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WEIL'S SCOTUS TERM IN REVIEW

By Appeals & Strategic Counseling
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INTRODUCTION

Weil's Appellate & Strategic Counseling group welcomes you to **Weil's SCOTUS Term in Review**. Here, we summarize and analyze the cases from the 2024 Supreme Court Term that are most germane to our clients' businesses.

Although relatively quiet for business cases, this Term included some high-profile decisions, including a number regarding executive action taken by President Trump in his first few months in office. While the Court has in large part upheld (at least on an interim basis) President Trump's initiatives, there are some notable outliers. And among those cases, one – *Trump v. CASA* – has significant implications for many cases brought against the government, and potentially for private litigation as well.

Beyond those headline-grabbing cases, the Court released decisions relevant to corporate speech rights, administrative law, and a number of other topics of general business interest. While less politically and legally significant than some of the Court's orders on executive power, these cases nonetheless may have important ramifications for a variety of legal issues.

CASES REVIEWED

SEPARATION OF POWERS AND DUE PROCESS

It took little time for President Trump's policies and executive orders to reach the Supreme Court. Several cases concerning the authority of the Executive to deport immigrants and the processes attendant to such deportations drew national attention. Among the most notable:

- In *Noem v. Abrego Garcia*, the Court issued a curt decision affirming a district court order directing the Administration to "facilitate" the return of Kilmar Armando Abrego Garcia, who had been incorrectly removed to El Salvador and detained there. The Court remanded the case with instructions to the district court to clarify some aspects of the order. Despite some further resistance from the Administration on remand, Abrego Garcia was ultimately returned to the United States.
- In *Trump v. J.G.G.*, the Court held that Venezuelan nationals challenging their detention and impending removal on the basis of alleged affiliation with Tren de Aragua could only challenge their threatened removal in a habeas proceeding, rather than in a civil action brought in Washington, D.C. The Court clarified, however, that such detainees are entitled to judicial review (in an appropriate proceeding) of their detention and removal.
- In *A.A.R.P. v. Trump*, the Court enforced the right to judicial review discussed in *J.G.G.* Venezuelan nationals had filed a class habeas proceeding seeking injunctive relief against their imminent removal, arguing in part that they lacked an opportunity for adequate judicial review. After a mad scramble in the lower courts, the Supreme Court enjoined the class members' removal until their due process claims could be adjudicated by the district court.
- In *Department of Homeland Security v. D.V.D.*, the Court stayed a lower court preliminary injunction prohibiting the Administration from removing members of a putative class to a "third country" (i.e., a country with which an immigrant has no connection) without notice and opportunity to be heard. The Court did not offer its reasoning, and three Justices (Sotomayor, Kagan, Jackson, JJ.) dissented.

In a string of other cases, various litigants challenged the Administration's efforts at withdrawing federal funding (*Department of State v. AIDS Vaccine Advocacy Coalition; Department of Education v. California*) and restructuring administrative agencies (*Office of Personnel Management v. American Federation of Government Employees; Trump v. American Federation of Government Employees; McMahon v. New York*). Although notable for their immediate effects and political significance, these cases have limited direct relevance for private or commercial litigation.

Two cases from the Court, however, merit special discussion. The first (*Trump v. CASA*) resolved a longstanding debate about the propriety of universal injunctions against government action, and the second (*Trump v. Wilcox*) portends the likely end of decades' old precedent that has been the subject of repeated criticism over the years.

Trump v. CASA: Court Puts a Stop to Universal Injunctions

Held: Universal injunctions likely exceed the equitable authority given to federal courts by Congress in the Judiciary Act of 1789 because they are not sufficiently analogous to any of the equitable remedies available at the time of the founding (Barrett, J.).

This case arose in response to President Trump's executive order purporting to end birthright citizenship, No. 14160, *Protecting the Meaning and Value of American Citizenship*. Several individuals and States challenged the order in various district courts, arguing that it violated the Fourteenth Amendment's Citizenship Clause and the Nationality Act of 1940. After concluding that the order was likely unlawful, the district courts in these cases entered universal injunctions preventing executive officials from enforcing the order against anyone in the country. Those injunctions were uniformly affirmed on appeal. The government sought emergency relief from the Supreme Court. The Court did not pass on the merits of the order purporting to end birthright citizenship; instead, the Court addressed only the propriety of issuing universal relief in the absence of a certified class.

"A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power." (Barrett, J.)

Universal injunctions, sometimes called "nationwide" injunctions, have become a hot legal topic in the last decade. A universal injunction binds the government's conduct toward the entire public rather than to any particular named party. In recent years, district courts have often issued universal injunctions in high-stakes litigation challenging federal statutes or executive actions. This practice has prompted criticism by every recent Administration (Obama, Trump I, Biden, and Trump II) – as well as by several Justices of the Supreme Court – that individual district court judges lack such sweeping power.

In a 6-3 opinion authored by Justice Barrett, the Court held that federal district courts generally lack the power to issue "universal" injunctions. Justice Barrett reached that conclusion by looking to federal courts' equitable jurisdiction. Congress, through the Judiciary Act of 1789, gave the federal

courts jurisdiction over all cases "in equity," which encompasses only the remedies traditionally issued by courts of equity at the time of our country's founding. Justice Barrett explained that neither the universal injunction nor any other analogous form of equitable relief was available at that time. Rather, suits and remedies were "party specific" and could not bind non-parties. Federal courts in the early days of the republic frequently declined to extend equitable relief beyond the parties, and universal injunctions did not arise until sometime in the twentieth century. The Court concluded that because the universal injunction has no "founding-era antecedent," Congress did not grant the federal courts jurisdiction to issue such a remedy through the Judiciary Act of 1789.

The Court clarified, however, that there are some circumstances in which relief that goes beyond the parties to a lawsuit may be justified. First, the Court confirmed that broad injunctive relief may be available to a class certified pursuant to Federal Rule of Civil Procedure 23. Second, the Court acknowledged that injunctive relief may sometimes incidentally benefit non-parties if necessary to provide the named plaintiff with complete relief. In light of the second of these exceptions, the Court remanded to the lower courts to resolve whether nationwide relief was necessary to provide complete relief to New Jersey and the other States.

