

**Supreme Court Review**

**Virgin Islands  
Fourteenth Annual District Conference**

**Erwin Chemerinsky  
Dean and Jesse H. Choper Distinguished Professor of Law  
University of California, Berkeley School of Law**

**January 16, 2024**

***October Term 2022***

**I. Affirmative action**

Students for Fair Admissions Inc. v. President & Fellows of Harvard College, 143 S.Ct. 2141 (2023). The admissions programs at Harvard College and the University of North Carolina violate Title VI of the 1964 Civil Rights Act and the equal protection clause of the 14th Amendment in using race as a factor in admissions decisions to benefit minorities and enhance diversity.

**II. Civil rights litigation**

Groff v. DeJoy, 143 S.Ct. 2279 (2023). Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

**III. Criminal law**

Samia v. United States, 143 S.Ct. 2004 (2023). The admission of a nontestifying codefendant's confession did not violate the Sixth Amendment's confrontation clause where the confession as modified did not directly inculcate the defendant but used the descriptor "other person" and the jury was instructed to consider the confession only as to the codefendant.

**IV. Elections**

Allen v. Milligan, 143 S.Ct. 1487 (2023). The state of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act.

Moore v. Harper, 143 S.Ct. 2065 (2023). The federal elections clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections and therefore did not bar the North Carolina Supreme Court from reviewing the North Carolina legislature's congressional districting plans for compliance with North Carolina law.

## V. Executive power

Biden v. Nebraska, 143 S.Ct. 2355 (2023). The Secretary of Education does not have authority under the Higher Education Relief Opportunities for Students Act of 2003 to establish a student loan forgiveness program that will cancel roughly \$430 billion in debt principal and affect nearly all borrowers.

## VI. First Amendment: speech

Counterman v. Colorado, 143 S.Ct. 2106 (2023). To establish that a statement is a “true threat” unprotected by the First Amendment, the state must prove that the defendant had some subjective understanding of the statements’ threatening nature, based on a showing no more demanding than recklessness.

303 Creative LLC v. Elenis, 143 S.Ct. 2298 (2023). The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.

### *October Term 2023*

#### I. Administrative law

*Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, No. 22-448 (argued October 3, 2023). Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau, **12 U.S.C. § 5497**, violates the appropriations clause in Article I, Section 9 of the Constitution, and in vacating a regulation promulgated at a time when the Bureau was receiving such funding.

*Securities and Exchange Commission v. Jarkesy*, No. 22-859 (to be argued November 29, 2023). (1) Whether statutory provisions that empower the Securities and Exchange Commission to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment; (2) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and (3) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

*Loper Bright Enterprises v. Raimondo*, No. 22-451 (to be argued on January 17, 2023). Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

*Relentless v. Department of Commerce*, No. 22-1219 (to be argued on January 17, 2023). Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

*Food and Drug Administration v. Alliance for Hippocratic Medicine*, No. 23-235 (argument date not set yet). 1) Whether respondents have Article III standing to challenge the Food and Drug Administration’s 2016 and 2021 actions with respect to mifepristone’s approved conditions of use; (2) whether the FDA’s 2016 and 2021 actions were arbitrary and capricious; and (3) whether the district court properly granted preliminary relief.

## **II. Bankruptcy**

*Harrington v. Purdue Pharma L.P.*, No. 23-124 (argued December 4, 2023).

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants’ consent.

## **III. Criminal law and criminal procedure**

*Smith v. Arizona*, No. 22-899 (to be argued January 10, 2024). Whether the confrontation clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst’s statements are offered not for their truth but to explain the expert’s opinion, and (b) the defendant did not independently seek to subpoena the analyst.

## **IV. First Amendment -- speech**

*O’Connor-Ratcliff v. Garnier*, No. 22-324 (argued October 31, 2023). Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official’s personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

*Lindke v. Freed*, No. 22-611 (argued October 31, 2023). Whether a public official’s social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

*Moody v. NetChoice, LLC*, No. 22-277 (argument date not set). (1) Whether the laws’ content-moderation restrictions comply with the First Amendment; and (2) whether the laws’ individualized-explanation requirements comply with the First Amendment.

*NetChoice, LLC v. Paxton*, No. 22-555 (argument date not set). Whether the First Amendment prohibits viewpoint-, content-, or speaker-based laws restricting select websites from engaging in editorial choices about whether, and how, to publish and disseminate speech — or otherwise burdening those editorial choices through onerous operational and disclosure requirements.

*Murthy v. Missouri*, No. 23-411 (argument date not set). (1) Whether respondents have Article III standing; (2) whether the government’s challenged conduct transformed private social media companies’ content-moderation decisions into state action and violated respondents’ First Amendment rights; and (3) whether the terms and breadth of the preliminary injunction are proper.

*National Rifle Association of America v. Vullo*, No. 22-842 (argument date not set). Whether the First Amendment allows a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government’s own hostility to the speaker’s viewpoint or (b) a perceived “general backlash” against the speaker’s advocacy.

**V. Guns**

*U.S. v. Rahimi*, No. 22-915 (argued on November 7, 2023). Whether **18 U.S.C. § 922(g)(8)**, which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.