

# NAACA NEWS

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## FROM THE PRESIDENT'S DESK

**JOE ANCLIEN, Staff Attorney**  
**U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT**

I'll let you in on an embarrassing little secret about being president: the hardest part for me is writing this column.

We have ourselves a very stable, well-run little organization. The site-selection committee researches the locations for our next conference, and in my experience, prepares such thorough and thoughtful reports that it is simple for the board to pick the best option. The education committee works extremely hard to devise a full three-day program with interesting topics and compelling speakers. The membership committee keeps boosting our numbers; the social committee makes sure we all have a good time at the conference; the



website committee (i.e., Mac McCallum) . . . runs the website; and the publications committee keeps us connected and informed. And, critically, our executive directors steer us through the day to day, considering issues

from the picayune (need to keep that adobe subscription up to date!) to the vital (are we meeting our room requirements for the hotel?), and everything in between (how would you like to have the t-shirt reception in a church?). “Many hands make light work” perhaps understates just how hard all these hands are working, but the basic point is true: every year, a lot of people pitch in to keep things running smoothly. And really, this column is the one thing I have to do all on my own!

*(President's Desk continued on page 2)*



*In affiliation with*

(President's Column continued from page 1)

That also brings me to the main point I would like to stress: if you are able to, please volunteer for something! If you are one of the people who volunteers every year: thank you, keep it up! And if you have not done so in the past, dip your toe in! There is a committee for every person, no matter how much or little time you have to offer. Each committee is responsible for making decisions that determine the quality of our next year, so by volunteering, you can make a real difference in what we do. You also get to meet other NAACA folks. NAACA people are all kind and friendly, but it is easier to get to know someone when you're working shoulder to shoulder (even if it's virtually!). Once you meet your other committee members, you'll meet the people they know, and before you know it, you'll know all sorts of people. Who knows, you might end up president!

**Join a Committee!**

*“Each committee is responsible for making decisions that determine the quality of our next year, so by volunteering, you can make a real difference in what we do.”*

*See page 14 to learn more about NAACA's committees.*

With that, I'd like to thank all the people who have contributed so much this year. I won't name names, or else this column would double in length. But if you've served on a committee, been on the board, or, of course, executive directed, I'm talking about you. I am extremely grateful to you all. You've done so much, so well, that writing a 450-word column is my biggest challenge.

### 2023-2024 NAACA Board Nominations

The Nominations Committee (Phaedra Kalicki, Martha Newcomb, and Christine Djalleta) recommends the following slate of officers and directors for NAACA for 2023-2024:

- President: [Kyle McLaughlin](#), CA4
- Vice President: [Mark O'Brien](#), CA4
- Secretary: [Brenda Roberts](#), Nevada Court of Appeals
- Treasurer: [Stephanie Paine](#)\*, Virginia Court of Appeals (elected in 2022 to a two-year term)
- Immediate Past President: [Joe Anclien](#)\*, CA3
- Director: [Jennifer McCarthy](#), Virginia Supreme Court (nominated for a two-year term)
- Director: [Timothy Gorde](#), CA4 (nominated for a two-year term)
- Director: [Sally Bassett](#), Supreme Court of Nevada (nominated to serve final year of Brenda Roberts' two-year term)
- Director: [Frank Gibbard](#)\*, CA10 (elected in 2022 to a two-year term)

\*The starred positions are the ones not subject to an election of the membership at this time.

## NAACA BOARD OF DIRECTORS

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THIRD CIRCUIT  
U.S. COURT OF APPEALS

**KYLE McLAUGHLIN**  
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**CHRISTINE DJALLETA**  
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**BRENDA ROBERTS**  
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## EVERDAY IS FUNDAY IN PITTSBURGH (MESSAGE FROM THE SOCIAL CHAIR)

MARTHA NEWCOMB, Chief Staff Attorney  
RHODE ISLAND SUPREME COURT

In just a few days, many of us will get together in Pittsburgh for what is one of the best educational experiences going! But NAACA's not all about work and brain power. We like to exercise our social intelligence as well. As in past years, this year's conference will feature several social events where we can reconnect with old friends and meet new ones.

The first one is the opening night reception, which will be held at the hotel immediately following the registration period. It runs from 6 pm to 8 pm. It's a great way to kick off the conference. This year the Social Committee is reprising the Bingo card icebreaker that we did last year. It's easy. It's fun. And it's a great way to learn about how interesting some of your fellow staff attorneys are. (Let me just say there are some unusual hobbies and notable accomplishments in this group!) So, come prepared to mix and mingle, and perhaps to reveal a bit about yourself as you learn about your fellow appellate court attorneys. (Be assured there's no pressure if you don't want to participate. It's low key.)

The next social event is the annual T-shirt lottery to be held at a reception on Wednesday night, from 6 pm to 8 pm. NAACA's directors, John Tucker and Mark Zanchelli, scoped out the venue for this reception a couple of years ago and have assured me that it's amazing. It's a former church that has been converted into a brewery. If you want to learn more about its history, check out its website at:

[History on Church Brew Works.](#)

So, the venue alone will be worth it, but the T-shirt lottery itself is always lots of fun.

