Looking Ahead: October Term 2025

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"It's tough to make predictions, especially about the future," a Yankee skipper informed us.[1] And more apt for this journal, the greatest lawyer of the ancient world relates "Vetus autem illud Catonis admodum scitum est, qui mirari se aiebat quod non rideret haruspex haruspicem cum vidisset."[2] And if we to are follow the elder Cato's admonition, all predictions and forecasts are in some sense folly. Having acknowledged the wisdom of sages, ancient and modern, it still behooves us to peer into the upcoming Supreme Court Term on a somewhat firmer basis of already accepted cases, as well as reading the entrails of the emergency docket.

As in recent Terms, the past may be prologue to what the Court takes up.[3] *Garland v. Cargill*[4] two Terms ago was mirrored, albeit with different results, in *Bondi v. Vanderstok*.[5] Last term the Court took up transgender issues in *United States v. Skrmetti*,[6] finding Tennessee's law against hormonal therapy and sex reassignment surgery for

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[1] This quote is often attributed to Yogi Berra. Alex R. Piquero, *It's Tough to Make Predictions, Especially About the Future*, Vital City (March 12, 2024), https://www.vitalcitynyc.org/articles/the-perils-and-necessity-of-jail-population-forecasting.

[2] Cicero, De Divinatione II 51 ("Old Cato always wondered how two fortune-tellers could look at each other without laughing.").

[3] William Shakespeare, The Tempest act 2, sc. 1, l. 253.

[4] 602 U.S. 406 (2024) (holding ATF had no authority to prohibit the use of bumpstocks).

[5] 145 S. Ct. 857 (2025) (holding ATF could regulate easily completed "ghost gun" kits) Both *Cargill* and *Vanderstok* are better understood as administrative law cases than "gun cases." The other big "gun case" of the term, which proved Smith & Wesson not only beats four aces but also Mexico, was a statutory interpretation case rather than a Second Amendment case which the Court still seems chary of taking. Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos, 145 S. Ct. 1556 (2025).

[6] 145 S. Ct. 1816 (2025).

minors constitutional. This Term, legal questions surrounding those whose genders do not conform to their biological sex have come up in three separate cases.[7] The question of where transgender status stands on the tiers of scrutiny will be front and center: strict, intermediate or rational basis?

Similarly, it is highly unlikely that we have seen the last of *Trump v. CASA, Inc.*[8] or the issues lurking within it. Billed as "the birthright citizenship" case by the press, it was actually the "nationwide injunctions" case. Not only was the question of birthright citizenship and whether it can be changed by executive order, if at all, unaddressed by the Court, but the decision also left loopholes in its "no nationwide injunctions" ruling that a plaintiff's attorney should be able to run a defectively designed truck through.

The Court also rejected the effort of *Learning Resources* to expedite consideration of the petition for writ of certiorari before judgment.[9] But it is still pending as a petition for cert. There may yet be an early adjudication of whether the tariffs imposed willy-nilly by the executive branch, relying on the International Emergency Economic Powers Act (IEEPA) are lawful or a usurpation of congressional prerogatives without statutory or constitutional warrant.[10] It is highly likely this issue will be before the Court before the 2025 Term is out.

It should be noted that the solid originalist-textualist majority, heralded in these pages for the October 2022 Term, has continued into last Term and can expected to continue into the Term ahead.[11] The mighty

[7] Hecox v. Little, 104 F.4th 1061 (9th Cir. 2024), *cert. granted*, Little v. Hecox, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025) (whether laws limiting participation in girls' sports to biological females violates the Equal Protection Clause of the 14th Amendment); B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542 (4th Cir. 2024), *cert. granted sub nom.*, West Virginia v. B. P.J., No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025) (same with additional question of whether Title IX prohibits such limitations on the participation in girls' sports); United States v. Shilling, 221 L. Ed. 2d 962 (May 6, 2025) (from the emergency docket whether transgender individuals can be excluded from military service).

[8] 145 S. Ct. 2540 (2025).

[9] Learning Res., Inc. v. Trump, No. 24-1287, 2025 WL 1717468 (U.S. June 20, 2025).

[10] In the interests of full disclosure, the author is counsel to several plaintiffs in similar litigation around the country and has filed amicus briefs in the *Learning Resources* litigation. *See* Complaint, Emily Ley Paper Inc. v. Trump, No. 3:25-cv-00464 (N.D. Fla. Apr. 3, 2025); Complaint, FIREDISC, Inc. v. Trump, No. 1:25-cv-01134 (W.D. Tex. July 21, 2025).

[11] Ilya Shapiro, *Looking Ahead: October Term 2022*, 2021–2022 Cato Sup. Ct. Rev. 335 (2022).

SCOTUSblog Stat Pack crunches the numbers for us.[12] Forty-two percent of the cases from last term were unanimous, down slightly from last year's 44 percent but including the sometimes contentious areas of free speech and religious rights. The 6-3 splits between Republican and Democrat appointments to the Court were reduced to nine percent of opinions, where they averaged 13.75 percent between the October 2020 and 2024 Terms. Chief Justice John Roberts was not only in the majority in 95 percent of the cases but issued no separate opinions—that's dissents or concurrences—this Term. Justice Ketanji Brown Jackson was in the majority the least of any of her colleagues at 72 percent. This statistic is a good measure of where the Court is and—with no personnel changes—where it is likely to be in October 2025: "Conservative" in a Roberts rather than Thomas direction but uncongenial to those looking to restore or maintain the progressive methods of analysis of the Burger-era Court. For instance, conservative Justices were in the minority in 28 percent of the cases, which is far more cases than the 6-3 ideological splits (nine percent) that so alarm the *New York Times* Court watchers. That same 6-3 split with only Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch dissenting was six percent of cases. Yet these ideological splits gather no opprobrium or concern from the spectating commentariat. To emphasize the point, Justice Elena Kagan was in the majority 83 percent of the time, which surpassed the majority percentages of Justices Thomas, Gorsuch, or Alito. Which is to say it's John Robert's judicial world and we're all living in it now.

Part of that world is the practice of not taking a lot of cases. There were only 67 cases with written opinions before the October 2024 Term ended. As of July 3, 2025, shortly after the October 2024 Term ended, the Court has only granted *certiorari* in 30 cases.[13] This is pretty thin gruel, even though some of the cases on voting rights and transgender issues may be "blockbusters" by the end of the Term.

[12] Jake S. Truscott & Adam Feldman, *SCOTUSblog Stat Pack for the 2024-25 Term*, SCOTUSblog, https://www.scotusblog.com/stat-pack-2025/ (last visited Aug. 26, 2025).

