Supreme Court Controversies
Spring 2025
Collier

First Day Assignment

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SIDEBAR

Trump's Supreme Court Agenda Is Likely to Include Legal U-Turns

In recent years, new administrations have not been shy about disavowing positions taken by their predecessors.

By Adam Liptak
Reporting from Washington

Nov. 8, 2024

Under the Trump administration, the government is very likely to flip its position in a major case pending in the Supreme Court, on the rights of transgender minors, a reversal that reflects the sharply changing direction of the next administration.

It may also take steps to thwart a ruling on so-called ghost guns. And it could disavow the Biden administration's positions in an array of cases involving the Environmental Protection Agency, the Food and Drug Administration, criminal sentencing and employment discrimination.

Such reversals were once rare. The solicitor general, the Justice Department official whose office represents the United States in the Supreme Court, generally tries to protect its reputation for consistency, credibility and independence. Solicitors general of both parties have said they are wary of veering from positions staked out by their predecessors.

Justice Elena Kagan, who was President Barack Obama's first solicitor general before joining the court, said in 2018 that "a change in position is a really big deal that people should hesitate a long time over."

Michael R. Dreeben, who worked in the solicitor general's office for more than 30 years and argued more than 100 cases in the Supreme Court, surveyed the landscape in a 2021 article in The Yale Law Journal.

"The Obama administration swept into office following eight years of Republican rule, and ample areas existed for revision and change," Mr. Dreeben wrote. "But President Obama's solicitors general took a highly restrained approach to reversing the positions of their Bush predecessors. During President Obama's first term in office, *no* cases featured overt reversals of positions taken in the Supreme Court."

When the solicitor general made a modest change late in Mr. Obama's first term, Chief Justice John G. Roberts Jr., who once served in the solicitor general's office, took note.

"The position that the United States is advancing today is different from the position that the United States previously advanced," he told a lawyer in the office in 2012.

The Obama administration had filed a brief in a minor case on pension plans disavowing a position taken by its predecessor, saying it was the product of "further reflection."

"That is not the reason," Chief Justice Roberts said. "It wasn't further reflection." The new position, he said, was prompted by a change in administrations. (The joke around the solicitor general's office had long been that "upon further reflection" actually meant "upon further election.")

Adam Liptak
Supreme Court reporter

"I try to make the Supreme Court accessible to readers. I strive to distill and translate complex legal materials into accessible prose, while presenting fairly the arguments of both sides and remaining alert to the political context and practical consequences of the court's work."

Learn about how Adam Liptak approaches covering the court.

The first Trump administration was considerably bolder, Mr. Dreeben wrote. It flipped positions in four major cases in its first full Supreme Court term, including ones on workers' rights and voting rolls.

"The reversals were abrupt and appeared strikingly at odds with institutional norms," Mr. Dreeben wrote. But the justices did not seem to think the shifts particularly noteworthy, and the Trump administration prevailed in all four cases.

It may have helped that the administration's briefs had abandoned the phrase "upon further reflection" in favor of something blunter. "After the change in administration," a typical brief said, "the office reconsidered the issue and has reached the opposite conclusion."

The Biden administration was not shy about switching positions, either. It disavowed the approaches of the Trump administration five times and lost four of those cases, according to a tally by Thomas Wolf of the Brennan Center for Justice.

The transgender rights case, United States v. Skrmetti, No. 23-477, is a challenge brought by the Biden administration to a Tennessee law that bans some medical treatments for transgender minors. It is scheduled to be argued in December.

Although the law was also challenged in a separate lawsuit by families and a doctor, the justices granted only the Biden administration's petition seeking review. The Trump administration will almost surely reverse course, and the court will sooner or later have to make adjustments if it is to decide the constitutionality of the law.

There are several possible procedural permutations. Ed Whelan, a conservative legal commentator, suggested this one on social media: The court could dismiss the Biden administration's petition as improvidently granted, grant a petition from the private plaintiffs, hear arguments in the spring and decide the case by the end of the term in late June or early July.

The case on ghost guns, Garland v. VanDerStok, No. 23-852, was argued in October. But the Trump administration could render it moot by rescinding the regulation at issue in the case, which places limits on kits that can be bought online and assembled into untraceable homemade firearms.

In all, Mr. Wolf said, it was possible that the Trump administration could change positions in a half-dozen sets of cases, roughly in line with the Biden administration's track record. That was, he said, understandable, to a point.

"All of these legal disputes are taking place within the context of the democracy that we're supposed to have," he said. "As part of that democracy, elections are supposed to have consequences for policy, including legal policy. So it's natural to assume that if one administration succeeds another with significantly different policy views that their legal positions should change as well."

"However," he added, "it's critical that in the course of making those changes that the administrations are also recognizing some bedrock principles about the rule of law and the legitimate boundaries of our constitutional rights."

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

A version of this article appears in print on , Section A, Page 18 of the New York edition with the headline: Expect U-Turns in Trump's Supreme Court Agenda

2024 ELECTION

Trump has shaped the Supreme Court, but it could still hinder his agenda

Although the court has three Trump appointees as part of its 6-3 conservative majority, it hasn't always ruled for him and could push back on expansive uses of executive power.

Growing focus on what Trump's victory means for the Supreme Court

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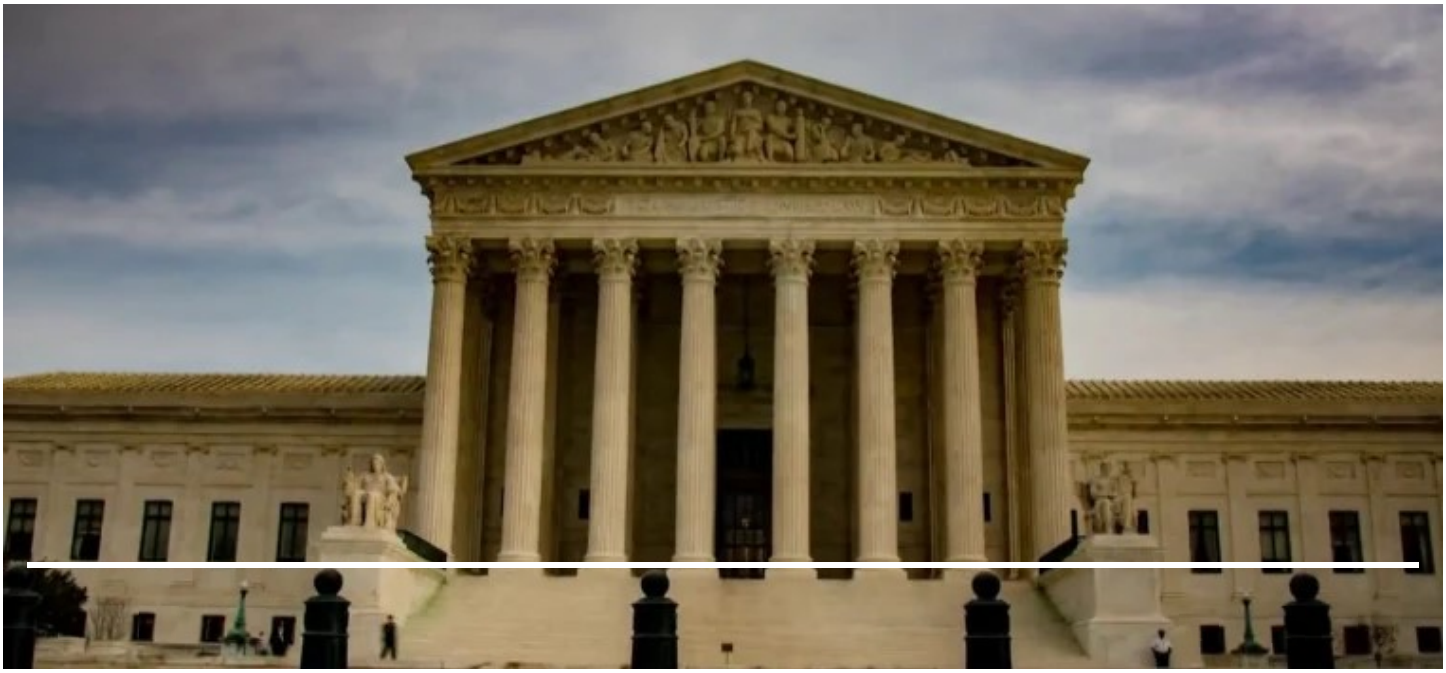

