Civil Cases in the Supreme Court's October Term 2019

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With thanks to Professor Todd E. Pettys for his past years of service writing this column, it is my honor to summarize, for *Court Review,* the civil case docket for the Supreme Court's 2019 Term. The Court's term was most memorable for its blockbuster cases involving gay and transgender rights, abortion rights, religious liberties, and presidential power. But it also supplied important decisions governing remedies for constitutional violations. It also decided a handful of environmental law cases, and, with even less profile and fanfare, the Court ultimately disposed of a significant number of intellectual property cases, as well. Along the way, the Chief Justice often called his own number when assigning opinions in the highest profile cases, while other members of the Court's conservative wing illustrated the heterodoxy that often characterizes textualism and originalism. While conservatives may be displeased with a few of the resulting decisions, nothing in the opinions written by the Chief Justice or Justice Gorsuch this Term suggested a propensity to embrace rights that have no grounding in any relevant legal text or history. The Court's liberal wing, meanwhile (and perhaps unsurprisingly), seemed to work from a defensive posture, often maintaining a solid grouping while catering to competing conservative principles in an effort to gain a vote or two. As fate would have it, October Term 2019 will also go down in history as Justice Ruth Bader Ginsburg's last. She gave everything until the very end, having long ago secured her place in the Pantheon of American law.

STATUTORY CIVIL RIGHTS

One major theme the Court confronted this Term was the role of causation in statutory civil rights cases. The causation issue featured prominently as the Court unraveled the role of "sex" in applying Title VII to dismissals of gay and transgender employees, but it also cropped up in other cases. Here, we see how the Justices' views of causation intertwine with their methods of statutory interpretation. Also interesting: The Court's liberals not only voted with the majority in each of these cases, but did so by joining strictly textualist opinions written by conservative Justices.

Racial Discrimination in Contracts: Race Must Be a Cause, Not Just a Motiving Factor, to Justify Relief. *Comcast Corp. v. Nat'l Assoc. of African American-Owned Media,* No. 18-1171.

First, in *Comcast Corp. v. Nat'l Assoc. of African American-Owned Media,* No. 18-1171, the Court addressed what is required to survive a motion to dismiss when pleading a claim under 42 U.S.C. § 1981, which prohibits racial discrimination in making and enforcing contracts. There, an African-American-owned television-network operator, Entertainment Studios Network (ESN), sued Comcast under section 1981 for refusing to carry ESN's channels. The district court dismissed the complaint for failure to allege facts plausibly showing that Comcast acted as it did because of racial animus. The Ninth Circuit reversed and held that ESN was required only to plead facts plausibly showing that race played ***some*** role in defendant's decision making (which the complaint had done), not facts showing that racial animus was a but-for cause of the decision.

In a majority opinion by Justice Gorsuch, the Court unanimously reversed, holding that over the course of a § 1981 lawsuit—including at the pleading stage—the plaintiff bears the burden of establishing that race was a ***cause*** of the plaintiff's injury, and not merely a motivating factor. Starting from the usual rule that "a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct," the Court found no reason based on the text of section 1981 to make an exception. Among other indicators, the precise operative text of section 1981—that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"—suggests the need to establish but-for causation, Justice Gorsuch wrote, because it invites comparison to how the defendant would have responded had the plaintiff been white.

Furthermore, text and precedents concerning closely analogous federal statutes also establish a but-for causation standard. And while ESN had urged the Court instead to follow Title VII precedents permitting plaintiffs to establish liability by proving only that race was a "motivating factor" in an employment action (thereby shifting the burden to the defendant to ***disprove*** causation, at least to avoid damages and reinstatement remedies), the two statutes shared no common history or text justifying such "judicial adventurism." Along the way, Justice Gorsuch's opinion for the Court flagged, but did not resolve, the question whether section 1981 forbids discrimination only as to contract ***outcomes*** or also forbids discrimination in the contracting ***process***. The Court remanded for the Ninth Circuit to consider the sufficiency of ESN's complaint under the proper test.

Justice Ginsburg authored a concurring opinion to emphasize her view that § 1981's guarantee covers all aspects of the contracting process, not just the final decision to enter the contract.

Author's Note: *Thomas M. Fisher - Solicitor General, State of Indiana.* *The author would like to express gratitude to Notre Dame law student India Irving, who as a law clerk in the Office of Attorney General assisted with initial drafts of these case summaries. Ultimately, however, the analysis (and any errors) are the author's alone.*

Age Discrimination: Federal Personnel Actions Must Be "Untainted" by Consideration of Age. *Babb v. Wilkie,* No. 18-882.

A similar collection of process-versus-outcome issues played out in *Babb v. Wilkie,* No. 18-882, but with a different result. There, a clinical pharmacist at a Veterans Administration hospital sued the VA for various forms of age and sex discrimination after it narrowed the scope of promotions available to her, passed her over for promotions, denied her training opportunities, and reduced her holiday pay. Using the familiar *McDonnell Douglas* burden-shifting framework where the plaintiff relies on indirect proof of discrimination, the district court granted summary judgment for the VA because while Babb had established a prima facie case under the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, the VA had offered legitimate explanations for the challenged actions that no jury could reasonably deem pretextual.

In the Supreme Court, Babb argued, with echoes of ESN's argument under section 1981, that the text of the federal-sector provision of the ADEA imposes liability even where age discrimination is not necessarily the but-for cause of negative employment action. In that regard, the anti-discrimination text of the federal-sector ADEA provision differs from the anti-discrimination text applicable to private employers and state and local governments in ways that make the *McDonnell Douglas* test inappropriate. *McDonnell Douglas* is designed to isolate unlawful discrimination as a but-for cause of negative personnel action, but the federal-sector ADEA, in Babb's view, creates liability more broadly. That text provides that "personnel actions" for those 40 and older "shall be made free from any discrimination based on age."

In an opinion by Justice Alito, the Court, by a vote of 8-1, agreed with Babb and held that the plain meaning of § 633a requires that federal personnel actions be "untainted" by *any* consideration of age in the process, regardless of its precise causal relationship to the outcome. For while the "based on" text connotes but-for causation, what really matters is the entire phrase, and in particular how the term "personnel actions" relates to the imperative "shall be made" and how those relate to "free from any discrimination" and "based on age." Critically, "free from any discrimination" modifies "made," which connotes the decision-making process, not the result. And while "based on age" modifies "discrimination," it does *not* modify "personnel actions," *i.e.*, the *outcome* of the decision-making process. In sum, even where the outcome is free from age discrimination as a causal agent, liability will still attach where age discrimination infected the process of making that decision.[1]

Justice Thomas alone dissented. In his view, § 633a's substantive mandate against discrimination is ambiguous, such that the default rule of but-for causation should apply, just as it did in (for example) *Comcast*.

Title VII Sex Discrimination: Gay and Transgender Status Protected Because Sex Is a But-For Cause of Employment Action. *Bostock v. Clayton County, Georgia,* No. 17-1618.

". . .the Gorsuch majority opinion purports to undertake a purely textual analysis, stressing its commitment to the 'ordinary public meaning' of 'because of sex' in 1964."

Finally under the civil rights heading, in perhaps the most dramatic decision of the Term, the Court, by a vote of 6-3, held in *Bostock v. Clayton County, Georgia,* No. 17-1618,[2] that Title VII's prohibition against employment discrimination "because of sex" shields employees from being fired for being gay or transgender. The Court, in a majority opinion written by Justice Gorsuch, said that the statute protects gay and transgender status because it precludes any negative employment action where an employee's sex is a but-for cause. Said the majority, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Justices Alito (joined by Justice Thomas) and Kavanaugh dissented, and the competing opinions undertake a pitched battle over the legacy of Justice Scalia and the meaning of "textualism" as an interpretive method. The Court's liberals, meanwhile, lined up behind Justice Gorsuch and the Chief Justice without offering any alternative interpretive method.

That alignment of liberal justices with two conservatives is all the more interesting because, unlike some lower-court judges that reached the same result only by expressly claiming to "update" Title VII, the Gorsuch majority opinion purports to undertake a purely textual analysis, stressing its commitment to the "ordinary public meaning" of "because of sex" in 1964. In that vein, while the parties disputed the meaning of "sex" in 1964, the Court proceeded from the "assumption" that the term refers only to "biological distinctions between male and female" and not to gender identity or sexual orientation. Sticking with that understanding of "sex," however, was "just a starting point." The statutory text doing the real work (said the majority) is "because of," a "sweeping standard" that incorporates liability at least where sex is a but-for cause of employment action. Long-ago precedents confirm Title VII liability even in mixed-motive cases and same-sex harassment cases, among others, which underscores the breadth of plausible Title VII theories. To be sure, when an employer fires an employee for being gay or transgender, "two causal factors may be in play—***both*** the individual's sex ***and*** something else"—namely, sexuality or gender identity. "But Title VII doesn't care." Sex—again, purely in the biological sense—is still, necessarily, one but-for (and intended) cause for the termination, such that "liability may attach."

