University of San Diego School of Law

THE BLUE BRIEF

Faculty Review of the 2024-2025 U.S. Supreme Court Term

University of San Diego SCHOOL OF LAW

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Robert Schapiro

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Introduction

The University of San Diego School of Law is pleased to present the fifth annual Blue Brief, a faculty review of nine carefully selected rulings from the most recent Term of the United States Supreme Court. USD has an extraordinarily distinguished law faculty, and I believe that you will enjoy reading their assessments of cases ranging across a variety of important topics including civil rights, freedom of speech, administrative law, religion in schools, and citizenship.

This momentous Term highlighted continuing sharp divisions among the Justices. The Supreme Court showed deference to executive power with its rulings in *Trump v. CASA* and other emergency power cases, and it continued to define the contours of protections for marginalized groups in decisions such as *United States v. Skrmetti* and *Mahmoud v. Taylor.* Free speech in the digital age also came under scrutiny in cases including *TikTok v. Garland* and *Free Speech Coalition v. Paxton.*

In addressing critical issues, the Justices often rely on the insights of our faculty, and this past Term was no exception. Professor Michael Ramsey's work was cited by Justice Thomas in his concurrence in *Fuld v. Palestine Liberation Organization* and by Justice Sotomayor in her dissent in *Trump v. CASA*.

We are very happy to share the insights of nine of our eminent faculty on these important Supreme Court decisions. We are eagerly awaiting the opening of the Court's new Term on October 6, 2025, and we look forward to reporting back to you in the summer of 2026 with the latest developments.

Warm Regards,

Robert Schapiro

Robert Schapiro

Kevin Cole

Professor of Law

I. *Barnes v. Felix* Addresses Regulating Police Use of Force

In ***Barnes v. Felix***, the Court faced important questions about how to regulate police use of force. It unanimously agreed not to create a blanket rule, while offering a list of considerations for lower courts to ponder.

Officer Roberto Felix, Jr., pulled over motorist Ashtian Barnes for suspected toll violations. An odd encounter ensued, recorded on the officer's dashcam. Barnes said he didn't have his license with him, claimed the car was a rental in his girlfriend's name, and began rummaging through papers in the car, leading Felix to insist that Barnes stop "digging around." Felix said he smelled marijuana and asked "if there was anything in the car he should know about." Barnes responded that he might have some identification in the trunk and, at Felix's request, remotely opened the trunk from the driver's seat. Barnes also turned off the ignition.

Felix then told Barnes to get out of the car. Barnes opened the door, but turned the ignition back on instead of exiting. Felix unholstered his gun and jumped onto the car's doorsill as the car began to move forward, twice shouting, "Don't fucking move." Felix fired his gun twice inside the car while still standing on the doorsill, unable to see where he was aiming because his head was above the roof. Barnes was hit and died shortly thereafter. Barnes's mother sued on her son's behalf under **42 U.S.C. § 1983**, alleging a violation of Barnes's **Fourth Amendment** right against unreasonable seizures.

The case raised two issues that recur in police excessive force cases. First, when is it reasonable for police to persist in using force to effect an arrest for a minor offense? Many will remember the notorious 2014 case of **Eric Garner**, who died from a chokehold while being arrested for selling single cigarettes from packs without tax stamps. Second, and relatedly, does analyzing the reasonableness of force require consideration of other steps the police might have taken that might have made the later use of force unnecessary? For example, in some cases, police might de-escalate a situation in a way that would have prevented an arrestee from becoming a threat to officer safety. Or police might act belligerently in a way that provokes a later need to use deadly force. Declining to pursue a fleeing suspect is the ultimate form of de-escalation. Should it, or less drastic means, sometimes be constitutionally required through the reasonableness inquiry?

> Justice Kagan's narrow opinion specifically declined to address the broader difficult and important question: "whether or how an officer's own 'creation of a dangerous situation' factors into the reasonableness analysis."

In *Barnes*, the lower courts resolved the case by applying the "moment-of-threat" rule, which they described as compelled by Fifth Circuit precedent. That rule focuses solely on whether the officer is in danger at the moment of the threat that results in the use of deadly force, and events "leading up to the shooting" are "not relevant." Whether the officer acted reasonably early in the chain of events, including in jumping onto the doorsill, didn't matter in analyzing the reasonableness of deadly force; all that mattered was whether that force was necessary to protect the officer. Accordingly, the lower courts concluded that Felix's shooting was reasonable.

Though Officer Felix won in the courts below, he seemingly understood that the moment-of-threat rule from which he had benefited, as described in the lower courts, was indefensible. Taken literally, the rule would preclude a court from considering the nature of the offense for which Barnes had been stopped or the course of conduct between Barnes and Felix in deciding whether the officer actually faced a threat at the time force was used. Hence, Felix suggested that Judge Higginbotham's **majority opinion for the Fifth Circuit** misdescribed the moment-of-threat rule. Felix **argued** that, in actuality, Circuit precedent simply excluded consideration of whether "an officer's earlier error itself 'created the need for deadly force.'" There was some reason to be skeptical of the accuracy of Judge Higginbotham's majority opinion. Atypically, Judge Higginbotham authored both the majority opinion and a concurring opinion in the case. In the **concurring opinion** (which starts at page 9 of the filing), Judge Higginbotham said he would have found the shooting unreasonable if he had been permitted to look at all the facts.

