Looking Ahead: October Term 2023

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"The sequel is never as good as the original."[1] Sequels follow blockbusters, and the same excitement that prompts the sequel can make it fail to live up to the hype. There are many examples. *Jaws* was once the highest grossing movie of all time. But plaudits for the original gave way to condemnation for the sequel—*Jaws: The Revenge*. Critics derided the latter as a dud—in all parts "[i]llogical, tension-free, and filled with cut-rate special effects."[2] *The Karate Kid* followed a similar trajectory. Famed movie critic Roger Ebert dubbed the original "one of the nice surprises of 1984—an exciting, sweet-tempered, heartwarming story with one of the most interesting friendships in a long time."[3] But that movie was followed by a series of others: *The Karate Kid Part II*, *The Karate Kid Part III*, and *The Next Karate Kid*—each faring worse than the last. The original *Zoolander* received mostly positive reviews and inspired a generation of poses ranging from Blue Steel to Ferrari to Le Tigre.[4] But the antagonist Jacobim Mugatu appears to have had the last laugh as critics lambasted *Zoolander 2* for "its scattershot rehash of a script."[5]

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[1] Chris Compendio, *When a Sequel Is Better than the Original: The 7 Categories of Movie Sequels*, Film Inquiry (Jun. 15, 2017), https://tinyurl.com/2zbw448j.

[2] Alex Vo, *The 57 Worst Sequels of All Time*, Rotten Tomatoes, https://tinyurl.com/ynvfz5a8 (last visited Aug. 15, 2023).

[3] Roger Ebert, *The Karate Kid*, RogerEbert.com (Jan. 1, 1984), https://tinyurl.com/3a4htdjr.

[4] The *very* subtle differences between the poses—which only the expert eye can discern—is beyond the scope of this article.

[5] *Zoolander No. 2.*, Rotten Tomatoes, https://tinyurl.com/5b3f8z3n (last visited Aug. 15, 2023).

Every once in a while, however, audiences will enjoy a sequel even more than the original. Well-known examples include *The Godfather Part II*, *Star Wars: Episode V - The Empire Strikes Back*, and *The Dark Knight*—all considered by discerning moviegoers and critics as sequels that outmatched the movies they followed.

The last Supreme Court term was a blockbuster. The Court decided cases involving racial preferences in university admissions, the scope of the Clean Water Act, the authority of the executive branch to "cancel" student loans under the HEROES Act, child placement under the Indian Child Welfare Act, and the interplay between the First Amendment and public accommodation laws. Many other cases last term would have garnered more interest if only they had been issued in a different term.

The previous term will be a tough act to follow. Court watchers often quip that just as "the sequel is never as good as the original," a Supreme Court term full of big cases often precedes a term filled with quieter ones. Following that pattern, one might predict that the October 2023 Term will be a tranquil one, lacking in the type of landmark cases that shaped the term before it. But that prediction could prove wrong. With several big cases involving the administrative state, the Second Amendment, the taxing power, trademarks, and social media already on the calendar, and several other important cases on the horizon, the upcoming term might just be the sequel that matches—if not exceeds—the original.

I. The Administrative State

Federal agencies exercise outsized control over American life. The FCC regulates what Americans can see on television or hear on the radio. The FDA dictates what Americans can get from their pharmacist to treat their illness. The EPA can stop a home improvement project in its tracks. Any American who has filed taxes (hopefully) did so in accordance with the rules established by the IRS, and anyone who has flown in the United States in the last two decades has had to interact with agents from the TSA.[6] The

[6] For those who don't deal in shorthand, the agencies are the Federal Communications Commission (formed in 1934), the Food and Drug Administration (1906), the Environmental Protection Agency (1970), the Internal Revenue Service (1862), and the Transportation Security Administration (2001).

hundreds of agencies that make up the administrative state are the chimeras of the constitutional system. Although technically residents of the executive branch, federal agencies exercise the executive power to enforce laws, the legislative power to promulgate rules and regulations, and even the judicial power to adjudicate civil actions.

