Looking Ahead: October Term 2024

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Introduction

"Is everything sad going to come untrue? What's happened to the world?"[1] So asked the hobbit Sam Gamgee of the wizard Gandalf in J.R.R. Tolkien's *The Lord of the Rings*, upon awakening in Ithilien to find that his quest had not been a dream and that the One Ring was destroyed.

Those attuned to what Chief Justice John Roberts has called "the danger posed by the growing power of the administrative state"[2] may now be asking similar questions. Following a dramatic Term in which the Supreme Court "unmade" *Chevron* deference and several other administrative law doctrines along with it, some may hope (or fear) that the world is changing.

The upcoming Term may provide clarity. Already, the Court has granted several cases that involve federal administrative agency interpretations across a wide array of federal statutory schemes covering topics including guns, health care, and the environment. These and other grants still to come could elaborate on passages in *Loper Bright Enterprises v. Raimondo*,[3] where the Court appeared to temper *Chevron*'s end with nods toward statute-by-statute grants of discretion and "respect" for administrative interpretations.

The Court will of course also take up many other issues. In the two grants that so far appear most likely to generate headlines, the Court

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[1] J.R.R. Tolkien, The Lord of the Rings 692 (Reset ed., HarperCollins 2021) (1954).

[2] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[3] 144 S. Ct. 2244, 2262 (2024).

will consider an equal protection challenge to a Tennessee statute that limits sex-transition treatments for minors and a First Amendment challenge to a Texas statute that restricts minors' access to commercial pornographic websites by requiring these websites to verify the age of their visitors.

Throughout these and other cases, the Court will confront several persistent issues. The Texas and Tennessee cases, for example, each implicate the Court's often stated, but seemingly seldom followed, preference for as-applied constitutional challenges. And in its agency cases, the Court may again confront issues about the scope of available remedies that have troubled lower courts and spurred separate writings from several Justices.

Suits against State Officials

The Court kicks off its Term with a pair of cases involving 42 U.S.C. §§ 1983 and 1988. Sections 1983 and 1988 are the most important statutes authorizing suits against state officials for violations of the federal Constitution and other laws of the United States. Enacted in 1871 to combat the influence of the Ku Klux Klan in state governments across the South, Section 1983 provides a remedy against any person who, acting under color of state law, subjects any other person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[4] Section 1988, enacted later, allows federal courts to award attorney's fees to the "prevailing party" in these and certain other cases.[5]

In *Williams v. Washington*, the Supreme Court will decide whether exhaustion of state administrative remedies is required to bring claims under Section 1983 in state court. All agree that Section 1983 lacks a textual exhaustion requirement. And 40 years ago, in *Patsy v. Board of Regents*, the Supreme Court rejected a lower federal court's attempt to imply one.[6] Nevertheless, the Alabama Supreme Court held last year that it could not compel the Alabama Department of Labor to adjudicate applications for unemployment benefits within the time frame mandated by a federal statute because the plaintiffs in that case had not exhausted mandatory administrative remedies.

[4] 42 U.S.C. § 1983.

[5] 42 U.S.C. § 1988(b).

[6] Patsy v. Bd. of Regents, 457 U.S. 496 (1982).

The Alabama Supreme Court said that although *Patsy* had held that Section 1983 lacked an exhaustion requirement, that did not prevent state law from adding one. The court added that "even if" independent exhaustion requirements found in state law were preempted by Section 1983, "that preemption would at most allow the plaintiffs to bring their unexhausted claims in *federal* court."[7]

It seems unlikely that the Supreme Court will allow the Alabama decision to stand. The Alabama court did not discuss (and as the state's brief in opposition complains, the plaintiffs' state-court briefing did not cite) the Supreme Court's decision in *Felder v. Casey*. That decision, contrary to what the state court said, applied *Patsy* to find that Wisconsin's exhaustion requirement was preempted as to a suit in that state's courts.[8] To be sure, *Felder*'s reasoning could be characterized as purposivist: It said that because "Congress enacted § 1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers," Congress could not also have "contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."[9] But that reasoning also accords with the absence of any exhaustion requirement in the text of Section 1983. And as the Court stated recently, "[t]he fact that multiple grounds support a result is usually regarded as a strength, not a weakness."[10]

Turning from the ability to bring a Section 1983 case to the incentive to do so, the Court in *Lackey v. Stinnie* will decide whether a plaintiff who obtains a preliminary injunction is a "prevailing party" entitled to attorney's fees under Section 1988 when there is no final ruling on the merits. In that case, the Virginia General Assembly repealed a state statute after a federal district judge held that it was likely unconstitutional. Virginia then tried to avoid paying attorney's fees by arguing that the preliminary injunction was not a final decision.

[7] Johnson v. Washington, No. SC-2022-0897, 2023 WL 4281620, at *4 (Ala. June 30, 2023), *cert. granted sub. nom* Williams v. Washington, 144 S. Ct. 679 (2024).

[8] Felder v. Casey, 487 U.S. 131, 147 (1988).

[9] *Id.* at 147.

[10] Biden v. Nebraska, 143 S. Ct. 2355, 2375 n.9 (2023).

The en banc Fourth Circuit rejected Virginia's position. In a decision that joined "[e]very other circuit to consider the issue," the Fourth Circuit overturned its own prior precedent to hold that "a preliminary injunction may confer prevailing party status in appropriate circumstances."[11] "Although many preliminary injunctions represent only 'a transient victory at the threshold of an action,'" the court said that "some provide enduring, merits-based relief" that entitles a plaintiff to status as a "prevailing party" under Section 1988.[12]

Virginia, obviously, has a different view. So does the United States. (Although the federal government cannot be sued under Section 1983, it is subject to fee shifting under the Equal Access to Justice Act and other statutes that employ the "prevailing party" language.[13]) In an amicus brief supporting Virginia, the Solicitor General argued that the lower threshold required to obtain preliminary relief and the potential for later reversal both indicate that a party who has obtained preliminary relief has not "prevailed" in the sense of the statute.[14]

Both sides cite a 2007 decision by the Supreme Court. In *Sole v. Wyner*, the Court held that a "plaintiff who secures a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against her" is not a "prevailing party" because she "has won a battle but lost the war."[15] However, the *Sole* Court was careful to "express no view on" the issue that is now presented in *Lackey*: "[W]hether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees."[16]

Both views have something to recommend them. After all, a plaintiff who succeeds in obtaining a merits-based preliminary injunction seems to be a "prevailing party" as a practical matter. To be sure, where such relief is later reversed—as in *Sole*, where the district

[11] Stinnie v. Holcomb, 77 F.4th 200, 203 (4th Cir. 2023) (en banc); *see id.* at 209 (collecting cases); *id.* at 209 n.6 (explaining that among the courts of appeals, only "[t]he First Circuit has not yet opined on the issue"), *cert. granted sub nom.* Lackey v. Stinnie, 144 S. Ct. 1390 (2024).