Writing for a unanimous Court, Justice Kagan rebuffed Felix's effort to redescribe the moment-of-threat rule. The Court had to decide the appropriateness of the moment-of-threat rule as it had been described and relied on by the majority opinion below. And that broad rule was obviously incorrect, as it would exclude information essential to determining the implications to be sensibly drawn about a suspect's intentions when force was used. Justice Kagan's narrow opinion remanded the case for consideration without reliance on the broad moment-of-threat rule as described in the majority opinion below. And the Court explicitly declined to address the difficult and important question: "whether or how an officer's own 'creation of a dangerous situation' factors into the reasonableness analysis."

In a separate **concurring opinion**, Justice Kavanaugh, joined by Justices Thomas, Alito, and Barrett, added "a few points about the dangers of traffic stops" for consideration by courts when addressing the reasonableness of officer conduct when a driver flees. Among other points, the concurrence stated that no option is without danger and warned against "scrutiniz[ing] an officer's actions with the '20/20 vision of hindsight,' 'in the peace of a judge's chambers.'" As to the option of letting the driver escape, Kavanaugh cited precedent cautioning against the "**perverse incentives**" that would be created by doing so and noted how flight from a minor offense "**could well be indicative of a larger danger.**"

Kevin Cole

Margaret **Dalton**

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II. Charter Schools Earn a Reprieve with a 4-4 Split in *Oklahoma Statewide Charter School Board v. Drummond*

Advocates for maintaining the nonsectarian nature of charter schools in the U.S. earned a momentary reprieve on May 22 from the U.S. Supreme Court in ***Oklahoma Statewide Charter Sch. Bd. v. Drummond*** (consolidated with *St. Isidore of Seville Cath. Virtual Sch. v. Drummond*). In a 4-4 split, the Court affirmed the **Oklahoma Supreme Court**, which had ruled against the Oklahoma charter school board and St. Isidore in holding that charter schools are public schools and, as such, must be nonsectarian. The Court's ruling was deceptively simple, but the case leading up to it was not.

The primary issue was whether a state must allow religious charter schools, specifically whether Oklahoma could authorize a Catholic charter school as part of its public charter school system. That is not a simple question, as decades of legislation and jurisprudence have affirmed that charter schools are public schools, even though their charters often provide greater flexibility than a traditional public school. They are deemed public schools by state and federal law, must be authorized by a public chartering entity (typically a public school district or state agency), provide a public service, and rely on public funding. They also operate under public school accountability systems, are subject to many of the same state education laws and regulations as traditional public schools, and are subject to all federal education laws.

This case was a close call. The **decision of Justice Amy Coney Barrett to recuse herself** from the case before any consideration (and therefore, deliberations) had begun opened the door to the 4-4 vote. Although there is no requirement that a Justice explain their recusal, it is likely related to the fact that Justice Barrett is a former Notre Dame law professor and has at least one close friend affiliated with the **Notre Dame Religious Liberty Clinic**, a Counsel of Record for St. Isidore. If she had participated, it is possible the Court would have ruled in favor of St. Isidore's, thereby permitting religious charter schools. As it stands now, other entities can revive the issue of whether public funds can support religious charter schools.

Although St. Isidore presented its case as a free exercise of religion matter, an order to force Oklahoma to charter a Catholic private school would have been unprecedented. Charter schools are created by state statutes and primarily funded by public dollars. That is all we really need to know to understand why this case received such outsized attention. One of St. Isidore's **arguments**, that it should receive public funding as a charter school, admits the school is private and religious but claims that since Oklahoma had approved other charter schools, it would be unconstitutional to deny charter status to a private religious school. St. Isidore argued that Oklahoma discriminated against their school because its stated objective is to include Catholic teaching in every aspect of the curriculum.

That is a misunderstanding of charter schools, which are subject to state control, state oversight, state accountability systems, and myriad regulations. While Oklahoma may choose to exercise less control over its charter schools than California, for example, the schools nevertheless remain subject to state governmental control. St. Isidore did not want to relinquish its independence as a private religious entity; rather, it argued that it could simultaneously be private, incorporating religion into every aspect of its education, yet publicly funded without that transforming it into a public entity.

The **First Amendment** guarantees two sometimes competing rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause means that government cannot favor any one religion over another (or no religion); the free exercise clause means government cannot burden a person's right to exercise their religion. How these two interact in education has been a source of increased litigation in recent years.

> While the Supreme Court's ruling preserves the longstanding legal distinction that charter schools must be secular, the split decision … ensures that the question of religious charter schools will remain a contentious and evolving issue in American education policy.

In 1925, the U.S. Supreme Court held in ***Pierce v. Society of Sisters*** that parents do not need to send their children to public schools, and many do not. While all states have compulsory education requirements requiring children to attend school until a certain age, those requirements do not mandate where to send children. Parents may choose public schools (including charter schools), private religious schools, private nonsectarian schools, and even home schooling. As a general rule, parents are responsible for funding any choices other than traditional public and public charter schools. The Court's holding is treating St. Isidore's like any other private religious school, and there is no constitutional problem with treating private schools differently from public schools.

While the Supreme Court's ruling preserves the longstanding legal distinction that charter schools must be secular, the split decision invites further legal challenges and legislative action as both supporters and opponents seek to clarify or change the rules around charter school eligibility. The uncertainty may prompt some states to amend their charter laws, either to explicitly prohibit or permit religious charter schools. The debate will likely focus on whether charter schools are public actors or private entities, with significant implications for public education, separation of church and state, and the rights of families, students, and educators.