For decades, the judiciary has given agencies free rein to regulate. Courts have countenanced broad delegations of power from Congress to federal agencies and deferred to the latter's interpretation of the law. In recent years, however, courts have appeared increasingly willing to place limits on the authority of the administrative state. The big case last term involved the Department of Education's move to cancel up to $20,000 in student loans per borrower. The Court rebuffed the Department's claim that it had authority to implement the cancellation under the HEROES Act—a 2003 law that allows the Secretary of Education to "waive or modify" any statutory or regulatory provision related to a student aid program "as the Secretary deems necessary in connection with a war or other military operation or national emergency."[7] This Term, the Supreme Court will hear three separate cases involving agency deference, agency enforcement, and agency funding. That could make this Term the most consequential one yet for the administrative state.

A. Agency Deference

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court will consider overruling its roughly 40-year-old precedent in *Chevron v. Natural Resources Defense Council*,[8] "the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever."[9] In *Chevron,* the Court departed from Chief Justice John Marshall's axiom that it's emphatically the duty of the judiciary to say what the law is.[10] *Chevron* instructs courts to defer to agency interpretations of statutory language that the court considers ambiguous.

[7] *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[8] 467 U.S. 837 (1984).

[9] Ronald A. Cass, Chevron—*Complicated, Start to Finish*, 23 Federalist Soc'y Rev. 265 (2022).

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Chevron has launched waves of detractors. They contend that *Chevron* is incompatible with the Constitution's structure and unlawfully delegates the judicial power to interpret laws to federal agencies. Another critique is that *Chevron* contravenes basic principles of due process. It has been long said that a man cannot be the judge in his own case, but *Chevron* requires courts to defer to agency interpretations even where the same agency is a litigant in the case. Still more, the Supreme Court has never provided an answer to a threshold question: How much ambiguity is enough to take a question of statutory interpretation out of the hands of a court and vest it in the domain of a federal agency? A law review article from 2017 surveyed over 1,000 cases and found that appellate courts found ambiguity in the statutory language roughly 70 percent of the time.[11] Yet one prominent federal court of appeals judge remarked that same year that he had never found statutory language ambiguous enough to defer to the agency in interpreting it.[12]

Loper Bright presents the Court with the opportunity to overrule *Chevron*. The plaintiffs in *Loper Bright* are commercial fishers who participate in the Atlantic herring fishery. Federal law permits the federal government to require fishing boats to carry observers who monitor compliance with fishery management plans. What federal law does not specify, however, is who must pay for the observers. Faced with budget shortfalls, the National Marine Fisheries Service (NMFS) implemented a rule to require fishers to fund monitors, who perform the same basic functions as observers. That imposes a heavy financial burden on fishers trying to earn a living: The Service itself estimates that the requirement imposes costs of over $700 per day and reduces profits by roughly 20 percent.

The fishers contend that the Magnuson-Stevens Act, a 1976 law that requires fishers to carry observers, did not authorize the agency to require fishers to pay for them. A divided D.C. Circuit panel concluded that the language of the Magnuson-Stevens Act was not "wholly unambiguous" as to whether the NMFS may require fisher-funded monitors.[13] It then proceeded to step two of the *Chevron*

[11] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017).

[12] Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017).

[13] Loper Bright Enters. v. Raimondo, 45 F.4th 359, 366 (D.C. Cir. 2022).

analysis and upheld the NMFS rule after concluding that the agency's interpretation of the Act was "reasonable."[14]

The decision will have enormous practical consequences. Hundreds of agencies promulgate countless rules that affect individuals across the United States every year. Those Americans sometimes challenge agency rules on the grounds that Congress never provided the statutory authorization for those rules in the first place. How a court decides particular cases can determine whether individuals may keep their hard-earned profits, whether they may build on their own property, or even whether they may remain outside of prison walls.[15] A court applying *Chevron*, however, places a thumb on the scales in favor of the agency. If the court concludes that a statute is ambiguous (or as in *Loper Bright*, not "wholly unambiguous"), it must shirk its duty to say what the law is in favor of any reasonable interpretation offered by the agency—which is typically one of the parties in the case.

B. Agency Enforcement

Loper Bright would be the biggest administrative law case by a mile in most other terms, but not this one. In *SEC v. Jarkesy*, the Supreme Court will review a groundbreaking Fifth Circuit decision that invalidated several aspects of the U.S. Securities and Exchange Commission's (SEC's) powers on several different grounds.