[13] *Supreme Court of the United States Granted & Noted List October Term 2025 Cases for Argument*, SupremeCourt.gov (July 3, 2025), https://web.archive.org/web/20250701140519/https://www.supremecourt.gov/orders/25grantednotedlist.pdf. Two others have been set for reargument or to resume merits briefing.

Which brings us to the "known unknowns" of the Supreme Court term.[14] Who knows what surprises lurk in the heart of the Supreme Court? The shadow docket knows.[15] While the Court takes few cases in the current era, it has (particularly this Term and into the summer) been bombarded by emergency petitions to grant or lift stays in contentious litigation. The Justices have had a busy time on the emergency docket. On such things as voting rights, they have stayed the effect of rulings of the appellate courts until *certiorari*, if any, can be considered. The Eight Circuit's momentous decision that the civil rights laws don't allow private parties to sue to enforce Section 2 of the Voting Rights Act has been stayed:

> The issuance of the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 23-3655, is stayed pending the filing and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.[16]

Those words portend a return to the Supreme Court in this and many other cases where lower court stays or injunctions have been dissolved for now.

These orders are designated with a non-scarlet "A" on the Court's Orders list. But they might as well bear that color, since they stand out as issues the Court will likely have to address in the coming Term. These "A" orders point to some very consequential cases in the making. These include: (1) the extent of the President's power to dismiss federal employees when an agency is mandated by Congress to exist;[17] (2) whether the Secretary of Homeland Security can revoke the categorical grant of parole to over a half a million noncitizens without

[14] News Briefing, Sec. Def. Donald Rumsfeld (Feb. 2, 2002).

[15] With apologies to "the Shadow." *See The Shadow*, radiohalloffame.com, https://www.radiohalloffame.com/the-shadow (last visited Aug. 26, 2025); *see also* Steve Vladeck, The Shadow Docket (2023).

[16] Turtle Mountain Band v. Howe, No. 25A62, 2025 WL 2078664 (U.S. July 24, 2025).

[17] McMahon v. New York, No. 24A1203, 2025 WL 1922626 (U.S. July 14, 2025) (granting stay of district court order of reinstatement of Department of Education employees).

providing individual case-by-case adjudication for each person;[18] (3) the continued vitality of *Humphrey's Executor* and the extent of the President's power to terminate federal employees protected by congressional statute;[19] and (4) whether the Department of Defense can enforce its policy of disqualifying individuals with gender dysphoria or who have undergone medical interventions for gender dysphoria.[20] By late July of 2025, the administration had petitioned the Supreme Court 21 times, surpassing the 19 petitions that the Biden administration filed in the entire four years of that presidency.[21] This is a function of either: (1) activist anti-Trump judges, (2) the record number of executive orders issued (over 180, the most since F.D.R.), (3) the aggressive nature of the actions under current law, or (4) as former Cato Supreme Court Review author Kannon Shanmugam postulates "the disappearance of Congress from the scene."[22] Take your pick or mix and match. But an emergency docket that active six months into a presidential term is bound to cause controversy. That is particularly so because, in the teeth of criticisms of the lack of explanation in some of these orders, the Court has stated explicitly that "although [its] interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."[23]

With the cases already granted *certiorari* and those waiting for further development after emergency application to the Supreme Court, we have a term poised to address some of the most divisive social issues of the present: transgender legal status, the extent of executive power against the concomitant powers of Congress and the judiciary, and cases that could upend longstanding practices and understandings of voting rights. The questions of free speech and campaign donations and donor privacy are also front and center and promise to make the October 2025 Term one for the books.

[18] Noem v. Doe, 145 S. Ct. 1524 (2025) (granting stay).

[19] Trump v. Wilcox, 145 S. Ct. 1415 (2025) (granting stay).

[20] United States v. Schilling, No. 24A1030, 2025 WL 1300282 (U.S. May 6, 2025) (granting stay of district court injunction).

[21] Zach Schonfeld, *Trump Notches Winning Streak in Supreme Court Emergency Docket Deluge*, The Hill (July 28, 2025), https://thehill.com/regulation/court-battles/5420857-trump-winning-streak-supreme-court/.

[22] *Id.*

[23] Trump v. Boyle, 145 S. Ct. 2653 (2025) (staying an order reinstating NLRB Commissioners terminated by the Trump administration).

I. Is *Humphrey's Executor* as Dead as Humphrey?

The ruling authority of *Humphrey's Executor* has been in the sights of constitutional conservatives for many years.[24] Finally, 90 years after the anti-New Deal Court disposed of *Myers v. United States*[25] to hand F.D.R. a loss by ruling that the firing of the FTC commissioner was unlawful, *Humphrey's* appears to be on its last legs. The Trump administration's efforts to ensure that the entire administrative apparatus is under White House control without "deep state Fifth columnists" undermining the stated goals of the administration, combined with an effort to "defund the left" and perhaps even challenge the constitutionality of the civil service laws, has set up an incredibly rich environment of Article II cases on executive power. The lower courts, all bound by *Humphrey's*, have been saying just that for some time and did so again in the *Wilcox* and *Boyle* cases. It was this clash of precedent binding the lower courts with the likely direction of the current Supreme Court on the matter that drove the dueling concurrence and dissents in *Trump v. Boyle*. The Court, in a *per curiam* order likely written by Roberts, stayed the ruling of the Maryland district court reinstating the terminated NLRB commissioners.[26] Justice Brett Kavanaugh, a staunch defender of minimalism on the emergency docket, urged the Court to grant the stay and grant *certiorari* before judgment both in *Boyle* and in *Wilcox*.[27] Justice Kagan, joining Justices Sonia Sotomayor and Jackson, dissented and chastised the Court for "all but overturn[ing]" *Humphrey's* and doing so, as in *Wilcox*, without a thorough opinion.[28] What was not explained is why the three dissenters did not just join Kavanaugh in granting *certiorari* before judgment? It only takes four to grant *certiorari*, and if your problem is that something important is being overruled *sub silencio* why not vote for full briefing and consideration of the issue?

Another question about all these cases is why no Supreme Court Justice, so prickly on the remedy of universal injunctions, has not simply stayed or recommended staying the dismissal cases, since the

[24] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[25] 272 U.S. 52 (1926).

[26] Who upon receiving the order went back to the agency and countermanded everything done in their absence, generally creating good facts to overrule *Humphrey's*.

[27] *Boyle*, 145 S. Ct. at 2655 (2025) (Kavanaugh, J., concurring).

[28] *Id.* (Kagan, J., dissenting).

remedy is unlikely to be lawful. *Humphrey's Executor* is named that because Humphrey was dead. His estate sought back pay.[29] Where do the district courts get the power to reinstate presidential appointees when they have been terminated and may have successors, acting or confirmed, in their place?