In a dissent joined by Justice Thomas, Justice Alito rejected

Footnotes

1. That said, under traditional remedial principles, a federal-sector ADEA plaintiff may obtain the specific remedies of hiring, reinstatement, back pay, and compensatory damages only by showing that age was a but-for cause of the actual personnel decision; otherwise, lesser remedies, such as a forward-looking injunction, may be available.
2. Together with R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107, and Altitude Express Inc. v. Zarda, No. 17-1623.

". . . the Court struck down Texas's requirement that first trimester abortions be performed in ambulatory surgical centers and by physicians having admitting privileges . . ."

the majority's purported textualism as a mere guise for updating Title VII to reflect modern values—as a "pirate ship" that "sails under a textualist flag." Citing Scalia, Alito points out that the task for the Court is not to apply every meaning of which statutory text is literally susceptible, but to apply the text based on what it conveyed to reasonable people when it was enacted. And, under that standard, "[e]ven as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" Furthermore, Alito refutes the majority's theory that sex discrimination is inherent in sexuality or transgender discrimination because an employer can carry out both types of discrimination without even knowing the sex of the employee—a point that counsel for the employees conceded at oral argument.

In his separate dissent, Justice Kavanaugh also disagrees with the majority's literalist approach—quoting Scalia for the observation that "the good textualist is not a literalist"—and argues that the ordinary meaning of "discriminate because of sex" does not mean to discriminate based on sexual orientation or gender identity. Both now and in 1964, "sex" and "sexual orientation"—to say nothing of gender identity—have been treated differently in both common language and in common legal usage. And as for the majority's focus on the significance of but-for causation embodied in "because of," Kavanaugh responds that what counts is the ordinary meaning of the phrase as a whole, not the separate words or segments of the phrase. Here, in common parlance, the employees were fired because they were gay or transgender, not because they were men.

CONSTITUTIONAL RIGHTS

Abortion Doctrine Déjà Vu? Closing Clinics Because Doctors Do Not Have Hospital Admitting Privileges Is Still a Problem, but Five Justices Vote Against a Judicial Balancing Test. *June Medical Services LLC v. Russo,* No. 18-1323.

Ever since *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016), where the Court struck down Texas's requirements that first-trimester abortions be performed in ambulatory surgical centers and by physicians having admitting privileges at hospitals within 30 miles, states and abortion providers have been battling over the meaning of the "undue burden" test. Citing *Hellerstedt*, abortion providers have been urging lower courts not only to consider whether abortion regulations impose substantial obstacles to a woman's choice to have an abortion, but also to balance the relative benefits and burdens of each regulation. Some have also urged lower courts to consider the "cumulative effects" of all abortion regulations rather than to consider each new regulation individually. States, of course, have resisted this doctrinal gambit, stressing that courts are ill-equipped to balance all the competing interests at stake, particularly where the regulation, such as with informed consent, is designed to protect fetal life rather than just promote maternal health. And while some lower courts embraced *Hellerstedt* balancing in all cases, others rejected it, at least in some circumstances. Along the way, lower courts also have had to confront whether *Hellerstedt* permits courts to reach different results about the validity of the same abortion regulation in different states, depending on local circumstances.

The federal judiciary confronted this array of issues when it considered a Louisiana statute imposing admitting privileges requirements materially identical to those invalidated in *Hellerstedt*. The Louisiana law had been enjoined by a district court based on concrete evidence that if it went into effect, it would "result in a drastic reduction in the number and geographic distribution of abortion providers," *June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 87 (M.D. La. 2017); that Louisiana hospitals would likely deny privileges to abortion providers for reasons other than competency, *id.* at 46, 49–50; and that Louisiana abortion providers had made good-faith efforts to obtain privileges but were unable to do so, *id.* at 78. The Fifth Circuit reversed on several findings of clear factual error by the district court. *June Med. Servs. v. Gee*, 905 F.3d 787, 815 (5th Cir. 2018).

The obvious tension between the result of the Fifth Circuit's decision in *June Medical* and the result in *Hellerstedt* was too much for the Supreme Court to ignore. Yet, Justice Kennedy, one of the five pro-abortion-clinic votes in *Hellerstedt*, had retired and been replaced by Justice Kavanaugh. So, would (1) the Court overturn *Hellerstedt* so quickly after deciding it, (2) Justice Kavanaugh join the Court's four liberal justices in support of *Hellerstedt*, or (3) one (or more) of the *Hellerstedt* dissenters switch sides?

Door number three proved the accurate choice, albeit on a 4-1-4 voting alignment. First in response to a motion to stay the Fifth Circuit's decision, and then again on the merits, the Chief Justice, who dissented in *Hellerstedt*, voted with the Court's liberal wing to overturn the Louisiana admitting-privileges law in *June Medical Services LLC v. Russo,* No. 18-1323.[3] Critically, however, the Chief Justice wrote a solo concurrence that diverges sharply from the standard employed by Justice Breyer in his plurality opinion joined by Justices Ginsburg, Kagan, and Sotomayor. As a result, abortion providers and States (including Indiana) are now engaged in pitched battles around the country as to which, if either, *June Medical* opinion controls, and, consequently, what constitutes the governing standard in abortion cases.

3. Together with Russo v. June Medical Services LLC, No. 18-1460, where Louisiana, via cross-petition, asked the Court to consider whether the abortion providers had third-party standing to assert the rights of abortion patients, especially considering that the providers were challenging regulations designed to protect patients by regulating the providers. The Court rejected the third-party standing argument, both as waived and as foreclosed by precedent. In a single brief filed under both cause numbers, Indiana, together with Arkansas, co-wrote an amicus brief supporting Louisiana joined by several other States.

". . . Justice Thomas would, as he has said multiple times in the past, reject the Court's abortion jurisprudence as having no basis in the Constitution."

Justice Breyer's plurality opinion first concluded that the Louisiana law was invalid merely because it imposed a "substantial obstacle" to abortion given how it threatened to close some abortion providers who had not been able to obtain admitting privileges. In that regard it considered the district court's findings and evidence regarding demographic, economic, and other factors that supported its determination that the Louisiana admitting-privileges law imposed a substantial obstacle. It went on "to weigh the law's asserted benefits against the burdens it imposes on abortion access," citing *Hellerstedt*. The plurality concluded that, as in *Hellerstedt*, the benefits of an admitting-privileges law were small in comparison to the burden imposed on the right to choose abortion, at least in Louisiana.

In his solo concurrence, the Chief Justice acknowledged that he dissented in *Hellerstedt* and that he is still of the view that case was wrongly decided. But, he said, the competing principle of *stare decisis* commanded respect for the result in *Hellerstedt*. And in that regard, he agreed with the plurality that, on the record established in the district court, if the Texas admitting-privileges law imposed a "substantial obstacle" to abortion in *Hellerstedt*, so did the Louisiana admitting-privileges law at issue here. The Fifth Circuit, in the Chief Justice's view, went too far second-guessing the district court's factual findings about the impact of the law on existing abortion providers. That said, however, the Chief Justice completely rejected the plurality's weighing of an abortion law's benefits against its burdens. The portion of *Hellerstedt* that did so, he said, was mere dicta and need not be treated as the controlling test—and indeed was dicta here for the plurality, as well. Furthermore, he said, the Court should reject such a balancing test because it "would require us to act as legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" 140 S. Ct. at 2136 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

While the Court's liberal Justices united behind one opinion with no apparent variation in their views of the case and benefited from the Chief's decision to go with *stare decisis* over originalism, the conservatives supplied multiple dissents offering an array of critiques of both the plurality and the Chief Justice's concurrence.

Justice Thomas issued a dissent explaining that he would have rejected the ability of abortion providers to sue on behalf of hypothetical future patients to enjoin regulations that are designed to protect those very patients. And on the merits, Justice Thomas would, as he has said multiple times in the past, reject the Court's abortion jurisprudence as having no basis in the Constitution.

Justice Alito wrote a dissent joined *in toto* by Justice Gorsuch and joined in part by Justices Thomas and Kavanaugh. Justice Alito rejected the majority's use of stare decisis to follow *Hellerstedt*, which he thought both incorrect and unworkable. In his view, moreover, both the plurality and the Chief Justice distorted the record of the case and even applied the wrong standard of appellate review to the district court's determination of what amounted to legislative or constitutional facts, not adjudicative facts. But like the Chief Justice, Justice Alito disagrees with the plurality's application of *Hellerstedt* balancing test and maintains that *Casey*'s "substantial obstacle" test should remain the sole governing standard. He would remand, however, for further factual development under that test.

