

Supreme Court Panel Discussion

*Fifth Circuit Bar Association's Appellate Advocacy Seminar
October 6, 2025*

Panel Presenters

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- Jeff Green—Partner, Green Lauerman
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Emergency/Shadow Docket

What's Going On?

Some possible answers:

- The Appeasement/Institutional Preservation Theory
- The Grand Bargain Theory
- The Policy Theory

The Appeasement Theory

- Congressional Power over the Court
 - Budget
 - Jurisdiction
- Historical Precedent
 - *Stuart v. Laird*
 - *Marbury v. Madison*
- Congress may change soon

The Grand Bargain Theory

- Court gives Administration what it wants
- Administration promises to take up these important issues on the merits
- Especially when Administration is losing regularly in the district and circuit courts
- Court cannot take up issues on its own – a party has to ask in some fashion

The Policy Theory

- These are political matters and policies of the Administration
- There is no precedent for many of them
- The Court can only police violations of law
- Five or six members of the Court agree that no law has been violated
- Changing the scope of executive power temporarily

OCTOBER 2024 TERM

Free Speech Coal. v. Paxton

- Holding: Intermediate scrutiny applies to Texas law requiring adult website operators to verify user age, and Texas law survives that scrutiny
- CT (+5) majority; EK (+2) dissent
- Speech “obscene as to minors”
- *Ginsberg v. NY* or *Ashcroft v. ACLU*?
- Law only incidentally burdens speech, so intermediate
- History and tradition of state regulation informs scrutiny
- CA5 judgment affirmed (but slightly different rationale)

TikTok v. Garland
[No. 24-656](#)
(January 17, 2025)

Protecting Americans From Foreign Adversary Controlled Applications Act (“PAFACAA”)

Requires Divestiture of TikTok specifically – by January 19, 2025 – only one 90-day extension available

Does it violate free speech? No – national security is paramount

Per Curiam decision

TikTok Aftermath

- Many extensions by Executive Order delaying enforcement for national security and foreign policy reasons
- Most recent: [Order of September 16](#) (to December 16)
- On what authority? None – but who cares?
- The challenge:
 - One-a transfer of source code?
 - License from ByteDance?
 - US company controls data?
- Could TikTok be used to take over other platforms?

Mahmoud v. Taylor

- A Maryland school introduced a variety of “LGBTQ+-inclusive” storybooks into the elementary school curriculum.
- Parents challenged the policies, asserting that they impermissibly burdened their religious exercise.
- Justice Alito’s opinion for the Court deemed them likely to succeed, reaffirming that parents have the right to direct the religious upbringing of their children.

U.S. v. Skrmetti

- Holding: Tennessee does not violate EPC by banning treatments that promote gender transition for minors
- CJ (+5) majority; SS (+2) dissent
- Again, tiers of scrutiny are everything
- This is age and treatment-based classification, not sex-based, so rational basis applies; this is not *Bostock 2.0*
- States can make judgments about disputed medical practices and protecting minors
- Stay tuned for womens' sports cases; *Chiles*; parents' rights

Trump v. Casa
[No. 24a884](#)
June 27, 2025

“Universal” injunctions narrowed

Context: Executive Order “ending” Birthright citizenship

6-3 (Justice Barrett)

When can district courts issue universal injunctions

Aftermath (*Washington, Barbara, Casa*)

Class Actions?

Will Loper Bright be affected?

Subsequent Litigation on the Merits

On September 26, 2025, the Administration filed petitions in two of the cases that have upheld birthright citizenship

In neither instance did the Administration ask that the Court expedite

[No. 25-365](#) – *Trump v. Barbara* (First Circuit) seeking certiorari before judgement, following district court’s class-wide preliminary injunction

[No. 25-364](#) – *Washington v. Trump* (Ninth Circuit) seeking certiorari from a divided opinion affirming a universal injunction – the dissent argued that the States do not have standing

Medina v. Planned Parenthood

- The Medicaid statute requires States to ensure that eligible individuals may obtain medical assistance from any “qualified” provider.
- South Carolina determined that Planned Parenthood could no longer participate in the State’s Medicaid program; a patient sued under Section 1983, arguing that Planned Parenthood was her preferred “qualified” provider.
- The question was whether the suit could be maintained under Section 1983.
- The Court said no. The “qualified” provider provision does not clearly and unambiguously confer individual rights enforceable under Section 1983.

Fuld v. PLO/CC Devas v. Antrix

- What showing is required to establish personal jurisdiction over a foreign entity or foreign state?
- *CC/Devas*: The FSIA does not require a minimum contacts test, only satisfaction of an immunity exception. 9-0 (SAA).
- *Fuld v. PLO*: The Fifth Amendment does not require minimum contacts, either. Congress has flexibility in determining an adequate nexus with U.S. interests. 9-0 (CJ).
- Future Qs on *Devas* remand: Are foreign states persons under 5A? Will FSIA exemptions satisfy *Fuld*'s 5A test?

Lackey v. Stinnie

- Section 1988(b) allows an award of attorney's fees to "prevailing parties" under Section 1983.
- The question in this case was whether a plaintiff who obtains a preliminary injunction can qualify as a prevailing plaintiff, even if the case becomes moot before final judgment.
- The Supreme Court said no. Preliminary injunctions do not make a party "prevailing" because they do not conclusively decide the case on the merits.
- A party "prevails" when a court grants enduring judicial relief that materially alters the legal relationship between the parties.