Years ago, George Jarkesy established two hedge funds, which brought in over 100 investors and held roughly $24 million in assets. The SEC initiated an action within the agency, alleging that Jarkesy committed fraud by misrepresenting information about the funds and overvaluing the funds' assets. The SEC's administrative law judge (ALJ) conducted an evidentiary hearing and held in favor of . . . the SEC. The ALJ required Jarkesy and his investment advisor to pay $300,000 in civil penalties and nearly $700,000 in disgorgement. The ALJ also prohibited Jarkesy from associating with brokers, dealers, and advisors.

Jarkesy raised multiple constitutional claims, first with the SEC and then on appeal to the Fifth Circuit. The SEC rejected all of them.

[14] *Id.* at 369.

[15] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703–04 & n.18 (1995).

A divided Fifth Circuit panel, however, agreed with Jarkesy on each of the claims that it considered.[16] The court first held that the SEC proceedings violated Jarkesy's Seventh Amendment rights by depriving him of a jury trial. That question turns on whether the rights at issue are historically considered "public rights," which an agency may adjudicate without affording the individual a jury trial. The court reasoned that the fraud claims at issue were quintessentially about the redress of private harms, and thus the SEC violated Jarkesy's Seventh Amendment rights by assigning that type of action to a proceeding devoid of a jury.[17]

The Fifth Circuit then held that the facts gave rise to nondelegation issues because Congress provided the SEC unbridled discretion to determine whether to prosecute individuals in federal district court or through in-house proceedings.[18] Finally, the Court held that the removal restrictions for the SEC's administrative law judges were unconstitutional.[19] As the head of the executive branch, the President must retain sufficient control over ALJs, who perform substantial executive functions. Yet two layers of removal protections impede the President's control over ALJs: ALJs may be removed by SEC commissioners only for good cause established by the Merit Systems Protections Board and SEC commissioners may only be removed by the President for good cause.

Any one of these issues would make *Jarkesy* an important case, but the Supreme Court will consider all three. The Court's decision will also have massive practical ramifications in the financial sector. In Fiscal Year 2022, the SEC initiated over 200 enforcement actions, heard more than 200 civil actions, and imposed over four billion dollars in civil penalties on individuals.[20] The decision will therefore dictate the rights of individuals, like Jarkesy, who find themselves in the crosshairs of SEC enforcement actions. Beyond that, many other federal agencies adjudicate enforcement actions in-house, with such actions adjudicated by ALJs who enjoy some form of tenure protection.

[16] Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022).

[17] *Id.* at 457.

[18] *Id.* at 462–63.

[19] *Id.* at 465.

[20] *See* SEC, Addendum to Division of Enforcement Press Release, Fiscal Year 2022, at 1–2 (Nov. 15, 2022).

The different issues that the Court is considering in this case underscore the conceptual tensions that arise from the unique features of administrative agencies, which don't fit neatly within any single branch of government and instead exercise the powers of all of them. Congress presumably provided removal protections to administrative law judges to mimic, on a smaller scale, the type of tenure protections afforded to federal judges. The issue, however, is that administrative law judges are not members of the federal judiciary, but instead officers of agencies that operate within the executive branch. That fact raises significant due process concerns: In important cases involving hundreds of thousands of dollars in penalties, an agency can serve as the judge in its own case.

C. Agency Funding

In *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America*, the Supreme Court will consider the legality of the funding mechanism for the CFPB. The CFPB enforces a host of laws whose subjects range from credit cards to student loans. The Bureau garners money through a peculiar funding process. Most agencies receive their funds through the appropriations process—by which Congress directly allocates funds to the agency via statute year after year. But the CFPB draws funds directly from the Federal Reserve—without any congressional action at all. Coincidentally (or maybe not), when a Member of Congress demanded to know which CFPB official authorized an expenditure of 200 million dollars in taxpayer money to refurbish its lobby with a two-story waterfall, the Bureau's then-director responded "why does that matter to you?"[21]

The Supreme Court will review the Bureau's funding mechanism in a challenge to the CFPB's Payday Lending Rule. That Rule prohibits lenders from collecting repayment via preauthorized account access after two consecutive withdraw attempts have failed due to insufficient funds. In the Bureau's view, this practice is "unfair" and "abusive."[22] The Fifth Circuit held that the way in which the CFPB

[21] GOPFinancialServices, *Why Does That Matter to You?*, YouTube (Mar. 17, 2015), https://tinyurl.com/5fs79j2m.

