Guns, Social Media and Fair Play for Whistleblowers Stand Out on Early Docket

A Review of the First Month of the Supreme Court's 2023-2024 Term

November 17, 2023 **by Dan McCue**

WASHINGTON — While "chaos" was the most apt description for certain parts of the federal government in October, the U.S. Supreme Court reconvened and got on with the business of unwinding the nation's thorniest legal questions.

By the time Congress finally chose Rep. Mike Johnson, R-La., to be its new speaker on Oct. 25, ending a weekslong state of paralysis in the U.S. Congress, the justices presiding across the street from the Capitol had already heard oral arguments in half a dozen cases.

And by the time the House approved a continuing resolution to keep the government funded into next year — the justices had heard another six cases and unveiled their first-ever code of ethics.

For those distracted by all the hullabaloo next door, what follows is a review of what's been going on over at 1 First Street.

Pulsifer v. United States
Argued on Oct. 2, 2023

In their first argument of the new term, the justices were asked to look, with a copy editor's precision, at a provision of a law aimed at reducing prison sentences for some nonviolent drug crimes.

The U.S. Supreme Court building on a relatively quiet morning shortly after the start of its 2023-2024 term. (Photo by Dan McCue)

The case focused on part of the First Step Act, bipartisan legislation passed in 2018 in response to the nation's ballooning prison population.

Though the number has gone down, the Bureau of Justice Statistics reports that there were still over 1.2 million people in federal prisons in 2021, the latest year for which comprehensive statistics are available.

Under the so-called "safety valve" provision, judges could disregard the mandatory minimum sentences that had resulted in tens of thousands of people with limited criminal history being put behind bars for nonviolent drug offenses.

But judges have been somewhat uneasy with their new power, finding the safety value difficult to interpret.

Three of the requirements written into the provision involve prior criminal history, and this left judges in something of a quandary when determining who might be eligible for a shorter sentence or some lesser form of punishment.

Shades of former President Bill Clinton's grand jury testimony during the Monica Lewinsky scandal, when he famously avoided answering a question directly by saying, "it depends on what the meaning of the word 'is' is," the judges wanted clarification on whether the word "and" in the safety valve provision always means "and" or whether it also means "or."

The justices' decision will determine whether an individual before the court can get a shorter sentence if they meet just one of the prior criminal history criteria or if they must meet all three.

At the center of the underlying case is Mark Pulsifer, who pleaded guilty to one count of distributing at least 50 grams of methamphetamine in the Southern District of Iowa.

Because of the drug type and quantity involved and a prior conviction for a "serious drug felony," the statutory minimum

mandatory term of imprisonment was 15 years — unless the "safety valve" applied.

As written, Section 3553(f)(1) of the First Step Act would apply to Pulsifer so long as he did not have any "criminal history points" a) resulting from a 1-point offense; b) a prior 3-point offense; and c) a prior 2-point offense.

Pulsifer contended he qualified for a shorter sentence because he did not have (a), (b) and (c). If he prevailed, his sentence could be as little as seven years.

The trial judge disagreed, concluding that a defendant that met any one of the three criteria was ineligible for the safety valve sentence.

The 8th U.S. Circuit Court of Appeals affirmed the judge's ruling, holding that the word "and" in Section 3553(f)(1) had to be interpreted "severally," not "jointly."

Pulsifer petitioned the Supreme Court to weigh in, asking the justices to decide whether the term "and" carries a conjunctive or disjunctive meaning.

One of the interesting wrinkles in the oral argument for the case was the fact Justice Ketanji Brown Jackson is sitting on the bench.

Jackson is the first public defender to serve on the Supreme Court. She also worked for the U.S. Sentencing Commission, which studies and develops sentencing policies for the federal courts.

In the interest of completeness, it should be noted three of her colleagues, Justices Neil Gorsuch, Sonia Sotomayor and Samuel Alito, are all former prosecutors.

But it was Jackson who immediately bore down to the practical consequences of the law.

"I appreciate that 'and' can sometimes mean 'or,' but this is not a conversation," she said. "This is a statute, and it's a criminal statute with huge implications for the lives and well-being of the people who come through the system."

"What I'm trying to understand," she said to Frederick Liu, the assistant to the solicitor general who was arguing for a stricter interpretation of the provision, "is why the imprecision in this statute, the fact that you say there are two textually grammatically possible readings, doesn't count against the government?"

Liu responded by arguing the definition of penal law that the court has embraced, and one that extended all the way back to the English common law of the pre-Revolution period, consists of laws that define a crime or increase or impose a punishment.

"This provision does neither," Liu said. "It relieves defendants of punishment. It is a congressional act of lenity. And this court has never applied the Rule of Lenity."

"So, despite the fact this has to do with punishment — and the implications on that punishment vary dramatically depending upon whether it applies or not, you reject the notion that lenity is something that we should consider?" Jackson said.

"Correct," Liu said. "This court has never applied the Rule of Lenity to this type of statute. It would be an extension of the Rule of Lenity to a new context."

Shay Dvoretzky, arguing on behalf of Pulsifer, described the First Step Act as "a once-in-a-generation sentencing reform, passed in a bipartisan manner, signed by President Trump."

"The motivating force here was to move away from mandatory minimums," Dvoretzky said.

"But either way you want to look at it, whether it is lenity in favor of the defendant, the defendant having to satisfy all three in order to be disqualified, or if you want to look at it as Congress wanting to grant broad relief here from mandatory minimums, we ought to construe 'and' to mean 'and.'