[12] *Id.* at 203.

[13] *See* 28 U.S.C. § 2412(d); 5 U.S.C. § 504 *et seq*.

[14] 42 U.S.C. § 1988(b). *See also* Brief of the United States as *Amicus Curiae* Supporting Petitioner at 8–10, Lackey v. Stinnie, No. 23-621 (U.S. June 27, 2024).

[15] Sole v. Wyner, 551 U.S. 74, 86 (2007) (cleaned up).

[16] *Id.*

court eventually ruled against the plaintiffs after initially granting them preliminary relief—the plaintiff has not prevailed. But where such relief is not reversed and a further ruling can never happen because the case was mooted after the plaintiff obtained initial relief, the plaintiff appears to have accomplished what it intended. That is the situation in *Lackey*, where a district court held Virginia's law likely unconstitutional and Virginia mooted the case by removing the statute from the books.[17]

Against this interpretation, the Fourth Circuit dissenters argued that "prevailing party" is a term of art with a more limited meaning.[18] The case will likely turn on how well that argument is developed in the merits briefs—the fact that states or the federal government would prefer not to pay attorney's fees after losing is certainly no reason to supplant the statutory text.

Suits against Federal Agencies

For its first post-*Chevron* Term, the Supreme Court has granted several cases that involve an agency's interpretation of a statute that it administers. In addition to providing an initial look at the course correction that the Court signaled in *Loper Bright*,[19] each case is important for the regulated community it affects. Also lurking behind some of these cases are cross-cutting issues affecting the scope of permissible remedies under the Administrative Procedure Act (APA) and other agency review statutes.

Start with *Garland v. VanDerStok*,[20] which joins *Lackey* on the second day of argument and is otherwise known as the "ghost guns" case.[21] Fresh off the Supreme Court's rejection of its bump stock

[17] Lest one conclude that this is a one-off situation, Georgia, the only other sovereign to file an amicus brief, similarly repealed a state law and tried to resist paying attorney's fees after a plaintiff obtained a preliminary injunction on constitutional grounds. *See* Common Cause/Georgia v. Billups, 554 F.3d 1340, 1355 (11th Cir. 2009).

[18] *See Stinnie*, 77 F.4th at 220 (Quattlebaum, J., dissenting).

[19] 144 S. Ct. at 2262. *Loper Bright*, as the readers of this article surely know, overturned Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[20] 144 S. Ct. 1390 (2024) (order granting petition for certiorari).

[21] *See, e.g.*, Mark Sherman, *Supreme Court Will Take Up Legal Fight over Ghost Guns, Firearms without Serial Numbers*, Associated Press (Apr. 22, 2024), https://apnews.com/article/supreme-court-ghost-guns-regulation-1a29729cf1bee46590d82ac46ab7b8f4.

rule,[22] the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is defending a regulation that would require homemade guns to bear serial numbers. In the Fifth Circuit's estimation, the new regulation "flouts clear statutory text and exceeds the legislatively-imposed limits on agency authority" in service of the agency's "public policy" goal.[23]

The statutory dispute appears straightforward. The Gun Control Act of 1968 imposes restrictions on a "firearm," a term it defines to include the "frame or receiver" of a weapon.[24] ATF was concerned that some hobbyists were not subject to the Act's restrictions because they had purchased unfinished weapons parts kits and later made a frame or receiver themselves from the materials included in these kits. So ATF issued what it called "an updated, more comprehensive definition" of the terms "firearm" and "frame or receiver" that includes within those definition "unfinished" frames or receivers.[25] The problem, as the Fifth Circuit saw it, was that the revised definition "states that the phrase 'frame or receiver' includes things that are admittedly not yet frames or receivers."[26] "This confusion highlights ATF's attempt to stretch the [Gun Control Act's] language to fit modern understandings of firearms without the support of statutory text."[27]

The case has already been before the Supreme Court once via the emergency docket. Last August, the Court voted 5–4 to stay the district court's vacatur pending appellate review.[28] In addition to defending its statutory interpretation, the government argued that the APA's instruction to "set aside" unlawful rules does not authorize what it (somewhat redundantly) called "nationwide vacatur."[29]

[22] *See* Garland v. Cargill, 602 U.S. 406 (2024).

[23] VanDerStok v. Garland, 86 F.4th 179, 182 (5th Cir. 2023).

[24] 18 U.S.C. § 921(a)(3)(C).

[25] *VanDerStok*, 86 F.4th at 182–83 (quoting Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447, 478–79)).

[26] *Id.* at 189–90.

[27] *Id.* at 190.

[28] Garland v. VanDerStok, 144 S. Ct. 44 (2023) (staying district court order).

[29] Application for a Stay of the Judgment Entered by the United States District Court for the Northern District of Texas at 31–32, Garland v. VanDerStok, 144 S. Ct. 44 (2023) (No. 23A83) (July 5, 2023).

Justice Neil Gorsuch made a similar point in a different case,[30] sparking a thoughtful response from Justice Brett Kavanaugh at the end of last Term that persuasively defended the practice.[31] Now more muted, the anti-vacatur argument is still present in ATF's merits brief.[32] *VanDerStok* may thus become a catalyst for more thinking from the Justices on the subject.