Justice Thomas, joined by Justice Gorsuch, filed a concurrence, emphasizing that the complete-relief principle "operates as a ceiling" preventing courts from awarding relief beyond what is necessary to redress the plaintiffs' injuries. Justice Alito, joined by Justice Thomas, also filed a concurrence, noting that the Court did not decide whether States have third-party standing to assert the Citizenship Clause claims of their residents, or decide the propriety of class certification for nationwide classes. Justice Alito cautioned that courts still need to adhere to the rigorous procedural requirements for certifying classes under Rule 23. Justice Kavanaugh echoed this point in a separate concurrence, where he also explained why it is critical for the Supreme Court to hear and resolve cases on issues of significant national importance. Justice Sotomayor, joined by Justices Kagan and Jackson, dissented. Justice Sotomayor argued that the executive order is patently unlawful and that a universal injunction enjoining its enforcement in toto is an appropriate remedy in this case. Justice Jackson filed a separate dissent, emphasizing that allowing the Executive branch to enforce unlawful orders against anyone who has not sued for relief threatens the rule of law.

The decision puts to rest a long-running debate about the propriety of universal injunctions. It has broad repercussions for challenges to federal programs, which in recent years have often triggered universal injunctions binding the government's conduct towards numerous non-parties. The decision will likely dramatically affect litigation seeking to strike down executive action in its entirety, as the procedural requirements of class-action litigation make it quite cumbersome.

At the same time, parties have quickly embraced the Court's recognition that Rule 23 remains a viable mechanism for broad relief. After remand, several plaintiffs amended their claims to seek classwide relief, and they thereafter sought provisional certification and a classwide preliminary injunction against the Order. Several courts have now issued or reissued preliminary injunctions against the Order since the Court's decision, setting up a likely return to the Supreme Court in the near future. And, importantly, the Court did not resolve whether courts may have power under the Administrative Procedure Act to vacate unlawful agency action nationwide.

Trump v. Wilcox: "For Cause" Removal in the Crosshairs

Held: Members of the National Labor Relations Board and the Merit Systems Protection Board likely exercise executive power and an injunction against their removal by the President raises a significant risk of harm.

"Officers of the United States," as defined by the Constitution, generally are removable by the President "at will." In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court recognized an exception to that rule for bipartisan, multi-member administrative bodies, allowing Congress to protect the heads of such bodies from removal except "for cause." In the past several years, the Supreme Court has chipped away at that precedent and strongly signaled an interest in overruling it in an appropriate case. Shortly after taking office, President Trump teed the issue up by dismissing certain executive officers protected by statute from "at will" removal and prompting those officers to file suit to retain their positions.

In *Wilcox*, the lower courts had granted preliminary injunctive relief to members of the National Labor Relations Board and the Merit Systems Protection Board whom President Trump had removed without cause. Specifically, the courts ordered those members to be restored to their positions pending completion of the litigation. The rationale of the lower courts was that while the Court has recently questioned *Humphrey's Executor*, it has not yet overruled it, and so lower courts are bound to apply its general rule allowing for "for cause" removal protections for multi-member administrative bodies.

In a two-page, unsigned order, the Supreme Court granted a stay of that preliminary injunction, thus reinstating President Trump's removal of those Officers from their positions. The Court explained its view that "the Government is likely to show that both the NLRB and MSPB exercise considerable executive power," but declined to decide whether those agency heads fall within the *Humphrey's Executor* exception. Instead, the Court stated that resolution of the applicability of any exception is "better left for resolution after full briefing and argument" and that "the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." And finally, the Court signaled that its ruling did not implicate the removal protections for the Federal Reserve's Board of Governors, which "is a uniquely structured, quasi-private entity."

Justice Kagan dissented, joined by Justices Sotomayor and Jackson. She objected that the emergency docket should not be used to overrule or revise existing law, including *Humphrey's Executor*. Under *Humphrey's Executor*, Justice Kagan argued, the case before the Court was an easy one and the President acted outside of his lawful authority in removing the members without cause. The Court's stay order, Justice Kagan urged, was "nothing short of extraordinary," effectively "allow[ing] the President to overrule *Humphrey's* by fiat."

The *Wilcox* order – as well as another emergency order in *Trump v. Boyle* that afforded the same relief – strongly signals that the Court is poised to strike down *Humphrey's Executor* in its entirety, or at least substantially narrow it. While the Court stopped short of weighing in on the critical merits question, as Justice Kagan pointed out, the Court's order can only be read as at least implicitly ratifying President Trump's view of the precedent. A case on the merits raising this issue is surely headed to the Supreme Court in the near future.

FIRST AMENDMENT

Free Speech Coalition v. Paxton: Age Restrictions for Adult Content Survive Intermediate Scrutiny

Held: Age verification requirements for websites with adult content do not violate the First Amendment and are subject to intermediate scrutiny because they only incidentally burden the First Amendment rights of adults (Thomas, J.).

Texas law H.B. 1181 requires certain commercial websites that publish sexually explicit content to verify that individuals attempting to access the website are at least 18 years old. That age verification must use either government-issued identification or "a commercially reasonable method that relies on public or private transactional data," such as proof of a mortgage. Websites that knowingly fail to do so face fines of up to $10,000 per day and an additional $250,000 if any minors access sexually explicit content as a result of the violation. Plaintiffs sued to block the statute, arguing that the law is facially unconstitutional under the First Amendment's Free Speech Clause because it burdens adults' right to access speech protected under the First Amendment.

In a 6-3 ruling, the Court held that Texas's law is subject to intermediate scrutiny under the First Amendment and, under that standard, is constitutional. The Court determined that intermediate scrutiny applied to Texas's law because the law only incidentally burdens adults' First Amendment right to access sexually explicit materials. Strict scrutiny – which requires a State to employ the least restrictive means to achieve a compelling state interest and is "the most demanding test known to constitutional law" – is reserved for direct infringement of First Amendment rights, such as complete bans on protected speech. On the other hand, rational basis review, which simply requires the State to provide a reasonable explanation for the law, applies to laws that do not implicate fundamental constitutional rights at all. Texas's law, the Court concluded, falls somewhere in the middle of these two extremes, thus requiring Texas to show only that the law advances an important governmental interest and is sufficiently tailored to that interest.

