A Review of Significant Supreme Court Decisions of the 2022-23 Term

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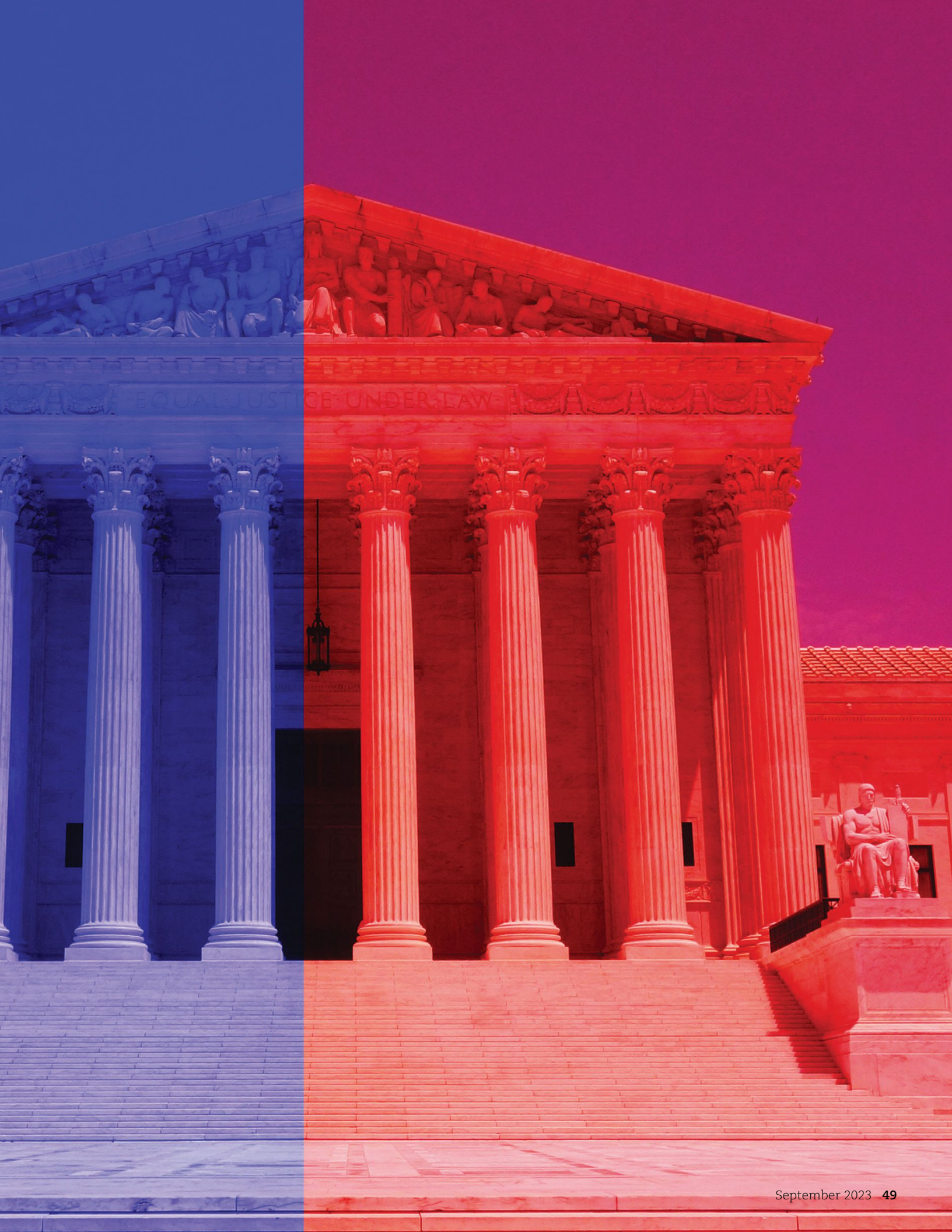
Two years ago, the review of the marquee cases from the 2020-2021 Supreme Court term included legally significant cases, but few can probably recall them by name or impact. Last year, a shift toward a conservative majority led to cases that not only changed the law—sometimes dramatically—but also lit up internet forums and newspaper front pages for weeks. The reversal of *Roe v. Wade* has, even a year later, continued to shape political conversations.

