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# CLE RELAY

2023-2024  
US Supreme Court  
Term in Review



# Our Panel



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**Adam Unikowsky**

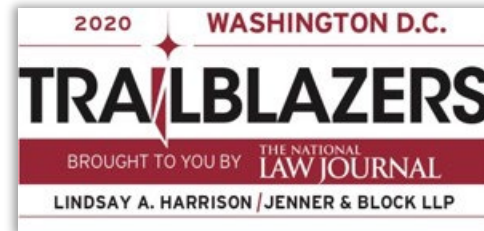
Co-Chair of the AI Task Force;

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# Jenner's Supreme Court Practice

- Routinely appear in federal and state appellate and trial courts and provide counseling on commercial and regulatory issues
- 13 oral arguments in the past six US Supreme Court Terms
- Nine members of the firm have argued before the US Supreme Court
- Featured on *The National Law Journal's* **"Appellate Hot List"** for the last 15 consecutive years
- Named a **"Practice Group of the Year"** several times by *Law360*
- Consistently recognized in *Chambers USA* as being among the nation's **leading appellate law practices**



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ACLU of Oklahoma Honors McGirt Team with Angie Debo Civil Libertarian Award

Partner Michelle Kallen Named Virginia Lawyers Weekly's 2022 Leader of the Year



LENNY POWELL 2023

# Agenda

● *The Past Term – Roundtable*

● *The 2023-2024 Term – Cases*

Ad Law Cases

Abortion

Democracy and Voting

A Recurring Litigant

Guns

Content Moderation and First Amendment Cases

Business Cases

● Next Term

● Q&A



*The Past Term*  
***Roundtable***

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*Cases*  
***The 2023-24 Term***

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*Cases*  
***Abortion Cases***

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# Abortion Back on the Docket

- ***FDA v. Alliance for Hippocratic Medicine***
  - Anti-abortion doctors challenge FDA’s 2000 approval of mifepristone and 2016 access-expanding guidance under the APA.
  - Supreme Court stays district court decision in full.
  - Fifth Circuit ultimately reverses district court regarding 2000 approval; affirms regarding post-2016 decisions.
  - Supreme Court holds, 9-0, that plaintiffs lacked standing.
    - No standing based on hypothetical conscience injury when doctors have conscience protections
    - No standing based on speculative risk of increased emergency room visits
    - No organizational standing based on resource expenditures



# Abortion Back on the Docket

- ***FDA v. Alliance for Hippocratic Medicine***
- ***Moyle v. U.S.***
  - Whether the lower courts properly enjoined Idaho's Defense of Life Act, which prohibits abortions unless necessary to save the life of the mother, on the ground that the Emergency Medical Treatment and Labor Act preempts it.
  - Supreme Court stayed lower court injunction and heard case on expedited basis.
  - Court was sharply divided at oral argument.