In addition to joining Justice Alito's dissent, Justice Gorsuch also issued a solo dissent arguing that the plurality and concurrence overlook the deference the Court owes to the legislative process. Those opinions also, in his view, misapplied many of the rules that typically constrain the judicial process, such as who has standing to sue, rules about facial challenges (particularly based on fact-bound decision making), and the burden of proof necessary for a prospective injunction.

Finally, Justice Kavanaugh also wrote a solo dissent rejecting the *Hellerstedt* cost-benefit standard—and pointing out that, including the Chief Justice, five members of the Court now reject that balancing test. He also agreed with Justice Alito that the case should be remanded for a new trial with additional fact finding under the proper legal standards.

June Medical showcases the dilemmas the Court's conservatives sometimes face in sorting through competing decision-making principles (and fuels the originalist critique of *stare decisis*), but it also portends great likelihood that lower courts will disagree over what the case means, such that, before long, the Court will likely once again need to sort out unworkable or irreconcilable outcomes in abortion cases.

Free Exercise Clause: Baby Blaine No-Aid Provisions Cannot Bar Religious School Participation in School-Choice Programs. *Espinoza* v. *Montana Department of Revenue,* No. 18-1195.

School choice advocates have waged a long battle to secure the place within the U.S. Constitutional structure of scholarship programs that permit parents to use taxpayer dollars to pay tuition at religious primary and secondary schools. The first major victory, where the Supreme Court rejected charges that the Establishment Clause foreclosed such scholarships, came in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002). For the next 18 years, the litigation focused on whether state supreme courts would interpret state constitutions to preclude use of such scholarships at religious schools. Buried within such state constitutional attacks on school choice programs was a U.S. Constitutional defense—that the Free Exercise Clause does not allow states to exclude parochial schools from school choice participation on disestablishment grounds. The Free Exercise defense has achieved particular force because so many state constitutional provisions prohibiting even indirect aid to religious institutions were animated by anti-Catholic bias, courtesy of the failed effort by the nativist Know-Nothings in 1876 to enact the "Blaine Amendment" to the U.S. Constitution, and the follow-on movement to enact "Baby Blaine" no-aid provisions in State constitutions, which 38 states (including in Montana) retain.

Various disputes with similar themes arrived at the Court over the years with different results, most particularly *Locke v. Davey*, 540 U.S. 712 (2004), where the Court permitted a public univer-

sity scholarship program to exclude study for the clergy, and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. (2017), where the Court invalidated the exclusion of churches from a state playground resurfacing grant program. When the Montana Supreme Court invalidated a choice scholarship program because it included religious schools, the Court was forced to reconcile those two lines of precedent.

This Term in a 5-4 vote in *Espinoza v. Montana Department of Revenue,* No. 18-1195, the Court invalidated the use of state constitutions to exclude religious entities from school choice scholarship programs—though the case is interesting also for the Court's rebuke of the Montana Supreme Court's effort to avoid the Free Exercise Clause issue.

Montana operates a scholarship program for students attending private schools and permits a $150.00 tax credit to anyone who donates to an organization providing scholarships to private schools. The Montana legislature directed that the Montana Department of Revenue operate the program consistent with Article X, section 6 of the Montana Constitution, which prohibits "any direct or indirect appropriation or payment from any public fund . . . to aid any church, school . . . or other literary or scientific institution controlled in whole or in part by any church, sect or denomination." To carry out that directive, the Department of Revenue promulgated "Rule 1," which prohibits Montana families from using funds from the state's scholarship program to pay tuition at religiously affiliated private schools.

When petitioners, three mothers of students at Stillwater Christian School, were unable to apply scholarship funds to their children's tuition, they sued in state court, alleging religious discrimination under the Free Exercise Clause. The trial court enjoined Rule 1 on the grounds that it was unnecessary to enforce the "no-aid" provision of the state constitution (which applies only to appropriations and not expressly to tax credits), but the Montana Supreme Court reversed, albeit without directly addressing the Free Exercise Clause issue, except to mention as an aside that "this is not one of those cases" where prohibiting government benefits to a religious entity would implicate the Free Exercise Clause. It concluded both that the Department had no authority to issue Rule 1 and that the scholarship program, unmodified by Rule 1, violated the state constitution's "no-aid" provision by using tax credits to subsidize tuition at "religiously affiliated" private schools and schools "controlled in whole or in part by churches." The proper relief consistent with the Montana Constitution, the Montana court ruled, was to enjoin the operation of the whole program.

In a majority opinion by the Chief Justice, the Court reversed, holding that the Montana Supreme Court's application of the no-aid provision violated the U.S. Constitution's Free Exercise Clause by discriminating against religious schools and families with children who attend or desire to attend religious schools. The case was governed by *Trinity Lutheran*, which said that religious schools cannot be barred from public benefits solely because of their religious character. The Court rejected the theory that the case was more like *Locke v. Davey* because it prohibited use of state benefits for religious ***study***, not merely religious ***status***. The Montana Supreme Court, said the Court, "applied the no-aid provision solely by reference to religious status," namely, by reference to "schools controlled in whole or in part by churches" and "religiously affiliated schools." No compelling state justification exists for such discriminatory treatment based on status, the Court held (being careful to stress no view on whether "some lesser degree of scrutiny applies to discrimination against religious uses of government aid"). A state's desire to erect a higher barrier between church and state than that provided by the Establishment Clause is limited by the Free Exercise Clause.

". . . the Court [held] that the Montana Supreme Court's application of the no-aid provision violated the U.S. Constitution's Free Exercise Clause by discrimination against religious schools . . ."

The kicker, however, came at the end of the majority's opinion, where it addressed the Montana Supreme Court's effort to avoid the Free Exercise Clause issue entirely by enjoining the entire program. Procedurally, it was "not accurate" to frame the case as merely a situation where the Montana Supreme Court eliminated the program "based on some innocuous principle of state law." Rather, it did so "pursuant to a state law provision that expressly discriminates on the basis of religious status." Critically, when the Montana Supreme Court "was called upon to apply a state-law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation," not merely to conclude in passing that "this was not one of those cases" while terminating the program all the same. "Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds."

Justice Thomas, joined by Justice Gorsuch, concurred "to explain how this Court's interpretation of the Establishment Clause continues to hamper free exercise rights. Until we correct course on that interpretation, individuals will continue to face needless obstacles in their attempts to vindicate their religious freedom." Specifically, citing principally *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), Justice Thomas criticized the Establishment Clause "equality principle," which holds that governments may not "express[] any preference for religion—or even permit[] any signs of religion in the governmental realm." It is that very principle—"unmoored from the original meaning of the First Amendment"—that supplies the "Establishment Clause made me do it" defense (my words) that featured so prominently in *Locke v. Davey,* which Montana relied on in this case. "Properly understood," Justice Thomas said, "the Establishment Clause does not prohibit States from favoring religion." In Justice Thomas's view, "this Court has an unfortunate tendency to prefer certain constitutional rights over others," with the Free Exercise Clause resting "on the lowest rung of the Court's ladder of rights, and precariously so at that." One way to fix that, said Justice Thomas, is to restore the Establishment Clause "to its proper scope."

Justice Alito wrote separately to unload both barrels at the sordid anti-Catholic, nativist, Know Nothing history of Baby Blaine amendments—and to discuss the relevance of that historical motivation given *Ramos v. Louisiana*, No. 18-5924 (a criminal

". . . the Court . . . held that the First Amendment precludes court intervention in employment disputes that involve teachers at religious schools who have the responsibility to instruct students in religious faith."

case decided this Term), which overturned longstanding precedent to preclude states from allowing non-unanimous jury verdicts in criminal trials. In *Ramos*, Justice Alito observed, the Court "emphasiz[ed] that the States originally adopted" non-unanimous jury verdicts "for racially discriminatory reasons," and "highlighted" the role of the Ku Klux Klan. In his *Ramos* dissent, Justice Alito argued that such historical facts, "though deplorable," had no relevance to constitutional validity because such laws can be—and were—re-adopted for non-discriminatory reasons. "But I lost," he said, and "[i]f the original motivation for the laws mattered there, it certainly matters here." Indeed, in 1854 in Massachusetts the Know Nothing party, "in many ways a forerunner of the Ku Klux Klan," advocated one of the first no-aid state constitutional provisions. And later, a prominent supporter of the failed federal Blaine Amendment was the Klan itself. As in *Ramos*, said Alito, the Montana provision's "'uncomfortable past' must still be '[e]xamined.'" "And here, it is not so clear that the animus was scrubbed," particularly given that the re-enacted no-aid provision retained the same "disquieting" text prohibiting aid to "sectarian" schools (a loaded anti-Catholic term), which (again citing *Ramos*), "keep[s] it 'tethered' to its original 'bias.'"