The facts of the cases likely to come before the Court are instructive. In *Wilcox* the two terminated officers were from the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB).[30] Both organizations are multi-member independent agencies with terms of years. By statute "The President is prohibited . . . from removing these officers except for cause, and no qualifying cause was given."[31] The district court had granted an injunction against their termination. The Court cited *Seila Law LLC* for the proposition that the executive may dismiss any officer "subject to narrow exceptions recognized by our precedents."[32] The Court posited that the officers were unlikely to demonstrate that they did not wield executive power and so would not succeed on the merits. But they also submitted that the harm to the Executive of having to endure a removed officer continuing to wield its executive power exceeds the harm done to the officer from not exercising his statutory duty.[33]

Trump v. Boyle is of a piece. There, three Democratic commissioners of the Consumer Products Safety Commission (CPSC) were terminated with no reason given. The Court, citing *Wilcox* as already explained, stayed the district court order reinstating them. The Fourth Circuit had refused to do so even after *Wilcox*, claiming it was bound by *Humphrey's Executor* and that the case was distinguishable. The Court gave its powerful statement that emergency docket orders "inform

[29] *Humphrey's Ex'r*, 295 U.S. at 612.

[30] *Wilcox*, 145 S. Ct. at 1416.

[31] *Id.*

[32] *Id.* (citing Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 215–18 (2020)).

[33] *Id.* The case also curiously reached out to exclude the Federal Reserve from the likely effect of these logical conclusions about executive power by citing the history of the First and Second Banks of the United States. *Id.* at 1417. This comports with the author's long-held view that if the independence of the Federal Reserve was ever threatened the Chief Justice would find that it was a tax and within Congress's power to levy. *See* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). The President promptly fired Federal Reserve Governor Lisa Cook for cause setting up yet anothjer lawsuit.

how a court should exercise its equitable discretion in like cases."[34] Justice Kagan is right that it would be hard for a court to more strongly signal the abandonment of prior precedent than the Court has here. It is not without interest that the administration has also terminated an FTC commissioner, and one of the fired commissioners has been granted summary judgment (citing *Humphrey's*) on her claim that the firing was illegal.[35] That case is already at summary judgment, not a preliminary ruling, and could be on all fours with *Humphrey's*. Barring an argument that the powers granted to the FTC now are much different than the powers granted to the FTC in 1935, it would be hard to see how *Humphrey's* survives even in vestigial form.[36]

A related issue foreshadowed by the shadow docket is the executive branch termination of over 1,300 employees of the Department of Education. In *McMahon v. New York*, the government undertook a reduction in force (RIF) involving 1,378 employees.[37] Secretary of Education Linda McMahon said in a press release that the RIF "reflects the Department of Education's commitment to efficiency, accountability, and ensuring that resources are directed where they matter most: to students, parents, and teachers."[38]

In an executive order issued nine days later, President Donald Trump instructed McMahon to "take all necessary steps to facilitate the closure" of the department.[39] On March 21, he announced that programs for students with special needs and the federal student loan portfolio would be transferred from the Department of Education to the Department of Health and Human Services and the Small Business Administration, respectively. The plaintiffs—a group of 19 states led by New York, as well as the District of Columbia, two public school districts, and teachers' unions—went to federal court in Massachusetts, arguing that the RIF violated both the Constitution

[34] *Boyle*, 145 S. Ct. at 2653.

[35] Slaughter v. Trump, No. 25-909 (LLA), 2025 WL 1984396 (D.D.C. July 17, 2025).

[36] *See* Eli Nachmany, *The Original FTC*, 77 Ala. L. Rev. (forthcoming 2025) (arguing powers of the FTC far exceed those originally granted and commissioners can now be fired without overruling *Humphrey's Executor*).

[37] *McMahon*, 145 S. Ct. at 2643.

[38] Press Release, Dep't Educ., Department of Education Initiates Reduction in Force (Mar. 11, 2025).

[39] Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025).

and the federal laws governing administrative agencies. That court granted an injunction against this administrative action.

The Supreme Court stayed that injunction. It allowed the administration to continue its dismantling of the Department of Education. As the dissent by Justice Sotomayor, joined by Justice Kagan and Justice Jackson, pointed out, the Department of Education was created by Congress by statute and is funded by appropriations. They decried the President's "unilateral efforts to eliminate a Cabinet-level agency established by Congress[.]"[40] The dissent also raised the "take care" clause as being violated, which is rare in the Supreme Court context. The dissent also used Secretary McMahon's own words that her termination of half the staff of the agency was a downpayment on the Executive Order to take all steps to close the agency.[41] This case probably requires further work in the district and appellate courts. It is replete with issues around congressional statutory authorizations, control of the executive-created agencies and even the civil service laws. After all, the employees terminated have resorted to the OPMA and the procedures for wrongful termination. But the concerns of the dissent are not going to go away. It is not clear whether those concerns, unless raised in an emergency context, would garner more than three votes.

Finally, on this issue, while there are no cases on the constitutionality of civil service protections likely to reach the Court this term, it does appear that the first shots have been fired against that system—started by Republican administrations to curtail corruption that had emerged from Jacksonian process—by a Republican administration with great admiration for Jackson.[42]

II. Tariffs of Abominations and Executive Power.

The second cessation crisis this nation faced was over the Tariff of Abominations.[43] This sop to mostly Northern manufacturers included 50 percent tariffs and provoked the nullification crisis,

[40] *McMahon*, 145 S. Ct. at 2643 (Sotomayor, J., dissenting).

[41] *Id.* at 2643–44.

[42] Leif Emery, *Echoes of Andrew Jackson: Donald Trump and the Legacy of Populism*, The Sci. Surv. (Mar. 11, 2025), https://thesciencesurvey.com/editorial/2025/03/11/echoes-of-andrew-jackson-donald-trump-and-the-legacy-of-populism/.

[43] The first was caused by New England's being embargoed and cut off from British Trade and the formation of the Hartford convention. *See generally* Jeremy D. Baily,

which had to be put down by President Jackson with the carrot and stick of reduced tariff legislation and the Force Bill to drive South Carolina into line.[44] The tariff of abominations at least had the virtue of being passed by Congress. And then reduced by Congress. This was done using that now nearly obsolete measure of the nineteenth century—legislation.