Under that standard, the Court held that Texas's age-verification law passes constitutional muster. It recognized that preventing minors from accessing sexual content is an important, even a compelling, governmental interest. It also held that Texas's law was sufficiently tailored to that interest, as it does not burden substantially more speech than is required to further those interests. Requiring age verification effectively prevents minors from accessing content that is obscene to them while also allowing adults full access to that content.

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented. She argued that strict scrutiny, not intermediate scrutiny, should apply to Texas's law because the law regulates speech based on its content and directly burdens adults' First Amendment right to access the regulated speech. Justice Kagan noted that all parties agree that Texas has a compelling interest in shielding children from the sexually explicit material the law targets. Unlike age restrictions for liquor, lottery ticket, and firework sales cited by the majority, however, the material restricted here is protected by the First Amendment. Justice Kagan therefore urged that the case should have been remanded for evaluation under the proper standard.

The Court's decision is likely to embolden other States to pass similar laws (as some states already have). Operators of websites with sexually explicit materials will therefore have to increasingly confront a patchwork of state laws and decide whether to solicit identifying information from visitors that could compromise their privacy or whether to withdraw from operating in those states with age-verification laws. The growing debate over regulation of such websites is therefore likely to continue into the future.

TikTok v. Garland: No Relief for TikTok from Congressional Ban

Held: A statute making it unlawful for companies in the United States to provide services to distribute, maintain, or update TikTok so long as it is under control of a Chinese company does not violate the First Amendment (per curiam).

In 2024, Congress passed the Protecting Americans from Foreign Adversary Controlled Applications Act, effectively banning TikTok in the United States on the basis of concerns about its ownership by a Chinese company. Although the effective date of the legislation has been deferred indefinitely, TikTok (as well as its corporate parent and several users) promptly filed suit and sought to strike down the statute, arguing that it impeded on TikTok's First Amendment rights. The D.C. Circuit held that the statute did not violate the First Amendment rights under any of the applicable standards for evaluating restrictions on speech.

The Supreme Court affirmed. The Court first considered whether the statute is even

subject to First Amendment scrutiny, noting that it is not clear whether the statute "itself directly regulates protected expressive activity, or conduct with an expressive component," because the statute instead only regulates TikTok's relationship with its corporate parent. The Court, however, ultimately did not reach the issue, instead assuming, without deciding, that the statute implicates the First Amendment.

The Court then analyzed the statute under the First Amendment framework. First, the Court concluded that the challenged provisions are facially content neutral – that is, they apply regardless of the specific content TikTok makes available on its platform – and are supported by content-neutral justifications related to China's access to sensitive user data. Because the statute is content neutral – and does not single out any particular speaker – the Court concluded that intermediate, as opposed to strict, scrutiny applied.

Under intermediate scrutiny, a law burdening speech is constitutional if it advances "important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." The Court concluded that the statute – as applied to TikTok – satisfies both of those criteria. Congress has "an important and well-grounded interest in preventing China from collecting the personal data of tens of millions of U.S. TikTok users." And the statute, the Court concluded, is "sufficiently tailored to address the Government's interest in preventing a foreign adversary from collecting vast swaths of sensitive data about the 170 million U.S. persons who use TikTok."

Justice Sotomayor concurred in the judgment, contending that the statute clearly does implicate First Amendment rights, but agreeing that the statute survives intermediate scrutiny. Justice Gorsuch filed a separate concurrence, stating, among other things, that while he was not confident the statute did not give rise to strict scrutiny, he believes the statute passes muster even under that higher standard.

While the decision confirms the significant latitude afforded to Congress when making decisions about how best to further national security interests, the Court left unresolved the most crucial question about whether the First Amendment is implicated at all. The nexus between free speech rights and regulation of social media platforms remains an important, but elusive, concept in modern First Amendment jurisprudence. Although the Court offered some perspectives on the issue, it did not provide firm guidance on how lower courts should proceed in future cases.

Notably, although the law was passed in 2024, President Trump has repeatedly deferred the effective date of the legislation – although his authority to do so is in question, as the statute gives the President the power only to defer the effective date by 90 days once. It remains to be seen whether this ban will ever in fact go into effect.

ADMINISTRATIVE LAW

McLaughlin Chiropractic Associates v. McKesson Corporation: Agency Interpretive Orders Not Binding in Private Litigation

Held: The Hobbs Act's exclusivity provision does not prevent district courts from considering challenges to the FCC's statutory interpretations (Kavanaugh, J.).

This case involved unsolicited advertisements that a McKesson business unit sent to McLaughlin Chiropractic via online fax services. The plaintiff alleged that those advertisements violated the Telephone Consumer Protection Act (TCPA), designed to curb spam telephone calls. Six years into the litigation, the Federal Communications Commission (FCC) issued an interpretive order construing the TCPA to exclude "online fax service[s]" from the definition of "telephone facsimile machine." If this interpretation were accepted, McLaughlin and the putative class would have no claim under the TCPA.

The Hobbs Act allows parties to seek pre-enforcement review within 60 days of an interpretive FCC order and gives the courts of appeals exclusive jurisdiction to hear such suits. McLaughlin did not challenge the FCC's interpretive order through the Hobbs Act, and instead simply argued in its litigation against McKesson that the interpretation was wrong and should not control. The lower courts ruled against McLaughlin, holding that the only avenue for challenging an FCC interpretive order is through the 60-day pre-enforcement window.

The Supreme Court reversed. The Court held that the Hobbs Act's exclusivity provision does not prevent district courts from considering challenges to the FCC's statutory interpretations during private or public enforcement actions. The Court found that unlike some other statutes, the Hobbs Act is silent as to whether parties can challenge agency statutory interpretations during enforcement proceedings. When a statute is silent, the Court held the default rule is that courts must independently determine whether an agency's statutory interpretation was correct, even if the window for pre-enforcement review has passed. The 6-3 majority downplayed the dissent's concerns that the Court's holding would result in uncertainty and conflicting orders.

This case follows in the footsteps of *Loper Bright* from last Term – overruling the longstanding doctrine of *Chevron* deference – and further strengthens courts' independent authority to interpret the law, even where an administrative agency has issued a formal order interpreting a statute. Entities facing adverse regulatory action should carefully consider the strength of the agency's legal analysis and, when assessing a potential judicial challenge, should bear in mind that a federal court is unlikely to give much (if any) deference to an agency's view of the law. The *McLaughlin* ruling affects certain actions of the FCC, USDA, and DOT, among other smaller agencies.