"And, either way," he added, "Congress knows how to use 'and' and 'or.' It ought to be held to those ordinary meanings. And if it were to disagree with this court's decision in our favor, Congress is free to amend the statute."

Alito, for one, seemed to grow tired of the debate very quickly.

"Everybody I assume in this courtroom today speaks the English language, and all we're trying to do is understand some words in the English language," Alito said. "It just seems to me that a lot of these arguments that we've heard, I mean, the people here who haven't studied the case must think this is — this is gibberish."

Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.
Argued Oct. 3, 2023

Congress created the Consumer Financial Protection Bureau in the wake of the global financial crisis of 2007-2008, intent on protecting consumers from what were seen as predatory and deceptive practices by financial institutions.

In 2017, the agency adopted a regulation, the Payday Lending Rule, that prohibited lenders from attempting to withdraw funds

from borrowers' bank accounts after two consecutive attempts failed for lack of funds.

A group of lenders sued not only hoping to gut the new rule, but to potentially render the agency and all of its regulations toothless.

To do so, they contended the way the agency was funded was unconstitutional.

Instead of receiving money allocated to it each year by Congress, as most federal agencies do, the bureau receives an annual capped amount of funding directly from the Federal Reserve, which collects fees from member banks.

This, the lenders said, is a violation of the Constitution's appropriations clause.

A federal judge disagreed with the lenders, but his ruling was reversed by the 5th U.S. Circuit Court of Appeals.

The government appealed to the Supreme Court arguing that the lenders' argument was essentially wrong.

According to Solicitor General Elizabeth Prelogar the nation's founders created similar funding structures and they'd since been applied to the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corp. and even the Federal Reserve itself.

"The very first Congress," Prelogar said, "enacted an appropriation without specifying a fixed sum up to a particular cap of spending.

"That's just how the CFPB funding mechanism is structured today, and there have been countless appropriations that looked like this throughout history," she said.

Prelogar added that if the lenders were to prevail, it would have "sweeping consequences."

"Even today, in the 2022 Consolidated Appropriations Act, we counted more than 400 uses of this kind of discretion to spend up to a specified cap," she said.

But Chief Justice John Roberts expressed some apprehension about her argument.

"You have a very aggressive view of Congress' authority under the appropriations clause," he told Prelogar.

"I'm not saying remotely that that's not correct, but … I mean, you represent the executive branch … and it struck me that the reason you would want to defend that [position] is because it gives [Congress] more power to give away," Roberts said.

The chief justice said if one followed that line of logic, then it was natural for some, the lenders in this case, to worry that Congress may have given too much of its own power away when it created the bureau.

"Is that an unpersuasive concern?" he asked.

"I don't think it's an unpersuasive concern, but built into your question as I understood it … was the idea that maybe Congress could do something that would be surprising or anomalous to the framers," Prelogar said.

"To that I would say if you're looking at it through that lens, then history should play a powerful role in trying to understand the limits or scope of how much Congress can give away, [and] when does it become too much," she said.

Noel Francisco, who served as solicitor general in the Trump administration, represented the lenders.

> "Congress has never authorized an agency to pick its own perpetual appropriation," he argued. "And if it can do that for the CFPB, then you have blessed a regime in which Congress can authorize the executive branch to spend whatever it wants to fund the entire government."

Supreme Court Cases

Pulsifer v. United States

What's it about? Does the Word “And” in the Safety Valve Provision of the Federal Sentencing Statute, Which Requires Courts to Ignore Any Statutory Minimum Mandatory if Specific Criteria Are Met, Mean “And” or “Or”?

How are they leaning? Justices appear inclined to rule “and” means “and.”

Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.

What's it about? Is the Consumer Financial Protection Bureau’s Payday Lending Rule Invalid Because the Bureau Receives Its Budget from the Federal Reserve System, and Not a Direct Annual Appropriation from Congress?

How are they leaning? Justices seem inclined to uphold the way the Consumer Financial Protection Bureau and many other agencies are funded.

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Interactive content by Flourish

Acheson Hotels, LLC v. Laufer Argued on Oct. 4, 2023

Deborah Laufer, a woman with both physical disabilities and vision impairments, has filed more than 600 lawsuits against restaurants, hotels and other public accommodations in recent years over their failure to comply with the Americans with Disabilities Act.

In 2020, Laufer sued Acheson Hotels after she discovered it failed to publish information about the accessibility of its accommodations on its website, a requirement of the ADA.

A federal judge dismissed Laufer's lawsuit, finding that she lacked standing to sue because she had no plans to visit the hotel and therefore, suffered no injury as a result of the lack of information on its website.

However, the 5th U.S. Circuit Court of Appeals reversed the lower court's ruling, concluding that Laufer's lack of intent to actually book a room at a hotel operated by Acheson did not negate the fact that she suffered an injury.

The hotel petitioned the Supreme Court to intervene, asking it to clarify when someone has standing to challenge a public accommodation's failure to provide the public with accessibility information.

When oral arguments got underway, Adam Unikowsky, the attorney representing Acheson Hotels, said Laufer lacked standing to sue because "she has no use for the information she seeks."

He also noted that as a so-called "tester," Laufer had filed suit against hundreds of hotels based on the same allegations.

Murray v. UBS Securities, LLC

What's it about? Under the Sarbanes-Oxley Act, Must Whistleblower-Employees Prove Their Employer Acted With Retaliatory Intent?

How are they leaning? Justices seemed to be leaning toward rejecting an effort by UBS Group to make it more difficult for financial whistleblowers to prove retaliation claims.