[22] *See Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 624 (5th Cir. 2022).

receives its funds violated the Appropriations Clause.[23] One problem is that the CFPB receives its funds from the Federal Reserve and not Congress. To make matters worse, the Federal Reserve itself receives funds not from the normal appropriations process but through bank assessments. Just as strange, the CFPB keeps its money not with the Treasury, but in its own account in the Federal Reserve. Such funds are committed to the control of the CFPB's Director, and unspent funds in one year can be rolled over to the next.

If the Supreme Court agrees that the anomalous CFPB funding structure violates the Appropriations Clause, it must confront a thornier question: remedy. If the Court decides that the CFPB's funding structure is unconstitutional, will the Court invalidate the Payday Lending Rule? The CFPB contends that even if it loses on the constitutional question, the Court should keep the Rule in effect and only prevent the Bureau from using unconstitutionally appropriated funds to enforce the Rule in the future. The Fifth Circuit, however, reasoned that because the CFPB promulgated the Payday Lending Rule with illicit gains, an Appropriations Clause violation necessitates vacating the Payday Lending Rule entirely. The remedy the Supreme Court chooses will shape the practical significance of the case. If the Court agrees with the CFPB, Congress may well choose to fix the funding problem and keep the Payday Lending Rule humming along. But if the Court affirms the Fifth Circuit's remedial analysis, the decision could effectively invalidate numerous other rules promulgated by the CFPB, if not all of them.

II. The Second Amendment

In *United States v. Rahimi*, the Court will consider a Second Amendment challenge to a federal law that prohibits persons subject to domestic violence restraining orders from possessing firearms. At different times, the Fifth Circuit has issued rulings for both of the opposing parties in the case. It had originally ruled for the government in upholding the federal law, but after the Supreme Court's decision in *New York State Pistol and Rifle Association v. Bruen*,[24] the Fifth Circuit withdrew its earlier opinion and considered the case anew.

[23] *Id.* at 642.

[24] 142 S. Ct. 2111 (2022).

Bruen was enough for the Fifth Circuit to come to a different conclusion. Drawing on the historical analysis that the Supreme Court performed in *Bruen*, the Fifth Circuit concluded that the federal law violated the Second Amendment because there was no historical analogue to the federal firearm prohibition at issue.[25] In the last two decades, there have been several big Supreme Court cases involving the Second Amendment, which had been largely absent at the Court before 2008. But each of those cases, significant as they were, left open obvious questions for future courts to resolve. *Bruen* was no different, and *Rahimi* presents the Court with a significant opportunity to clarify *Bruen*'s reach.[26]

III. The Taxing Power

In *Moore v. United States*, the Justices will confront a Sixteenth Amendment question, a subject that rarely makes its way to the Court's docket. The Sixteenth Amendment allows Congress to impose taxes on "income" without apportionment among the several states (apportionment is required for "direct" federal taxes that are not "income"). The word "income" has traditionally meant income realized by the taxpayer. In other words, shareholders might be taxed if the company provides distributed profits to shareholders in the form of dividends, but not if the company reinvests its profits.

In 2017, Congress enacted a one-time Mandatory Repatriation Tax (MRT). That tax was assessed to shareholders who owned over ten percent of the shares of certain American-owned foreign companies. Before 2017, shareholders in this position only paid taxes when the companies distributed earnings. The MRT, however, treated a company's retained earnings (which are not distributed to shareholders) as income and assessed taxes at rates of either eight or 15.5 percent, depending on how the company held the assets.

[25] United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023).

[26] Astute readers of *Rahimi* might find that the statute at issue, 18 U.S.C. § 922(g)(8), has a familiar ring. That's because the Gun Free School Zones Act at issue in *United States v. Lopez*, 514 U.S. 549 (1995), was codified at 18 U.S.C. § 922(q). After *Lopez*, Congress added a jurisdictional hook, and the statute now provides that it "shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A).