FCC v. Consumers' Research: Supreme Court Declines Opportunity to Revive the Nondelegation Doctrine

Held: The Universal Service Fund (USF), a program administered by the FCC that provides telecommunications services to underserved communities, does not violate the nondelegation doctrine (Kagan, J.).

Congress established the USF under Section 254 of the Telecommunications Act of 1996 to facilitate the provision of telecommunications services to certain underserved communities. Section 254 requires every telecommunications carrier providing interstate services to contribute to the USF and establishes six principles on which the FCC is required to base its universal service policies. The FCC has issued regulations authorizing the Universal Service Administrative Company (USAC), a private entity, to produce financial estimates that are used to determine the quarterly amounts that providers must pay to fund the USF's services.

Consumers' Research challenged this framework, arguing that Congress had improperly delegated legislative power to the FCC without an "intelligible principle" and that the FCC had in turn unconstitutionally delegated to a private entity, the USAC, the authority to determine the required contribution amounts that providers must pay.

In a 6-3 opinion authored by Justice Kagan, the Supreme Court upheld the USF funding scheme. Applying the Court's longstanding "intelligible principle" test, the Court found that Section 254 adequately constrained the FCC's discretion. In the majority's view, Section 254 limits the FCC to collecting only what is sufficient to support universal service programs while requiring the FCC to consider specific criteria, including affordability, usage, and necessity for public health, education, and safety. While the Court acknowledged that Section 254 did provide the FCC with some policy discretion, the Court explained that "that kind of discretion – balancing or no – does not raise a constitutional problem: A degree of policy judgment . . . can be left to those executing or applying the law." The majority also rejected the challengers' nondelegation argument against the USAC by concluding that the USAC played only an "advisory role" in setting contribution rates and remained "broadly subordinate" to the FCC, because the FCC ultimately retained the decision-making authority to set rates.

Justice Gorsuch dissented, joined by Justices Thomas and Alito. He argued that Section 254 represents a broad and unconstitutional transfer of the taxing power to an executive agency. His dissent disputed that the law imposes sufficient qualitative limits on the USF to supply an intelligible principle, instead effectively providing the FCC with a "blank check" to expand services.

"[T]hat kind of discretion – balancing or no – does not raise a constitutional problem: A degree of policy judgment … can be left to those executing or applying the law." (Kagan, J.)

In a notable concurrence, Justice Kavanaugh defended the Court's ruling in part by pointing to the Supreme Court's recent decisions in *Loper Bright Enterprises v. Raimondo* and *West Virginia v. EPA*, which together make clear that executive discretion is constrained "by the scope of Congress's authorization and by any restrictions set forth in [the] statutory text." Justice Kavanaugh seemed to suggest that the Court's articulation of other limitations on executive discretion is sufficient to guard against the concerns the nondelegation doctrine is meant to address.

Some Court watchers were expecting the Court to crack down on the nondelegation doctrine, particularly in light of *Gundy v. United States*, a nondelegation case from 2019 in which Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. But there was no interest from the majority in *Consumers' Research* to reevaluate the doctrine.

Consumers' Research indicates that the Court is still calibrating its view of the administrative state and is not invariably limiting agency authority. It remains to be seen, however, whether the Court will enforce the nondelegation doctrine with renewed rigor in closer cases. There are active nondelegation challenges to other federal statutes, as well as a pending challenge to the validity of President Trump's tariffs. Some combination of these cases is likely to find its way to the Supreme Court.

Diamond Alternative Energy, LLC v. EPA: Supreme Court Clarifies Standing Requirements for Indirectly Regulated Parties

Held: Liquid fuel producers have Article III standing to challenge the Environmental Protection Agency's (EPA) approval of California's vehicle emission standards for automakers (Kavanaugh, J.).

The Clean Air Act allows California to seek EPA approval for more stringent vehicle emissions standards than federal law imposes. After the EPA reinstated California's 2012 emissions rules in 2022, several fuel producers challenged the decision in the D.C. Circuit. The challengers argued that the regulations would reduce demand for liquid fuels, harming their businesses. The D.C. Circuit dismissed the case, concluding that the plaintiffs had not satisfied the redressability requirement

of Article III standing. The court found it speculative whether automakers would change their production behavior if the regulations were vacated.

In a 7-2 opinion authored by Justice Kavanaugh, the Supreme Court reversed the D.C. Circuit's decision. In evaluating redressability, the Court emphasized that the fuel producers needed to establish only "a predictable chain of events" likely to follow judicial relief. Relying on "commonsense economic principles," the Court found it predictable that invalidating the challenged regulations would result in at least some increased fuel sales. The Court explained that California's emissions standards would force automakers to produce vehicles that use significantly less liquid fuels, and were thus likely to cause economic injuries to the fuel producers in the form of reduced fuel sales that would be redressable through a decision invalidating the regulations. The Court underscored that the fuel producers were not required to provide specific evidence, such as expert affidavits or declarations from automakers, to establish standing.

Diamond Alternative clarifies that there is no heightened Article III standing requirement for indirectly regulated parties challenging agency action. Going forward, litigants should consider whether there are any analogous "commonsense economic principles" that may help establish standing in agency litigation. As a practical matter, this decision will be especially helpful for indirectly regulated parties (such as upstream or downstream market participants) considering their own challenges to agency action when a directly regulated party chooses not to pursue a challenge.

Riley v. Bondi: Final Orders of Removal Clarified

Held: (1) Board of Immigration Appeals (BIA) orders denying deferral of removal in "withholding-only" proceedings are not "final order[s] of removal" under the Immigration and Nationality Act (INA); and (2) the 30-day filing deadline for a petition for judicial review of a "final order of removal" is a claims-processing rule, not a jurisdictional requirement.

In January 2021, petitioner Pierre Riley received notice that the Department of Homeland Security had declared him deportable to his home country of Jamaica. Riley challenged his removal in immigration court, expressing fear of being killed upon returning to Jamaica. An immigration judge initially granted withholding of removal relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). However, in late May 2022, the BIA reversed the decision and denied relief. Riley petitioned the Fourth Circuit for review four days after the BIA's decision. Over the objection of both Riley and the U.S. government, the Fourth Circuit held that an order denying CAT relief is not a "final order of removal" and dismissed Riley's appeal for lack of jurisdiction because he had not petitioned for review of the underlying final administrative removal order within 30 days' of its issuance.