Alexander v. South Carolina State Conference of the NAACP

What's it about? Did South Carolina Engage in Impermissible Racial Gerrymandering and Impermissible Dilution of Black Residents' Votes in Drawing Its Congressional District 1 After the 2020 Census?

How are they leaning? Justices seem likely headed for a split decision with conservative majority poised to find "no clear error" made in the drawing of the map.

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Laufer's attorney, Kelsi Corkran, urged the justices to allow the case to advance toward a decision so the standing issue could be resolved for future litigants.

Vidal v. Elster

What's it about? Can the Government Deny a Trademark Because It Contains the Name of a Political Figure, Without That Person's Written Consent?

How are they leaning? The Justices will likely reject a California lawyer's claim to a right to own a "Trump too small" trademark.

United States Department of Agriculture Rural Development Rural Housing Service v. Kirtz

What's it about? Does the Fair Credit Reporting Act Authorize a Person to Sue the Government for Failing to Investigate and Remedy Incorrect Credit Information the Government Reported to a Credit Reporting Agency?

How are they leaning? Justices seem ready to accept that a government agency could be held liable under the Fair Credit Reporting Act.

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"For … decades, this court has recognized that discrimination inflicts Article III injury regardless of whether the plaintiff experiences any harm beyond the unequal treatment," Corkran said. "We're talking about a discriminatory denial of information."

But this line of argument was sidetracked when first, Justice Clarence Thomas, and later, most of the other justices raised objections to the case being decided at all.

As Thomas pointed out, since the lawsuit was filed the hotel website had been brought into compliance with the ADA, and Laufer herself had moved to dismiss the lawsuit.

"Why should we decide this?" Thomas asked Unikowsky. "It seems as though it's finished. The respondent [Laufer] has withdrawn her suit."

While Unikowsky acknowledged Laufer had dropped her suit, he also observed that "she hasn't promised not to bring new suits in the future. And if she doesn't, another plaintiff presumably will."

"Well, do you admit that it would be easier to simply moot this out and wait on a suit that is still pending for another round to discuss standing?" Thomas asked.

"I'm actually not really sure it would be easier because I think that even if the court does what respondent asked, it would still be a significant precedential decision," Unikowsky said. "I mean, the court would essentially be blessing the legal strategy, over our objection, of filing large numbers of lawsuits and abandoning

them at the last minute. That, I think, would create a template for future plaintiffs to rely upon."

Unikowsky went on to argue: "Respondent does not face an imminent injury from the absence of accessibility information at the website of a hotel she has no interest in visiting. Respondent faces neither an informational injury nor a stigmatic injury. She does not face an informational injury because she has no use for the information she seeks. She's not interested in going to the hotel, so she has no reason for information about whether it is accessible. Nor does she face a stigmatic injury.

"This court has held that a person is injured when she is personally subject to unequal treatment. But that requirement is not satisfied by a plaintiff who searches for hotel websites on the internet to check whether they comply with her interpretation of the ADA," the attorney said.

Unikowsky urged the court to settle the question of standing raised by the case.

"The circuits are divided. The question is important. The arguments are fully aired. And if the court doesn't decide the question here, it may not have another opportunity to do so," he said.

"The court should not 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," Unikowsky said.

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC
Argued on Oct. 10, 2023

Historically, the Supreme Court has maintained that federal courts must enforce so-called "choice of law" clauses in maritime contracts.

The choice-of-law clause, according to Black's Law Dictionary, is a contractual provision through which the parties to a contract designate the jurisdiction whose law will govern any disputes that may arise between the parties.

In this case, the court is being asked when such a clause in a maritime contract can be ignored.

The case — a rare insurance dispute on the court's docket — pits insurer Great Lakes Insurance SE against a yacht owner, Raiders Retreat Realty Co.

The marine insurance policy in question was intended to cover "all risks" for physical damage to the vessel, and states that federal maritime law must be used to resolve any disputes between the parties, with New York state's insurer-friendly law serving as a backup.

In 2019, the yacht ran aground near Fort Lauderdale, Florida, incurring at least $300,000 in damage.

During a post-accident inspection, the claims adjuster discovered that the fire extinguishers onboard the vessel were not properly certified and tagged, which — per the contract — voided any coverage that would have been granted.

With that, Great Lakes denied the claim submitted by Raiders and Raiders sued for bad faith breach of contract and breach of fiduciary duty under Pennsylvania law, a move that prompted

the insurer to file a counterclaim seeking to enforce the venue provisions in the policy.

The district court dismissed Raiders' claims, finding that the policy's choice-of-law provision required the application of New York law.

The court also rejected Raiders' argument that the choice-of-law provision was unenforceable under the Supreme Court's 1972 decision in *The Bremen v. Zapata Off-Shore Co.*, in which the court held that under federal admiralty law, a forum-selection provision is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought."

On appeal, the 3rd U.S. Circuit Court of Appeals reversed the lower court ruling, holding that a choice of law contract "might not be enforceable if its election for New York law were contrary to the 'strong public policy' of the displaced state, Pennsylvania."

In its petition to the Supreme Court, the insurer argues the 3rd Circuit's decision should be reversed because it places value on state choice of law rules over federal rules.

It premises its argument on the contention that the appeals court ruling violates both judicial precedent and the supremacy clause of the Constitution.

During oral arguments, the majority of the justices appeared to favor upholding choice of law provisions in marine insurance policies.

Justices Brett Kavanaugh and Gorsuch, in particular, seemed to suggest that maintaining the status quo and enforcing choice of law clauses in marine contracts would ensure a sense of legal predictability.

Likewise, Sotomayor noted that there's a consensus about the law among lower courts and appeared to suggest that maintaining this uniformity — Great Lakes' position — is important.

