

SECOND CIRCUIT REVIEW

The Second Circuit In the Supreme Court

By Martin Flumenbaum and Brad S. Karp

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With the U.S. Supreme Court beginning its October Term 2023 in the coming weeks, we conduct our 39th annual review of the performance of the U.S. Court of Appeals for the Second Circuit in the Supreme Court during the past term.

The Supreme Court's October Term 2022 was its first with Justice Ketanji Brown Jackson, who proved to contribute a strong, independent voice. She was the court's most active questioner in two decades of data, and she issued three dissents signed by no other justice, a type of opinion not issued by a new justice since Justice Clarence Thomas in 1991. Additionally, the court maintained its recent practice of hearing around 60 cases—the fewest since the 1860s.

The court issued major decisions concerning the use of race in university admissions, student debt, election law, religious rights and freedom of speech. Nearly half of its decisions were unanimous, a marked increase from the two-decade low of 28% the previous term. Lee Epstein et al., *Provisional Data Report on the 2022 Term* 15 (June 30, 2023).

While significant cases were divided along ideological lines, including the university-admissions and student-debt cases, many were not, including cases concerning the use of race in election redistricting and in laws governing adoption for Native American children.

Overall, the court issued opinions in 58 cases, seven of which arose from the Second Circuit. The court reversed in five of those cases, but the Second Circuit was not an outlier in that respect: three other circuits had as many or more reversals. Indeed, the court reversed in roughly two-thirds of the cases it decided, including 11 from the Ninth Circuit alone.



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The table below compares the Second Circuit's performance to those of its fellow federal courts of appeals, as well as the federal district courts and the state courts. We will next discuss the court's seven decisions that arose out of the Second Circuit.

Performance of the Second Circuit in the Supreme Court During the Past Term, Compared With Other Courts

Court	Cases	Affirmed	Reversed/ Vacated	% Reversed/ Vacated
First Circuit	3	1	2	67%
Second Circuit	7	2	5	71%
Third Circuit	2	1	1	50%
Fourth Circuit	3	1	2	67%
Fifth Circuit	9	2	7	78%
Sixth Circuit	4	2	2	50%
Seventh Circuit	2	1	1	50%
Eighth Circuit	3	1	2	67%
Ninth Circuit	14	3	11	79%
Tenth Circuit	2	0	2	100%
Eleventh Circuit	2	2	0	0%
D.C. Circuit	0	-	-	-
Federal Circuit	2	2	0	0%
District Courts	1	1	0	0%
State Courts	5	1	4	80%

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This chart counts separately cases from different courts that were consolidated and resolved in a single opinion. It also includes per curiam opinions and summary reversals; it excludes merits in original actions and cases that were dismissed for various reasons.

Duty of Honest Services

Percoco v. United States involved the question whether a private citizen not currently serving as a public official may owe a public duty of honest services that supports a conviction for fraud under 18 U.S.C. §1343. 143 S. Ct. 1130 (2023). The Second Circuit upheld jury instructions recognizing that duty under two conditions—first, if the citizen “dominated and controlled any governmental business” and, second, if government officials relied on the citizen due to “a special relationship” between them.

The Supreme Court reversed in a unanimous decision. In an opinion by Justice Samuel Alito, the court accepted that a person not currently in public service could owe the duty, but concluded that the jury instructions here were “too vague” to provide fair notice. Those instructions, it reasoned, could be satisfied “when-ever such persons’ clout exceeds some ill-defined threshold,” potentially erroneously including individuals like lobbyists.

Justice Neil Gorsuch, joined by Justice Thomas, concurred. In their view, “no set of instructions could have made things any better” because the statute itself unconstitutionally fails to define “honest-services fraud.”

Right To Control

Ciminelli v. United States presented the question whether a fraud conviction may be premised on the intangible property interest of control over one’s assets. 143 S. Ct. 1121 (2023). The Second Circuit allowed that right-to-control theory, and affirmed jury instructions defining “property” under 18 U.S.C. §1346 to include an interest in “economic information.”

