The Supreme Court of the United States (SCOTUS)

***

Week 3

Nils Pedersen & Joyce Francis

Fall 2024

Jefferson County Library & The Salish Sea Fellowship

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

Agency Power: Does administrative SEC enforcement require a jury trial?

- The SEC act authorizes the SEC to adjudicate claims of securities fraud and impose *civil* penalties for violations. Is this a violation of a person's 7th Amendment right to a jury trial?

  *'In Suits **at common law**, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'*

- The **5th Circuit (!!)** said that the ***public rights doctrine***, covering matters between the federal government and persons subject to its authority, which otherwise authorizes the SEC adjudication, is not applicable: SEC actions resemble common law actions for fraud, and jury trials would not dismantle the statutory scheme.
- Commentators' prediction from last year: **a majority in favor of the SEC**.

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

- The SEC was created to enforce three statutes enacted after the Wall Street crash of 1929. It can bring **enforcement actions in two ways:**
  - File suit in Federal District Court
  - Adjudicate the matter itself, at the SEC (Administrative Law Judges, (ALJs))
- In-house adjudication is by the ALJs, there is **no jury**.
- While originally the SEC could only seek civil penalties (monetary fines) in federal court, the **Dodd-Frank Act authorized such penalties for in-house adjudication.**
- ***Jarkesy*** was fined $300,000 for violating anti-fraud provisions of the federal securities laws in an in-house proceeding
- The **5th Circuit vacates the SEC order**, finding that *Jarkesy* is entitled to a jury trial under the 7th amendment, and the SEC appeals.

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

- **Roberts** wrote the majority opinion in a partisan 6-3 split

  Roberts goes through a historical discussion of why we have the 7th amendment and its importance, emphasizing that in "suits at common law … the right of trial by jury shall be preserved."

  - This right embraces all suits that are not of equity or admiralty jurisdiction, but 'legal in nature.'
  - To determine if its legal in nature, look at whether the cause of action and the remedy resemble those at common law
  - Here the SEC seeks a civil penalty, monetary relief, designed to punish rather than 'restore the status quo.'
  - There is a close relationship between securities fraud and common law fraud.

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

- **Roberts** thus concludes that a jury trial is required unless a 'public rights' exception applies:
  - Such matters historically could have been decided exclusively by the executive and/or legislative branches (examples: revenue collection; customs law; immigration law; relations with native tribes; etc.)
  - Roberts goes through a lengthy discussion about why this exception does not apply here.

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

- **Sotomayor** wrote the dissent:
  - Her main argument seemed to be the public rights doctrine, arguing that when Congress creates a public right enforced by the federal government, it can "assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment."
  - Roberts' response says that Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be … taken to an administrative tribunal."
  - The key here, I think, is that the claim at issue, securities fraud, is so similar to common law fraud.

Taking on the Administrative State

Securities and Exchange Commission v. Jarkesy

- **Impact:**
  - Legal experts believe *Jarkesy* is the first case that has held an administrative enforcement action brought to its ALJ must be tried by a jury.
  - Since *Jarkesy*, **at least three lawsuits have been filed** claiming that the Dept. of Labor’s administrative **proceedings for enforcing anti-discrimination** requirements for federal contractors are **unconstitutional.**

Taking on the Administrative State

Loper Bright Enterprises v. Raimondo etc.

The *Chevron* Deference was established in 1984:

- Courts must defer to the authority of an administrative agency's interpretation of a statute whenever **both:**
  - the intent of Congress was ambiguous and
  - the agency's interpretation is reasonable or permissible.
- The *Chevron* case involved the EPA's interpretation of sources of pollution under the Clean Air Act. The Court developed a two-step test for when to defer to agency interpretation:
  - First, was there an unambiguous expression of Congressional intent contained in the statute. If so, the Court must yield to Congressional intent.
  - If not, then the Court would proceed with the second step of the test: is the agency's application of the statute based on a "reasonable" interpretation of ambiguous wording. If so, then defer to the agency's interpretation of the statute. If not, then the agency's interpretation would likely be deemed impermissible.

Loper Bright Enterprises v. Raimondo etc.