Important Criminal Cases from the 2024 Term

[No. 23-852](#) – *Bondi v. Vanderstock* (March 26, 2025) ATF regulation of ghost guns upheld

[No. 23-909](#) – *Kousisis v. United States* (May 22, 2025) Mail and wire fraud statutes cover advancement of a scheme – even if no harm ever occurs

[No. 23-1239](#) – *Barnes v. Felix* (May 15, 2025) Section 1983 analysis looks not just to “moment of threat” but to all facts and circumstances

[No. 23-1002](#) – *Hewitt/Duffy v. U.S.* (June 26, 2025) The First Step Act applies to defendants who are being resentenced for other reasons

[No. 23-1095](#) – *Thompson v. U.S.* (March 21, 2025) True but misleading statements on mortgage applications do not violate federal statute covering false statements in mortgage applications

OCTOBER 2025 TERM

Louisiana v. Callais

- This redistricting case is up for reargument on Oct. 15 on the question whether Louisiana's intentional creation of a new majority-Black district violates the Constitution.
- The State was subject to a preliminary injunction, affirmed on the merits by the CA5, that required the creation of a new majority-Black district pursuant to the Voting Rights Act.
- Rather than allow the district court to draw a new map, Louisiana drew its own, which was promptly enjoined as an unconstitutional racial gerrymander.

Chiles v. Salazar
No. 24-539
Argument October 7, 2025

- Colorado and twenty other states prohibit “conversion therapy” based upon findings that it is neither safe nor effective
- Chiles, a therapist, sued Colorado contending that the prohibition violates the First Amendment
- Is therapy conduct and not speech?
- Is health care subject to First Amendment scrutiny?
- If so, what level of scrutiny applies to professional speech?
- Can Colorado regulate practices that civil courts have found to be malpractice?
- *Skrmetti* – “medical consensus” is at high risk of being based upon politics

Berk v. Choy

- Delaware law requires affidavit of merit from medical doctor to be filed alongside complaint.
- Does that state-law requirement apply in federal court?
- Is that a procedural rule (*contra* FRCP 8 & 11) or a substantive rule?
- Strange bedfellows? *See Shady Grove* (2010).
- Implications? Anti-SLAPP laws, etc.

Trump v. Slaughter

[No. 25a264](#)

- In 1935, the Supreme Court upheld for-cause removal protections for the Federal Trade Commission, a multi-member, independent agency.
- Since then, the Supreme Court has rejected attempts to hamper the President's removal power (*Seila Law* and *Collins*).
- President Trump fired FTC commissioner Rebecca Slaughter, and the Supreme Court granted the government's request to stay an injunction against her termination.
- The Court granted certiorari before judgment and ordered argument in the December sitting.

Learning Resources v. Trump

No. 24-1287 (November 5)

- Twelve States challenged President's authority to impose tariffs
- Private companies did as well
- What is the scope of the President's authority under the International Emergency Economic Powers Act?
- Per the IEEPA, President must declare a national emergency and identify an "unusual and extraordinary threat" to national security, foreign policy, or the economy of the U.S.
- Is the power to regulate the power to impose tariffs?

Learning Resources Qs

- Has the President identified an unusual and extraordinary threat other than persistent budget and trade deficits?
- Does the IEEPA unconstitutionally delegate authority to regulate international commerce to the President?
- Do the limits of Section 122 of the Trade Act – limiting retaliatory tariffs to 15% or less and no longer than 5 months – apply?
- Argument November 5

First Choice v. Platkin

- When does a First Amendment claim stemming from a state AG subpoena ripen into a justiciable federal claim?
- CA3: Only after you unsuccessfully resist subpoena in state court.
- First Amendment associational rights in donor/member information.
- What do the ACLU, pro-life groups, Big Tech, the U.S. Chamber, and pro-immigration charities all have in common?

OT '25 Criminal Cases

[No. 24-482](#) – *Ellingburg v. U.S.* (Argument October 14) Is restitution under the Mandatory Victims Restitution Act penal and therefore constrained by the Ex Post Facto Clause

[No. 24-624](#) – *Case v. Montana* (Wednesday, October 15) What is the scope of the emergency aid exception for warrantless entry into a home without probable cause (really bad vehicle)

[No. 24-557](#) – *Villarreal v. Texas* (Monday, October 6) Can a trial court prohibit an attorney from speaking with her client about the client's ongoing testimony during and overnight recess consistent with the Sixth Amendment?

[No. 24-556](#) – *Fernandez v. U.S.* (Wednesday, Nov. 12) Does the scope of “extraordinary and compelling circumstances” under the Compassionate Release statute include constitutional claims that could be brought in a 2255 (habeas) petition?

Landor v. La. DOC

- The question presented is whether RLUIPA authorizes a private right of action against a prison employee in their individual-capacity for damages.
- The Supreme Court permitted a similar right of action in *Tanzin v. Tanvir*.
- Ten federal courts of appeals have rejected a similar rule in the RLUIPA context because RLUIPA is Spending Clause legislation and Congress did not (and perhaps could not) clearly authorize such a right of action.

Other Cases of Note for the 2025 Term

[No. 25a312](#) – *Trump v. Cook* (Argument January 2026) Can the President fire a member of the Federal Reserve Board of Governors? (decision deferred until after oral argument in January 2026)

[No. 24-621](#) – *National Republican Senatorial Committee v. FEC* (No argument date) Do the limits on coordination between political parties and candidate campaigns violate the First Amendment?

Q&A
