As New Term Starts, Challenge to 'Chevron' Stars on High Court's Docket

September 29, 2023 **by Dan McCue**

WASHINGTON — The Supreme Court returns to the bench on Monday to begin a term that will include major cases on gun rights, the Americans With Disabilities Act, social media use by public officials, racial gerrymandering in South Carolina, and whether Purdue Pharma's proposed reorganization plan and its provisions related to a multibillion-dollar opioid settlement violates the Bankruptcy Code.

But there is little doubt the most closely watched case of this year's term will be *Loper Bright Enterprises v. Raimondo*, a case in which the justices, who have recently been on a tear overturning long-standing precedents, will consider the fate of the decades-old *Chevron* doctrine.

The central question in *Loper* is whether *Chevron* should be overturned. If it is, it could have a profound effect on the regulatory powers of federal agencies.

The one certainty about the case is that during oral arguments one will hear a lot about "stare decisis," which means "to stand by things decided" in Latin.

Of course the other thing diehard court observers will be watching for starting Monday are clues to the high court's philosophical bent this term.

Following its 2021-2022 term, in which the court handed down such **blockbuster rulings** as *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*, the conservative

The Supreme Court Building. (Photo by Dan McCue)

majority led by Justice Clarence Thomas, appeared to be in ascendance.

A year later, however, while still deeply conservative, the court saw something of a return to the incrementalism preferred by Chief Justice John Roberts, Jr. In fact, during the 2022-2023 term of the court, the chief justice was in the majority in divided cases 86% of the time.

Whether this term will see a continuation of that trend is anybody's guess, but the as-yet unscheduled oral argument and outcome in *Loper* will go a long way in determining how the court is perceived when the 2023-2024 term wraps up in late June of next year.

As this piece is being written, chaos on Capitol Hill is making it highly likely that there will be a federal government shutdown come midnight on Saturday.

The Supreme Court, however, will continue to conduct its normal operations, relying on permanent funds that are not subject to annual approval.

Here are some, though certainly not all, of the cases on the Supreme Court's docket people will be talking about in the coming months:

United States v. Rahimi

The case involves the constitutionality of a federal statute that prohibits the possession of a firearm by a person subject to a restraining order meeting several preconditions.

It involves Zackey Rahimi, a Texas man who was issued a civil restraining order by a state court in February 2020, after his ex-girlfriend accused him of assault. The order barred him from engaging in harassment-related behaviors towards his ex-girlfriend or her child, as well as owning firearms.

Later, while investigating an unrelated crime, police officers executed a search warrant at Rahimi's home, discovering a rifle and a pistol he admitted to possessing. Rahimi was charged and convicted in a federal district court of unlawful firearm possession. The 5th U.S. Circuit Court of Appeals later tossed the verdict.

Now that the case is before the Supreme Court, the key earlier decisions that will have a bearing on its outcome are *District of Columbia v. Heller* and *New York State Rifle v. Bruen.*

In *Heller*, the court held that the Second Amendment guarantees an individual right to possess firearms in the home for purposes of self-defense. In *Bruen*, the court held that the Second Amendment guarantees an individual right to carry firearms outside the home for purposes of self-defense.

But *Heller* also placed some limits on select gun rights, with the justices saying the case established the right of "law abiding, responsible citizens" to use arms in the defense of their homes.

That assertion is expected to weigh heavily in the government's argument. So, too, are state laws from the very earliest days of the Republic which held that local governments could disarm loyalists who refused to swear allegiance to the new country, and which allowed states to confiscate guns from those known to have used them to foment terror.

Later state laws also blocked the sale of firearms to minors, people who were known to be mentally disturbed and intoxicated individuals.

Loper Bright Enterprises v. Raimondo

Already mentioned above, the petitioner in this case is effectively making three arguments in favor of overturning the *Chevron*

doctrine, also known as the *Chevron* Deference.

First, the petitioner says in briefs already filed in the case, that the doctrine violates Article III of the Constitution because it requires courts to violate their duty under *Marbury v. Madison* to conduct a judicial review and clearly — and independently — state what a law means, part of the system of checks and balances created by the ruling.

Secondly, the petitioner contends that *Chevron* permits Congress to delegate to agencies the power to make policy — a violation of Article I's requirement that only Congress can exercise legislative power.

Next, the petitioner argues *Chevron* violates due process because it is inconsistent with the principle that courts must decide cases impartially, without a predisposition to one party or the other.

If none of these arguments work, lawyers for the petitioner are also planning on arguing that the *Chevron* doctrine has simply proved unworkable in practice.

This is because courts have shown they can have significantly different views on what constitutes a vague and ambiguous statute.