*Cases*  
***Democracy and Voting***

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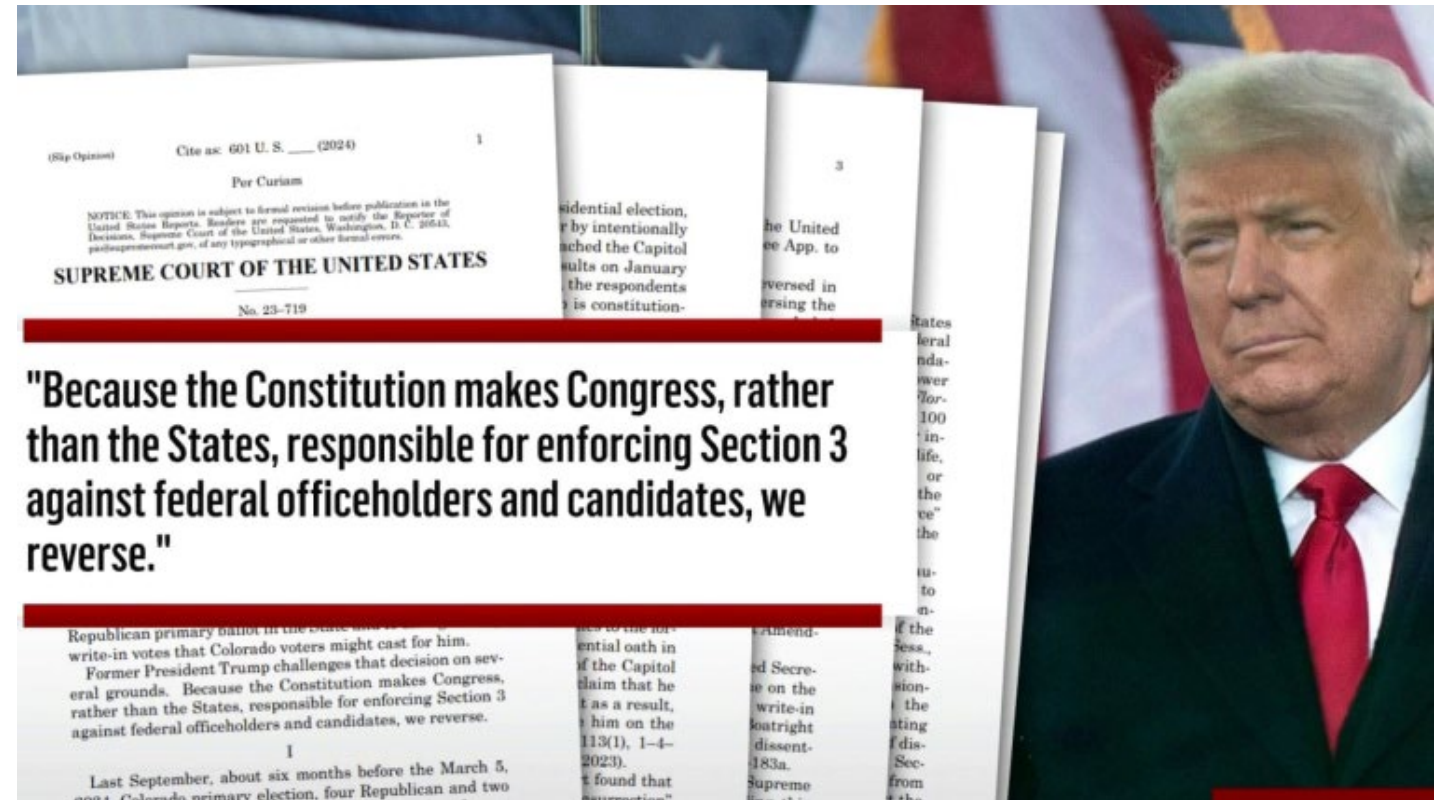
# Trump Ballot Removal Case – *Trump v. Anderson*

- Colorado Supreme Court orders that Trump must be removed from ballot because he is not eligible for office.
- Section 3 of the Fourteenth Amendment says that no person can hold any office if, they “engaged in insurrection” while previously serving as an “officer of the United States” and having previously taken an oath to support the Constitution of the United States.
- Officer of the United States?
- Engaged in insurrection?



# Trump Ballot Removal Case – *Trump v. Anderson*

- *Per curiam* opinion holds that “States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.”
- Only Congress can enforce Section 3 through legislation under Section 5 of the Fourteenth Amendment.
- Justice Barrett: “I agree that States lack the power to enforce Section 3 against Presidential candidates. That principle is sufficient to resolve this case, and I would decide no more than that.”
- Justices Kagan, Sotomayor, and Jackson: “We cannot join an opinion that decides momentous and difficult issues unnecessarily, and we therefore concur only in the judgment.”



# Racial Gerrymandering – *Alexander v. South Carolina NAACP*

- Did the Legislature subordinate traditional districting principles to racial considerations in drawing Congressional District 1?
- How to disentangle race from politics?
- Direct appeal from a three-judge court, so review is supposed to be highly deferential and the Court is supposed to reverse only for clear error.
- In a 6-3 opinion authored by Justice Alito, the Court conducts a detailed review and finds the decision below clearly erroneous.
- In dissent, Justice Kagan references her earlier opinion for the Court in *Cooper v. Harris* and observes that the change in the Court composition means that what is essentially the same case now comes out differently.
- Justice Thomas “write[s] separately to address whether our voting-rights precedents are faithful to the Constitution.”