In a 5-4 opinion, the Supreme Court vacated and remanded. In the first part of the opinion, Justice Alito, joined by Chief Justice Roberts as well as Justices Thomas, Kavanaugh, and Barrett, held that a BIA order denying deferral of removal under CAT is not a "final order of removal." As Justice Alito explained, the "statutory text speaks directly and clearly to this question" because, under the statutory scheme, an "order of removal" is deemed to refer to the "order of deportation," and the "order of deportation" is one that "conclud[es] that the alien is deportable or ordering deportation." Riley's final administrative removal order was the executive branch's determination that he was deportable, and it became final immediately upon issuance. Relying on the Supreme Court's earlier decisions in *Nasrallah* and *Guzman Chavez*, Justice Alito reasoned that the BIA's subsequent denial of CAT relief "is not a final order of removal and does not affect the validity of a previously issued order of removal or render that order non-final."

In the second part of the opinion, the full Court held that the 30-day filing deadline for petitions for judicial review of final orders of removal is not jurisdictional. Justice Alito observed that the Court's decisions over the past two decades support the conclusion that the "demanding requirement" for jurisdictional provisions is not met in the INA, because the relevant provision "imposed requirements on litigants, not the courts," and did not reference a court's jurisdiction or include any directive language for courts. Importantly, because the U.S. government declined in this case to seek to enforce the 30-day time limit for filing a petition for review, the Court's decision allows Riley's case to proceed on remand.

In a concurring opinion, Justice Thomas agreed with the majority in full but wrote separately to question whether the Fourth Circuit ever had jurisdiction over the suit initially.

In a partially dissenting opinion – echoing an *amicus* brief authored by Weil on behalf of several administrative law professors – joined in substantial part by Justices Kagan, Gorsuch, and Jackson, Justice Sotomayor argued that Congress provided both for judicial review of orders denying CAT relief and their underlying removal orders; the only way to properly review both is to hold that removal orders do not become final until withholding-only proceedings are complete.

Relevant to petitioners seeking relief from review of a denial of CAT relief, the decision erects a potentially significant procedural barrier to securing such relief. Although the government in this case waived the 30-day time limit for filing a petition for review, it may not do so in future cases. Petitioners will therefore need to file a preemptive petition for review upon receipt of an order of removal and supplement that petition after administrative appeals for CAT relief are exhausted. This procedure is likely to frustrate many petitioners' efforts to obtain judicial relief from an adverse CAT order.

More broadly, this case represents another example of the Court's strict textualist

statutory interpretation approach, even where the result appears likely to lead to unworkable or unusual outcomes further down the line. It is also notable that while the Court has consistently pushed toward more aggressive judicial review of administrative action, in this case, the Court adopted a reading of the statute that is likely to significantly narrow the scope of CAT orders reviewable in federal court.

FDA v. R.J. Reynolds Vapor Co.: Tobacco Retailers May Seek Review of FDA Marketing Request Denials

Held: Retailers who would sell a tobacco product if not for the Food and Drug Administration's (FDA) denial of the manufacturer's request to market the product are "adversely affected" by the FDA's denial and therefore may seek judicial review of the FDA's decision under the Family Smoking Prevention and Tobacco Control Act (TCA) (Barrett, J.).

The TCA requires manufacturers to apply for FDA approval before marketing any "new tobacco product." If the FDA denies such an application, "any person adversely affected" by the FDA's decision may petition for judicial review – but they must do so either in the D.C. Circuit or their home circuit. In *R.J. Reynolds*, the FDA denied R.J. Reynolds Vapor Co.'s (RJR Vapor) request to market certain e-cigarette products. RJR Vapor is based in the Fourth Circuit, but rather than file suit there, RJR Vapor joined forces with Fifth Circuit-based tobacco retailers and sought review of the FDA's denial in the Fifth Circuit, which is generally considered a favorable venue for challenging agency actions. The FDA moved to transfer the case to either the D.C. Circuit or the Fourth Circuit. It argued that only the applicant itself – here, RJR Vapor – is "adversely affected" by a TCA marketing denial, and therefore the retailers had no right to review and no right to file in the Fifth Circuit. The Fifth Circuit disagreed and denied the FDA's motion.

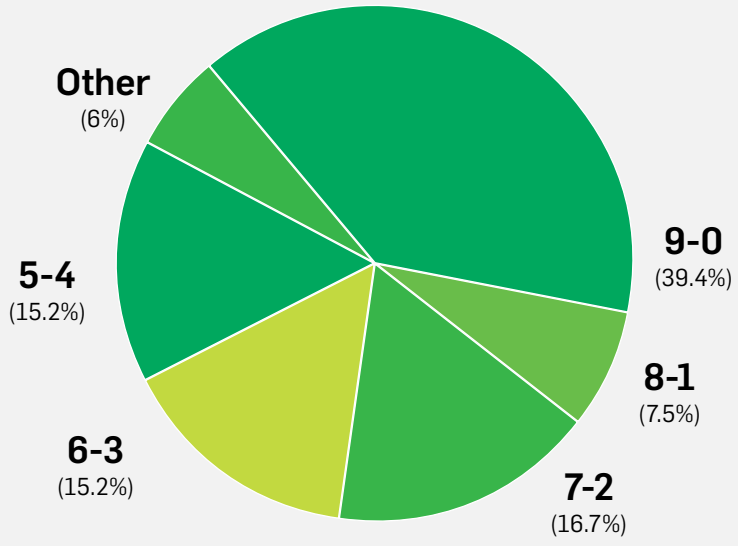
The Supreme Court affirmed. Writing for the 7-2 majority, Justice Barrett explained that "adversely affected" is a term of art in administrative law, appearing most notably in the Administrative Procedure Act (APA), which affords judicial review to anyone "adversely affected or aggrieved by agency action within the meaning of the relevant statute." The Supreme Court has interpreted this to permit anyone to seek review who even "arguably" falls within the zone of interests implicated by the statute in question. Parties therefore can sue unless their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." And there is a presumption that "adversely affected" bears that same broad meaning when used in statutes other than the APA.

