SUPREME COURT ROUNDUP:

What Immigrants' Rights Legal Representatives Should Know from the October 2023 Supreme Court Term[1]

September 17, 2024

This roundup summarizes cases from the Supreme Court's October 2023 term (through June 2024) that are potentially relevant to lawyers representing noncitizens, be it in immigration matters, criminal defense, or civil litigation under the Administrative Procedure Act or the U.S. Constitution.

The cases summarized below are organized into four sections, with each section organized chronologically by the date of decision. Each summary provides case details, including an underlined link to the Supreme Court docket where you can download case filings; a citation to the Supreme Court or U.S. Reporter; a short explanation of the case's significance; and a summary of its background, the majority's holding, and the most relevant concurring and dissenting opinions. Note that the facts in each case described below are taken from the Court's opinions.

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IMMIGRATION

Wilkinson v. Garland, No. 22-666, 601 U.S. 209 (Mar. 19, 2024)

Key significance: All mixed questions of law and fact relating to cancellation of removal ineligibility determinations are judicially reviewable, even those that are primarily factual, including whether a particular set of facts is "exceptional and extremely unusual."

Background: In 2019, Immigration and Customs Enforcement (ICE) arrested Petitioner Situ Kamu Wilkinson, a native of Trinidad and Tobago, when he appeared at a courthouse to contest a drug charge that was later dropped. ICE then initiated removal proceedings against him for overstaying his 2003 tourist visa. An immigration judge (IJ) denied Wilkinson cancellation of removal under 8 U.S.C. § 1229b(b)(1)(D), holding that the hardship Wilkinson's removal would cause to his young U.S. citizen son—who has a serious medical condition and relies on Wilkinson for financial and emotional support—did not rise to the statutory "exceptional and extremely unusual" standard. After the Board of Immigration Appeals (BIA) affirmed without opinion, the Third Circuit held that it lacked jurisdiction to review the IJ's hardship determination, joining five other Circuits in holding that such hardship determinations are not reviewable under 8 U.S.C. § 1252(a)(2)(D); *contra* the precedent in three other Circuits holding that these determinations *are* reviewable.

Vote: 6-3. J. Sotomayor writing for the Court, joined by JJ. Kagan, Gorsuch, Kavanaugh, and Barrett; J. Jackson filed an opinion concurring only in the judgment; C.J. Roberts and J. Alito (joined by C.J. Roberts and J. Thomas) filed dissenting opinions.

Holding: Reversed in part, vacated in part, and remanded. This case is controlled by *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020), which held that mixed questions of law and fact are reviewable under § 1252(a)(2)(D). An IJ's determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact (as even the dissent agrees); it is therefore reviewable under § 1252(a)(2)(D). "Mixed questions of law and fact, even when they are primarily factual, fall within the statutory definition of 'questions of law' in § 1252(a)(2)(D) and are therefore reviewable." Facts underlying any cancellation determination remain unreviewable, as does an IJ's discretionary decision whether to grant cancellation to an eligible noncitizen.

Concurring only in the judgment, Justice Jackson agreed *Guerrero-Lasprilla* decides this case, but notes she was not on the Court at the time and briefly expresses skepticism that Congress intended decisions like this one to be reviewable.

United States v. Texas, No. 23A814, 144 S. Ct. 797 (Mem) (Mar. 19, 2024)[2]

Key significance: In a case on the "shadow docket," the Supreme Court admonishes the Fifth Circuit for its misuse of unreasoned "administrative" stays of lower court decisions but permits Texas's anti-immigrant SB4 to go into effect (briefly).

Background: In a late 2023 special legislative session, Texas enacted a statute (SB 4) that, among other things, makes it a state crime for a noncitizen to enter or reenter the state from Mexico without federal authorization; and authorizes state judges to order noncitizens removed from the United States. After the federal government, the County of El Paso, and two nonprofit organizations filed suit, a district court preliminarily enjoined the statute days before it was slated to take effect. Texas immediately appealed and asked the Fifth Circuit to stay the preliminary injunction pending resolution of the appeal; without deciding that motion (which it referred to the merits panel), the Fifth Circuit motions panel quickly issued an "administrative" stay of the preliminary injunction. Two days later, Justice Alito granted an administrative stay of the Fifth Circuit's administrative stay (putting the preliminary injunction back into effect), which he twice extended, the second time indefinitely, while the full Court considered the applications to vacate the Fifth Circuit's stay.

Vote: Unknown. J. Barrett (joined by J. Kavanaugh) issued a concurring opinion; J. Sotomayor (joined by J. Jackson) issued a dissenting opinion.

Holding: Application for vacatur of the Fifth Circuit's "administrative stay" is denied. On March 19, the Court issued an unsigned two-sentence order denying the challengers' applications to stay the Fifth Circuit's administrative stay and vacating Justice Alito's prior orders, thereby allowing SB 4 to go into effect.

Justice Barrett wrote a five-page opinion concurring in the denial of the applications, in which she discussed the appropriate use of administrative stays and how they are generally unreviewable, while also stating that if the Fifth Circuit did not soon issue a decision on the then still-pending motion to stay the district court's preliminary injunction, "the applicants may return to this Court."

Dissenting, Justice Sotomayor wrote that SB 4 is flagrantly unconstitutional and that the Fifth Circuit abused its discretion because its administrative stay upended the status quo ante and was indefinite. She also noted the Fifth Circuit's recent "troubling habit of leaving 'administrative' stays in place for weeks if not months."

[**Postscript**: Hours after the Supreme Court's order issued, the Fifth Circuit merits panel dissolved the administrative stay entered by the motions panel, thereby restoring the district court's preliminary injunction of SB 4.]

[2] Consolidated with *Las Americas Immigrant Advocacy Center v. McGraw*, No. 23A815.