The most vivid exchange during oral arguments came as Alito reflected on the "harsh" result that would occur if New York law was applied to the case — specifically that the yacht owner would be denied coverage due to something completely unrelated to the yacht's running aground.

Addressing Jeffrey Wall, the attorney for the insurer, Alito notes "a wonderful line in your brief."

"Now, this is a case about a yacht that ran aground, and when the claim is filed, your client denies the claim because you say they didn't do what they were supposed to do regarding fire extinguishers. But there was no fire," Alito said.

"The absence of fire extinguishers up to your standards had nothing whatsoever to do with this. … And so you have this line: 'Although that denial may seem harsh to the land-bound, it reflects traditional maritime principles.'

"Now, if I were not land-bound, suppose, you know, I spent a lot of time sailing around the world on ships, it wouldn't seem harsh to me anymore?" Alito asked.

"It would not, if you were a member of the admiralty bar, as I've come to understand," Wall said.

"Justice Alito, I've always been worried about this because it struck me as harsh too when I approached the case. There is a different tradition that grew up around the admiralty system and Lloyd's of London," Wall said.

"I know there are a lot of things about old-time maritime law that are very harsh," Alito said, cutting him off. "Like, we had a case a few years ago involving a sailor who got a fractured skull shortly after leaving port, and a captain who refused to put him ashore at any port to get medical treatment. They made the entire journey first."

"But the reason for this, Justice Alito, is that you had international insurers located overseas who had no way of monitoring these vessels or incentivizing compliance. And so this tradition grew up and it's very different from what we think of as car insurance or home insurance, where you pay your premiums and they process the claims in the pool. These are sort of specialized policies," Wall said.

The attorney went on to explain that his client, Great Lakes, is an entity known as a "surplus lines insurer."

"I didn't know what that was before, but it turns out you go to them when other insurers won't take you," Wall said. "You can't get your boat policy from Progressive or GEICO because it may be risky or, as here, the boat is very expensive and you want a big policy. … So it's kind of a unique transaction that others in the market don't do."

Murray v. UBS Securities, LLC
Argued on Oct. 10, 2023

In the early 2010s, Trevor Murray was a financial expert for UBS Securities. As part of his job, and in adherence with Securities and Exchange Commission regulations, Murray had to confirm the authenticity and independence of his financial reports.

He was later fired after he complained that the UBS trade desk pressured him to skew his reports in favor of the financial

services company's commercial mortgage-backed securities business.

In 2014, Murray sued USB, accusing it of retaliatory termination in violation of the Sarbanes-Oxley Act's whistleblower protections.

This act is designed to shield whistleblowers from retribution when they unveil potential legal breaches within publicly traded companies.

The primary issue before the justices was how the act should be interpreted, particularly when it comes to the issue of who should ultimately bear the burden of proof.

Secondarily, the court is being asked to decide whether a whistleblower needs to demonstrate the employer's retaliatory intent to prevail in such cases.

After a jury trial, a federal judge ruled in favor of Murray, awarding him $1 million in damages.

UBS then turned to the 2nd U.S. Circuit Court of Appeals where it argued the jury should have been informed about the necessity for Murray to prove the firm's retaliatory intent.

The 2nd Circuit agreed, and overturned the lower court ruling; with that, the case was on to the Supreme Court.

Arguing for UBS was Eugene Scalia, son of the late Justice Antonin Scalia, who told the justices that under Sarbanes-Oxley, whistleblowers absolutely need to prove retaliatory intent on the part of employers.

Scalia also asserted that Murray was let go not because he raised uncomfortable concerns for higher ups, but because the company was trying to rein in costs.

Murray's lawyer, Easha Anand, argued that in the interests of employees, Congress purposefully lowered the proof threshold in Sarbanes-Oxley whistleblower cases.

As she explained to the justices, first, Murray needed to demonstrate that his whistleblowing was a determining factor in his termination.

Then, the burden would shift to UBS to explain that the action — Murray's being let go — would have been taken irrespective of his whistleblowing stance.

When it was Gorsuch's turn to weigh in, he seemed particularly disturbed by the 2nd Circuit's insistence that employees would have to prove their employer had a motive to retaliate if they were to have any hope of prevailing in the claim, a notion Gorsuch said the Supreme Court had already rejected.

"The question is whether there was discrimination, period," Gorsuch said.

Justice Elena Kagan, however, wasn't so sure.

She said she feared Gorsuch's "bare bones" approach to analyzing the case would ultimately force the court to return to the issue time and again.

"I don't think anybody wants to have this conversation all over again," Gorsuch said in response.

Justice Amy Coney Barrett also worried about Gorsuch's interpretation, saying it could leave the door open for lower courts to put more requirements on employees' burden of proof.

"In Sarbanes-Oxley, Congress employed a phrase, 'discriminate because of,' that has long been recognized to require a plaintiff to show discriminatory intent," Scalia said, trying to address at

least some of the justice's concerns. "It is this transplanted phrase with its rich soil that decides this case."

Alexander v. South Carolina State Conference of the NAACP
Argued on Oct. 11, 2023

This case involves the constitutionality of South Carolina's new congressional district map, which allegedly moved Black voters out of one district to make it more hospitable to Republicans.

The focal point of claims of an unlawful racial gerrymander is South Carolina's 1st Congressional District, currently represented by Rep. Nancy Mace, R-S.C.

Following the 2020 Census, state lawmakers had to redraw its seven congressional districts so that each contained a roughly equal population of about 730,000 people.