The Court concluded that this interpretation of "adversely affected" applies to the TCA. It rejected the FDA's contention that, because retailers play no role in the TCA application process and the TCA expressly limits certain other relief to applicants, the retailers could not seek review of the FDA's decision. Rather, the Court reasoned that if Congress had wanted to similarly limit review of marketing denials, it would have specified that only "applicants" are entitled to review, not "any person adversely affected." And the retailers were "adversely affected" by the FDA's denial within the meaning of the TCA, as it prevented them from selling the

BY THE NUMBERS

With six Republican-appointed Justices and three Democrat-appointed Justices, Court watchers have been tracking the prevalence of 6-3 decisions. This Term, however, saw a noticeable *downturn* in the prevalence of 6-3 decisions, from 34.4% last Term to 15.2% this Term. This Term also saw a decrease (albeit a modest one) in the prevalence of unanimous decisions, from 41% from last Term to 39.4% this Term. That continues a trend from the past several years.

VOTE SPLIT BY CASE



products at issue without risking various sanctions. The Court declined to consider the FDA's argument that each petitioner in a joint petition for review under the TCA must independently establish venue, because the FDA had not raised that argument below.

For now, the Court's decision greenlights a raft of petitions for review that e-cigarette manufacturers have jointly filed in the Fifth Circuit with Fifth Circuit-based retailers. Going forward – whether in *RJR Vapor* itself or another case – the FDA will likely renew its argument that all parties to a joint petition must establish venue. At oral argument, however, Justice Gorsuch suggested that issue may have little practical impact: Even if out-of-circuit applicants like RJR Vapor cannot jointly challenge marketing denials in the Fifth Circuit with local retailers, they could instead simply fund the retailers' litigation in that (or another) circuit. In any event, and beyond the TCA itself, the Court's opinion affirms that impacted third parties may often obtain judicial review of agency action when the statute at issue affords such review to those "adversely affected."

DISCRIMINATION AND EQUAL PROTECTION

United States v. Skrmetti: Ban on Gender-Affirming Care Upheld

Held: Tennessee's ban against gender-affirming care for minors does not violate the Equal Protection Clause (Roberts, C.J.).

In 2023, Tennessee passed a law restricting the availability of gender-affirming treatment – that is, treatment intended to help an individual address gender dysphoria – for minors. The legislature found that certain treatments, including the use of puberty blockers and hormones, may have long-term effects for minors and that minors lack the maturity to understand the consequences of those effects. The statute does not prevent the use of puberty blockers and hormones to treat conditions other than gender dysphoria. A group of transgender minors, their parents, and a doctor filed suit seeking to enjoin the statute under the Equal Protection Clause as to the ban against the administration of puberty blockers and hormones. The Sixth Circuit denied preliminary injunctive relief.

The Supreme Court affirmed in a 6-3 decision. Writing for the majority, Chief Justice Roberts first reasoned that the statute does not discriminate on the basis of sex or transgender status. Instead, the statute classifies on the bases of age (i.e., individuals under the age of 18) and medical use (i.e., treatment for gender dysphoria). Such classifications, the Court asserted, are subject only to rational basis review (the lowest standard for constitutionality under the Equal Protection Clause). The Court rejected the argument that its prior decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020) – which interpreted Title VII to prohibit discrimination on the basis of sexual preference or gender identity – compelled a different result, adhering again to the reasoning that the statute discriminates only on the basis of age and medical use, and not any impermissible characteristics.

Applying rational basis review, the Court held the statute is constitutional. The Court noted the findings of the Tennessee legislature regarding the potentially harmful effects of gender-affirming care for minors and the availability of less invasive approaches to addressing gender dysphoria. And the Court declined to second-guess the rationality of Tennessee's approach for addressing those risks and alternatives.

Justice Thomas concurred and wrote separately to address additional arguments in support of the law he found persuasive. Justice Barrett, joined by Justice Thomas, concurred and wrote separately to opine that transgender status is not a suspect class giving rise to intermediate scrutiny. Justice Alito concurred, arguing that although there is a strong argument that the law classifies on the basis of transgender status, he also does not believe transgender status is a suspect class.

Justice Sotomayor dissented, joined by Justices Kagan and Jackson. The key dispute between the majority and the dissent was whether the statute discriminated on the basis of sex or transgender status, thereby triggering intermediate scrutiny. According to the dissent, the statute discriminates on the basis of sex because "[m]ale (but not female) adolescents can receive medicines that help them look like boys, and female (but not male) adolescents can receive medicines that help them look like girls." The dissent further urged that the statute discriminates on the basis of transgender status because it prohibits the administration of treatment to help minors identify with a gender identity inconsistent with their sex. Thus, in the dissent's view, the statute triggers intermediate scrutiny, and Justices Sotomayor and Jackson discussed at a high level how that analysis might play out. Justice Kagan filed a separate dissent clarifying that she would not opine (even preliminarily) on the application of intermediate scrutiny to the statute.

The case provides an interesting example of how a jurist's perspective or framing of an issue can affect the result. The majority viewed the statute as nondiscriminatory because it prohibited minors' use of puberty blockers and hormones for a specified medical treatment, irrespective of the minor's sex or gender identity. The dissent viewed the statute as discriminatory because a male minor could take hormones to appear more like a boy, but a female minor could not take the same hormones to appear more like a boy. Constitutional doctrine does not provide a clear answer as to which of those two perspectives is the correct approach, and the Court is likely to have more disagreements in the future about how to frame a statute under review.

Ames v. Ohio Department of Youth Services: No Special Test for Majority Discrimination

Held: Plaintiffs claiming Title VII discrimination based on their membership in a majority demographic group do not face a higher evidentiary burden than plaintiffs belonging to minority groups (Jackson, J.).

In *Ames*, a heterosexual woman sued her employer, the Ohio Department of Youth Services, under Title VII, alleging discrimination based on her sexual orientation. The Department had considered Ames for a promotion but ultimately hired a lesbian woman, then later demoted Ames and hired a gay man to fill her previous position. The district court and the Sixth Circuit held that Ames had failed to make out a prima facie case of discrimination.

