

SECOND CIRCUIT REVIEW

The Second Circuit in the Supreme Court

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With the U.S. Supreme Court beginning its October Term 2026 in the coming days, we conduct our 42nd 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 2025 was a significant one. The court issued major decisions concerning birthright citizenship; immigration and citizenship; the Second Amendment; LGBTQ+ issues; the Voting Rights Act; elections; foreign sovereign immunity; tariffs; the Fourth Amendment; state sovereign immunity; standing; the Sixth Amendment; intellectual property; and executive removal power.

Significant cases were decided 6–3, along ideological lines, including the rulings on transgender athletes and Title IX, executive removal power over an FTC Commissioner, voting rights and campaign finance, firearms on private property, and immigration.

Other major cases decided without the 6–3 ideological split included those on birthright citizenship,



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federal gun prosecutions, tariffs, conversion therapy and free speech, mail-in voting, and the Fourth Amendment.

Overall, the court decided 63 argued cases on the merits and issued 57 opinions in argued cases, six of which concerned decisions of the Second Circuit. The court reversed or vacated in half of those cases, but the Second Circuit was not an outlier in that respect: nine other circuits had reversal rates as high as or higher than the Second Circuit's. Indeed, the court reversed in nearly 62% of the cases it decided on the merits, including all from the Seventh, Eighth, and Eleventh Circuits.

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.

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Court	Cases*	Affirmed	Reversed or Vacated	Percent Reversed or Vacated
First Circuit	1	1	0	0%
Second Circuit	6	3	3	50%
Third Circuit	3	1	2	67%
Fourth Circuit	5	1	4	80%
Fifth Circuit	11	3	8	73%
Sixth Circuit	4	2	2	50%
Seventh Circuit	2	0	2	100%
Eighth Circuit	1	0	1	100%
Ninth Circuit	7	1	6	86%
Tenth Circuit	3	2	1	33%
Eleventh Circuit	2	0	2	100%
D.C. Circuit**	3	2	1	33%
Federal Circuit	2	1	1	50%
District Courts	6	2	4	67%
State Courts	5	3	2	40%

This table reflects cases on the Supreme Court’s Granted & Noted List as of June 30, 2026. Where the Supreme Court’s judgment concerns a decision of a district court, rather than a decision of a court of appeals, we have accounted for that judgment in the “District Courts” row. Where the Supreme Court decided cases together that originated from different lower courts, we reflect those cases in the rows for the applicable courts. We treat consolidated cases emerging from the same lower court as a single case in the table.

In *Trump v. Cook*, the Supreme Court denied the stay following the D.C. Circuit’s denial of the stay and, accordingly, we are counting the Supreme Court’s denial as an affirmance.

We will next discuss the court’s six decisions in argued cases and two decisions in cases without argument from the Second Circuit.

Compassionate Release

In *Fernandez v. United States*, the court considered whether district judges can consider the alleged invalidity of a conviction as among the “extraordinary and

compelling reasons” that may warrant compassionate release. 146 S. Ct. 1292 (2026).

The district court had granted a prisoner’s motion for compassionate release under 18 U.S.C. §3582(c)(1)(A)(i) on account of the judge’s concerns about the trial, including the truthfulness of some testimony. On appeal, the Second Circuit reversed, holding that such concerns over the validity of a conviction cannot constitute “extraordinary and compelling reasons” under Section 3582(c)(1)(A) that could warrant compassionate release.

In an 8–1 decision, the court affirmed the Second Circuit’s judgment. Justice Barrett, writing for the court, explained that Fernandez’s compassionate release motion was an impermissible collateral attack on a federal conviction. She noted that Fernandez previously raised concerns over the validity of his conviction—through direct appeal and then under the federal habeas statute—and lost in these attempts.

Now, Justice Barrett explained, the prisoner “repackaged” these arguments under the compassionate release statute and “obtained release from prison on those twice-rejected grounds.” She reasoned that the term “extraordinary and compelling” in Section 3582(c)(1)(A) cannot encompass an allegedly invalid conviction, explaining that “a reason is not ‘compelling’ if Congress has channeled it through the post-conviction statutes.”

Implied Private Rights of Action Under the Investment Company Act

FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd. addressed the question whether Section 47(b) of the Investment Company Act (ICA) grants a private right of action to sue for rescission where a contract allegedly violates the Act. 146 S. Ct. 1546 (2026). At the district court, managers of open-end mutual funds (Saba) sued investment companies that manage closed-end mutual funds (Funds), alleging that the Funds “violate the ICA’s requirement that ‘every share of stock... shall be a voting stock and have equal voting rights with every other outstanding stock.’”

Saba argued that Section 47(b) of the ICA afforded Saba this implied private right of action and the district court agreed. Following the district court’s grant of summary judgment for Saba, the Second Circuit summarily affirmed.

The Supreme Court reversed 6–3, holding that the ICA does not grant a private right of action for contract rescission. Justice Barrett began with the

text, explaining that the relevant portion of Section 47(b) provides that if a contract made in violation of the ICA “has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter.”