Brown v. United States, No. 22-6389, 144 S. Ct. 1195 (May 23, 2024)[3]

Key significance: The text of the controlled substances ground of deportability, 8 U.S.C. § 1227(a)(2)(B)(i), is materially different from the sentencing enhancement in the Armed Career Criminal Act (ACCA) at issue here, but both incorporate Controlled Substances Act (CSA) drug definitions, which creates a temporal question when the CSA definition changes between the conviction for the predicate offense and the time when a court is asked to apply the sentencing enhancement based on that predicate offense (which *Brown* addresses in the ACCA context); both also require application of the categorical approach, all of which makes *Brown* relevant (but not controlling) as to how § 1227(a)(2)(B)(i) should be understood when CSA definitions change.

Background: Petitioners Justin Rashaad Brown and Eugene Jackson were separately convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and had their sentences enhanced (to a 15-year mandatory minimum) under the ACCA for having at least three previous convictions for "a serious drug offense," *id.* § 924(e)(1). Under the categorical approach, a state drug offense (like theirs) only counts as an ACCA predicate if (*inter alia*) the state's definition of the drug in question matches the federal definition under the CSA. At the time of Brown and Jackson's state convictions, the relevant drug definitions matched, but the CSA definitions later changed (so that they no longer matched) before the two men were sentenced for the felon-in-possession violations; Congress had amended the definition of marijuana to exempt some hemp and the Drug Enforcement Administration had changed the cocaine definition to authorize a radioactive derivative used to treat Parkinson's. Brown and Jackson argued the lack of a match now means their convictions are not ACCA predicates; the Third Circuit disagreed with Brown and the Eleventh Circuit disagreed with Jackson, both holding that what matters is whether the drug definitions match at the time of conviction.

Vote: 6-3. J. Alito writing for the Court, joined by C.J. Roberts and JJ. Thomas, Sotomayor, Kavanaugh, and Barrett. J. Jackson issued a dissent joined by J. Kagan and, with regards to Parts I-III, J. Gorsuch.

Holding: Affirmed. For purposes of the ACCA's 15-year mandatory minimum sentence, a state drug conviction counts as an ACCA predicate if the state definition of the drug matched the federal definition in the CSA schedules *at the time of the state conviction*. A later change in the federal schedules makes no difference. Justice Alito wrote that the backward-looking approach adopted here best accords with the statutory text and precedent and best fulfills ACCA's statutory objectives; he rejected the arguments that the statute's present-tense language and its incorporation of the CSA (and the "reference canon") means that the Court should apply the law as it exists at the time of sentencing under the ACCA. Justice Alito acknowledged that under the

[3] Consolidated with *Jackson v. United States*, No. 22-6640.

majority's interpretation, state drug convictions from before the CSA's enactment in 1970 cannot be ACCA predicates.

Dissenting, Justice Jackson argued that the reference canon and ACCA's incorporation of the CSA's "dynamic" list of prohibited substances indicate congressional intent that courts consult the drug schedule in effect at the time of the federal offense for which the defendant is being sentenced. In the part Justice Gorsuch did not join, Justice Jackson argued that, contrary to the majority's assertion, its interpretation does not best serve the ACCA's objectives.

Campos-Chaves v. Garland, No. 22-674, 144 S. Ct. 1637 (June 14, 2024)[4]

Key significance: Rejects defective notices to appear (NTAs) as a basis for rescission/reopening under 8 U.S.C. § 1229a(b)(5)(C)(ii) where the noncitizen received actual notice from the immigration court of the hearing at which they were ordered removed *in absentia*. Its dicta will likely embolden the Executive Office for Immigration Review (EOIR) to further erode the holdings about defective NTAs in *Niz-Chavez v. Garland*, 593 U.S. 155 (2021), and *Pereira v. Sessions*, 585 U.S. 198 (2018). *See, e.g., Matter of R-T-P-*, 28 I&N Dec. 828 (BIA 2024).

After *Campos-Chaves*, noncitizens whose NTAs lack the hearing date and time but who later received a hearing notice from the immigration court can still seek rescission/reopening under § 1229a(b)(5)(C)(ii) if there is an independent basis, such as failure to receive the immigration court-issued notice of the hearing.

Background: Each noncitizen in these three consolidated cases was ordered removed *in absentia* after receiving an initial NTA that did not comply with 8 U.S.C. § 1229(a)(1)'s requirements (they lacked the date and time of the hearing), making them defective under *Niz-Chavez* and *Pereira*. The noncitizens each moved to reopen under § 1229a(b)(5)(C)(ii), which permits rescinding such an order when (*inter alia*) noncitizens can show they "did not receive notice in accordance with paragraph (1) or (2) of [§] 1229(a)," on the ground that their NTA was unquestionably not in accordance with § 1229(a)(1). Each of the noncitizens had, subsequent to the NTA, received a notice that purported to be issued under paragraph (2) of § 1229(a) about the hearing at which each was ordered removed *in absentia*. Five Circuits had held that noncitizens in these circumstances could reopen based on the defective NTA, while the Eleventh Circuit had reached the opposite conclusion.

Vote: 5-4. J. Alito writing for the Court, joined by C.J. Roberts and JJ. Thomas, Kavanaugh, and Barrett; J. Jackson issued a dissent joined by JJ. Sotomayor, Kagan, and Gorsuch.

Holding: The noncitizens cannot rescind their *in absentia* removal orders and reopen removal proceedings based on their defective NTAs because they all received a subsequent notice that

[4] Consolidated with *Garland v. Singh*, No. 22-884, and *Garland v. Mendez-Colin*.

complied with § 1229(a)(2) for the hearing at which they were ordered removed. Justice Alito scarcely mentioned *Niz-Chavez* (in which Justices Thomas and Barrett were in the majority) and waved off *Pereira*'s discussion of § 1229(a)(2) as "mere dicta."

