U.S. Supreme Court Review: Key Decisions of 2021-22 Term and Preview of Upcoming Term

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U.S. District Court for the District of Puerto Rico Continuing Legal Education Program: 2.5 Instruction Hours

I. Major Themes of October Term 2021-22

- The new conservative majority flexes its muscle on politically-charged issues of abortion, gun rights, school prayer and religious school funding
- High tension at the Court caused by abortion cases and leaked draft of *Dobbs* opinion
- Reining in the administrative state: the emergence of the "major questions" doctrine
- We all need to be historians now in constitutional cases
- We all need to be linguists now in statutory interpretation cases
- Retirement of Justice Breyer and appointment of Justice Jackson
- October Term 2022: more blockbuster cases—affirmative action; voting rights; same-sex rights

II. Major Civil Constitutional Rights Rulings

DOBBS v. JACKSON WOMEN'S HEALTH ORG. (Opinion by Alito) (Implied Substantive Due Process Liberty Rights)

Key facts: Mississippi enacted a ban on abortions after the 15th week of pregnancy, in conflict with *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) holding that women have a constitutional liberty right to obtain an abortion up until a fetus becomes viable (capable of living outside the womb) at around the 24th week of pregnancy.

Question presented: Do all bans on pre-viability abortions violate the Constitution?

Held: *Roe* and *Casey* are overruled, and any abortion restrictions in the future will be evaluated under a rational basis test that is deferential to legislative determinations. A right to abortion is not deeply rooted in American history and traditions (as necessary to imply a substantive due process liberty right into the Constitution), and there is no good *stare decisis* reason to continue to adhere to *Roe* and *Casey*, particularly since those decisions were "egregiously wrong."

Concurrence (Thomas): All implied substantive due process liberties like contraception, adult sexual freedom, and same-sex marriage lack constitutional foundation and should be reconsidered in future cases.

Concurrence (Roberts): Overruling *Roe* and *Casey* completely is too disruptive and unnecessary. We should just recognize that those decisions guaranteed a meaningful right of a woman to choose whether to have a child or not, and Mississippi's allowance of 15 weeks is a reasonable time to choose. Fetal viability around the 24th week, on the other hand, was too long of a period to choose an abortion and never made sense.

Joint Dissent (Kagan/ Breyer/Sotomayor): An exclusive focus on historical understandings is not a sufficient or wise method of constitutional interpretation, and not what we have done in the past. Women were not considered persons entitled to any meaningful rights in 1868 at the time of the adoption of the 14th Amendment due process clause. The majority's reasoning relegates women to second-class citizenship status. Moreover, there are strong *stare decisis* reasons for not overruling *Roe* and *Casey*, including a woman's reliance on an abortion option in the event of an unplanned pregnancy to permit her to live her personal and professional life on equal terms with men.

NY STATE RIFLE & PISTOL ASS'N v. BRUEN (Opinion by Thomas) (Second Amendment Rights)

Key facts: Two residents of New York who were members of that State's National Rifle Assn affiliate, applied for a license to carry a concealed weapon in public. They were denied due to the State's requirement that a person has to show a special self-defense need for such a license. The NRA affiliate sued on behalf of the two members, claiming they had a Second Amendment right to carry a concealed weapon in public for general self-defense purposes.

Question presented: Does a requirement that a person prove a special self-defense need for carrying a concealed weapon in public violate the Second Amendment?

Held: The Second Amendment right to possess a firearm for purposes of self-defense in the home recognized in the 2008 *Dist. of Columbia v. Heller* decision, is extended to the right to carry concealed firearms in public for purposes of self-defense. The requirement to show a special danger to carry such a weapon violates the Second Amendment. Moreover, the government has the burden of showing that any restrictions it wants to place on carrying a concealed weapon in public comport with American history and traditions; otherwise the restriction is unconstitutional.

Concurrence (Kavanaugh/Roberts): Properly interpreted, the Second Amendment allows a "variety" of gun regulations of the sort we described in *Heller*, such as restrictions on carrying firearms in sensitive places or the possession of firearms by felons or the mentally ill.

Dissent (Breyer/Sotomayor/Kagan): As legal historians have written since *Heller*, that decision was wrong to conclude that the Second Amendment extended beyond militia service to an individual right to firearms. Hence, at the least it should not be extended to public carry. Moreover, an exclusive focus on history is not a sufficient mode of constitutional interpretation and not what we have done in the past. It handcuffs the states and territories from taking into account their modern interests in passing gun control regulation—like preventing mass shootings and other forms of rampant gun violence. Gun control laws should be left to the democratic process and the people to decide.