In summary, the ruling leaves the door open for renewed legal and legislative fights, ensuring that the question of religious charter schools will remain a contentious and evolving issue in American education policy.

Margaret A. Dalton

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III. *Seven County Infrastructure Coalition v. Eagle County:* Constraining Environmental Review

In *Seven County Infrastructure Coalition v. Eagle County*, the Court narrowed federal agencies' environmental review obligations under the National Environmental Policy Act (NEPA). The case is the latest development in a national debate about environmental permitting reform and an early illustration of agency discretion after *Loper Bright Enterprises v. Raimondo*.

Signed into law in 1970, NEPA aims to "encourage productive and enjoyable harmony between man and his environment." Despite this lofty language, the Supreme Court has long interpreted the statute to be procedural rather than substantive. In particular, before taking any "major Federal actions significantly affecting the quality of the human environment," a federal agency must produce "a detailed statement" discussing "reasonably foreseeable environmental effects of the proposed agency action." Such actions include granting permits for environmentally consequential projects. Litigants may sue to block projects if agencies fail to adequately consider environmental effects under NEPA.

The dispute in *Seven County* arises from the U.S. Surface Transportation Board's approving the construction and operation of an 88-mile railroad to transport "waxy crude" oil from a remote part of Utah to out-of-state refineries. To comply with NEPA, the Board created an environmental impact statement analyzing the railway's effects on the immediate environment around the railroad. But the Board declined to consider the foreseeable upstream environmental effects that would result from increased oil drilling or the foreseeable downstream effects—particularly greenhouse gas emissions—created by oil refining. Several environmental NGOs and Eagle County, Colorado, through which the railroad would run, sued to stop the project. The challengers argued, among other things, that the Board had an obligation under NEPA to consider

> **Whether the opinion in fact spurs development remains to be seen. … Less environmentally informed projects may not be faster ones.**

the railroad's upstream and downstream environmental effects. **The D.C. Circuit agreed** and found the Board's NEPA analysis insufficient on these grounds.

All eight justices participating in the case—Justice Gorsuch recused himself—sided with the Board and found its environmental analysis sufficient under NEPA. But the justices' reasons for doing so diverged.

Concurring in the judgment, Justices Sotomayor, Kagan, and Jackson found the Board's analysis sufficient on the narrow ground that the Board's organic statute forbids denying railroad approval based on the ultimate third-party use of transported products. But Justice Kavanaugh, writing for the Court, relied on a more expansive justification based on a reading of NEPA that embraces agencies' discretion while cabining their obligations.

To establish agencies' discretion, **the opinion** picked up where *Loper Bright* left off, reiterating that courts decide questions of law, whereas agencies decide questions of fact. Although interpreting the statutory phrase "detailed statement" is "a question of law to be decided by a court," the opinion explained that determining *which* details must be included in a NEPA analysis is a question of fact. Because "[t]he agency is better equipped to assess what facts are relevant to the agency's own decision than a court is," fact-based decisions about the scope and contents of NEPA analyses deserve "substantial deference" from judges. The D.C. Circuit, according to the Court, erred by failing to defer sufficiently to the Board's judgment to exclude upstream and downstream environmental effects in its NEPA analysis.

The Court set forth a second, independent reason to side with the Board: NEPA includes no obligation to consider environmental effects from "potential future projects or from geographically separate projects." In such cases, according to the Court, the causal relationship between the project at issue and foreseeable environmental effects grows too attenuated. This is especially true, the Court noted, when the agency conducting the NEPA analysis lacks authority over the other projects. As is relevant here, the Board does not regulate oil drilling or refining. All told, the foreseeable environmental effects that will result from these activities exceed NEPA's scope.

Seven County has implications for administrative law insofar as it offers a data point about the kinds of contexts in which agencies continue to enjoy discretion after *Loper Bright*. To determine the extent of agency discretion under other statutes, courts and litigants may compare the relevant language to NEPA's "detailed statement" requirement.

The most significant implications are for environmental law. *Seven County* seems to pave the way for shorter, less comprehensive NEPA analyses. Those who view the statute as overly burdensome will welcome the development; those who value the statute as key to blocking environmental harms will not. The Court appears to be in the former camp. Blaming NEPA for slowing infrastructure, the opinion signaled in a footnote that analyses for project *approvals* may be reviewed more leniently than those for project *denials*.

Whether the opinion in fact spurs development remains to be seen. **Prominent scholars have debated** the extent to which NEPA slows infrastructure projects, which after all, face multiple hurdles from federal, state, and municipal laws. Less environmentally informed projects may not be faster ones.

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IV. Not Taking the Win: The Paradox of *TikTok, Inc. v. Garland*

Seventeen percent of Americans regularly get news from TikTok, an application I have never used and until recently vaguely associated with cats. Such people are as likely to view news from celebrities or influencers (68%) as from news outlets or journalists (67%). But even more (84%) obtain news from "**other people they don't know personally.**"

This explains a lot.

TikTok, Inc. is a California corporation based in California. Its ultimate parent is ByteDance Ltd., a Chinese company. ByteDance owns an algorithm that TikTok uses to recommend content to users; it also owns and develops part of the platform's source code. **Chinese law** requires ByteDance to cooperate with the Chinese government, including by making data that ByteDance possesses available to it.

In 2020, President Trump issued an **executive order** forbidding any person subject to U.S. jurisdiction from engaging in transactions with ByteDance. He declared that dissemination of mobile applications developed or owned by Chinese companies threatened "the national security, foreign policy, and economy of the United States." TikTok was explicitly named in the Order, the evident purpose of which was to force ByteDance to divest TikTok.