- Since being handed down, *Chevron* had become among the most frequently cited cases in American administrative law:
  - Over 17,000 lower federal court decisions and 70 decisions by the Supreme Court itself have cited *Chevron.*
  - Between 2003 and 2013, circuit courts applied *Chevron* in **77%** of decisions regarding regulatory disputes.
- In years prior to the current case, the Supreme Court, with a majority of conservative justices, had been seen as leading towards weakening or overturning *Chevron*.

Loper Bright Enterprises v. Raimondo etc.

The *Chevron* Deference (working title, *'The Agency Supremacy!'*)

- The Magnuson–Stevens Fishery Conservation and Management Act says that the National Marine Fisheries Service may require fishing vessels to "carry" federal monitors on board to enforce the agency's regulations.
- The Service starts making the *industry* pay for the monitors, sometimes to the tune of $700/day for the monitor. It's a lot of herring to pay for that monitor.
- Loper, a family herring business, sues in Federal District Court, which finds that the MSA **unambiguously** provides for **industry-funded** monitoring of the herring fishery, and thus concluded its analysis at **the first step** of Chevron.
- Loper goes to the DC Circuit Court of Appeals which affirmed the district court. But, the Circuit Court finds that the act was ***not completely unambiguous*** about industry-funded monitoring of the herring fishery. Instead, they go to the second step of *Chevron*, stating that the Service ***reasonably interpreted*** the act when it came to what the Court called "silence on the issue of cost of at-sea monitoring."

Loper Bright Enterprises v. Raimondo etc.

The Chevron Deference (Final title, *'The Supreme Ultimatum!'*)

- Arguments against Chevron:
  - Violates Art. III because the courts are not (under Chevron) saying what the law means;
  - Violates Art. I because it delegates legislative power to the agencies;
  - Violates Due Process because it biases the court in favor of one party in the litigation from the start;
  - Violates the APA because the APA requires courts to decide all relevant questions of law and thus the courts should interpret statutes 'de novo.'
  - Not a workable rule because courts often disagree on what is ambiguous and what is not.

Loper Bright Enterprises v. Raimondo etc.

The *Chevron* Deference

- Arguments for *Chevron*:
  - *Stare decisis*
  - Not unconstitutional; the 'major questions' doctrine is a backstop to agency overreach;
  - Ok w/ APA because Court only defers to the agency *after* independently deciding that Congress has not clearly resolved the issue.
  - Not really any adverse consequences; the Chevron deference is no more difficult to apply than other comparable standards.

Loper Bright Enterprises v. Raimondo etc.

The *Chevron* Deference

- ***Relentless, Inc. v. Department of Commerce***
  - This case was added but has essentially the same facts and issues. So if *Loper* will decide the issues anyway, why add it?
  - Justice Jackson was on the original Circuit Court panel in Loper, and had recused herself at the Supreme Court (even though not taking part in the decision). This case allows her participation, apparently.

Loper Bright Enterprises v. Raimondo etc.

The Chevron Deference

- *Loper* was backed by the anti-regulatory Koch network, which has ties to Justice Thomas as shown by ProPublica reporting. That led to calls for Thomas to recuse himself from *Loper*, which he hasn't done.
- The *Relentless* case was also brought by a Koch-backed firm, so the fact that it became the lead case on the *Chevron* precedent doesn't eliminate that issue.

Decision in *Loper*

- The Court holds that the APA requires courts to exercise their independent judgment in deciding whether an agency acts within its statutory authority; courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; ***Chevron* is overruled**
- Chief Justice Roberts wrote the opinion of the Court, and the basic points are:
  - Citing the Constitution, the Federalist Papers and Marbury v. Madison, Roberts emphasizes that it is **the job of the courts to decide what the law means**
  - Courts should **'respect' Executive Branch decisions, but without 'deference' to those decisions**
  - The Administrative Procedure Act, APA, requires that **courts, and not agencies, will decide** all relevant questions of law that come up in reviewing agency actions
  - The Chevron deference cannot be squared with the APA; **in instituting Chevron, the Courts essentially disobeyed Congress' intent as expressed in the APA**
  - Roberts notes that **agencies have no special competence in resolving statutory ambiguities,** whereas courts do; the point of Chevron seemed to be that agencies in fact had special *technical* competence in their areas that informed their interpretation.