U.S. v. VAELLO MADERO (Opinion by Kavanaugh) (Equal Protection Rights)

Key facts: While living in New York, Mr. Vaello Madero received federal Supplemental Security Income benefits. When he moved to Puerto Rico (PR), he continued to receive those benefits until the U.S. government learned he had moved. It then sought restitution of roughly

$28,000 in benefits Vaello Madero had received while living in PR. The government cited a federal law denying such benefits to PR residents, even though they were made available to residents of every American state plus residents of the Northern Mariana Islands territory.

Question presented: Does the exclusion of PR residents from eligibility to receive federal benefits made available to residents of U.S. states and certain territories violate the Equal Protection Clause?

Held: The exclusion of PR residents does not violate the EP Clause. Under the applicable deferential rational basis scrutiny that applies to challenges to Congress' regulation of U.S. territories pursuant to the Constitution's Territories Clause, the fact that PR residents are exempt from federal income and other taxes provides a legitimate basis for excluding them from the benefits program at issue. Otherwise, Congress might have an EP obligation to tax PR residents the same as residents of American states. Congress requires latitude in designing taxing and benefits programs applicable to U.S. territories.

Concurrence (Gorsuch): Although not at issue in this case, when it has the opportunity the Court should overrule the Insular Cases under which the Constitution's guarantees do not apply as fully to residents of U.S. territories as they do to residents of the American states.

Dissent (Sotomayor): Supplemental Security Income benefits provide a safety net for needy U.S. citizens regardless of an individual's, or his or her state's, contributions to the U.S. Treasury which funds them. Hence, it is irrational, and antithetical to the purpose of the benefits, to exclude otherwise eligible citizens from receiving them regardless of where they live in the U.S.

KENNEDY v. BREMERTON SCHOOL DIST. (Opinion by Gorsuch) (First Amendment)

Key Facts: Kennedy was a football coach for a public high school who would say prayers on the field after games. Eventually other coaches, and players from the home and visiting teams, would join Kennedy in prayer. School district officials asked that Kennedy pray more privately in order to avoid the appearance that the district endorsed his prayer activities in violation of the Establishment Clause. Kennedy continued his public prayers activities and thereafter lost his job.

Question presented: Did the school district violate Kennedy's free exercise of religion and free speech rights in the way it treated him for his public prayer activities?

Held: Kennedy's free exercise and free speech rights were violated by the district, since it had no legitimate grounds for fearing an Establishment Clause violation as the result of his public prayer activities. The district needed to justify its actions under strict scrutiny since it targeted Kennedy's due to his religious activities, and under heightened scrutiny for his free speech claim since although he was a public employee he was praying in his capacity as a private citizen. Regardless of what precise scrutiny applied, the district had no legitimate Establishment Clause concerns and made the mistake of viewing the problem through the lens of the discredited endorsement test derived from *Lemon v. Kurtzman*. Establishment Clause violations must be assessed by reference to American history and traditions, and no credible evidence was presented that student football players felt coerced into participating in Kennedy's prayer activities.

Dissent (Sotomayor/Breyer/Kagan): The majority distorts the record to characterize Kennedy's actions as essentially private prayer activities when they were very public displays. Moreover, since 1962, this court has held that public school officials leading prayers violate the Establishment Clause and the religious liberty of objecting students and parents. The court is wrong to overrule *Lemon* in favor of an exclusive focus on history, and ignores that here some student football players complained of feeling coerced into participating for fear of losing playing time.

CARSON v. MAKIN (Opinion by Roberts) (Free Exercise of Religion)

Key facts: Maine provided tuition assistance to areas of the State that lacked public schools, offering such assistance to parents who wished to send their children to private schools. However, state law required such private schools to be nonsectarian in nature, on the view that taxpayer monies should not be used to fund education provided through the lens of various religious beliefs and practices. Parents wishing to send their kids to private schools affiliated with different Christian sects challenged the non-sectarian requirement. The First Circuit upheld it, reasoning that while recent Supreme Court precedent forbade discriminating against religious schools in educational funding on the basis of their religious status, Maine's non-sectarian requirement had been interpreted to apply to schools who would use the public funds for religious training.