Nov. 9, 2024, 2:00 PM EST / Updated Nov. 11, 2024, 1:36 PM EST

By Lawrence Hurley

WASHINGTON — President-elect Donald Trump's ambitious agenda could face pushback from an institution he has done much to shape: the Supreme Court.

With a 6-3 conservative majority including three Trump appointees, the court has spent the

last few years buffeted by criticism from the left. But if the justices stick true to their stated jurisprudential principles, the new administration could end up on the losing side at least some of the time, legal experts say.

“I think if President Trump’s executive agencies tried to stretch the law beyond the breaking point in the same kind of way that the Biden administration has done then, yes, the courts will be a check on that power,” said John Malcolm, a lawyer at the Trump-allied Heritage Foundation.

Brianne Gorod, a lawyer with the left-leaning Constitutional Accountability Center, said while in certain rulings the court has failed to hold Trump accountable, it still has a key role to play.

“Trump has made clear that going forward he is going to be even less concerned with abiding by the Constitution and federal law than he was the last time he was in the White House, so the courts, including the Supreme Court, are on notice that their role as a vital check in our constitutional system will be tested,” she added.

History is a guide, with Trump losing several high-profile cases in his first term, including over his attempt to wind down the program that protects young immigrants known as “Dreamers” from deportations and a plan to add a citizenship question to the census.

The Trump administration also suffered a big loss when in 2020 the court ruled 6-3 to extend workplace discrimination protections to LGBTQ employees, a decision that angered conservatives.

He won his fair share of cases too, including over his travel ban on people entering the U.S. from mostly Muslim-majority countries.

Trump’s losses often derived from the court faulting federal agencies for not following the correct procedures when issuing new policies.

“I do think the Supreme Court will make the administration do the real work that is required to make regulatory change,” said Jonathan Adler, a professor at Case Western Reserve University School of Law.

The court has changed somewhat since then, with Trump’s third appointee, Amy Coney Barrett, joining right at the end of his first term, creating the current 6-3 majority. President Joe Biden, meanwhile, appointed Justice Ketanji Brown Jackson to replace fellow liberal Justice Stephen Breyer.

Trump could also have the opportunity to further shape the court in his new term, with the possibility of one or more of the senior conservative justices stepping down.

During the Biden years, the court has set new precedents while ruling against the administration that in theory apply to Trump too.

The court embraced a theory called the "major questions doctrine" in striking down Biden policies that relied upon broad use of executive power that wasn't explicitly authorized by Congress, including his broad plan to forgive student loan debt.

The court earlier this year also overturned a 40-year-precedent that gave deference to federal agencies, soon to be controlled again by Trump, in interpreting vaguely worded laws.

Trump could get more leeway on certain issues where the president traditionally gets more deference from courts than the law constrains him.

Immigration, foreign policy and international trade are all areas where Trump has flexibility to act, Adler said.

Another contentious issue the Supreme Court could back Trump on would be on any attempt to enforce the Comstock Act, an obscure 19th-century law that prohibits abortion-related materials from being transported by mail between states. It could potentially be applied to abortion pill mifepristone.

But on other issues, like environmental regulation, efforts to deregulate more than laws allow for could be difficult to defend, he added.

One issue where Trump would almost certainly enter choppy legal waters is his plan to end birthright citizenship, a right enshrined in the Constitution.

Proposals to withhold funding to liberal jurisdictions that refuse to cooperate with the administration on, for example, rounding up undocumented immigrants or rolling back protections for transgender students in schools, would also lead to litigation that could end up before the justices.

Although the Biden administration suffered many high-profile losses during the last four years, on abortion, gun rights, regulatory issues and more, it also chalked up some major victories in cases it intervened in.

Last year, the court rejected a conservative plea to further weaken the landmark Voting Rights

Act and also turned away a fringe legal theory that would have given state legislatures unfettered power over election rules. The court this year nixed a lawsuit aimed at overturning federal approval of mifepristone.

But some on the left have no confidence that the court will hold Trump to the same standards as Biden, citing in part the ruling earlier this year granting Trump some immunity over his attempt to overturn the 2020 election results. The court actions in that case derailed the chance of a trial taking place before the election.

“The Supreme Court supermajority has given us no reason to expect that it will be anything other than be a rubber stamp for his worse impulses,” said Alex Aronson, who runs Court Accountability, a left-leaning legal group. “They’ve previewed their support for an imperial presidency and have demonstrated their willingness to strip rights and freedoms from the American people.”

Lawrence Hurley

Lawrence Hurley is a senior Supreme Court reporter for NBC News.

What's on the Supreme Court's agenda ahead of the new term

npr
By Ayesha Rascoe

Published October 6, 2024 at 6:10 AM MDT

LISTEN • 5:10

AYESHA RASCOE, HOST:

Tomorrow marks the start of a new term for the Supreme Court. Last term, it handed down blockbuster rulings on presidential immunity and the power of regulatory agencies, boosting its own role in how the federal government functions. The new term begins weeks from the election against a backdrop of deep political divisions and heightened scrutiny of the court. Amy Howe is a reporter and editor for SCOTUSblog. She's been keeping an eye on the Supreme Court's upcoming docket and joins us now. Welcome to the program.

AMY HOWE: Thanks for having me.

RASCOE: So the court has 34 cases on the docket. For reference, it heard 62 cases last term. I'm sure everybody has those numbers just offhand. But does this look to be a quieter term?