Next consider *City and County of San Francisco v. EPA*,[33] also scheduled for the October sitting. There, the Court will decide whether the Clean Water Act authorizes the EPA to impose narrative limitations in National Pollutant Discharge Elimination System permits that subject permit holders to enforcement for violating water quality standards without identifying specific numeric limits to which their discharges must conform.[34]

The Ninth Circuit upheld the EPA's practice as consistent with the statute, pointing specifically to a 1994 agency policy that interprets the Clean Water Act not only to authorize but in fact to "*require* . . . narrative limitations when necessary to satisfy applicable" water quality standards.[35] San Francisco, which holds a federal permit to discharge wastewater into the Pacific Ocean, argues that the EPA's narrative limitations are in conflict with the statute because they are indeterminate and because they premise liability

[30] *See* United States v. Texas, 599 U.S. 670, 695 (2023) (Gorsuch, J., concurring) ("[The APA] does not say anything about 'vacating' agency action[.]").

[31] *See* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2462 (2024) (Kavanaugh, J., concurring) ("[T]he text and history of the APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available" each show that "the APA authorizes vacatur of unlawful agency actions, including agency rules[.]"); *see also* United States v. Texas, 599 U.S. at 721 (Alito, J., dissenting) ("[T]he . . . argument . . . that the APA's 'set aside' language may not permit vacatur . . . would be a sea change in administrative law[.]").

[32] *Cf.* Brief for the Petitioners at 27, Garland v. VanDerStok, No. 23-825 (U.S. June 25, 2024) ("If ATF ever sought to apply the Rule to a parts kit that could not readily be converted into a functional firearm, the affected parties would be free to challenge that action as beyond ATF's statutory authority. But the hypothetical possibility of such invalid applications does not justify relief in this facial, pre-enforcement challenge.").

[33] No. 23-753 (U.S. May 28, 2024), 2024 U.S. LEXIS 2342 (granting petition for certiorari).

[34] *See* Petition for Writ of Certiorari at i, City & Cnty. of San Franciso v. EPA (U.S. Jan. 8, 2024) (No. 23-753).

[35] City & Cnty. of San Francisco v. EPA, 75 F.4th 1074, 1090 (9th Cir. 2023).

on receiving water quality rather than on the nature or content of its own point source discharges.[36]

That the EPA has a prior administrative interpretation on the books may afford the Court an opportunity to elaborate an issue left open after *Loper Bright*.[37] There, the Court appeared to leave *Skidmore* respect intact even as it overturned *Chevron* deference, emphasizing that "courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes."[38] Indeed, that is something that the Court itself did in another recent Clean Water Act case, where it cited favorably the EPA's "longstanding regulatory practice" while pointedly stating that it "d[id] not defer . . . to EPA's interpretation of the statute embodied in this practice."[39]

Despite *Loper Bright* having left this path open, early reports indicate that most courts are not taking it.[40] And it is not clear that the Supreme Court should here either. After all, the 1994 EPA policy cited by the Ninth Circuit was issued decades after the Clean Water

[36] *See* Brief for Petitioner at 21, City & Cnty. of San Francisco v. EPA, No. 23-753 (U.S. July 19, 2024) (describing permit obligations as "hopelessly indeterminate") (quoting Sackett v. EPA, 598 U.S. 651, 681 (2023)); *id.* at 24–37 (arguing that "[t]he CWA does not authorize EPA to impose permit conditions that hold permitholders directly liable for the quality of receiving waters").

[37] For a focused discussion of the EPA's prior interpretation, see Brief of *Amici Curiae* Public Wastewater and Stormwater Agencies and Municipalities Supporting Petitioner at 16–20, City & Cnty. of San Francisco v. EPA, No. 23-753 (U.S. July 26, 2024) (citing, inter alia, 40 C.F.R. § 122.44(d)(1) *et seq.*; U.S. Env't Prot. Agency, *NPDES Permit Writers' Manual*, §§ 6.2 & 6.3 (Sept. 2010), https://www.epa.gov/sites/default/files/2015-09/documents/pwm_chapt_06.pdf).

[38] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[R]ulings, interpretations and opinions" of agencies, "while not controlling," "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. . . .").

[39] Cnty. of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 178 (2020); *see also* Jeremy J. Broggi, *With* En Banc *Review, Tenth Circuit Foreshadows Potential Split with D.C. Circuit on Chevron Waiver*, Wash. Legal Found., 35 Legal Backgrounder 19 (Sept. 25, 2020), https://www.wlf.org/wp-content/uploads/2020/09/9252020Broggi_LB.pdf. (discussing *Hawaii Wildlife*'s approach in more detail).

[40] *See* Robert Iafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, Bloomberg Law (July 29, 2024), https://news.bloomberglaw.com/daily-labor-report/courts-show-little-interest-in-skidmore-as-a-chevron-alternative ("[F]ederal courts didn't refer to 1944's *Skidmore v. Swift & Co.* in 19 of 20 rulings on agency actions that cited *Loper Bright*, according to a Bloomberg Law review[.]").

Act,[41] and it may not be a reliable indicator of the statute's meaning at the time of its enactment. Regardless, the Court's ultimate treatment of the 1994 EPA policy in the context of deciding the statutory question presented may provide a signal to how the Court is thinking about administrative interpretations in a post-*Chevron* world.

Two more statutory cases involving agencies could have cross-cutting effects. The first is *Advocate Christ Medical Center v. Becerra*,[42] concerning the calculation of Medicare payments to hospitals. The petition asks whether the phrase "entitled . . . to benefits" means the same thing for supplementary security income that it does for Medicare Part A, with the hospitals arguing that the agency erred by giving identical phrases different meanings.[43] But the D.C. Circuit, in a careful opinion by Judge Gregory Katsas, explained that "the phrase 'entitled to supplementary security income benefits . . . under subchapter XVI'" is materially different from "the phrase 'entitled to benefits under part A'" because the two schemes referenced by the two phrases in fact operate in two different ways.[44] The case is thus at least superficially similar to *Yates v. United States*[45] and *Fischer v. United States*,[46] insofar as it appears to again pit a woodenly literal reading of isolated terms against a more contextual interpretation.