Question presented: Did Maine's non-sectarian requirement as applied to religious uses of the public tuition assistance funds violate the free exercise rights of the parents and their kids?

Held: Yes, Maine's non-sectarian requirement violated the free exercise rights of the plaintiffs. Whenever public benefits are made generally available for a program, it violates the free exercise rights of potential religious recipients to exclude them out to a desire to maintain a degree of separation between church and state regardless of whether such funding will be used for religious purposes or not. A state's antiestablishment interests do not justify enactments that exclude some members of the community from an otherwise generally-available public benefit because of their religious exercise.

Dissent (Breyer/Sotomayor/Kagan): The private religious schools at issue here teach students to accept particular religious beliefs and to engage in particular religious practices. Compelling states to fund such activities whenever they fund secular education is essentially forcing taxpayers to subsidize religious views they may disagree with. This is unconstitutional and may foster societal divisions that the Establishment Clause was designed to avoid.

WHOLE WOMEN'S HEALTH v. JACKSON (Opinion by Gorsuch) (Ability to Challenge Laws that Violate Constitutional Rights)

Key facts: A year prior to the *Dobbs* ruling that overturned *Roe v. Wade*, Texas passed a law banning doctors from performing abortions after the detection of a fetal heartbeat (approximately 6 weeks into a pregnancy). The law essentially deputized private citizens to enforce the law by filing lawsuits for statutory damages against any persons in violation of it. Since the Texas ban

was in clear violation of *Roe* at that time, plaintiff abortion providers brought a pre-enforcement challenge against it in federal court.

Question presented: Did the plaintiffs have a right to bring a pre-enforcement action to the Texas ban under principles of standing and state sovereign immunity?

Held: Most Texas executive and judicial officials could not be sued because they lacked enforcement powers under the Texas ban that would have provided standing and the ability to sue them under the *Ex Parte Young* exception to state sovereign immunity. However, state law did authorize certain public health officials to deny licensing to abortion providers who violated the state health code, including the Texas ban, and could thus be sued to enjoin the law.

Partial concurrence and dissent (Roberts/Breyer/Sotomayor/Kagan): Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. These provisions effectively chill the provision of abortions in Texas. The clear purpose and actual effect of the Texas law has been to nullify this Court's rulings. It is the role of the Supreme Court in our constitutional system that is at stake.

Partial concurrence and dissent (Sotomayor/Breyer/Kagan): By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other States to refine Texas's model for nullifying federal rights by denying all state officials enforcement powers. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government. What are federal courts to do if, for example, a state effectively prohibits worship by a disfavored religious minority through crushing "private" litigation, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court. I fear the Court, and the country, will come to regret that choice.

III. Major Constitutional Structure Rulings (Separation of Powers)

WEST VIRGINIA v. U.S. ENVIRONMENTAL PROTECTION AGENCY (Opinion by Roberts) (Agency Authority)

Key facts: Under the Obama Administration, the EPA had interpreted the Clean Air Act (CAA) to permit it to effectively require coal and gas plants to produce more of their energy using renewable sources (wind and solar). The EPA under the Trump Administration repealed that program and replaced it with one lacking that requirement. It based the repeal on its view that such a renewable energy requirement was not a "system of emission reduction" (SER) that the CAA would authorize the EPA to impose. The D.C. Circuit held the repeal to be unlawful since it was based on an incorrect reading of the CAA—ruling that such a renewable energy requirement did qualify as a SER. The appellate court subsequently stayed its ruling at the request of the Biden Administration, which asked for time to consider the issues and engage in new rulemaking.

Questions presented: 1) Does the case remain justiciable? 2) If so, did the D.C. Circuit err in ruling that a renewable energy requirement could qualify as a SER under the CAA?

Held: 1) The case remains justiciable under the voluntary cessation exception to mootness since it was possible the Biden Administration EPA might change its position and reimpose the renewable requirement. 2) The D.C. Circuit erred in holding that the CAA authorized the EPA to impose a renewable energy requirement as a SER. Under the major questions doctrine, if a question of agency authority under a federal statute involves a question of vast economic and political significance, the agency bears the burden of showing clear congressional authorization for the authority it claims. Here, the EPA's authority to impose renewable energy requirements on coal and gas plants presented a major question. And given the text, history and context of the CAA, the EPA could not prove Congress clearly authorized it to impose renewable energy requirements as a SER.

Concurrence (Gorsuch/Alito): The major questions doctrine is vital to protecting the separation of powers. When Congress seems slow to solve problems, it may be only natural that those in administrative agencies might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives.