The goal is to bring a new T-shirt, size XL, that is fun, beautiful, interesting, funny, rare, or otherwise

desirable—one that other people will see and covet! We will have a set amount of time to eyeball other people's T-shirts, and those with better numbers can take a shirt from anyone with a worse number. (And by "better numbers," I mean whichever ones—low or high—that John Tucker says are better!) Come ready to trade! There will be a prize for the person who brought the winning T-shirt.

Those are the only scheduled social events at the conference, but there will be plenty of time to catch up with each other at lunches and dinners. And Pittsburgh itself is full of great restaurants, great museums, fascinating history, and much more.

The Friday evening after the conference the Pittsburgh Pirates are playing the San Francisco Giants at home. As of this past Friday, tickets are available: [Pittsburgh Pirates tickets](#). If enough



people at the conference are interested in going, you can contact me or John Tucker or Mark Zanchelli and we can see about organizing a group to go.

The last issue of *NAACA News* had a lot of information about Pittsburgh, so you can refer back to that for additional suggestions of things to see and do and eat. Looking forward to seeing many of in a couple of days!



# PITTSBURGH RECOMMENDATIONS

KYLE MCLAUGHLIN, Staff Attorney  
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pittsburgh was never toward the top of my list of cities I wanted to visit, but I found myself there in 2014 on a visit with brother, who was attending medical school at the University of Pittsburgh. And, wow, did Pittsburgh exceed my expectations! The food, the museums, the beautiful natural surroundings, and the quirky charm all convinced me that Pittsburgh is one of our best cities, and I am so excited to return next week! I consulted with my brother to provide a few recommendations of how to spend your free time during the conference or any extra days you plan to spend in the area.

**Museums.** Reconnect with your inner child at the Carnegie Museum of Natural History, where you can see reconstructions of dinosaurs displayed in their natural habitats. Nearby in the Oakland neighborhood, you can find the Carnegie Museum of Art and the Phipps Conservatory and Botanical Gardens. The Mattress Factory is a must see: located in the beautiful Mexican War Streets, it is considered the best facility for installation art in the country. And a trip to Pittsburgh would not be complete without a visit to the Andy Warhol Museum. The Pulitzer Prize-winning playwright, August Wilson, is another Pittsburgh native, and you can learn more about his life and work at the August Wilson African American Cultural Center. If you are interested in the history of Pittsburgh, visit the Heinz History Center, located in the bustling Strip District. That museum hosts the set from Mister Rogers' Neighborhood!



*The Andy Warhol Museum*

Photo by Abby Warhola

**Views and parks.** One item on my itinerary next week is a ride on the Duquesne Incline up Mt. Washington to enjoy a view of Pittsburgh and the confluence of the three rivers—the Allegheny, Monongahela, and Ohio. You can also get a close-up view of the three rivers at Point Park. Or rent a kayak and view Pittsburgh's skyline and many bridges from the water. You can catch another stunning view of the city from the top of the University of Pittsburgh Cathedral of Learning. And check out the nearby Schenley Park with its miles of hiking trails.



**Neighborhoods.** Pittsburgh contains 90 unique neighborhoods! Some of my favorites are the Strip District, Shadyside, Lawrenceville, and South Side. I encourage you to take an Uber or Lyft to one (or more) of these neighborhoods and discover Pittsburgh's charm.

**Restaurants.** Pittsburgh has some excellent restaurants. A classic favorite is Primanti Bros. Restaurant and Bar with multiple locations across the city. You can order its famous sandwich, which combines your choice of meat, provolone cheese, coleslaw, tomatoes, and...french fries. My favorite restaurant is Point Brugge Café, which serves Belgian-inspired cuisine. Order the mussels and frites with the crispy bread. So good! My brother recommends Noodlehead, a Thai restaurant in

*(Pittsburgh Recommendations continued on page 5)*

*(Pittsburgh Recommendations continued from page 4)*

Shadyside. He also recommends checking out the Abbey, a coffee shop/bar/restaurant in



*The Terminal in the Strip District (photo credit: Ed Massury)*

Lawrenceville. The Abbey is across the street from the Allegheny Cemetery and used to be a funeral home!

**Sports.** Although I am not a huge sports fan, I hear that PNC Park, the home of the Pirates, is one of the most beautiful baseball stadiums in the country. And the Pirates have a game against the San Francisco Giants on July 14!