[41] The statute today called the Clean Water Act results from the 1972 amendments to the Federal Water Pollution Control Act of 1948. *See History of the Clean Water Act*, U.S. Env't Prot. Agency (June 12, 2024), https://www.epa.gov/laws-regulations/history-clean-water-act.

[42] No. 23-715 (U.S. June 10, 2024), 2024 U.S. LEXIS 2572 (granting petition for certiorari).

[43] Petition for a Writ of Certiorari at i, 2–3, Advocate Christ Med. Ctr. v. Becerra, No. 23-715 (U.S. June 10, 2024), 2024 U.S. LEXIS 2572.

[44] Advoc. Christ Med. Ctr. v. Becerra, 80 F.4th 346, 352–53 (D.C. Cir. 2023).

[45] 574 U.S. 528 (2015). The question in *Yates* was whether a fish was a "tangible object" within the meaning of a provision in the Sarbanes-Oxley Act, a federal statute addressing corporate and accounting deception and coverups. *See* 18 U.S.C. § 1519. While acknowledging that "[a] fish is no doubt an object that is tangible," the Court held the provision's placement within the overall statutory scheme showed that a tangible object captured by it "must be one used to record or preserve information." *Yates*, 574 U.S. at 532.

[46] 144 S. Ct. 2176 (2024). *Fischer*, like *Yates*, involved the construction of a broadly worded provision in Sarbanes-Oxley. The Court held that a subsection imposing criminal liability on anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so" was limited by the immediately preceding subsection that established liability for anyone who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." *Id*. at 2181 (quoting 18 U.S.C. § 1512(c)(1) and § 1512(c)(2)).

Next is *Seven County Infrastructure Coalition v. Eagle County*,[47] where the Court will decide whether the National Environmental Policy Act (NEPA) requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority. In the decision below,[48] the D.C. Circuit rejected as inadequate an environmental review conducted by the Surface Transportation Board. The court held that an agency "cannot avoid" environmental review "on the ground that it lacks authority to prevent, control, or mitigate" environmental effects that are "reasonably foreseeable."[49] "As a result," the petition explains, the D.C. Circuit "ordered the Board to study the local effects of oil wells and refineries that lie outside the Board's regulatory authority."[50]

Seven County defies the typical posture in an agency case because the reviewing court demanded that the agency exercise *more* authority than the agency had claimed for itself. Because NEPA is not administered by a single agency, the Board's decision would not have been a candidate for *Chevron* deference even prior to *Loper Bright*. But the D.C. Circuit was apparently concerned that no other regulator could step in if the Board declined to study the potential environmental effects of the increased number of oil wells and refineries that would result from a new rail line,[51] underscoring that deference to unaccountable agencies may not be the only "danger" that enables "the growing power of the administrative state."[52]

The only nonstatutory agency case that has been granted as of this writing is *FDA v. Wages & White Lion Investments*.[53] There, the Biden administration asks the Court to reverse a decision of the en banc Fifth Circuit setting aside the Food and Drug Administration's denial of certain applications for authorization to market new

[47] Seven Cnty. Coal. v. Eagle Cnty., No. 23-975 (U.S. June 24, 2024) (granting petition for certiorari).

[48] Eagle Cnty. v. Surface Transp. Bd., 82 F.4th 1152 (D.C. Cir. 2023).

[49] *Id.* at 1180 (cleaned up), *cert. granted sub nom.* Seven Cnty. Coal. v. Eagle Cnty., No. 23-975 (U.S. June 24, 2024).

[50] Petition for a Writ of Certiorari at i, Seven Cnty. Coal. v. Eagle Cnty., No. 23-975 (U.S. June 24, 2024).

[51] *See Eagle Cnty.*, 82 F.4th at 1180.

[52] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[53] No. 23-1038 (U.S. July 2, 2024), 2024 U.S. LEXIS 2902 (granting petition for certiorari).

e-cigarette products.[54] Although the government has yet to file its merits brief, this is another case to watch for whether the government attempts to revive arguments that it made below about the scope and nature of relief authorized by the APA.[55] The case may also offer insight into how the Court is currently thinking about the arbitrary and capricious standard, which it often describes as "deferential" but which sometimes appears to involve a hard look at agency action.[56]

False Claims Act

The False Claims Act authorizes private parties to bring actions on behalf of the United States against other private parties who submit false and fraudulent claims for money or property to the federal government.[57] In *Wisconsin Bell, Inc. v. United States, ex rel. Heath*,[58] the Court will decide whether reimbursement requests submitted to the Federal Communications Commission's (FCC's) E-rate program are "claims" under the Act.

[54] For the opinion of the Fifth Circuit, see Wages & White Lion Invs., LLC v. FDA, 90 F.4th 357 (5th Cir. 2024) (en banc). For the government's petition seeking certiorari, see Petition for a Writ of Certiorari, Wages & White Lion Invs., LLC v. FDA, No. 23-1038 (U.S. July 2, 2024), 2024 U.S. LEXIS 2902.

[55] *Cf.* Application for a Stay of the Judgment Entered by the United States District Court for the Northern District of Texas at 31–32, Garland v. VanDerStok, 144 S. Ct. 44 (2023) (No. 23A83); Brief for the Petitioners at 27, Garland v. VanDerStok, No. 23-825 (U.S. June 25, 2024).

[56] For an article discussing the Court's apparent "oscillation" between deference and scrutiny in application of the arbitrary-and-capricious standard of review, see Eli Nachmany, *Arbitrary and Capricious Review at the Court after FCC v. Prometheus Radio Project: From the Return of "Hard Look" to the "Zone of Reasonableness,"* Fed. Soc. Blog (July 27, 2021), https://fedsoc.org/commentary/fedsoc-blog/arbitrary-and-capricious-review-at-the-court-after-fcc-v-prometheus-radio-project-from-the-return-of-hard-look-to-the-zone-of-reasonableness; *compare* Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983) (describing standard of review as "most deferential"), *and* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) (explaining that the standard of review "simply ensures that the agency has acted within a zone of reasonableness"), *with* Dep't of Com. v. New York, 588 U.S. 752, 785 (2019) (cautioning that courts are "not required to exhibit a naiveté from which ordinary citizens are free") (quoting United States v. Stanchich, 550 F. 2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

[57] *See* 18 U.S.C. §§ 286, 287; 31 U.S.C. § 3729.