The census revealed the 1st Congressional District, which encompasses a number of South Carolina's fastest-growing coastal communities, was overpopulated by about 88,000 people, while the neighboring 6th Congressional District, a so-called "opportunity" district under the Voting Rights Act currently represented by Rep. James Clyburn, D-S.C., was underpopulated by about 85,000 residents.

Instead of simply moving the district lines to equalize the number of people in each district, Will Roberts, a cartographer on the state Senate's staff, moved 53,000 residents from the 6th Congressional District to the 1st Congressional District, then moved 140,000 residents from District 1 to District 6.

As a result of these moves, the state Legislature was able to maintain a 17% Black voting-age population in the 1st District,

while moving fast-growing and increasingly affluent Beaufort and Berkeley Counties entirely within its borders.

Both moves tended to favor Republican candidates.

Republican Gov. Henry McMaster signed the redistricting plan into law in January 2022.

Shortly thereafter, the South Carolina State Conference of the NAACP and Taiwan Scott, a Black voter who lives in the district, sued, arguing that the 1st Congressional District and two others, the state's 2nd and 5th Congressional Districts, were unconstitutional racial gerrymanders that were drawn to intentionally dilute Black voting strength.

The Republicans insisted they had redrawn the lines to try to maintain their hold on six of the state's seven Congressional districts — a partisan gerrymander, not a racial one, which they say the Supreme Court has upheld as legal.

In January, a three-judge panel ruled against the plaintiffs in regard to the latter two districts, but ruled in their favor when it came to the 1st Congressional District.

In doing so, it found that race was the "predominant motivating factor" in the drawing of the district's lines and it enjoined the state from holding elections with the district in its current configuration.

Under federal law, any decision by a three-judge panel is appealable directly to the Supreme Court, and the state availed itself of that opportunity. Both parties have requested a decision by Jan. 1.

During oral arguments, Alito suggested "this whole case is about disentangling race and politics" and his fellow justices quickly

appeared to adopt this aspect of the dispute as their main line of questioning.

The state's reliance on blatantly partisan motives in drawing the map was made possible by the high court's 2019 decision in *Rucho v. Common Cause*.

In *Rucho*, a decision written by Roberts, the court ruled that it did not have authority nor the ability to resolve partisan gerrymandering claims, a decision that paved the way for states to blatantly gerrymander their congressional maps to favor one party over another.

Referring to that case's impact since it was announced, Kagan observed that "Before *Rucho*, you could understand completely why it was that mapmakers started [using] race in order to achieve partisan gerrymanders because they couldn't do partisan gerrymanders directly.

"They were afraid that was going to be found unlawful … so why do people keep using race when they can just [partisan gerrymander] directly?" she asked.

The lawyer for the Black voters and South Carolina NAACP countered by saying the Legislature used race "as a proxy" to predict partisan behavior.

That caused Sotomayor to observe that if the only way you can achieve your political objectives is through race, then that's clearly illegal.

The attorney for South Carolina then tried to shift the focus of the argument, claiming the three-judge panel that heard the case erred by failing to enforce what he called the "alternative map requirement."

Under this "requirement," plaintiffs bringing racial gerrymandering claims would have to produce an alternative map to the one being challenged in order to demonstrate that the Legislature could achieve its political aims without using race as a predominant factor.

"[But] the alternative map requirement doesn't exist," Kagan said.

She said that under the court's racial gerrymandering case law in *Cooper*, "the plaintiff's task is simply to persuade the trial court, without any special evidentiary prerequisite, that race, not politics, was the predominant consideration."

She then went on to say that neither an alternative map's presence nor its absence, "can in itself resolve a racial gerrymander."

Roberts did attempt to bring the two lines of questioning together, but only wound up with additional questions.

"Counsel, we have said that the burden that you're assuming of disentangling race and politics in a situation like this is very, very difficult. But it is your burden, right?" he asked the lawyer representing the South Carolina NAACP.

"Yes, your honor," she said.

"And you're trying to carry it without any direct evidence, with no alternative map, with no odd-shaped districts — which we often get in gerrymandering cases — and with a wealth of political data that you are suggesting your friends on the other side would ignore in favor of racial data.

"Have we ever had a case like that with that combination?" Roberts asked. "We usually are looking for those sorts of things

and we have those. Have we ever had a case before where all it is is circumstantial evidence?"

But Sotomayor seemed confident that whether there was actual or just circumstantial evidence is irrelevant.

"*Cooper* was … clear that you don't need a smoking gun, and if you don't need a smoking gun, you don't need direct evidence to prove a racial gerrymander," she said.

Culley v. Marshall
Argued on Oct. 30, 2023

This case starts as a tale of two women. The first, Halima Culley, lent her car to her son; the second, Lena Sutton, lent her car to a friend.

In both cases, the borrowers were subsequently arrested for driving while on drugs and police seized the cars as "instrumentalities of crime."

The relevant state seizure statute contains an exception for innocent vehicle owners but offers no expedited hearing for owners to prove their innocence.

The cities that held the women's cars kept them under lock and key for a year before Culley and Sutton proved their innocence in summary judgment proceedings.

In all, Sutton had to wait 14 months to get her car back, while Culley waited 20 months before courts determined her car should be returned.

Each woman then filed a class-action lawsuit in federal court claiming that the cities' failure to provide a prompt post-deprivation hearing violated their rights under the 14th

Amendment's due process clause and the Eighth Amendment's excessive fines clause.

The Supreme Court was asked to determine how the need for a post-deprivation hearing should be decided.

One test available for the court to consider is whether denying such a hearing would violate the Sixth Amendment's "speedy trial" guarantee; another would determine deprivation of property without due process.