The Supreme Court reversed in a unanimous decision. In an opinion by Justice Thomas, the court concluded that the right-to-control theory is inconsistent with the statutory text, which covers traditional property rights, and the structure and history of the federal fraud statutes. Further, it explained, treating “mere information as the protected interest” covers “almost any deceptive act,” creating federal criminal jurisdiction over conduct “traditionally left to state contract and tort law.”

Justice Alito concurred, emphasizing the limits of the decision and noting unresolved procedural issues.

Preservation of Bankruptcy-Transaction Protection

In *MOAC Mall Holdings v. Transform Holdco*, the Supreme Court addressed the question whether parties must timely invoke §363(m) of the Bankruptcy Code, which protects a good-faith purchase or lease of bankruptcy-estate property from a successful appeal of the order authorizing that sale or lease, unless the order was stayed pending appeal. 143 S. Ct. 927 (2023). The Second Circuit held that §363(m) was jurisdictional and therefore available at any stage of the litigation.

The Supreme Court vacated in a unanimous decision. Justice Jackson, writing for the court, noted that a provision is not jurisdictional unless Congress clearly says so, which it did not for §363(m). The court explained that §363(m) contemplates authorization orders being modified on appeal and appears separately from the Code’s jurisdictional provisions. Accordingly, parties must timely raise §363(m), it held, and remanded for further proceedings.

Sentencing

Lora v. United States addressed the question whether the requirement in 18 U.S.C. §924(c) that sentences under §924(c) be served consecutively, rather than concurrently, likewise applies to sentences under §924(j). 143 S. Ct. 1713 (2023). Second Circuit precedent applied the requirement, causing a 30-year prison sentence in this case—the sum of the defendant’s 25-year sentence under §924(c) and his five-year sentence under §924(j).

In a unanimous opinion by Justice Jackson, the Supreme Court vacated, holding that plain text confines the §924(c) requirement to “that subsection,” without encompassing §924(j), an entirely different subsection. Reading §924(c) as governing §924(j) penalties, the court explained, would ignore that their cross-references concerned only offense elements; plus, it would cause §924(c) and §924(j) to conflict, as sometimes the minimum sentence would exceed the maximum sentence.

The court acknowledged that §924(j) addresses more serious conduct than §924(c), but observed that the “sentencing flexibility” of §924(j) aligns with Congress’s approach to punishment in 1994, when §924(j) was enacted, decades after the nondiscretionary approach of §924(c) was enacted in 1968.

Fair Use Doctrine

Warhol v. Goldsmith involved the Copyright Act’s fair-use provisions and the licensing of an image of Prince, which Andy Warhol made from a photograph taken by Lynn Goldsmith. 143 S. Ct. 1258 (2023). The question presented was whether the first of four fair-use factors under 17 U.S.C. §107(1)—concerning “the purpose and character of the use”—weighed in favor of Goldsmith. The Second Circuit determined that it did.

The Supreme Court affirmed in a 7-2 decision. In an opinion by Justice Sonia Sotomayor, the court explained that the first factor evaluates whether the use of the copyrighted work will “serve a purpose distinct from the original,” and balances the degree of distinction against the new work’s commercial nature. That balance does not favor “any use that adds some new expression, meaning, or message,” it continued, which would allow “transformative use” to swallow the copyright owner’s right to derivative works.

In this case, the court determined, the first factor weighed against fair use because Warhol’s image shared substantially the same commercial purpose as Goldsmith’s copyrighted photograph. It emphasized that the outcome was specific to the case, pointing to other parts of copyright law that protect artistic works involving copying. Further, the court noted, requiring compensation will incentivize artists like Goldsmith to create original works.

Justice Gorsuch, joined by Justice Jackson, concurred. In their view, in light of the statutory text and context, the first fair-use factor requires considering the purpose and character of the challenged use, not the creator's purpose when first producing the work.

Justice Elena Kagan, joined by Chief Justice John Roberts, dissented. They voiced concern that the court's decision will "stifle creativity of every sort." They disagreed with relying on the commercial nature of the licensing, instead of Warhol's transformation of Goldsmith's photograph.