In 2024, Congress passed the **Protecting Americans from Foreign Adversary Controlled Applications Act** (the "Act"). In substance it prohibited the distribution of any application controlled by a country designated a foreign adversary. ByteDance and TikTok were specifically named.

The law took effect 270 days from enactment, subject to "a 1-time extension of not more than 90 days" if the president certified evidence of "a path to executing a qualified divestiture" to Congress, including having put "binding legal agreements" enabling divestiture in place. The deadline was January 19, 2025.

The **D.C. Circuit** rejected a challenge asserting that the Act violated the **First Amendment** because it was based in part on the premise that the TikTok algorithm could be used to manipulate content and shape public opinion. The Court heard argument on January 10, and on January 17, affirmed the D.C. Circuit.

The Court **held in a per curiam decision** that the Act could be justified on the ground that TikTok gathers data from users, which data could be used to track federal employees, conduct corporate espionage, or facilitate blackmail of people with sensitive information. The Court rightly thought this was a content-neutral justification, and that the Act furthered an important interest unrelated to suppressing speech while not burdening more speech than was necessary to further the interest—the standard for intermediate scrutiny.

If we accept as sound the premise that the national security risk is real rather than conjecture, then this conclusion was sound as well. And the Court was typically (and defensibly) deferential to Congress's conclusion that the risk was real.

The Court did not reach an alternative justification—that China might covertly manipulate content and thus public discourse in the U.S.—on the ground that the data collection rationale sufficed. The Court rightly dismissed as unnecessary to its decision some interesting but hard questions about how to analyze the regulation of an input to speech—such as a social media platform with 170 million U.S. users—rather than speech as such.

Yet as of this writing, TikTok remains available in the U.S. Why?

January 19 was the critical date, and **TikTok briefly went dark**. President Trump took office on January 20 and issued an **executive order** instructing the attorney general not to take any enforcement action for 75 days, and even after that period not to take any enforcement action against companies distributing TikTok content during that period. Contrary to the Act's requirements, no binding divestiture agreements existed; no certification was made.

> The law was passed ostensibly to defend national security. … Nothing has happened to alter whatever security threat might have existed. Yet the law remains unenforced.

The new deadline, April 6, came and went with no deal. On April 4, President Trump issued a **second executive order** extending the enforcement deadline another 75 days until June 19. The second order instructed the Attorney General to provide letters to TikTok distributors "stating that there has been no violation of the statute and that there is no liability for any conduct that occurred during the above-specified period, as well as for any conduct from the effective date of the Act until the date of this order." On June 19, the President issued **yet another executive order** kicking the enforcement can down the road once more—this time to September 17.

Meanwhile, according to **SEC disclosures** filed by Akamai Technologies, Inc., which provides distribution for TikTok, "[e]ven though President Trump has extended the enforcement deadline" the company provides (in the abstruse language of SEC filings) "no assurance that we will not be exposed to liability and we may be exposed to significant fines, litigation, indemnification claims, negative publicity, reputational harm, diversion of management attention, interruptions in our operations, financial loss and other similar harms by continuing to provide services to" TikTok. That's a disclosure you don't see every day.

The law was passed ostensibly to defend national security. It was challenged, and the challenge featured brilliant lawyering on both sides. The Court upheld the law in an opinion as notable for its prudence and restraint as for the speed with which the dispute was heard and the opinion issued. Nothing has happened to alter whatever security threat might have existed. Yet the law remains unenforced. Remarkable.

At any rate, President Trump's over 15 million TikTok followers are safe. For now.

David McGowan

Miranda McGowan

Professor of Law

V. *United States v. Skrmetti:* Formalism Saves Tennessee's Ban on Medical Treatment for Transgender Youth

In 2023, Tennessee joined 26 other states in banning doctors from prescribing puberty blockers and hormone therapy to transgender minors to treat gender dysphoria (the persistent sense that someone's gender identity doesn't match their sex assigned at birth). Doctors may still prescribe them to treat other conditions, including precocious puberty, excessive facial hair in girls, or breast development in boys.

The ACLU sued, arguing that the law violated equal protection by discriminating based on sex and transgender status. The Sixth Circuit upheld the law, finding no sex discrimination and holding that transgender status does not trigger heightened scrutiny. The law satisfied deferential rational basis scrutiny: Tennessee argued minors could not adequately consent to the potential health risks of these treatments, such as bone loss and possible infertility.

The Supreme Court affirmed in *United States v. Skrmetti*. Writing for the majority, Chief Justice Roberts held that the law involved neither sex nor transgender discrimination and satisfied rational basis review.

The idea that Tennessee's law is not transgender discrimination makes little sense. The Court said it is not discrimination because Tennessee lets doctors prescribe hormones to transgender adults (age discrimination) and to minors for conditions like precocious puberty (medical condition discrimination). Neither of those is a suspect class. Equal protection, however, forbids laws that discriminate against a suspect classification *even if* they also discriminate on other grounds. Only transgender people have gender dysphoria. Tennessee's law therefore discriminates against transgender teens and kids.

The Chief Justice may have chosen the narrowest basis for decision, however. The Court could have held that transgender persons are not a protected class—as Justice Alito and

Justice Barrett argued in separate concurrences. The Court has not recognized a new suspect class in 48 years. Instead, it has deployed a shadow level of scrutiny—rigorous rational basis—to strike laws that discriminate based on sexual orientation and other classifications when those laws are based on morality alone or reflect animus toward a group.

