[Intro music]

[Sound of gavel]

Hillel Aron: Oyez, oyez, oyez! All persons having business before this podcast are admonished to draw near and give their attention, for the podcast host is now sitting. Hey! I said Oyez! Oyez in the podcast! This is Sidebar, a podcast by Courthouse News. I'm your host, the Honorable Hillel Aron, and I'll be presiding. The last Supreme Court term produced a series of sweeping decisions, upending precedents on gun control, the EPA's ability to fight climate change, and of course, the right of women to obtain an abortion. That last case, *Dobbs v. Jackson Women's Health Organization*, overturned *Roe v. Wade*, triggered widespread protests and may even shape the balance of power in Congress next year. This term, which begins in October, promises to be, okay, maybe not quite as dramatic, but not entirely without drama either. Among other things, it will be the first to feature Justice Ketanji Brown Jackson, President Joe Biden's recent appointee to the court, and the court will delve into some pretty weighty issues. When do racial minorities deserve extra protection? Should artists be allowed to reuse art to make their own art? And should a web designer be allowed to refuse to work on a site for same-sex marriage? We'll start with two cases that could affect elections for decades to come. Every 10 years, states and cities must draw new legislative lines that reflect the results of the latest census in order to ensure equal representation for everyone. Just how those lines are drawn has always been the subject of political skirmishing. In one upcoming case, the Supreme Court will decide whether states can take race into account while drawing the district lines. In another, the court will decide if state legislatures should have sole authority to draw those lines or whether the courts can overrule them. Nina Pullano, who covers Brooklyn for Courthouse News, previews the upcoming Supreme Court term.

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Nina Pullano: A case out of Alabama, *Milligan v. Merrill*, is calling into question how the government should weigh race as a factor when drawing congressional maps.

Sophia Lin Lakin: For purposes of the case before the U.S. Supreme Court, it is centered around our challenge to the maps under section two of the Voting Rights Act.

NP: That's Sophia Lin Lakin, interim co-director of the American Civil Liberties Union's Voter Rights Project. The ACLU was one of the organizations working on the case. The challengers say that the way certain districts were redrawn this year dilutes the voting power of Black voters in Alabama.

SLL: The fact is, in Alabama, the Legislature continued to prioritize majority white communities over the Black Belt, which it continued to crack across several districts, and ultimately, Alabama passed a map where Black voters have meaningful influence in only one of seven congressional districts although Black people make up 27% of the state's population, so that is why even a panel of three judges appointed by presidents of different parties ruled after a lengthy hearing and a very detailed 200-page opinion, it's quite long, that the appropriate remedy here must be to redraw these maps.

NP: Alabama, of course, appealed that decision.

News clip: The ruling from a divided Supreme Court allows Alabama to rely on a congressional map that a lower court said likely denied Black voters in that state an additional member in the U.S. House of Representatives.

NP: Lin Lakin says the state's position ignores changing demographics.

SLL: So, Alabama argues that the maps, the congressional maps, have had a single majority Black congressional district that itself was created as a result of a violation of the Voting Rights Act and that it continued to do so, and that there was essentially no need to draw a second congressional district that was majority Black or provide an equal opportunity for Black voters to have a meaningful opportunity to elect candidates of their choice there. There's been growth and changes in the population over time across the South where you have growing populations of Black voters, but also you just have changing compositions of Black voters and ultimately the point isn't to say, okay, let's just look at what you've been doing before and whether you've been doing it before means you can continue doing it again without consequences, without taking a closer detailed look at whether or not the lines that you are drawing are complying with the requirements of federal law.

NP: So, when redrawing these maps, Alabama says, we didn't use race as a deciding factor. Advocates say that's the problem. Here's Mitchell Brown, counsel for voting rights at the Southern Coalition for Social Justice.