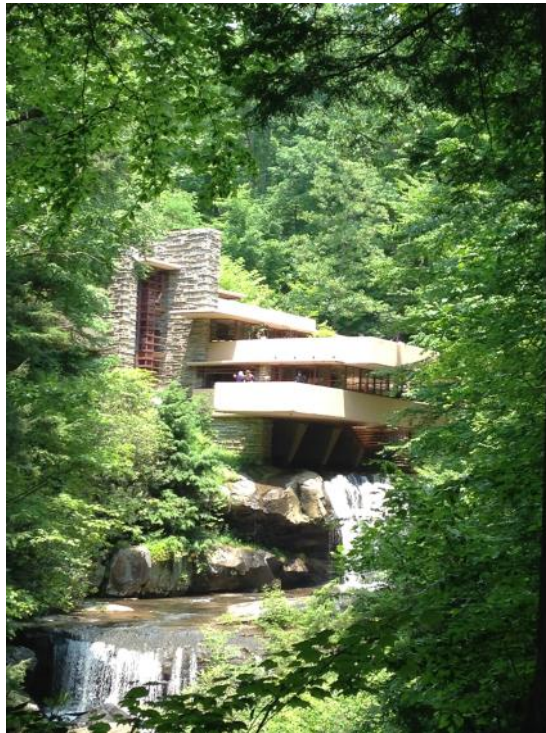
**Day trips.** I highly recommend a visit to Fallingwater, the beautiful Frank Lloyd Wright house built on top of a waterfall. The guided tour is fantastic! Ohiopyle State Park is also close to Pittsburgh. I plan on visiting this park after the conference to enjoy the natural water slide.

I hope you come away from the conference loving Pittsburgh as much as I do. And I am looking forward to seeing you there very soon!

## FABULOUS FORAY—FALLINGWATER

CHRISTINE DJALLETA  
(EMERITUS) U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

What if you hired an architect, and he told you that he would build your house for \$35,000, but the final price was over four times as high? What if that same architect ignored your wishes to build your house with a view of a waterfall and instead built your house on top of that waterfall! Would you be mad? What if that architect was Frank Lloyd Wright? You might come around and agree with the rest of the world that you now own an architectural gem! And when you come to the conference in Pittsburgh this summer, you can see that gem, Fallingwater, if you get in the car and drive for about an hour and 15 minutes from our conference hotel.



Fallingwater was designed by Wright in 1935 for

Pittsburgh's Kaufmann family. Edgar J. Kaufmann, Sr. was the owner of the largest department store in Pittsburgh (the Kaufmann building is just a few blocks from our conference hotel). Kaufmann's son, Edgar Kaufmann jr. (not a typo—that's the way he wanted his name written!) was an apprentice of Wright's at his Taliesin East studio in Wisconsin from 1933 to 1934. Kaufmann Sr. commissioned Wright to replace a deteriorating family cabin near a waterfall. Kaufmann envisioned a home with a view of the waterfall, but Wright surprised (and initially disappointed) him by designing a home ON the waterfall! In fact, a resident of the home could descend a staircase from

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the living room and sit with feet dangling over the water, or jump in for a refreshing dip!



Sali and I visited for the first time last year. We were both wowed by the beauty and grace of the architecture and the way that it fits in the natural setting, blending the inside and outside of the home with the surrounding landscape. The interior reminded me a lot of my childhood, as I grew up in a

Wright-inspired home in Iowa, with floor to ceiling windows, a sunken slate “conversation pit,” and lots of very low furniture. I learned at Fallingwater that the furniture is placed low to the ground to encourage your eyes to scan the horizon. I thought

the design of my childhood home was very 60s, but apparently we were borrowing architectural ideas from the 30s!

Fallingwater offers guided tours for \$25, \$35, or \$87 per person, depending on whether you want to see just the outside, the outside and inside, or have an extended in-depth guided tour. You can also get just a grounds pass (no guide) for \$15/person. If you are interested, I would recommend getting your reservations in advance—and I would highly recommend a tour that includes the interior. And if you want to splurge, they have a Forest to Table Dinner from 5-9 p.m. on July 14 or 15 for \$425 per person! Don't miss this National Historic Landmark!



## Free Virtual Legal Programs

William & Mary Law is offering several legal education sessions this fall. You may register for free if you attend virtually via Zoom and are not seeking CLE credits.

### October 6-7, 2023: [2023 Supreme Court Preview](#)

This conference convenes leading Supreme Court experts, including journalists, judges, lawyers, and academics, for a weekend of lively intellectual debate and discussion about the upcoming Court term: the underlying issues, topics of interest, and likely areas of legal innovation and change. The event will begin on Friday, October 6 at 4:00 p.m. with a moot court featuring experienced Supreme Court advocates. Saturday, October 7 will include a series of expert panels to discuss and dissect the major themes and cases on the docket for next term.

### October 26-27, 2023: [20th Annual Brigham-Kanner Property Rights Conference](#)

This conference is designed to bring together members of the bench, bar, and academia to explore recent developments in the law that affect property rights.

## SCOTUS NEWS: October 2022 Term (May, June, and End of Term Thoughts)

TIM GEIGER, Staff Attorney  
ARIZONA SUPREME COURT

As I mentioned in the spring edition, SCOTUS has been uncharacteristically *slow* in getting out opinions this Term. What that translated into is a flurry of opinions in the final weeks of the Term. Therefore, for this edition of *SCOTUS News*, I had to whittle down the forty-four opinions the Court issued in May and June to a handful of the most consequential.