Justice Gorsuch concurred to stress that it makes no difference whether the Montana Constitution discriminates against religious ***status*** or religious ***use*** because both types of discrimination violate the Free Exercise Clause.

Justice Ginsburg, joined in part by Justice Kagan, dissented to emphasize that the only question properly before the Court is whether applying the no-aid provision to prohibit state-sponsored private school funding violates the Free Exercise clause. She argued that the Montana Supreme Court's decision did not violate the Free Exercise clause because it treated all private school parents equally, and the Court should not have addressed whether the no-aid provision, alone, was constitutional.

Justice Breyer dissented, joined by Justice Kagan, to say that the majority failed to respect the "play-in-the-joints" doctrine set forth in (among other cases) *Locke v. Davey*, which permits states leeway to ensure they avoid Establishment Clause violations, even if by separating church and state more than necessary, without transgressing Free Exercise Rights.

Justice Sotomayor dissented to argue that the Court resolved a constitutional question that was not presented—and did so incorrectly. She said that the Court's decision improperly invokes *Trinity Lutheran* to require a State to subsidize religious schools if the state enacts an education tax credit program, which, in her view, weakens the Court's precedents and the separation of church and state more generally.

Free Exercise Clause: Ministerial Exemption Applies to Catholic-School Teachers. *Our Lady of Guadalupe School v. Morrissey-Berru,* No. 19-267.

Nearly a decade ago, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the Court held that the Free Exercise Clause bars employment discrimination claims brought by individuals holding important positions with churches and other religious institutions. There, the EEOC and a teacher sued the religious school that fired the teacher, alleging retaliation for threatening to file a claim under the Americans with Disabilities Act. But the Court rejected the claim based on several factors, including the plaintiff's educational training, obligations to teach religion and participate in religious activities with students, and her title, "Minister of Religion, Commissioned." *Hosanna-Tabor*, 565 U.S. at 190–91. In the wake of *Hosanna-Tabor*, lower courts had disagreed over precisely what qualified a religious school employee as a "minister" subject to the First Amendment exception, including whether it applied to those who teach the faith, or only those formally recognized as leaders of the faith.

This Term, in *Our Lady of Guadalupe School v. Morrissey-Berru,* the Court added some clarity to the matter by holding, on a vote of 7-2, that the First Amendment bars employment claims from those who instruct students in religious faith, even when they are not formally titled as "ministers."

Both Agnes Morrissey-Berru, an elementary school teacher at Our Lady of Guadalupe School (OLG), and Kristen Biel, an elementary school teacher at St. James School, sued their respective schools after being fired. Our Lady and St. James are both Roman Catholic schools in the Archdiocese of Los Angeles, and Morrissey-Berru and Biel had nearly identical employment agreements that described the Catholic schools' mission to develop and promote a Catholic faith community. The employment agreements obligated the teachers to personally model their Catholic faith and to provide religious instruction and worship, and the agreements explained that these commitments form the bases for evaluating the teachers' performance. In accordance with their employment agreements, Morrissey-Berru and Biel each taught religion in the classroom, worshipped and prayed with students, and received performance evaluations based on religious measures.

In her suit against OLG, Morrissey-Berru alleged the school violated the Age Discrimination in Employment Act of 1967 (ADEA) by demoting her from a full-time to part-time teacher and then refusing to renew her contract to replace her with a younger teacher. The school said the problem was her performance, in particular how she handled implementation of a new reading and writing program. The district court dismissed the case, but the Ninth Circuit held that Morrissey-Berru did not come within the scope of the "ministerial exception" because she lacked the formal title of "minster," had minimal religious training, and did not publicly hold herself out as a religious leader.

For her part, Biel sued St. James School for violating the Americans with Disabilities Act of 1990, alleging the school terminated her when she requested leave for breast cancer treatment. The school said she failed to follow the planned curriculum and to keep an orderly classroom. Again, the Ninth Circuit held the ministerial exception did not apply because the plaintiff lacked sufficient formal credentials, religious training, and ministerial background.

In a majority opinion by Justice Alito, the Court reversed and held that the First Amendment precludes court intervention in employment disputes that involve teachers at religious schools who have the responsibility to instruct students in religious faith. While Cheryl Perich, the plaintiff in *Hosanna-Tabor*, had a formal title "Minister of Religion, Commissioned" plus ministerial education and training, such formal credentials are not essential to application of the "ministerial exception," which is a misnomer in any event. The exception is derived from the right of religious institutions to decide matters of faith and doctrine, and, by connection, church governance, and is grounded in long-ago precedents about control of church property and appointment of bishops, not selection or supervision of clergy. Based on how lower courts implemented the exception even before *Hosanna-Tabor*, no rigid doctrinal formula is necessary to make the ministerial exception work, and indeed might ultimately discriminate among religions. For example, applying the exception only where the employee has the formal title "minister" would amount to discrimination because many religions do not use the title, and even (such as with Islam) maintain the equality of all believers, which would thwart efforts to evaluate whether other titles (such as "imam") are comparable to "minister."

Instead, what is critical is the role of the claimant in carrying out the institution's mission, and "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." Here, as "teachers" and "catechists," Morrissey-Berru and Biel performed "vital religious duties," including religious instruction and practice with the students, which their schools "expressly saw . . . as playing a vital part in carrying out the mission of the church"—a viewpoint that the Court described as "important" to the overall assessment.

Justice Thomas, joined by Justice Gorsuch, concurred, joining the Court's opinion in full but emphasizing his view that the First Amendment's Religion Clauses require civil courts to defer to a religious organization's determination that certain employee positions are ministerial. In his view, "[w]hat qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis." And if courts should "go[] to great lengths to avoid governmental 'entanglement' with religion—such as by barring facilitation of student prayer at public school football games, *see Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000), or by permitting states to avoid even indirect funding of ministerial instruction, *see Locke v. Davey*, 540 U.S. 712 (2004)—they should also "defer to" religious groups' "good-faith understandings of which individuals are charged with carrying out the organizations' religious missions."

Justice Sotomayor dissented, joined by Justice Ginsburg. In her view, the Court turned *Hosanna-Tabor* into a singular inquiry about whether a church believes its employee has an important religious role and has unnecessarily expanded the ministerial exception beyond its historically narrow scope. Justice Sotomayor writes that this approach does not have a basis in law and leaves religious schoolteachers without sufficient legal protection. She would focus instead on whether the employee in question exercised a "leadership" role, which was missing from the plaintiffs' job descriptions in these cases. As for the Court's concern that excessive focus on titles and other formal "ministerial" indicia would risk discriminating among religions, Justice Sotomayor acknowledged "that may or may not be true," but insisted that the freedom of religious schools to define their own membership and governing structures "should carry consequences in litigation."

". . . the Court said un unlawful exemption need not tank an entire regulatory statute."

Free Speech: TCPA Exception for Federal Government Debt Collection Invalid but Severable. *Barr v. American Association of Political Consultants, Inc.*, No. 19-631.

Exemptions are often the Achilles heel of statutes regulating the time, place, and manner of speech. Efforts to maintain peace and order that necessarily regulate speech must either be "content neutral" or the "least restrictive means" to advance a compelling government interest. A seemingly innocuous exemption can turn an otherwise permissible incidental speech restriction into a content-based division of winners and losers subject to strict scrutiny rather than intermediate scrutiny under the First Amendment. For many decades, governments were able to defend incidental speech restrictions under intermediate scrutiny notwithstanding a handful of minor exemptions so long as the restriction itself was *justified* by content-neutral concerns. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Concerns arose only when the exemptions grew so massive that they undermined the asserted justification for the underlying rule. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

Defense of speech restrictions featuring exemptions, however, became more difficult a few terms ago when the Court, in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), said that, henceforth, content neutrality would be determined by the terms of the restriction and exemptions, not by the rationale supporting the restriction. Given the proclivity of legislatures to create mosaic-like regulatory schemes hyper-tailored to benefit various constituencies, that standard could be a real problem even for the most widely supported time-place-manner speech restrictions, such as those applying to telemarketers. And if an exemption makes a law content-based without sufficient justification, the question of appropriate remedy arises: must the entire benevolent protection for peace and harmony fall or can the exemption merely be deleted?