Over a decade ago, Charles and Kathleen Moore invested in a foreign start-up founded by Charles Moore's friend and former coworker. The company, which was founded to empower rural farmers in underserved communities in India, sought to import, manufacture, and distribute farming equipment. The business was very profitable. Therefore, although the Moores never received a dividend, they were assessed over $10,000 in taxes under the MRT. The Ninth Circuit rejected the Moores' Sixteenth Amendment challenge, concluding that nothing in the Amendment prohibits the government from taxing shareholders on a pro-rata basis.[27]

Proposals to tax the unrealized income of individuals have already advanced through the House and Senate in recent years, and a Supreme Court decision blessing Congress's authority to impose such taxes might give Congress all the encouragement that it needs to do so.

IV. The First Amendment

The previous term was a big one for the First Amendment. The Court decided *Counterman v. Colorado*,[28] which clarified the interplay between true threats and the First Amendment, and *303 Creative LLC v. Elenis*,[29] which concluded that the First Amendment prohibits Colorado from compelling website designers to create websites expressing messages with which the designers disagree.

This term will feature some notable First Amendment cases of its own. The first concerns an issue near and dear to virtually every millennial's and Gen Z-er's heart: social media blocking. In a pair of cases, the Court will consider whether public officials violate the First Amendment when they block their constituents on social media. The issue is a murky one because "state action" is a prerequisite to any First Amendment claim. But many public officials have personal accounts that they use to communicate issues of public concern. A classic example of this came up a few years ago when then-President Donald Trump blocked individuals on X, the website then known as Twitter. Before the Supreme Court could hear the case, Donald Trump lost his reelection bid and the case became moot.

[27] Moore v. United States, 36 F.4th 930, 936 (9th Cir. 2022).

[28] 143 S. Ct. 2106 (2023).

[29] 143 S. Ct. 2298 (2023).

For better or worse, the government officials in the two social media cases to be considered by the Court next term are not as well known. *O'Connor-Ratcliff v. Garnier* involves two school board members in California and *Lindke v. Freed* involves a city manager in Michigan. With social media becoming an increasingly prevalent tool by which government officials communicate important information, the cases could be significant for the ability of individuals (and sometimes even "trolls") to participate in public discourse.

The Court will also hear a trademark case arising out of the Patent and Trademark Office's rejection of a "Trump Too Small" trademark. The Supreme Court has previously invalidated federal trademark laws prohibiting the registration of trademarks that "disparaged" persons or were "immoral or scandalous," finding that both prohibitions infringed First Amendment rights. In *Vidal v. Elster*, the Court will decide whether there are similar First Amendment problems with a federal trademark law that bars trademarks containing names identifying particular living individuals without their written consent. As in the other two cases involving laws on trademark registration and the First Amendment, the government lost in the Federal Circuit but then was successful in getting the Supreme Court to grant review. On the one hand, that may not bode well for the government, since it handily lost the two previous cases. On the other hand, the previous cases involved laws that expressly disfavored certain viewpoints, and it's not obvious that the law in this case does the same.

V. Tester Standing

In *Acheson Hotels LLC v. Laufer*, the Court will decide whether testers have standing to sue for violations of the Americans with Disability Act (ADA). The ADA requires hotels to post adequate information about room accessibility. Deborah Laufer is an ADA "tester"—someone who scours hotel websites for violations of this requirement but has no plans to stay at the hotels that she sues. There is a split of authority among the federal courts of appeals on whether someone in Laufer's position has standing to sue under the ADA, and the Supreme Court's conclusion might hinge on how it defines the injury. If the injury is access to information for its own sake, then we should expect the Court to affirm Laufer's standing to sue. But if the Court concludes that Congress imposed the informational requirements at issue only as a means for future hotel residents to

ensure that they can book an accessible room, then the smart money is on a ruling in favor of the hotel.

There's another twist. In late July, Laufer voluntarily dismissed her lawsuit in district court and asked the Supreme Court to take it off its docket. Acheson Hotels also contends that the case is moot, but only because it has now provided all the information that is required under the ADA. Acheson Hotels has accused Laufer of strategic maneuvering and asked the Supreme Court to proceed with arguments. The Supreme Court announced that it will do just that, but it called on the parties to be prepared to answer questions on mootness.