### SCOTUS rules that noncitizens subject to deportation have new chance to appeal

In an opinion released on May 11, the Court ruled that noncitizens subject to deportation do not have to ask the Board of Immigration Appeals (BIA) to reconsider its allegedly erroneous decisions prior to seeking judicial review in the federal courts of appeals. In *Santos-Zacaria v. Garland*, the government sought to deport Estrella Santos-Zacaria, who is a native of Guatemala and entered the United States unlawfully in 2008 and 2012, before she was deported. She again entered the country unlawfully in 2018. When she was again caught, she sought to avoid deportation by arguing (among other things) that she was likely to be persecuted in Guatemala because she is a transgender woman.

The immigration judge rejected Santos-Zacaria's claims and reinstated the deportation order. The BIA upheld the immigration judge's ruling, holding that Santos-Zacaria had established she suffered past persecution in Guatemala and was consequently entitled to a presumption she would be persecuted in the future, but ruled she was not entitled to relief because the government had successfully rebutted the presumption.

A divided three-judge panel of the Fifth Circuit rejected Santos-Zacaria's argument that the BIA based its ruling on facts it was not permitted to find and dismissed her case. The court, raising the issue



of exhaustion on its own, concluded that she failed to pursue all available administrative remedies as required by 8 U.S.C. § 1252(d)(1), which allows courts to review final deportation orders only when a noncitizen has “exhausted all available administrative remedies available to” her “as of right.”

In short, the Fifth Circuit panel majority found that before Santos-Zacaria could seek judicial review, she was required to ask the BIA to reconsider its future persecution determination, holding that the failure to do so deprived the Fifth Circuit of the power to hear her claim. Hence, the principal legal issue before SCOTUS was whether § 1252(d)(1) requires noncitizens to petition the BIA to reconsider its alleged errors before seeking review in the federal courts of appeals.

In a largely unified opinion delivered by Justice Brown Jackson, the Court reversed the Fifth Circuit, finding that § 1252(d)(1)'s exhaustion requirement is not jurisdictional. Justice Brown Jackson also observed that treating exhaustion provisions as jurisdictional undermines the

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efficiency Congress intends to promote by forcing litigants to waste time in nonjudicial proceedings that may be pointless, slow, or contrary to their interests.

### **In copyright dispute, the Court rules against Warhol estate**

The Court's May 18, 2023, opinion in *Andy Warhol Foundation for the Visual Arts v. Goldsmith* provides a profound statement in the role that copyright law plays in fostering artistic creativity where the Court upheld the claim of celebrity photographer, Lynn Goldsmith, that the Andy Warhol estate infringed her copyright. At issue was a photograph of the musician Prince—the estate licensed an image that Warhol derived from Goldsmith's photograph for the cover of a magazine published shortly after Prince's death.

The Court, in a 7-2 opinion, held that the “purpose and character” of the Warhol Foundation's use of Goldsmith's photograph in commercially licensing “Orange Prince” to Condé Nast does not favor the Foundation's fair use defense to copyright infringement. The 7-2 opinion involved a rather unusual line-up: Justice Sotomayor wrote for the majority; Justice Gorsuch, joined by Justice Brown Jackson, agreed with Sotomayor's opinion, and wrote a brief separate opinion. Justice Kagan, joined by Chief Justice Roberts, dissented.

Scholars and practitioners (and Warhol enthusiasts) will undoubtedly debate the details of the Court's decision for years, but I certainly cannot do the various opinions justice in this brief review, so I leave it to those interested in the nuances of Sotomayor's opinion to debate the questions this case raises and struggle—as I envision the lower courts will—with the Court's answers until the Court decides to weight in again.

### **SCOTUS rules Minnesota county violated takings clause**

Many know the facts of this case, so briefly, Hennepin County sold the condo of 94-year-old Geraldine Tyler after about \$15,000 in unpaid property taxes accumulated. The auction yielded \$40,000. Ms. Tyler's complaint arose when Hennepin County kept not only \$15,000 to cover

the unpaid taxes, penalties, and costs, but also the \$25,000 that was left over.

On May 25, 2023, SCOTUS ruled that the county's actions violated the takings clause. Chief Justice Roberts, writing for the unanimous Court, began with rejecting the county's argument that Tyler lacked standing to bring her takings claim at all. The county argued that Tyler was not actually harmed by the sale of her condo because she may have also had a mortgage for \$49,000 on the property, as well as a \$12,000 lien for unpaid homeowners' association fees.

The Court dismissed the county's arguments as speculation—“Tyler still plausibly alleges a financial harm: The County has kept \$25,000 that belongs to her.” If she had received that money, Roberts wrote, Tyler could have used it to pay down some of the debts linked to the condo. Roberts framed the question before the Court as whether the \$25,000 surplus is “property” for purposes of the takings clause. Stressing that “property rights cannot be so easily manipulated,” Roberts observed that even Minnesota “recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt.”