Dissent (Kagan/Breyer/Sotomayor): Congress charged EPA with addressing the potentially catastrophic harms of climate change. This Court has obstructed EPA's effort from the beginning. The Court may be right that hearing this case does not violate Article III mootness rules (which are notoriously strict). But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide it. The parties do not dispute that a renewable energy generation shifting requirement is indeed the "best system" to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. The relevant precedents require the application of ordinary statutory interpretation principles, not a newly-announced tougher set of rules to meet called the "major questions doctrine." The Court has never even used that phrase before.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. U.S. OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION (Per Curiam Opinion) (Agency Authority)

Key facts: OSHA implemented an emergency rule requiring all employers at businesses with 100 or more employees to require that workers either be fully vaccinated against Covid-19 or provide a weekly negative covid test and wear a face mask. Plaintiff NFIB sought an emergency stay of the rule.

Question presented: Was plaintiff entitled to an emergency stay of the vaccine mandate?

Held: Yes, emergency stay granted. Plaintiff is likely to succeed on its claim that OSHA lacked statutory authority to enact the mandate. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. Here, Congress did not clearly authorize OSHA to impose such a mandate. Although OSHA is empowered to set occupational and workplace health and safety standards, it is not empowered to address general

public health problems like the covid pandemic.

Concurrence (Gorsuch/Thomas/Alito): We sometimes call the test applied by the majority the major questions doctrine, and OSHA's mandate fails that doctrine's test. That doctrine ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives.

Dissent (Breyer/Sotomayor/Kagan): OSHA's rule perfectly fits the language of the applicable statutory provision. OSHA is empowered to prevent workplace harm, such as those presented by covid transmission in such settings. At bottom the question here is who decides how much protection, and of what kind, American workers need from Covid–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

IV. Key Criminal Justice Rulings

CONCEPCION v. U.S. (Opinion by Sotomayor) (First Step Act)

Key facts: In 2007, Concepcion pled guilty to distributing crack cocaine and received certain sentence enhancements as a career offender. In 2018, Congress passed the First Step Act (FSA) which permitted certain retroactive reductions in sentences to further the goal of eliminating disparities in punishments for powder and crack cocaine offenses. In 2019, Concepcion filed for a sentence reduction under the FSA, citing changes in factual circumstances and the law unrelated to the sentence reductions for crack v. powder cocaine.

Question presented: Does the FSA permit district judges to consider changes in law or fact since a defendant's original sentencing, other than the sentencing reductions for crack v. powder cocaine, when considering a request for a reduction?

Held: Yes. Since the FSA contains no restriction on considering other intervening changes, American legal tradition holds that when a defendant appears for sentencing (or resentencing), the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction. However, the FSA does not compel courts to exercise their discretion to reduce any sentence based on other considerations.

Dissent (Kavanaugh/Roberts/Alito/Barrett): The text of the FSA authorizes district courts to reduce sentences based only on changes to the crack-cocaine sentencing ranges, not based on other unrelated changes that have occurred since the original sentencing.

VEGA v. TEKOH (Opinion by Alito) (Sec. 1983 actions)

Key facts: Tekoh, a medical center employee, was accused of sexually assaulting a female patient. Vega, a law enforcement officer, questioned Tekoh about the incident without reading him his *Miranda* rights. Tekoh eventually provided a written statement which was admitted against him at trial. Tekoh was acquitted of the assault, and then brought a Sec. 1983 action against Vega seeking damages for violating his 5th Amendment rights. The Ninth Circuit held

that the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates his 5th Amendment right not to incriminate himself and could support a Sec. 1983 claim against the officer who obtained the statement.

Question presented: Can a plaintiff bring a Sec. 1983 action for damages against a police officer based on an allegedly improper admission of an un-*Mirandized* statement in a criminal prosecution?

Held: No. Being a prophylactic rule only, a violation of *Miranda* does not necessarily constitute a violation of the right against compelled self-incrimination, and therefore such a violation does not constitute the deprivation of a right secured by the Constitution for purposes of Sec. 1983. Seeking exclusion of the un-*Mirandized* statement is the proper remedy.

Dissent (Kagan/Breyer/Sotomayor): If police fail to provide the *Miranda* warnings to a suspect before interrogating him, then he is generally entitled to have any resulting confession excluded from his trial. From those facts, only one conclusion can follow—that *Miranda*'s protections are a right secured by the Constitution for purposes of Sec. 1983.