The recap last year predicted that one of the most significant long-term changes did not directly concern the decisions themselves but the sharp decline in public confidence in the Court. Support for and confidence in the Court had sagged to the lowest point recorded since Gallup began tracking the number. (Support has dropped even further since then.)[1]

The 2022-2023 term produced important decisions with decidedly conservative bents on hot button topics. The most important are summarized below. But lawyers interested in the long-term will also pay attention to news about the lack of a code of ethics in the Supreme Court. Each week produces another news cycle about justices' accepting benefits without disclosures or recusals. As one senior district judge wrote in a *New York Times* opinion piece:

> The recent descriptions of the behavior of some of our justices and particularly their attempts to defend their con-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> duct have not just raised my eyebrows; they've raised the whole top of my head. Lavish, no-cost vacations? Hypertechnical arguments about how a free private airplane flight is a kind of facility? A justice's spouse prominently involved in advocating on issues before the court without the justice's recusal? Repeated omissions in mandatory financial disclosure statements brushed under the rug as inadvertent? A justice's taxpayer-financed staff reportedly helping to promote her books? Private school tuition for a justice's family member covered by a wealthy benefactor? Wow.[2]

Whatever happens—either self-imposed by the Court itself or imposed on it by Congress—might have implications on which justices are able to hear cases and will likely lead to a change in public reaction to the Court, either stanching the loss of public confidence or hastening the slide. Lawyers should carefully follow the discussion of high court ethics in 2023-2024.

While Congress and the Court consider possible ethics reforms, the Court moves along with its regular resolution of legally, politically and culturally important cases. All its opinions are, by definition, important, but five stood out among the rest for both lawyers and laypeople.

Affirmative action is unconstitutional

Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (6-3)

The most widely anticipated case of the last term was a challenge to the affirmative action programs. The 40-page majority opinion was followed by nearly 200 pages of concurring and dissenting views. The Court ruled that race-based preferences in college admissions programs violated the Equal Protection Clause. While racial diversity had earlier been ruled to be a compelling interest of a state, the use of race had to have an endpoint. Absent any expected endpoint, the Court would not defer to academic freedom to achieve that compelling interest and ended race-based affirmative action in higher education.

The Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws."[3] The main goal of the Fourteenth Amendment is to eliminate racial discrimination, and "[e]liminating racial discrimination means eliminating all of it."[4] Therefore, exceptions have been severely hard to come by using a "strict scrutiny" analysis that asks (1) if the use of race would serve a compelling state interest and (2) if the use of race was necessary to achieve that interest.

In *Bakke v. Board of Regents*, the Court had ruled that a state interest existed not in racial diversity *per se*, but in the educational benefits that flow *from* that diversity. Race could be used on a limited basis, and only as a "plus" to an application, in a flexible approach according to Justice Powell. Harvard, filing as an amicus, gave as an example that having a Black student in the mix at Harvard would benefit the student body in the same way that having a farm boy from Idaho would, but that having (another) Bostonian would not. In other words, racial diversity would be a form of diversity where the variety, not the race of the student, would lead to the benefit. Years later, in *Grutter v. Bollinger*, the Court squarely approved of Justice Powell's approach in *Bakke*, but one additional requirement was added: at some point, the use of race must end.

Returning to the recent case, the Court found the admissions programs failed strict scrutiny review. First, the benefits from diversity were so amorphous (e.g., training future leaders and producing engaged citizens) that no court could ever measure whether they were being achieved. Second, the schools could not link their means to achieving the benefits. Next, race was being used as a negative; admissions is a zero-sum game where any plus award from having a characteristic by one applicant is necessarily a negative for anyone who does not have that characteristic.[5]

The Court saved most of its analysis for its final fault with the programs: They had no endpoint.[6] Although the Court in *Grutter* had mentioned a 25-year window (which would have closed in 2028), the Court saw no end in sight to the sort of affirmative action *Bakke* produced. With no reason to think the race-conscious admissions programs would ever run their course, the Court took matters into its own hands and ruled that race could not be a factor in admissions.

While affirmative action programs were given a severe blow, it was not fatal. As Chief Justice Roberts put it, "Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life."[7] Immediately after the decision, some advocates began planning challenges to other race-conscious preferences while those on the opposite side began thinking of new ways to achieve the same racial diversity using race-neutral proxies. Litigation is sure to continue as the sides fight about the limits of Chief Justice Robert's life preserver line. As one Harvard law professor predicted, "We're going to be fighting about this for the next 30 years."[8]

Employers face a higher threshold for not accommodating religion

Groff v. DeJoy, 143 S. Ct. 2279 (2023) (9-0)

Although most of the significant cases during the last two years have been decided by a 6-3 vote, the entire Court occasionally agrees even on typically controversial matters involving religion. In *Groff*, the Court had to decide just what an employer needs to show to justify its refusal to accommodate a worker's religion: a *de minimis* burden or something more? The Court unanimously agreed that a *de minimis* burden was not right and

that, instead, a substantial burden was needed.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate workers' religious practices unless doing so would impose an "undue hardship on the conduct of the employer's business."[9] Nearly fifty years ago, the Court issued its opinion in *Trans World Airlines, Inc. v. Hardison*[10] and used the phrase "*de minimis*" in one sentence about the meaning of "hardship." Ever since, lower courts have used that single instance to allow employers to deny accommodations for even extremely low-burden reasons.