Finally, if all else fails, expect the petitioner's attorneys to argue that *Chevron* effectively provides Congress with an incentive not to do one of its principal jobs, to legislate, thereby subjecting Americans to agency overreach.

The case is ripe for Roberts to be the deciding vote.

Alexander v. South Carolina State Conference of the NAACP

After the 2020 Census, South Carolina's Republican-controlled Legislature adopted a new congressional map that moved tens of thousands of Black voters out of the state's 1st Congressional District, effectively guaranteeing that the district would be a safe seat for Republicans.

It is now represented by Rep. Nancy Mace, R-S.C.

The South Carolina State Conference of the NAACP sued, and a three-judge panel concluded that the district was an unconstitutional racial gerrymander.

The legislators then appealed directly to the Supreme Court, arguing that the map was actually a political gerrymander — which Roberts had previously held are "beyond the reach of the federal courts" — that had an unintended and ancillary racial impact.

The district court found this argument unconvincing, holding that race was the predominant factor in the drawing of lines for the 1st Congressional District, and that the Legislature purposefully set a racial target in carving up Charleston County to ensure a Republican tilt in the district.

The main question presented to the justices in this case is whether the lower court erred in finding that race was the predominant factor in the drawing of the congressional district.

The petitioners are also asking the justices to determine whether the lower court erred in its assessment of their claim the new map dilutes their vote, in violation of the 14th Amendment.

The South Carolina Legislature contends the lower court's ruling was rife with legal and factual errors, and failed to give due credit

to the state's evidence that politics predominated in the drawing of the congressional district.

It also contends there is no evidence the district was adopted with a racially discriminatory purpose or resulted in a racially discriminatory effect, which the petitioners must prove to prevail in the case.

Securities and Exchange Commission v. Jarkesy

Prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in the wake of the 2008 global financial crisis, only registered entities like licensed investment advisers were subject to the Investment Advisers Act's administrative enforcement provisions.

After the meltdown, the congressional response appeared to empower the Securities and Exchange Commission to impose significant civil penalties on individuals through an administration process subject only to limited review by a federal court of appeals.

In 2007, George Jarkesy created two hedge funds investing in small startup companies that lost value a year later when the world's markets tanked.

The SEC then accused him of overestimating the value of the hedge fund assets and making other false claims.

Under Dodd-Frank, the agency decided to pursue its proceedings against Jarkesy internally, rather than have a jury evaluate its claims against him.

Seven years later, the agency slapped Jarkesy with $300,000 in civil penalties and $685,000 in disgorgement. He was also barred from any future investments-related activities.

Jarkesy appealed to the 5th U.S. Circuit Court of Appeals, which held the administrative enforcement procedure used against Jarkesy was unconstitutional because it violated his Seventh Amendment right to be tried by a jury.

The case could have a sweeping impact because it could determine whether going forward, the SEC and other agencies can continue to conduct internal investigations and impose penalties or must instead bring their actions in federal court.

Harrington v. Purdue Pharma

After it became clear that Purdue Pharma, manufacturer of OxyContin, would be held liable for its role in contributing to the nation's opioid epidemic, the Sackler family, owners of the pharmaceutical giant, withdrew roughly $11 billion from its accounts. Purdue later went bankrupt.

Under a proposed reorganization plan, Purdue Pharma would distribute money to opioid victims, with the Sacklers contributing at least $6 billion dollars to fund the effort. In return, the Sacklers would be relieved of personal liability in future claims.

But there's a rub. Not only does the proposed reorganization release the family from the claims of those who consent to the plan, it also releases the claims of those who do not.

The question before the justices will be whether the Bankruptcy Code authorizes a court to approve a reorganization plan that releases third-party claims against non-debtors without the consent of the third parties.

Purdue, a group of opioid victims and some of the company's unsecured creditors argue that the Bankruptcy Code does

authorize such third-party releases. To hold otherwise, they say, would only result in Purdue Pharma's liquidation.

The government, meanwhile, asserts that as per the relevant provisions of the code, bankruptcy involves a debtor and its creditor, not the relationship between those creditors and non-debtors.

To extend relief to non-debtors, the government argues, would allow non-debtors to reap the benefits of bankruptcy without incurring any of its obligations.

Acheson Hotels, LLC v. Laufer

The question here is whether a woman with multiple disabilities who has decided to be a self-appointed Americans with Disabilities Act "tester," has Article III standing to challenge a hotel's failure to provide disability accessibility, even if she has no intention of visiting it?

Deborah Laufer, the respondent in the case, regularly visits hotel-reservation websites to determine whether they comply with the Reservation Rule and the ADA.