[58] No. 23-1127 (U.S. June 17, 2024), 2024 U.S. LEXIS 2699 (granting petition for certiorari).

The FCC's E-rate program provides discounted telecommunications and internet service to eligible schools and libraries.[59] The program is administered by the Universal Service Administrative Company, a private, nonprofit corporation funded by statutorily required contributions from telecommunications carriers.[60] In this case, a private individual sued Wisconsin Bell alleging that it had overcharged schools and libraries under the E-rate program. The theory of the case is that such overcharging would render reimbursement requests submitted to the Universal Service Administrative Company false claims.[61]

The principal legal issue concerns the provenance of the funds disbursed by the Universal Service Administrative Company. The False Claims Act defines a "claim" to include a request to a "contractor, grantee, or other recipient" if the federal government "provided any portion of the money" requested.[62] The en banc Seventh Circuit found that the E-rate program satisfied that statutory definition because Congress ordered telecommunications carriers to contribute to the program and the FCC ultimately oversees its administration.[63] But Wisconsin Bell argues that under the term's ordinary meaning, the government "provides" money only if the government is itself the source of that money.[64] And here, the funds contributed to the private administrator undisputedly come from private telecommunications carriers who are assessed a fee for that purpose, not from the U.S. Treasury out of general tax revenues.[65]

Lurking in the background are also questions about the constitutionality of the Universal Service Administrative Company. About a month after the Supreme Court granted cert in *Wisconsin Bell*,[66] the en banc Fifth Circuit held that the FCC violated the private

[59] *See generally E-Rate: Universal Service Program for Schools and Libraries*, Fed. Comms. Comm'n (Feb. 27, 2024), https://www.fcc.gov/consumers/guides/universal-service-program-schools-and-libraries-e-rate.

[60] *See generally About USAC: Universal Service*, Univ. Serv. Admin. Co., https://www.usac.org/about/universal-service/ (last visited Aug. 19, 2024).

[61] *See* United States ex rel. Heath v. Wis. Bell, Inc., 92 F.4th 654, 659 (7th Cir. 2023).

[62] 31 U.S.C. § 3729(b)(2)(A)(ii)(I); *see id.* § 3729(c).

[63] *See Wisconsin Bell*, 92 F.4th at 668–71.

[64] Brief for Petitioner at 13–14, Wis. Bell, Inc. v. United States ex rel. Heath, No. 23-1127 (U.S. Aug. 13, 2024) (summarizing argument).

[65] *See id.* at 14–15.

[66] No. 23-1127 (U.S. June 17, 2024), 2024 U.S. LEXIS 2699.

nondelegation doctrine by authorizing a private corporation to collect funds from the telecommunications carriers in the first place.[67] Although that question is not presented here, Wisconsin Bell has argued that the Universal Service Administrative Company is not an "agent of the United States" within the meaning of the False Claims Act.[68] That argument seems to touch on similar themes. Expect merits briefing and questions at oral argument to look more closely than did the Seventh Circuit at the nature of the Universal Service Administrative Company and its relationship to the FCC.

Securities Fraud

During a wave of securities fraud litigation that accompanied the internet technology boom in the 1990s, Congress passed the Private Securities Litigation Reform Act.[69] The Act makes such cases more difficult to bring by imposing heightened pleading standards on the complainant. In this way, Congress sought to protect the emerging technology companies that were then fueling the national economy from what Congress viewed as largely frivolous lawsuits.[70]

The Court will weigh in on the Private Securities Litigation Reform Act pleading standard in *NVIDIA Corp. v. E. Ohman J:or Fonder AB*.[71] The case involves a shareholder lawsuit against NVIDIA, one of the world's largest producers of graphics processing units. The lawsuit alleges that NVIDIA and its chief executive misrepresented how much of the company's revenue was attributable to cryptocurrency mining.[72] The Court will decide whether plaintiffs must plead with particularity the contents of internal company documents, and whether

[67] Consumers' Rsch. v. FCC, No. 22-60008, 2024 WL 3517592, at *1 (5th Cir. July 24, 2024) (en banc).

[68] *See* 31 U.S.C. § 3729(b)(2)(A)(i); Brief for Petitioner at 15–17, Wisconsin Bell, Inc. v. United States ex rel. Heath, No. 23-1127 (U.S. Aug. 13, 2024) (summarizing argument).

[69] 109 Stat. 737 (Dec. 22, 1995) (codified at 15 U.S.C. §§ 77(k), 77(l), 77(z)(1)–(2), 78(a), 78(j)(1), 78(u)(4)–(5)).

[70] *See* S. Rep. No. 104-98, at 9 (1995) (describing an "in terrorem effect on Corporate America" from class action lawsuits brought by "professional plaintiffs" burdening "high-technology companies," especially "[s]maller start-up[s]").

[71] No. 23-970 (U.S. June 17, 2024), 2024 U.S. LEXIS 2688 (granting petition for certiorari).

[72] *See* E. Ohman J:Or Fonder AB v. NVIDIA Corp., 81 F.4th 918, 923 (9th Cir. 2023). Cryptocurrency mining, the Ninth Circuit explained, is the act of using a computer's "processing power to solve 'a difficult mathematical puzzle through laborious trial-and-error work'" that is then "rewarded with new issues of cryptocurrency." *Id.* at 924.

expert opinion can substitute for factual allegations.[73] The case will be watched closely by both plaintiff and defense bars because the Private Securities Litigation Reform Act pleading standard affects not only cryptocurrency but most securities fraud claims across the country.

Online Speech

The Supreme Court decided five cases last Term involving the application of the First Amendment to social media and the internet.[74] In *Free Speech Coalition, Inc. v. Paxton*,[75] the Court will decide the standard for assessing the constitutionality of a Texas statute that restricts minors' access to commercial pornographic websites by requiring these websites to verify the age of their visitors.