The Third Circuit was one of those courts when it heard an appeal by Gerald Groff. Groff is an Evangelical Christian who does not believe in transporting worldly goods on Sunday. His job with the United States Postal Service was ideal because mail was not delivered on Sundays. But, in 2013, the USPS started delivering packages for Amazon on Sundays. Because Groff did not have enough seniority to avoid being scheduled for Sunday work, he quit.

Groff argued that the USPS could have accommodated his Sabbath by having other workers do the Sunday deliveries. The Third Circuit looked to *Hardison*'s use of "*de minimis*" to find that almost any burden was enough to refuse an accommodation. *Hardison* had also involved a worker who was also expected to work on the Sabbath, and after finding that various work-arounds would not suffice, the Court wrote, in a frequently cited sentence, that "[t]o require [the employer] to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[11]

In *Groff*, the Court stressed that the intention of *Hardison* had not been to define the standard at such a low level. In fact, in contrast to the "fleeting" use of "*de minimis*," three times in *Hardison*, the Court had also used language indicating a much higher standard of "substantial" burden. Requiring a "substantial" burden gave the words of Title VII their plain meaning. The Court did not define "substantial" in detail, explaining that instead of searching for a "favored synonym," it was enough to instruct lower courts to account for all the relevant factors including the practical impact of an accommodation.[12]

The Court did take advantage of the case to address two other points. First, the burden must be on the conduct of the employer's business, not on coworkers *per se*; a burden on coworkers might result in sufficient interference with the employer's business, but the burden on the coworkers was not itself enough. Second, an employer must do more than simply assess the particular accommodation being sought but must more broadly consider other options to try to accommodate the worker.

Corporations' exposure to forum shopping expanded

***Mallory v. Norfolk S. Ry.*, 143 S. Ct. 2028 (2023) (4-1-4)**

One of the most important

cases from the recent term escaped almost all popular publicity, but lawyers—especially those in the statehouse—need to be aware of it. In *Mallory v. Norfolk Southern Railway*, the Court ruled that a state statute making a corporation subject to suit in a state based only on its registration in that state was permissible.

The case was filed in Pennsylvania, but none of the facts had anything to do with Pennsylvania. Robert Mallory worked as a mechanic for the Norfolk Southern Railway in Virginia and Ohio, spraying boxcar pipes with asbestos and handing chemicals in the paint shop. Additionally, he was exposed to carcinogens while demolishing train cars.

When he developed cancer, he sued the railroad in Pennsylvania even though he resided in Virginia. His complaint said that he had been exposed to the cancer-causing materials in Virginia and in Ohio. And, the defendant was headquartered and incorporated in Virginia. Nothing connected the lawsuit to Pennsylvania, but a Pennsylvania statute made businesses operating there register. More importantly, the same law made registrants agree to appear in Pennsylvania courts on "any cause of action" against them.

Historically, courts have had limited reach that ended at the borders of a state. But, in a system the Court described as "tag jurisdiction," a court could grab hold of jurisdiction over a person if the person were tagged—that is, caught by a process server—while physically in the state, even temporarily.[13] States passed laws requiring corporations wanting to enjoy the benefits of doing business there to agree to be subject to certain suits as a trade-off.

In 1917, the Court had upheld a similar exercise of jurisdiction in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*[14] That case had permitted an Arizona company whose property was damaged in Colorado to sue a Pennsylvania company in Missouri based on a Missouri law specifically about insurance companies. In last term's case, Norfolk Southern tried to avoid the clear precedent from 1917 by differently interpreting more recent cases, but the Court rejected each as overblown. Instead, what the Court had announced in 1917 still applied, even outside the context of a state's laws about foreign insurers. As long as a state conditioned doing in-state business on agreeing to general jurisdiction (that is, jurisdiction not tied to the specifics of the underlying wrong), the Due Process Clause of the Fourteenth Amendment was not violated by exercising the breadth of jurisdiction to which the defendant had consented.