Ordinarily, to state a prima facie case of disparate treatment under Title VII, a plaintiff must establish "that she applied for an available position for which she was qualified, but was rejected under circumstances giving rise to an inference of unlawful retaliation." For majority-group plaintiffs, however, the Sixth Circuit and several others require an additional showing of "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." In *Ames*, this requirement was dispositive: The Sixth circuit acknowledged that, but for the higher evidentiary burden, "Ames's prima facie case was easy to make."

The Supreme Court unanimously reversed, holding that the "background circumstances" requirements for majority-group plaintiffs was "not consistent with Title VII's text or our case law construing the statute." Writing for the Court, Justice Jackson noted that the plain text of Title VII "draws no distinction between majority-groups and minority-group plaintiffs." Justice Jackson then surveyed the Court's precedent and noted cases like *Griggs* that explicitly state "discriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed."

The Court's decision was relatively short and uncontroversial. In contrast, Justice Thomas's concurring opinion (joined by Justice Gorsuch) is a wide-ranging critique of "judge-made doctrines." Justice Thomas stated that he "would be willing to consider whether the *McDonnell Douglas* framework [applied in Title VII cases] is a workable and useful evidentiary tool." Justice Thomas argued that the framework makes it more difficult for meritorious claims to succeed. At the same time, Justice Thomas mused that the concepts of "majority" and "minority" groups may not even be possible to define – potentially indicating that Justice Thomas is willing to reconsider other doctrines that purport to protect a vulnerable "minority."

OTHER CASES OF INTEREST

Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos: Mexico Cannot Hold American Gun Manufacturers Liable for Cartel Violence in Mexico

Held: Mexico's complaint did not plausibly allege that the defendant gun manufacturers aided and abetted gun dealers' unlawful sales of firearms to Mexican traffickers, thus the Protection of Lawful Commerce in Arms Act (PLCAA) barred the lawsuit (Kagan, J.).

The PLCAA broadly bars civil lawsuits against firearm manufacturers for injuries resulting from the criminal or unlawful misuse of their products by third parties. However, the Act has an exception to permit lawsuits when the manufacturer "knowingly violated a State or Federal statute applicable to the sale or marketing" of firearms and such "violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). Mexico argued that its suit against seven American gun manufacturers fit within that exception because the manufacturers knowingly aided and abetted gun sales to drug cartels in violation of federal statute, causing harm in Mexico. The First Circuit allowed the suit to proceed, holding that Mexico plausibly alleged aiding-and-abetting liability.

The Court unanimously reversed. Writing for the Court, Justice Kagan clarified that aiding-and-abetting liability requires "conscious" and "culpable participation in another's wrongdoing"; in other words, a defendant must intend to facilitate the wrongdoing. Moreover, as Justice Kagan explained, complaints making general accusations about a broad category of activity (here, gun trafficking) must plausibly allege "pervasive, systematic, and culpable assistance" in the criminal scheme by the defendant. The allegations here did not clear that bar.

Justice Thomas concurred, adding his view that the PLCAA exception requires a finding of guilt or liability in an adjudication regarding a violation of state or federal statute. Justice Jackson separately concurred, adding that Mexico failed to provide anything beyond conclusory allegations about statutory violations.

The Court's decision is important for firearms manufacturers, but it is also important for companies that face secondary liability for the misuse of their products by some customers. In particular, the Court's decision builds upon and expands *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), which made clear the challenges of pleading such an aiding-and-abetting theory. Notably, like *Taamneh*, *Smith & Wesson* arose on a motion to dismiss and thus rejected an aiding-and-abetting theory without the need for discovery.

"[T]he complaint repeatedly states that the manufacturers treat rogue dealers just the same as they do law-abiding ones - selling to everyone, and on equivalent terms." (Kagan, J.)

CC/Devas (Mauritius) Limited v. Antrix Corp.: Supreme Court Clarifies Personal Jurisdiction Requirements in Suits Under the Foreign Sovereign Immunities Act

Held: Personal jurisdiction exists under the Foreign Sovereign Immunities Act (FSIA) when an enumerated exception to sovereign immunity applies and service is proper; the FSIA does not require proof of "minimum contacts" over and above the statutory exception (Alito, J.).

The FSIA provides that foreign states and their "instrumentalities" are immune from federal lawsuits – and thus United States courts may not exercise jurisdiction over them – unless (1) one of the enumerated exceptions to this immunity applies, and (2) the foreign state is properly served. If both of those prerequisites are satisfied, the FSIA provides that "personal jurisdiction over a foreign state shall exist as to every claim for relief."

In this case, an Indian private corporation sought, pursuant to the FSIA, to confirm an arbitral award against an Indian government-owned corporation as the first step toward enforcing the award against the government-owned corporation's U.S.-based assets. The Ninth Circuit reversed the district court's order confirming the award, holding that the government-owned corporation lacked minimum contacts with the United States pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and thus U.S. courts lacked personal jurisdiction over the government-owned corporation. The Ninth Circuit was the only circuit to follow this approach, with four other circuits declining to impose such a requirement.

The Supreme Court unanimously reversed. Justice Alito, writing for the Court, declined to read an extra-textual minimum-contacts requirement into the statute. The outcome was not surprising: By the time the case reached the Supreme Court, neither of the parties nor the United States (which participated as *amicus*) defended the Ninth Circuit's minimum-contacts rule. Moreover, both the parties and the United States agreed that the Supreme Court did not need to reach new arguments against confirming the award raised by the government-owned corporation for the first time in the Supreme Court.

Devas creates uniformity among the circuits in interpreting the FSIA's personal jurisdiction requirements, but otherwise the case's immediate impact is likely to be limited. At the same time, *Devas* left open several questions for the Supreme Court to decide in a future case, including whether a plaintiff must establish minimum contacts in order to satisfy the *constitutional* threshold for personal jurisdiction.

United States v. Miller: Federal Government Not Subject to Fraudulent Transfer Suit Brought Under State Law in Bankruptcy Proceeding

Held: The waiver of sovereign immunity in Section 106(a) of the Bankruptcy Code applies only to Section 544(b) itself, not to the underlying state-law fraudulent transfer claim (Jackson, J.).