The Administration has invoked, by executive orders, the International Emergency Economic Powers Act (IEEPA) to claim that the President can declare a trade deficit and its effects an "emergency" to set tariff rates that conflict with previous international agreements, congressionally set tariff rates, and economic reality. IEEPA authorizes the President to take certain actions after declaring a national emergency and allows certain actions to address that emergency. That statute identifies the permitted actions. It authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit" certain transactions and property.[45] It then identifies the categories of transactions and property the authorized actions may address. Conspicuously absent from this detailed subparagraph is any reference to tariffs, imposts, duties, or taxes. That absence should defeat the President's assertions that IEEPA authorizes tariffs because, since after *Loper Bright* silence cannot be construed as a delegation of authority to the executive.[46]

Nonetheless, the Administration, again by executive order, imposed billions of dollars in tariffs on American companies that ship goods from foreign countries into the United States. First on February 1, 2025, using executive orders and declaring various "emergencies" over opioids, near-zero tariffs were increased to 25 percent on Canada, China, and Mexico.[47] On April 2, 2025, no doubt delayed to avoid the conclusion that it was an April Fool's joke, the administration declared "Liberation Day" and immediately

The Hartford Convention, Bill of Rts. Inst., https://billofrightsinstitute.org/essays/the-hartford-convention (last visited Aug. 26, 2025).

[44] Michele Metych, *Tariff of 1828*, Britannica, https://www.britannica.com/topic/Tariff-of-1828 (last visited Aug. 26, 2025).

[45] 50 U.S.C. § 1702(a)(1)(B).

[46] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[47] The reader may be forgiven for missing the great opioid crisis emanating from the Great White North.

imposed the shackles of 10 percent "reciprocal" tariffs on all Americans importing from abroad with higher tariffs on 57 other countries' goods. These tariffs were sometimes paused and sometimes not in a bewildering series of moves, confusing all Americans trying to plan imports and make a business plan for the year.

Large corporations were strangely quiet, as were large law firms. With one exception, big firms and businesses stayed out. The first case to be filed against the unlawful tariffs was *Emily Ley* in the Northern District of Florida. Initially challenging the original tariffs but amended to cover "Liberation Day" tariffs, this case was followed in short order by two cases filed in the Court of International Trade (CIT) by V.O.S. Selections and a coalition of states lead by Oregon, represented by the Liberty Justice Center and the Oregon Solicitor General.[48] A small single practitioner filed on behalf of some Black Feet Indians in Montana.[49] PLF filed a case representing four small businesses in the CIT titled *Princess Awesome, LLC v. United States Customs and Border Protection*, which, like Emily Ley Paper, was subsequently stayed pending V.O.S. and Oregon.[50]

And California sued in California.[51] In the exception that proves the rule, Akin Gump filed in the D.C. district court for its client *Learning Resources*.[52] It quickly became apparent that the Justice Department preferred the CIT as the exclusive venue for its case largely because of a 1970s case from a court that doesn't exist anymore.[53] It moved to transfer all cases filed anywhere but the CIT to that court.

The Administration suffered losses in both the CIT and in D.C. In a textbook originalist and textualist opinion, Judge Rudolph Contreras

[48] Complaint, V.O.S. Selections, Inc. v. United States, 772 F. Supp. 3d 1350 (Ct. Int'l Trade 2025); Complaint, Oregon v. United States, 772 F. Supp. 3d 1350 (Ct. Int'l Trade 2025).

[49] Webber v. U.S. Dep't of Homeland Sec., No. 25-26-GF-DLC, 2025 WL 1207587 (D. Mont. Apr. 25, 2025).

[50] Princess Awesome, LLC v. U.S. Customs and Border Prot., 1:25-cv-00078 (Ct. Int'l Trade filed Apr. 24, 2025).

[51] California v. Trump, No. 25-CV-03372-JSC, 2025 WL 1569334, at *1 (N.D. Cal. June 2, 2025).

[52] NCLA has recently filed another case in the Western District of Texas on behalf of Texas importers and board game association. Complaint, FIREDISC, Inc. v. Trump, *supra* note 10.

[53] Yoshida Int'l, Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974) (upholding President Nixon's temporary tariffs under the Trading With the Enemies Act (TWEA)).

found that IEEPA is not a tariff statute, and so district courts, not the CIT, had jurisdiction. While he granted plaintiffs summary judgment and an injunction, which halted the collection of tariffs from those plaintiffs, he stayed the order while the D.C. Circuit could address it.[54] The CIT found exclusive jurisdiction in itself but ruled against all of the tariffs as failing to "deal with an unusual and extraordinary threat" and thus not allowed by the language of IEEPA, striking the tariffs down *in toto*.[55]

The only tariff case to make it in any way shape or form to the Supreme Court thus far is that of *Learning Resources*.[56] The Question Presented is whether "IEEPA authorizes the President to impose tariffs." Learning Resources and hand2mind are companies that import materials from China and turn them into educational toys. The Plaintiffs were affected by these EOs, so they challenged the tariffs. The district court granted Plaintiffs' motion for a preliminary injunction that prevented the collection of the tariffs against the Plaintiffs, but then the District Court stayed its order in light of a more sweeping injunction against the tariffs ordered by the CIT in *V.O.S. Selections v. Trump*.

One of these tariff cases and maybe more are bound for the Supreme Court this Term. Whether or not the *Learning Resources* petition is granted, another will be. That is because the government is highly unlikely to win anywhere. The importance of tariffs to the administration and its going to the CIT, which has in its first order struck down every tariff in the country, means that the Solicitor General must petition for *certiorari*.

Not only are these decisions important to the administration, but they also affect nearly every American and the economy in such a massive way that it is virtually impossible for the Court to duck the issue. If, as is probable, the D.C. Circuit and other circuits differ from the Federal Circuit on who has jurisdiction, that will provide another powerful reason to take the case. One way or another the case will be before the Supreme Court this Term.

[54] *Learning Res., Inc.*, 2025 WL 1525376 at *15–16, *appeal filed*, No. 25-5202 (D.C. Cir. 2025).

[55] *V.O.S. Selections*, 772 F. Supp. 3d at 1382-83.

[56] Petition for Writ of Certiorari, Learning Res., Inc. v. Trump, No. 24-1287 (June 17, 2025).

The Court is almost certainly going to strike the tariffs down as unlawful. Not only have four different lower court judges from wildly different backgrounds and outlooks found them so, but an originalist and textualist Court is not going to toss out a method of statutory analysis painstakingly built over decades to affirm these tariffs. The government will lean hard on national security and foreign policy interests. So did the Truman administration in the Steel Seizure cases.[57] It did not work then and it will not work now, when the emergency is not Communists pouring into South Korea but Koreans pouring too many affordable goods into America.