In short, the case argued before the justices assessed the power of law enforcement to retain property seized by police that belongs to people not charged with a crime.

During oral argument, members of the court's conservative majority appeared sympathetic to the police officers who impounded the vehicles and the state forfeiture law they were upholding.

Thomas, for instance, seemed to suggest that the cities' existing legal process was adequate and that it was up to the women to seek summary judgment of their cases or for an expedited ruling on the merits of their individual cases.

"If you had filed a motion for summary judgment a week after the property had been taken, or the process had begun — forfeiture proceedings began — would you be here?" Thomas asked a lawyer representing one of the women.

But Sotomayor was having none of this discussion and angrily lashed out at what she called "abuses of the forfeiture system."

"It's been documented throughout the country repeatedly of the incentives that police are given to seize property to keep its

value," Sotomayor said. "We also know that that incentive has often led to months, if not years, of retention of property."

Since the suits were filed, Alabama, the state in which both seizures occurred, has revised the civil forfeiture law at the heart of this case to let someone who claims to be an innocent owner request a hearing at any time after the property seizure.

Lindke v. Freed and O'Connor-Ratcliff v. Garnier, combined cases
Argued on Oct. 31, 2023

It's a question born of a divisive, technology-enabled age: Can a public official block individuals who harass or disagree with them from their social media page?

At the center of more than three hours of oral argument were two local officials, one in California and the other from Michigan, who blocked certain individuals from posting on their public Facebook pages.

In *Lindke*, the official posted both personal and official information on his Facebook page; in *O'Connor-Ratcliff*, the officials posted information related to their offices.

In both cases, the blocked individuals sued, arguing that the officials had violated their First Amendment rights.

In the California case, Michelle O'Connor-Ratcliff, the vice president of the Poway Unified School District Board of Education, and T.J. Zane, a former board member, both created public Facebook pages while they were running for positions on the school board in 2014.

O'Connor-Ratcliff also had a public Twitter page.

Christopher and Kimberly Garnier, residents of San Diego County whose three children were enrolled in the school district, posted frequently — and in some cases, repeatedly — in regard to their displeasure with some of the board members' posts.

Ultimately, O'Connor-Ratcliff and Zane blocked the Garniers from their social media accounts, which prompted the couple to sue.

The Garniers contend that social media pages are effectively public spaces, and the board members violated their First Amendment rights by blocking them.

A federal district court sided with the Garniers, and the 9th U.S. Circuit Court of Appeals upheld the lower court's decision and concluded the Garniers' First Amendment rights were violated.

In doing so, the 9th Circuit said O'Connor-Ratcliff and Zane "acted under color of state law by using their social media pages as public fora in carrying out their official duties" because "they clothed their pages in the authority of their offices and used their pages to communicate about their official duties."

O'Connor-Ratcliff and Zane then petitioned the Supreme Court to intervene, arguing an official's posting on a social media page does not constitute state action when no actual state duty or authority is involved.

The dispute in the second case led to the opposite outcome, with a federal appeals court ruling in favor of the city manager of Port Huron, Michigan, after concluding in part that maintaining a social media account was not among his official duties.

James Freed had a private Facebook page that he converted into a public page after he was named city manager in 2014. In addition to identifying him as a city official, Freed's revamped page also

featured a link to a Port Huron city website and a city email address.

In addition to all this, Freed wore a city manager's pin in his profile picture and used the page primarily to share information about city programs and the work of his office.

From time to time, he also shared updates about his life outside of work.

In March 2020, Port Huron resident Kevin Lindke began posting criticisms of the city's COVID-19 response to Freed's Facebook page.

Though the two men initially engaged in some debate about the city response, Freed ultimately deleted Lindke's comments and blocked the three distinct Facebook profiles Lindke was using to post his thoughts on the pandemic and the city response.

Lindke then sued, alleging his First Amendment rights were violated when Freed deleted his comments and blocked his accounts.

A federal district court ruled in favor of Freed, finding that his Facebook activity was not state action and therefore shielded from 1st Amendment scrutiny.

The 6th U.S. Circuit Court of Appeals affirmed the lower court's decision and created a "duty-or-authority test," under which social media activity would be subject to constitutional scrutiny only if it is conducted in furtherance of governmental "duties" or where the activity depends on "state authority."

Applying its own test, the 6th Circuit concluded Freed was acting in his personal capacity and had not engaged in state action.

Further, it said, no state statute required him to have a Facebook page as part of his duties, and he didn't use his government staff or other resources to manage it.

Finally, the appellate panel said, Freed's profile belonged to Freed alone and was not the property of the city manager's office.

Lindke then turned to the Supreme Court, arguing the circuit court erred in its decision by failing to weigh the extent to which Freed used his Facebook page to perform and publicize his public responsibilities.

During oral arguments, a number of justices seemed skeptical of the assertion that any job-related discussions on a personal Facebook page means a government official is acting in his or her official capacity.

"One of the concerns I have about your position is [its] defining talking about your job as doing your job," Kavanaugh said. "[That's] really quite all-encompassing."

Kavanaugh went on to liken a Facebook page to other public places, like a grocery store, church or the stands at a high school football game where a public official might talk to members of the public or constituents in an informal, unofficial capacity.

"That's where they learn things to help them do their job better," the justice said. "They're thinking … I'm going to church, I'm going to the grocery store, but I'm also going to pick up things … that are going to help me get my finger on the pulse of the community."

Other justices appeared to be concerned about adopting rules that fail to account for the level of discourse taking place online.

