* at 630-31.
[149] *Id.* at 643 (Thomas, J., concurring).
[150] *Id.* at 650-51.
[151] *Id.* at 686 (Sotomayor, J., dissenting).
[152] *Id.* at 657.
[153] *Id*. at 639 (majority opinion).
[154] *Id.* at 686 (Jackson, J., dissenting).
[155] 603 U.S. 480 (2024).
[156] 18 U.S.C. § 1512(c)(1).

imposes the same liability on anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so."[157] The government wanted to read this second clause broadly to apply it to actions by January 6 rioters, but the Court said that it should be read more narrowly to make "it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified" in the first part of that statute.[158] In an unusual alignment, Jackson joined Roberts, Thomas, Alito, Gorsuch, and Kavanaugh to form the majority and wrote separately to emphasize her view of "why and how" the majority's interpretation "follows from the legislative purposes that this statute's text embodies."[159] The Court's decision here had a broader significance because the special counsel charged Trump with violating this same statutory provision, and the Justice Department charged many other January 6 defendants with violating it too.

Barrett, joined by Sotomayor and Kagan, dissented, saying that the majority could not "believe that Congress mean what it said."[160] While the framers of the statute did not have events like January 6 in mind, she said that courts must "stick to the text anyway," and that in her view the majority engaged in "textual backflips to find some way—*any* way—to narrow the reach" of the statute.[161]

Finally, in an unsigned (per curiam) unanimous decision, the Justices held in *Trump v. Anderson* that state officials cannot disqualify federal officeholders and candidates based on a supposed violation of Section 3 of the Fourteenth Amendment because "the Constitution makes Congress, rather than the States, responsible for" its enforcement.[162]

Here, a group of Colorado voters contended that Donald Trump had engaged in insurrection or rebellion against the United States and thus was disqualified under Section 3 of the Fourteenth Amendment from again serving as president. That provision of the Constitution provides that anyone who "having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States" then engages "in insurrection or rebellion against the same" or gives "aid or comfort to the enemies thereof" shall be disqualified from holding a wide range of offices, though it never

---

[157] 18 U.S.C. § 1512(c)(2).
[158] *Fischer*, 603 U.S. at 491.
[159] *Id.* at 499 (Jackson, J., concurring).
[160] *Id.* at 506 (Barrett, J., dissenting).
[161] *Id.*
[162] Trump v. Anderson, 601 U.S. 100 (2024).

explicitly lists the presidency or vice presidency.[163] The section goes on to say that "Congress may by a vote of two-thirds of each House, remove such a disability."[164]

The Court reasoned that, in order for someone to be disqualified from federal office pursuant to Section 3, Congress must first pass appropriate legislation under the power given to it under Section 5 of the Fourteenth Amendment to enforce that amendment's provisions. As the Court further explained, this case also raised "the question whether the States, in addition to Congress, may also enforce Section 3."[165] It concluded "that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency."[166] Accordingly, it reversed the Colorado Supreme Court's decision allowing state officials to keep Trump off of the ballot in that state.

Barrett concurred in part and concurred in the judgment. She agreed that "States lack the power to enforce Section 3 against Presidential candidates," but because she thought that principle was "sufficient to resolve this case," she would have decided "no more than that."[167] Sotomayor, joined by Kagan and Jackson, also concurred in the judgment and criticized the Court for deciding more than was necessary to resolve the case.[168]

VII. NOTABLE DENIALS

Although the Court only heard 62 cases during its 2023 Term—a much lower number of cases than it heard each term only a decade or so ago—it declined to hear several cases seeking resolution of important issues.[169] Among those were cases involving whether and when tech companies can be held accountable for their misconduct. In *Doe v. Snap*, Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari. Thomas wrote that under the law as currently understood, internet platforms can claim to be

---

[163] U.S. CONST. amend. XIV, § 3.

[164] *Id.*

[165] *Anderson*, 601 U.S. at 110.

[166] *Id.*

[167] *Id.* at 117 (Barrett, J. concurring).

[168] *Id.* at 118.

[169] *Supreme Court cases, October term 2023-2024*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2023-2024; *see also* Adam Feldman & J.S. Truscott, *Supreme Court Term 2023-2024 Stat Review (Version 1.1)*, EMPIRICALSCOTUS, July 1, 2024, https://empiricalscotus.com/2024/07/01/2023-stat-review/.