The trustee in a bankruptcy suit must maximize the value of the bankruptcy estate, including by avoiding unlawful transfers of the debtors' assets. A trustee has several statutory tools for doing so. One of them is Section 544(b) of the Bankruptcy Code, which permits a trustee to "avoid any transfer of an interest of the debtor that is voidable under applicable law by a creditor holding an unsecured claim." The provision therefore requires the trustee to establish: (1) that "applicable law" (typically state law) renders a transfer "voidable" and (2) that there exists an actual "creditor holding an unsecured claim" who could seek to void the transfer under that "applicable law." Separately, Section 106(a) of the Bankruptcy Code waives the United States' sovereign immunity against suits for damages "with respect to" various sections of the Bankruptcy Code, including Section 544.

In *Miller*, officers of a Utah-based transportation business used company funds to pay their personal taxes to the Internal Revenue Service (IRS). The company filed for bankruptcy three years later. The trustee sought to avoid the transfer to the IRS under Section 544(b), invoking Utah's fraudulent transfer law as the underlying "applicable law." The United States conceded that the elements of a fraudulent transfer under Utah law were satisfied, but argued that the trustee's claim nevertheless failed because no "actual creditor" could pursue it – the United States would enjoy sovereign immunity in such a hypothetical suit. The lower courts rejected that argument, relying on Section 106(a) to hold that the United States' sovereign immunity for the underlying state law claim had been waived.

The Supreme Court reversed. Writing for the majority, Justice Jackson framed the question as whether Section 106(a) waives sovereign immunity "with respect to whatever state-law cause of action a trustee might invoke as the source of 'applicable law' for his or her § 544(b) claim." Answering that question in the negative, the Court explained that waivers of sovereign immunity are jurisdictional only and therefore do not create any substantive right to suit. The trustee's interpretation of the statute, the Court reasoned, would effectively modify the elements of a Section 544(b) claim by no longer requiring the trustee to identify an actual creditor who could pursue an avoidance action.

While the Court's decision does not impact a trustee's ability to recover funds fraudulently transferred to private parties, it does significantly limit their ability to proceed against the U.S. government. A trustee may still recover from the United States under Section 548 – the Bankruptcy Code's own fraudulent transfer provision. But such claims are subject to a two-year statute of limitations, which is shorter than the statute of limitations for state fraudulent transfer laws like Utah's.

More broadly, the decision reinforces and arguably extends the Supreme Court's longstanding reluctance to infer a waiver of

sovereign immunity in a statute. Likewise, Justice Jackson reiterated that "no amount of legislative history can supply a waiver that is not clearly evident from the language of the statute." Notably, the federal government did not argue that it was immune from the trustee's suit – only that the trustee's claim failed because no "actual creditor" could avoid the transfer in a hypothetical suit under Utah law. And the trustee did not argue that Section 106(a) actually waived the federal government's sovereign immunity as to such a hypothetical suit, but rather argued that such immunity should be treated as waived for purposes of evaluating a trustee's claim under Section 544(b). The case arguably therefore does not implicate the policy concerns ordinarily associated with waivers of of sovereign immunity.

Barnes v. Felix: Correcting Fourth Amendment Circuit Split

Held: The Fifth Circuit's use of the "Moment of the Threat" Doctrine contravenes the Court's established Fourth Amendment jurisprudence (Kagan, J.).

Barnes arose out of a 2016 traffic stop in which Respondent Officer Roberto Felix, Jr. fatally shot Ashtian Barnes. Barnes' estate brought suit for violation of Barnes' Fourth Amendment right against excessive force. In affirming the district court's dismissal of the case, the Fifth Circuit applied its "Moment of the Threat Doctrine," which requires a court to consider only the action that immediately precipitates an officer's use of deadly force (rather than examining the totality of the circumstances) when deciding if there was excessive force. The Moment of the Threat Doctrine was also the prevailing test applied in the Fourth, Eighth, and Second Circuits.

In a unanimous decision, the Supreme Court vacated and remanded, instructing the lower courts to examine whether Officer Felix had used excessive force against Barnes under the "totality of the circumstances." The Court's holding was narrow, concluding only that the Moment of the Threat Doctrine is incompatible with the long-held totality of the circumstances analysis that the Court has consistently applied to Fourth Amendment excessive use of force claims, which requires evaluation of the full context of any given situation. The Court expressed concern that the Moment of the Threat doctrine fails to properly frame the analysis of excessive use of force claims by forcing courts to put on "chronological blinders." The Court concluded that considering the totality of the circumstances is an approach well-established by both its own precedent, and the Moment of the Threat Doctrine cannot be squared with that approach under the Fourth Amendment. The Court also declined to consider whether or how the officer's own creation of a dangerous situation factors into the reasonableness analysis, an issue Respondent had requested clarification of during oral argument of the case.

In a concurrence joined by Justices Thomas, Alito, and Barrett, Justice Kavanaugh agreed with the majority's conclusion to remand the case for proceedings in line with an analysis of the totality of the circumstances, and wrote separately to further discuss the dangers of traffic stops for police officers, particularly in circumstances similar to the case below, where the driver pulls away during a traffic stop.

The Supreme Court's decision reinforces the totality of circumstances analysis as the correct test for courts to apply when evaluating excessive use of force claims under the Fourth Amendment. The decision also broadens legal protections for civilians and allows for additional potential avenues for holding officers accountable for the decisions they make during encounters with the community.

NEXT TERM PREVIEW

The Supreme Court is still filling out its merits docket for the 2025 Term. Of those cases granted so far, a few of are interest:

- In *Landor v. Louisiana Department of Corrections and Public Safety*, the Court will determine whether a plaintiff may obtain damages against state officers in suits filed under the Religious Land Use and Institutionalized Persons Act for violations of religious liberty. Weil represents the petitioner in this case, and partner Zack Tripp will be presenting the oral argument.
- In *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, the Court will decide whether Section 47(b) of the Investment Company Act creates an implied private right of action.
- In *Chevron USA Inc. v. Plaquemines Parish*, the Court will address questions related to the standard for removal to federal court of a lawsuit filed against a person "acting under" an officer of the United States.
- In *Little v. Hecox* and *West Virginia v. B.P.J.*, the Supreme Court will consider challenges to state laws that limit participation on women's and girls' sports teams based on sex, thereby restricting transgender women and girls from joining those teams.

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