# Racial Gerrymandering and the Voting Rights Act – Louisiana

- In a suit brought by Black voters, a district court in Louisiana held that Louisiana likely violated the Voting Rights Act in drawing a congressional map with only one district in which Black voters had an opportunity to elect a candidate of their choice.
- Louisiana then enacted a map with two majority-Black districts. White voters sued in a different district court to say the new map was a racial gerrymander. The district court agreed and struck down the map.
- In a 6-3 ruling, the Supreme Court granted an emergency stay motion from the State putting that ruling on hold given the pendency of the 2024 election.
- Eventually, the case will present the Court with questions about the interaction of the Court's Voting Rights Act and racial gerrymandering precedent.



*Cases*  
***A Recurring Litigant***

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# Donald Trump Back in Front of the Court

- ***Trump v. United States***

- Court grants cert on the following question:

- Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

- Court grants a stay, albeit “without expressing a view on the merits”

# Donald Trump Back in Front of the Court

- ***Trump v. United States***

- *Nixon v. Fitzgerald* (1982):

- Recognizes “absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”

- The Hypos

- Shooting on Fifth Avenue
- Seal Team 6

- Timing of trial

- Justice Barrett: “You concede private acts don’t get immunity?”

# Donald Trump Back in Front of the Court

- ***Fischer v. United States***

- January 6<sup>th</sup> prosecution for “obstruction”
- Freestanding “obstruction of proceedings” crime vs. “obstruction” concerning evidence
- Hypos
  - Disruption in the Court?
  - Pulling a fire alarm before vote?
- Substantial obstruction, corrupt intent
- Part of a long series of cases narrowing prosecutorial discretion
- Effect on Trump obstruction charges in Florida

*Cases*  
***Gun Cases***

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# Gun Cases

- **Background:**

- *Heller* (2008): recognized an individual right to bear arms under the Second Amendment.
- *Bruen* (2022):
  - To burden the right to bear arms, the government must affirmatively establish that regulation is “part of the historical tradition.”
  - “[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”

# Gun Cases

- **Background:**

- Lower courts *post-Bruen* engaged in historical analysis to determine whether the regulation was part of the “historical tradition.”
  - Felon in possession of firearm
  - Assault rifles and machine guns
  - Sensitive places
  - Firearms for domestic abusers
- How does a court go about determining how close the historical analogue must be?

# Gun Cases

- ***United States v. Rahimi***:
  - Fifth Circuit holding:
    - Need not be a historic “twin” but the historical analogues offered by the government were too dissimilar.
  - The Supreme Court (8-1) reversed.
  - 7 separate opinions, with Thomas as the sole dissenter.

# Gun Cases

## – Majority opinion (Roberts, C.J.)

- “[S]ome courts have misunderstood the methodology of our recent Second Amendment cases.” He then drops two incomprehensible paragraphs seeking to clarify how *Bruen* is supposed to work.
- *Bruen* was “not meant to suggest a law trapped in amber.”
- Law need only be “relevantly similar” to laws our tradition is understood to permit—though, even then, the restriction cannot go “beyond what was done at the founding.”
- “When an individual poses a clear threat of violence to another, the threatening individual may be disarmed.”
- Declined to resolve whether the relevant history is as of 1791 or 1868.

## Gun Cases

- **Gorsuch:** “Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. (As we have today.) Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves).”
- **Kavanaugh:** “The balancing approach can be antithetical to the principle that judges must act like umpires... It is true that using history to interpret vague text can require ‘nuanced judgments,’ ... [b]ut at a minimum, history tends to narrow the range of possible meanings that may be ascribed to vague constitutional language.”
- **Barrett:** “Historical regulations reveal a principle, not a mold”; “Imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us ‘a law trapped in amber.’ And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority.”

## Gun Cases

- **Sotomayor** (and Kagan): That “shared principle” with a Reconstruction-era law “is sufficient.”
- **Jackson**: “Make no mistake: Today’s effort to clear up ‘misunderst[andings],’ ante, at 7, is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them.”