This Term, in *Barr v. American Association of Political Consultants, Inc.,* No. 19-631, the Court said an unlawful exemption need not tank an entire regulatory statute, and in the process issued a decision that is probably more important for its impact on remedy and severability doctrine than First Amendment doctrine.[4]

4. Indiana and Virginia filed a multi-state amicus brief in support of the United States, on which the author of this article served as counsel of record.

". . . Justice Kavanaugh concluded that . . . the government-debt exception to the robocall restriction law is content-based, indeed "is about as content-based as it gets.""

Nearly 30 years ago, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) to (among other things) prohibit nearly all robocalls, but amended it in 2015 to exempt robocalls seeking to collect on debt owed to or guaranteed by the United States, including student loans and mortgage debt. 47 U.S.C. § 227(b)(1)(A) (iii). The American Association of Political Consultants and three other organizations that wish to use robocalls to spread political messages alleged that the government-debt exemption renders the robocall ban a content-based restriction that cannot survive strict scrutiny and, as such, the entire ban, not just the exemption, must be invalidated.

In a series of scorecard opinions, none of which commanded a majority, the Court invalidated the exemption—but *only* the exemption. On the question whether the government debt exemption violated the First Amendment by creating a content-based restriction that could not survive strict scrutiny, the vote in favor was 6-3, with the Court's conservatives plus Justice Sotomayor in the majority. On the question whether that invalid exemption was severable from the remainder of the robocall ban (such that the ban could remain in place sans exemption), the vote in favor was 7-2, with all four liberal justices joining the Chief Justice and Justices Alito and Kavanaugh in the majority, but with Justices Thomas and Gorsuch dissenting.

Justice Kavanaugh, who announced the judgment of the Court, delivered an opinion joined in full by the Chief Justice and Justice Alito and, except as to its discussion of severability, Justice Thomas. On the First Amendment question, Justice Kavanaugh concluded that, under *Reed*, the government-debt exception to the robocall restriction law is content-based, indeed "is about as content-based as it gets." He rejected the Government's arguments for deeming the law content-neutral, namely, that (1) the law distinguished among callers, not call content (which is both inaccurate and unhelpful even if accurate), and (2) the law applied based on the caller's economic activity, not speech (which is really just a restatement of the first argument). Justice Kavanaugh also was unpersuaded by the Government's slippery-slope argument that deeming this law content based would essentially deem *all* laws regulating debt collection content-based. While other regulations on debt collection may incidentally impact speech, this one *targeted* speech, said Justice Kavanaugh. Furthermore, the Government conceded that the statute could not pass muster under strict scrutiny and indeed advanced no justification to distinguish between government-debt-collection robocalls and others.

With respect to remedy, Justice Kavanaugh first said that, unlike in *Ladue*, the government-debt exception did not render the overall robocall prohibition "littered with exceptions that substantially negate the restriction." Accordingly, invalidation of the entire robocall ban for failing to advance a substantial government interest was unwarranted. And, applying ordinary severability principles, Justice Kavanaugh said that the general severability directive that Congress originally enacted as part of the Federal Communications Act of 1934 applied, by its terms, to every part of the robocall regulation, including the government-debt exception—particularly because the rest of the TCPA was fully functional without the exception. So, he voted to sever the exception and permit the remainder of the ban to remain in place. Critically, Justice Kavanaugh also recognized that this was, at bottom, an equal treatment case, and that such cases "can sometimes pose complicated severability questions." Whether based on a severability clause or a presumption of severability, "the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all." The trick is naming "the relevant" benefits and burdens, but here the government-debt exception was so narrow that this was a case about extending the burden (the ban on robocalls), which, after all, protects tens of millions consumers every day, deserves respect as the product of the democratic process, and does not on its own violate the First Amendment.

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented from the First Amendment judgment but concurred with the severability judgment. On the First Amendment, he rejected the plurality's approach, "which reflexively applies strict scrutiny to all content-based distinctions," an approach he deems "divorced from First Amendment values" in a case about "commercial regulation" that "pos[es] little threat to the free marketplace of ideas." Though the robocall ***ban*** impacted political speech, that did not, in his view, justify applying strict scrutiny to the government-debt-collection exception, which did not have political-speech implications. Applying intermediate scrutiny, Justice Breyer would find that the government-debt exception does not violate the First Amendment. He sees very little First Amendment harm (*i.e.*, harm to the "marketplace of ideas") caused by the government-debt exception, particularly given that debt collection is highly regulated anyway. And he sees great benefit from the exception's protection of the public fisc.

Justice Sotomayor, though she agreed with Justice Breyer's assessment that strict scrutiny should not apply, concluded that even under intermediate scrutiny, the government-debt exception fails. In her view, the Government "could have employed far less restrictive means to further its interest in collecting debt," such as securing consent from debtors to make the calls or making the calls itself. (It is not clear for whom such solutions would be "less restrictive," however—certainly not the government debt collectors, who have free reign under the statute as written.) In any event, Justice Sotomayor concurred in the judgment that the government-debt exception is severable from the remainder of the robocall ban, citing *City of Ladue* for the proposition that a proper remedy in cases where a regulation covers too little speech may be to remove the discrimination and cover more speech.

Justice Gorsuch concurred with the majority that the government-debt exception violates the First Amendment, concluding that it allows government-preferred speech related to debt while banning political advocacy without a compelling justification. What is more, in view of that First Amendment violation, Justice Gorsuch (on this point joined by Justice Thomas), would invalidate the *entire* robocall ban. Justice Gorsuch would not apply

severability principles but would instead hold that respondents are entitled to an injunction that prevents the law from applying to them. He questioned how the severability doctrine provides any remedy at all for the respondents, since despite vindicating First Amendment rights, the Court's ultimate judgment actually bans more speech.

As noted, this decision may be more important for constitutional remedies and severability doctrine than for First Amendment doctrine. On the basic "level-up/level-down" choice, seven justices refused to raise political speech to the treatment of government debt collectors and instead took away the special privileges of the latter. One might contrast this result with that in *Espinoza*, where the Court rejected the Montana Supreme Court's decision enjoining an entire tax credit program to save it from religion and instead "levelled up" by bestowing on religious schools the same special benefits (tax credits for scholarship donations benefiting their students) as non-religious private schools. Issues regarding appropriate constitutional remedies (including severability) will be back to the Court next Term, particularly in *Texas v. California*, No. 19-1019,[5] where the Court will consider once again whether the ACA's individual mandate is unconstitutional and, if so, whether it is severable.

Free Speech: United States Policy Against Sex Trafficking Need Not Stop at the Border. *U.S. Agency for Int'l Development v. Alliance for Open Society Int'l,* No. 19-177.

In 2003 Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, known as the Leadership Act, in response to the global HIV/AIDS health crisis. 22 U.S.C. §7601 *et seq.* Congress allocated billions of dollars to U.S. and foreign nongovernmental organizations engaged in efforts to mitigate HIV/AIDS abroad, but conditioned funding on a "Policy Requirement" that recipient organizations explicitly oppose sex trafficking and prostitution. *See* § 7631(f); *See also* § 7631(e); 45 C.F.R. § 89.1 (2019). Several years ago, in *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.* (*AOSI I*), 570 U.S. 205, 214 (2013), the Court ruled that the First Amendment precludes application of the Policy Requirement to American organizations receiving Leadership Act funding.

This Term, in In *U.S. Agency for Int'l Development v. Alliance for Open Society Int'l,* No. 19-177 (*AOSI II*), the Court voted 5-3 (Justice Kagan recused) to ***uphold*** application of the Policy Requirement to American NGOs' legally distinct foreign affiliates. In an opinion by Justice Kavanaugh, the Court said that foreign organizations operating outside U.S. territory have no rights under the U.S. Constitution, and long-settled principles of American corporate law do not permit legally independent foreign affiliates of U.S. corporations to acquire U.S. constitutional rights. Mere "affiliation" with American organizations is not equivalent to incorporation in the United States.

Justice Thomas wrote separately to address his continued agreement with *AOSI I* and explain that the Leadership Act's Policy Requirement does not violate the First Amendment when applied to respondents or respondents' foreign affiliates because it does not compel anyone to say anything.

". . . the Court said that foreign organizations outside U.S. . . . have no rights under the U.S. Constitution. . ."

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented. In his view, the Court addressed the wrong question in asking whether foreign organizations have First Amendment rights. The real question is whether requiring the foreign affiliates of American NGOs to maintain anti-trafficking/anti-prostitution policies as a condition of federal funding impinges the First Amendment rights of the American corporations, who, in effect, speak through their (legally distinct) affiliates when providing services in foreign countries.