Roberts further wrote that, although the county can sell Tyler's condo to recover the \$15,000, it cannot “use the toehold of the tax debt to confiscate more property than was due,” and by keeping the \$25,000, Roberts concluded, the county “effected a ‘classic taking in which the government directly appropriates private property for its own use.’”

### **The Court issues another setback for the Clean Water Act**

Also on May 25, 2023, in *Sackett v. EPA*, the Court, reviewing whether the Clean Water Act applies to a wetland, established a more stringent test in a ruling that was a setback for the EPA. The Ninth Circuit had applied the test outlined by Justice Kennedy in *Rapanos v. United States*: whether there is a “significant nexus” between the wetlands and waters that are covered by the CWA, and whether the wetlands “significantly affect” the quality of those waters.

The unanimous Court—with several concurring opinions—reversed the Ninth Circuit. As Justice Alito explained, courts should apply the more

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stringent test, outlined by the dissenting justices (including Alito, Chief Justice Roberts, and Justice Thomas) in *Rapanos*, in which the CWA applies to a particular wetland only if it blends or flows into a neighboring water that is a channel for interstate commerce.

The most interesting of the concurring opinions is one written by Justice Kavanaugh—joined by Justices Sotomayor, Kagan, and Brown Jackson—that agreed the CWA does not apply to the wetlands on the Sacketts’ lot but disagreed with the majority’s reasoning. Kavanaugh argued that “[b]y narrowing the Act’s coverage of wetlands to only adjoining wetlands, the Court’s new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.”

### **SCOTUS upholds Section 2 of the Voting Rights Act**

On June 8, 2023, by a vote of 5-4, the Court issued a monumental [if not surprising based on the oral argument] voting rights decision. In *Allen v. Milligan*, the majority ruled that Alabama’s new congressional map likely violates the Voting Rights Act. More significantly, the Court declined an invitation to adopt an interpretation of the Act that would have made it significantly more difficult to challenge redistricting plans on the ground that they weaken the collective voting power of Black people.

Chief Justice Roberts, joined by Justices Sotomayor, Kagan, Kavanaugh, and Brown Jackson upheld a three-judge District Court’s ruling. In a 34-page opinion by Roberts, the majority agreed with the challengers that the lower court had correctly applied the Court’s 1986 decision in *Thornburg v. Gingles*, which outlines a three-part test to evaluate claims brought under Section 2, to reach its conclusion that the new map violated the Voting Rights Act.

### **Jack Daniel’s prevails in challenge to “Bad Spaniels” dog toy**

In Jack Daniel’s *Properties v. VIP Products*, the unanimous Court decisively rejected use of Jack

Daniel’s trademarks by a manufacturer selling a line of dog chew toys that mock various beverage manufacturers. At issue here was the “Bad Spaniels” dog toy that mimics elements of Jack Daniel’s famous bottle. In the words of Justice Kagan:

- The toy “is about the same size and shape as an ordinary bottle of Jack Daniel’s”;
- The “faux bottle” follows the original in using a “black label with stylized white text and a white filigreed border”;
- The toy has the product name (Bad Spaniels) “in a like font and arch” to those of the Jack Daniel’s bottle; and
- “Old No. 2 On Your Tennessee Carpet” replaces “Old No. 7 Tennessee Sour Mash Whiskey.”

The full Court joined Kagan’s opinion finding the toy a condemnable infringement of the Jack Daniel’s marks.

### **SCOTUS upholds Indian Child Welfare Act**

In what can only be referred to as a *major* ruling, the Court rejected a challenge to the constitutionality of the Indian Child Welfare Act, a 1978 federal law that seeks to keep Native American children with Native American families.

In a vote of 7-2, the Court held that Congress had the power to enact the law, and rebuffed arguments that the law violates the 10th Amendment’s “anticommandeering” doctrine that bars the federal government from requiring states to adopt or enforce federal law. Justice Coney Barrett wrote for the majority, in a 34-page opinion joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Brown Jackson. Justices Thomas and Alito each filed separate dissenting opinions.

The majority declined to reach two other claims. The most notable an argument that the ICWA discriminates based on race. The Court explained that neither the individuals challenging the law, nor the state of Texas, has standing.

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## Justices hold that claims of legal innocence cannot be raised in successive challenge

In *Jones v. Hendrix*, the Court held that a federal prisoner cannot raise a claim of legal innocence if he has already challenged his conviction—even if that claim was unavailable at the time of the prisoner’s original challenge. In a philosophical 6-3 split, Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Alito, Gorsuch, Kavanaugh, and Barrett joined. Justices Sotomayor and Kagan filed a dissenting opinion, as did Justice Brown Jackson.

Specifically, the majority held: Section 2255(e) does not allow a prisoner asserting an intervening change in interpretation of a criminal statute to circumvent the Antiterrorism and Effective Death Penalty Act of 1996’s (AEDPA) restrictions on second or successive § 2255 motions by filing a § 2241 habeas petition.