> The idea that Tennessee's law is not transgender discrimination makes little sense. … Only transgender people have gender dysphoria. Tennessee's law therefore discriminates against transgender teens and kids.

Even under this more searching form of rational basis review, the *Skrmetti* plaintiffs likely would have lost. While U.S. **medical associations** and one **international** medical association support these treatments in some cases, **several Western European** countries have sharply **restricted** them because of their side effects. This disagreement among American and European experts allows Tennessee to satisfy rigorous rational basis scrutiny by showing that its law prevents potential third party harms and is not based in "animus" towards a group.

But how is transgender discrimination not sex discrimination? In 2020, ***Bostock v. Clayton County*** held that discrimination against transgender workers violated Title VII's ban on sex discrimination. An employer who discriminates against a transgender worker, *Bostock* said, necessarily discriminates "because of sex" because an employer necessarily takes that worker's sex into account. As Justice Sotomayor wrote **in dissent** in *Skrmetti*, for a doctor to tell if Tennessee lets them prescribe puberty blockers or hormones, that doctor must take into account a patient's sex.

To distinguish equal protection from Title VII, the Chief Justice resurrected ***Geduldig v. Aiello*** (1973). Disparaged since it was issued, *Geduldig* held that discrimination against pregnant women wasn't sex discrimination—the "nonpregnant" class included both women and men. Tennessee, the Court reasoned, also treats both transgender males and transgender females the same. The logic is formally sound. However, *Geduldig*'s formalism ignores the obvious: states and employers long used pregnancy as a proxy to disadvantage women, and only women. Justice Sotomayor castigated the Court for its formalistic reliance on *Geduldig*. Subsequent to *Geduldig*, the Court has held that any law that takes account of sex—as Tennessee's ban must—triggers heightened scrutiny.

The Court's formalism echoes ***Plessy v. Ferguson*** (1896), infamous for upholding as "separate but equal" Louisiana's Jim Crow law that consigned Black people to separate train cars from white people. The law, *Plessy* held, equally restricted both white and Black people from riding together. It turned a blind eye to Louisiana's obvious purpose—to promote white supremacy. The *Skrmetti* Court also turns a blind eye to the obvious distress and risks of denying gender affirming medical care to transgender youth. But the Court reasoned that Tennessee does not do so to promote the supremacy of either sex. The law inflicts pain on both sexes equally.

Pain, equal or not, scars transgender kids and their parents. Their only hope is to seek out-of-state telemedicine treatment from doctors in states that protect them from prosecution, investigation, or extradition by states that ban care. So far, these shield laws have successfully permitted some who need medication abortions to continue to get them. Whether shield laws can do the same for transgender youth who need care remains to be seen.

Miranda McGowan

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VI. *Trump v. CASA Inc.* and the Power of Federal Courts to Issue Universal Injunctions

In ***Trump v. CASA, Inc.***, a 6-3 majority of the Supreme Court found that federal courts lack power to issue so-called "nationwide" or "universal" injunctions—injunctions that apply to the rights of persons or entities that are not parties to the case before the court. The *CASA* case arose from President Trump's **executive order** purporting to limit birthright U.S. citizenship under the **Fourteenth Amendment's** citizenship clause to the children of U.S. citizens and lawful permanent residents. Various individuals and organizations (including CASA, an immigrant rights organization) filed suits challenging the executive order as a violation of the citizenship clause and **§201 of the Nationality Act of 1940**. Three district courts, in Maryland, Massachusetts, and the state of Washington, issued preliminary injunctions prohibiting enforcement of the executive order.

At the Supreme Court, the question presented was not the legality of the executive order but rather the power of the district courts to provide remedies to parties not before them. Litigation of the merits is proceeding in the lower courts, and in its **petition** to the Court the Trump administration did not challenge the preliminary injunctive relief as to the named parties. The Trump administration only asked the Court to narrow the injunctions to exclude non-parties.

In an opinion by Justice Barrett, the Court's majority agreed. According to the Court, the issue turned on the scope of the **Judiciary Act of 1789**, which provides authority for federal courts to grant equitable relief such as preliminary injunctions. That scope in turn is determined by the power of English equity courts at the time the Act was adopted (a proposition established by Justice Scalia's 1999 opinion for the Court in ***Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.***).

Applying this test, the Court found that "universal" injunctions (that is, those protecting the rights of non-parties) were not generally a power of English courts, and indeed were not used by lower federal courts in the United States until relatively recently. The Court therefore found them to be beyond federal courts' power under the Judiciary Act.

> In recent years, district courts have increasingly used universal injunctions to block presidential actions nationwide. … The courts' practice in this regard had been sharply criticized by some commentators and defended by others.

The Court sent the case back to the district courts with directions to narrow the injunctions. The majority opinion did not address several other procedural questions, including whether Congress could authorize universal injunctions if it wanted to and whether various state and organizational plaintiffs had standing to bring the case. The majority also said nothing about the constitutionality of the executive order.

Chief Justice Roberts and Justices Thomas, Alito, Gorsuch and Kavanaugh joined the majority opinion, with **Thomas**, **Alito**, and **Kavanaugh** each adding concurrences. Justice Sotomayor, joined by Justices Kagan and Jackson, **dissented**. Sotomayor principally contested the majority's view of the power of English courts, and therefore of U.S. courts, to issue injunctions protecting non-parties. She also addressed the merits, finding that the Constitution's text and historical context showed the executive order to be clearly unconstitutional. Justice Jackson's separate **dissent** decried the limited judicial role asserted by the majority; in her view, courts' obligation to uphold the law—and the President's obligation to follow the law—required courts to enjoin unlawful president orders generally. In a strikingly pointed response to Jackson, the majority accused her of misunderstanding the courts' role in a system of separation of powers: "she offers," the majority said, "a vision of the judicial role that would make even the most ardent defender of judicial supremacy blush."