Fourth and Fifth Amendment: *Bivens* Stops at the Border. *Hernandez v. Mesa,* No. 17-1678.

For a variety of reasons, reformers have recently been questioning the legitimacy of affording qualified immunity to state and local law enforcement against constitutional torts, particularly excessive force claims. Justice Thomas, for one, has expressed a willingness to "reconsider our qualified immunity jurisprudence" in an "appropriate case" under 42 U.S.C. § 1983. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). At the end of the 2019 Term, however, the Court denied cert petitions in several cases (many backed by highly regarded civil libertarian groups) urging it to curtail the reach of immunity or end it entirely.

The terms of holding federal officials to account for similar abuses has not sparked as much public debate, though Justice Thomas's concurrence in *Ziglar* grapples with the parallels. The cause of action for federal constitutional-tort claims is entirely judge-made, yet reaches many fewer scenarios than claims under 42 U.S.C. § 1983. And this Term, in *Hernandez v. Mesa,* No. 17-1678, the Court confirmed that it takes very seriously the doctrinal limits it has imposed on claims against federal agents.

Nearly a half century ago, in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court announced that, despite the lack of any congressional authorization to sue federal agents for violating one's constitutional rights, it would permit such claims in limited circumstances. The Court later extended the same remedy to a congressional staffer who alleged she was fired because of her sex in violation of the Fifth Amendment and a federal prisoner's Eighth Amendment Claim for inadequate medical treatment. But more generally, the Court asks whether a request to apply *Bivens* arises in a "new context" or against a "new class of defendants." If so, the Court asks whether "special factors counsel hesitation" about extending *Bivens*. In *Hernandez*, the Court held that a *Bivens* claim does not extend to cross-border shootings.

In *Hernandez*, United States Border Patrol Agent Jesus Mesa shot and killed 15-year-old Mexican national, Sergio Adrián Hernández Güereca, who was playing with a group of friends in a culvert separating El Paso, Texas from Ciudad Juarez, Mexico.

5. Consolidated with California v. Texas, No. 19-840. Indiana is a party aligned with Texas in both cases.

"Even though prior *Bivens* cases had raised 4th and 5th Amendment claims, none had covered cross-border shootings, which posed a greater risk of disruptive judicial intrusion into the affairs of the other branches of government."

Hernandez and a friend had run to the American side, where Mesa detained the friend and, when Hernandez ran back, fired two shots. Mesa, who contended the boys were attempting an illegal border crossing and had pelted him with rocks, stood on American soil when he fired his gun, but Hernandez stood on Mexican soil when the bullets struck and killed him. Hernández's parents sued for damages on his behalf under *Bivens*, alleging Mesa violated Hernández's Fourth and Fifth Amendment rights.

In an opinion by Justice Alito, the Court ruled 5-4 that *Bivens* did not provide a remedy in this case. First, "[t]he *Bivens* claims in this case assuredly arise in a new context." Even though prior *Bivens* cases had raised Fourth and Fifth Amendment claims, none had covered cross-border shootings, which posed a greater risk of disruptive judicial intrusion into the affairs of the other branches of government.

In addition, several factors caution against extending *Bivens* to the new context of cross-border shootings: expanding the *Bivens* remedy would impinge on foreign relations by affording a particular form of redress for an "international incident," risk undermining border security, and defy congressional decisions not to authorize damages awards against federal officials who inflict injuries outside the United States. In particular, because the United States Government had decided not to prosecute Mesa or extradite him for prosecution in Mexico on the grounds that he acted consistent with Border Patrol policy and training, a judicially created remedy would undermine Executive Branch conduct of foreign relations. The Executive Branch, the Court said, does not "want a jury in a *Bivens* action to apply its own understanding of what constituted reasonable conduct by a Border Patrol agent under the circumstances of this case," which could risk embarrassment of the federal government abroad with pronouncements by multiple government departments on a single question—and carry implications for national security responsibilities carried out by Border Patrol agents.

Justice Thomas, joined by Justice Gorsuch, concurred, arguing that the *Bivens* doctrine should be abandoned altogether. In *Ziglar*, the Court acknowledged the shaky foundation of the *Bivens* doctrine, and the Court has over time narrowed the reach of *Bivens* considerably. Furthermore, unlike during the era when it decided *Bivens,* the Court is no longer willing to imply a cause of action even for federal statutes absent congressional authorization. The *Bivens* remedy, in Justice Thomas's view, is limited to a handful of cases, and the time has come to overrule it entirely.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. She disagreed with the majority's characterization of a cross-border shooting as a "new" context for *Bivens* claims because the conduct of a rogue U.S. officer comes within a familiar *Bivens* setting. She further argues that even if the cross-border context could be characterized as new, no "special factors" counsel against providing a *Bivens* remedy and no alternative remedies exist for the plaintiffs. And the matter is not one concerning the application of U.S. law to conduct abroad because the plaintiffs seek the application of U.S. law to conduct that occurred within the U.S. border.

SEPARATION OF POWERS AND FEDERALISM

This Term the Court carried a heavy load of cases that required it to police the limits of the governmental branches vis-à-vis one another and vis-à-vis states.

Appointments Clause: Puerto Rico Financial Board Members May Serve Without Senate Confirmation. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,* No. 18-1334

First, in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,* No. 18-1334,[6] the Court held that the process for appointing members of a federal board without Senate Confirmation did not violate the Appointments Clause—a win for greater presidential authority, albeit as delegated in the first instance by Congress.

In response to Puerto Rico's financial crisis, Congress enacted the Puerto Rico Oversight Management, and Economic Stability Act (PROMESA) in 2016. 130 Stat. 549, 48 U.S.C. § 2101 *et seq*. The Act created a Financial Oversight and Management Board with authority to file for bankruptcy on behalf of Puerto Rico and its instrumentalities, to supervise and modify the territory's laws to achieve fiscal responsibility, and to gather evidence and conduct investigations to support the restructuring efforts. The Board consists of seven members appointed by the President without Senate confirmation, with six members selected from lists compiled by congressional leaders. President Obama selected the seven Board members in 2016 using the statutory process, and the Board proceeded to file bankruptcy petitions on behalf of Puerto Rico and five of its entities. Several creditors moved to dismiss all proceedings on the grounds that the method by which Board members were chosen violated the Appointments Clause because they were not confirmed by the Senate.

In an opinion by Justice Breyer, the Court unanimously upheld the Board selection process. While the Appointments Clause applies to officers exercising power in Puerto Rico as "Officers of the United States," not all officials in U.S. Districts and Territories so qualify. The text and history of the Appointments Clause suggest a distinction between federal officers (who exercise power on behalf of the National Government) and non-federal officers (who exercise some other governmental power). In places like the District of Columbia and Puerto Rico, local offices created by federal law frequently are filled through election or local executive appointment. The key to whether such

6. Together with UTIER v. Financial Oversight and Management Board for Puerto Rico, No. 18-1521; U.S. v. Aurelius Investment, LLC, No. 18-1514, Aurelius Investment, LLC v. Puerto Rico, No. 18-1475; and Official Committee of Debtors v. Aurelius Investment, *LLC,* No. 18-1496.

alternative selection modes are permissible lies in the "nature of an appointee's federally created duties, i.e., whether they are *primarily local versus primarily federal*." *Id.* at 1663. In creating the Board, Congress established powers and duties revolving around representation of local interests, supervision of local expenditures, reliance on local logistical support, and the dependence on local laws that suggest the members are part of local government, not federal officers.

Article III Standing: Retirement Plan Members May Not Sue Plan Administrators for Violation of Fiduciary Duties Absent Demonstrable Harm. *Thole v. U.S. Bank, N.A.*, No. 17-1712.

Four years ago, in *Spokeo, Inc. v. Robbins*, 136 S.Ct. 1540 (2016), the Court held that Congress could not obviate Article III's direct-injury requirements simply by conferring a cause of action to enforce federal law on someone who does not suffer actual injury from a defendant's unlawful actions (there, violation of the Fair Credit Reporting Act). In a decision enforcing that same principle and thereby limiting the reach of federal courts, the Court in *Thole v. U.S. Bank, N.A.*, No. 17-1712, ruled that retirement plan beneficiaries lack Article III standing to sue plan administrators for violation of fiduciary duties where they cannot demonstrate actual harm to themselves from the violations. The plaintiffs, retirees James Thole and Sherry Smith, are both vested participants in U.S. Bank's defined-benefit retirement plan and are legally and contractually entitled to payment of monthly pension benefits for the remainder of their lifetimes. To date, Thole and Smith have been paid all of their monthly pension benefits. They filed a class-action lawsuit against U.S. Bank and others under the Employee Retirement Income Security Act of 1974 (ERISA), alleging violation of the fiduciary duties of loyalty and prudence arising from defendants' allegedly poor investment decisions. Plaintiffs sought repayment of the approximately $750 million in alleged losses to the plan that resulted from poor management, along with attorney's fees. Plaintiffs also requested injunctive relief to replace the retirement plan's fiduciaries.