HOWE: Right now, it does, but many of the cases that made last term a blockbuster weren't on the court's docket at this time last year, so they could still add another 30 cases or so to their docket that could make this court a blockbuster. But right now it looks a little bit quieter, which may be in part, a deliberate choice by the justices to try to keep some space in their schedule and keep a lower profile in case some election

RASCOE: Are there one or two cases that you are paying close attention to?

HOWE: There are a couple of cases that, you know, are high-profile cases by really any definition. One of them is a case called United States v. Skrmetti. It's a challenge to a Tennessee law that bans hormone treatment as gender-affirming care for minors. The plaintiffs in the case, who are transgender teens and their parents argue that the law violates the Constitution because the law allows minors who aren't trans to receive the same treatment if they're seeking to conform the sex that they were assigned at birth. And so they say that's discrimination based on sex. In 2020, in a case called Bostock, the Supreme Court ruled that under federal employment laws, if you discriminate against someone because they're transgender, you're discriminating based on sex. And so the plaintiffs in this case, joined by the federal government, say that the same logic should apply to their claim under the Constitution.

RASCOE: Are there any other cases that you're looking or paying close attention to?

HOWE: There's another case involving what's known as ghost guns. It's a challenge to the Biden administration's efforts to regulate these guns, which are sort of partially complete firearms or firearms that you can assemble from a kit that you can sometimes even buy online. And the Biden administration says that we just want to be able to subject them to the same rules as other commercial gun sales to make sure that they don't wind up in the hands of people who aren't supposed to have them. This is not a case about the Second Amendment right to bear arms. It's a complicated interpretation of the federal laws governing commercial gun sales. It's going to be a close case.

RASCOE: There any particular legal themes, legal theories that you're following?

HOWE: One of the things you've already mentioned was, you know, last term was the idea of regulatory power. And last term, the court struck down a 40-year-old decision in a case called Chevron involving deference to administrative agencies. And so one of the themes that a lot of people are watching is whether the court will continue what some people have called the war on the administrative state. And with the Chevron doctrine, for example, it was the idea that Congress would write the laws and that courts should be the ones to determine what the laws say rather than

RASCOE: This court is dealing with political pressure, leaks to the media, controversies with spouses - as a court watcher, can you sense any tension with the justices?

HOWE: Traditionally, the justices at the end of their term, which usually ends in late June or early July, have sort of the summer to travel or teach or go on vacation and sort of decompress and return to the bench sort of refreshed. And I think that's one thing that we'll be watching is when they return to the bench on Monday, will they look refreshed or will they look like they, you know, didn't really have much of vacation and there still continues to be a lot of tension? And I think to a certain extent, the fact that they had these leaks and that people were talking to the press signals that there is sort of tension and dissent coming from inside the court.

RASCOE: That's Amy Howe a reporter and editor for SCOTUSblog. Thank you so much for joining us.

HOWE: Thanks so much for inviting me. Transcript provided by NPR, Copyright NPR.

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Ayesha Rascoe

Ayesha Rascoe is a White House correspondent for NPR. She is currently covering her third presidential administration. Rascoe's White House coverage has included a number of high profile foreign trips, including President Trump's 2019 summit with North Korean leader Kim Jong Un in Hanoi, Vietnam, and President Obama's final NATO summit in Warsaw, Poland in 2016. As a part of the White House team, she's also a regular on the NPR Politics Podcast.

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In the
Supreme Court of the United States

TIKTOK, INC., *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States of America,

Respondent.

BRIAN FIREBAUGH, *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PRESIDENT DONALD J. TRUMP AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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December 27, 2024

QUESTION PRESENTED

Whether the Protecting Americans from Foreign Adversary Controlled Applications Act ("the Act"), as applied to petitioners, violates the First Amendment.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* PRESIDENT DONALD J. TRUMP[1]

Amicus curiae President Donald J. Trump ("President Trump") is the 45th and soon to be the 47th President of the United States of America. On January 20, 2025, President Trump will assume responsibility for the United States' national security, foreign policy, and other vital executive functions. This case presents an unprecedented, novel, and difficult tension between free-speech rights on one side, and foreign policy and national-security concerns on the other. As the incoming Chief Executive, President Trump has a particularly powerful interest in and responsibility for those national-security and foreign-policy questions, and he is the right constitutional actor to resolve the dispute through political means.

President Trump also has a unique interest in the First Amendment issues raised in this case. Through his historic victory on November 5, 2024, President Trump received a powerful electoral mandate from American voters to protect the free-speech rights of all Americans—including the 170 million Americans who use TikTok. President Trump is uniquely situated to vindicate these interests, because "the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson* v. *Celebrezze*, 460 U.S. 780, 795 (1983).

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[1] This brief was not authored in whole or in part by counsel for any party, and no party or party's counsel has made a monetary contribution toward the brief's preparation or submission.

Moreover, President Trump is one of the most powerful, prolific, and influential users of social media in history. Consistent with his commanding presence in this area, President Trump currently has 14.7 million followers on TikTok with whom he actively communicates, allowing him to evaluate TikTok's importance as a unique medium for freedom of expression, including core political speech. Indeed, President Trump and his rival both used TikTok to connect with voters during the recent Presidential election campaign, with President Trump doing so much more effectively. As this Court instructs, the First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 162 (2014) (quoting *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971)).

Further, President Trump is the founder of another resoundingly successful social-media platform, Truth Social. This gives him an in-depth perspective on the extraordinary government power attempted to be exercised in this case—the power of the federal government to effectively shut down a social-media platform favored by tens of millions of Americans, based in large part on concerns about disfavored content on that platform. President Trump is keenly aware of the historic dangers presented by such a precedent. For example, shortly after the Act was passed, Brazil banned the social-media platform X (formerly known as Twitter) for more than a month, based in large part on that government's disfavor of political speech on X. *See, e.g., Brazil's Supreme Court*

Lifts Ban on Social Media Site X, CBS NEWS (Oct. 8, 2024).[2]

In light of these interests—including, most importantly, his overarching responsibility for the United States' national security and foreign policy—President Trump opposes banning TikTok in the United States at this juncture, and seeks the ability to resolve the issues at hand through political means once he takes office. On September 4, 2024, President Trump posted on Truth Social, "FOR ALL THOSE THAT WANT TO SAVE TIK TOK IN AMERICA, VOTE TRUMP!"[3]

Furthermore, President Trump alone possesses the consummate dealmaking expertise, the electoral mandate, and the political will to negotiate a resolution to save the platform while addressing the national security concerns expressed by the Government—concerns which President Trump himself has acknowledged. *See, e.g.,* Executive Order No. 13942, *Addressing the Threat Posed by TikTok*, 85 Fed. Reg. 48637, 48637 (Aug. 6, 2020); *Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 85 Fed. Reg. 51297, 51297 (Aug. 14, 2020). Indeed, President Trump's first Term was highlighted by a series of policy triumphs achieved through historic deals, and he has a great prospect of success in this latest national security and foreign policy endeavor.