Mitchell Brown: You know, there's been this tension between when do you use race and when don't you use race. Tied with that tension about using race is section two of the Voting Rights Act, which we argue in its essence requires you to look at race in order to protect the rights of Black voters. And so this, this case, squarely presents a question to the court about is a state's use of race to draw a particular district to protect Black voters, is that unconstitutional? Does that count as racial gerrymandering? And just right there, I just wanna make sure I'm clear there's racial gerrymandering, which race is the predominant factor so, you looked at a person's race to draw a particular district. But then there's section two of the Voting Rights Act, which says that you have to protect against vote dilution for minority voters. And so, there's a tension that's now squarely before the court.

NP: Brown explained the impact of that question, that tension.

MB: You know, if you put a bunch of Black voters in one district, you know, and you say you have five total districts, you know, but they make the majority up of one, they really can only elect one candidate choice. Whereas if you were to kind of spread, spread them out a little bit more, where you could create maybe two majority-minority districts and they have two opportunities to elect their candidate choice, so that kind of vote dilution is no, we're not stopping you from the ballot box, but we're going to diminish the value of your vote so, it takes more votes to win for your candidate choice. And again, it keeps on going back. Courts are trying to dwindle away, like and chip away at the Voting Rights Act, one, and just voting rights in general because to them, you know, this theory of race blindness should be the standard in this country. And that's problematic again, as I said earlier because if you are race blind, it means you are ignoring people and you are ignoring their needs. And so that's in the voting rights context and even in the affirmative action context. So, affirmative action cases going up before the Supreme Court as well, same theory, race blindness, you know, colleges should not be able to look at your race. When certain people have been given a head start of 250 years plus, you know, and Black voters and Latino voters, other voters get some margin of headway, make some headway into fight for civil rights. But then you say, actually we're gonna do race blind now. We're going to ignore the burdens that were put upon you for over 200 years. We wanna ignore that, you know, because you're all right. It's like, no, it's not. We're not all right. The way it was told to me in law school is you can't, you can't unring a bell that's already been rung. And so, in this country, we've seen race. By this country was

founded upon seeing race. Now, you know, it's more so willful blindness. Right now, you are willfully blind to the system that you set up from the beginning.

NP: For some insight into what might happen here, I talked to our reporter Kelsey Reichmann, who covers the Supreme Court and politics for Courthouse News.

Kelsey Reichmann: So, in terms of the Alabama case, something that stood out I think when the case was on the emergency docket is that John Roberts, the chief justice, he was a dissenting justice and John Roberts, who wrote the opinion in Shelby County, which found that section four of the Voting Rights Act was unconstitutional, you know, he's not known as this big voting rights supporter. So, for him to dissent was notable and it doesn't necessarily mean that he is changing a position on these issues, but it just shows where the rest of the conservatives are. So, voting rights experts are really concerned about this case and what it'll do for the Voting Rights Act.

NP: The court is going to hear another important voting case this term that could have huge impact on the way elections are run. *Moore v. Harper* is out of North Carolina. It calls into question whether under the constitution, state legislatures have sole authority to regulate federal elections. Here's Mitchell Brown again, who's one of the attorneys working on the *Moore* case.

MB: If the court agrees with the North Carolina Legislature's thoughts and argument that only the Legislature is able to make the rules around federal elections and in terms of redistricting, the only one that can draw maps and state courts can't do anything about it, then there's no check.

NP: They're separate cases, but they do tie into one another. Brown explained how the outcome of the *Moore* case cuts back to the *Milligan* case in Alabama.

MB: Just to play that out for you. So, let’s say the Legislature draws up a map as they did this year, this past year, where it's a partisan gerrymander, like is extremely skewed, 11-3 Republican. And under the North Carolina Constitution, our Supreme Court had said that it's unconstitutional. If the court in hearing *Moore v. Harper* agrees with the North Carolina Legislature that a state court, the state Supreme Court cannot hold the Legislature accountable. Then the Legislature is able to run again, wild and free in North Carolina and say, hey we could draw this map and nobody can stop us. Now, we can go to federal court and that's where the *Milligan* case comes into play. Cause if we don't have section two, then we can't hold the Legislature accountable.