Dissenting, Justice Jackson explained how the majority's blessing of the government's persistent practice of issuing defective NTAs is inconsistent with *Pereira* and *Niz-Chavez*, upends the statutory scheme, and prejudices noncitizens who now may never receive the information Congress required them to be given prior to being ordered removed.

For more on *Campos-Chaves, Niz-Chavez,* and *Pereira,* see NIPNLG and American Immigration Council's "Strategies and Considerations in the Wake of *Niz-Chavez v. Garland*" practice advisory.

Dep't of State v. Muñoz, No. 23-334, 144 S. Ct. 1812 (June 21, 2024)

Key significance: Decides that there is no liberty interest in one's noncitizen spouse being admitted to the United States, and therefore due process does not require the State Department to provide an explanation for denying a visa on the "unlawful activity" ground of inadmissibility, under 8 U.S.C. § 1182(a)(3)(a)(II).

Background: After U.S. citizen Sandra Muñoz successfully petitioned U.S. Citizenship and Immigration Services (USCIS) for her husband—a citizen of El Salvador whom she married in 2010—to be classified as an immediate relative, the State Department denied her husband's application for a visa under § 1182(a)(3)(a)(II), which makes inadmissible a noncitizen whom the consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in" certain specified offenses or "any other unlawful activity." Unlike other grounds of inadmissibility, there is not a statutory requirement to provide a basis for the denial, *see* § 1182(b)(3), but Muñoz sued, alleging that the Due Process Clause requires the State Department to provide the reason for its conclusion that her husband is inadmissible. The district court dismissed based on consular nonreviewability, but the Ninth Circuit vacated, holding (consistent with its precedent, but *contra* the precedent of most other Circuits) that a timely explanation was required given Muñoz's constitutionally protected liberty interest in her husband's visa application.

Vote: 6-3. J. Barrett writing for the Court, joined by C.J. Roberts and JJ. Thomas, Alito, and Kavanaugh; J. Gorsuch wrote an opinion concurring only in the judgment; J. Sotomayor filed a dissent joined by JJ. Kagan and Jackson.

Holding: Reversed and remanded. A U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country, and so due process does not require the government to provide an explanation for denying her spouse's visa application. Due process

only protects those unenumerated rights that are "objectively, deeply rooted in this Nation's history and tradition," and the right to reside with one's noncitizen spouse in the United States has no such history. To the contrary, from the first immigration statutes, Congress has generally *not* exempted spouses from generally applicable immigration restrictions (like grounds of inadmissibility or deportability), and even when Congress has shown "special solicitude" for noncitizen spouses, it's been "a matter of legislative grace rather than fundamental right." The discussion in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), about the Executive's "facially legitimate and bona fide reason" had nothing to do with procedural due process, which was not even at issue in the case (which involved a First Amendment claim). Holding that a liberty interest is at stake in this case could have "unsettling" collateral consequences, since it would apply beyond the visa or even immigration context.

Justice Sotomayor, dissenting, faulted the majority for unnecessarily deciding the constitutional issues and for its conclusion that excluding a citizen's spouse does not burden her right to marriage. She would have held that it does burden that fundamental right and that the government must provide "at least a factual basis for its [visa denial] decision."

CONSTITUTIONAL LITIGATION

Lindke v. Freed, No. 22-611, 601 U.S. 187 (Mar. 15, 2024)

Key significance: Articulates a test for what constitutes "state action" (for purposes of 42 U.S.C. § 1983) in the social media context.

Background: James Freed, the city manager of Port Huron, Michigan, used his Facebook account primarily to post about his private life but also to post city updates and to communicate with residents about their concerns. In this case, Freed deleted comments to his posts made by city resident Kevin Lindke that were critical of the city's pandemic response; later, Freed blocked Lindke from commenting on Freed's posts, although Lindke could still see them. Lindke sued under § 1983 for First Amendment viewpoint discrimination. The district court dismissed for lack of state action, and the Sixth Circuit affirmed, holding that state action is only present if the social media account is nominally an official one or is run with state resources or staff. In contrast, the Second and Ninth Circuits' precedent on state action in this context focuses merely on whether the account's appearance and content look official.

Vote: 9-0. J. Barrett writing for the unanimous Court.

Holding: Vacated and remanded. A public official's social-media activity constitutes state action under § 1983 only if the official both "(1) possessed actual authority to speak on the State's behalf [on the particular issue], and (2) purported to exercise that authority when [speaking] on social media." Whether someone is a public official is not determinative; "[p]rivate parties can act with the authority of the State, and state officials have private lives and their own constitutional rights." Similarly, the appearance and function of the account is relevant at step two but does not compensate for a lack of authority at step one. At step one, a court should ask whether the state "granted" to the official, through custom, law, or usage, "the type of authority" at issue. If yes, a court (at step two) should undertake a "fact-specific" review of the "content and function" of the social media activity to determine whether the official intends to speak officially, relying heavily on the official's own characterization; if a profile purports to be personal, the official would be entitled to a "heavy presumption" that all posts on that account were personal. Justice Barrett also emphasized that "[t]he nature of the technology matters to the state-action analysis," noting that an official may risk liability by blocking users from commenting on personal posts if that also blocks them from commenting on official posts.