EGBERT v. BOULE (Opinion by Thomas) (*Bivens* actions)

Key facts: In connection with an investigation in which Boule was suspected of engaging in illegal border smuggling, U.S. Border Patrol agent Egbert allegedly physically assaulted Boule and initiated government retaliation against Boule for speech in support of smuggling activities. Boule initiated a *Bivens* action for damages against Egbert for using excessive force in violation of the 4th Amendment, and for speech retaliation in violation of the 1st Amendment.

Question presented: Did the 9th Circuit err in holding that Boule could maintain a *Bivens* action for his excessive force and retaliation claims?

Held: Yes, the court of appeals erred in extending *Bivens* to Boule's claims since they presented a new context for both types of claims (excessive force and 1A retaliation in the border security context), and Congress is better equipped than courts to determine to weigh the costs and benefits of allowing damages actions against Border Patrol agents under such circumstances. Moreover, as to the excessive force claim, Congress has provided alternative remedies for aggrieved parties in Boule's position that independently foreclose a *Bivens* action here.

Concurrence in judgment (Gorsuch): If the costs and benefits do not justify a new *Bivens a*ction on facts so analogous to *Bivens* itself, it's hard to see how they ever could. We should forthrightly return the power to create new causes of action to the people's representatives in Congress instead of doing these case-by-case determinations.

Concurrence in part and dissent in part (Sotomayor/Breyer/Kagan): Just five years after circumscribing the standard for allowing *Bivens* claims to proceed, a restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases. The Court's excessive force ruling contravenes precedent and will strip many individuals who suffer injuries at the hands of federal officers, and whose circumstances are materially indistinguishable from those in *Bivens*, of an important remedy. I therefore dissent from the

disposition of Boule's excessive force claim. I concur in the Court's judgment that Boule's First Amendment retaliation claim may not proceed under *Bivens* since such claims could potentially be brought against many different federal officers, stretching substantially beyond the common sphere of law enforcement to reach virtually all federal employees. Under such circumstances, this Court's precedent holds that evaluating the impact of a new species of litigation on the efficiency of civil service is a task for Congress, not the courts.

THOMPSON v. CLARK (Opinion by Kavanaugh) (Sec. 1983 actions)

Key facts: Thompson's sister-in-law, who apparently suffered from a mental illness, called 911 and falsely reported that Thompson was sexually abusing his baby. When police arrived, Thompson told them that they could not enter without a warrant. They nonetheless entered and handcuffed Thompson, and then arrested and charged him with obstructing governmental administration and resisting arrest. He was detained for two days before being released. The charges against Thompson were dismissed before trial without any explanation by the prosecutor or judge. After the dismissal, Thompson sued the police officers for violating his 4th Amendment rights under 42 U. S. C. §1983, seeking damages for malicious prosecution.

Question presented: In a 4th Amendment malicious prosecution claim, a plaintiff needs to prove, among other things, that he obtained a favorable termination of the underlying criminal prosecution. But to do so, does a plaintiff need to provide affirmative evidence of his innocence or just that the proceedings ended without a conviction?

Held: The latter since in most American courts that had considered the question as of 1871 (the year Sec. 1983 was adopted), the favorable termination element of a malicious prosecution tort claim was satisfied so long as the prosecution ended without a conviction.

Dissent (Alito/Thomas/Gorsuch): The Court improperly creates a chimera of a constitutional tort by stitching together elements taken from two very different claims: a Fourth Amendment unreasonable seizure claim and a common-law malicious prosecution claim. The Court justifies this creation on the ground that malicious prosecution is the common-law tort that is most analogous to an unreasonable seizure claim. But this Court has never held that the Fourth Amendment houses a malicious prosecution claim.

DENEZPI v. U.S. (Opinion by Barrett) (Double Jeopardy Clause)

Key facts: Denezpi plead guilty to committing assault and battery under the Ute Mountain Ute Code in a CFR court, a court which administers justice for Indian tribes in certain parts of Indian country where tribal courts have not been established. He was sentenced to time served—140 days' imprisonment. Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country for the same assault, an offense covered by the federal Major Crimes Act. Denezpi moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the consecutive prosecution since it involved the same offense to which he had earlier pled guilty in CFR court. The District Court denied Denezpi's motion and he was convicted and sentenced to 360 months' imprisonment.

