Judging the Court's Performance: There is Much More to Question than the Blockbusters

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INTRODUCTION

Most Americans judge the performance of the Supreme Court by their reaction to its blockbuster rulings, which this year included granting Donald Trump substantial immunity from criminal prosecution and overturning the 1984 decision that gave administrative agencies deference in interpreting their statutes.[1] Moreover, since John Roberts became Chief Justice in 2005, the Court has had an agenda, which it has been largely successful in advancing, that has eliminated the constitutional right to an abortion;[2]

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[1] *See* Trump v. United States, 603 U.S. 593, 595–97 (2024); Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[2] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

banned affirmative action in education;[3] elevated the rights of religious individuals over the nonsectarian interests of the states;[4] increased the power of the President[5] while reducing that of federal administrative agencies;[6] and undermined the Voting Rights Act and constitutional litigation designed to lessen the impact of racial and political gerrymandering[7]—to name just a few. To be sure, when Earl Warren was Chief Justice, the Court had its own rather different agenda. It set out to eliminate or at least substantially reduce racial discrimination;[8] provide additional protection for defendants in criminal cases;[9] end political gerrymandering;[10] and reestablish the wall between church and state.[11]

It is a fair question whether the Court, whose members are appointed for life, should have agendas at all, unlike our elected officials. But there is little question that the Court has often had an agenda, which has been largely made possible by the certiorari process that gives the Justices almost total freedom to decide which cases they wish to hear and, within each case, which questions they will or will not resolve. That function is very significant for the nonblockbuster cases that, each term, comprise a majority of its decisions. The question that this Essay asks is, how is the Court doing in its case selection, in choosing which questions to consider, and whether and how it decides those questions? It does not address normative questions, such as whether the decisions are well-reasoned, follow precedent, or produce results consistent with the values of our society. Rather, focusing on this past term, it examines nine cases that the Court decided—many of them unanimously—and asks some rather mundane questions. Did the decision produce a winner and a loser, or was the outcome still unclear? Did the Court reach a conclusion where the record was fully developed? Did the Court order full briefing and oral argument when it should have been clear that summary disposition would have been the better course? Did the Court grant review on one question while passing on another seemingly antecedent question that would have provided much needed guidance to the lower courts? If the Court decided a significant issue, did it finish the job or leave part of the case up in the air? The ultimate question that this Essay asks is

3 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023).

4 *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022).

5 *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020).

6 *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022).

7 *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 647–48 (2021).

8 *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

9 *See* Miranda v. Arizona, 384 U.S. 436, 439, 467–68 (1966).

10 *See* Reynolds v. Sims, 377 U.S. 533, 562, 566 (1964).

11 *See* Engel v. Vitale, 370 U.S. 421, 424–25, 436 (1962).

whether the Court is doing its job properly in the routine nonideological cases, as well as in some very significant cases, too.

In order to answer these questions, it is necessary to have a theory of the job of the Supreme Court in selecting which cases to hear and, within those cases, which questions to decide and on what record. The Court has often said that its main job is not error correction, although there are times when that appears to be the principal reason it took a case.[12] The Court's Rule 10 sets forth the discretionary criteria for a grant of certiorari, all of which apply only to "important" matters.[13] The most often invoked reason for granting review is a conflict among the circuit courts of appeals or between a circuit and a state's highest court, especially if the state is within the conflicting federal circuit[14]—although the Court does not always agree to hear circuit conflicts, even when parties on both sides seek review. The other bases—conflict with a decision of the Supreme Court, or where the court below "has decided an important question of federal law that has not been, but should be, settled by this Court"[15]—are even more open-ended. Moreover, the party seeking review must specify which questions it wishes the Court to hear.[16] However, the Court may—and often does—decide to consider fewer than all of them, it may rewrite the question, or it can pose a question of its own.[17] Put another way, it has complete freedom to decide what it wants to decide, and so it is fair to judge the Court's performance in light of its vast discretion at the front end.

In assessing the Court's performance, it is also important to recognize that the Court and the litigants—and perhaps even their lawyers—do not always have the same objectives in mind. Generally, the parties want a clear decision announcing that they won the case and are less interested in the overall development of the law. However, that is sometimes not the case where the litigation is seen as a test case, with other decisions expected to follow. The Court, on the other hand, is generally hopeful that it can issue decisions that will settle the law for interested persons beyond those in the specific case.[18] However, given the precedential effects of its rulings, the Court must be mindful of the impact that a decision will have on those not party to the litigation and, therefore, must be careful not to decide more than is necessary, especially when the circumstances of future cases may differ from the present one.

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12 *See* SUP. CT. R. 10; *see, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803).

13 SUP. CT. R. 10.

14 *See* SUP. CT. R. 10(a)-(b).

15 SUP. CT. R. 10(c).

16 SUP. CT. R. 14(1)(a).

17 *Id.*

18 *See* SUP. CT. R. 10.

Thus, the other question that this Essay addresses is whether the Court is doing a good job in striking an appropriate balance between its law-declaring and case-deciding functions. The answer is further complicated because, in almost all of the cases discussed in this Essay, there are different ways to debate whether the Court performed less than optimally. Thus, in some cases, the Court issued an opinion but did not answer the question of which side prevailed, although there were no apparent reasons why the case should not have been resolved. In others, the Court did not answer the question on which review was granted but decided it on other grounds that could have been the basis for denying review or for summary treatment with a brief explanation. In still others, the Court granted review on one question when there was another more significant issue that should have caused the Court to grant both, to deny both, or to grant only the one that it did not hear.

One further point about the cases discussed in this Essay. Most of them were unanimous or nearly unanimous decisions,[19] which raises the question of whether the price of obtaining consensus may have been to agree *not* to decide the actual dispute between the parties or a more significant question lurking in the case. In a few of the unanimous cases, there were sharp differences among the Justices as to the rationale for the agreed-upon result,[20] but the concerns expressed in this Essay are not the source of those differences.

Based on this relatively small sample, this Essay concludes there is a potentially serious question as to whether the Court is paying sufficient attention to the details of a number of cases that do not make headlines—and in some instances, those that do—both when review is granted and at the final disposition stage.

At a high level of generality, the problems that this Essay identifies have a common theme. Nonetheless, and recognizing some overlap, there are several subgroups of problems, and this Essay is organized around them: why didn't the Court decide the question presented; why did the Court take this question at all; why didn't the Court take another more significant question instead; why didn't the Court finish the job; and why didn't the Court seek further input before deciding a significant question.

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19 *See, e.g.*, *infra* notes 39–43 and accompanying text.

20 *See, e.g.*, *infra* notes 44–52 and accompanying text.