NP: And that opens up another really important question when it comes to how federal elections go down. Kelsey explained those concerns.

KR: Something that I've, when talking to experts about this case, while this case is just about redistricting, nothing that the justices could do in this case, it is gonna go beyond that. However, if they do embrace this theory, this independent state legislature theory, that's kind of the beginning of embracing some of those 2020 election overturning theories. You know, the idea that these state legislatures can have so much power over elections. That's kind of the first step to create precedent for, you know, overturning a bigger election. So that's really why people are so nervous about this case and nervous about a ruling in this case.

[Piano music]

NP: It's worth noting that Justice Thomas has not recused himself from the *Moore* case. His wife, Ginni Thomas, is a Donald Trump supporter and a conservative activist who called on the White House chief of staff and state legislators to overturn the 2020 presidential election results. Ginni Thomas says she and her husband never discussed those efforts, but two years later, she holds the same views. She continued to claim that the election was stolen during an interview in September with the House Committee investigating the January 6 attack on the capitol. And I'll mention there is another case where a justice did recuse herself, that's Justice Jackson in *Students for Fair Admissions v. Harvard*. Jackson went to Harvard and was on the university's Board of Overseers. The Harvard suit challenges affirmative action efforts. This is what Mitchell Brown was referring to earlier, and it says that the policies discriminate against white and Asian American applicants. There's a separate challenge against the University of North Carolina saying the same thing.

KR: The court originally took up these challenges to affirmative action, and they were going to hear them together. Jackson, when she joined the court, there was a lot of questions as soon as she was nominated over whether she would recuse.

NP: Questions like this one from Senator Ted Cruz.

Ted Cruz: So now you're on the Board of Overseers of Harvard. If you're confirmed, do you intend to recuse from this lawsuit?

Justice Ketanji Brown Jackson: That is my plan, senator.

TC: OK.

KR: She did decide to recuse, so now we have the court has separated the cases so that she can participate in the University of North Carolina case. There could be two rulings in the case. Presumably, they will be similar, especially since Jackson is gonna be part of that liberal voting block with only three votes versus that supermajority. But, you know, it does create an interesting dynamic and I think it is, it'll be notable to watch her participation in that case and what she has to say, and if she ends up writing anything.

[String music]

HA: Andy Warhol once said, ‘Art is anything you can get away with.’ Warhol died more than 35 years ago, and the courts still aren't quite sure what he should have gotten away with. A photographer is suing the Andy Warhol Foundation over a photo of prints that Warhol copied, and the Supreme Court's ruling could have a lasting impact on other artists' ability to reuse or remix other art. The case concerns something called fair use, a legal doctrine that allows for the unauthorized use of copyrighted material in certain contexts. It's why TV news segments can show clips of films they're talking about. It's why Weird Al Yankovic can record a song called ‘Amish Paradise,’ a parody of ‘Gangsta’s Paradise,’ by the late Coolio. It's why the Beastie Boy's 1989 album, ‘Paul's Boutique,’ was able to include samples of more than 100 different songs. You couldn't make that album today because a district court in New York ruled in 1991 that sampling wasn't covered under fair use. That court decision, *Grand Upright Music v. Warner Brothers* changed hip-hop forever, and it's a good example of what impact the courts can have when they rule on the limits of fair use. Here's Nina again with a look into how the Supreme Court could shake up the art world.

[String music]

NP: In a case dating back to the early 1980s, the Supreme Court is going to weigh in on when someone else's art can serve as inspiration and when you're just ripping them off. It can get especially heated when involving two iconic artists like, for example, Andy Warhol and Prince. This is *Warhol Foundation v. Goldsmith*. Here's a bit of context from Amelia Brankov, she's an attorney in New York and the chair of the Art Law Committee of the New York Bar Association.