Question presented: Did Denezpi's prosecution for committing aggravated sexual assault under federal law violate the Double Jeopardy Clause?

Held: No. The DJ Clause only prohibits successive prosecutions for the same offense by the same sovereign. Subsequent prosecutions by separate sovereigns for the same offense is not covered. And even if it were assumed that prosecutors in CFR court exercise federal authority, the DJ Clause still was not violated since the same sovereign may prosecute a person twice for different offenses arising out of the same conduct. Here, the offenses were different because they were enacted by two different sovereigns—the Ute Tribe and the federal government.

Dissent (Gorsuch/Sotomayor/Kagan): Federal prosecutors tried Denezpi twice for the same crime. First, they charged him with violating a federal regulation. Then, they charged him with violating an overlapping federal statute. Same defendant, same crime, same prosecuting authority. The court improperly applies the dual-sovereignty doctrine to permit this result.

V. Major Cases to be Decided in Upcoming Term

STUDENTS FOR FAIR ADMISSIONS v. HARVARD COLLEGE AND UNIV. OF NORTH CAROLINA (Affirmative Action)

Key facts: An organization representing Asian applicants denied admission to Harvard, and Asian and White applicants denied admission to the U. of N. Carolina, sued those institutions for race discrimination (as a private college accepting public funds Harvard is bound by the same Equal Protection non-discrimination standards as public universities). In the Harvard case, the plaintiffs essentially claimed that Harvard had an admissions program that 1) illegally engaged in racial balancing of the students the college admitted to the detriment of Asian American candidates with higher test scores and other admission criteria, and 2) intentionally discriminated against such candidates by giving them lower personal assessment scores than similar applicants. In the UNC case, both Asian American and White applicants claimed that the school's admission policy illegally favored non-Asian minority applicants at the expense of Asian American and White applicants that possessed higher admission criteria.

Questions presented: 1) Should the Court overrule *Grutter v. Bollinger* (2003), permitting the consideration of race as a factor in higher education admissions? 2) If *Grutter* is not overruled, did the lower courts erroneously apply strict scrutiny to conclude that the desired level of student body diversity could not have been achieved with race-neutral applicant assessment criteria?

MOORE v. HARPER (Elections Clause)

Key facts: Following the 2020 census, the N. Carolina Assembly, controlled by the G.O.P., redrew its congressional voting districts to accord with the one-person-one-vote established by the U.S. Supreme Court as a matter of Equal Protection rights. Plaintiff N. Carolina League of Conservation Voters and others challenged the new districts in state court as an unconstitutional partisan gerrymander. The state supreme court agreed, ruling that the new districts violated certain provisions of the N. Carolina Constitution, including the right to free elections. The court then ordered that the 2022 elections be held under redrawn districts.

Question presented: When a state court reviews congressional voting districts created by a state legislature for compliance with state law, and replaces or alters them as a remedy for a violation, do such actions violate the Elections Clause of the U.S. Constitution which provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof…."

MERRIL v. MILLIGAN (Voting Rights Act)

Key facts: After the 2020 census, the Alabama Legislature redrew its 7 congressional voting districts to contain one Black majority district. A three-judge U.S. District Court panel ruled that, given the population demographics of the State, the Legislature's failure to create two Black majority districts diluted Black votes in violation of Section 2 of the Voting Rights Act (VRA). The District Court then ordered the Legislature to draw new districts that complied with the VRA. In a 5-4 order, the U.S. Supreme Court stayed the District Court's decision and granted certiorari—reinstating the original map for the 2022 elections.

Question presented: Did the original map violate Section 2 of the VRA by diluting Black voting power, and what is the standard for assessing such claims?

303 CREATIVE v. ELENIS (First Amendment)

Key facts: A website designer in Colorado desired to expand her services to include designing websites for weddings, but did not want to include same-sex weddings due to her Christian belief that God's will is that marriage is between a man and woman. Fearing prosecution under the Colorado Anti-Discrimination Act (CADA), the plaintiff brought a pre-enforcement challenge to the CADA claiming that prosecuting her for refusing to assist in facilitating and celebrating same-sex weddings would violate her free speech and free exercise rights under the First Amendment.

Question presented: Would the application of the CADA to the plaintiff violate her free speech rights, essentially compelling her to engage in expressive activities to which she objects? (Interestingly, SCOTUS only agreed to take up the plaintiff's free speech challenge and not her free exercise claim.)