National Rifle Association of America v. Vullo, No. 22-842, 602 U.S. 175 (May 30, 2024)

Key significance: The NRA stated a plausible First Amendment coercion claim (brought under 42 U.S.C. § 1983) against a New York agency for it allegedly pressuring third parties to cut ties with the NRA; *see also Murthy v. Missouri*, *infra.*

Background: New York's Department of Financial Services (DFS), regulator of insurers, brought an enforcement action against three insurers that offered a National Rifle Association (NRA) insurance product ("Carry Guard") that paid civil and criminal legal fees for customers who shot other people, including in intentional criminal acts. New York law does not allow insuring a person for their own criminal acts and requires a license to promote Carry Guard that the NRA didn't have. DFS discovered these infractions were common in NRA-endorsed insurance programs offered by other regulated entities. During the pendency of the (legitimate) enforcement action, Maria Vullo, then-head of DFS, issued guidance as part of then-Governor Cuomo's efforts to curb the NRA's power. This guidance, issued to DFS-regulated entities, warned of the "risks . . . that may arise from their dealings with the NRA," pointing specifically to technical infractions for which the regulated entities had legal liability, and "encourage[d]" DFS-regulated insurers to "review any relationships they have with the NRA . . . [and] take prompt actions to manag[e] these risks and promote public health and safety." Over the subsequent months, three insurers publicly cut ties with the NRA (while also agreeing to pay DFS millions in fines). The NRA sued under § 1983 for First Amendment censorship and retaliation, arguing that Vullo's guidance was properly seen as a threat to bring an enforcement action against insurers working with the NRA. After the district court denied a motion to dismiss the claims against Vullo, the Second Circuit reversed, holding that Vullo's speech (including the guidance) constituted permissible government speech and legitimate law enforcement coercion. In the alternative, the Second Circuit held that even if the Complaint stated a claim, Vullo was entitled to qualified immunity because the law was not clearly established.

Vote: 9-0. J. Sotomayor writing for the unanimous Court; J. Gorsuch and J. Jackson each filed a concurrence.

Holding: Vacated and remanded. The NRA plausibly alleged that Vullo violated the First Amendment by coercing regulated entities to terminate their business relationships with the NRA in order to punish or suppress the NRA's gun-promotion advocacy. While a public official may "forcefully" "share her views" "in the hopes of persuading others," she cannot use the power of the state – including the threat of enforcement actions – "to punish or suppress disfavored expression." An "official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." Justice Sotomayor discussed factors relevant to determining whether the public official's speech was coercive; emphasized the liberal pleading standard at the Rule 12(b)(6) stage; and noted that the Second Circuit could revisit the qualified immunity question on remand.

J. Jackson concurred to stress the distinction between government coercion and First Amendment violations. Government coercion, by itself, does not create a First Amendment claim; the coercion must create a "system of informal censorship" to violate the First Amendment. Past cases have concerned governmental coercion of the distributors of publications, which obviously infringed speech (the publications), but NRA insurance products are not speech, making the connection between the alleged coercion of regulated entities and the alleged censorship of NRA's speech "more attenuated." Justice Jackson suggests that "our First Amendment retaliation cases might provide a better framework for analyzing . . . coercion claims that are not directly related to the publication or distribution of speech."

Chiaverini v. City of Napoleon, Ohio, No. 23-50, 144 S. Ct. 1745 (June 20, 2024)

Key significance: Holds in a case brought under 42 U.S.C. § 1983 that probable cause for one charge does not categorically preclude a malicious prosecution claim for a separate baseless charge.

Background: Charged with two misdemeanors and a felony, Jascha Chiaverini was arrested and jailed for three days before prosecutors dropped the case. Chiaverini brought a Fourth Amendment malicious prosecution claim for damages under § 1983, alleging that the felony charge lacked probable cause. The Sixth Circuit affirmed the dismissal of Chiaverini's claim on the ground that existence of probable cause for *any* charge (here, the misdemeanors) defeats a Fourth Amendment malicious prosecution claim. Its categorical rule created a split with three other Circuits.

Vote: 6-3. J. Kagan writing for the Court, joined by C.J. Roberts and JJ. Sotomayor, Kavanaugh, Barrett, and Jackson; dissents were issued by JJ. Thomas (joined by J. Alito) and Gorsuch.

Holding: Vacated and remanded. Pursuant to the Fourth Amendment and the common law, the existence of probable cause for one charge in a criminal proceeding does not necessarily defeat a malicious prosecution claim relating to another, baseless charge. "[I]f an invalid charge . . . causes a detention either to start or to continue, then the Fourth Amendment is violated. And that is so even when a valid charge has also been brought." Justice Kagan noted the diversity of arguments regarding "how that causation element is met when a valid charge is also in the picture," but did not reach that question; instead, the Court remanded to the Sixth Circuit, "leav[ing] for another day the follow-on question of how to determine in th[e]se circumstances whether the baseless charge caused the requisite seizure."

Dissenting, J. Gorsuch argued that any constitutional hook for a § 1983 malicious process claim "would be more properly housed" in the Fourteenth Amendment's guarantee of due process, which protects, "at the least, those 'customary procedures to which freemen were entitled by the old law of England.'" That said, Justice Gorsuch posited that any state with a statutory malicious prosecution tort would provide "all the process [that] is due."

Gonzalez v. Trevino, No. 22-1025, 144 S. Ct. 1663 (June 20, 2024)

Key significance: Holds that the exception discussed in *Nieves v. Barlett*, 139 S. Ct. 1715 (2019)—permitting a plaintiff to bring a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983 notwithstanding the presence of probable cause for situations in which officers typically do not arrest—does not require the plaintiff to identify virtually identical comparators who were not arrested; instead, they can present other objective evidence to meet their burden. J. Jackson's concurrence discusses types of objective evidence that can be used.