Amelia Brankov: So, in the early '80s, a well-known photographer named Lynn Goldsmith took a photograph of the recording artist Prince, and in 1984, she licensed that photo of Prince to Vanity Fair magazine for use as an artist reference. It turned out the artist that used it as a reference was Andy Warhol, who the magazine had commissioned to create an illustration of prints for an article entitled 'Purple Fame.' At the same time, Warhol also created about 15 additional artworks based on Goldsmith's photo, and all of these 16 works later became known as the 'Prince Series.' And then, when Prince died in 2016, Condé Nast, which owns Vanity Fair, issued a commemorative issue of its magazine and licensed another of Warhol's print series works for its magazine cover and Ms. Goldsmith saw that cover and claimed that that licensing use infringed her copyright in her photograph of prints.

NP: So, the Warhol Foundation filed a lawsuit against Goldsmith to get a declaration that it had made fair use of the image. The Southern District of New York agreed with the foundation, but then that decision was reversed in the Second Circuit.

AB: So, an interesting thing happened, you know, thereafter, which is the Supreme Court issued an opinion on fair use in a case involving software code called the *Google v. Oracle* case. And in that case, the court said that the line-by-line copying of software code could be a fair use because it, because that usage served an important, you know, function in the creation of new software and new uses, you know, for the public. And the Warhol Foundation said, wait, Second Circuit, you've gotta take a second look at this case based on what the Supreme Court said in the *Google v. Oracle* case. And in that case, the Supreme Court made what many perceive as a veiled reference to a Warhol work, saying that, you know, the use of an advertising logo by an artist could be a fair use. And so, the Second Circuit issued in August an amended opinion and considered whether the *Google* case would affect its opinion in any way and said, no, we're coming out with the same decision. It's not fair use.

NP: The difference again is that software code is utilitarian in nature, according to the circuit court. So, even though copying a logo is okay, like a can of Campbell soup, in the Goldsmith case both the photo and the print series are works of art.

AB: And I think here, Goldsmith's lawyers were pretty smart and really focusing in their argument not on the infringement of the underlying works, like Warhol's actual physical works being infringing. The real nut of the problem, according to Goldsmith, is the licensing use. When Warhol's work functions as a cover of a magazine, that's something that she's claiming is usurping her market for licensing. She's a photographer, so a lot of the money that photographers make from exploiting their works is through licensing. And that's really where sort of the rubber hits the road. And frankly, where I think that her claims or the claims of a photographer become most sympathetic.

NP: Major media groups are weighing in on the case too. Here's Kelsey again.

KR: This case has garnered a lot of attention and attention from, you know, big names in the media industry. There's amicus briefs from the Screen Actors Guild and the Motion Picture Association. And, you know, the Motion Picture Association doesn't take a side, but they urge the court to reject this expansion of these fair use defenses in what they're calling an expansion, and return the court's concept of transformative use to a previous meaning that they find in the court's precedence.

NP: Another case rooted in the visual arts comes from Colorado. A website designer named Lorie Smith is challenging the state's Anti-Discrimination Act. She says it's preventing her from being able to speak freely online.

KR: Smith wants to create wedding websites only for couples who follow her understanding of marriage, specifically she doesn't want to create websites for same-sex couples, and she also wants to put a disclaimer on her website saying she can only promote messages that are consistent with her religion.

Lorie Smith: It's deeply personal for me to determine which messages I really wanna invest my time and talents in promoting.

News clip: Lorie creates wedding websites. As a Christian, she says working with LGBTQ+ couples goes against her religious beliefs.

LS: It's imperative for me that the things that I create, my custom graphics and websites, that they're honoring and glorifying to God.

NP: Smith says she does work with LGBT customers but takes or refuses jobs based on the message that's requested and not on the person requesting it. She's gotten support from the right. Here’s, once again, Senator Cruz.