In an opinion by Justice Kavanaugh, the Court ruled 5-4 that the plaintiffs lacked Article III standing to bring suit because they are members of a defined-benefit retirement plan (rather than a defined-contribution plan) legally entitled to payment of (and receiving without interruption) their monthly benefits regardless of the value of the plan or its fiduciaries' investment decisions. Win or lose, they would receive the exact same monthly pension payment, and "therefore have no concrete stake in the lawsuit." Furthermore, under *Spokeo*, it is irrelevant that ERISA afforded plaintiffs a right of action to sue to restore plan losses.

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented. In her view, (1) participants in defined benefit plans have a sufficient interest in the plan's financial integrity (akin to private trust beneficiaries) to satisfy Article III, (2) the breach of fiduciary duty alleged by the complaint is a cognizable Article III injury, and (3) if nothing else, plaintiffs should be able to assert, in a representational capacity, the rights of the retirement plan itself, which undoubtedly was injured. In short, the dissent would permit plan beneficiaries broad leeway to use ERISA lawsuits to protect against future plan failure even absent actual financial injury, while the majority holds that "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

Agency Independence: Unlawful for Powerful CFPB to Be Governed by Lone Administrator not Answerable to the President. *Seila Law LLC v. Consumer Financial Protection Bureau,* No. 19-7.

". . . Congress may not establish an independent agency headed by a single director rather than by a multi-member commission."

Perhaps the most anticipated separation-of-powers case of the term was *Seila Law LLC v. Consumer Financial Protection Bureau,* No. 19-7, which asked whether it was lawful for the Director of the Consumer Financial Protection Bureau to be immune from presidential removal except for cause. In general, the constitutional validity of independent agencies has risen to the fore in recent years, including a decade ago in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (2010), where the Court invalidated the structure of the Public Company Accounting Oversight Board, which not only insulated board members from removal except for cause, but also precluded the president from determining whether cause existed. Indeed, many, including the Trump Administration Department of Justice, have asked whether the time has come to overturn *Humphrey's Executor*, 295 U.S. 602 (1935), where the Court held that Congress acted validly when it established the Federal Trade Commission as an independent agency headed by three commissioners with staggered terms, removable only for cause. *Seila Law* presented a similar question, though here the agency is headed by a single director, and, notably, DOJ refused to defend the statute, prompting the Court to appoint amicus curiae to defend the constitutionality of CFPB independence. Equally critical, *Seila Law* also required the Court to address statutory severability and the scope of appropriate relief in the event CFPB's single-director independence was invalid. Would the Court wipe out the entire CFPB—which was created in the wake of the 2008 financial crisis to ensure the safety and transparency of consumer debt products—or would it merely declare that the Director was subject to presidential removal at will?

On the question of constitutionality, the Court, in an opinion by the Chief Justice and joined by Justices Thomas, Alito, Gorsuch and Kavanaugh, ruled that Congress may not establish an independent agency headed by a single director rather than by a multi-member commission. It said that neither *Humphrey's Executor* nor precedents upholding protections "for inferior officers with limited duties and no policymaking or administrative authority"—cases that "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power"—resolved the constitutionality of a tenure-protected single-member agency head having "significant executive power." *Id.* at 11–12. The agency structure of the CFPB and its single director, said the Court, is both historically unprecedented and incompatible with the United States constitutional structure, which avoids concentrating power in the hands of a single person, aside from the President.

Justice Thomas, joined by Justice Gorsuch, concurred, but would overturn *Humphrey's Executor* outright.

Justice Kagan, joined by Justices Ginsburg, Breyer, and

"The Court also decided a group of cases on the susceptibility of a sitting president to grand jury and congressional subpoenas of personal tax-related documents."

Sotomayor, partially dissented on the grounds that administrative structure should be left to Congress and the President to sort out.

With respect to remedy, the Chief Justice, joined by justices Alito and Kavanaugh, concluded that the Director's removal protection is severable from the other Dodd-Frank provisions that established the CFPB. Justice Kagan (again joined by Justices Ginsburg, Breyer, and Sotomayor) separately agreed with the severability holding. In short, the Court left the CFPB in place, albeit with a director removable at will by the president.

Presidential Immunity: State Grand Jury and Congress Not Automatically Barred from Subpoenaing President's Personal Documents. *Trump v. Vance*, No. 19-635; *Trump v. Mazars USA, LLP*, No. 19-715.

The Court also decided cases bearing on the susceptibility of a sitting president to grand jury and congressional subpoenas of personal tax-related documents.

In *Trump v. Vance*, No. 19-635, the Court rejected 7-2 the President's claim of absolute immunity from state criminal processes—here a New York County grand jury subpoena *duces tecum* to the president's personal accounting firm for financial records related to the President and to his businesses. In an opinion by the Chief Justice, the Court, citing both *Nixon v. Fitzgerald* and *Clinton v. Jones*, rejected the argument that the burdens of distraction, stigma, and harassment justify absolute immunity from state criminal proceedings or that state prosecutors satisfy a heightened standard of need before issuing document subpoenas for a president's financial records. Existing procedural safeguards can prevent vexatious lawsuits, and the Supremacy Clause prohibits state judges and prosecutors from interfering with the President's performance of official duties. In dissent, Justice Thomas agreed that the President is not entitled to absolute immunity, but would hold that the President is entitled to relief from a subpoena if he can show (as here) that it would intrude on his presidential duties. Justice Alito separately dissented, emphasizing that the Court's decision threatens the functioning of the Presidency—opening the President to investigation by 2,300 local prosecutors—and does not respect the structure of the government created by the Constitution.

Next, in *Trump v. Mazars USA, LLP*, No. 19-715,[7] the Court, again by a vote of 7-2, rejected the President's claim of immunity from four subpoenas issued to his accounting firm and bank by three committees of the U.S. House of Representatives, but said the President may yet prevail. The Court, again in an opinion by the Chief Justice, vacated and remanded the case, holding that the lower courts had not taken proper account of the significant separation-of-powers concerns implicated by Congress issuing subpoenas seeking the President's information. It delineated a new four-part test to guide the analysis: "First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. . . . Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. . . . Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial, the better. . . . Fourth, courts should assess the burdens imposed on the President by a subpoena, particularly because they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."

Justice Thomas, in dissent, said he would hold that Congress lacks the legislative power to subpoena the President's private, nonofficial documents; he noted that Congress may obtain such documents only using its impeachment power. Justice Alito also dissented, but unlike Justice Thomas would not hold that Congress is categorically barred form subpoenaing a President's personal documents. He agreed with the majority that the lower courts did not afford proper consideration to the separation-of-powers concerns implicated. He would, however, require the House to describe what legislation it is considering for which the subpoenaed records would be relevant—and spell out the constitutional authority for enacting such legislation. He would also require the House to explain why the subpoenaed information is needed, as opposed to information more readily available from other sources.

Presidential Election: States May Replace and Punish Faithless Electors. *Chiafalo v. Washington*, No. 19-465.

Finally under the federalism/separation-of-powers heading, in *Chiafalo v. Washington*, No. 19-465,[8] the Court held 9-0 that States may enforce penalty-backed pledge laws against presidential electors. In Washington, three Democratic electors who pledged to cast their electoral votes in the 2016 presidential election for the same candidate chosen by Washington voters broke their pledges and cast their ballots for Colin Powell rather than Hillary Clinton. The State removed and replaced them and fined them $1,000 each.

The faithless electors challenged their fines, arguing that the Constitution gives members of the Electoral College the right to vote for whomever they please.

In an opinion by Justice Kagan, the Court ruled that States may penalize faithless electors, observing that the "Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President." Article II, § 1 gives a State broad authority over presidential electors as long as no other part of the Constitution is in opposition to the State's conditions to electoral appointment. No part of the Constitution expressly prohibits States from removing presidential electors' voting discretion. Aside from Article II, § 1 addressing electoral

7. Consolidated with and Trump v. Deutsche Bank AG, No. 19-760.

8. Decided alongside, but not consolidated with, Colorado Department of State v. Baca, No. 19-518.

appointments and the Twelfth Amendment addressing procedures, the Constitution is "bare bones" in regard to electors. The practice of tying electors to the presidential choices of others has existed for over 200 years and States have a longstanding history of using pledge laws to make clear to electors that they are to vote as agents of the State's citizens.