## General redactions enough to allow admission of non-testifying codefendants’ confessions

On June 23, 2023, in *Samia v. United States*, the Court made it easier for the prosecution to introduce codefendant confessions. In an opinion by Justice Thomas, the Court held that non-obvious redaction distinguished *Gray v. Maryland* and, along with a jury instruction, sufficiently protected Samia’s rights. The key paragraph in Thomas’ opinion, that Justice Kagan descried as “blink-and-you-miss-it,” explains why: “Stillwell’s confession was redacted to avoid naming Samia, satisfying the *Bruton* [*v. United States*] rule. And, it was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some ‘other person’ were not akin to an obvious blank or the word ‘deleted.’”

Specifically, the 6-3 Court held: The Confrontation Clause was not violated by the admission of a non-testifying codefendant’s confession that did not directly inculcate the defendant and was subject to a proper limiting instruction.

Justice Thomas delivered the opinion of the court, in which Chief Justice Roberts and Justices

Alito, Gorsuch, and Kavanaugh joined, and in which Justice Barrett joined as to all but part II-A. Justice Barrett filed an opinion concurring in part and concurring in the judgment. Justice Kagan filed a dissenting opinion, in which Justices Sotomayor and Brown Jackson joined. Justice Brown Jackson filed a dissenting opinion.

## SCOTUS tells Texas and Louisiana they lack the right to challenge Biden immigration policy

On June 23, 2023, it was a major victory for the Biden administration when the Court ruled that Texas and Louisiana do not have Article III standing to challenge newly promulgated immigration-enforcement guidelines that prioritize certain groups of unauthorized immigrants for arrest and deportation. Therefore, the Court did not get to the question on the legality of the policy. Instead, the Justices reversed a ruling by a federal district court in Texas that struck down the policy.

Justice Kavanaugh wrote for the 8-1 majority that included Chief Justice Roberts and Justices Sotomayor, Kagan, and Brown Jackson. Justice Gorsuch wrote a separate opinion in which he agreed that the states lacked standing, but for a different reason. Gorsuch’s opinion was joined by Justices Thomas and Coney Barrett (who wrote her own concurring opinion that was joined by Gorsuch).

## Justices narrowly interpret federal law to avoid First Amendment concerns

Also, on June 23, the Court, in *United States v. Hansen*, decided whether a federal law that criminalizes “encouraging or inducing” immigrants to come or remain in the United States unlawfully violates the First Amendment’s guarantee of the freedom of speech. The opinion shed some light on the newer justices’ ideas on the freedom of speech and the direction the Court may be pushing First Amendment law.

In the 7-2 decision authored by Justice Coney Barrett, the court narrowly interpreted the law, noting that if “encourage or induce” were given their ordinary, conversational meanings—including meanings such as to “influence,” “encourage,” or “inspire with hope”—as the Ninth Circuit held they did, the law would not avoid the First Amendment concerns.

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Justice Coney Barrett’s opinion was joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Gorsuch, and Kavanaugh. Justice Thomas filed a concurring opinion. Justice Brown Jackson filed a dissenting opinion that was joined by Justice Sotomayor.

### **SCOTUS rules against North Carolina’s “independent state legislature” theory**

In what may have been the most consequential election-law decision in years, on June 27, the Court ruled that, although the Constitution gives state legislatures the power to regulate federal elections, state courts can supervise the legislature’s exercise of that power. In a 6-3 vote, the Justices rejected the so-called “independent state legislature theory.” The Court held that the North Carolina Supreme Court did not violate the Constitution when it set aside a congressional map adopted by the state’s legislature.

Chief Justice Roberts delivered the opinion of the Court, which was joined by Justices Sotomayor, Kagan, Kavanaugh, Coney Barrett, and Brown Jackson, that began by addressing the question whether the Court could reach the “independent state legislature” question after the North Carolina Supreme Court reconsidered the case (after a switch to a 5-2 Republican majority following the November 2022 elections) and ruled that it does not have the power to review the challenges to the map. Justice Kavanaugh filed a concurring opinion.

Justice Thomas dissented, in an opinion joined by Justices Alito and Gorsuch. Thomas wrote that he would not have reached the “independent state legislature theory” question at all. Instead, he would have dismissed the case as moot.

As to the merits of the “independent state legislature theory,” the Court highlighted the long tradition of state courts invalidating laws that violate state constitutions. As the Court’s cases make clear, Roberts wrote, there is no exception to this tradition for laws relating to elections. Nonetheless, the Court cautioned, “state courts do not have free rein” to strike down state laws governing elections. Roberts added that, although the elections clause gives state legislatures power to govern federal elections, federal courts “have an obligation to ensure that state court interpretations

of that law do not evade federal law.”