III. Transgender, Equal Protection, and the First Amendment.

"Girls will be boys and boys will be girls. It's a mixed up, muddled up, shook up world" except perhaps for the Supreme Court on a host of gender issues. There are at least four cases on the horizon where the Supreme Court will wade into the area it touched on in last term's *United States v. Skrmetti*.[58]

In *Little v. Hecox*, the question presented is "Whether laws that seek to protect women's and girls' sports by limiting participation to women and girls based on sex violate the Equal Protection Clause of the Fourteenth Amendment."[59] But the facts paint a far more vivid picture of what is involved. In March 2020, Idaho enacted a categorical ban on the participation of transgender women and girls in women's student athletics. The ban also included a sex-verification process whereby any individual can dispute the sex of any student athlete and require the athlete to undergo gynecological exams to confirm the athlete's sex. No such process exists for male sports. Transgender and cisgender athletes challenged the ban and the sex verification as a violation of the Equal Protection Clause. The Ninth Circuit held that heightened scrutiny was triggered on the bases of sex *and* transgender status, leaving the plaintiffs likely to succeed on the merits of their equal protection claims for the purposes of a preliminary injunction.[60]

[57] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584 (1952).

[58] 145 S. Ct. 1816 (2025).

[59] Petition for Writ of Certiorari at i, Litte v. Hecox, No. 24-38 (July 11, 2024), *cert. granted*, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025).

[60] *Hecox*, 104 F.4th at 1068 (9th Cir. 2024).

This is one of the most politically contentious cases of the Term since it will involve determining whether transgender people are a discrete and insular minority for the purposes of the tiers of scrutiny. This will determine the permissible degree of latitude Congress and the states may undertake on the basis of this status. Even if transgender people are not a discrete and insular minority, the Court will have to determine a way to analyze how laws against transgender athletes changes the metes and bounds of suspect discrimination on the basis of sex. The inspection of young women or girls' sex organs on the accusation of a teammate is likely to raise objections on a host of grounds. Some Justices have already signaled they are in no mood to create new protected classes, but the Court as a whole has not weighed in on the matter.[61]

West Virginia v. B.P.J. addresses gender identity in the context of Title IX. The QPs here are: "Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth," and "Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth."[62] The facts are that B.P.J. is a 14-year-old biological male who has publicly identified as a girl since the third grade and takes medicine to stave off the onset of male puberty. B.P.J. has also begun to receive hormone therapy with estrogen. B.P.J.'s mother, Heather Jackson, went to federal court when the principal at B.P.J.'s middle school told the family that her daughter would not be allowed to participate on the girls' sports teams because of a West Virgina law "banning girls who are transgender from participating on all girls' sports teams from middle school through college." The Fourth Circuit held that the statute's definition of a person's sex was a facial classification based on gender identity subject to intermediate scrutiny under the Equal Protection Clause and violated Title IX as applied to the student-plaintiff.[63] Even if transgender people are not a discrete and insular minority, the Court will have to determine how to determine how

[61] *Skrmetti*, 145 S. Ct. at 1850 (Barrett, J., concurring).

[62] Petition for Writ of Certiorari at i, West Virginia v. B.P.J., No. 24-43 (July 11, 2024), *cert. granted* No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025).

[63] *B.P.J.*, 98 F.4th at 550.

laws against transgender athletes changes the metes and bounds of suspect discrimination on the basis of sex.

It seems unlikely that the current court is going to create a "discrete and insular" minority comprising people who actually claim sex is *not* an immutable characteristic. The specter of *Bostock* haunts these cases, probably unnecessarily.[64] That case, decided under Title VI and involving employment discrimination, did not touch on natural physical differences between men and women or personal spaces. It is likely the Court will decide the cases on rational basis and affirm them, except on different grounds—the intimate inspection of private parts.

In *Chiles v. Salazar* the Court takes up the First Amendment in the medical context. That context, however, involves gender dysphoria. The question presented is "Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause."[65] Colorado passed a law called the Minor Conversion Therapy Law (MCTL). The MCTL prevents licensed social workers, therapists, counselors, and psychotherapists from engaging in conversion therapy (defined by the statute as practice or treatment aimed at changing the client's sexual orientation or gender identity) with clients under the age of 18. Chiles, a licensed counselor and practicing Christian, offers services that help her clients, as Chiles claims, "overcome," "reduce," or "eliminate" unwanted sexual attractions or disharmony. She challenged the MCTL. The Tenth Circuit held that Colorado's MCTL regulated professional conduct incidentally involving speech, thus not triggering strict scrutiny.[66]

This case represents an opportunity to strengthen free speech by preventing states from clamping down on it just because the speech comes from a licensed professional. A license should not alter a person's constitutional right to speak their mind according to their conscience. The Tenth Circuit's disposition of this case deepens a circuit split between the Eleventh and Third Circuits, which do not

[64] Bostock v. Clayton Cnty., 590 U.S. 644, 656 (2020).

[65] Petition for Writ of Certiorari, Chiles v. Salazar, No. 24-539 (Nov. 8, 2024), *cert. granted*, 145 S. Ct. 1328 (2025).

[66] Chiles v. Salazar, 116 F.4th 1178 (10th Cir. 2024).

treat counseling conversations as conduct, and the Ninth Circuit, which does.[67] It is likely to be highly controversial, as the LGBT community has not only had bad experiences with conversion therapy of this type but also a lot of success in having it criminalized. They may see it not as a free speech issue but one of animus and discrimination. The case may also have an impact on laws that prohibit telehealth or require doctor visits. If medicine is not being prescribed and the treatment is only talk, it may be difficult to defend those laws if *Chiles* turns out to be a strong win for professional free speech.

Finally, the issue of gender dysphoria in the military may come back to the Court this Term. In *United States v. Shilling*, the Court granted a stay against a district court's preliminary injunction against the military's ban on those with gender dysphoria in the military.[68] Seven current transgender members of the armed forces, along with one transgender person who would like to join the military and a nonprofit with similarly situated members, went to federal court to challenge the new policy. The lead plaintiff in the case, Commander Emily Shilling, has been a naval aviator for nearly two decades, and she estimates that the Navy has spent $20 million on her training. Whether this case gets to the Court this term may well turn on how many facts the parties wish to develop in district court as well as expert opinions. Whether or not the Court takes this one, the other three it has taken will be closely watched by the entire civil rights community.

IV. Voting Rights, Political Parties, Redistricting and Spending as Speech

The blockbuster, no holds barred, political and voting case of the year will be *Louisiana v. Catllais*. Not since Elbridge Gerry was redistricting Massachusetts has a district-drawing case been this anticipated. Not only was the case already contentious and portentous, but over the summer the Court asked the parties to brief a new issue. But let's lay the groundwork.

[67] NCLA had a case against California for a similar law that prevented doctors from recommending certain treatments for Covid-19 to their patients. After an injunction was entered the law was repealed. Hoeg v. Newsom, 728 F. Supp. 3d 1152, 1155 (E.D. Cal. 2024).