The Fifth Circuit upheld Texas's age verification requirement.[76] Beginning with the undisputed premise that under binding Supreme Court precedent the "regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review,"[77] the court found that this standard was easily satisfied because "the age-verification requirement is rationally related to the government's legitimate interest in preventing minors' access to pornography."[78] As for adults, the Fifth Circuit found that their rights were not implicated because the Texas law "allows adults to access as much pornography as they want whenever they want" and "whatever 'burden'" arises from the age-verification requirement is

[73] *See* Petition for a Writ of Certiorari at i, NVIDIA Corp. v. E. Ohman J:Or Fonder AB, No. 23-970 (U.S. June 17, 2024), 2024 U.S. LEXIS 2688.

[74] *See* Lindke v. Freed, 601 U.S. 187 (2024) (holding that a public official's social media activity constitutes state action if the official had actual authority to speak on behalf of the government and purported to exercise that authority); O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (per curiam) (remanding a similar case for reconsideration in light of *Lindke*); Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (consolidated opinion remanding two cases for the lower courts to perform the necessary inquiry in reviewing facial challenges to state laws that regulate social media); Murthy v. Missouri, 144 S. Ct. 1972 (2024) (rejecting challenge to asserted censorship by government coercion of social media companies for lack of Article III standing).

[75] No. 23-1122 (U.S. July 2, 2024), 2024 U.S. LEXIS 2897 (granting petition for certiorari).

[76] *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024).

[77] *Id.* at 270; *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[I]t was rational for the legislature to find that the minors' exposure to such material might be harmful[.]").

[78] *Free Speech Coal.*, 95 F.4th at 267.

of "the same type" as that "required to enter a strip club, drink a beer, or buy cigarettes."[79]

The petitioning adult industry trade associations argue that the Fifth Circuit underestimated the burden the law places on adults.[80] In their view, the age-verification requirement is a content-based speech restriction that "subjects adults to significant and chilling burdens" that must be reviewed under "strict scrutiny."[81] Although the associations acknowledge that the Supreme Court in *Ginsberg v. New York* upheld a state law that prohibited the sale of "girlie picture magazines" to minors,[82] their petition says that the internet "poses unique security and privacy concerns" that require a different analysis.[83]

Free Speech Coalition represents the Supreme Court's first foray in an area of increasing activity by state legislatures. In addition to age restrictions for accessing online pornography (the petition says there are eight such laws already in existence, including the one pending the Court's review, and 12 more under consideration),[84] the National Conference of State Legislatures reports that at least 30 states and Puerto Rico have enacted or are considering bills that purport to protect children's online privacy in some way.[85] Many regulate more broadly than Texas. For example, California has enacted an Age-Appropriate Design Code Act, which was preliminarily enjoined by a federal district court[86] and which

[79] *Id.* at 275–76.

[80] *See* Petition for Writ of Certiorari at 1–2, Free Speech Coal., Inc. v. Paxton, No. 23-1122 (U.S. July 2, 2024), 2024 U.S. LEXIS 2897 ("[T]he Act imposes significant burdens on adults' access to constitutionally protected expression. Of central relevance here, it requires every user, including adults, to submit personally identifying information to access sensitive, intimate content over a medium—the Internet—that poses unique security and privacy concerns.").

[81] *Id.* at 22.

[82] *Ginsberg*, 390 U.S. at 634; *see also* Petition for Writ of Certiorari, *Free Speech Coal.*, *supra* note 80, at 6.

[83] Petition for Writ of Certiorari, *Free Speech Coal.*, *supra* note 80, at 1–2.

[84] *See id.* at 34.

[85] *See Social Media and Children 2024 Legislation*, Nat'l Conference of State Legislatures (June 14, 2024), https://www.ncsl.org/technology-and-communication/social-media-and-children-2024-legislation.

[86] *See* NetChoice, LLC v. Bonta, 2023 U.S. Dist. LEXIS 165500, at *5 (N.D. Cal. Sept. 18, 2023) (stating that the Act "likely violates the First Amendment" and issuing a preliminary injunction), *aff'd in part and rev'd in part*, 2024 U.S. App. LEXIS 20755 (9th Cir. Aug. 16, 2024).

has been copied by proposed or enacted bills in Connecticut and Maryland.[87] California's law requires many different kinds of businesses to assess and report whether their online content is "harmful, or potentially harmful" if accessed by children and to develop a mitigation plan.[88] Unlike California's law and those modeled on it, the Texas statute purports to regulate only speech that the Supreme Court considers outside the First Amendment's protection as to minors. For that reason, the Supreme Court could resolve this case narrowly. But whatever action the Court takes, *Free Speech Coalition* will be closely watched for any insight into how the Justices are thinking about state regulation of children's online activities.

Free Speech Coalition may also provide insight into issues that the Supreme Court identified in *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Paxton*,[89] two social media cases decided last Term. There, the Court reiterated its preference for resolving constitutional challenges to statutes on an as-applied basis, observing that its precedents "made facial challenges hard to win" "even when a facial suit is based on the First Amendment."[90]

Free Speech Coalition may give the Court an opportunity to elaborate on what it meant in the *NetChoice* cases. The Texas age verification statute appears more circumscribed than the social media statutes at issue in those cases, which would make potential factual development much easier. But the petitioning adult industry trade associations do not assert that particular adults have had their use of pornography chilled by the age verification statute. Nor do they explain why the statute's alternatives for age verification (which, according to the Fifth Circuit, include means similar to in-person age verification) are too burdensome in practice. Presumably, the associations believe such details are unnecessary. But these are exactly the types of unknowns that have given some of the Justices pause

[87] *See* Md. Code. Ann., Com. Law, §§ 14-4601–4613 (2024); H.B. No. 6253, Jan. Sess., 2023 (Conn. 2023).

[88] Cal. Civ. Code § 1798.99.31; *see also* NetChoice, LLC v. Bonta, 692 F. Supp. 3d at 944 (issuing preliminary injunction).

[89] The two cases were joined and adjudicated by the same decision. *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

[90] *Id.* at 2397–98.

in other facial challenges.[91] *Free Speech Coalition* may thus spur additional clarification about what is needed when plaintiffs seek broad-based relief.