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[2] *At* https://www.cbsnews.com/news/brazil-supreme-court-lifts-ban-social-media-site-x-elon-musk/.

[3] *At* https://truthsocial.com/@realDonaldTrump/posts/113081258242253706.

The 270-day deadline imposed by the Act expires on January 19, 2025—one day before President Trump will assume Office as the 47th President of the United States. This unfortunate timing interferes with President Trump's ability to manage the United States' foreign policy and to pursue a resolution to both protect national security and save a social-media platform that provides a popular vehicle for 170 million Americans to exercise their core First Amendment rights. The Act imposes the timing constraint, moreover, without specifying any compelling government interest in that particular deadline. In fact, the Act itself contemplates a 90-day extension to the deadline under certain specified circumstances. Pet.App.97a, § 2(a)(3)(A)-(C).

President Trump, therefore, has a compelling interest as the incoming embodiment of the Executive Branch in seeing the statutory deadline stayed to allow his incoming Administration the opportunity to seek a negotiated resolution of these questions. If successful, such a resolution would obviate the need for this Court to decide the historically challenging First Amendment question presented here on the current, highly expedited basis.

SUMMARY OF ARGUMENT

President Trump takes no position on the merits of the dispute. Instead, he urges the Court to stay the statute's effective date to allow his incoming Administration to pursue a negotiated resolution that could prevent a nationwide shutdown of TikTok, thus preserving the First Amendment rights of tens of millions of Americans, while also addressing the government's national security concerns. If achieved, such a resolution would obviate the need for this

Court to decide extremely difficult questions on the current, highly expedited schedule.

There is ample justification for the Court to stay the January 19 deadline—by which divestment for ByteDance must occur, or else TikTok will face an effective shut-down in the United States—while it considers the merits of the case. *First*, this Court has aptly cautioned against deciding "unprecedented" and "very significant constitutional questions" on a "highly expedited basis." *Trump* v. *United States*, 603 U.S. 593, 616 (2024). Due to the Act's deadline for divestment and the timing of the D.C. Circuit's decision, this Court now faces the prospect of deciding extremely difficult questions on exactly such a "highly expedited basis." Staying this deadline would provide breathing space for the Court to consider the questions on a more measured schedule, and it would provide President Trump's incoming Administration an opportunity to pursue a negotiated resolution of the conflict. Indeed, the Court recently pursued a similar course in *Zubik* v. *Burwell*, vacating lower-court decisions and pausing the enforcement of HHS's contraceptive mandate against religious organizations to "allow the parties sufficient time to resolve any outstanding issues between them." 578 U.S. 403, 408 (2016) (per curiam).

Second, three features of the Act raise concerns about possible legislative encroachment on prerogatives of the Executive Branch under Article II. First, the Act dictates that the President must make a particular national-security determination as to TikTok alone, while granting the President a greater "degree of discretion and freedom from statutory restriction" as to all other social-media platforms. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Second, the Act mandates that the

President must exercise his power over foreign affairs "through an interagency process" commanded by Congress, instead of exercising his sole discretion over the deliberative processes of the Executive Branch. Pet.App.19a. Third, the Act—due to its signing date—now imposes a deadline for divestment that falls one day before the incoming Administration takes power. Especially when viewed in combination, these unique features of the Act raise significant concerns about possible legislative encroachment upon the President's prerogative to manage the Nation's geopolitical, strategic relationships overall, and with one of our most significant counterparts, China, specifically. This is an area where the Nation must "speak ... with one voice," and "[t]hat voice must be the President's." *Zivotofsky ex rel. Zivotofsky* v. *Kerry,* 576 U.S. 1, 14 (2015) (citation omitted).

Third, the First Amendment implications of the federal government's effective shuttering of a social-media platform used by 170 million Americans are sweeping and troubling. There are valid concerns that the Act may set a dangerous global precedent by exercising the extraordinary power to shut down an entire social-media platform based, in large part, on concerns about disfavored speech on that platform. Perhaps not coincidentally, soon after the Act was passed, another major Western democracy—Brazil—shut down another entire social-media platform, X (formerly known as Twitter), for more than a month, apparently based on that government's desire to suppress disfavored political speech. Moreover, despite the Act's enormous impact on the speech of 170 million TikTok users, the D.C. Circuit's opinion grants only cursory consideration to the free-speech interests of Americans, while granting decisive weight and near-plenary deference to the views of national-

security officials. Yet the history of the past several years, and beyond, includes troubling, well-documented abuses by such federal officials in seeking the social-media censorship of ordinary Americans.

In light of the novelty and difficulty of this case, the Court should consider staying the statutory deadline to grant more breathing space to address these issues. The Act itself contemplates the possibility of a 90-day extension, indicating that the 270-day deadline lacks talismanic significance. Such a stay would vitally grant President Trump the opportunity to pursue a political resolution that could obviate the Court's need to decide these constitutionally significant questions.

ARGUMENT

This Court may grant a stay to preserve the status quo in a case that presents novel and difficult questions of great constitutional significance. The granting of such a stay does not necessarily forecast one party's likelihood of success on the merits.

A stay may be warranted where "[t]he underlying issue in th[e] case … has not heretofore been passed upon by this Court and is of continuing importance." *McLeod* v. *Gen. Elec. Co.*, 87 S. Ct. 5, 6 (1966) (Harlan, J.). "[T]he existence of an important question not previously passed on by the Court" is a factor that weighs in favor of a stay. *Shiffman* v. *Selective Serv. Bd. No.5*, 88 S. Ct. 1831, 1832 n.3 (1968) (Douglas, J., dissenting); *Certain Named and Unnamed Non-Citizen Children and Their Parents* v. *Texas*, 448 U.S. 1327, 1332 (1980) (Powell, J., in chambers) (holding that a case that "presents novel and important issues" warrants a stay). Where the appeal "raises a difficult question of constitutional significance" that "also

involves a pressing national problem," a stay may be warranted. *Texas*, 448 U.S. at 1331.

The moving party's likelihood of success on the merits is not an absolute prerequisite for such a stay. Instead, in extraordinary cases, a "fair prospect of reversal" may suffice. *Karcher* v. *Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). Such a "fair prospect of reversal" may exist when "[t]he issues underlying this case are important and difficult," and the "fair prospect" standard does not require "anticipating [the Court's] views on the merits." *Times-Picayune Publ'g Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1309 (1974) (Powell, J., in chambers). A stay may be warranted when the "petitioner's position … cannot be deemed insubstantial," *McLeod*, 87 S. Ct. at 6, and the Court need not "think it more probable than not that" reversal will occur, *Texas*, 448 U.S. at 1332.

I. The Case's Current Schedule Requires the Court To Address Unprecedented, Very Significant Constitutional Questions on a Highly Expedited Basis.

