Supreme Court Panel Discussion

Fifth Circuit Bar Association's Appellate Advocacy Seminar

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Panel Presenters

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Introduction and Statistical Overview

OCTOBER 2023 TERM

Fischer v. U.S.

No. 23-5572

- Holding: To prove a violation of 18 U.S.C. § 1512(c)(2) — a provision of the Sarbanes-Oxley Act — the government must establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding, or attempted to do so.

Murthy v. Missouri

- Louisiana, Missouri, and five individual plaintiffs sued Executive Branch officials, alleging that the government violated the First Amendment by coercing social media platforms to censor third parties' speech on important topics like COVID-19, vaccines, and election integrity.
- The majority held that plaintiffs lacked Article III standing.
- Justices Alito, Thomas, and Gorsuch believed plaintiffs had Article III standing and were likely to succeed on their First Amendment claims.

Loper Bright v. Raimondo,
144 S. Ct. 2244 (2024)

- In 1984, in *Chevron v. Natural Resources Defense Council*, the Supreme Court held that where an authorizing statute is silent or ambiguous on a matter, an agency interpretation of that statute was entitled to deference if it was based on a permissible construction of the statute
- FACTS of *Loper Bright*: Pursuant to the Magnuson-Stevens Act ("MSA"), the National Marine Fisheries Service ("NMFS") created a rule that fishing vessels carry observers to make sure the vessels observed relevant requirements, such as catch limits; the NMFS also required that the vessels pay for these observers
- Applying *Chevron*, the D.C. Circuit and the First Circuit upheld the rule, finding that it was a permissible interpretation of the MSA
- SCOTUS granted the petitioner fishermen's petition for cert.

Loper Bright v. Raimondo (cont’d)

Held 6-3 (majority opinion by C.J. Roberts): *Chevron* is overruled

- The Administrative Procedure Act (“APA”), 5 U.S.C. § 706, requires courts to exercise their independent judgment in deciding whether an agency had acted within its statutory authority; and thus courts may not defer to an agency interpretation of the law simply because a statute is ambiguous
- Because *Chevron* deference cannot be squared with the APA, and because *stare decisis* does not counsel adherence to *Chevron*, it is overruled

Loper Bright v. Raimondo (cont'd)

- Justice Kagan dissented, joined by Justice Sotomayor and (in one of the cases, Justice Jackson): *Chevron* reflected a sensible default rule that Congress intended for agencies to fill the gaps when Congress was silent or ambiguous about implementing details; moreover, *Chevron* deference is perfectly compatible with the APA; to make matters worse, *stare decisis* provided even further reason to stick with *Chevron*

And speaking of the APA . . .

Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 144 S. Ct. 2440 (2024)

- HELD (6-3, per Justice Barrett): For purposes of a suit alleging a violation of the APA, the six-year statute of limitations ("SOL") of 28 U.S.C. § 2401(a) does not begin to run until the plaintiff is injured by final agency action
- Here, Corner Post ("CP") challenged a Federal Reserve Board regulation that (CP claimed) allowed higher debit card "interchange fees" than permitted by the allegedly authorizing statute; the Eighth Circuit dismissed the suit as time-barred on the view that the SOL began running when the regulation was first published in 2011; the Court rejected that view, holding that the SOL began to run when CP was first injured by the regulation (*i.e.*, when it opened for business in 2018); therefore, CP's suit was not time-barred

Corner Post (cont'd)

- Justice Jackson dissented, joined by Justices Sotomayor and Kagan: Under this holding, the legitimacy of an agency rule will never be subject to repose; it can always be challenged by bringing in someone who has only been affected by it within the limitations period

Trump v. Anderson,
No. 23-719

- Holding: Because the Constitution makes Congress, rather than the states, responsible for enforcing Section 3 of the 14th Amendment against federal officeholders and candidates, the Colorado Supreme Court erred in ordering former President Donald Trump excluded from the 2024 presidential primary ballot.

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

- FACTS: Although it could have elected to bring an enforcement action by filing suit in federal court, the SEC instead elected the option of bringing an in-house administrative enforcement action against respondents for violating "the antifraud provisions" of relevant securities statutes (prohibiting the misrepresentation or concealment of material facts)
- A divided panel of the Fifth Circuit vacated the SEC's order adjudicating respondents in violation of those provisions and assessing civil penalties against them, on the ground that adjudicating the matter in-house violated respondents' Seventh Amendment right to a jury trial
- SCOTUS granted the SEC's petition for cert.

SEC v. Jarkesy (cont'd)

Held 6-3 (majority opinion by C.J. Roberts): The Fifth Circuit correctly found a violation of respondents' Seventh Amendment jury-trial right:

- The SEC action here implicated the Seventh Amendment because the SEC's antifraud provisions replicated common-law fraud, thus establishing that the SEC's action was "legal in nature"
- Furthermore, the "public rights" exception to the Seventh Amendment jury-trial requirement did not apply; because this was equivalent to an action for common-law fraud, which historically could be enforced only in courts of law, the SEC's action involved a matter of private right not public right
- Congress could not circumvent the Seventh Amendment simply by recasting a traditionally legal action as a new statutory action in order to circumvent the Seventh Amendment

SEC v. Jarkesy (cont'd)

- *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), was not to the contrary; *Atlas Roofing* did not extend the public-right exception to traditional legal claims, like the one at issue here; rather, *Atlas Roofing* upheld agency adjudications only where the claims at issue were "unknown to the common law"
- Justice Sotomayor, dissenting, joined by Justices Kagan and Jackson: *Atlas Roofing* and the cases on which it relies permit an agency adjudication where, as here, the government is involved in its sovereign capacity under an otherwise valid statute; today's holding casts into doubt proceedings before more than two dozen other agencies besides the SEC that can impose civil penalties in administrative proceedings

Alexander v. S. Carolina State Conf. of the NAACP

- Three-judge district court held that race predominated in South Carolina’s drawing of a congressional district.
- The Supreme Court reversed on clear-error grounds.
- The Supreme Court took care to emphasize that racial-gerrymandering plaintiffs must supply an alternative map showing a rational legislature sincerely driven by its political goals would have drawn a different map with greater racial balance.