Background: Following her election, Sylvia Gonzalez, the first Latina city council member in Castle Hills, Texas gathered signatures for a petition to remove the city manager. At the end of a contentious two-day city council meeting at which the petition was introduced, the mayor, Edward Trevino, approached Gonzalez and asked her for the petition. When Gonzalez stated she believed Trevino had it, he asked Gonzalez to check her binder, which did contain the petition. Gonzalez said she did not intentionally put the petition in her binder, but after the mayor mentioned the incident to the police, a private attorney tasked with investigating the situation concluded Gonzalez had likely violated a state anti-tampering statute prohibiting intentionally removing a government record. The private attorney obtained an arrest warrant from a local magistrate; Gonzalez turned herself in and spent an evening in jail. The district attorney dismissed the charges, after which Gonzalez brought a damages action under § 1983, alleging that her arrest was in retaliation for her First Amendment protected activities. In support, Gonzalez proffered evidence that in the last decade the county had not charged anyone under the anti-tampering statute for "trying to steal a nonbinding or expressive document"; rather it was used to prosecute people who presented fake identity documents. Gonzalez argued that, while *Nieves* requires a plaintiff bringing a retaliatory arrest claim to "plead and prove the absence of probable cause for the arrest," she fit within *Nieves*' exception for plaintiffs who can produce "objective evidence that he (*sic*) was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Ruling against Gonzalez, the Fifth Circuit held the *Nieves* exception applies only if the plaintiff proffers "comparative evidence" of "otherwise similarly situated individuals who engaged in the same criminal conduct but were not arrested," i.e., identifiable people who allegedly mishandled a government petition.

Vote: 8-1. Per Curiam; concurring opinions were filed by JJ. Alito, Kavanaugh (joined by J. Sotomayor); J. Thomas issued a dissent.

Holding: Vacated and remanded. The Fifth Circuit "took an overly cramped view of *Nieves*" by demanding Gonzalez proffer "virtually identical and identifiable comparators" to support her retaliatory arrest claim. The *Nieves* exception properly applies when officers have probable cause but typically do not arrest, and the "only express limit" the Court placed on "the sort of evidence a plaintiff may present for that purpose is that it must be objective." Gonzalez's proffered evidence—suggesting that no one has ever been arrested for engaging in similar conduct—satisfied that test, and the Fifth Circuit went "too far" by demanding "examples of identifiable

people who 'mishandled a government petition' in the same way Gonzalez did but were not arrested." The Court remanded for further proceedings consistent with its opinion; it expressly did not reach Gonzalez's argument that "the *Nieves* no-probable-cause rule applies only to claims predicated on split-second arrests, rather than deliberative ones."

Justice Jackson concurred to highlight other types of objective evidence that would satisfy the *Nieves* exception, such as "irregular[] or unnecessarily onerous arrest procedure"; "the timing and events leading up to" an arrest; officers "falsely document[ing] the arrest"; or "other indicia of retaliatory motive" that suggest differential treatment.

United States v. Rahimi, No. 22-915, 144 S. Ct. 1889 (June 21, 2024)

Key significance: *Rahimi* provides a new controlling framework for arguments about 18 U.S.C. § 922(g)(5)'s criminal prohibition on certain noncitizens possessing firearms or ammunition.

Background: Zackey Rahimi was charged under 18 U.S.C. § 922(g)(8) for possessing a firearm while under a domestic violence protective order (which had been obtained by the mother of his child). Applying the direction if *New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1 (2022), to invalidate any gun control law not in the "historic tradition of firearm regulation," the Fifth Circuit held that § 922(g)(8) violates the Second Amendment and that domestic abusers cannot lawfully be singled out for gun dispossession.

Vote: 8-1. C.J. Roberts writing for the Court, joined by everyone but J. Thomas, who issued a dissent. Concurring opinions were filed by JJ. Sotomayor (joined by J. Kagan), Gorsuch, Kavanaugh, Barrett, and Jackson.

Holding: Reversed. When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment. "Since the founding," U.S. firearms laws have included regulations to stop "individuals who threaten physical harm to others from misusing firearms," and § 922(g)(8) fits within this tradition. The Second Amendment permits more than just regulations identical to those existing in 1791; the law is not "trapped in amber." Also allowed are "relevantly similar" laws that "apply[] faithfully the balance struck by the founding generation to modern circumstances." Central to this inquiry is why and how the regulation burdens the right to bear arms.

ADMINISTRATIVE PROCEDURE ACT (APA) LITIGATION

Loper Bright Enterprises v. Raimondo, No. 22-451, 144 S. Ct. 2244 (June 28, 2024)[5]

Key significance: *Chevron* is overruled, and courts should no longer defer to agencies interpreting an ambiguous statute. As a consequence, Circuit Courts should no longer defer to the Board of Immigration Appeals when interpreting the INA, although their previous decisions that relied on *Chevron* deference remain good law unless/until individually overruled; nor should the government get deference in other contexts, like litigation challenging agency action.

Background: The Court took these two cases to decide whether to overrule *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837 (1984). *Chevron* and its progeny held that where a statute is ambiguous, courts should generally defer to the interpretation of the Executive branch agency tasked with administering that statute, so long as its interpretation is a "permissible" way to resolve the ambiguity. "*Chevron* deference" was premised on two related ideas: the presumption that when Congress leaves an ambiguity in a statute an agency implements, it generally intends the agency to have discretion to resolve that ambiguity; and agencies often have superior subject matter expertise, particularly on technical matters.

Vote: 6-2 (6-3 in *Relentless*). C.J. Roberts writing for the Court, joined by JJ. Thomas, Alito, Gorsuch, Kavanaugh, and Barrett; J. Thomas and J. Gorsuch each issued concurrences; J. Kagan issued a dissent, joined by JJ. Sotomayor and Jackson in *Relentless* but not *Loper*, in which J. Jackson did not participate.

Holding: Vacated and remanded. *Chevron* is overruled. The doctrine was "fundamentally misguided" from the beginning, as it conflicts with the Administrative Procedure Act's command that courts (not agencies) decide matters of statutory interpretation and with the constitutional role of the courts, which alone decide what the law means. *Chevron*'s presumption that statutory ambiguities are essentially delegations to agencies is a "fiction," and indulging it "is simply not necessary to ensure that resolution of statutory ambiguities is informed by subject matter expertise." The doctrine has additionally proven unworkable, and *stare decisis* "does not require the Court to persist in the *Chevron* project." Congress can and sometimes does authorize agencies "to exercise a degree of discretion," and *Skidmore* deference remains, but courts may not defer to an agency's interpretation of the law merely because a statute is ambiguous. Overruling *Chevron* deference does not call into question cases that relied on the *Chevron* framework; those remain subject to statutory *stare decisis*, and "[m]ere reliance on *Chevron*" is not a "special justification" sufficient "to justify overruling a statutory precedent."