In *Trump* v. *United States*, this Court expressed the concern that "[d]espite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis." 603 U.S. 593, 616 (2024). Due to the deadline imposed by the Act and the timing of the D.C. Circuit's decision below, this Court now faces the prospect of considering "unprecedented" and "very significant constitutional questions" on virtually the same "highly expedited basis" on which the D.C. Circuit acted in that historic case. *See* Briefing Scheduling *in United States* v. *Trump*, No. 23-3228 (D.C. Cir. Dec. 13, 2023) (adopting a briefing schedule on Presidential

immunity with opening briefs due on December 23 and oral argument on January 9).

In light of this Court's well-placed concerns about the "highly expedited" resolution of novel, difficult, and "very significant" constitutional questions, *Trump*, 603 U.S. at 616, the Court should consider staying the statutory deadline for divestment and taking time to consider the merits in the ordinary course. Such an approach would allow this Court more breathing space to consider the merits, and it would also allow President Trump's Administration the opportunity to pursue a negotiated resolution that, if successful, would obviate the need for this Court to decide these questions. *See Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

This Court's recent precedent provides support for this approach. For example, in *Zubik*, facing novel and difficult questions of religious liberty, this Court vacated the judgments of several federal courts of appeals and directed the lower courts on remand to "allow" the federal government and private petitioners "sufficient time to resolve any outstanding issues between them." 578 U.S. at 408. Two factors influenced the Court's decision: (1) the "gravity of the dispute," and (2) the fact that a political resolution that could obviate the need for the federal courts to decide difficult constitutional questions seemed feasible. *Id.*

The Court should consider a similar approach here. Staying the statutory deadline for divestment would reflect "the gravity of the dispute," and it would give "the parties"—especially the Government, under the new leadership of President Trump—"an opportunity to arrive at an approach going forward

that accommodates" the free speech interests of the 170 million Americans who use TikTok, "while at the same time ensuring" that the Government's national security concerns are adequately protected. *Id.*

This approach also draws support from the fact that the January 19, 2025, deadline for divestment falls one day before President Trump takes office, and is unfortunately timed to bind the hands of the incoming Trump Administration on a significant issue of national security and foreign policy. As discussed below, this feature of the Act, combined with others, raises significant concerns under Article II of the Constitution.

II. Three Features of the Act, Considered in Combination, Raise Concerns of Possible Legislative Encroachment on Executive Authority Under Article II.

Three features of the Act, especially when considered in combination, raise concerns about possible legislative encroachment on Executive authority under Article II, including the Executive's power over national security and foreign affairs. These serious questions alone warrant staying the statutory deadline for more measured consideration.

First, while the Act defers to the Executive's determinations as to all other social-media platforms, when it comes to TikTok, the Act takes that determination out of the Executive's hands. Pet.App.99a-100a, § 2(g)(3)(A); *contrast id.* at 100a § 2(g)(3)(B)(ii). As to TikTok alone, the Act makes the determination for the Executive Branch—thus effectively binding the hands of the incoming Trump Administration on a significant point of foreign policy. *See, e.g.,* Pet.App.29a. But the Executive, not

Congress, is primarily charged with responsibility for the United States' national security, its foreign policy, and its strategic relationship with its geopolitical rivals. Whether Congress may dictate a particular *outcome* by the Executive Branch on such a significant, fact-intensive question of national security raises a significant question under Article II.

Second, the statute purports to dictate how the President must exercise his national security and foreign affairs authority in this sensitive area, by mandating that the President must make key determinations "through an interagency process." Pet.App.100a, § 2(g)(6)(A)-(B). Whether Congress has authority to dictate the specific intra-Executive procedures through which the President must exercise his foreign affairs power presents another significant constitutional question.

Third, as the Act was signed on April 24, 2024, the statutory deadline for divestment falls on the day before President Trump's inauguration, raising concerns that the Act effectively forestalls the incoming Administration's ability to address the question. At very least, this timing raises yet another significant question under Article II—a concern reinforced by the first two overlapping concerns.

"In foreign affairs, as in the domestic realm, the Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" *Zivotofsky,* 576 U.S. at 16 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Yet this Court has long recognized that there are certain areas within the domain of foreign affairs that constitute "exclusive power[s] of the President," such that "Congressional commands contrary to the President's …

determinations are thus invalid." *Trump*, 603 U.S. at 609 (citing *Zivotofsky*, 576 U.S. at 32).

Further, this Court has long emphasized the general primacy of Executive authority in this area. "In this vast external realm" of foreign affairs, "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *Curtiss-Wright*, 299 U.S. at 319. When it comes to treaty negotiation, for example, "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." *Id.* Though this Court cautions that the President's foreign-affairs power is not "unbounded," *Zivotofsky*, 576 U.S. at 20, and Congress plays a significant role as well, *id.*, the primary authority of the Executive Branch in this area is long acknowledged.

In *Curtiss-Wright*, this Court observed that "[t]he President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success." 299 U.S. at 319 (quoting 8 U.S. Sen. Reports Comm. on Foreign Relations, at 24 (Feb. 15, 1816)). "[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" is "a power which does not require as a basis for its exercise an act of Congress…." *Id.* at 320; *see also Zivotofsky*, 576 U.S. at 14 (recognizing that "functional considerations" dictate that "the Nation must have a single policy" regarding foreign-state recognition).

Thus, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President *a degree of discretion and freedom from statutory restriction* which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U.S. at 320 (emphasis added). Ultimately, the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries…." *Id.*

Under these principles, the three features of the statute noted above—especially considered in combination—raise concerns of possible legislative encroachment on Executive authority. First, as noted above, the statute defers to the Executive Branch's determinations of national security risks as to every other social-media platform, but when it comes to TikTok alone, the Act purports to make the determination *for* the Executive Branch. Pet.App. 99a-100a, § 2(g)(3)(A), (B). This singling out of TikTok raises a serious question whether the Act grants the President the requisite "degree of discretion and freedom from statutory restriction" in his conduct of foreign affairs, *Curtiss-Wright*, 299 U.S. at 320. This question is particularly significant in the context of the Nation's complex, ever-evolving relationship with one of its most challenging geopolitical rivals.

Second, the statute mandates that the President must make key foreign policy determinations through a specific, dictated procedure, *i.e.*, "through an interagency process." Pet.App.100a, § 2(g)(6)(A)-(B). Whether Congress has the authority to dictate that the President must use certain specific procedures to make sensitive national-security determinations presents a significant constitutional question. At the

very least, if the President's authority is bound by the recommendations or conclusions of such an "interagency process," the provision would raise grave Article II concerns. *Cf. Loper-Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024).

Third, the Act was signed on April 24, 2024, thus triggering a 270-day deadline for divestment by January 19, 2025—one day before President Biden's successor would take office. Pet.App.97a, § 2(a)(2). This timing binds the hands of the incoming Administration on a significant issue of national security and foreign policy, and thus it raises significant questions under Article II. When it comes to foreign policy regarding our geopolitical rivals, the Executive Branch must "speak ... with one voice," and "[t]hat voice must be the President's." *Zivotofsky*, 576 U.S. at 14 (quoting, in part, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 424 (2003)). "Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'" *Id.* (quoting THE FEDERALIST NO. 70, at 424 (A. Hamilton)). This principle applies not just to the outgoing, but also—and arguably with even more strength due to the fact that it is that President which will be left to handle the results of any such action—the incoming President of the United States.