Justice Barrett explained that the phrase “rescission at the instance of any party” cannot imply a private right of action because, among other observations, the “key actor is ‘a court,’ not an individual” and Section 47(b) “says not a word about individual rights.” Justice Barrett also explained that the ICA’s “structure” points in the same direction because “Congress’s decision to create a comprehensive agency enforcement scheme supports the conclusion that private parties generally cannot enforce the ICA.”

Justice Jackson, joined by Justice Sotomayor and in part by Justice Kagan, dissented, arguing that the text, structure, statutory history, and legislative history indicate that Section 47(b) permits an implied private right of action.

Cumulative Firearm Convictions and Double Jeopardy

In *Barrett v. United States*, the court considered whether a single act that violates both 18 U.S.C. §924(c)(1)(A)(i), which criminalizes using a firearm in connection with a crime of violence or drug trafficking crime, and Section 924(j), which prescribes different penalties (including, in certain circumstances, capital punishment) when a violation of Section 924(c) causes death, may yield two convictions or only one. 146 S. Ct. 482 (2026). Below, the Second Circuit held that one such act may yield two convictions and instructed the district court to impose separate convictions and sentences.

The panel acknowledged that the two provisions qualify as the same offense under *Blockburger v. United*

States, 284 U.S. 299 (1932), but ruled that they “are separate offenses for which Congress has clearly authorized cumulative punishments.” *Barrett*, 146 S. Ct. at 488. Because the government agreed with *Barrett*, the court appointed an amicus curiae to defend the Second Circuit’s judgment.

In a unanimous decision, the court reversed in relevant part. Justice Jackson, writing for the court, explained that all agreed the two subsections define the same offense under *Blockburger*, and that the court has “long presumed that Congress intends to authorize only one conviction per offense.” Justice Jackson explained that here, that presumption held: “Congress intended subsection (j) as an alternative, not a supplement, to subsection (c)(1)(A)(i),” and at the very least Congress “did not clearly manifest a contrary intention, as it would have to do if it wished to authorize two convictions in these circumstances.”

Status of Returning Lawful Permanent Residents at the Border

Blanche v. Lau presented the question whether the Immigration and Nationality Act (INA) requires a border officer to have clear and convincing evidence that a returning lawful permanent resident has committed a crime involving moral turpitude before deeming him an applicant “seeking an admission.” 146 S. Ct. 1981 (2026).

Lau, charged in New Jersey with trademark counterfeiting, left the country while awaiting trial; when he sought reentry, a border officer declined to regard Lau as admitted and instead paroled him into the United States pending the resolution of his criminal case (thus allowing Lau entry without a formal admission).

Following Lau’s guilty plea to the New Jersey charge, the government initiated removal proceedings and secured a removal order, which the Board of Immigration Appeals affirmed. Later, the Second Circuit vacated the removal order, ruling that Lau should

have been deemed already admitted “upon arrival unless the border officer had ‘clear and convincing’ evidence that Lau had committed the crime,” evidence that the Second Circuit held the officer lacked.

The Supreme Court vacated the Second Circuit’s judgment and remanded in a 6–3 decision. Justice Thomas, writing for the Court, described removal on an inadmissibility charge as a two-step inquiry in which “only commission [of the crime] is required at step one” while “conviction (or admission) is required at step two.”

“Nothing in the INA imposes the burden that the Second Circuit recognized,” which came “not from the statutory text, but from inapposite Board of Immigration Appeals precedent” applicable at the removal hearing rather than at the border.

And here, Justice Thomas explained, the government satisfied its burden at the removal hearing because “Lau’s guilty plea was clear and convincing evidence that, before he attempted to reenter the country, he had committed the crime in question.” Justice Jackson, joined by Justices Sotomayor and Kagan, dissented. In Justice Jackson’s view, “the only question this case presents is one of sequencing.”

Federal Jurisdiction to Confirm or Vacate Arbitral Awards

Jules v. Andre Balazs Properties presented the question whether a federal court that has stayed claims under Section 3 of the Federal Arbitration Act (FAA) has jurisdiction to confirm or vacate the resulting arbitral award under Sections 9 and 10, even when the motion to confirm or vacate would not independently present a basis for federal jurisdiction. 146 S. Ct. 1209 (2026).

The Second Circuit held that such a court has jurisdiction, distinguishing *Badgerow v. Walters*, 596 U.S. 1 (2022), which involved a freestanding action to vacate an award, from an action that “started as a federal question suit before it was stayed pending arbitration.” *Jules*, 146 S. Ct. at 1217.

The court affirmed in a unanimous decision. Justice Sotomayor, writing for the court, explained that “[a] court with the power to stay the action under §3 has the further power to confirm [or vacate] any ensuing arbitration award.” Nothing in the FAA eliminated the district court’s Section 1331 jurisdiction while the parties arbitrated: “The court had federal question subject matter jurisdiction and... never lost it.”