Decision in *Loper*

- The **argument of *Stare Decisis* tends to go the way of all such arguments**: if the law is wrong, it's wrong, and the fact that we've had it a long time doesn't make it any more right.
- The decision was a **6-2/6-3 split along conservative/liberal lines**; Jackson recused herself in *Loper* since she was on the DC Circuit panel during part of the *Loper* case. No recusal by Thomas.
- **Kagan's dissent was concerned with the disruption that eliminating *Chevron* would create.** She also wrote that while the majority may believe that agency decisions may still be respected by courts, "if the majority thinks that the same judges who argue today about where 'ambiguity' resides are not going to argue tomorrow about what 'respect' requires, I fear it will be gravely disappointed."

Decision in *Loper*

ONE COMMENTATOR:

- *Loper Bright* may in fact lead nowhere.
- Most judges are honestly trying to find the best answer possible, and they are certainly clever.
- The judges will figure out a way to get back to *Chevron*. They won't *mention* it, because Chevron "is no longer law", but they'll *do* it.
- They'll evaluate whether the agency's process and outcome are within the bounds of the law and rational, and if so, they'll go along with the agency, perhaps carefully relying on various other cases that establish alternate bases for deference (such as *Skidmore* deference). Or maybe they won't mention deference at all but their "interpretation of the law" will coincidentally match exactly what the agency did based on the agency record.

--Leonardo Cuello, a Research Professor at the Georgetown University McCourt School of Public Policy's Center for Children and Families.

BANKRUPTCY
Harrington v. Purdue Pharma
(Opinion Issued June 27, 2024)

TIMELINE:

- **1996** – Purdue Pharma (owned by Sackler family) **released painkiller OxyContin.**
- **NEXT TWO DECADES** – Painkiller **generated >$35 billion** in revenue for Purdue Pharma while **247,000 people died** from overdoses.
- **2004** – **Purdue's board** entered into an expansive Indemnity Agreement **protecting its directors and officers from financial liability**.
- **2007→ Sackler family** stepped away from board and **initiated a "milking program," selling/transferring $11 billion (75% of firm's assets) overseas.**
- **2007 & 2020** – **Purdue twice pleaded guilty to federal criminal charges** of its marketing, and Purdue **faced thousands of civil suits.**
- **2019** – **Purdue filed for bankruptcy**, though **NOT** the Sacklers.

Harrington v. Purdue Pharma (cont.)

- **MAY 2023** – The **2nd Circuit approved Purdue's proposed reorganization plan**, and the **Sacklers agreed to fund $4.3→6 billion in exchange for release from all liability.**
- **JULY, 2023** – **Acting for the U.S. Trustee**, the division of the DOJ that oversees federal bankruptcy cases, the **government appealed to SCOTUS for a stay.**

QUESTION – **Does the Bankruptcy Code authorize a court to approve**, as part of a plan of reorganization under Chapter 11, **a release that extinguishes claims without the claimants' consent?**

NOTE

The estate of **Purdue is estimated to be around $1.8 billion**, **while claims** against both Purdue and the Sacklers are **estimated to exceed $40 trillion**.

Harrington v. Purdue Pharma (cont.)

5:4 MAJORITY DECISION (by Gorsuch, joined by Thomas, Alito, Barrett, & Jackson.

"The bankruptcy code ***does not authorize a release and injunction*** *that, as part of reorganization under Chapter 11, effectively seeks to discharge claims against a non-debtor* ***without the consent of affected claimants****."*

- *"When a debtor files for* ***bankruptcy****, it 'creates an estate' that* ***includes virtually all the debtor's assets****…In this case, the* ***Sacklers have not filed for bankruptcy or placed all their assets on the table*** *for distribution to creditors, yet they seek what essentially amounts to a discharge."*
- The settlement offers the Sacklers **broader relief than they would have obtained by declaring bankruptcy** themselves, providing ***"a roadmap for tortfeasors*** *to misuse the bankruptcy system in future cases."*
- Plan's proponents claim that the Sacklers will not return any funds unless they are granted immunity, but the U.S. Trustee argues that the ***"potentially massive liability the Sacklers face may induce them to negotiate*** *for consensual releases on terms more favorable to all the claimants."*

Harrington v. Purdue Pharma (cont.)