The significance of the decision is difficult to assess. On one hand, especially in recent years, district courts have increasingly used universal injunctions to block presidential actions nationwide, leading to complaints of overreaching by both the Biden and Trump administrations and their supporters. The courts' practice in this regard had been sharply criticized by some commentators and defended by others. The Court's opinion appears definitively to resolve this dispute (at least as a statutory matter) in finding that courts lack power to issue injunctions protecting the rights of non-parties. Thus, for example, in the present case, although the President's executive order cannot be applied to parties to the particular suits, it can remain in effect as to non-parties at least until they bring their own claims to court.

On the other hand, it is not clear what practical significance this will have. Class actions under

Federal Rules of Civil Procedure Rule 23 and other procedural mechanisms may allow very large numbers of people to become parties (and therefore eligible for relief under the Court's decision). Further, if states and organizations can bring challenges on behalf of their residents and members (a point the majority did not address), the remedies that courts can order as to these parties may be very broad. It is possible that the decision will not do much more than require plaintiffs' lawyers to work harder to prepare their cases. Finally, it is worth noting again that the majority opinion did not say anything about the constitutionality of the executive order; that issue is likely to come to the Court in the relatively near future, with the prospect of a conclusive nationally applicable ruling from the Court.

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VII. A Unanimous Opinion Regulating Tobacco Products in *FDA v. Wages and White Lion Investments, LLC*

In a **unanimous opinion** authored by Justice Alito, the Supreme Court largely upheld the Food and Drug Administration (FDA)'s denial of certain applications to sell flavored-e-cigarettes. The Court held that the FDA's 2021 orders rejecting fruit and candy-flavored e-liquids did not impermissibly shift regulatory standards mid-stream and therefore were not "arbitrary and capricious" under the **Administrative Procedure Act** (APA). The only setback for the FDA involved a remand back to the Fifth Circuit for further consideration of an unresolved procedural point. The decision represents a significant victory for a federal agency from a Supreme Court that has often acted to limit agency power.

The statute at issue is the **Family Smoking Prevention and Tobacco Control Act of 2009**, which requires a manufacturer to obtain premarket authorization for any "new tobacco product" unless it can demonstrate that marketing the item "would be appropriate for the protection of the public health." After deeming e-cigarettes to be new tobacco products requiring authorization in 2016, the FDA confronted a flood of applications seeking permission to sell flavored nicotine liquids. Agency guidance published in **2019** and **2020** warned that flavored products presented heightened risks to adolescents and that applicants would need rigorous comparative science to prove a net public health benefit. A public health benefit could result if the reduction in tobacco use due to e-cigarettes outweighs the harm caused to new users who begin using tobacco products because of such e-cigarettes. Concluding that the evidence submitted was insufficient, **the FDA denied the applications** in September 2021.

Wages and White Lion Investments, LLC, a manufacturer of fruit- and candy-flavored e-liquids, petitioned the Fifth Circuit for review. Sitting en banc, that court—**through an opinion** by the prominent Judge Andrew Oldham—

concluded that the agency had quietly "move[d] the scientific goalposts," imposing evidentiary demands not found in its earlier guidance, and that it had compounded the error by ignoring the marketing plans applicants had been directed to submit. The Fifth Circuit therefore set aside the denials and ordered the FDA to reevaluate the applications.

The Supreme Court reversed almost entirely. First, it rejected the claim that the agency's evidentiary requirements had shifted. The guidance, the Court observed, consistently alerted manufacturers that flavored products would be disfavored absent "sufficient product-specific evidence"—ideally "robust and reliable" evidence like randomized controlled trials or longitudinal cohort studies—demonstrating that the flavors help adult smokers quit to an extent that outweighs their appeal to youth. Wages and White Lion Investments had offered only generic literature reviews and survey data, falling short of that threshold. Applying the agency's standard, the Court said, was no change at all but merely the logical culmination of the warnings the FDA had issued since 2019.

The agency's sole misstep involved its treatment of marketing plan materials submitted to it for review. The agency guidance stated that applicant proposals to restrict youth access were "critical," yet agency reviewers never opened the electronic folders containing those plans. All parties, including the FDA, agreed the omission violated the APA's requirement of reasoned decision-making.

The question was what remedy was appropriate under the harmless error provision of the APA. While the Fifth Circuit treated the agency's mistake as fatal, Justice Alito suggested a more forgiving standard. Because the Fifth Circuit never considered the correct standard, the Supreme Court directed it to do so on remand.