South Carolina does not have a statute like Pennsylvania's, and courts cannot subject foreign corporations to general jurisdiction here based on nothing more than filing with the secretary of state. At least some states will likely amend their jurisdictional laws to expand their state courts' reach over foreign corporations. It is too early to know if South Carolina

will join them, but savvy plaintiff's lawyers in South Carolina should begin researching other possible venues if other states do amend their own laws.

Free speech trumps anti-discrimination law

303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023)

The change in the Court's make-up over the last several years was highlighted in a case arising from Colorado that involved commercial providers of speech-related services to same-sex couples getting married. Five years ago, the Court ruled narrowly in another Colorado case that a state agency had been unfairly hostile to the religious beliefs of a cake maker who refused to decorate a wedding cake celebrating a same-sex wedding.[15] The Court did not, however, tackle which interest had to yield when a state's interest in protecting same-sex couples' rights conflicted with a sincerely held religious belief. Indeed, the Court did not even address whether decorating a cake would be reviewed as free speech at all.

That first Colorado case was decided by a seven-vote majority on an issue which avoided some constitutional difficulties. Since then, Justice Kennedy retired (replaced with Justice Kavanaugh) and Justice Ginsburg died (replaced with Justice Coney Barrett). When a very similar case arose a second time, the Court did not shy away from the meatier issues and ruled in favor of the First Amendment rights of the service provider.

Lorie Smith is a web designer who wanted to expand her business to include creating websites about weddings, but she claimed that providing those services to celebrate same-sex weddings was against her religious beliefs. A Colorado law barred discrimination on sexual orientation and other statutorily enumerated traits, and she challenged it before even starting to provide the service at all.

Colorado and Smith stipulated to many facts including that she would provide services to same-sex couples *as long as* she did not have to express a sentiment against her religious beliefs; she opposed the message, but not the customer. Both sides agreed that her beliefs were sincerely held, and both sides agreed that her services resulted in expressive, original and customized content that would be connected with her as its creator.[16]

The majority began by pointing to the stipulations as clearly leading to the conclusion that Smith's services would be pure speech and that it would be *her* speech. Next, the Court highlighted earlier cases that had permitted discrimination based on sexual orientation such as allowing a St. Patrick's Day parade in Boston to exclude gay participants[17] and allowing the Boy Scouts to exclude a gay scoutmaster.[18]

The dissent suggested the majority opinion was the first step on a slippery slope that could end with "Whites Only" signs in businesses. The majority repeatedly relied on the agreement of the parties to find that, while "what

qualifies as expressive activity protected by the First Amendment" might be challenging in many cases, *303 Creative, LLC* was not a close call. The majority also gave its own slippery slope, tilted in the other direction but leading to an equally bad outcome: "[G]overnments could force 'an unwilling Muslim movie director to make a film with a Zionist message,' they could compel 'an atheist muralist to accept a commission celebrating Evangelical zeal,' and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages."[19]

The opinions seemed to be missing each other's point. For the majority, all that was being decided was a case involving what everyone agreed had been First Amendment speech and not the workaday provision of fungible goods. According to the dissent, there would be no stopping businesses from recasting their services as expressive and taking advantage of a loophole that swallowed the rule. Neither side quite answered the opposing views, and so the scope of the decision will have to be fleshed out in future cases. For example, would selling a package of balloons for use at a same-sex wedding be covered by the ruling? What if someone not only sold the balloons as goods but also the service of inflating them? What if he were also asked to tie them into shapes? What if the shape were a heart? What if the heart were made from rainbow-colored balloons? The Court offered nothing to help decide if any (all?) of those refusals could be defended by the First Amendment.

Race may be considered in redistricting

***Allen v. Milligan*, 143 S. Ct. 1487 (2023) (5-4)**

With new census data in hand, Alabama created a new map of its congressional districts. While 27% of the state's population is Black, the state concentrated most of those Black voters into a single district and spread the remainder at low levels through the other six. Challengers won under the Voting Rights Act, arguing that the effect of the redistricting would be racially impermissible. Alabama took the case to the Supreme Court where it not only defended its plan under the existing interpretation of the VRA, it also sought a wholesale rethinking of the VRA which would have eliminated any consideration of race in the redistricting, regardless of the effects.