[68] *Shilling*, 221 L. Ed. 2d at 962.

In response to the 2020 census, Louisiana's legislature adopted a congressional map in 2022 that included only one majority-Black district out of the six allotted to the state, even though roughly one-third of the state's population is Black. A group of Black voters went to federal court, where they argued that the 2022 map violated Section 2 of the federal Voting Rights Act (VRA), which prohibits election practices that result in a denial or abridgement of the right to vote based on race, because it diluted the votes of Black residents. A federal district court threw out the 2022 map. It agreed with the voters that the map likely violated Section 2, and, for that reason, barred the state from using the map for congressional elections and instructed it to draw a new map with a second majority-Black district. The U.S. Court of Appeals for the 5th Circuit upheld that ruling and ordered Louisiana to draw a new map by January 15, 2024, or face the prospect of a trial, after which the district court could adopt a new map for the 2024 elections. In response, the Louisiana legislature enacted a new map. That map, known as S.B. 8, created a second majority-Black district—the 6th District—that stretches across Louisiana from Baton Rouge in the southeast corner of the state to Shreveport in the northwest corner. The adoption of S.B. 8 led to the lawsuit in this case, brought by a group of voters who describe themselves as "non-African American." They contended that the map was an unconstitutional racial gerrymander—that is, it sorted voters based primarily on their race. A three-judge federal district court agreed and barred the state from using the map in upcoming elections.[69]

The Supreme Court last year put the lower court's decision on hold, which allowed Louisiana to use the new map during the 2024 elections. Rep. Cleo Fields, who had been a member of Congress for two terms during the 1990s until his district was redrawn, was elected to represent the 6th District. Both the state and the Black voters who had challenged the 2022 map appealed the three-judge district court's ruling to the Supreme Court, which heard oral arguments in the case in March. Now it appears that the Justices will hear oral arguments once again in the fall, with a decision likely to follow sometime in 2026.

[69] Callais v. Landry, 732 F. Supp. 3d 574 (W.D. La. 2024).

The original QPs were: (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. On August 1, 2025, the Supreme Court directed the parties to address a question raised by the Appellees: "Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution."[70]

Before addressing the likely outcome, we should return to the Turtle Band of Chippewa Indians in North Dakota mentioned earlier. As noted, a stay of the Eighth Circuit's decision that Title 2 of the VRA does not provide for a private right of action even under 28 U.S.C. 1983. The QP was "[w]hether the Supreme Court should stay an appeals court mandate stating that private plaintiffs cannot rely on 42 U.S.C. § 1983 to file suit under Section 2 of the Voting Rights Act."[71] The Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and three Native American individuals brought this lawsuit in federal court in North Dakota against North Dakota's Secretary of State. They contended that a state legislative map adopted in 2021 diluted the voting power of Native Americans in violation of Section 2. The 2021 map had eliminated two of the three legislative districts in the northeastern part of North Dakota in which Native American voters had the ability to elect their own candidates. The District Court agreed that the 2021 map violated Section 2. The District Court gave the state just over a month to propose a new map that would correct the violation; when it did not do so, Judge Peter Welte instructed the state to adopt a map created by the plaintiffs. North Dakota used that map in the November 2024 elections, leading to the election of three Native American legislators. North Dakota appealed to the Eighth Circuit, which overturned the District Court's decision. The court of appeals ruled that private plaintiffs, like the tribes and the voters, cannot use federal civil rights laws to bring lawsuits alleging violations of Section 2. And under a 2023 decision by the same

[70] Louisiana v. Callais, No. 24-109, 2025 WL 2180226, at *1 (U.S. Aug. 1, 2025).

[71] *See* Application for Stay, Turtle Mountain Band of Chippewa Indians v. Howe, No. 25A62 (July 15, 2025).

court, the majority noted, private plaintiffs cannot bring a lawsuit directly under Section 2. After the full Eighth Circuit declined to reconsider the case, the plaintiffs filed a petition with SCOTUS to stay the Eighth Circuit's ruling. The plaintiffs argued that unless the court intervened, one of the plaintiffs—who was elected to the state's legislature in 2024—could become ineligible to serve because she does not live in the 2021 map's version of her district. Moreover, they added, if the Eighth Circuit's decision is allowed to stand, the plaintiffs will "face irreparable harm if a decidedly unlawful map governs the 2026 election." On July 16, Justice Kavanaugh granted their request for an administrative stay – an order temporarily blocking the implementation of the Eighth Circuit's decision to give the Justices time to consider the plaintiffs' request.

As this case demonstrates, there is a way the Supreme Court could avoid holding that the VRA's requirement of majority-minority districts is unconstitutional because it does not survive strict scrutiny. The Court could hold that neither Section 2 nor Section 1983 allows a private right of action. This would leave the VRA to be enforced by the Attorney General. But that would simply kick the can down the road until the Attorney General decided to bring a case under Section 2.

The conundrum is that the Court has gone very far in excising race as a consideration in legislation, whether it helps racial minorities or not.[72] The Voting Rights Act was passed at a time when nobody thought Whites would elect Blacks or that Blacks would elect Whites to protect their interests. Now, however, there are Black legislators elected by majority-White electorates.[73] And Black districts have elected White men to protect their interests.[74]

The long-term interpretation of this statute, passed when the overwhelming numbers of Americans considered themselves White, Black, or Native American, at a time when Asians, Hispanics, and biracial categories were statistical blips, is in flux. One possible way to brief this issue to preserve congressional intent is to note that the Fourteenth and Fifteenth Amendments were passed to overturn

[72] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

[73] See, e.g., Senator Tim Scott.

[74] See, e.g., Representative Steve Cohen.

Supreme Court precedent and put the enforcement of those amendments primarily in the hands of Congress—not the Courts.[75] It is likely that three votes exist, certainly Justice Thomas's, to strike down racial gerrymandering. Whether five exist to do so remains to be seen.

While not as earth shattering as a total rework of the VRA would be on redistricting, another closely watched election case is *National Republican Senatorial Committee v. FEC,* concerning the free speech rights on "coordinated expenditures" between political parties and candidates. The question is whether the limits on coordinated party expenditures under federal law[76] violate the First Amendment, either on their face or as applied to party spending in connection with "party coordinated communications" as defined in the Code of Federal Regulations.[77] This is yet another attempt to loosen the strictures of *Buckley v. Valeo*, the landmark case that allowed certain political spending as free speech and not prone to corruption.[78] The case that is most in the crosshairs is *Colorado II*.[79] The instant dispute was filed by the National Republican Congressional Committee (NRSC), then-Sen. J.D. Vance, and former Rep. Steve Chabot, who represented Ohio in the House of Representatives for more than two decades. The challengers contended that the law violates the First Amendment, and they argued that the *Colorado II* decision should no longer apply because the Supreme Court's later cases have "tightened the free-speech restrictions on campaign-finance regulations" while political fundraising and spending have also changed. The Sixth Circuit did not buy the argument, holding FECA's limits on coordinated campaign expenditures were not unconstitutional, either facially or as applied to plaintiffs' "party coordinated communications."[80] If SCOTUS used this as an

[75] Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit (2021).