[5] Heard with *Relentless v. Department of Commerce*, No. 22-1219. Justice Jackson participated in *Relentless* but not *Loper*.

In dissent, Justice Kagan lamented the replacement of *Chevron*'s "rule of judicial humility" with "a rule of judicial hubris" that turns the Court "into the country's administrative czar." She wrote to defend the substance and justifications of the *Chevron* doctrine and to explain how in "destroy[ing] one doctrine of judicial humility," the majority "mak[es] a laughing-stock of a second"—*stare decisis*. Justice Kagan also warned of a forthcoming "jolt to the legal system" given the "thousands" of decisions relying on *Chevron*, "many settled for decades," notwithstanding how "sanguine" the majority is on that issue: "Courts motivated to overcome an old *Chevron*-based decision can always come up with something to label a 'special justification,'" just as the majority does here.

Corner Post v. Board of Governors of the Federal Reserve System, No. 22-1008, 144 S. Ct. 2440 (July 1, 2024)

Key significance: Effectively eliminates the default (six-year) statute of limitations for facial challenges to agency regulations subject to it by authorizing such a suit to be brought by anyone first injured by the rule within the prior six years, even if the regulation was final long before, which will facilitate facial challenges to agency regulations no matter how long they have been final.

Background: Corner Post is a truck stop and convenience store in North Dakota that opened in 2018. Corner Post accepts debit cards for payment, requiring the store to pay an "interchange fee" to the issuing bank in an amount set by payment networks (*e.g.*, Visa and Mastercard) that process the transaction. Corner Post has paid hundreds of thousands of dollars in interchange fees since opening. Interchange fees were unregulated until 2010, when Congress directed the Federal Reserve Board to set standards to ensure fees are "reasonable and proportional." The Fed promulgated a regulation for that purpose in 2011. Corner Post alleges that this regulation is facially unlawful because it allows payment networks to charge more than the statute permits. Joining five other Circuits, the Eighth Circuit held that, as to facial challenges to a regulation, 28 U.S.C. § 2401(a)'s 6-year statute of limitations begins to run on the day the regulation is final—regardless of when the plaintiff was injured—and therefore expired in 2017.

Vote: 6-3. J. Barrett writing for the Court, joined by C.J. Roberts and JJ. Thomas, Alito, Gorsuch, and Kavanaugh; J. Kavanaugh issued a concurrence; J. Jackson issued a dissent joined by JJ. Sotomayor and Kagan.

Holding: Reversed. The APA doesn't let litigants bring a claim unless and until they are injured by a final agency action; injury and finality are both required. The applicable statute of limitations, § 2401(a), says a complaint must be filed within six years "after the right of action first accrues." The government says an APA claim "accrues" when the agency action is final, regardless of when an injury occurs, but that is wrong; "[a] right of action 'accrues' when the plaintiff has a 'complete and present cause of action'—i.e., when she has the right to 'file suit

and obtain relief.' An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." The dissent's warning that this holding will "devastate the functioning of the Federal Government" is "baffling—indeed, bizarre." Regardless, Congress could enact a different statute of limitations. Justice Barrett notes that the Court did not reach the argument that only parties that existed during the rulemaking process can claim to have been injured by procedural shortcomings, like a deficient notice of proposed rulemaking.

Concurring, Justice Kavanaugh wrote at some length to address an issue that the federal government has recently begun making in APA cases: that the APA does not authorize courts to vacate agency rules. Justice Kavanaugh asserted that Corner Post could obtain meaningful relief only because the APA authorizes vacatur, since an injunction against application of the rule against it would serve no purpose (because the rule does not regulate Corner Post).

Justice Jackson, dissenting, wrote that, under the Court's precedent, the meaning of "accrues" is "context specific" and that historically limitations ran "from the moment of agency action." Justice Jackson also observed that even though a plaintiff's injury is irrelevant to a facial challenge, the majority's holding "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face," since now "every new commercial entity"—including those created by "well-heeled litigants to game the system"—can "bring fresh facial challenges to long-existing regulations," warning that this result is "profoundly destabilizing."

STANDING, MOOTNESS, & STATUTES OF LIMITATIONS

Acheson Hotels, LLC v. Laufer, No. 22-429, 601 U.S. 1 (Dec. 5, 2023)

Key significance: Justice Jackson's concurrence invites future arguments to the Supreme Court's practice of vacating lower court decisions if the case becomes moot while pending before the Court (the so-called "*Munsingwear* vacatur").

Background: Deborah Laufer, who has multiple sclerosis and uses a wheelchair or a cane to move around, searches online for hotels whose websites do not provide information about the accessibility of the hotel's facilities, as required by regulations promulgated under the Americans with Disabilities Act. Since 2018, Laufer has sued hundreds of hotels, and most of those lawsuits have settled quickly. Acheson Hotels fought, arguing that because Laufer never intended to stay at their hotel, she lacks standing. Joining two other Circuits, the First Circuit held Laufer has standing to sue hotels even when she does not intend to stay in them because she has a standalone right to information about the hotels' accessibility under the ADA; three other Circuits have gone the other way (*about Laufer specifically*; she single handedly created the Circuit split). When the hotel sought certiorari, Laufer consented and asked the justices to resolve the split over whether testers like her have standing. But prior to argument, Laufer voluntarily dismissed all her pending ADA lawsuits (including the one against Acheson) and filed a suggestion of mootness with the Court, explaining that one of her lawyers had been suspended for the practice of law for alleged fraud and other ethical violations related to his representation of Laufer and another ADA tester; Laufer also stated that she will not file another ADA lawsuit. Acheson urged the Court to nonetheless resolve the standing question because dismissing would be to "bless a legal strategy of filing large numbers of lawsuits, settling almost all of them, and abandoning the rare case that threatens to create adverse precedent so as to facilitate the filing of another round of lawsuits."