I. FAILURE TO DECIDE THE WINNER

A. Lindke v. Freed *and* O'Connor-Ratcliff v. Garnier

In *Lindke v. Freed*[21] and *O'Connor-Ratcliff v. Garnier*,[22] the Court agreed to decide whether public officials who use a private social media account for both personal uses and to communicate with their constituents are subject to the First Amendment when they decide to restrict access to their accounts. All of the Justices agreed that public officials could not limit access to certain disfavored individuals if the accounts were official, but could if they were private.[23] The two courts of appeals reached opposite conclusions on whether the First Amendment applied in nearly identical factual contexts in which the accounts were used for both purposes, and so it seemed certain that one decision would be affirmed and the other reversed.[24] But that is not what happened.[25]

In a unanimous decision written by Justice Amy Coney Barrett in *Lindke*, and a per curiam decision in *O'Connor-Ratcliff*, the Court vacated both rulings below and remanded them for further consideration in light of the Court's opinion.[26] Not only did the Court not decide whether the First Amendment applies when an official includes both kinds of materials on a regular basis, but the *Lindke* opinion also did not give any further guidance on how that question should be answered by the lower courts. Should courts decide which use predominates? If so, does a court count the number of tweets or number of words, and over what period(s) of time? Or should courts look at the subject matter of the messages that caused the particular dispute and the disfavored treatment? Should it matter if the plaintiff is suing for damages, despite a likely defense of qualified immunity, in which case focusing only on a single incident may be sensible? Or is she seeking an injunction to prevent the official from censoring her future posts, in which case a general rule might be preferable, at least in terms of administrability? The Court's ruling did not answer any of those questions, nor did it provide any other guidance that would clarify the law or help the lower courts determine the winner. And what makes it worse, the Court had previously dismissed a similar case involving the Twitter account of Donald Trump as

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21 601 U.S. 187 (2024).

22 601 U.S. 205 (2024) (per curiam).

23 *Lindke*, 601 U.S. at 201–02.

24 *See* Lindke v. Freed, 37 F.4th 1199, 1201 (6th Cir. 2022), *vacated and remanded*, 601 U.S. 187 (2024); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1163 (9th Cir. 2022), *abrogated by* Lindke v. Freed, 601 U.S. 187 (2024).

25 *See Lindke*, 601 U.S. at 204; *O'Connor-Ratcliff*, 601 U.S. at 208.

26 *Lindke*, 601 U.S. at 204; *O'Connor-Ratcliff*, 601 U.S. at 208.

moot after he was no longer President.[27] In sending these two cases back to the lower courts, the Court did not identify any facts that were in dispute or suggest that additional evidence was needed to answer the legal question presented.[28] It simply punted on the cases before it and did nothing to clarify the law in this area.[29]

B. Cantero v. Bank of America

Most banks that offer mortgages require the borrower to include in their monthly payments to the bank an amount that covers a portion of the real property taxes that the borrower will owe at various future dates.[30] The bank agrees to pay the homeowner's property taxes, and the advance payment assures that the bank has the funds in what is known as an escrow account to be able to do that.[31] Because the lenders have the use of the money paid into escrow before the taxes are due—and thus can loan it to others at a profit—New York has a law that requires banks and other lenders to pay the owner interest, at the rate of two percent, on the amount held in escrow.[32]

The Bank of America is a national bank, chartered under the National Bank Act, and it took the position that, as a national bank, the states lacked the power to require it to pay interest on the amount held in escrow as a matter of federal preemption.[33] It is agreed that there are some areas of law in which state regulation of national banks is prohibited and that there are other areas where states are free to pass laws of general applicability that national banks must follow.[34] When Bank of America refused to pay the interest mandated by New York law, two homeowners sued on behalf of a class of New Yorkers with Bank of America mortgages.[35]

Federal preemption of state banking law has been a subject of considerable dispute, so Congress in 2010 provided that courts should follow the decision in a specific Supreme Court case named in the statute.[36] On

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27 Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220–21 (2021).

28 *See Lindke*, 601 U.S. at 204; *O'Connor-Ratcliff*, 601 U.S. at 208.

29 On remand, the Sixth Circuit concluded that the case needed to be returned to the district court for further proceedings, including additional factfinding. Lindke v. Freed, 114 F.4th 812, 820 (6th Cir. 2024). The Sixth Circuit found clues in the Supreme Court opinion to suggest how to proceed, although none of what it directed the trial court to do was directly based on the Supreme Court's ruling. The Sixth Circuit did suggest that the answers to some of the questions raised in the text above would help resolve the underlying controversy.

30 Cantero v. Bank of Am., N.A., 602 U.S. 205, 212–13 (2024).

31 *See id.*

32 *See id.*

33 *See id.*

34 *See id.* at 213.

35 *See id.* at 212.

36 *See id.* at 213–14.

appeal from the district court's ruling dismissing the case, the Second Circuit affirmed.[37] In doing so, the appeals court primarily relied on cases that had been decided prior to the one specified in the statute, and the Supreme Court granted review to pass on that ruling.[38] In a unanimous opinion by Justice Brett Kavanaugh, the Court rejected the Second Circuit's preemption decision because it failed to follow Congress's directions.[39] The Court then described in some detail a number of its prior decisions, in addition to the case cited in the statute, and sent the case back to the lower courts to resolve the applicability of those cases to this case.[40]

Once again, there was no suggestion that there were facts that needed to be determined to answer what appears to be a purely legal question or that the record was lacking in any other respect.[41] The Court collected and described the statutes in all the relevant Supreme Court cases,[42] and all it had to do was decide on which side of the line the New York law fell. As a result, no matter which party wins on remand, the loser will be certain to ask the Court to resolve the same issue once again. Meanwhile, other banks and homeowners in other states with similar laws will remain in the same state of limbo. It is fair to ask, what price had to be paid for consensus?[43]

C. Muldrow v. City of St. Louis

In *Muldrow v. City of St. Louis*,[44] the Court decided the case by unanimously reversing the lower court, but it should have done much more to clarify the law and avoid significant continuing litigation in the lower courts. The plaintiff in *Muldrow* was a female police officer who was transferred to a different position within the City, but her pay and other material conditions of employment were unchanged.[45] The Eighth Circuit dismissed her complaint, finding that her injury was insufficient to state a claim under Title VII.[46] The Court, in an opinion by Justice Elena Kagan, unanimously reversed, but the majority opinion seemed to leave some room

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37 *Id.* at 212–13; *see* Cantero v. Bank of Am., N.A., 49 F.4th 121, 139–40 (2d Cir. 2022).

38 *See Cantero*, 602 U.S. at 213.

39 *See id.* at 221.

40 *See id.* at 217–21.

41 *See id.* at 221.

42 *See id.* at 217–21.

43 By contrast, there was consensus in *Trump v. Anderson* that the State of Colorado could not disqualify Donald Trump from appearing on the presidential ballot but not consensus on the basis for the ruling. *See* 601 U.S. 100, 117–19 (2024) (per curiam). But that ruling ended the case, unlike in *Cantero* and *Lindke*, and the need for future guidance was much less there because of the uniqueness of the circumstances of that case.