"More and more of our government operates on social media. More and more of our democracy operates on social media. Public discourse, this is the forum for officials to talk to citizens, for citizens to talk to officials, for citizens to talk to each other, and it is becoming increasingly so," Kagan observed.

She went on to describe the task of coming up with a rule or formula to determine when an official is speaking in their official capacity on social media and when they are not is "a big picture challenge about the nature of the world we live in."

It was a challenge — the setting of a bright-line rule — that also appeared to weigh heavily on Roberts.

"On these pages, people — people have both a job in the government and they have all sorts of other things, whether it's cats or children or whatever it is, and the problem, it seems to me, is we kind of have to disaggregate that.

"And we have to say, well, you know, you have to have a governmental page and you have to have a private page and you can't mention the government on your private page or else it's going to become a government page," the chief justice said.

"As I understand it," Roberts said to Allon Keden, the attorney for Lindke, "say, if you've got 5% government, then we, the government, can basically say the whole thing, even if the rest of it is all about your children … and the dogs, that's ours. And if we don't like little dogs, we can say you can't put pictures of little dogs on there."

Vidal v. Elster
Argued on Nov. 1, 2023

Can the Patent and Trademark Office deny a request for a trademark because it contains the name of a political figure?

That was the question before the court after Steve Elster, a California lawyer, sought to trademark the phrase "Trump Too Small" so he could use it on t-shirts.

The phrase itself stems from an exchange between Sen. Marco Rubio, R-Fla., and former President Trump during a debate that occurred in the race during the 2016 Republican primary season.

At some point earlier, while on the campaign trail, Trump had insulted Rubio by calling him "Little Marco."

Rubio responded during the debate by claiming Trump had disproportionately small hands.

Trump fixated on the comment, seeing it as a jab at his manhood.

"Look at those hands. Are they small hands?" Trump asked from the debate stage.

"If they're small, something else must be small. I guarantee you, there's no problem. I guarantee it," he said.

By the time Elster applied to trademark the phrase, Trump had been elected president.

Elster said that "Trump Too Small" expressed his opinion about "the smallness of Donald Trump's overall approach to governing."

A trademark examiner rejected the proposed mark under Section 2(c) of the Lanham Act, which bars marks that "[consist of or comprise] a name … identifying a particular living individual" without the individual's "written consent."

The Trademark Trial and Appeal Board upheld the examiner's decision. Both also rejected Elster's claim that the rejection violated his free speech rights.

During oral arguments, several justices appeared to doubt that denying Elster the trademark violated his right to free speech.

And Roberts worried that a win for Elster would cause problems for others down the road, who, like the doctor, simply want to express their political opinion.

"Presumably there will be a race to trademark 'Trump Too This, Trump Too That,' whatever," Roberts said. "And then, particularly in an area of political expression, that really cuts off a lot of expression that other people might regard as an important infringement on their First Amendment rights."

Sotomayor was even more direct, telling the attorney for Elster, "The question is, is this an infringement on speech? And the answer is no."

U.S. Dept. of Agriculture Rural Housing Service v. Kirtz
Argued on Nov. 6, 2023

Reginald Kirtz took out, and later paid-in-full, two loans; one a student loan administered by the Pennsylvania Higher Education Assistance Agency, and the other, a loan administered by the U.S. Department of Agriculture's Rural Housing Service.

Despite having paid off both loans in June 2018, Kirtz discovered that both agencies continued to report the status of his accounts as "120 days past due date" on his credit file from TransUnion LLC, a consumer credit reporting agency.

Believing the erroneous reports were damaging his credit score, he sent a letter to TransUnion disputing the inaccurate statements on his credit file.

TransUnion then notified both lenders, alerting them to the alleged problem. Despite this, Kirtz said, neither agency took any

action to investigate or correct the disputed information.

In 2020, Kirtz sued the USDA in federal court alleging its failure to correct his credit report was a violation of the Fair Credit Reporting Act.

The department asked the district court to dismiss the case, arguing the act did not clearly show that Congress had intended to waive the federal government's immunity from lawsuits. The district court agreed and dismissed the suit.

Kirtz then appealed to the 3rd U.S. Circuit Court of Appeals, which reversed the lower court ruling. In doing so, it pointed to the act's definition of "person," which includes "any government or governmental subdivision or agency."

Moreover, the appellate court added, because the federal government is "the nation's largest employer and creditor," allowing lawsuits against it for violations of the FCRA would be consistent with Congress' goal of ensuring "fair and accurate credit reporting."

The USDA then asked the Supreme Court to intervene and finally decide whether the Fair Credit Reporting Act does indeed authorize an individual to sue the government for failing to investigate and remedy incorrect credit information a department or agency may have transmitted to a third party.

During oral arguments, a majority of the justices, including those on both sides of the ideological spectrum, seemed inclined to rule in favor of Kirtz.

After quoting from the actual text of the act, Thomas noted the statute specifically defined a person to include the government and its agencies.

"Wouldn't that suggest that it applies to the U.S. government?" he asked.

Jackson agreed, noting that lawmakers had amended the statute to make clear that it intended to expand liability beyond a single individual.

Gorsuch later opined that it would not be out of the ordinary that Congress wanted to protect consumers by placing liability on the government for its mistakes.

"What Congress has done is authorize a suit against natural persons, enterprises and governments," Kagan said, seeing the wording of the act as unambiguous.

When lawyers for the petitioner pushed back, asserting that the word "person" rather than "government" or "agency" is sprinkled throughout the act's text, Kagan would have none of it.

"The definition has a lot of words, right?" Kagan said. "There's a person, there's a corporation, there's an association, there's an enterprise, et cetera, et cetera. You can see why Congress didn't want to say that every time."