Trump v. U.S.,
No. 23-939

- Holding: The nature of presidential power entitles a former president to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority; he is also entitled to at least presumptive immunity from prosecution for all his official acts; there is no immunity for unofficial acts.

United States v. Rahimi,
144 S. Ct. 1889 (2024)

- *New York State Rifle & Pistol Ass'n v. Bruen* (2022): rejected a means-end analysis for regulations implicating the Second Amendment, and held that the only relevant inquiry was whether the regulation was consistent with the "history and tradition" of gun regulation informing the scope of the Second Amendment.
- On the basis of *Bruen*, the Fifth Circuit in Rahimi's case held that 18 U.S.C. § 922(g)(8) – criminalizing possession of a firearm by a person under a domestic-violence restraining order – was facially unconstitutional under the Second Amendment
- SCOTUS granted the government's petition for cert.

United States v. Rahimi (cont'd)

Held 8-1 (majority opinion by C.J. Roberts): 18 U.S.C. § 922(g)(8) is not unconstitutional on its face, and the Fifth Circuit erred in striking down Rahimi's conviction

- When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment
- At least some applications of § 922(g)(8) fit squarely within that principle, which is supported by history and tradition, thus scuttling a facial challenge
- The Fifth Circuit erred in requiring a historical "twin" to § 922(g)(8)

United States v. Rahimi (cont'd)

- Separate concurring opinions by Justices Sotomayor, Gorsuch, Kavanaugh, Barrett, and Jackson
- Justice Thomas dissented: The Court's analysis is totally at odds with *Bruen*; not a single historical regulation justifies 18 U.S.C. § 922(g)(8)
- What about as-applied challenges to § 922(g)(8)?
- What about felon-in-possession? Other firearms regulations?

Arbitration Cases

- *Smith v. Spizzirri*: FAA Section 3 does not permit a court to dismiss a case rather than issue a stay when the dispute is subject to arbitration and a party requests a stay.
- *Bissonnette v. LePage Bakeries*: FAA Section 1’s exemption for any “class of workers engaged in foreign or interstate commerce” is not limited to workers whose employers are in the transportation industry.
- *Coinbase, Inc. v. Suski*: Where parties agree to two, potentially conflicting contracts, a court must decide which contract governs and thus who (an arbitrator or a court) may decide arbitrability.

Smith v. Arizona,
144 S. Ct. 1785(2024)

- *Crawford*: Under the Confrontation Clause of the Sixth Amendment, an out-of-court statement that (1) is testimonial, and (2) is offered for the truth of the matter asserted, generally may not be introduced at trial unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity for cross-examination.
- In *Smith*, D was prosecuted for drug offenses
- Arizona Department of Public Safety analyst Elizabeth Rast tested the drugs at issue in the case

Smith v. Arizona (cont'd)

- However, Rast stopped working at the DPS before D's trial, so the State called forensic scientist Gregory Longoni as a substitute expert; Longoni reviewed Rast's work and, based on her work, testified that the substances in question were in fact the charged drugs
- D objected that this procedure violated his constitutional right to confront Rast
- The Arizona Court of Appeals rejected the CC challenge, holding that Rast's analysis was not offered for the truth of the matter asserted, but rather was offered only to show the basis of Longoni's expert opinion

Smith v. Arizona (cont'd)

- Held (per Justice Kagan): When an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into evidence for their truth
- Here, Rast's statements came in for their truth; all of Longoni's opinions were predicated on the truth of Rast's factual statements; but Rast could not be cross-examined about those statements
- Because the lower courts did not address the question whether Rast's statements were also "testimonial" in the CC sense, the Court vacated the judgment and remanded for the Arizona Court of Appeals to address that question in the first instance

OCTOBER 2024 TERM

Seven County v. Eagle County

- Petitioners sought and obtained the Surface Transportation Board's approval to construct and operate an 88-mile rail line in Utah.
- The question presented is whether the STB violated the National Environmental Policy by failing to consider the environmental effects of a hypothetical barrel of Utah oil that (after traveling on the line) is eventually refined in Texas and Louisiana.

[Selected OT ’24 Case]

Free Speech Coalition v. Paxton, *cert. granted* (U.S. July 2, 2024) (No. 23-1122)

- FACTS: Texas passed a law (Texas House Bill 1181) requiring, *inter alia*, age verification in order to access sexually oriented materials online; applying strict scrutiny, the district court preliminarily enjoined that requirement as violative of the First Amendment; however, a divided panel of the Fifth Circuit (Judge Higginbotham dissenting), applying rational-basis review, vacated the preliminary injunction of the age-verification requirement
- QP: 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

Glossip v. Oklahoma

- Petitioner was convicted of murder and sentenced to death.
- He claims that the State violated *Napue v. Illinois* and *Brady v. Maryland* by not disclosing evidence of a co-defendant's psychiatric issues, which allegedly cast doubt on the co-defendant's testimony implicating Petitioner.
- The State has confessed error and is supporting Petitioner through Paul Clement; Petitioner is represented by Seth Waxman; the Court appointed Chris Michel to defend the judgment. Argument tomorrow.

Q&A