VI. Discrimination

The Supreme Court's current docket doesn't yet carry any case quite like *Students for Fair Admissions v. Harvard*,[30] but it does nonetheless feature two cases involving allegations of discrimination. The Court will hear yet another redistricting case in *Alexander v. South Carolina State Conference of the NAACP*. The three-judge panel agreed with the challengers that South Carolina's congressional map had been racially gerrymandered. The defendants—a group of government officials and election commissioners—reply that the district lines were prompted not by racial considerations, but political ones.

In *Muldrow v. City of St. Louis*, the Court will consider a question that it reframed: Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage? Intuitively, the answer might be yes, but the Eighth Circuit ruled against Sergeant Jatonya Muldrow, who alleges that she was transferred because the St. Louis Police Department wanted to hire a man for her role. The Eighth Circuit reasoned that Title VII prohibits "adverse employment decisions," and absent a showing of material change in the terms of her employment, Muldrow could not make out a successful Title VII claim. If the Court affirms that rationale, it might leave unchecked transfer decision prompted by considerations of race and sex. That might give government employers who are fixated on racial or gender proportionality another tool to reach their desired outcome even after the *Students for Fair Admissions* cases.

[30] 143 S. Ct. 2141 (2023).

VII. Forfeiture

In *Culley v. Marshall*, the Supreme Court is presented with the question of whether civil asset forfeiture without a prompt post-deprivation hearing violates due process. The question is an important one as civil forfeiture—a process by which government takes an individual's property even though the individual has not been convicted of a crime—has expanded over the previous years. Lengthy delays can be particularly problematic for individuals going through the civil-forfeiture gantlet. Such individuals have had property or cash embargoed under government control for months or even years. The importance of this issue is underscored by the ideologically diverse group of organizations that have filed friend-of-the-court briefs in this case. The groups include the Pacific Legal Foundation (my former employer), the Institute for Justice, the American Civil Liberties Union, the Legal Aid Society, the Constitutional Accountability Center, the National Federation of Independent Business Small Business Center, and others.

VIII. On the Horizon

At this time last year, the petitions in several major cases of the Term, from student loan forgiveness to home equity theft, had not yet been granted by the Court. Following that pattern, we should expect the Court to take a few more blockbusters in the next few months. Here are some likely contenders:

A. Property Rights

In *Sheetz v. County of El Dorado*, the Court will have the opportunity to clarify the law on unconstitutional exactions. The Supreme Court previously held in a pair of cases—*Nollan v. California Coastal Commission*[31] and *Dolan v. City of Tigard*[32]—that the government can't indirectly work takings by forcing property owners to surrender their property in exchange for permits. Permit conditions must bear a substantial nexus and be roughly proportional to the permit itself. Those cases involved exactions by agency officers, and a handful of subsequent cases have drawn a distinction between that type of

[31] 483 U.S. 825 (1987).

[32] 512 U.S. 374 (1994).

"adjudicative exaction" and "legislative exactions." The Court will decide whether the latter are exempt from the unconstitutional conditions analysis merely because the exactions were authorized by legislation.

In *Devillier v. Texas*, a group of property owners allege that Texas worked a taking by flooding their land. But the issue presented to the Supreme Court isn't whether Texas violated the Takings Clause; it's whether the state would have to pay just compensation even assuming that the flooding *did* work a taking. That's an open question because there is unresolved tension between two constitutional principles: sovereign immunity, which provides that states are typically immune from claims for money damages, and the Fifth Amendment, which requires states to provide just compensation when they take private property.

In *Community Housing Improvement Program v. City of New York*, a group of plaintiffs contend that New York's rent-control law constitutes a per se taking under the Fifth Amendment. The law at issue covers roughly a million apartment units in New York City and prohibits landlords from taking back possession of their units after the renter's lease expires. The plaintiffs rely heavily on the Court's recent decision in *Cedar Point Nursery v. Hassid*,[33] which held that a California regulation requiring agricultural growers to allow union organizers onto the growers' farms was a per se taking because it destroyed the growers' right to exclude. The plaintiffs in the New York case contend that New York's law similarly deprives them of their right to exclude and should therefore also be treated as a per se taking.