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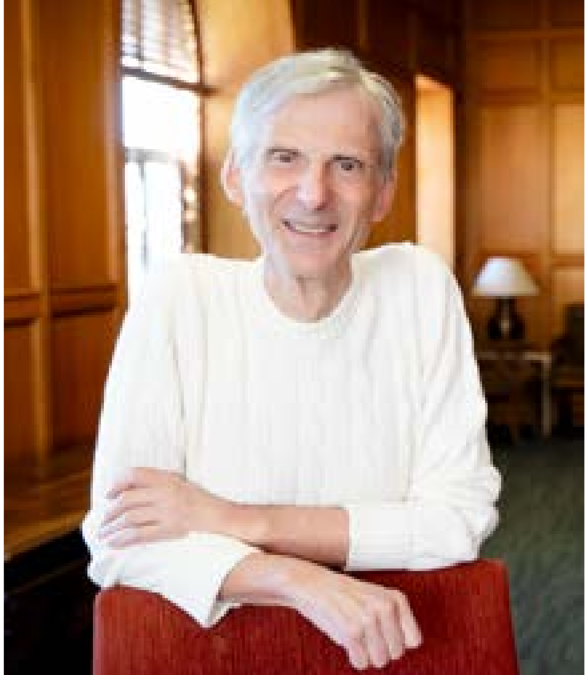
The *Wages and White Lion* case represents an important victory for the FDA in its attempt to regulate tobacco products. Even more broadly, it stands out as a significant exception to the Supreme Court's recent efforts to cut back on the regulatory power of administrative agencies, as in ***Loper Bright Enterprises v. Raimondo*** (overturning ***Chevron*** deference) and in ***SEC v. Jarkesy*** (holding that a jury trial is necessary for SEC actions seeking civil penalties for securities fraud). While the Supreme Court may continue to constrain administrative agencies, *Wages and White Lion* shows that it will also act to uphold the power of such agencies, even when lower courts have found their actions to violate the law.

Michael Rappaport



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VIII. *Free Speech Coalition, Inc. v. Paxton, Attorney General of Texas:* Age Verification in the Pornosphere

Is it constitutional for a state to require commercial pornographic websites to verify that persons gaining access to these websites are adults? In ***Free Speech Coalition, Inc. v. Paxton***, decided in late June 2025, the Supreme Court held that the answer is Yes.

In 2023, Texas enacted a **law** requiring commercial entities to adopt reasonable age verification methods to ensure that users are 18 or older, for any internet website where more than one-third of the content is hard-core pornography of a kind that would be legally obscene for a minor to view or have access to. Representatives of the pornography industry sued, and a federal district court granted a **preliminary injunction** against the law, on the basis that the law probably violates the **First Amendment**. The Fifth Circuit Court of Appeals **reversed**, concluding that it probably doesn't. In the *Paxton* decision, the Supreme Court upheld the Court of Appeals, and went on to uphold the Texas law. But the Supreme Court's reasoning differed somewhat from that of the lower court.

The Supreme Court's decision was written by Justice Thomas and the Court was divided 6-3—as it so often is now in controversial cases—with a **dissent** by Justice Kagan, joined by Justices Sotomayor and Jackson. Although Justice Kagan's dissent was acerbic in tone, the majority and the dissent actually agreed on many of the essential points in the case.

The Justices all agreed that some pornography is legally obscene, for adults as well as for minors, and can be banned without offense to the First Amendment. They also agreed that some pornography is not legally obscene, and is protected as free speech by the First Amendment. They further agreed that some pornography or sexual content is not legally obscene and cannot be banned for adults—but it is legally obscene for minors, and hence the First Amendment does not preclude banning it for those that are underage.

With those premises, the constitutionality of the Texas law was therefore deemed to turn, in

There are other questions ... where the meaning of strict scrutiny—following the majority's view in *Paxton* or the dissenters' instead—may have very great consequences indeed.

rather technical terms, on the proper "standard of review." Earlier in the twentieth century, the Court adopted or invented the idea that in a few categories of cases—involving racial discrimination, or where fundamental rights are at stake—there would be "strict scrutiny," and a law (or other act of government) challenged as unconstitutional would almost inevitably be struck down, unless (among other things) there was a "compelling state interest" to justify it. In any other category of case, the constitutionality of a law or other act of government would be upheld so long as it was even minimally rational. Later, at first in cases involving sex discrimination, there emerged the idea of "intermediate scrutiny" for some types of cases: that the courts in such cases would decide whether a law or act of government was constitutional depending on balance whether there was substantial, but not necessarily "compelling," justification for it.

The Fifth Circuit appeals court in *Paxton* held the age-verification law to be subject only to minimal "rationality" scrutiny, and thus held that it is constitutional (in contrast to the district court, which thought it subject to strict scrutiny). The Supreme Court rejected both standards, held the law subject to intermediate scrutiny, and concluded that it nonetheless "readily survives" such scrutiny and is thus constitutional.

Justice Kagan's dissent differed from the majority by insisting that strict scrutiny, not intermediate scrutiny, should apply in adjudicating whether the Texas law violates the First Amendment. The dissent maintained that online age-verification may impede or discourage adult access to websites that are obscene only as to minors—unlike age-verification at a "brick-and-mortar" "adult" bookshop or cinema, which does not offend the First Amendment, as the dissent conceded.

But intriguingly, Justice Kagan's dissent did not conclude that the Texas law is necessarily unconstitutional. On the contrary, she maintained that strict scrutiny is "a highly rigorous but not fatal form of constitutional review." If the law "is the best Texas can do" to exclude minors effectively while minimizing the law's impact on adults, then "the statute should pass First Amendment review." The difference between the dissent and the majority, then, was that according to the dissent the Texas law may well be constitutional, whereas according to the majority it *is* constitutional.

As a practical matter, this might seem something less than an irreconcilable difference.