### **Justices prioritize “free speech” over protecting victims of online stalking**

In *Counterman v. Colorado*, in a 7-2 vote, the Court ruled that the Colorado courts applied the wrong test to determine whether Counterman’s statements were “true threats” not protected by the First Amendment. Justice Kagan, writing for the majority, did not focus on an objective standard and whether a reasonable person would regard the man’s statements as a threat of violence, but rather wrote that courts should look at whether prosecutors had shown that Counterman had made the threats recklessly—that is, whether he was aware that the recipient, a local Colorado musician, could regard his speech as a threat, but made them anyway.

The Justices declined to adopt the objective standard on which the Colorado courts relied to convict Counterman, explaining that the Court looks only at “how reasonable observers would construe a statement in context.” Therefore, it would also suppress speech that was not a true threat, because people would not want to run the risk that their non-threatening speech would be misunderstood.

Kagan wrote that a subjective standard—a recklessness standard—is the proper test, which for cases involving true threats “means that a speaker is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’” This recklessness standard, Kagan reasoned, achieves the proper balance between avoiding suppressing non-threatening speech, and allowing states to effectively protect “against the profound harms” that can flow from true threats.

Kagan was joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Brown Jackson. Justice Sotomayor filed an opinion concurring in part and in the judgment that was joined by Justice Gorsuch as to Parts I, II, II-A, and III-B. Justice Barrett filed a dissenting opinion that was joined by Justice Thomas.

Justice Thomas also wrote a separate dissenting opinion, in which he criticized the majority’s “surprising and misplaced reliance on *New York Times v. Sullivan*” and its “actual malice” standard.

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“Like the majority’s decision today,” Thomas wrote, “*New York Times* and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law.”

### **Affirmative Action programs in college admissions struck down by SCOTUS**

On June 29, 2023, the penultimate day of the October 2022 Term, the Court, in a truly historic decision, by a 6-3 vote, effectively ended the use of race in college admissions. The Justices, in an opinion authored by Chief Justice Roberts, ruled that the admissions programs used by the University of North Carolina and Harvard College violate the Constitution’s equal protection clause, which bars racial discrimination by government entities.

Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett, clarified that college admissions programs can consider race to allow an applicant to explain how their race influenced their character in a way that would have a concrete effect on the university. But a student “must be treated based on his or her experiences as an individual — not on the basis of race.”

Justice Sotomayor wrote a dissenting opinion, joined by Justice Kagan and Justice Brown Jackson (only as to the N.C. case), emphasizing that the Court’s decision rolled “back decades of precedent and momentous progress” and “cement[ed] a superficial rule of colorblindness as a constitutional principle in an endemically segregated society.”

The majority effectively, though not explicitly, overruled the Court’s 2003 decision in *Grutter v. Bollinger*, where Justice O’Connor, in her opinion for the majority reaffirmed that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” but she warned that race-conscious admissions policies should not last forever. In 25 years, she suggested, “the use of racial preferences will no longer be necessary to further the interest” in diversity.

### **SCOTUS rules Biden administration student-loan forgiveness program overstepped authority**

On June 30, the last day of the October 2022

Term, in one of three opinions issued, the Court, in a 6-3 vote, ruled that last year when the Biden administration announced it would cancel up to \$400 billion in student loans, it overstepped its authority. Chief Justice Roberts writing for the court in *Biden v. Nebraska*, characterized the decision as a straightforward interpretation of federal law.

The Court emphasized that the HEROES Act, relied on by the Biden administration for the loan forgiveness program, gives the secretary of education the power to “waive or modify” laws and regulations governing the student-loan programs. Roberts reasoned that Congress’ use of the word “modify” means the administration can make “modest adjustments and additions to existing provisions” but cannot “transform them.” The plan “modifies” student-loan laws and regulations, Roberts suggested, “only in the same sense that the French Revolution ‘modified’ the status of the French nobility — it has abolished them and supplanted them with a new regime entirely.”

Justice Kagan dissented, in an opinion joined by Justices Sotomayor and Brown Jackson. In the dissent’s view, the Court was wrong to reach the merits of the states’ claims because none of the states had standing. Kagan explained that the theory of standing advanced by the states, and accepted by the majority, “points to MOHELA as the proper plaintiff,” because MOHELA — rather than Missouri — is the entity that would be injured by the plan. Nonetheless, although MOHELA could have filed its own lawsuit, it did not.

In Kagan’s view the debt-relief plan is authorized by the text of the HEROES Act. The Act, she contended, “provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules” — exactly what was done by the Biden administration.

### **Six-justice majority rules website designer can decline to create websites for same-sex weddings**

In the final opinion of the Term, Justice Gorsuch, writing for the six-justice majority agreed that Colorado cannot enforce a state anti-discrimination law against a Christian website designer. The owner of 303 Creative LLC does not want to create

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wedding websites for same-sex couples because, she claims, doing so would violate her First Amendment right to free speech.

Gorsuch's opinion, joined by Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Coney Barrett, explained that Colorado cannot "force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." The First Amendment, Gorsuch explained, "protects an individual's right to speak his mind," even when others may regard that speech as "deeply misguided" or it may cause "anguish."