Justice Sotomayor observed that structure confirmed the result; because Section 3 mandates a stay rather than dismissal, the rule adopted by the court works well: “a court that has granted a §3 stay can superintend the arbitration to the end, including through confirmation or vacatur.” The contrary rule would force parties into a fresh state-court proceeding and invite “wasteful, bifurcated, and possibly inconsistent proceedings.”

Seventh Amendment Challenge to Agency Forfeiture Orders

FCC v. AT&T, Inc., consolidated with a companion case brought by Verizon, presented the question whether the Commission’s practice of issuing monetary forfeiture orders under 47 U.S.C. §503(b)(4) without a jury violates the Seventh Amendment. 146 S. Ct. 1418 (2026). The Fifth Circuit held that it does; the Second Circuit disagreed, concluding that the “FCC’s forfeiture order... does not, by itself, compel payment” because the Department of Justice must first “initiate a collection action.”

The Supreme Court affirmed the Second Circuit judgment and reversed the Fifth Circuit judgment in an 8–1 decision. Chief Justice Roberts, writing for the court, framed the question as one of timing: “before the government can collect a penalty, it must prove its case to a jury in a trial de novo.”

The Seventh Amendment does not “prescribe at what stage” a jury must act, and the Commission’s orders “did not create an obligation to pay.” Because forfeitures are recoverable only in a trial de novo, the order is “simply a prerequisite to suit,” a “preliminary”

procedure to which “[t]he Seventh Amendment does not extend.”

Qualified Immunity

Zorn v. Linton concerned whether a Vermont police sergeant was entitled to qualified immunity for using a rear wristlock to lift a passively resisting woman to her feet during a sit-in at the state capitol. 146 S. Ct. 926, 928–929 (2026).

The district court granted summary judgment for *Zorn*, ruling that he was entitled to qualified immunity. The Second Circuit then reversed, holding that *Zorn* was not entitled to qualified immunity because *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), clearly established that “the gratuitous use of pain compliance techniques... on a protestor who is passively resisting arrest constitutes excessive force.” *Zorn*, 146 S. Ct. at 930–931.

The Supreme Court summarily reversed in a per curiam opinion. Reiterating that precedent must define a right with a “high degree of specificity,” the court held that “[t]he Second Circuit contravened these principles.”

The court stated that *Amnesty America* held only that a jury could find the force used in that case gratuitous, so reasonable officials would not read *Amnesty America* “to establish that using a routine wristlock to move a resistant protester after warning her, without more, violates the Constitution.” Justice Sotomayor, joined by Justices Kagan and Jackson, dissented, arguing that the Second Circuit correctly read *Amnesty America* as having “clearly established” that *Zorn*’s alleged conduct violated the Constitution.

AEDPA and Jury Instructions

McCarthy v. Hernandez arose from the prosecution of Pedro Hernandez for the 1979 disappearance of 6-year-old Etan Patz. 146 S. Ct. 1873 (2026). After the trial court declined to suppress Hernandez’s confessions, the jury asked whether it “must” disregard the later, post-warning confessions if it found the first confession involuntary; the state judge answered

“no” and, after the jury found Hernandez guilty of kidnapping and felony murder, the intermediate appellate court affirmed the conviction.

Subsequently, Hernandez’s application for habeas relief was denied at the district court, but the Second Circuit reversed, ordering habeas relief after finding that the trial court’s “no” answer to the jury was “contrary to” and “involved an unreasonable application” of *Missouri v. Seibert*, 542 U.S. 600 (2004). *McCarthy*, 146 S. Ct. at 1876, 1879–1880.

The Supreme Court summarily reversed in a per curiam opinion. “The Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’) imposes strict limits on federal courts’ power to grant habeas relief to a prisoner convicted in state court,” explained the court. The court reasoned that “Hernandez had no federal right to have the jury evaluate the lawfulness of his confessions after the trial court admitted them.” “Even if Justice Kennedy’s opinion [in *Seibert*] clearly established a rule of federal law cognizable under §2254(d),” the court said, “that opinion established nothing about a jury’s determination of a confession’s legality.”

Additionally, the court explained that its “case law does not support the Second Circuit’s conclusion

that the trial judge’s response to the jury’s note violated Hernandez’s right to due process” because the court has “never held that... a trial court [must] explain to a jury an issue that the jury is not required to decide.”

The October Term 2026

As of Sept. 14, 2026, the Supreme Court had agreed to review three cases arising out of the Second Circuit for the October Term 2026. *RiseandShine Corp. v. PepsiCo, Inc.* presents the question whether trademark strength is a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. §1114. *Grant v. Higgins*, consolidated with *Viramontes v. Cook County* out of the Seventh Circuit, addresses whether the Second and Fourteenth Amendments guarantee the right to possess semiautomatic rifles (including the AR-15) that are in common use for lawful purposes in the United States. *Wassily v. Blanche* concerns whether noncitizens who were “granted asylum,” but whose asylum was later terminated, are eligible for adjustment to lawful permanent resident status under 8 U.S.C. §1159(b) (as the Fifth Circuit held), or are categorically ineligible (as the Second and Fourth Circuits held).