"fully responsible for their websites when it results in constitutional protections [under the First Amendment], but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit [because of Section 230 of the Communications Act] than nearly any other industry."[170] He urged the Court to "consider if this state of affairs is what § 230 demands."[171]

The Court also denied certiorari in *Tingley v. Ferguson*, though Justices Thomas, Alito, and Kavanaugh would have taken up the question of whether the State of Washington could censor counselors "who help minors accept their biological sex."[172] Washington banned so-called "conversion therapy," and a counselor licensed by the state challenged the ban on First Amendment grounds. The Ninth Circuit ruled for the government, saying the ban regulated conduct rather than speech, unlike the Eleventh Circuit which had ruled two years earlier that a similar ban *did* regulate speech.[173] Despite the circuit split and the importance of the issue, the Court denied the counselor's petition.[174]

In *Coalition for TJ v. Fairfax*, the Court declined to take a case that challenged a high-performing Virginia magnet school's admissions policies. The challengers alleged that those policies—although facially race-neutral—were designed to discriminate against Asian students. Alito, joined by Thomas, wrote a powerful dissent from the denial of certiorari.[175]

Similarly, Alito wrote a powerful statement "respecting the denial of certiorari" in *Missouri Department of Corrections v. Finney*. While he agreed that the Court should not have granted certiorari in this particular case because it was "complicated by a state-law procedural issue," he expressed concern "that the lower court's reasoning may spread and be a foretaste of things to come."[176] In *Finney*, a Missouri trial court had dismissed two jurors from a case involving a claim by a lesbian prison employee against the state Department of Corrections for discrimination under Missouri law. During voir dire,

---

[170] Doe Through Roe v. Snap, Inc., 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari).

[171] *Id.*

[172] 144 S. Ct. 33 (2023) (Thomas, J., dissenting from denial of certiorari).

[173] Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

[174] But the Court has agreed to hear a case involving this issue during its October 2025 Term. Chiles v. Salazar, No. 24-539, 2025 WL 746313 (U.S. Mar. 10, 2025).

[175] *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 218 L.Ed.2d 71 (2024) (Alito, J., dissenting from denial of certiorari).

[176] Mo. Dep't of Corr. v. Finney, No. 23-203, 2024 WL 674657 (2024) (Alito, J., statement respecting denial of certiorari).

the jurors honestly answered questions about their religious views, homosexuality, and marriage, and Finney's counsel moved to have them struck from the jury for cause—even though each juror said they "could follow the law" as required.[177] Alito wrote that because these jurors had been prohibited from serving based on their religious beliefs, their fundamental rights were implicated. He believed that the trial court's decision "exemplifies the danger that [he] anticipated in *Obergefell v. Hodges*, . . ., namely, that Americans who do not hide their adherence to traditional religious beliefs about homosexual conduct will be 'labeled as bigots and treated as such' by the government."[178]

Justice Thomas also issued a statement related the Court's decision not to hear *Harrel v. Raoul*. Unlike Justice Alito who would have granted the petition, Thomas wrote that the "Court is rightly wary of taking cases in an interlocutory posture."[179] But, he said, he hopes it "will consider the important issues presented by these petitions"—namely, whether Illinois's ban on "assault weapons" (including AR-15s) violates the Second Amendment—"after the cases reach final judgment."[180]

Thomas and Gorsuch would have granted the petition in *Allstates v. Su* challenging Congress's grant of authority to the Occupational Safety and Health Administration (OSHA) to "enact and enforce any workplace safety standards that it deems 'reasonably necessary or appropriate'" as an unconstitutional delegation of authority by Congress.[181] And finally, Gorsuch issued a lone dissent from the denial of certiorari in *Cunningham v. Florida*, saying he would have agreed to hear Cunningham's challenge to Florida's use of six-person rather than twelve-person juries in most felony cases.[182]

VIII. Conclusion

The Supreme Court's 2023 Term continued the recent trend of the Court issuing important decisions in a number of areas each Term. Its separation of powers decisions in the areas of administrative law and presidential immunity will likely be cited for years to come, and they will play a major role in debates

---

[177] *Id.*

[178] *Id.*

[179] Harrel v. Raoul, 144 S. Ct. 2491 (2024) (Thomas, J., statement respecting denial of certiorari).

[180] *Id.*

[181] Allstates Refractory Contractors, LLC v. Su, 144 S. Ct. 2490 (2024) (Thomas, J., dissenting from denial of certiorari) (citing 29 U.S.C. §§ 652(8), 655(b)).

[182] 144 S. Ct. 1287 (2024) (Gorsuch, J., dissenting from denial of certiorari).

about the proper allocation of power among the branches of the federal government.

By the same token, some of the issues left unresolved in the election context, the delegation of power context, and other contexts will likely be back at the Court soon. Indeed, the Court has already agreed to take up the professional speech issue it declined to hear in the Term in *Chiles v. Salazar*, which will likely be heard in fall 2025. And debates among the Justices about whether and how text, history, and tradition should apply to discrete areas of the law—especially in areas like free speech where that approach has not been common for the last half century—are likely to continue unabated. Of course, a change in personnel at the Court could affect the contours of those debates too.

Setting aside those future debates, it's clear that the Court's 2023 Term was one for the ages as courts, Congress, the executive branch, and we the people continue to grapple with important questions fundamental to our ability to govern ourselves according to our constitutional system of government.