III. The Case Presents Novel, Difficult, and Significant First Amendment Questions.

A stay of the statutory deadline is also justified on the basis that the case presents a novel, difficult, and significant tension between national security concerns and the free speech interests of over 170 million ordinary Americans.

To be sure, the national security concerns presented by ByteDance and TikTok appear to be significant and pressing. No one knows this better than President Trump, who has issued multiple orders expressing concerns similar to those that the Government cites to defend the Act. *See* Executive Order No. 13942, *Addressing the Threat Posed by TikTok*, 85 Fed. Reg. 48637 (Aug. 6, 2020); *Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 85 Fed. Reg. 51297 (Aug. 14, 2020).

On the other hand, neither the United States' relationship with the People's Republic of China, nor the federal government's involvement in social-media censorship, has remained static during the last four years. On the contrary, recent historical developments reinforce the significant First Amendment concerns raised by the petitioners here.

First, as discussed above, the President alone, not Congress or the federal courts, is charged with the primary responsibility for the United States' national security and foreign policy—a responsibility that President Trump will assume on January 20, 2025, one day after the Act's arbitrary deadline, which may be extended under the terms of the Act itself.

Second, the Act exercises an extraordinary power—the power to effectively shut down an entire social-media platform with over 170 million domestic users based in large part on the government's concerns about disfavored speech on the platform. The exercise of this power risks inadvertently setting a troubling global precedent. A few months after the Act was passed, Brazil—a Western democracy of more than 216 million people—shut down the platform X (formerly Twitter) within its borders for more than a month. Brazil's action was reportedly linked to

government officials' demands that X censor specific speakers who were critical of the government: "On Aug. 31, tensions came to a head when [a Brazilian judge] dramatically blocked X for failing to deactivate the accounts of dozens of supporters of former far-right president Jair Bolsonaro…." *Brazil's Supreme Court Lifts Ban on Social Media Site X, supra*. Reportedly, Brazilian officials "had been feuding [with X] for months … over allegations that X was supporting a network of people known as digital militias who allegedly spread defamatory fake news and threats against Supreme Court justices." *Id.*

The close chronological sequence is startling—and troubling. This Court should be deeply concerned about setting a precedent that could create a slippery slope toward global government censorship of social-media speech. The power of a Western government to ban an entire social-media platform with more than 100 million users, at the very least, should be considered and exercised with the most extreme care—not reviewed on a "highly expedited basis." *Trump*, 603 U.S. at 616.

Third, the D.C. Circuit's majority opinion gives limited consideration and weight to the free-speech interests of the over 170 million Americans who use TikTok. After exhaustively analyzing the government's interest and concerns, the opinion belatedly acknowledges in its conclusion that "this decision has significant implications for TikTok and its users." Pet.App.65a. This recital "tests the limits of understatement." *Gonzales* v. *Oregon*, 546 U.S. 243, 286 (2006) (Scalia, J., dissenting). TikTok's over 170 million users include American content creators whose entire livelihood may rest on their use of the platform. Those users include political candidates employing TikTok to reach new audiences with core

political speech in their "campaigns for political office," during which the First Amendment's "constitutional guarantee has its fullest and most urgent application." *Susan B. Anthony List*, 573 U.S. at 162 (quoting *Monitor Patriot Co.,* 401 U.S. at 272). They include grandparents sharing videos of beloved grandchildren, teenagers connecting with friends, and people posting rather silly viral videos—in other words, the entire range of protected freedom of expression, from momentous to trivial, all of which faces a government-ordered shut-down.

By contrast, while purportedly applying strict scrutiny, the D.C. Circuit's opinion confers near-plenary deference to the say-so of national-security officials on matters of social-media censorship. *See, e.g.,* Pet.App.32a, 33a, 38a, 43a-44a, 47a-48a, 52a. Yet, in the last four years, federal officials—including national-security officials—have repeatedly procured social-media censorship of disfavored content and viewpoints through a combination of pressure, coercion, and deception. *See, e.g., Missouri* v. *Biden*, 680 F. Supp. 3d 630, 675-679, 693, 701-03 (W.D. La. 2023); *Missouri* v. *Biden*, 83 F.4th 350, 365, 388-92 (5th Cir. 2023), *both rev'd on other grounds sub nom. Murthy* v. *Missouri*, 603 U.S. 43 (2024). For example, in late 2020, federal national security officials "likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in [wrongful] suppression of the story a few weeks prior to the 2020 Presidential election," and this deliberate campaign of "deception" was "just another form of coercion." *Missouri*, 680 F. Supp. 3d at 702. Likewise, "[f]or months in 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened

Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID–19-related speech. Not surprisingly, Facebook repeatedly yielded." *Murthy*, 603 U.S. at 79 (Alito, J., dissenting).

There is a jarring parallel between the D.C. Circuit's near-plenary deference to national security officials calling for social-media censorship, and the recent, well-documented history of federal officials' extensive involvement in social-media censorship efforts directed at the speech of tens of millions Americans. *See Murthy*, 603 U.S. at 78. This recent history of sheds new light on the Act's stark restriction—a restriction which impacts the free-speech interests of over 170 million Americans with "a blunderbuss" rather than "a scalpel." *Heckler* v. *Chaney*, 470 U.S. 821, 852 (1985) (Marshall, J., concurring in the judgment).

In short, there are compelling reasons to stay the Act's deadline and allow President Trump to seek a negotiated resolution once in office.

CONCLUSION

President Trump takes no position on the underlying merits of this dispute. Instead, he respectfully requests that the Court consider staying the Act's deadline for divestment of January 19, 2025, while it considers the merits of this case, thus permitting President Trump's incoming Administration the opportunity to pursue a political resolution of the questions at issue in the case.

December 27, 2024

Respectfully submitted,

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SCOTUSBlog

October Term 2024

October Sitting

Royal Canin U.S.A. v. Wullschleger, No. 23-677 [Arg: 10.7.2024]
Issue(s): (1) Whether a post-removal amendment of a complaint to omit federal questions defeats federal-question subject matter jurisdiction pursuant to 28 U.S.C. § 1331; and (2) whether such a post-removal amendment of a complaint precludes a district court from exercising supplemental jurisdiction over the plaintiff's remaining state-law claims pursuant to 28 U.S.C. § 1367.

Williams v. Washington, No. 23-191 [Arg: 10.7.2024]
Issue(s): Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court.

Garland v. VanDerStok, No. 23-852 [Arg: 10.8.2024]
Issue(s): (1) Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive" under 27 C.F.R. § 478.11 is a "firearm" regulated by the Gun Control Act of 1968; and (2) whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver" under 27 C.F.R. § 478.12(c) is a "frame or receiver" regulated by the act.