# Gun Cases

- **In summary:**
  - Six conservatives are aligned that arms restrictions should be viewed under an “original history” test and not under a balancing test.
    - But see Barrett’s concurrence in *Vidal v. Elster* (““Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test.”).
  - Five (except Thomas) do not require a precise match to restrictions at ratification and are willing to look at “clear threat” restrictions at the founding as broadly permitting regulation.
    - Thomas in dissent believes that only founding-era restrictions are permissible and establish not just principle but precedent.
  - Three liberals reject *Bruen*.

# Gun Cases

- What's on the statutory front? *Cargill v. Garland* (6-3).
- What's next on the constitutional front?

*Cases*

***Content Moderation and First  
Amendment Cases***

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# Content Moderation and First Amendment Cases

- **Whose speech is it anyway?**
  - Social media platforms: content moderation is the platforms' protected speech (in the form of editorial judgments).
  - The States: focus on the speech of social media users whose speech has been removed or deprioritized.
- **Who is censoring who?**
  - The States: social media platforms are censoring disfavored speakers.
  - Social media platforms: the State laws are censoring the platforms' editorial judgments.





*Cases*  
***Business Cases***

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# Business Cases

- *Moore (Tax)*
- *Purdue*
- *Securities*
- *Arbitration*
- *Homelessness*

# *Next Term*

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## Next Term

- *Election litigation?*
- *Prohibitions on Gender Affirming Care*
- *Guns (weapons kits)*
- *Securities*
- *NEPA*

# *Questions*

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*Thank You!*

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# Our Panel



## Ian Heath Gershengorn

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Ian is chair of the firm's Appellate and Supreme Court Practice and is one of the nation's premier Supreme Court and Appellate advocates. He has argued 17 cases before the Supreme Court. Before re-joining Jenner in 2017, he served in the Office of the Solicitor General at the US Department of Justice, first as Principal Deputy Solicitor General and then as Acting Solicitor General of the United States, a position he held from June 2016 until the end of the Obama administration in January 2017. Ian's practice focuses on advising clients on a range of complex litigation and strategy problems, with particular emphasis on commercial disputes and challenges involving government, regulatory, and other public policy issues.

Since returning to the firm in the Fall of 2017, Ian has appeared regularly in the state and federal appellate courts, arguing on behalf of clients such as McKesson Corporation, FanDuel, the Recording Industry Association of America, FirstTrust Bank, General Dynamics, and Charter Communications.

Ian currently co-teaches a course at Harvard Law School on The Roberts Court.

# Our Panel



## Jessica Ring Amunson

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Jessica Ring Amunson is Co-Chair of the firm’s Appellate and Supreme Court Practice and Chair of the firm’s Election Law and Redistricting Practice. In 2018, she was named an “Appellate MVP” by Law360, which recognizes the five attorneys in the country “who had extraordinary wins and contributed most to their practice area in the past year.” An experienced litigator, Jessie has argued before the US Supreme Court and multiple federal and state courts of appeals and has authored hundreds of briefs. She has successfully represented clients in matters involving federal constitutional claims, statutory interpretation questions, administrative law issues, and large commercial disputes. Jessie also regularly counsels clients on appellate and Supreme Court strategy.

As chair of the firm’s Election Law and Redistricting Practice, Jessie represents clients, including elected officials, in matters involving redistricting, voting rights, and campaign finance in the US Supreme Court, before the Federal Elections Commission, and in courts around the country. She has litigated election law and redistricting matters in a number of states, including litigation involving disputed elections. She regularly represents clients on the merits and as amici in direct appeals to the US Supreme Court in redistricting and voting rights cases. Jessie has been repeatedly recognized for her extensive knowledge of election law and regularly speaks on panels regarding issues in redistricting and voting rights. She serves on the Advisory Committee to the Voting Rights Institute and is a member of the Litigation Strategy Council for the Campaign Legal Center.

# Our Panel



## Matthew Hellman

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Matthew Hellman is Co-Chair of the firm's Appellate and Supreme Court Practice. He has been lead counsel in dozens of appellate matters and has presented arguments in the US Supreme Court and in federal and state appellate courts around the country. He has successfully defended on appeal more than \$1 billion in commercial claims, and he has prevailed in the Supreme Court in important bankruptcy, copyright, First Amendment, and administrative law cases. Clients such as Marriott, GE, Nomura, and General Dynamics have sought Matt's counsel on a wide variety of banking, hospitality, government contracts, copyright, and business torts matters.