B. Search and Seizure

Verdun v. City of San Diego involves one way that the government enforces those dreaded time limits on parking where no parking meter is in sight. Since the 1970s, San Diego has resorted to "tire chalking" to catch miscreants who don't bother to move their cars. Tire chalking is the low-tech strategy of marking the tires of every car in a time-limited parking area with chalk. The enforcer returns after whatever time limit is in effect (say, two hours later) and places tickets on any remaining chalked cars. The Sixth Circuit previously

[33] 141 S. Ct. 2063 (2021).

held that tire chalking is a search under the Fourth Amendment and does not fall within the "administrative search" exception, for which no warrant is required. The Ninth Circuit in *Verdun* thought the Sixth Circuit got it upside down. The administrative search exception to the warrant requirement has been used to justify warrantless searches of junkyards, massage parlors, and daycare centers. The Ninth Circuit held that tire chalking falls comfortably within that exception, putting it on firm constitutional footing. It remains to be seen whether the Supreme Court will agree.

C. Free Speech

Mazo v. Way involves a First Amendment challenge to an election law that prohibits candidates from using certain slogans. New Jersey allows candidates in primary elections to place slogans of up to six words next to their names on the ballot. Yet candidates cannot reference any individual or corporation in their slogans absent written consent from that individual or corporation. One of the challengers wanted to use the slogan "Bernie Sanders Betrayed the NJ Revolution," but she couldn't do so because she failed to obtain written approval from Bernie Sanders himself.

In *Tingley v. Ferguson*, a licensed marriage and family counselor is asking the Court to review a Washington State law that prohibits conversion therapy for minors. The counselor contends that the Washington law poses both free speech and free exercise problems. If the Court were to take this case, its decision would be significant nationwide. Twenty states and over 100 municipalities have similar laws.

The Supreme Court has called for the views of the Solicitor General in *NetChoice, LLC v. Paxton* and *NetChoice, LLC v. Moody* and might take up those cases this term.[34] The cases involve First Amendment challenges to state laws that regulate social media companies. The Texas law at issue in *Netchoice, LLC v. Paxton* bars large social media platforms from blocking, removing, or demonetizing content based on the social media users' views. The Florida law at issue in *Netchoice,*

[34] In mid-August, the Solicitor General filed a brief asking the Court to take both cases, but she indicated the United States' view that not all of the issues presented warrant review. Brief for the United States as Amicus Curiae, Moody v. NetChoice, LLC; NetChoice, LLC v. Moody; NetChoice, LLC v. Paxton, Nos. 22-277, 22-393 and 22-555 (U.S. Sup. Ct. filed Aug. 14, 2023).

LLC v. Moody prohibits social media companies from deplatforming candidates, hiding posts by or about a candidate, or deplatforming "journalistic enterprises."

D. Jurisdiction

In *Federal Bureau of Investigation v. Fikre*, the government is (to no one's surprise) attempting to kick another case out on jurisdictional grounds. Yonas Fikre challenges his placement on the FBI's No Fly List. The government contends that Fikre's challenge is moot because the FBI took Fikre off the list and provided a declaration that Fikre will not be placed on the list in the future based on currently available information. The case may present the Court with an opportunity to clarify the scope of the voluntary cessation doctrine—a mootness exception that guards against government gamesmanship to get rid of a case on mootness grounds only to revert to its old ways once the coast is clear.

E. Equality Under the Law

Coalition for TJ v. Fairfax County School Board involves changes to the admissions policy at one of the most prestigious high schools in the country: The Thomas Jefferson High School for Science and Technology (known to some as "TJ"). Before 2020, TJ admitted students on the basis of a series of standardized tests given to all applicants. But in 2020, board members voiced concerns about the racial composition of TJ, and altered the admissions criteria in hopes of changing the school's racial demographics. The new policy requires TJ to admit a certain percentage of students from each middle school, and led to a dramatic decrease in Asian American students, who the Board presumably considered "overrepresented" at TJ in previous years. The case tees up an important question on the heels of the *Students for Fair Admissions* decision: What does the Equal Protection Clause say about efforts to racially balance schools through facially neutral proxies for race?

Conclusion

Last term will be a tough act to follow. But with several big cases already on the calendar and perhaps many more waiting in the wings, the upcoming term might just be even bigger. It might just be another blockbuster.