In *City of Mobile v. Bolden*,[20] the Court had ruled in 1980 that the VRA outlawed voting practices *motivated* by racial discrimination, but not those that have only a discriminatory *effect*. Congress reacted with a compromise amendment to the VRA that opened the door to considering the effects of voting changes but also included a specific warning that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their

proportion in the population."[21]

The Court responded in 1986 with a new analysis in *Thornburg v. Gingles*.[22] First, the minority group must be sufficiently large and geographically compact to be a majority in a new district and elect its preferred member. Second, the group must be politically cohesive enough to even have a preferred candidate to support. Third, race must at least plausibly account for the conditions being challenged. Lastly, the court considers the totality of the circumstances in a review of the facts and history of the specific locality.

The Court in the new Alabama contest worked through the *Gingles* test and ruled none of the lower court's findings was clearly erroneous. Then, the Court turned to the real issue: Alabama sought to "remake" the Court's approach by adopting a "race-neutral benchmark"—the average number of majority-minority districts based on millions of options drawn by race-blind computers programmed to consider only traditional districting factors.[23] According to Alabama, "only" if deviations from such a map could be explained by racial discrimination would they fail.

The Court addressed several practical reasons it was rejecting Alabama's invitation to reinvent VRA analysis. For example, many examples proved that adhering to *Gingles* would not result in automatic racial proportionality. Additionally, difficulty in distinguishing permissible race-consciousness and impermissible race-motivation was not enough to overrule *Gingles*. Next, while the number of computer-drawn maps offered by Alabama seemed large (30,000 and 2,000,000), the Court pointed out that the number of other maps that were *not* drawn was so much larger (at least in the "trillion trillions") that the state's offering was "not many at all." Throughout its opinion, the Court returned to the unbroken chain of cases applying the VRA with race-awareness to redistricting and refused to overturn them.[24]

After oral arguments, observers predicted a win for Alabama (and a sharp setback for the VRA), but Chief Justice Roberts and Justice Kavanaugh joined the three liberal justices for a surprise victory for the challengers. The Court observed that Congress could change the VRA if it were unsatisfied with the Court's long history of interpreting, but given the political divide in Congress, any change to the law seems highly unlikely. Thus, racial effects of redistricting continue to be a large part of VRA analysis.

Conclusion

This term, the Supreme Court issued only 58 opinions, down 10% from the historic low of just last term. Still, what the Court lacked in volume, it surely made up for in significance. The new conservative bloc secured 6-3 outcomes in groundbreaking cases involving race, religion and speech to name only a few. But the political division of the Court, although still extremely important, weakened perhaps some. Last year's summary of the most important cases pointed out that each one of the cases had been decided by a predictable 6-3 vote of the same justices. But, in a development that few observers would have predicted a year ago, some opinions from the 2022-2023 term garnered support from individual members of the conservative majority to produce unexpected 5-4 outcomes with the liberal wing in the majorities.

The politics of the Court will remain in sharp focus in Congress over ethics issues and term-limits. Will those congressional efforts produce reforms? What would reforms look like? And will the Court itself find common ground on important issues (or at least restrain itself from rocking the boat too much)? No one yet knows, and until October, the Court is in recess.

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Endnotes

[1] https://news.gallup.com/poll/4732/supreme-court.aspx
[2] Michael Posner, "A Federal Judge Asks: Does the Supreme Court Realize How Bad It Smells?," New York Times, July 16, 2023, at SR-4 (available at https://www.nytimes.com/2023/07/14/opinion/supreme-court-ethics.html?searchResultPosition=1).
[3] U.S. Const. amend. XIV, § 1.
[4] *Students for Fair Admission, Inc.*, 143 S. Ct. at 2161.
[5] *Id.* at 2166-70.
[6] *Id.* at 2170.
[7] *Id.* at 2176.
[8] Nina Totenberg, "Supreme Court guts affirmative action, effectively ending race-conscious admissions," https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision.
[9] 42 U.S.C. § 2000e(j).
[10] 432 U.S. 63, 84 (1977).
[11] *Id.*
[12] *Groff*, 143 S. Ct. at 2294-95.
[13] *Mallory*, 143 S. Ct. at 2034.
[14] 243 U. S. 93 (1917).
[15] *Masterpiece Cakeshop v. Col. Civil Rights Comm'n*, 584 U.S. ___ (2018).
[16] *303 Creative LLC*, 143 S. Ct. at 2309-10.
[17] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995).
[18] *Boy Scouts of Am. v. Dale*, 530 U. S. 640 (2000).
[19] *303 Creative LLC*, 143 S. Ct. at 2314.
[20] 446 U.S. 55 (1980).
[21] 52 U.S.C. § 10301.
[22] 478 U. S. 30 (1986).
[23] *Allen*, 143 S. Ct. at 1506.
[24] *Id.* at 1507-17.