Matt maintains a substantial pro bono practice, including matters with significant commercial implications, such as his win in the US Supreme Court in *Law v. Siegel*, which was called the most important bankruptcy case of that term. He has argued or supervised more than a dozen pro bono cases in the courts of appeals, including two capital cases. In 2007, Jenner & Block recognized Mr. Hellman with the Albert E. Jenner, Jr. Pro Bono Award, which annually recognizes lawyers in the firm with a strong commitment to pro bono or public service work.

In 2016, Matt was named Co-Director of the Jenner & Block University of Chicago Law School Supreme Court and Appellate Clinic, a testament to his experience as well as his ability to teach the next generation of appellate advocates. He is also a member of the Edward Coke Appellate Inn of Court and on the Board of Directors of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. He serves as Co-Chair of the DC Hiring and Hiring Executive Committees and is also a member of the Associate Development and Evaluation Committee and the Finance Committee.

# Our Panel



## Michelle Kallen

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Michelle Kallen, the former Solicitor General of Virginia, helps clients navigate complex matters before federal and state appellate courts. Leading companies in the blockchain, aerospace and defense, hospitality, technology, and transportation industries benefit from her extensive government experience, unique insight into multistate and constitutional litigation matters, and award-winning appellate work. She specializes in helping clients navigate unsettled and evolving areas of law. Michelle regularly files briefs and litigates matters in the US Supreme Court, the Supreme Court of Virginia, the United States Court of Appeals for the Fourth Circuit, the Eastern District of Virginia, and other state and federal courts.

She achieved notable wins in these venues during her tenure in the Office of the Attorney General of Virginia, including defending the Commonwealth against challenges to its COVID-19 response. Michelle also served as lead counsel in the Commonwealth's election matters and in litigation to certify and publish the Equal Rights Amendment to the US Constitution.

# Our Panel



## Annie Kastanek

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Andrianna (Annie) Kastanek is a former federal prosecutor, former Supreme Court clerk, and Co-Chair of Jenner & Block's Appellate and Supreme Court Practice.

Annie has briefed more than 200 federal appeals before the US courts of appeals and filed hundreds of briefs in federal district courts. She has argued more than 40 federal appeals, including in the Second, Seventh, and Ninth Circuits. She has tried 13 cases in federal court, ranging from civil antitrust claims to criminal conspiracy, tax, and fraud charges.

As Co-Chair of the firm's Appellate and Supreme Court Practice, Annie leverages her vast appellate and trial experience, and her award-winning writing skills, to successfully represent clients in high-stakes matters. She regularly represents clients in the US Supreme Court and the federal courts of appeals, as well as in federal district court. She also coordinates closely with the firm's trial teams on legal and strategic issues, positioning clients for victories on motions to dismiss, motions for summary judgment, and at trial. She is a member of the firm's Management Committee.

Over her 12 years as a federal prosecutor, Annie also served in other leadership positions, including Deputy Chief of Appeals and Civil Rights Coordinator. She received DOJ's prestigious Director's Award for Superior Performance of an Appellate Team.

# Our Panel



## Adam Unikowsky

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Adam Unikowsky represents businesses, trade associations, and individuals in federal district courts, courts of appeals, and the US Supreme Court. He has argued eleven cases at the Supreme Court, winning nine. His experience spans a wide range of industries and subject matter, including securities litigation, Indian law, patents, civil procedure, and constitutional law. He draws on that broad-based experience to develop the approach best suited to his clients' business needs. With his depth of insight into the appellate and Supreme Court litigation process, Adam frequently collaborates with larger legal teams in developing strategies across multiple cases and courts. Adam clerked for Justice Antonin Scalia and Chief Judge Douglas Ginsburg on the DC Circuit.

He earned his JD, *magna cum laude*, from Harvard Law School and a BS from Massachusetts Institute of Technology. His undergraduate and graduate degrees in electrical engineering and computer science heighten Adam's understanding of technical nuances at play in his cases.