TC: Lorie wants to exercise her First Amendment rights to freedom of expression in accordance with her own conscience. And in Colorado right now, she can't. Colorado wants to compel the speech of Christian artists and business owners who decline to use their God-given talents to celebrate events that run contrary to what their faith teaches.

NP: But interestingly, not all advocates for religious freedom are on the same page.

KR: I think this case is interesting. The court ruled on some big religious liberty cases last term. Those were really concerned with expanding the Free Exercise Clause while limiting the Establishment Cause, which, you know, resulted in the narrowing of separation of church and state. You know, this is a different context for religious liberty, but it's still, it's interesting to follow what the court is doing in this area. While the court is eager to take up religious liberty cases, some groups are claiming that the court is favoring certain religions in these rulings. Thirty religious civil rights and grassroots organizations have submitted an amicus brief, and they say that the only way to protect religious liberty rights is to actually rule against Smith's challenge. Advocates in that brief claimed that Smith is petitioning the justices for a right to exclude card for businesses who want to violate public accommodation laws and warn that a ruling in the designer's favor could open the floodgates to discrimination. Something else I will say on this, you know, when I talk to advocates who are asking the court to rule against Smith's position, one thing they do say is, you know, I don't think this can be taken out of context to other attacks on same-sex marriage, you know, or last term we saw Justice Thomas in his concurring opinion in *Dobbs* question if *Obergefell* should be overturned. Congress is working right now on seeing if they're gonna codify

same-sex marriage. And while they're not directly related, I don't think the context can be ignored either. And I think it might be an interesting part of this case.

NP: We'll be right back.

[Music break]

HA: The Indian Child Welfare Act, passed in 1978, gives Native American tribal governments jurisdiction over adoption and foster care on Indian reservations. In 2018, a federal judge in Texas declared the law unconstitutional. Now the Supreme Court will have their say, and it could speak volumes on how the court sees the role of race in America. Here's Nina.

NP: Finally, a case that explores the adoption process for children from tribal nations will come before the court. *Haaland v. Brackeen* involves a law that's been challenged by families before, but now states are involved. Texas, Louisiana and Indiana are leading the charge, along with seven individual plaintiffs. The law is called the Indian Child Welfare Act or ICWA, and the idea was to rectify a disproportionately high number of indigenous children being separated from their families. It gives preference to Native American families during adoptions.

Kathryn Fort: So, at the time that ICWA is passed, 25 to 35% of all native children have been removed from their homes and replaced in primarily non-native homes.

NP: Kathryn Fort is the director of clinics at Michigan State Law School and runs the Indian law clinic.

KF: There were years of testimony, hearings from 1974 to 1978 from tribal leaders, child welfare officials, experts in the field, all testifying that essentially the removal of the children by state agencies was causing real harm to the children, the families and the tribes. And so, the purpose of ICWA was to address those removals, address the bias and racism that was leading to those, was the cause of those removals, and try to set higher standards for states to follow, at least higher than their state laws. ICWA itself is, of course, self identifies as providing federal minimum standards, so is considered the minimum, the bare minimum that states should be doing for native children and families and tribes. I represent four tribes that decided to intervene as parties, so the Cherokee Nation, the Oneida Indian Nation, the Quinault Indian Nation and the Morongo Band of Mission Indians. Because it was clear that this was gonna be a major lawsuit about a law that tribes feel very strongly about, but no tribe was a party to the case as a result of the posture.

NP: A judge in the Northern District of Texas ruled that ICWA was unconstitutional, but a Fifth Circuit panel turned that around with a complex 325-page opinion.

KF: There is no clear majority on virtually anything. They found that a couple provisions of the law are violative of the commandeering doctrine, but that was about the extent to which they could agree on any one thing about the law. And from there all four parties, the foster families, Texas, the federal government and the tribes, filed petitions for certiorari at the court, which was granted in February.

NP: Despite the length and depth of that ruling, it's had little effect in practice.