[76] 52 U.S.C. § 30116.

[77] 11 C.F.R. § 109.37 (2006).

[78] Buckley v. Valeo, 424 U.S. 1, 16 (1976).

[79] Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 432 (2001).

[80] Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 391 (6th Cir. 2024).

opportunity to overturn *Colorado II*, the face of political advertising would be changed, as political parties would spend as much as they want or can to advertise on candidates' behalf and with the inputs of the candidates. Much of the political world now believes the parties have declined partly as a result of campaign finance laws and the inability to coordinate with the parties' candidates. And moreover, it is difficult to see the corruption that emerges from a party helping candidates running on its platform. For these reasons, the strong free speech bent of this Court may rework campaign finance law in advance of the 2028 election.

An even more minor case may have echoes of the aftermath of the 2016 election that may not sit well with some members of the Court. The perennial issue of standing to challenge election rules is before the Court again. An Illinois law requires the counting of mail-in ballots that arrive up to two weeks after Election Day so long as they are postmarked (or certified) by Election Day. Representative Michael Bost and two former presidential electors sued under the Constitution's elections and electors clauses, arguing that the extended ballot receipt deadline unlawfully extends federal election timing beyond what federal law allows.[81] They also invoked candidate-specific injuries, including campaign resource burdens and the alleged dilution of the "accurate vote tally." The Seventh Circuit held that the allegations in the plaintiffs' complaint were not sufficient to establish the injury necessary to confer them with standing.[82] Bost argues that the Seventh Circuit's decision created a circuit split. In support of this, he points to the Eighth Circuit's decision in *Carson v. Simon* (recognizing candidates' interest in accurate vote tallies) and precedents from the U.S. Court of Appeals for the Fifth Circuit like *Texas Democratic Party v. Benkiser* and *Republican National Committee v. Wetzel* (accepting campaign costs as a cognizable injury).[83] Whatever the outcome, it is probably a good idea to clarify these rules before the next presidential election.

[81] 2 U.S.C. § 7; 3 U.S.C. § 1.

[82] Bost v. Ill. State Bd. of Elections, 114 F.4th 634 (7th Cir. 2024).

[83] Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020); Tex. Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006); Republican Nat'l Comm. v. Wetzel, 120 F.4th 200 (5th Cir. 2024).

V. "Born in the U.S.A.": Birthright Citizenship

Last term in *Trump v. CASA*, the Court made law on the extent of equitable powers in the district courts to impose nationwide injunctions.[84] What it did not do is address whether birthright citizenship can be denied to the children of tourists or illegal aliens born in this country. The President issued an executive order stating that those categories of persons born in the U.S. would no longer be considered American citizens at birth.[85] Seizing on the Fourteenth Amendment's directive that only those persons born to parents in the United States "subject to the jurisdiction thereof" would be citizens, the EO denied citizenship papers to the children of visitors and illegal aliens. The breadth of the judicial hostility to this novel proposition can be measured by the fact that no court anywhere has endorsed the administration's position as lawful. In *Trump v. CASA*, the Supreme Court noted at the outset that three widely dispersed district courts had all enjoined the action.[86] As Justice Amy Coney Barrett relates, every appellate court affirmed the injunctions—all on likelihood of success on the merits.[87]

No wonder. Until the Trump era (2015-?) this was considered a settled question. *United States v. Wong Kim Ark* seemed to hold that the only persons born in the U.S. who are not "subject to the jurisdiction thereof" were foreign diplomats' children, those born on ships in port, and tribal members of the Indian sovereignties.[88] Congress adopted nearly identical language to that of the Fourteenth Amendment statutorily for citizenship.

Starting with Professor John Eastman of the Claremont Institute, a theory began to emerge that certain types of American-born people could be denied citizenship.[89] As the Trump era progressed, a "strange new respect" for like theories began to emerge from originalist and

[84] Trump v. CASA, Inc., 145 S. Ct. 2540 (2025).

[85] *Id.* at 2549.

[86] *Id.*

[87] *Id.*

[88] United States v. Wong Kim Ark, 169 U.S. 649, 681 (1898).

[89] John Eastman, *Birthright Citizenship Is Not Actually in the Constitution*, N.Y. Times (Dec. 22, 2015, 11:59 AM), https://www.nytimes.com/roomfordebate/2015/08/24/should-birthright-citizenship-be-abolished/birthright-citizenship-is-not-actually-in-the-constitution.

libertarian academics.[90] A prominent jurist with Supreme Court aspirations began to walk back his previous writings on the subject.[91]

Be that as it may, the judiciary has stood like a stone wall against this new theory, as the proceedings in *Trump v. CASA* demonstrate. We know without doubt that the three dissenters in *CASA*, Sotomayor, Kagan, and Jackson, will rule against the administration when the issue next emerges. That means only two other Justices are needed to thwart this executive action. I cannot imagine that Chief Justice Roberts, Justice Kavanaugh, or Justice Barrett will have any different views. Justices Thomas and Alito may harbor the belief that Congress could change the law on these categories of Americans under its authority over the Fourteenth Amendment, but they are not likely to hold that the President can do so through an EO.

Given that there appears no way to get a circuit split under current law and circumstances, or even a dissent, the Court does not have to take the case.[92] This is a high priority for the administration and, like tariffs, the S.G.'s hand may be forced to petition for *certiorari*. If this case is taken by the Court, it will be to rebuke the administration for breaking with all American jurisprudence on the issue since *Dred Scott*. If they do not take it, they will be doing the administration a favor.

VI. "Money, Money, Money": The Spending Clause and Budgeting.

In addition to *McMahon v. Doe*, which had the added issue of employee termination of civil service protected individuals, there are a host of cases running through the pipeline on whether and under

[90] Randy E. Barnett & Ilan Wurman, *Birthright Citizenship*, Volokh Conspiracy (Feb. 18, 2025, 11:21 AM), https://reason.com/volokh/2025/02/18/birthright-citizenship/.

[91] *Cf.* James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 The Green Bag 367, 367 (Summer 2006), https://www.gibsondunn.com/wp-content/uploads/documents/publications/Ho-DefiningAmerican.pdf; Josh Blackman, *An Interview with Judge James C. Ho*, Volokh Conspiracy (Nov. 11, 2024, 8:00 AM), https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho/.