She sued the Acheson Hotels in Maine after visiting the hotel's website and finding its website did not provide any accessibility information.

Under the ADA, hotel owners are required to describe the accessibility features of their hotels in sufficient detail to enable persons with disabilities to determine if the hotel meets their accessibility needs.

The ADA gives a cause of action for injunctive relief to any person subjected to discrimination based on disability.

In this case, because Laufer had no intention to visit the hotel, a federal court dismissed the case for lack of Article III standing. However, the 1st U.S. Circuit Court of Appeals reversed that ruling based on an earlier case, *Havens Realty Corp. v. Coleman*.

The *Havens Realty* court held that a tester like Laufer who is deprived of information to which she is legally entitled suffers an Article III injury.

Based on this, the 1st Circuit concluded that Laufer suffered an injury because she was deprived of the information she would need to decide whether the hotel met her accessibility needs — even though she lacked any intent to visit the hotel.

The petitioner contends the 1st Circuit got it wrong, and that the ruling in another case, *TransUnion LLC v. Ramirez* should take precedence. In that case the court held that a failure to provide information that does not cause any adverse effect cannot constitute a legally cognizable injury.

In the alternative, the petitioner also asserts that the ADA does not entitle a non-traveler, like Laufer, to accessibility information in a hotel or other accommodation.

Muldrow v. City of St. Louis

Petitioner Jatonya Muldrow, a police sergeant, sued the city of St. Louis, Missouri, after she was transferred from its intelligence division. Muldrow contends she was transferred solely due to her gender, a violation of Title VII.

Title VII prohibits an employer from discriminating against its employees on the basis of certain personal characteristics, including sex, with respect to "terms, conditions or privileges of employment."

The question the justices are being asked to address is whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer significantly disadvantaged the individual in terms of salary and benefits.

A ruling in Muldrow's favor would make it easier for employees facing discrimination to bring legal claims.

A district court granted the city's motion for summary judgment, and the 8th U.S. Circuit Court of Appeals affirmed the decision, holding that Title VII does not prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.

Essentially, the 8th Circuit said not requiring petitioners to provide proof of being placed at a significant disadvantage would create a situation where disgruntled employees could sue over every management they didn't like under the guise of discrimination.

Muldrow's attorneys maintain Title VII contains no such requirement and that in any event, any transfer to a new position, in and of itself, alters an employee's terms or conditions of employment.

Lindke v. Freed

Like seven in 10 other Americans, Michigan native James Freed created a private Facebook profile just over a decade ago that was originally intended to connect with family and friends.

When his page grew too popular for Facebook's 5,000-friend limit on profiles, Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it.

In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect his new position. Over time, he continued to share both personal posts about himself and his family and professional updates, including directives and policies he initiated in his official capacity.

Kevin Lindke came across Freed's page and began commenting, negatively, on Port Huron's response to the coronavirus pandemic.

Initially, Freed simply deleted the comments, but ultimately, he decided to block Lindke entirely. Lindke then sued Freed for violating his First Amendment rights.

The district court granted summary judgment to Freed on the basis of his posts not being "a state action."

The 6th U.S. Circuit Court of Appeals affirmed that decision, explaining that in its view, a public official's posts on a social media account constitute state action only when the official is performing an actual or apparent duty of his office or invoking state authority.

In his petition to the Supreme Court, Lindke argues that public officials act under color of law when they use social media to invoke the pretense of governmental authority and to perform governmental functions.

Lindke further contends Freed engaged in state action because he conveyed the impression that his Facebook page was an official communication outlet and used it to perform the functions of his office.

O'Connor-Ratcliff v. Garnier

Christopher and Kimberly Garnier are parents of children in the Poway Unified School District in the city of Poway, California, a

community of about 50,000 people just north of San Diego, California.

The Garniers frequently posted comments critical of the district’s board of trustees on the social media pages of the trustees.

Two of those trustees, Michelle O’Connor-Ratcliff and T.J. Zane, subsequently created Facebook and Twitter pages for their respective school board campaigns.

Once reelected, they continued to use their Facebook accounts to post about school district business and news. At the same time, they decided to delete the most critical comments and ultimately blocked the couple entirely in October 2017.

The Garniers sued, arguing that their social media pages constitute a public space and that by blocking them, the trustees violated their First Amendment rights.

The district court granted declaratory and injunctive relief to the Garniers but found that the trustees had qualified immunity from the damages claims. The 9th U.S. Circuit Court of Appeals affirmed.

By law, a person is engaged in state action only when their conduct is “fairly attributed to the state.”