KF: I represent tribes on appeal, so during the pendency of this entire case, actually I still have been doing appeals around the country and *Brackeen* has not come up in any of them. It did not change the

law; it didn't change the guidelines and it didn't change the regulations. So, states and tribes, have generally been proceeding as normal under ICWA's protections for families.

NP: So far at least, but what happens at the Supreme Court could have a huge effect.

Angelique EagleWoman: My name is Angelique EagleWoman, Wambdi A. Was'teWinyan in my Dakota language. I'm a law professor and the director of the Native American Law and Sovereignty Institute at Mitchell Hamline School of Law. I also sit as a justice on my tribe's Supreme Court.

NP: Professor EagleWoman explained the impact ICWA has had since it was passed 40 years ago.

AE: I call it a transfer statute because it allows a tribal government to have their tribal attorneys come into the state court action and request the case be transferred to a tribal court. And we have over 300 tribal courts with judges and justices, just like I am a law professor, fully trained, fully able to handle these cases, to then make sure that the children are not lost from their culture, their identity, which has long term intergenerational traumatic effects for our people. Any people that are adopted out tend to over time want to know who they are, where they're from, and what the Indian Child Welfare Act does is it recognizes the best interest of the child is always a connection to their tribe, always. That's the default.

NP: Pushing back against ICWA, the professor says, goes even beyond the bounds of the act itself.

AE: They're focusing on the Indian Child Welfare Act because that is one of the strongest laws that recognize our nation to nation, sovereign to sovereign relationship with the United States government and that we are in a political status, not a racial classification with the United States, and that is based on our leaders entering into diplomatic relations and allowing the United States to purchase land and a permanent neighbor status. And this is embodied in article six of the U.S. Constitution where federal law, the U.S. Constitution and treaties of the United States are the supreme law of the land. But what we find is politics and people with adverse interests looking for ways to push us back into assimilation policies and genocidal policies.

NP: The plaintiff's position in *Brackeen* is that ICWA imposes an improper race-based classification, that the law is commandeering state's rights. Last year, the Supreme Court heard a different ICWA case brought by a couple trying to adopt a child whose biological father was a member of the Cherokee Nation. The child's father was seeking custody under ICWA and said he hadn't consented to the adoption, but the court ruled that a parent who didn't already have custody of their child can't use ICWA to block the adoption by a non-Indian parent. So as far as what may happen with this case, here's what Kelsey had to say.

KR: Gorsuch is definitely somebody to watch in this case. This is an issue that splits the conservative block. Justice Gorsuch is a huge supporter of tribal sovereignty, and there was an opinion last term he expressed very strongly his views on tribal sovereignty and so this case will be very interesting to see, you know, how he votes, what he says in oral arguments and how that plays out. It is important to remember that even if Justice Gorsuch were to go away from the conservative block, they still have those five votes. But that'll be interesting to watch.

NP: It was moving, listening to Professor EagleWoman recount the long, painful history of this country, starting with how colonizers treated the people who were already here when they arrived. I think about

what Mitchell Brown from the Southern Coalition for Social Justice said about the very start of the United States. We are a country founded upon seeing race and despite a push by some toward race blindness, that foundation set up two centuries of history that the courts still have to grapple with and will weigh in this upcoming term.

AW: We have endured so much hardship based on U.S.-Indian policies and at some point, we would like to regain our footing economically with our language, with our culture and know that our children are safe and within our family structures, within our traditions and our customs. And even though we have parents and families that aren't in tribal communities, they always come home. They always visit. They're always part of who we are, and we need the U.S. executive, legislative and judicial to honor the legal status of tribal people, including our children.

[Music break]

HA: That does it for our preview of the next Supreme Court term. You can read all about oral arguments and the decisions as well as legal coverage from all over the world at courthousenews.com. On the next episode of Sidebar, vampires, haunted houses and a parade of legal horribles each more terrifying than the last. A very special, very spooky Halloween special. But for now, God save the United States and this honorable podcast. Thanks for listening.

[Outro music]