Vote: 9-0. J. Barrett writing for the Court, joined by all but JJ. Thomas and Jackson, who each issued opinions concurring in the judgment.

Holding: Although the Court could decide the standing question (as Laufer concedes), this case will be dismissed as moot. Although "sensitive to Acheson's concern about litigants manipulating [our] jurisdiction," the Court is "not convinced . . . that Laufer abandoned her case in an effort to evade our review," given Laufer's voluntary dismissal of her pending ADA suits and representations to the Court that she will not file others after her lawyer was sanctioned. The First Circuit's judgment is vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (" The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

J. Jackson concurred to urge the Court to stop automatically vacating lower court judgments under *Munsingwear* every time a case is moot, and instead only vacate a lower court's judgment if that result is "most consonant to justice." She agrees that the case is moot and that, under the Court's precedent, Laufer's voluntary dismissal is the kind of "unilateral action" justifying vacatur of the lower court opinion but explains why she would not vacate the First Circuit judgment here had she been writing on a blank slate.

FBI v. Fikre, No. 22-1178, 601 U.S. 234 (Mar. 19, 2024)

Key significance: Taking someone off the No Fly List does not moot a lawsuit challenging their initial placement on that list, even when the government attests that the individual will not be returned to the List based on currently available information.

Background: In 2009, Yonas Fikre, a naturalized U.S. citizen, was invited to the U.S. embassy in Sudan (where he was born and still has family) while he was on a business trip there, ostensibly for a luncheon. When he arrived, he was "whisked instead to a small meeting room with two FBI agents," who informed him that he had been placed on the No Fly List. The agents offered to help him get removed from the No Fly List if he would agree to serve as an FBI informant and report on members of his religious community in Portland, Oregon, where he lived. Fikre refused. Several weeks later, while on a business trip to the United Arab Emirates, Fikre was "arrested, imprisoned, and tortured," reportedly at the request of the FBI. After being detained for 106 days, Fikre was flown to Sweden, where he remained until the Swedish government "returned him to Portland by private jet" in 2015. Fikre filed suit while still in Sweden, alleging that his placement on the No Fly List violated his rights to due process, equal protection, and free exercise of religion; he sought declaratory and injunctive relief. While his lawsuit was pending, the government informed Fikre that he had been removed from the No Fly List but gave no explanation; it then argued his suit was moot, eventually providing a declaration stating that Fikre "will not be placed on the No Fly List in the future based on the currently available information." The district court dismissed Fikre's case as moot, but the Ninth Circuit reversed, holding that since the declaration does not disclose what landed Fikre on the No Fly List in the first place, it does not ensure he will not be returned to the No Fly List if he engages in the same or similar conduct, and thus the declaration was insufficient to carry the government's burden to prove mootness. Shortly thereafter, the Fourth Circuit held in a different case that a similar declaration in similar circumstances *was* sufficient to prove mootness.

Vote: 9-0. J. Gorsuch writing for the unanimous Court; J. Alito issued a concurrence joined by J. Kavanaugh.

Holding: Affirmed. A defendant seeking to dismiss as a moot a case challenging a practice it voluntarily stopped post-filing has the "formidable burden' of proving that the practice "cannot 'reasonably be expected to recur.'" Governmental defendants have this burden just as private

ones do. The government's "sparse" declaration (which is assumed to be true) is insufficient to carry this burden, for the reason the Ninth Circuit gave: none of it "speaks to whether the government might relist [Fikre] if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant." The government argues that the declaration is sufficient when combined with the amount of time since Fikre was taken off the List in 2016, during which he "'presumably has joined religious organizations' and interacted freely with his co-religionists," but neither "litigating for some specified period" nor a "a defendant's speculation about a plaintiff's actions" compensate for "a lack of assurance about" the actions of the defendant. A defendant's repudiation of its past conduct "may sometimes help demonstrate that conduct is unlikely to recur," but repudiation is not categorically required.

Concurring, Justice Alito wrote (in a paragraph) to "clarify [his] understanding that our decision does not suggest that the Government must disclose classified information to Mr. Fikre, his attorney, or a court to show that his case is moot."

Harrow v. Dep't of Defense, No. 23-21, 601 U.S. 480 (May 16, 2024)

Key significance: Emphasizes that most time bars are not jurisdictional and instead can be equitably tolled, strengthening arguments for equitable tolling in other contexts.

Background: In 2013, the Department of Defense furloughed employee Stuart Harrow for six days. Harrow challenged his furlough and appealed the agency decision to the Merit Systems Protection Board ("MSPB"). Because MSPB had no quorum for five years, its ruling issued more than five years later, during which time Harrow changed jobs and his old address stopped forwarding to his new one. Harrow thus did not learn of the MSPB ruling until after expiration of the deadline for seeking review. Harrow nevertheless filed an appeal to the Federal Circuit shortly after learning of the MSPB's ruling, asking the Federal Circuit to equitably toll the filing deadline. The Federal Circuit dismissed his appeal as jurisdictionally barred.

Vote: 9-0. J. Kagan writing for a unanimous Court.

Holding: Vacated and remanded. The 60-day filing deadline in 5 U.S.C. § 7703(b)(1) for a federal employee to petition for review of a MSPB decision is not jurisdictional. Congress must "clearly state" when it means a procedural timeframe to be jurisdictional and therefore not subject to equitable exceptions. "Most time bars are nonjurisdictional," even when stated using "mandatory" and "emphatic" language.