Equal Protection

Perhaps the most controversial case granted so far also concerns state regulation of children. In *United States v. Skrmetti*,[92] the Biden administration seeks facial invalidation of a Tennessee statute that limits sex-transition treatments for minors experiencing gender dysphoria.[93]

As with *Free Speech Coalition*, the key legal issue is the standard of review. The Sixth Circuit applied rational basis review, which all parties agree is the correct equal protection standard for challenges to laws that make distinctions based on "age" and "medical condition."[94] The Tennessee statute distinguishes based on at least those factors, but the Biden administration contends that it also contains sex-based distinctions that should subject it to heightened scrutiny.

The challenged provisions prohibit health care providers from administering puberty blockers and hormone therapy to minors for sex-transition treatment.[95] Although the prohibitions are facially neutral in that they apply whether patients are boys or girls, the petition's lead argument is that they are "sex-based" in operation because they restrict only minors "who seek to induce physiological effects inconsistent with their sex assigned at birth": "An adolescent assigned female at birth cannot receive puberty blockers or testosterone to live as a male, but an adolescent assigned male at birth can. And vice versa, an adolescent assigned male at birth cannot receive puberty blockers or estrogen to live as a female, but an adolescent assigned female at birth can."[96]

[91] *See, e.g.*, *id.* at 2397–99 (rejecting facial challenge and remanding to lower courts given uncertainty regarding "the laws' full range of applications").

[92] No. 23-477 (U.S. June 24, 2024), 2024 U.S. LEXIS 2780 (granting petition for certiorari).

[93] *See* Petition for a Writ of Certiorari at 18–19, 29, United States v. Skrmetti, 2024 U.S. 2780 (U.S. June 24, 2024) (No. 23-477).

[94] *See* L.W. v. Skrmetti, 83 F.4th 460, 479–80 (6th Cir. 2024).

[95] *See* Tenn. Ann. Code § 68-33-103.

[96] Cert. Petition, *Skrmetti*, *supra* note 93, at 18–19 (cleaned up).

The Sixth Circuit acknowledged the law's different effects with respect to specific hormones but attributed these to "biological sex," "a lasting feature of the human condition."[97] Because "only females can use testosterone as a transition treatment" and "only males can use estrogen as a transition treatment," the Sixth Circuit found that the law restricts sex-transition treatments "evenhandedly" "for all minors, regardless of sex."[98] The court thus agreed with Tennessee that the law "treat[s] boys and girls exactly the same for constitutional purposes."[99]

Interestingly, although the initial challengers argued they could win even under rational basis review,[100] the Biden administration dropped that argument in its petition.[101] As an alternative path to heightened review, the petition asks the Supreme Court to designate transgender individuals as a new constitutionally protected class.[102] But the Court has not taken that route in over a half century. Unless the Court is inclined to do so now, the oral argument will need to explore each side's underlying assumptions about the nature of biological sex. Although at least one Justice is famously "not a biologist,"[103] *Skrmetti* is the second case in as many Terms that could turn on the Court's understanding of biological functions.[104]

[97] *Skrmetti*, 83 F.4th at 481.

[98] *Id.* at 480–81. *Cf.* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022) ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'") (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).

[99] *Skrmetti*, 83 F.4th at 482.

[100] *See* Plaintiffs' Motion for Preliminary Injunctive Relief at 21–22, Doe v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (No. 3:23-cv-00230-DJH) ("[T]here is no logical or rational connection between the Treatment Ban and any justifications that may be proffered by Defendants[.]") (citing Romer v. Evans, 517 U.S. 620 (1996)).

[101] *See* Cert. Petition, *Skrmetti*, *supra* note 93, at 17 (arguing that intermediate scrutiny should apply).

[102] *See id.* at 24–25.

[103] Myah Ward, *Blackburn to Jackson: Can you define 'the word woman'?* Politico (Mar. 22, 2022), https://www.politico.com/news/2022/03/22/blackburn-jackson-define-the-word-woman-00019543.

[104] *Compare* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting) ("Sleep is a biological necessity, not a crime."), *with id.* at 2225 (majority opinion) ("[W]hat are people entitled to do . . . to . . . fulfill . . . 'biological necessities'?").

Skrmetti may also present questions about the scope of relief. The district court issued broad preliminary injunctive relief that blocked all enforcement of the Tennessee statute.[105] But the Sixth Circuit, in addition to overruling that decision on the merits, cited the Supreme Court's *Salerno* standard under which a plaintiff seeking facial relief "must establish that no set of circumstances exists under which the statute would be valid," and specifically faulted the district court for failing to consider "every potentially valid application, say with respect to individuals too young to consent to a regimen of hormone treatments."[106] Although the Court need not reach this issue, *Skrmetti* could spur writings from the Justices about facial and as-applied relief.

Mandatory Minimums

The First Step Act was signed into law by President Donald Trump in 2018.[107] The statute reduces the mandatory minimum sentences for some federal drug and gun crimes (among other things) and is often cited by the former President as part of his plan to help "forgotten Americans."[108]

The First Step Act provides that its sentencing reductions "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."[109] The question before the court in both *Hewitt v. United States*[110] and *Duffey v. United States*[111] is whether

[105] *See* Doe v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023).

[106] *Skrmetti*, 83 F.4th at 489–90 (cleaned up); *see* United States v. Salerno, 481 U.S. 739 (1987).

[107] For an overview of the legislation, see *An Overview of the First Step Act*, Fed. Bureau of Prisons, https://www.bop.gov/inmates/fsa/overview.jsp (last visited Aug. 19, 2024).

[108] *President Donald J. Trump Has Championed Reforms That Are Providing Hope to Forgotten Americans*, The White House (Feb. 20, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-championed-reforms-providing-hope-forgotten-americans/.

[109] First Step Act, §§401(c), 403(b), Pub. L. No. 115-391, 132 Stat. 5194, 5221–22 (2018).

[110] No. 23-1002 (U.S. July 2, 2024), 2024 LEXIS 2900 (granting petition for certiorari and consolidating cases).

[111] No. 23-1150 (U.S July 2, 2024), 2024 LEXIS 2905 (granting petition for certiorari and consolidating cases).

that includes a defendant who was originally sentenced before the law was enacted but was then resentenced after the law's enactment.