In a dissent joined by Justices Kagan and Brown Jackson, Justice Sotomayor called the Court's decision "a sad day in the American constitutional law and in the lives of LGBTQ people." Sotomayor argued that the Constitution "contains no right to refuse service to a disfavored group." Moreover, she contended, Colorado's public accommodations law only bars business owners from discriminating against members of the public based on (among other things) their sexual orientation. She argued that it does not regulate or compel speech at all. A business owner like Smith, she explained, who "offers [her] goods or services to the public . . . remains free under state law to decide what messages to include or not to include." But Smith cannot, Sotomayor stressed, "offer wedding websites to the public yet refuse those same websites to gay and lesbian couples."

Sotomayor lamented that the Court's decision "declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class," and "the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status."

### October 2022 Term Wrap Up

Well, that's it. . . the second full term of the most conservative Supreme Court in modern history. Although this term overall was not as dramatic as the October 2021 Term, which culminated with the legally and politically seismic decision to overrule *Roe v. Wade*, it did make a few things a little less murky: (1) the six-justice conservative bloc is not entirely predictable; and (2) the Court is

deeply polarized and the Justices more at the center are in the driver's seat.

What is clear? Justices Alito and Thomas continue to fall on the rightmost boundary of the Court, and the other conservative justices are much harder to distinguish. Most notably, Roberts and Kavanaugh agreed with each other in ninety-five percent of the cases this term.

Roberts and Kavanaugh (and Coney Barrett) also voted with the liberals this term in one of the huge disappointments for right-wing advocates pushing the Court to embrace the "independent state legislature" theory that could have dramatically reshaped the way elections happen. The two justices also joined the liberals in the cases involving Section 2 of the Voting Rights Act, which will likely have negative consequences for Republicans in the 2024 elections. In fact, in addition to agreeing with each other more than any other two justices, Roberts and Kavanaugh were also the two conservative justices who agreed with the liberal justices the most.

Meanwhile, in her first year on the bench, Justice Brown Jackson established herself as an outspoken member of the Court's liberal minority—led by the justice on the leftmost boundary of the Court, Justice Sotomayor—with a scorching dissent in the Court's decision rejecting the use of race-conscious admissions in higher education.

Nonetheless, maybe the most telling aspect of just how deeply polarized the Court and Nation have become is the fact that this term there was no single "swing justice" on the Court. Yet, there are signs that consensus is possible under the current Court, but the justices still have profound and sometimes even personal disagreements.

But overall, there were more unanimous decisions this term, although it wasn't an unusually high level of unanimity. There was also more consensus this term than last term, which still stands out as a historically acrimonious term where there were fourteen ideological 6-3 splits, compared to only five this term.

Until First Monday of the October 2023 Term, I bid you farewell and have a great summer.

## NAACA COMMITTEES

*Are you interested in becoming more involved with NAACA? Join a NAACA committee. Visit the “Members Area” tab at [www.naacaonline.org](http://www.naacaonline.org) to sign up.*

### EDUCATION COMMITTEE

This committee of about five people will work with Co-Executive Director John Tucker to select topics and presenters for next summer’s conference. After first brainstorming by email, the committee will meet in the fall for a full-day planning session. Although we know emergencies can’t be avoided, committee participants should be people who expect to attend the next conference in order to welcome, introduce, and thank their assigned speakers.

### SOCIAL COMMITTEE

This committee will work with our Executive Directors to plan and coordinate activities for the next Educational Conference. Typical events include evening social activities (i.e., opening night “bingo” mixer, quirky t-shirt reception). The committee also sometimes coordinates group attendance for local events during or after the conference (i.e., professional baseball games, horse races, wine tasting). In addition, the social committee will be encouraged to brainstorm options for virtual events to take place throughout the year.

### SITE SELECTION COMMITTEE

This committee of about five people will help identify and gather information about potential sites for the conference to be held two years from now. Focus in a given year involves either a particular geographic area or a specific list of cities provided to the committee.

Committee activities take place primarily in the fall.

### MEMBERSHIP COMMITTEE

Want to share your enthusiasm about NAACA with others? Traditionally chaired by NAACA’s Vice President, this committee helps conduct our Annual Membership Drive. Efforts usually focus on making email contact with prior members who have not yet rejoined for the year or who may have been inactive for a period of time. Committee activities take place mostly in the fall.

### PUBLICATIONS COMMITTEE

Want to be a published author under your own byline or help in some other way? This committee is responsible for NAACA’s quarterly digital newsletter as well as for the more frequent judicial news updates (emails containing links to articles about both substantive legal issues and quirky law-adjacent topics). We need writers, proofreaders, coordinators, and desktop publishers.

### WEBSITE COMMITTEE

Although prior activities have focused mainly on simply updating the basic information on our website when Board composition and Conference offerings change, we also hope to expand the functionality of the website. If you have current programming experience, we particularly need you. We may also need graphic design assistance.

## NAACA PUBLICATIONS COMMITTEE

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