But there is perhaps a deeper disagreement between the Justices, bearing on matters far afield from obscenity and pornography. The prototypical object of strict scrutiny is racial discrimination. Justice Thomas's majority opinion in *Paxton* says “[s]trict scrutiny is unforgiving;” and that “it is fatal in fact absent truly extraordinary circumstances.” It is on this basis that the Supreme Court ruled against racial preferences in college and university admissions in the ***Students for Fair Admissions v. Harvard*** case in 2023, turning back decisions which over the course of decades had deferred to affirmative action preferences while nominally subjecting them to strict scrutiny. Justice Kagan also joined **Justice Sotomayor** and **Justice Jackson** in vehement dissent in *Students for Fair Admissions*. In such a case, it matters greatly whether strict scrutiny almost always means a finding of unconstitutionality, as Justice Thomas has it, or whether it leaves room for courts to condone things such as widespread reverse discrimination, as Justice Kagan would have it.

A diluted form of strict scrutiny might not make much difference to the *Paxton* decision: the dissenters do not insist, in the end, on holding the age verification law unconstitutional. But there are other questions of intense concern to the Justices and to the country, where the meaning of strict scrutiny—following the majority’s view in *Paxton* or the dissenters’ instead—may have very great consequences indeed.

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IX. *Mahmoud v. Taylor:* Public Schools in an Impossible Position to Maintain Neutrality

Public schools are in an impossible position. They are charged with serving a society now so polarized that large bodies of people effectively inhabit "separate moral galaxies," as James Davison Hunter explained in his much-discussed book, "Culture Wars." People disagree profoundly, sometimes on religious grounds, on all manner of issues—sex, marriage, gender roles, biology, human origins, education, race, politics, civil rights, and the list goes on and on. Inevitably, many of these issues will come up in a school's curriculum. And yet the Supreme Court has laid on public schools a duty (an "absolute" duty, the Court has sometimes said) to be strictly neutral toward religion: the schools are forbidden to "aid or oppose" any religion.

When these schools' inevitable failures to live up to this impossible duty wind up in court, the conundrum is passed on to judges, who typically resort to tactics of selective denial. Such tactics were on display in ***Mahmoud v. Taylor***. The Supreme Court ruled, 6-3, with a majority opinion by Justice Alito, that the school board of Montgomery County, Maryland, had violated the free exercise rights of hundreds of vociferously objecting parents including Muslims, Catholics, evangelicals, and others. The board had transgressed the **First Amendment**, the Court said, when it introduced a set of "LGBTQ+ inclusive" books into the reading curriculum for kindergarten through fifth grade students and refused to give the parents notice or opportunity for their children to opt out when those books were used and discussed.

In addressing this controversy, it seems, denial was unavoidable. Take Justice Sotomayor's impassioned **dissent**. Sotomayor's principal argument was that the schools were not trying to inculcate progressive positions on marriage, gender fluidity, or sexuality. On the contrary, she argued, students were merely being "made acquainted with" such positions; the curriculum provided students with "mere exposure" to people and ideas that some religions might find objectionable. This "mere exposure" rationale has been a common tactic in judicial decisions in such cases—grounded more in necessity than in believability. But the history of the board's policy (selecting books that would be "disruptive" to "heteronormativity" and "cisnormativity"), the comments of board members (sometimes comparing objecting parents to "white supremacists" and "xenophobes"), and most importantly the **content of the books** and the board's accompanying **guidelines** combined to leave Sotomayor looking like the classic "Lady Justice" who prefers to adjudicate under cover of self-imposed blindness.

> The Supreme Court ruled … that the school board of Montgomery County, Maryland, had violated the free exercise rights of hundreds of vociferously objecting parents–Muslims, Catholics, evangelicals, and others.

Sotomayor was on firmer ground, though, when she contended that conflicts between the schools' curriculum and some students' and parents' religious beliefs are legion, and that consistent implementation of the majority's reasoning would create a massive disruption in public education. Should fundamentalist students be excused from biology class when evolution is taught? Should students whose religion supports traditional gender roles be excused from readings or discussions that favorably depict women working as scientists, bankers, and CEOs? For these questions, it is the majority that seemed inclined to cover their eyes.

Sotomayor argued at length that the majority radically departed from clear doctrine and precedent. Her argument seemed strained; and indeed, given the celebrated incoherences in this area of law, the notion that there is any clear doctrine and precedent from which the majority could radically depart seems almost amusing.

And yet Sotomayor has a point: there is a sense in which *Mahmoud* is a departure from precedent. Previous judicial decisions involving public schools had typically adopted a "neutrality" that was skewed to favor a thoroughly secularized public education and that was dismissive of concerns expressed by parents or students who wanted to express their religious views. Any sort of school-sponsored prayer, even a brief and ecumenical graduation prayer by a rabbi, was deemed unacceptably coercive even if opt-outs were allowed. Such prayers were never excused as "mere exposure." In contrast, the mere exposure rationale was instead used (as in the much-discussed ***Mozert v. Hawkins County Public Schools*** case) to dismiss objections when religious students were compelled—day after day, in class, without the possibility of opting out—to read and discuss secular material offensive to their faith. The incongruity between treating short and optional extracurricular prayers as coercive and mandatory daily class lessons as "mere exposure" was palpable. This imbalance began to be corrected in a small way in the recent

Kennedy v. Bremerton School District case of the praying football coach. *Mahmoud* continues that course correction.

Which is not to say that *Mahmoud* confronts, or supplies any solution to, the problem of maintaining neutrality in a situation in which no neutral position is available. It doesn't. In that respect, schools will simply have to continue to struggle to do the impossible, and to hope for a "neutrality" slanted in their favor if parents decide to sue.

Steven Smith

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