The answer to that question is of obvious importance to the criminal defendants in these and other cases. For example, petitioner Tony Hewitt says that application of the First Step Act would have reduced his mandatory minimum sentence by 80 years, from 105 years to just 25.[112] At the certiorari stage, the government agreed with Hewitt (and Corey Duffey) that the First Step Act should apply at resentencing. But the government urged the Court to allow further percolation among the lower courts.[113] Given the parties' apparent agreement on the underlying legal issue, the cases necessitated the appointment of counsel to defend the interpretation taken by the court of appeals.[114]

Still to Come

As of this writing more than half the Court's docket remains to be filled. For some perspective, at this time last year, the Court had not yet granted *Corner Post*,[115] a case that together with *Loper Bright*[116] and *SEC v. Jarkesy*[117] helped define the October Term 2023 as a milestone in administrative law.

Three pending petitions are highlighted here. The first involves political speech, a topic in which the Court is often interested. In *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*,[118] petitioners ask the Court to decide whether the First Amendment allows San Francisco to require groups that run political advertisements to identify in those advertisements their top three

[112] *See* Petition for a Writ of Certiorari at 4, Hewitt v. United States, No. 23-1002 (U.S. July 2, 2024), 2024 LEXIS 2900.

[113] *See* Brief for the United States in Opposition at 9, Hewitt v. United States, No. 23-1002 (U.S. July 2, 2024), 2024 LEXIS 2900; Duffey v. United States, No. 23-1150 (U.S. July 2, 2024), 2024 LEXIS 2905.

[114] *See* Hewitt v. United States, No. 23-1002 (U.S. July 26, 2024), 2024 U.S. LEXIS 2978; Duffey v. United States, No. 23-1150 (U.S. July 26, 2024), 2024 U.S. LEXIS 2977 (inviting Michael H. McGinley to brief and argue the case as amicus curiae in support of the judgments below).

[115] Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).

[116] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2262 (2024).

[117] SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

[118] 85 F.4th 493, 506–7 (9th Cir. 2023), *petition docketed*, No. 23-926 (U.S. Feb. 27, 2024).

political donors (and, in some circumstances, each of those donors' top two political donors for a grand total of nine donors in all).[119] The district court record showed that for some 15-second and 30-second video ads, San Francisco's required disclosures occupied the entire ad, leaving no room for the speaker's own message.[120] And even for longer video ads of 60 seconds, San Francisco was still the primary speaker, occupying more than half of the ad time.[121] These stark facts make the case a potentially attractive vehicle for elaborating "exacting scrutiny," the minimum amount of First Amendment scrutiny applicable to compelled donor disclosures under *Americans for Prosperity Foundation v. Bonta*.[122]

Two more petitions involve state efforts to regulate global climate change by suing oil companies for common-law torts including nuisance, trespass, and negligence. In *Shell PLC v. City and County of Honolulu*[123] and *Sunoco LP v. City and County of Honolulu*,[124] Hawaii's highest court allowed these claims to go forward, stating that the "case concerns torts committed in Hawai'i that caused alleged injuries in Hawai'i" and that the claims were not preempted by the Clean Air Act or federal common law.[125] The petitions, for their part, argue that climate change is, by its nature, a global issue, and that any injury necessarily results from emissions all over the world.[126]

[119] *See* Petition for a Writ of Certiorari at i–ii, No on E, San Franciscans Opposing the Affordable Housing Prod. Act v. Chiu, No. 23-926 (U.S. Feb. 23, 2024).

[120] *See* No on E v. Chiu, 85 F.4th 493, 506–07 (9th Cir. 2023).

[121] *See id.* at 507.

[122] 594 U.S. 595 (2021); *see id.* at 606–08 (plurality opinion) ("exacting scrutiny" applies to "compelled disclosure" requirements); *id.* at 619 (Thomas, J., concurring in part and concurring in the judgment) ("[S]trict scrutiny [applies] to laws that compel disclosure of protected First Amendment association[.]'"); *id.* at 623 (Alito, J., joined by Gorsuch, J., concurring in part and concurring in the judgment) ("I see no need to decide which standard should be applied here.").

[123] 537 P.3d 1173 (Haw. 2023), *petition docketed*, No. 23-952 (U.S. Mar. 1, 2024).

[124] 537 P.3d 1173 (Haw. 2023), *petition docketed*, No. 23-947 (U.S. Mar. 1, 2024).

[125] City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173, 1181 (Haw. 2023).

[126] *See* Petition for a Writ of Certiorari at 2–3, Shell PLC v. City & Cnty. of Honolulu, No. 23-952 (U.S. Feb. 28, 2024) (introducing argument); Petition for a Writ of Certiorari at 3, Sunoco LP v. City & Cnty. of Honolulu, No. 23-947 (U.S. Feb. 28, 2024) (asking the Court to consider "whether federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate").

In the oil companies' views, the Constitution delegates authority to regulate cross-border emissions solely to the federal government, displacing the states.[127] The Court has signaled some interest in the cases, calling for the views of the Solicitor General.[128]

Conclusion

With *Chevron* ended, will everything sad come untrue in administrative law as Sam expected for Middle Earth? Some may be hoping that "all that was made or begun with that power will crumble" and that an administrative state shorn of its weapon will, like Sauron, "be maimed for ever, becoming a mere spirit of malice that gnaws itself in the shadows,"[129] but that result seems unlikely. Regardless, the October Term 2024 should provide an early glimpse at the Court's revised approach to the proper interpretation of statutes that are administered by federal agencies. And the remaining cases the Court has granted already will shed light on the meaning of other federal statutes, as well as apply the Constitution to new forms of state regulation, with more cases still to come.

[127] *See* Cert. Petition, *Shell*, *supra* note 125, at 20–21; Cert. Petition, *Sunoco*, *supra* note 125, at 5.

[128] *See* Shell PLC v. City & Cnty. of Honolulu, No. 23-952, 2024 U.S. LEXIS 2515 (U.S. June 10, 2024).

[129] J.R.R. Tolkien, The Lord of the Rings 640 (Reset ed., HarperCollins 2021) (1954).