DISSENT: (**by Kavanaugh**, joined by Roberts, Sotomayor, and Kagan)

- The majority ruling ***"wrong on the law and devastating for more than 100,000 opiod victims and their families."***
- *"The plan was a **shining example of the bankruptcy system at work**…**virtually all of the opioid victims** and creditors in this case fervently **support approval** of Purdue's bankruptcy reorganization plan."*
- *"**And all 50 state Attorneys General** have signed on to the plan—a rare consensus. The **only relevant exceptions** to the nearly universal desire for plan approval are a **small group of Canadian creditors and one lone individual.***
- The decision "***categorically prohibits non-debtor releases***" which have "***enabled substantial and equitable relief to victims** in cases ranging from asbestos, Dalkon Shield, and Dow Corning silicone breast implants to the Catholic Church and the Boy Scouts."*

Harrington v. Purdue Pharma (cont.)

Where Does the Public Stand?

In a SCOTUS Poll:

- **74 %** think the Sackler family **should NOT** keep immunity from future lawsuits.
- **27%** think the family **should** keep immunity.

JANUARY 6 OBSTRUCTION CHARGE

Fischer et. al. v. United States

(Opinion Issued June 28, 2024)

FACTS OF THE CASE:

- **Joseph Fischer** was one of several thousand Trump supported who **stormed the Capital** on January 6, 2021.
- He was **found guilty in the D.C. district court** of:
  - **assault**, resisting or impeding federal officers
  - **disorderly conduct** in a Capitol building/restricted grounds with intent to disrupt congressional/governmental functions
- He was **further charged with obstruction of an official proceeding**, but the District Court held that the **obstruction statute did not apply**.
- The **D.C. Circuit reversed**, concluding that the natural, broad reading of the **statute applies to obstructive conduct**. **SCOTUS granted review.**

***Fischer et. al. v. United States* (cont.)**

QUESTION: ***Does the federal obstruction statute****, which prohibits obstruction of congressional inquiries and investigations,* ***include acts unrelated to investigations & evidence****?*

6:3 MAJORITY OPINION: By Roberts (joined by Thomas, Alito, Gorsuch, Kavanaugh & Jackson [who wrote a concurring opinion]).

> *"To prove a federal obstruction violation, the Government must establish that the defendant* ***impaired the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding****, or attempted to do so."*

- The statute was enacted as part of the Sarbanes-Oxley Act (2002) to **address specific issues like document shredding in the Enron Scandal**.
- The statute should be **interpreted narrowly to cover acts impairing evidence rather than all forms of obstruction.**

Fischer et. al. v. United States (cont.)

- **Jackson filed a concurring opinion**, stating:

  Despite *"the shocking circumstances involved in this case or the Government's determination that they warrant prosecution, today, this* ***Court's task is to determine what conduct is proscribed*** *by the criminal statute that has been invoked…"* She made clear she believed **other charges could go forward**.

DISSENT: **By Barrett** (joined by Sotomayor and Kagan)

- The **text clearly supports the government's broader interpretation**, covering *"all sorts of action that affect or interfere with official proceedings."*
- **The Court *"does textual backflips*** *to find some way – any way – to narrow the reach"* of the statute.

Fischer et. al. v. United States (cont.)

OF NOTE:

- **Attorney General Merrick Garland** indicated he was "*disappointed*" by the ruling, but he stressed that:
  - *"**the vast majority of the more than 1,400 defendants** charged for their illegal actions on January 6 **will not be affected by this decision**."*
  - *"There are **no cases** in which the Department **charged** a January 6 **defendant only with the offense at issue** in Fischer."*
- In a review of this case, the New York Times noted that, *"In a series of decisions, the **Court has narrowed the reach of federal criminal laws aimed at public corruption and white-collar crime.**"*

Fischer et. al. v. United States (cont.)

Where Does the Public Stand?