44 601 U.S. 346 (2024).

45 *Id.* at 350–53.

46 *Id.* at 352–53; *see* Muldrow v. City of St. Louis, 30 F.4th 680, 688 (8th Cir. 2022).

for an employer to prevail because she wrote that "[t]he transfer must have left her worse off, but need not have left her significantly so,"[47] leaving open the question of how to determine how much worse is "significant."

Justice Thomas thought that meant that an employee would prevail as long as the harm was "more than trifling,"[48] while Justice Alito just found the majority opinion "unhelpful."[49] As he read the majority's opinion, he saw "little if any substantive difference between the terminology the Court approves and the terminology it doesn't like. The predictable result of today's decision is that careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years."[50] Justice Kavanaugh concurred because he viewed *any* transfer—even from a company's office from Columbus to Cincinnati—for an impermissible reason, such as race or gender, to be a violation of the statute.[51] Although he disagreed with "the Court's new some-harm requirement," he stated, "I expect that the Court's approach and my preferred approach will land in the same place and lead to the same result in 99 out of 100 discriminatory-transfer cases, if not in all 100."[52]

Unlike some of the cases discussed in this Essay, the Court definitely decided that the lower court mistakenly dismissed the complaint, but it could not agree how much, if anything, was left with the "some-harm" requirement, however it might be stated.[53] But that left the lower courts in suspense for other cases less clear than this one. Moreover, unless there is some reason to doubt Justice Kavanaugh's "99 out of 100" conclusion,[54] the significant benefits to litigants and lower court judges from a clear rule should have enabled the Court to reach a consensus behind a rule that a transfer that is based on an impermissible reason violates Title VII—period.

II. WHY DID THEY HEAR THIS CASE?

A. DeVillier v. Texas

The State of Texas constructed a number of barriers on its highways, including a roughly three foot tall barrier along the highway median to act as a dam, preventing stormwater from covering the south side of one road so

47 *Muldrow*, 601 U.S. at 359.
48 *Id.* at 360 (Thomas, J., concurring in the judgment).
49 *Id.* at 362 (Alito, J., concurring in the judgment).
50 *Id.* at 363.
51 *Id.* 363–65 (Kavanaugh, J., concurring in the judgment).
52 *Id.* at 365.
53 *See id.* at 357–60 (majority opinion).
54 *Id.* at 364–65 (Kavanaugh, J., concurring in the judgment).

that the road could be used as a flood evacuation route.[55] However, the barriers caused adjacent property, including that of the petitioners in *DeVillier v. Texas*,[56] to be flooded and, according to the owners, made their land unusable.[57] They sued in Texas state courts alleging that the flooding constituted a taking of their property without just compensation, in violation of the United States and Texas Constitutions.[58] The State removed the cases to federal court on the ground that there was a federal question presented, and then it argued that the federal claims had to be dismissed because the State is not a proper defendant under 42 U.S.C. § 1983.[59] The Fifth Circuit agreed with the State, and the plaintiffs obtained review in the Supreme Court on the question of whether, apart from 42 U.S.C. § 1983, there is an independent federal takings claim that may be brought directly in federal court.[60]

After full briefing and oral argument, the Court did not decide the question presented or even discuss the arguments on both sides.[61] Instead, in another unanimous opinion, this one written by Justice Clarence Thomas, the Court concluded that it was unnecessary to reach the question that it agreed to decide because the plaintiffs' claims under Texas law were still before the federal courts under supplemental jurisdiction.[62] Moreover, because the takings claims were identical under federal and Texas law,[63] the answer to the question that the Court agreed to hear was academic. That conclusion is certainly correct, but it is also one that should have been obvious to the Justices and their law clerks at the certiorari stage. The plaintiffs may not have understood that their rights would be fully protected no matter how the issue was decided—or they may have wanted to make new takings law—but the right course for the Court was to deny review, perhaps with an accompanying statement explaining why it was unnecessary to decide the question that the plaintiffs had asked the Court to decide. Instead, the parties spent considerable time and money briefing the case, the grant of which prompted the filing of eleven amicus briefs, including one by the United States and another by a group of states,[64] and all nine Justices and their law clerks had to prepare for oral argument and issue a seven page opinion—

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55 DeVillier v. Texas, 601 U.S. 285, 288 (2024).

56 601 U.S. 285 (2024).

57 *Id.* at 288–89.

58 *Id.* at 289–90.

59 *See id.* at 290.

60 *See id.*; Devillier v. Texas, 53 F.4th 904 (5th Cir. 2023) (per curiam).

61 *See generally DeVillier*, 601 U.S. at 287.

62 *See id.* at 286, 292–93; 28 U.S.C. § 1367.

63 *See DeVillier*, 601 U.S. at 289–90.

64 *See Devillier v. Texas*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/devillier-v-texas [https://perma.cc/JT6V-NKNP].

including two photographs.[65] And worse, it used one of the sixty or so slots that could have been given to a case in which the law might have been clarified.[66]

B. Moyle v. United States

A similar "why did they take this case" occurred in *Moyle v. United States*.[67] There the Court granted review of a preemption case in which the Biden Administration sought to enjoin Idaho's abortion restriction law as applied to women whose health was at significant risk as a result of complications in their pregnancies but who were not yet at the point where the risk appeared to threaten their lives.[68] The Government argued that the Emergency Medical and Treatment Act ("EMTALA")[69] requires hospitals to treat the women even if the best treatment option to safeguard the woman's health is to perform an otherwise unlawful abortion under Idaho law.[70] A district judge had issued a preliminary injunction, which was not stayed on appeal.[71] Before the Ninth Circuit could hear the case, the Supreme Court granted Idaho's request for a stay and also agreed to hear the case on the merits of the temporary injunction.[72]

Both in the briefs and at the oral argument, it became clear that there were many unanswered questions about how the two laws would intersect in practice, no doubt because Idaho's law was passed only after the Court's ruling in *Dobbs v. Jackson Women's Health Organization*[73] and because complications can arise in many different ways.[74] And so, when the decision was handed down, the Court's one sentence order dismissed the writ as improvidently granted and was accompanied by three concurring and one dissenting opinion.[75] The result is that the case is back in the Ninth Circuit. But if, as it appears, the problem is that the record is unclear, that problem will not go away in the appeals court because it will still have to decide what to do in the face of considerable factual and perhaps state law legal

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65 *DeVillier*, 601 U.S. at 285, 289 figs.1 & 2.

66 *See 2023-2024 Term*, OYEZ, https://www.oyez.org/cases/2023 [https://perma.cc/Q7B3-NTU3].

67 603 U.S. 324 (2024).

68 *Id.* at 326.

69 42 U.S.C. § 1395dd.

70 *Moyle*, 603 U.S. at 326–31 (Kagan, J., concurring).

71 *Id.* at 326.