Food and Drug Administration v. Alliance for Hippocratic Medicine, No. 23-235, 602 U.S. 367 (June 13, 2024)[6]

Key significance: The majority opinion's extensive discussion of Article III's causation requirement will be frequently cited when causation is contested, particularly in cases challenging the regulation of third parties. Its holding on organizational standing breaks no new ground but its dicta could be spun otherwise.

Background: Shortly after *Dobbs* overturned *Roe v. Wade*, four anti-abortion medical associations and several individual doctors sued the FDA under the APA, challenging its decisions over many years approving mifepristone—a pill used in 63% of abortions in the United States—and relaxing requirements to make it easier for women to obtain that drug. A few anti-abortion doctors and organizations sued, seeking to make mifepristone less available (to the public), asserting standing on the theory that FDA's relaxed mifepristone regulations will cause more women to suffer complications from mifepristone, which will cause "conscience" injuries and downstream economic injuries to the doctors by requiring them to perform emergency abortions if/when mifepristone causes complications. The organizations claimed injury based on their policy advocacy and public education costs that were part of their opposition to the FDA's mifepristone actions. The district court's preliminary injunction was partially stayed by the Fifth Circuit and then fully stayed by the Supreme Court prior to the Fifth Circuit's decision partially affirming the injunction.

Vote: 9-0. J. Kavanaugh writing for a unanimous Court; J. Thomas issued a concurrence.

Holding: Reversed and remanded. Plaintiffs lack Article III standing to challenge the FDA's regulatory actions regarding mifepristone. Justice Kavanaugh's decision discusses (at some length) the justifications for Article III's standing requirements, generally and as to each of the three elements, emphasizing the limits, why they are important, and why courts must respect them. He additionally discusses how it is "substantially more difficult" to prove standing based on the government's allegedly unlawful regulation of someone else, often because of the inability to establish causation (which, in such cases, "ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well."). "[T]o thread the causation needle in those circumstances, the plaintiff must show that the 'third parties will likely react in predictable ways' that in turn will likely injure the plaintiffs." No speculative or attenuated links in the causation chain are allowed.

The doctors lack standing. First, they cannot show injury in fact for their "conscience" injury. Federal conscience laws protect doctors from being forced to perform abortions unwillingly, and Plaintiffs cannot identify a single example of a doctor being forced to provide any abortion-related care over a conscience objection since mifepristone went on the market (2000). Second, the doctors' hypothetical economic injuries are unsupported by evidence and are too speculative

[6] Consolidated with *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, No. 23-236.

or attenuated to meet the causation requirement. In a footnote, Justice Kavanaugh's majority opinion rejects the doctors' argument that they have third-party standing, on behalf of their patients. Finally, Plaintiff medical organizations "cannot spend [their] way into standing simply by expending money to gather information and advocate against" defendant's actions. "An organization cannot manufacture its own standing in that way." It is "incorrect" to read *Havens Realty Corp. v. Coleman* as holding that "standing exists when an organization diverts its resources in response to a defendant's actions." In *Havens*, HOME had standing because Havens gave HOME's Black employees false information about apartment availability, "perceptibly impair[ing] HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers." "In other words, Havens's actions directly affected and interfered with HOME's core business activities," whereas the FDA's actions regarding mifepristone "have not imposed any similar impediment to the medical associations' advocacy businesses." "*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context. So too here."

J. Thomas's concurrence principally argues that the Court, in an appropriate case, should reconsider its precedent recognizing associational (membership) standing—in which an organization can sometimes represent the interests of its members who could sue in their own right, *see, e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)—because, in his view, "a plaintiff cannot establish an Article III case or controversy by asserting another person's rights." Justice Thomas noted his prior calls for the Court to overturn the third-party standing doctrine.

Murthy v. Missouri, No. 23-411, 144 S. Ct. 1972 (June 26, 2024)

Key significance: Read with *NRA* (*supra*), considers what constitutes state coercion of third parties to suppress or punish disfavored viewpoints; dismisses principally for lack of causation/redressability; and also rejects *parens patriae* standing.

Background: Federal officials regularly ask social media platforms to suppress content that endangers public health, encourages criminal activity, or undermines national security. In 2020 through 2022, officials frequently asked platforms to remove misinformation about COVID-19 and federal elections. Two states (Missouri and Louisiana) and five individual users of social media (three doctors, a news website owner, and a healthcare activist) sued Executive Branch officials and agencies alleging government coercion caused social media companies to censor their speech—or for states, that of state entities, officials, and residents—in violation of the First Amendment. After discovery into standing, the district court issued a preliminary injunction; the Fifth Circuit affirmed in part and also modified the injunction to add a vague and sweeping prohibition on the federal government coercing or encouraging social media companies to suppress protected speech.

Vote: 6-3. J. Barrett writing for the Court, joined by C.J. Roberts and JJ. Sotomayor, Kagan, Kavanaugh, and Jackson; J. Alito issued a dissent joined by JJ. Thomas and Gorsuch.

Holding: Reversed and remanded. Lacking likelihood of future harm, causation, and redressability, no Respondent can establish Article III standing to seek an injunction. Respondents point to social media companies' removal of speech but fail to establish a substantial likelihood that, in the near future, at least one platform will suppress at least one plaintiff's speech based on the actions of at least one government defendant. Nor have they shown that suppression of any post in the past (which are relevant to forward-looking relief only insofar as it predicts the future) was due to government action rather than platforms' merely applying of their own longstanding content moderation policies; the evidence indicates the platforms had independent incentives to moderate, often exercised their own judgment, and began to suppress plaintiffs' COVID-19 content before the challenged communications with the federal government began. States do not have *parens patriae* standing to challenge federal actions on behalf of their residents.