[92] A week after U.S. District Judge Sorokin declined to narrow a nationwide injunction blocking Trump's birthright citizenship Executive Order, the First Circuit appears poised to rule against the President. *See* Chris Villani, *1st Circ. Doubtful Of Trump's Stance On Birthright Citizenship*, Law360 (Aug. 1, 2025, 7:26 PM), https://www.law360.com/articles/2372304/1st-circ-doubtful-of-trump-s-stance-on-birthright-citizenship.

what circumstances the executive can cut off spending to recipients of grant or other spending programs. The administration has hinted at taking a run at the impoundment cases and the Impoundment Control Act of 1974, passed during the Nixon presidency. There has been severe criticism of the various efforts of the executive's attempts not to spend money in the face of congressional direction to do so.[93] It is not clear, however, how it will get to the Supreme Court at this time. The President has actually used the Impoundment Control Act to rescind nine billion dollars of spending with congressional approval. This eliminates some USAID and PBS related cases issues. Currently Judge Royce Lamberth in the D.C. District Court has restored funds to Voice of America by injunction.[94] As discussed, the Supreme Court has allowed cuts to the Department of Education thus far.[95]

In *Department of Education v. California*, the Court stayed the lower court's grant of an injunction to plaintiffs against cutting off millions of dollars for Diversity, Equity, and Inclusion (D.E.I.) programs.[96] At issue in the case are two grant programs intended to address a nationwide shortage of teachers. The Department of Education canceled all but five of the 109 grants after reviews found "objectionable" diversity and equity training material in the recipient programs. Eight states, led by California, filed a lawsuit in federal court in Massachusetts in early March. They contended that universities and nonprofits in their states had received grants through the programs, and that the Department of Education had violated the federal law governing administrative agencies when it ended those grants. A federal district judge issued a temporary order that required the government to reinstate the grants that it had terminated in the states bringing the lawsuit. U.S. District Judge Myong Joun also prohibited the government from implementing other terminations in those states. The First Circuit declined to put the district court's order on hold while the government appealed, but it fast-tracked the

[93] Ilya Somin, *Trump's Attempt to Usurp Congress's Spending Power*, Volokh Conspiracy (Jan. 28, 2025, 5:22 PM), https://reason.com/volokh/2025/01/28/trumps-attempt-to-usurp-congresss-spending-power/.

[94] Widakuswara v. Lake, 779 F. Supp. 3d 10 (D.D.C. 2025).

[95] *McMahon,* 145 S. Ct. at 2643

[96] Dep't of Educ. v. California, 145 S. Ct. 966 (2025).

appeal itself.[97] This issue has the added fillip of whether D.E.I. programs violate the law or the Constitution, but the issue of unilateral halts to spending still lurks within the case.

Also somewhat related is the now perennial question of student loans. In *Department of Education v. Career Colleges & Schools of Texas*, the Court has taken the question of "Whether the court of appeals erred in holding that the Education Act does not permit the assessment of borrower defenses to repayment before default, in administrative proceedings, or on a group basis."[98] The Department of Education issued a regulation in 2022 that expanded the "borrower defense" rule, making it easier for student loan borrowers to seek loan discharges if they were misled or harmed by their schools. The rule introduced broader definitions of misconduct, allowed group claims, and created mechanisms for the Department to recoup funds from schools. The Career Colleges and Schools of Texas (CCST), representing for-profit institutions, challenged the rule in federal court, arguing it exceeded the Department's statutory authority and violated due process. The Fifth Circuit held that the plaintiff was likely to succeed on the merits, ordering a nationwide injunction against the rule.[99] This case is somewhat related to the Court's decision in *Biden v. Nebraska*, where it struck down a student loan forgiveness program under the Major Questions doctrine.

VII. Potpourri for $500, Alex: Low Key Cases for Liberty Lovers

There are a few cases that seem relatively minor but may stake out positions important to liberty. In *Landor v. Department of Corrections*, the Court will determine whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) provides for money damages against prison officials who violate it.[100] In this case, Rastafarian inmate Damon Landor alleges that he was handcuffed to a chair and two prison guards shaved his head causing him to break the "Nazarite Vow" not to cut hair commanded by his religion.

[97] California v. U.S. Dep't of Educ., 132 F.4th 92 (1st Cir. 2025).

[98] Petition for a Writ of Certiorari at i, Dep't of Educ. v. Career Colls. & Schs. of Tex., No. 24-413 (Oct. 10, 2024), *cert. granted sub nom.*, 145 S. Ct. 1039 (2025).

[99] Career Colls. & Schs. of Tex. v. Dep't of Educ., 98 F.4th 220 (5th Cir. 2024).

[100] Landor v. La. Dep't of Corrs. & Pub. Safety, No. 23-1197, 2025 WL 1727386 (U.S. June 23, 2025).

Noem v. Doe stayed a lower court's order that the Secretary of Homeland Security could not revoke a categorical grant of parole to more than half a million noncitizens from certain countries without a case-by-case adjudication.[101] If this reaches the Supreme Court again this Term it may clarify whether mass amnesties granted by one President can be revoked by another President in like manner, or if that grant created some kind of due process rights in the noncitizens in their status.

In *Villarreal v. Texas*, the Court will address a vexing question of whether prohibitions on counsel discussing a criminal defendant's testimony with him during an overnight recess are constitutional.[102] This prohibition has always struck me as problematic, but it is not clear how it will come out.

In *Case v. Montana,* the Court will determine a Fourth Amendment case.[103] The question is whether law enforcement can make a warrantless search of a home on less than probable cause to believe that an emergency is occurring, or whether the emergency-aid exception requires probable cause. There is concern that the exception may swallow the rule if not cabined by the Supreme Court.

Conclusion

I will conclude with what is unlikely to reach the Court this year. The TikTok ban. Last year the Court (over Cato's spirited objection) upheld the law mandating that TikTok could not be controlled by the Communist Party of China.[104] The President has refused to enforce this bipartisan law upheld 9-0 by the Supreme Court. Nonenforcement of law remains the most difficult problem to attack via appeals to the Supreme Court. As usual, however, the Supreme Court is going to be in the thick of current American social and political affairs. The administration's aggressive agenda on transgender issues, tariffs, and immigration issues, as well as its strong "unitary executive" bent will press the Court all Term and leave us all eagerly anticipating the first Monday in October.

[101] *Noem*, 145 S. Ct. at 1524.

[102] Villarreal v. Texas, 145 S. Ct. 1897 (2025).

[103] Case v. Montana, No. 24-624, 2025 WL 1549773 (U.S. June 2, 2025).

[104] TikTok Inc. v. Garland, 145 S. Ct. 57 (2025).