In a SCOTUS Poll:

- **71 %** think the events at the U.S. capitol on Jan. 6, 2021, **were criminal.**
- **29%** think the events were **not criminal.**

EMERGENCY ABORTION CARE

Moyle (& Idaho) v. United States (consolidated)

(Opinion Issued June 27, 2024)

FACTS OF THE CASE:

- Since the Dobbs decision eliminated a constitutional right to an abortion, **Idaho criminalized the provision of an abortion except to save the life of the mother or in cases of rape or incest.**
- The Emergency Medical Treatment and Labor Act (**EMTALA**, 1986) **requires emergency rooms in hospitals that receive Medicare to provide *"necessary stabilizing treatment"* to patients who arrive with an *"emergency medical condition."***
- The **Biden administration challenged** the law, and the **District Court barred Idaho from enforcing the law, and the 9th Circuit refused to stay that ruling** while the state appealed.
- On January 5, **SCOTUS accepted the case and stayed** the District Court's injunction, **allowing Idaho's law to remain.**

Moyle (& Idaho) v. United States (cont.)

QUESTION:

- **Does EMTALA preempt an Idaho law** that criminalizes most abortions in that state?

UNSIGNED DECISIONS — Without settling the question, the court:

- **Dismissed (5:4)** the writs of certiorari as ***"improvidently granted."***
- **Vacated (6:3) the stay**

FOUR OPINIONS:

- **Jackson** was the justice who **split her vote**, arguing against dismissal.

  *"Today's decision is **not a victory for pregnant patients** in Idaho. **It is delay**…And for **as long as we refuse to declare what the law required, pregnant patients** in Idaho, Texas, and elsewhere **will be paying the price.**"*

Moyle (& Idaho) v. United States (cont.)

OPINIONS (cont.):

- **Kagan wrote a concurring opinion** (joined in full by Sotomayor and in part by Jackson) which **highlighted the conflict between EMTALA and Idaho's abortion:**

  *"**What falls in the gap**…are cases in which continuing the pregnancy does not put the woman's life in danger, but still places her at **risk of grave health consequences, including loss of fertility.***

- **Barret wrote a concurring opinion** arguing that the **Court should not weigh in until the lower courts consider** Idaho's "*difficult and consequential*" argument that the **Constitution bars Congress from using its *"power of the purse"* to require hospitals that take Medicare funding *"to violate state criminal laws."***

Moyle (& Idaho) v. United States (cont.)

OPINIONS (cont.):

- **Alito wrote a dissenting opinion, labeling the government's theory** that EMTALA supersedes state law as ***"plainly unsound."***

  "Far from requiring hospitals to perform abortions, ***EMTALA's text unambiguously demands that Medicare-funded hospitals protect the health of both a pregnant woman and her unborn child."***

Where Does the Public Stand?

In a SCOTUS Poll:

- **82 %** think Idaho hospitals **must provide** abortions in medical emergencies.
- **18%** think they are **not allowed.**

EMERGENCY ABORTION CARE

UPDATES OF NOTE:

- **Georgia's Supreme Court reinstated the state's strict abortion ban**, overruling a Superior Court Judge's ban, but it **retained a ban to give prosecutors broad powers to seek medical records of women who have obtained abortions.**
- **SCOTUS refused to intervene to require hospitals to perform abortions in emergency situations**, leaving in place a lower court ruling that **federal law does NOT require access to treatment** that would violate the state's abortion ban.

HOMELESSNESS

The City of Grants Pass, Oregon v. Johnson et al.

- Grants Pass has a **homeless population of 600 in a population of about 38,000 people**.
- The city also has public camping laws that **restrict encampments on public property**:
  - Initial violations trigger a fine
  - Multiple violations can result in imprisonment
- Plaintiffs here filed a class action on behalf of Grants Pass' homeless population arguing against enforcement of their camping laws because they **violate the Eighth Amendment of the Constitution**:

  "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The City of Grants Pass, Oregon v. Johnson et al.

- So how does a camping ban (which is common) allegedly violate the 8th amendment and constitute 'cruel and unusual punishment?' The **argument is as follows**:
  - In ***Martin v. Boise***, the 9th Circuit held that enforcing camping bans against the homeless **violates the 8th amendment when the number of practically available shelter beds is less than the homeless population** (the case did not go to SCOTUS).
  - In ***Robinson v. California***, the SCOTUS held that a CA law that said ***'no person shall … be addicted to the use of narcotics'*** **could not be enforced**. To do so would constitute cruel and unusual punishment **because it would punish the *status* of being addicted**.
  - By enforcing its camping ban against the homeless when there are inadequate shelter beds available, **Grants Pass is thus criminalizing the status of homelessness**.