72 *Id.* at 326–29.

73 597 U.S. 215 (2022).

74 *See Moyle*, 603 U.S. at 331–38 (Barrett, J., concurring); *id.* at 345–68 (Alito, J., dissenting).

75 Moyle v. United States, 603 U.S. 324 (2024).

uncertainty.[76] But at least the Supreme Court avoided making a final pronouncement, even as to preliminary relief, and gave the lower courts the opportunity to explore these questions in the first instance.[77]

The question remains, should the Court have taken the case in the first instance, assuming that the Court had decided not to block the order originally issued by the district court granting the United States preliminary relief? The Court has been subject to criticism for granting or overturning lower court stays on the basis of the motion papers alone,[78] so perhaps it took the case to fend off that objection. In support of the Government's position on the merits, there are examples of women who sought to bear children but whose complications endangered their health—and quite possibly their lives—and who could not get the hospital in Idaho to perform the treatment that their doctors reasonably believed was necessary.[79] On the other side, the United States sought to stop Idaho's entire abortion law as it applied to emergency treatment in hospitals.[80] There was also no data on how many pregnancies would be covered by the federal law,[81] which could argue for or against full review at this time, as well as the stay. All in all, a difficult call for the Court, but given the lateness in the term when the Court was deciding whether to hear the case and the preference that should exist for having an appellate decision to review, it would have been better not to have granted full review. That said, at least the Court made the wiser call in the end, and perhaps it will profit from the experience. And it was surely wiser not to have replicated the forays into unbriefed waters as it did in the Trump immunity ruling discussed below.

C. Warner Chappell Music, Inc. v. Nealy

Another wrong question case involved the federal copyright statute which contains a limitation period of three years.[82] It mainly impacts how much in damages a plaintiff can recover. There are two questions relating to that period: does the period start to run from the time that a violation occurred or from the time that the violation was discovered—or reasonably should have been discovered? The second question follows the first: assuming that

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76 *See id.* at 326 (Kagan, J., concurring); *id.* at 336 (Barrett, J., concurring).

77 *Id.* at 332–36 (Barrett, J., concurring).

78 *E.g.*, Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1 (2022).

79 Brief of Respondent United States at 15–16, *Moyle*, 603 U.S. 324 (No. 23-726). *Cf.* Mary D. Fan, *Abortion Ally or Abettor: Accomplice and Conspiracy Liability After* Dobbs, 93 GEO. WASH. L. REV. 1, 2–4 (2025) (discussing barriers to obtaining out-of-state treatment).

80 *See* Brief of Respondent United States, *supra* note 79, at 12–14.

81 *See Moyle*, 603 U.S. at 327–31 (Kagan, J., concurring).

82 17 U.S.C. § 507(b).

the action is timely filed, does the statute limit to three years the claims that the plaintiff can reach back to recover? The matter is further complicated because most copyright infringements are not a one-time event but continue over long periods of time. To illustrate the second question, *D* begins to infringe *P*'s copyright in 2010 and continues to infringe until 2020. *P* discovers the infringement in 2018 and sues in 2019. For what years may *P* seek damages?

The case raising these issues was *Warner Chappell Music, Inc. v. Nealy*,[83] and the question on which the Court granted review, and gave an answer, was the second issue—the issue of reach back. Without dissent on this issue, Justice Kagan concluded that, assuming that the case was timely filed under the discovery approach, there was no limit on how far back the plaintiff could go.[84] Therefore, in the illustration above, because the discovery was fewer than three years before suit was filed, *P* could go all the way back to 2010 to seek damages. Had the decision come out the other way, only those infringements occurring in 2016 or thereafter would be actionable.

What makes the case of interest for this Essay is that Justice Neil Gorsuch, joined by Justices Thomas and Alito, dissented because the Court "sidesteps the logically antecedent question whether the Act has room for [the discovery] rule."[85] They concluded that there is no legal basis for a discovery rule under this statute, and that once the Court eventually reaches that conclusion, it "promises soon enough to make anything we might say today about the rule's operational details a dead letter."[86] Whether the dissenters are correct that the proper reading of the limitation provisions excludes a discovery or that, if they are right, the Court's decision in this case will become irrelevant, they surely have a point that the two issues are closely related. This strongly suggests hearing them together, or perhaps hearing the discovery issue first would have been the preferable way to handle these questions.

Justice Gorsuch observed that it "may be understandable" why the Court granted only the reach back question because "none of the parties before us questioned the application of a discovery rule in proceedings below, but joined issue only over how it should work."[87] He acknowledged that the Court was permitted to follow the lead of the parties, but

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83 601 U.S. 366 (2024).

84 *Id.* at 371–73.

85 *Id.* at 374 (Gorsuch, J., dissenting).

86 *Id.*

87 *Id.* at 376.

> [n]othing requires us to play along with these particular parties and expound on the details of a rule of law that they may assume but very likely does not exist . . . . [R]ather than devote our time to this case, I would have dismissed it as improvidently granted and awaited another squarely presenting the question whether the Copyright Act authorizes the discovery rule.[88]

But there was another option available, suggested in the petition for a writ of certiorari, that observed that "this case would allow the Court to reach the [discovery] question if it were so inclined, and it is encompassed within the question presented [below]."[89] Respondent, of course, objected because the discovery issue had not been raised below,[90] to which petitioners replied by arguing that they "were not obligated to raise a futile challenge to the binding circuit precedent holding that the discovery rule applies, and the question presented in the petition simply affords the Court the opportunity to consider the applicability of the discovery rule at the merits stage if it so chooses."[91] Moreover, when the Court ultimately granted review, it revised the question presented to make the limitations question applicable "under the discovery accrual"[92] rule applied by the circuit courts, thereby specifically rejecting the effort by petitioners to have the Court pass on that rule as well. Given that history, it is hard to understand how the decision ended up with the three dissenters objecting to the exclusion of the discovery rule question—except for the possibility that no one grasped the interrelation between the two questions before full briefing and oral argument.[93]

One other point: because the Court granted only the reach back question, there was no reason to compare its impact to that of a no-discovery rule. The application of the reach back rule was simple: if the filing was timely, the plaintiff could go back forever, not just three years. But suppose the discovery rule were rejected. Because some, but not much, of the infringement took place within three years of filing the complaint, if the Court applied the reach back rule in that case, the effect would be the same as if the discovery rule had been adopted. And if the results were identical, that would suggest that there was something amiss with the analysis. Therefore, whether the dissenters are correct that the validity of the discovery

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88 *Id.* at 374–75.

89 Petition for a Writ of Certiorari at 14 n.*, *Warner Chappell Music, Inc.*, 601 U.S. 366 (No. 22-1078).

90 *See* Brief in Opposition at 18, *Warner Chappell Music, Inc.*, 601 U.S. 366 (No. 22-1078).