Lackey v. Stinnie, No. 23-621 [Arg: 10.8.2024]
Issue(s): (1) Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988.

Glossip v. Oklahoma, No. 22-7466 [Arg: 10.9.2024]
Issue(s): (1) Whether the state's suppression of the key prosecution witness' admission that he was under the care of a psychiatrist and failure to correct that witness' false testimony about that care and related diagnosis violate the due process of law under Brady v. Maryland and Napue v. Illinois; (2) whether the entirety of the suppressed evidence must be considered when assessing the materiality of Brady and Napue claims; (3) whether due process of law requires reversal where a capital conviction is so infected with errors that the state no longer seeks to defend it; and (4) whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

Bouarfa v. Mayorkas, No. 23-583 [Arg: 10.15.2024 Trans.; Decided 12.10.2024]
Holding: Revocation of an approved visa petition under 8 U.S.C. § 1155 based on a sham-marriage determination by the Secretary of Homeland Security is the kind of discretionary decision that falls within the purview of Section 1252(a)(2)(B)(ii), which strips federal courts of jurisdiction to review certain actions "in the discretion of" the agency.

Medical Marijuana v. Horn, No. 23-365 [Arg: 10.15.2024]
Issue(s): Whether economic harms resulting from personal injuries are injuries to "business or property by reason of" the defendant's acts for purposes of a civil treble-damages action under the Racketeer Influenced and Corrupt Organizations Act.

City and County of San Francisco v. Environmental Protection Agency, No. 23-753 [Arg: 10.16.2024]
Issue(s): Whether the Clean Water Act allows the Environmental Protection Agency (or an authorized state) to impose generic prohibitions in National Pollutant Discharge Elimination System permits that subject permit-holders to enforcement for violating water quality standards without identifying specific limits to which their discharges must conform.

Bufkin v. McDonough, No. 23-713 [Arg: 10.16.2024]
Issue(s): Whether the U.S. Court of Appeals for Veterans Claims must ensure that the benefit-of-the-doubt rule in 38 U.S.C. § 5107(b) was properly applied during the claims process in order to satisfy 38 U.S.C. § 7261(b)(1), which directs the court to "take due account" of the Department of Veterans Affairs' application of that rule.

November Sitting

Wisconsin Bell v. U.S., ex rel. Todd Heath, No. 23-1127 [Arg: 11.4.2024]
Issue(s): Whether reimbursement requests submitted to the Federal Communications Commission's E-rate program are "claims" under the False Claims Act.

Advocate Christ Medical Center v. Becerra, No. 23-715 [Arg: 11.5.2024]
Issue(s): Whether the phrase “entitled ... to benefits,” used twice in the same sentence of the Medicare Act, means the same thing for Medicare part A and Supplemental Social Security benefits, such that it includes all who meet basic program eligibility criteria, whether or not benefits are actually received.

E.M.D. Sales v. Carrera, No. 23-217 [Arg: 11.5.2024]
Issue(s): Whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.

Facebook v. Amalgamated Bank, No. 23-980 [Arg: 11.6.2024; Decided 11.22.2024]
Holding: Certiorari dismissed as improvidently granted.

Velazquez v. Garland, No. 23-929 [Arg: 11.12.2024]
Issue(s): Whether, when a noncitizen's voluntary-departure period ends on a weekend or public holiday, a motion to reopen filed the next business day is sufficient to avoid the penalties for failure to depart under 8 U.S.C. § 1229c(d)(1).

Delligatti v. U.S., No. 23-825 [Arg: 11.12.2024]
Issue(s): Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

NVIDIA Corp. v. E. Ohman J:or Fonder AB, No. 23-970 [Arg: 11.13.2024 Trans.; Decided 12.11.2024]

Holding: Certiorari dismissed as improvidently granted.

December Sitting

Food and Drug Administration v. Wages and White Lion Investments, LLC, No. 23-1038 [Arg: 12.2.2024]
Issue(s): Whether the court of appeals erred in setting aside the Food and Drug Administration's orders denying respondents' applications for authorization to market new e-cigarette products as arbitrary and capricious.

U.S. v. Miller, No. 23-824 [Arg: 12.2.2024]
Issue(s): Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under 11 U.S.C. § 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

Republic of Hungary v. Simon, No. 23-867 [Arg: 12.3.2024]
Issue(s): (1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act; (2) whether a plaintiff must make out a valid claim that an exception to the FSIA applies at the pleading stage, rather than merely raising a plausible inference; and (3) whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the FSIA.

U.S. v. Skrmetti, No. 23-477 [Arg: 12.4.2024]

Issue(s): Whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," violates the equal protection clause of the 14th Amendment.

Kousisis v. U.S., No. 23-909 [Arg: 12.9.2024]
Issue(s): (1) Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme; (2) whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services; and (3) whether all contract rights are "property."

Feliciano v. Department of Transportation, No. 23-861 [Arg: 12.9.2024]
Issue(s): Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

Seven County Infrastructure Coalition v. Eagle County, Colorado, No. 23-975 [Arg: 12.10.2024]
Issue(s): Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.
Dewberry Group v. Dewberry Engineers, No. 23-900 [Arg: 12.11.2024]
Issue(s): Whether an award of the "defendant's profits" under the Lanham Act can include an order for the defendant to disgorge the

distinct profits of legally separate non-party corporate affiliates.

January Sitting

TikTok v. Garland, No. 24-656 [Arg: 1.10.2025]
Issue(s): Whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to petitioners, violates the First Amendment.

Hewitt v. U.S., No. 23-1002 [Arg: 1.13.2025]
Issue(s): Whether the First Step Act's sentencing reduction provisions apply to a defendant originally sentenced before the act's enactment, when that original sentence is judicially vacated and the defendant is resentenced to a new term of imprisonment after the act's enactment.

Stanley v. City of Sanford, Florida, No. 23-997 [Arg: 1.13.2025]
Issue(s): Whether, under the Americans with Disabilities Act, a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.

Thompson v. U.S., No. 23-1095 [Arg: 1.14.2025]
Issue(s): Whether 18 U.S.C. § 1014, which prohibits making a "false statement" for the purpose of influencing certain financial institutions and federal agencies, also prohibits making a statement that is misleading but not false.

Waetzig v. Halliburton Energy Services, No. 23-971 [Arg: 1.14.2025]
Issue(s): Whether a voluntary dismissal without prejudice under

Federal Rule of Civil Procedure 41 is a “final judgment, order, or proceeding” under Federal Rule of Civil Procedure 60(b).

Free Speech Coalition v. Paxton, No. 23-1122 [Arg: 1.15.2025]
Issue(s): Whether the court of appeals erred as a matter of law in applying rational-basis review, instead of strict scrutiny, to a law burdening adults’ access to protected speech.