The City of Grants Pass, Oregon v. Johnson et al.

- **The District Court agreed** with plaintiffs and enjoined the City from enforcing its camping ban; the **9th Circuit agreed** (in a split decision) and SCOTUS took the case.
- **The conservative majority (6-3) reversed the decision**, with Gorsuch writing the opinion and holding that **the enforcement of 'generally applicable' laws regulating camping on public property does not constitute 'cruel and unusual punishment.'**
  - Gorsuch first emphasizes that the **8th Amendment is directed at 'the method or kind of punishment" that may be imposed under criminal statutes**, not whether particular behavior may be criminalized in the first place.
  - Initial fines, orders barring repeat offenders and up to 30-day jail sentences for violating such orders are **not cruel or unusual**.
  - Gorsuch distinguished the situation of criminalizing the status of homelessness, stating that the **camping bans do not criminalize this status**.

The City of Grants Pass, Oregon v. Johnson et al.

Specifically, Gorsuch points out:

- Public camping laws **prohibit actions taken by any person**, regardless of their status.
- **In *Robinson*, the status of being addicted was criminalized**; this law does not criminalize the status of homelessness, but the act of camping.
- **The argument that Robinson should be extended to acts that are in a sense 'involuntary'** (i.e. plaintiffs can't help camping on public property because there is no other place to go) is **further refuted by Gorsuch**:
  - **Not supported by precedent** (he cites a prior opinion by Thurgood Marshall in which an alcoholic argued that he can't help be drunk because he's an alcoholic, so it's an involuntary condition)
  - To extend Robinson beyond laws that directly criminalize a status to arguably involuntary acts is **opening a can of worms**

The City of Grants Pass, Oregon v. Johnson et al.

- **Sotomayor writes the dissent:**
  - The facial neutrality of the anti-camping ordinance is irrelevant, given that it would **effectively criminalize sleeping in the only location available to homeless people** in Grants Pass. Furthermore, the ordinance defines campsites as locations where bedding is placed "for the purpose of maintaining a temporary place to live", clearly directing its application toward homeless people, as opposed to other visitors.
  - Whereas an alcoholic's decision to drink to the point of public intoxication presents ambiguity in the extent of voluntary wrongdoing, **all homeless people must sleep**.
  - Criminalization of homelessness will **ultimately limit the employment and housing opportunities available to homeless people**. Homeless people are more likely to move to other areas than stay and engage in a costly and complex necessity defense.
- **NOTE:** There is **a lot of commentary and discussion** on this case and the various legal options available

NRA v. Vullo: A Brief Synopsis

- Following the Parkland high school shooting, the superintendent of the New York State Department of Financial Services (DFS) **Maria T. Vullo advised banks and insurance companies in the state of New York not to provide services to the National Rifle Association of America (NRA).**
- Vullo specifically told Lloyd's executives that **"DFS was less interested in pursuing" infractions unrelated to any NRA business *"so long as Lloyd's ceased providing insurance to gun groups, especially the NRA."***
- The NRA sued Vullo, alleging a First Amendment violation. A three-judge panel of United States Court of Appeals for the **Second Circuit ruled against the NRA**, affirming a lower court's dismissal of the case. Judge Denny Chin wrote that while government officials may not "use their regulatory powers to coerce individuals or entities into refraining from protected speech… government officials have a right — indeed, a duty — to address issues of public concern."
- The **Supreme Court Reversed in a unanimous decision**. The opinion was written by Justice Sotomayor.

NRA v. Vullo: A Brief Synopsis

- *"Government officials **cannot attempt to coerce private parties** in order to punish or suppress views that the government disfavors."*
- Government officials cross the line into impermissible coercion when they engage in conduct *"that, viewed in context, could be reasonably understood to convey **a threat of adverse government action in order to punish or suppress speech** … At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society."*