91 Reply Brief for the Petitioners at 2, *Warner Chappell Music, Inc.*, 601 U.S. 336 (No. 22-1078).

92 Petition for a Writ of Certiorari, *supra* note 89, at 9.

93 *Warner Chappell Music, Inc.*, 601 U.S. at 374–76 (Gorsuch, J., dissenting).

rule is "logically antecedent"[94] to a plaintiff's ability to reach back beyond the three-year limitations period, the questions are so closely related that it would have been advisable to consider them together, not just for efficiency purposes but because the answer to one would surely inform the answer to the other. Considering how the parties discussed that relationship at the petition stage, and the fact that the Court rewrote the question presented, it is difficult to understand why the Justices did not include the validity of the discovery rule once they decided to take the case.

D. Sheetz v. County of El Dorado

In *Sheetz v. County of El Dorado*,[95] the brief in opposition made clear that the issue that petitioner alleged—creating a conflict with other appellate courts—was not the real issue in the case.[96] Yet the Court granted the petition and decided a question on which there was no real dispute without answering the question on which the case would eventually turn.[97]

The petitioner wished "to build a small, prefabricated home on his residential parcel of land . . . . [For the permit,] he had to pay a [$23,420] fee to mitigate local traffic congestion."[98] According to the petition, the lower courts rejected petitioner's suit for a refund on the ground that the fee was imposed by the legislature, not an administrative agency.[99] In an opinion by Justice Barrett, with which all Justices concurred, the Court rejected that distinction.[100] In their concurrence, Justices Kavanaugh, Kagan, and Jackson pointed out that the question that the Court "today explicitly declines to decide—whether 'a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development'" was the real issue in the case.[101] In his separate concurrence, Justice Gorsuch would have answered that question with a resounding yes, for "how could it [be otherwise]?"[102]

The fact that a decision on the issue framed by petitioner would not advance this case at all was readily apparent before review was granted. The introduction to respondent's brief in opposition quoted petitioner's question

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94 *Id.* at 374.

95 601 U.S. 267 (2024).

96 Opposition to Petitioner's Petition for Writ of Certiorari at 23–24, *Sheetz*, 601 U.S. 267 (No. 22-1074).

97 *See Sheetz*, 601 U.S. at 273–80.

98 *Id.* at 270.

99 *See* Petition for Writ of Certiorari at 9–11, 23–24, *Sheetz*, 601 U.S. 267 (No. 22-1074).

100 *Sheetz*, 601 U.S. at 267–69.

101 *Id.* at 284 (Kavanaugh, J., concurring).

102 *Id.* at 281–83 (Gorsuch, J., concurring).

presented and then stated, "that is not what this case is about."[103] The opposition then acknowledged that some courts had adopted the legislative-administrative distinction but asserted that the California courts had not done so here.[104] It then directed the Court to what are essentially the issues identified in the concurring opinions: "The question presented in the Petition ignores the fact that the legislatively mandated, formulaic, nondiscretionary and broadly-applied fees [were found by the courts below] to fully satisfy the 'reasonable relationship' test for legislative exactions . . . ."[105] It then added that "[n]o case cited in the Petition or in any of the *amici curiae* briefs, or found by Respondent, has ever held that impact fees that meet the reasonable relationship test for legislative exactions in the MFA must also satisfy the *Nollan/Dolan* test,"[106] which is what the petitioner argued.[107] In other words, the opposition clearly identified the issues that the concurrences concluded will remain open after this decision and pointed out why the question presented by the petition was both irrelevant in this case and why petitioner would not prevail even if the question presented were decided in its favor. Thus, even though the Court unanimously answered the question presented in petitioner's favor, it should not have granted review of that question or at least added a second question that remains undecided.[108]

E. Macquarie Infrastructure Corp. v. Moab Partners, L.P.

In *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*,[109] Justice Sotomayor framed the question as follows:

> The question in this case is whether the failure to disclose information required by Item 303 can support a private action under Rule 10b–5(b), even if the failure does not render any "statements

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103 Opposition to Petitioner's Petition for Writ of Certiorari, *supra* note 96, at 4.

104 *Id.* at 25–28.

105 *Id.* at 4–5.

106 *Id.* at 5.

107 Petition for Writ of Certiorari, *supra* note 99, at 4–6.

108 Respondent's merits brief followed the same approach, restating the question as follows: "Whether the parcel-specific 'essential nexus' and 'rough proportionality' standard from *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to impact fees charged to property developers based on a legislatively determined schedule or formula." Brief for Respondent at i, Sheetz v. County of El Dorado, 601 U.S. 267 (2024) (No. 22-1074). Its opening pages made clear that the real dispute was whether *Nollan* and *Dolan* applied only to "ad-hoc exactions" but did not apply to "longstanding government authority to enact programmatic land use regulations and to charge fees to groups of similarly situated property owners" and did not "prevent governments from using predictive judgments about community growth to impose fees on categories of similar properties." *Id.* at 1–2.

109 601 U.S. 257 (2024).

> made" misleading. The Court holds that it cannot. Pure omissions are not actionable under Rule 10b–5(b).[110]

That may have been how the Second Circuit ruled,[111] but respondents were quite clear that the failure to provide additional information required by Item 303 alone was not the basis of their claim.[112] Rather, according to respondents' merits brief, the company made affirmative statements in 2012, but never disowned, that it "was moving away from" No. 6 fuel oil even though "[t]he opposite was true" and the company "remained secretly reliant on" No. 6 fuel oil.[113] Respondents further alleged that the company knew that its 2012 statements regarding moving away from No. 6 oil were no longer true when it failed to include adverse current information in Item 303 in the filing at issue in this case.[114] When the facts were revealed, the price of the company's stock took a sharp 41% decline.[115]

On the merits, there might be an argument that the prior statements were too remote in time to trigger an Item 303 obligation or that information about No. 6 fuel oil might have been otherwise available from other sources, but the Supreme Court did not decide the case on that basis. It ruled unanimously only that "Rule 10b–5(b) does not proscribe pure omissions,"[116] and does not apply when the company "says nothing."[117] However, that did not resolve the actual controversy in this case, because the plaintiff alleged that prior specific statements from the defendant made the failure to update them "misleading half-truths," which the Court confirmed are actionable under Rule 10b-5(b).[118] The case was then "remanded for further proceedings consistent with this opinion"[119] after a sidetrack of over a year in which the Court decided a question of law but left the parties essentially where they had been after the decision of the court of appeals.[120]

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110 *Id.* at 259–60.

111 *See id.* at 262; Moab Partners, L.P. v. Macquarie Infrastructure Corp., No. 21-2524, 2022 WL 17815767, at *1 (2d Cir. Dec. 20, 2022).

112 *See* Brief of Respondent Moab Partners, L.P. at 13–14, *Macquarie Infrastructure Corp.*, 601 U.S. 257 (No. 22-1165).

113 *See id.* at 8.