Food and Drug Administration v. R.J. Reynolds Vapor Co., No. 23-1187 [Arg: 1.21.2025]
Issue(s): Whether a manufacturer may file a petition for review in a circuit (other than the U.S. Court of Appeals for the District of Columbia Circuit) where it neither resides nor has its principal place of business, if the petition is joined by a seller of the manufacturer’s products that is located within that circuit.

McLaughlin Chiropractic Associates v. McKesson Corporation, No. 23-1226 [Arg: 1.21.2025]
Issue(s): Whether the Hobbs Act required the district court in this case to accept the Federal Communications Commission’s legal interpretation of the Telephone Consumer Protection Act.

Barnes v. Felix, No. 23-1239 [Arg: 1.22.2025]
Issue(s): Whether courts should apply the "moment of the threat" doctrine when evaluating an excessive force claim under the Fourth Amendment.

Cunningham v. Cornell University, No. 23-1007 [Arg: 1.22.2025]
Issue(s): Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods,

services, or facilities between the plan and a party in interest, as proscribed by 29 U.S.C. § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in the provision's text.

February Sitting

Gutierrez v. Saenz, No. 23-7809 [Arg: 2.24.2025]
Issue(s): Whether Article III standing requires a particularized determination of whether a specific state official will redress the plaintiff's injury by following a favorable declaratory judgment.

Esteras v. U.S., No. 23-7483 [Arg: 2.25.2025]
Issue(s): Whether, even though Congress excluded 18 U.S.C. § 3553(a)(2)(A) from 18 U.S.C. § 3583(e)'s list of factors to consider when revoking supervised release, a district court may rely on the Section 3553(a)(2)(A) factors when revoking supervised release.

Perttu v. Richards, No. 23-1324 [Arg: 2.25.2025]
Issue(s): Whether, in cases subject to the Prison Litigation Reform Act, prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim.

Ames v. Ohio Department of Youth Services, No. 23-1039 [Arg: 2.26.2025]
Issue(s): Whether, in addition to pleading the other elements of an employment discrimination claim under Title VII of the Civil Rights Act of 1964, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that

unusual employer who discriminates against the majority."

CC/Devas (Mauritius) Limited v. Antrix Corp. Ltd., No. 23-1201 [Arg: 3.3.2025]
Issue(s): Whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under the Foreign Sovereign Immunities Act.

BLOM Bank SAL v. Honickman, No. 23-1259 [Arg: 3.3.2025]
Issue(s): Whether Federal Rule of Civil Procedure 60(b)(6)'s stringent standard applies to a post-judgment request to vacate for the purpose of filing an amended complaint.

Smith & Wesson Brands v. Estados Unidos Mexicanos, No. 23-1141 [Arg: 3.4.2025]
Issue(s): (1) Whether the production and sale of firearms in the United States is the proximate cause of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico; and (2) whether the production and sale of firearms in the United States amounts to "aiding and abetting" illegal firearms trafficking because firearms companies allegedly know that some of their products are unlawfully trafficked.

Nuclear Regulatory Commission v. Texas, No. 23-1300 [Arg: 3.5.2025]
Issue(s): (1) Whether the Hobbs Act, which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority; and (2) whether the Atomic Energy Act of 1954 and the Nuclear Waste Policy Act of 1982 permit the Nuclear Regulatory

Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

Decided without oral argument

Hamm v. Smith, No. 23-167 [Decided 11.4.2024]
Holding: The judgment is vacated and the case is remanded to the U.S. Court of Appeals for the 11th Circuit to clarify the basis for its decision affirming the district court's judgment that Joseph Clifton Smith is ineligible for the death penalty due to intellectual disability.

Cases Not (Yet) Set for Argument

Oklahoma v. Environmental Protection Agency, No. 23-1067
Issue(s): Whether a final action by the Environmental Protection Agency taken pursuant to its Clean Air Act authority with respect to a single state or region may be challenged only in the U.S. Court of Appeals for the District of Columbia Circuit because the agency published the action in the same Federal Register notice as actions affecting other states or regions and claimed to use a consistent analysis for all states.

Environmental Protection Agency v. Calumet Shreveport Refining, LLC, No. 23-1229
Issue(s): Whether venue for challenges by small oil refineries seeking exemptions from the requirements of the Clean Air Act's Renewable Fuel Standard program lies exclusively in the U.S. Court of Appeals for the District of Columbia Circuit because the agency's denial actions are

"nationally applicable" or, alternatively, are "based on a determination of nationwide scope or effect."

Riley v. Garland, No. 23-1270
Issue(s): (1) Whether 8 U.S.C. § 1252(b)(1)'s 30-day deadline is jurisdictional, or merely a mandatory claims-processing rule that can be waived or forfeited; and (2) whether a person can obtain review of the Board of Immigration Appeals' decision in a withholding-only proceeding by filing a petition within 30 days of that decision.

Medina v. Planned Parenthood South Atlantic, No. 23-1275
Issue(s): Whether the Medicaid Act's any-qualified-provider provision unambiguously confers a private right upon a Medicaid beneficiary to choose a specific provider.

Rivers v. Lumpkin, No. 23-1345
Issue(s): Whether 28 U.S.C. § 2244(b)(2) applies only to habeas filings made after a prisoner has exhausted appellate review of his first petition, to all second-in-time habeas filings after final judgment, or to some second-in-time filings — depending on a prisoner's success on appeal or ability to satisfy a seven-factor test.

Diamond Alternative Energy LLC v. Environmental Protection Agency, No. 24-7
Issue(s): (1) Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.

Fuld v. Palestine Liberation Organization, No. 24-20
Issue(s): Whether the Promoting Security and Justice for Victims of

Terrorism Act violates the due process clause of the Fifth Amendment.

Louisiana v. Callais, No. 24-109
Issue(s): (1) Whether the majority of the three-judge district court in this case erred in finding that race predominated in the Louisiana legislature's enactment of S.B. 8; (2) whether the majority erred in finding that S.B. 8 fails strict scrutiny; (3) whether the majority erred in subjecting S.B. 8 to the preconditions specified in Thornburg v. Gingles; and (4) whether this action is non-justiciable.

Catholic Charities Bureau v. Wisconsin Labor & Industry Review Commission, No. 24-154
Issue(s): Whether a state violates the First Amendment's religion clauses by denying a religious organization an otherwise-available tax exemption because the organization does not meet the state's criteria for religious behavior.

Federal Communications Commission v. Consumers' Research, No. 24-354
Issue(s): (1) Whether Congress violated the nondelegation doctrine by authorizing the Federal Communications Commission to determine, within the limits set forth in 47 U.S.C. § 254, the amount that providers must contribute to the Universal Service Fund; (2) whether the FCC violated the nondelegation doctrine by using the financial projections of the private company appointed as the fund's administrator in computing universal service contribution rates; (3) whether the combination of Congress's conferral of authority on the FCC and the FCC's delegation of administrative responsibilities to the administrator violates the nondelegation doctrine; and (4) whether this case is moot in light of the challengers' failure to seek preliminary

relief before the 5th Circuit.