Jurisdiction and Immunity For Foreign Sovereigns

Turkiye Halk Bankasi v. United States considered two questions: (1) whether the general grant of federal court jurisdiction over prosecutions of federal crimes, 18 U.S.C. §3231, applies to foreign states and instrumentalities; and (2) if so, whether the Foreign Sovereign Immunities Act (FSIA) provides foreign states and instrumentalities immunity from criminal proceedings. 143 S. Ct. 940 (2023).

The Second Circuit held that the defendant was not immune from prosecution because, assuming that the FSIA provided immunity, the charged conduct satisfied the FSIA's exception for commercial activities.

The Supreme Court affirmed, first unanimously holding that 18 U.S.C. §3231 applies to prosecutions of foreign states and instrumentalities. In an opinion by Justice Brett Kavanaugh, the court declined to atextually limit §3231, which contains a "broad jurisdictional grant over 'all offenses.'" It explained that express references to actions against foreign states and instrumentalities elsewhere in the U.S. Code did not impliedly "shrink the textual scope of Section 3231."

In a 7-2 part of the decision, the court also affirmed on alternate grounds that FSIA immunity did not apply. It concluded that the FSIA provides immunity only in civil proceedings, as the statutory text exclusively identifies civil actions, and the statutory context reinforces the civil scope of immunity. The court therefore did not address the commercial-activity exception. Because the parties also raised arguments concerning common-law sovereign immunity, it vacated and remanded to the Second Circuit to consider those in the first instance.

Justice Gorsuch, joined by Justice Alito, concurred in the judgment but dissented from the court's holding that FSIA immunity does not apply in criminal proceedings. They would have affirmed the Second Circuit as to both FSIA immunity and the commercial-activities exception. In their view, the FSIA's plain text encompasses criminal matters, and the court's "common law path" provides inadequate guidance for resolving claims of foreign sovereign immunity in criminal cases.

Confrontation Clause

Samia v. United States concerned the Confrontation Clause of the Sixth Amendment. 143 S. Ct. 2004 (2023). Under the Con-

frontation Clause, at a joint trial, a nontestifying codefendant's confession that incriminates a nonconfessing defendant by name, or by an obvious redaction like substituting the name with "deleted" or a blank space, cannot be admitted. The question presented was whether the confession may be redacted by substituting the nonconfessing codefendant's name with a neutral placeholder.

The Second Circuit held that admission of such a confession does not violate the Confrontation Clause if the jury is instructed to consider the confession only as to the confessing codefendant. (Our law firm—Paul, Weiss, Rifkind, Wharton & Garrison—represented petitioner Samia at the Second Circuit and the Supreme Court.)

The Supreme Court affirmed in a 6-3 decision. In an opinion by Justice Thomas, the court held that introducing a confession that neither names the nontestifying defendant nor is obviously redacted does not violate the Confrontation Clause if coupled with a limiting instruction. It explained that it has historically presumed "jurors follow limiting instructions." While there is a "narrow exception" to this presumption, the court concluded that this exception only applies to confessions that "directly implicate a defendant," not confessions that do so indirectly when linked with other trial evidence.

Justice Amy Coney Barrett concurred in the judgment but highlighted flaws in the court's historical analysis.

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented. In their view, the court "elevat[ed] form over substance" and created an "end-run around [its] precedent" by "draw[ing] a line of constitutional significance" between confessions that use a name or a symbol of omission and confessions that use a neutral placeholder "no matter how obvious the reference to the defendant."

Justice Jackson filed a separate dissent underscoring that the court's "bottom-line view" eliminated Confrontation Clause protections against incriminating testimony by a nontestifying codefendant.

The 2023 Term

As of mid-September, the Supreme Court has agreed to review two cases arising out of the Second Circuit for the October Term 2023.

Murray v. UBS Securities presents the question whether, in a Sarbanes-Oxley Act claim, a whistleblower must prove in his case in chief that his employer acted with a "retaliatory intent," or instead his employer must prove, in an affirmative defense, lack of retaliatory intent.

Harrington v. Purdue Pharma presents the question whether a court may approve, in reorganization plan under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.