114 *See id.*

115 *See id.* at 10; *see also Macquarie Infrastructure Corp.*, 601 U.S. at 261.

116 *Macquarie Infrastructure Corp.*, 601 U.S. at 264.

117 *Id.* at 263–64.

118 *Id.* at 266.

119 *Id.*

120 The conclusion to petitioner's merits reply brief shows where the real differences are between the parties and how the Court's decision, addressing only the question granted, did not reach them:

> Moab and its amici do not and cannot defend the Second Circuit's analysis. Instead, they devote most of their attention to quarreling with the question presented. They insist that this case does not, after all, involve a *pure omission*—that is, silence in the

III. DECIDING A CASE WITHOUT AN ADEQUATE ADVERSARY PRESENTATION

A. Trump v. United States

Unlike most of the cases discussed above, *Trump v. United States*,[121] the election interference criminal case, was one for which no aspect should have been overlooked. There is much to say about that decision, but this Essay's focus is on this question: once the Court concluded that former President Trump was entitled to immunity with respect to some conduct alleged in the indictment, how much or how little should the Court have said given that the lower courts had not examined the specifics of the indictment when they ruled on the immunity issue?

Trump's position was that he was entitled to full immunity, while Special Counsel Jack Smith argued that he should receive none.[122] After Trump appealed an adverse district court ruling, Smith asked the Supreme Court to take the case immediately, hoping to bypass the court of appeals in an effort to bring the case to trial before the election.[123] The Court declined, and the case was argued and decided quickly in the appeals court, which rejected Trump's absolute immunity defense.[124] That court also directed that the mandate issue in four business days so that the trial could commence promptly.[125] Trump then sought a stay of the mandate, which the Court treated as a petition for certiorari, which it granted.[126] Significantly, it rewrote Trump's two questions, converting them into one: Whether, and if so to what extent, does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office?[127]

This Essay is about various missteps by the Court, in this instance, the Court's extensive discussion on the merits of the scope of absolute

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face of an SEC disclosure requirement in the absence of an otherwise-misleading statement.

Reply Brief for Petitioners at 1, *Macquarie Infrastructure Corp.*, 601 U.S. 257 (No. 22-1165).

121 603 U.S. 593 (2024).

122 *See* Brief for the United States at 4–5, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

123 Response in Opposition to Application for a Stay of the Mandate of the D.C. Circuit at 1–3, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939) [hereinafter Response in Opposition].

124 United States v. Trump, 91 F.4th 1173, 1208 (D.C. Cir. 2024).

125 Application for a Stay of the D.C. Circuit's Mandate Pending the Filing of a Petition for Writ of Certiorari at 7–8, app. at 58A, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939) [hereinafter Application for a Stay].

126 *Id.* at 1; Trump v. United States, 144 S. Ct. 1027 (2024) (mem.) [hereinafter Certiorari Grant].

127 Certiorari Grant, *supra* note 126.

presidential immunity as applied to this indictment when the lower court did not address that specific issue.[128] Before turning to that question, it is important to understand how the manner in which the parties responded—or did not respond—to the restated question presented may have placed the Court in the position in which it made significant rulings concerning absolute presidential immunity without deciding all the immunity issues that the Court identified in this case, without an adequate adversary presentation on the issues it did decide.

The revision to the questions presented should have set off an alarm in the Special Counsel's Office because, at least to this reader, it was a clear signal that the Court was not inclined to buy the "no immunity at all" position adopted below and in Smith's opposition.[129] It also suggested, although perhaps less clearly, that the Court was not likely to buy Trump's "get out of jail free" card. Instead, the "if so and to what extent" language strongly implied that the Court was going to focus on the specific allegations in the indictment and particularly on what Trump labeled the "official" acts for which he was criminally charged.[130]

In the opening pages of his stay application and in his merits brief, Trump reframed five separate parts of the indictment as "official" acts for which he was charged, which he argued were a violation of the principles laid down in the civil damages immunity decision in *Nixon v. Fitzgerald*.[131] His position was that there was absolute immunity for all of them because they fell within "the outer perimeter"[132] of the President's constitutional duties and, because those allegations relating to official acts were so pervasive, the indictment must be dismissed entirely.[133] Trump's merits brief was mainly devoted to establishing that the entire case should be dismissed on absolute immunity grounds, with only his final argument responding to the "to what extent" portion of the Court's reframed question presented.[134] Even then, Trump embraced the *Fitzgerald* standard but made no effort to

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128 Trump v. United States, 603 U.S. 593, 612–14 (2024).

129 *See generally* United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024).

130 *See* Certiorari Grant, *supra* note 126.

131 *See* Application for a Stay, *supra* note 125, at 4–6; Brief of Petitioner President Donald J. Trump at 4–5, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939); *see also generally* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

132 Brief of Petitioner President Donald J. Trump, *supra* note 131, at 4–5.

133 The Government's opposition discussed the indictment generally but never challenged Trump's contention that at least those parts that his application described in its opening section were official acts. Response in Opposition, *supra* note 123, at 4–5. Instead, the opposition supported the broad no immunity ruling and suggested "that, whatever the rule in other contexts not presented here, no immunity attaches to a President's commission of federal crimes to subvert the electoral process." *Id.* at 21 n.7.

134 *See* Brief of Petitioner President Donald J. Trump, *supra* note 131, at 37–40.

justify his claims that most of what the indictment alleged were official acts or how they fell within the outer perimeter of his official responsibilities.[135]

Trump's brief did suggest an alternative: "[I]f the Court concludes that criminal immunity exists generally, but requires further factfinding as to specifics of this case, it should remand to the lower courts to find any necessary facts and to apply that doctrine in the first instance."[136] He recognized that no court has addressed whether the various kinds of conduct alleged in the indictment constitute official acts or lie within the "outer perimeter"[137] of Presidential duties.[138] Accordingly, Trump argued that if the indictment was not dismissed, as it should be, the Court should remand the case to the lower courts to apply the doctrine in the first instance.[139]

Despite the restated question presented, the Government largely continued down the same path that it had followed from the outset: Trump has no immunity, but if there are a few places where immunity might be proper, that is a matter for the trial judge as part of her evidentiary rulings and instructions to the jury.[140] At no place did the Government's brief argue that the specific allegations that Trump contended involved official acts did not fall within the outer perimeter of his duties.[141] Rather, it contended that there is no immunity for the conduct at issue here, "efforts to subvert an election in violation of the term-of-office clause of Article II and the constitutional process for electing the President" and that "the private conduct that the indictment alleges is sufficient to support the charges."[142] Trump's reply maintained that all the overt acts with which Trump was charged are official conduct for which he has immunity.[143] It also repeated his request, never joined by the Government, that if the indictment is not dismissed, the Court "should remand to address whether each act in the indictment is shielded by immunity, with evidence if necessary, before any further proceedings."[144]

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135 *Id.* at 41–42.