United States v. Rahimi
Argued on Nov. 7, 2023

The incidents underlying this Second Amendment case go back to December 2019, when Zackey Rahimi got into an argument with his girlfriend, identified in court documents as "C.M." in a Texas parking lot.

During the argument, Rahimi knocked her to the ground and then pushed her into his car, causing her to hit her head on the dashboard. When Rahimi realized a bystander had witnessed the assault, he pulled a gun and fired at the individual.

C.M. used that moment to escape, but Rahimi later called her at home and threatened to shoot her if she told anyone what had happened.

In February 2020, a Texas court granted C.M. a domestic violence protective order, effective for two years.

The order prohibited Rahimi from threatening, harassing, or approaching C.M. or her family. It also suspended Rahimi's handgun license, prohibited him from possessing a firearm, and warned him that his possession of a firearm while the order remained in effect could be a federal felony.

Rahimi repeatedly violated the order and was eventually arrested outside of C.M.'s home. He also threatened another woman with a gun, and has been accused of firing a gun in five different incidents between December 2020 and January 2021.

Rahimi was indicted on charges of violating a civil protective order which, among other things, explicitly prohibited him from possessing firearms.

He moved to dismiss the indictment, arguing it violated the Second Amendment, but a federal district court denied his motion. Rahimi then pleaded guilty, and was sentenced to 73 months in prison, followed by three years of supervised release.

Nevertheless, Rahimi continued his constitutional challenge. While the appeal was pending, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*, in which it held that when the government regulates an individual's right to keep and bear arms, it must demonstrate that its regulation "is consistent with the nation's historical tradition of firearm regulation" in order to withstand Second Amendment scrutiny.

When it came to Rahimi, the decision threw the 5th U.S. Circuit Court of Appeals for a loop, causing it to issue a ruling on his appeal, withdraw it, issue another ruling and withdraw that, before reversing itself one more time.

When the dust settled, the court concluded the law prohibiting Rahimi from owning a gun was unconstitutional — prompting an appeal from President Joe Biden's administration.

The case is the first in which the justices will be forced to apply their newly crafted "history and tradition" test from *Bruen* — and they appear to be in a no-win situation.

If the court interprets its history and tradition test narrowly, it will likely be forced to strike down the law barring individuals under a domestic violence protection order from possessing a firearm.

If, on the other hand, the justices uphold the law Rahimi was prosecuted under, they'll have to find some justification for it falling under its history and tradition approach.

During oral arguments Rahimi's lawyer, James Matthew Wright, argued that preventing those with domestic violence restraining orders from owning guns would become a "complete proxy for a denial of a constitutional right."

Prelogar, who is representing the Biden administration in the case, countered that claim by emphasizing the increased risk to women in abusive relationships when firearms are present.

Among other things, she pointed to statistics that show women living in a home with an armed domestic abuser are five times more likely to be murdered.

Throughout oral arguments, Roberts, Kagan, Sotomayor, Kavanaugh and Barrett all appeared to be grasping for a way to weaken the history and tradition test enough to deny gun rights to domestic abusers without conceding they'd made a mistake in deciding *Bruen*.

The only justices who seemed inclined to strike the law on constitutional grounds and uphold the rights of domestic violence abusers to possess firearms were Thomas and Alito.

Rudisill v. McDonough
Argued on Nov. 8, 2023

The final case of the court's first month on the bench asked the justices to consider how a particular statute limited or framed a veteran's use of the education GI benefits, and how those guardrails differed for veterans with multiple periods of service and those with only one.

At the heart of the case are military veterans who've earned college benefits under both the Montgomery GI Bill, which pays tuition, and the newer, more generous Post-9/11 GI Bill, which pays tuition and fees, plus housing and books.

By law, veterans are allowed to receive benefits from both, up to a maximum of 48 months. It is estimated that as many as 1.6 million veterans could be affected by the court's ruling.

FBI Special Agent James Rudisill is a long-serving decorated Army veteran who had multiple periods of service before and after the Post-9/11 Bill took effect in 2009.

During his military career, Rudisill rose to the rank of captain, and he served three tours of duty in Iraq and Afghanistan.

After completing his first tour, Rudisill applied for education benefits under the Montgomery GI Bill, using 25 months and 14

days of the 36-month benefit available under that program to complete his degree.

In 2014, following a separate tour in Iraq and Afghanistan, he applied for education benefits under the Post-9/11 GI Bill.

At the time, Rudisill had been accepted into Yale Divinity School and his desire was to return to active duty after graduation as a chaplain.

Rudisill believed he qualified for 22 months of benefits under the Post-9/11 bill before he would hit the congressionally mandated cap of 48 months.

But the VA told Rudisill that he'd have to either exhaust or forfeit his remaining Montgomery benefit and would be limited to 10 months and 16 days of Post-9/11 benefits — an amount equal, due to differences in the two programs, to his unused Montgomery GI Bill entitlement.

That interpretation put the divinity school out of financial reach for Rudisill and the current litigation followed.

The veteran won twice in lower court, but saw his most recent victory overturned on appeal.

During oral arguments, a number of the justices seemed to be sympathetic to the veteran and his argument.

Roberts noted that if one adopted the government's logic, someone who didn't serve as long as Rudisill could wind up with more benefits.

"That seems to me to be a pretty raw deal," Roberts said.

Gorsuch asked why a veteran should be forced into making choices that would harm their ability to get the most out of their

benefits, while Kagan and Sotomayor took turns calling the VA's interpretation "irrational" and "arbitrary."

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