136 *Id.* at 44.

137 *Id.* at 4–5.

138 *See* Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

139 Brief of Petitioner President Donald J. Trump, *supra* note 131, at 4–5.

140 Brief for the United States, *supra* note 122, at 46.

141 *See generally id.*

142 *Id.* at 8; *see id.* at 47 ("That petitioner also engaged in official conduct that was intertwined with his private means of attaining the conspiracy's aim, should not immunize *all* of his conduct. No valid claim of blanket immunity should attach to a non-immune conspiracy committed with private actors through private conduct to obtain a private end simply because a former President also used official powers to further the conspiracy."(internal citation omitted)).

143 Reply Brief of Petitioner President Donald J. Trump at 22, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

144 *Id.* at 24.

The majority opinion by Chief Justice Roberts did not do what either party urged. It did not order the district court to dismiss the indictment nor did it find no immunity.[145] Those rulings are not the focus of this Essay, which discusses how Chief Justice Roberts parsed the indictment under his view of presidential immunity. First, he divided possible immunity in two parts, the first one involving duties of the President that are exclusive and for which immunity is absolute, with no exceptions.[146] According to Chief Justice Roberts, these duties include the power of the pardon as well as the ability to appoint and remove judges and executive branch officers.[147] According to the Chief Justice, also within this impregnable category are the President's role as Commander-in-Chief and his control over foreign affairs.[148] Coupled with the Court's ruling that immunity cannot be overcome by alleging unlawful motives,[149] these sweeping conclusions, suggested by neither party, are a major victory for an unaccountable President.[150]

The Court also included in this absolute category the following allegations characterized by Trump in his application for a stay: the indictment alleges that President Trump communicated with the Acting Attorney General and officials at the U.S. Department of Justice—which he oversaw as an integral part of his official duties as chief executive—about investigating suspected election crimes and irregularities, and possibly appointing a new Acting Attorney General.[151] Neither party briefed the argument that the duty of the President regarding law enforcement—let alone state laws, such as the Georgia laws at issue in this allegation—is exclusive. And this duty is surely different from powers expressly set forth in the Constitution, such as the powers to issue pardons and to appoint federal officers.

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145 *See Trump*, 603 U.S. at 641–42.

146 *Id.* at 606–09.

147 *Id.* at 606–07.

148 *Id.*

149 *Id.* at 616–17.

150 An extended discussion of the merits of these conclusions is beyond the scope of this Essay, but one small point illustrates how unjustifiably expansive they are. The Impeachment Clause of Article II, Section 4, specifically includes Treason and Bribery as a basis for impeachment, and the Impeachment Judgment Clause in Article I, Section 3, Clause 7, provides that after an impeachment concludes, the official is "subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7. If the majority is correct, then charges of bribery for appointing an individual to a federal judgeship or to obtain a pardon would nonetheless have to be dismissed on immunity grounds, as would almost anything else that a President does for which someone might pay him a bribe. The same is true for treason, which almost certainly would have been committed when the President was acting as commander-in-chief or engaging in foreign affairs.

151 *See* Application for a Stay, *supra* note 125, at 5.

The Court next dealt with the allegations regarding Trump's efforts to persuade Vice President Michael Pence to reject the election certifications from several states, the effect of which would be to make Trump the winner of the election or at least to delay the final determination.[152] The Court concluded that the issue of whether there is immunity is a close one and so remanded it for consideration by the district court,[153] as Trump had suggested for all these specific immunity issues. Despite the unanswered question of what factors are relevant to that determination, at least the remand gave the parties—especially the United States—an opportunity to brief the specific factual and legal matters that will bear on this, as well as any other allegation that the former President argues involves official conduct.

Although one can understand the Court's frustration at the parties' unwillingness in their briefs to focus on the question that the Court reframed as applied to this indictment, it should have been clear to the Court that some remand for further proceedings on the immunity question would be necessary. Indeed, at the oral argument, the Justices asked repeated questions of both sides on whether particular conduct was official or private.[154] So, in theory, but for the Court's calendar, the Court could also have asked for supplementary briefing before it made its decision. Or it could have decided all the applications of immunity, as it did for the Department of Justice allegations, which at least would have the benefit of consistency within the same opinion. The choice was not easy, but it is very hard to defend the mixed option of deciding some immunity issues but not others that the majority selected, especially given the stakes not only for this case but for all future Presidents and the federal criminal law.[155]

B. Thornell v. Jones

A similar "remand or decide" issue was presented to the Court in *Thornell v. Jones*.[156] All nine Justices agreed that the Ninth Circuit had applied the wrong standard to the prisoner's ineffective assistance of counsel claim.[157] Justice Alito, writing for a six-Justice majority, proceeded to review

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152 *See Trump*, 603 U.S. at 618–22.

153 *Id.* at 641–42.

154 *See* Transcript of Oral Argument at 14–16, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf [https://perma.cc/7NVF-87CJ].

155 The Court could also have been less cryptic in its directions to the parties and specifically asked them to brief which allegations in the indictment, if any, fell within the official duties of the former President, such that he was entitled to immunity for conduct alleged concerning them.

156 *See* 602 U.S. 154 (2024).

157 *Id.*

the record and reject the claim on the merits, concluding that the new evidence would not have affected the determination that the defendant would still have received a death sentence even if the new evidence had been available at the time of the original trial.[158] In her dissent, limited to the majority's decision to reweigh the evidence itself, Justice Sotomayor, joined by Justice Kagan, noted that the "record in this case is complex, contested, and thousands of pages long."[159] The dissent then quoted from the line of cases that the Court often invokes when it chooses to order a remand: "It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance. . . . '[W]e are a court of review, not first view.'"[160] As further support, the dissenters observed that remand should be the remedy "when, as here, the majority in the first instance parses a complex record containing contested medical diagnoses and disputed allegations of abuse and trauma."[161]

Compare this outcome with that in *Trump v. United States*, where the record was undisputed, and the immunity defense specific to the indictment had not been briefed, yet the Court decided some questions—such as allegations relating to the Department of Justice investigation in Georgia—but left other questions for remand.[162] There was no need for an immediate decision in *Thornell*, as the prisoner had been on death row for thirty years,[163] although the majority may have been reluctant to send the case back to the Ninth Circuit as this was the second reversal of that court in this case.[164] Still, it does not seem too much to ask the Court to be consistent on this "not first view" position, especially when these two cases were argued in the same April sitting and decided a month apart.

IV. FINISHING THE JOB

In *SEC v. Jarkesy*,[165] the Court granted review of three constitutional rulings by the Fifth Circuit that set aside the agency's order which imposed injunctive relief against the defendants and also ordered them to pay civil penalties and disgorge the profits that they made from what the Securities Exchange Commission ("SEC") concluded were unlawful activities.[166] The

158 *Id.* at 165–69.

159 *Id.* at 172 (Sotomayor, J., dissenting).

160 *Id.* (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

161 *Id.*

162 Trump v. United States, 603 U.S. 593, 624–31.

163 Joint Appendix at 7, 14, *Thornell*, 602 U.S. 154 (No. 22-982).

164 *Thornell*, 602 U.S. at 170–71; Jones v. Ryan, 583 F.3d 626 (9th Cir. 2009), *vacated*, 563 U.S. 932 (2011) (mem.).

165 603 U.S. 109 (2024).

166 *Id.* at 119.

Court's divided six-three decision, in an opinion authored by the Chief Justice, held that the SEC could not seek civil penalties in an administrative proceeding but had to sue in federal court to obtain that relief, where the defendants are entitled to a jury trial under the Seventh Amendment.[167]

The Fifth Circuit decided that there were two other constitutional flaws in the SEC's decision.[168] The Court granted review on them as well. These constitutional issues were fully briefed and the subject of many amicus briefs.[169] The Court did not pass on those issues because it appears to believe that its ruling mooted out the other bases for the decision below.[170] However, that is not correct. The second ground relied on by the Fifth Circuit is that the statute that gives the SEC an unconstrained choice between bringing the case in court or before the agency is an unconstitutional delegation of legislative authority.[171] That ruling remains in place and is an even more potent sword to wield against the SEC because its effect is to preclude the agency from bringing a case in *either* forum. Moreover, that decision applies not only to the SEC's claim for civil penalties against Jarkesy but also to the agency's efforts to stop unlawful conduct through various forms of injunctive relief against *anyone* whose case can be brought in the Fifth Circuit.[172] Other circuits may choose to follow the decision, and it is also likely to be applied in the Fifth Circuit to other agencies that have a similar option.

The Court also declined to pass on the third constitutional flaw found by the Fifth Circuit: that the limit on removing administrative law judges ("ALJs")—except for cause—violated the power of the President to take care that the laws are faithfully executed,[173] based on recent decisions such as *Seila Law LLC v. Consumer Financial Protection Bureau*[174] and *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[175] Had the

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167 *See Jarkesy*, 603 U.S. at 124. The Author was counsel of record on a law professors' amicus brief in *Jarkesy* that supported the constitutionality of the SEC's powers that were at issue in the case and also supported the limitation on for-cause removal of administrative law judges that the Court did not decide. Brief of Amici Curiae Administrative Law Scholars in Support of Petitioner, *Jarkesy*, 603 U.S. 109 (No. 22-859).

168 *Jarkesy*, 603 U.S. at 119; *see* Jarkesy v. SEC, 34 F.4th 446, 459–63 (5th Cir. 2022).

169 *See Securities and Exchange Commission v. Jarkesy*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/securities-and-exchange-commission-v-jarkesy [https://perma.cc/3PDP-6KQK].

170 *Jarkesy*, 603 U.S. at 119–21.

171 *Id.* at 119.

172 Jarkesy v. SEC, 34 F.4th 446, 459 n.9 (5th Cir. 2022) (citing case law to state that alternative holdings are treated as binding precedent, which means that they can be overturned only by the full court sitting en banc).

173 *Jarkesy*, 603 U.S. at 119.

174 591 U.S. 197 (2020).

175 561 U.S. 477 (2010).

majority chosen to address this conclusion, and assuming that it rejected the undue delegation claim, it had several options. It could have ruled that, because the agency proceeding included a request for civil penalties that was unconstitutional, the whole case had to be dismissed—but could be filed again without that defect. Second, it could have taken the opposite position and remanded the case for further proceedings.[176] Or it could also have decided the ALJ issue, since it was recurring, not just in cases before the SEC but also those before many other agencies. Instead, it said nothing but simply affirmed the ruling below.[177]

Where does that leave *Jarkesy* and the law regarding removals of ALJs? Putting aside the delegation issue, and with nothing but an affirmance from the Supreme Court, the Fifth Circuit is unlikely to do anything in this case about the ALJ issue. The SEC, on the other hand, would not be barred from starting new proceedings against Jarkesy, either in the district court, where it can presumably obtain all the relief that it seeks, or in an agency proceeding, where it is precluded from asking for civil penalties. But, in an agency proceeding, it can obtain full injunctive relief and presumably—but not certainly—an order of disgorgement,[178] which is a form of restitution not currently thought to be subject to the Seventh Amendment. If it seeks to proceed administratively, Jarkesy will almost certainly run to district court in the Fifth Circuit, as will almost any other SEC defendant. The SEC will rely on the Court's recent decision in *Axon Enterprise, Inc. v. FTC*[179] for the proposition that "structural" flaws in an agency's proceeding—an unconstitutional ALJ in this case—can be reviewed without awaiting a final adverse ruling.[180] Because the case can be filed in the Fifth Circuit, the SEC will almost certainly lose because of the *Jarkesy* precedent. Finally, defendants in proceedings involving other agencies, such as the Federal Trade Commission, Federal Communications Commission, and Commodity Futures Trading Commission, will have the same ALJ arguments available to them. At the very least, the Court's failure to finish the job in *Jarkesy*, where the ALJ issues were fully briefed and the question directly presented, will result in significantly more litigation and uncertainty for private parties and many administrative agencies.

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176 The Fifth Circuit had been equivocal on the effect of its ALJ ruling on the underlying judgment, and so a remand might have been justified for that reason. *See Jarkesy*, 34 F.4th at 465–66.

177 The dissent said nothing on this aspect of the majority's decision or on the delegation issue. *See* SEC v. Jarkesy, 604 U.S. 109 (2024).

178 JOSHUA T. LOBERT, CONG. RSCH. SERV., LSB10409, *LIU V. SEC*: THE SUPREME COURT TO CONSIDER WHETHER DISGORGEMENT IS AN EQUITABLE REMEDY IN SEC ENFORCEMENT ACTIONS 1 (2020) (defining order of disgorgement).

179 598 U.S. 175 (2023).

180 *Id.*

CONCLUSION

What should Court watchers make of these cases? They comprise only about 23% of one term's docket, and this term might be an aberration.[181] Even accepting the criticisms, the failures are not all the same, except at a very high level of generality: substantive disagreements aside, do they say more than that the Court is not doing its job properly? Nor are the problems identical. Some are focused on the front end—not granting the "right" question—while others are evident at the back end, where the Court issued an opinion filled with a discussion of the law but did not actually decide the case in front of them. In still others, it left too much or too little for remand, doing so in an inconsistent manner. But with all the writings on what the Court is doing well or badly in the big cases, perhaps it is worth reminding the Court of what it is doing—or not doing—in a sample of the "other" cases among the sixty or so it is now deciding every term, and stress that these cases are a vital part of its job—and which appear to require some further attention by the Court.

181 *2022 Term Supreme Court Statistics*, 137 HARV. L. REV. 490, 502 (2023).