Justice Thomas concurred, and was joined in part by Justice Gorsuch. Justice Thomas agreed that States have the power to require their electors to cast votes for the presidential candidate chosen by the States' citizens, but does not believe that authority arises from Article II. In Justice Thomas's view, the Constitution is silent on the issue of States' authority to bind their electors' votes, making control over electors part of the residual power reserved to States.

ENVIRONMENTAL AND LAND USE REGULATION

No Definitive Answer Whether Point Source Discharge into Groundwater Is Covered by CWA Permitting Requirements. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260.

Under the Clean Water Act, one must have a permit to discharge pollutants into navigable waters "from" a "point source." In recent decades, legal disputes have arisen over the types of water bodies qualifying as "navigable," the meaning of "point source," and what connection between the two is necessary to fall within the Clean Water Act. But anybody looking for clarity from the Supreme Court as to whether a permit is required for point source discharge into groundwater that ultimately reaches the Pacific Ocean can only be disappointed in *County of Maui, Hawaii v. Hawaii Wildlife Fund,* No. 18-260, where the Court, by a vote of 6-3, remanded for more fact finding without giving a definitive answer.

In *County of Maui*, environmental groups filed a citizens' Clean Water Act suit alleging that Maui needs a permit to discharge pollution from its wastewater reclamation facility (4 million gallons of treated water every day) into wells—discharge that combines with ordinary groundwater that reaches the Pacific Ocean. The two main competing interpretations of the Clean Water Act are that it either covers the Maui situation because discharge that ultimately reaches a navigable body of water (the ocean) is "fairly traceable" to a point source (the wastewater discharge), or that it does *not* cover the Maui situation because when the discharge mixes with groundwater (which is not a navigable body of water) it breaks the necessary connection between the point source and the navigable body of water. In other words, the issue before the court is whether the Clean Water Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," in this case, groundwater.

In a majority opinion by Justice Breyer, the Court said "maybe." The key word here is "from," which, while broad, is susceptible of contextual limitation. The Court deemed the "fairly traceable" interpretation of "from" too broad because it would sweep in sources releasing pollutants that could take many years to reach navigable waters—and, indeed, [v]irtually all water, polluted or not, makes its way to navigable water." Critically, such an interpretation would erode state authority over nonpoint source pollution, such as farm and rainwater runoff. But it also rejected the interpretation that "from" excludes a pollutant that travels through *any* groundwater before reaching navigable water. That standard, said the Court, would interfere with EPA's authority to regulate ordinary point source discharges and enable polluters to manipulate the exact spot of discharge to avoid the permitting requirement.

". . . the Court held that a 'functional equivalent' of a direct discharge of pollutants for the point source into navigable waters requires a permit."

Instead, the Court held that a "functional equivalent" of a direct discharge of pollutants from the point source into navigable waters requires a permit. What is a "functional equivalent" of a point source discharge? It is one where either the "point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means"? Courts must consider many factors, the most important of which are the time and distance between the point source discharge and the navigable water it ultimately pollutes. Other factors include the nature of the material through which the pollutant travels; the extent of dilution during transit; the amount entering the navigable water compared with the amount of point source discharge; the manner by which the discharge enters navigable waters; and "the degree to which the pollution has maintained its specific identity." The Court vacated and remanded for consideration under this standard.

Justice Thomas, joined by Justice Gorsuch, dissented, saying that a permit is required only when a point source discharges pollutants directly into navigable waters, *i.e.*, the text of the statute does not mention "functional equivalent" of a direct discharge. Furthermore, Justice Thomas criticized the majority for reading "from" in isolation rather than in context with "any point source," which makes clear the need for direct discharge into a navigable body of water.

Justice Alito separately dissented, writing that the majority invented an atextual, unclear rule: "If the Court is going to devise its own legal rules . . . it might at least adopt rules that can be applied with a modicum of consistency." In Justice Alito's view, the text must mean either (1) a pollutant could be originally discharged from a pipe and eventually reaches the ocean by flowing through groundwater or over the surface of the ground; or (2) a pollutant could have come from a pipe if it is discharged from the pipe directly into the ocean: "There is no comprehensible alternative to these two interpretations," no matter how unacceptable the results of either might be. Justice Alito agrees with Justices Thomas and Gorsuch that the better reading of the statute is to require direct discharge into a navigable body of water before a permit for point source pollution is required. Justice Alito would rely on a broad understanding of "point source" to prevent manipulation by polluters.

Pipeline Under Appalachian Trail May Continue. *U.S. Forest Service v. Cowpasture River Preservation Assn.*, No. 18-1584.

While industry and environmental groups alike must be frustrated with the uncertain outcome in *County of Maui*, a government land use case yielded a much more definite winner—the

". . . the Government created lawful exemptions for religious organizations from the contraceptive mandate . . . requiring employers to provide contraceptive coverage . . ."

pipeline builder. In *U.S. Forest Service v. Cowpasture River Preservation Assn.,* No. 18-1584,[9] the question was whether a pipeline developer had secured the necessary authorization to build underneath the Appalachian National Scenic Trail a 600-mile pipeline from West Virginia to North Carolina. Because the pipeline came within 16 miles of the George Washington National Forest, Atlantic Coast Pipeline, LLC, obtained a special use permit from the United States Forest Service for the right-of-way to place a 0.1-mile segment of pipe 600 feet below part of the Appalachian Trail. A collection of environmental and conservation groups challenged the plan, alleging that the Forest Service's permit was insufficient because the Appalachian Trail had become part of the National Park System, which meant that only the National Park Service, not the Forest Service, could give the necessary permission to build the pipeline under the Trail.

In an opinion by Justice Thomas, the Court rejected the challenge by a vote of 7-2, holding that the plain text of the Trails Act and an agreement between the Department of the Interior and the Forest Service create only an easement for the Department of Interior to establish a walking trail and reserved to the Forest Service jurisdiction over the land itself. The Court also held that the Forest Service had authority to issue the permit because the Department of Interior's decision to assign responsibility for the Appalachian Trail to the National Park System did not transform the land that the Trail crosses into land encompassed by the National Park System.

Justice Sotomayor, joined by Justice Kagan, dissented. In her view, the Trails Act defined the Appalachian Trail to be land in the National Park System—an understanding reinforced by statutory history and agency practice. The Court, she said, ignored the relevant statutory text when it focused on characterizing the Trail as an easement.

AFFORDABLE CARE ACT

In the time since Congress passed the Patient Protection and Affordable Care Act, Supreme Court litigation over its validity and meaning has largely broken into two classes: religious claims and "other." In the first category, the party claiming some right of religious exercise has won. In the second, the party demanding more government spending or regulation has usually prevailed. That pattern held firm in OT 2019.

Exemption from Contraceptive Mandate for Religious Organizations Permissible. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* No. 19-431.

First, in the religion category, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* No. 19-431,[10] the Court, by a vote of 7-2, held that the Government created lawful exemptions for religious organizations from the contraceptive mandate, a regulation requiring employers to provide contraceptive coverage to employees via group health plans.

As background refresher, the ACA does not specifically mention contraceptive coverage or require insurance coverage for the more general category of "preventive care." Rather, it says that health insurance coverage provided by employers must, "with respect to women," include "such additional preventive care and screenings . . . as provided for in the comprehensive guidelines supported by the Health Resources and Services Administration," which is an agency of the Department of Health and Human Services. Shortly after Congress passed the ACA, the Departments of Health and Human Services, Labor, and Treasury promulgated interim final rules that, relying on this delegation, incorporated the HRSA guidelines, which, when published, required contraceptive coverage. *See* 42 U.S.C. §3000gg–92; 29 U.S.C. § 1191c; 26 U.S.C. § 9833. Notably, the Departments did not proceed through normal notice-and-comment rulemaking under the Administrative Procedures Act (APA), but instead invoked a "good cause" exception permitting immediate promulgation.

Several religious businesses and organizations sued under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, arguing that the contraceptive mandate substantially burdened their religious exercise absent narrow tailoring to achieve a compelling government interest. After years of litigation, the Departments promulgated a final rule in 2013 that permitted, for churches and other religious organizations—but not other businesses closely held by religious objectors—an "accommodation" allowing religious organizations who object to providing contraceptive coverage to certify as much to their health insurers, who would then exclude contraceptive coverage from the group health plan but then make separate payments for contraception to beneficiaries.

Because it received no accommodation, Hobby Lobby, a closely held company whose owner maintains a religious objection to providing employees with contraception coverage, pressed its RFRA claim and ultimately prevailed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Because the certification rule meant that churches and religious orders still had to participate in offering coverage for contraception, many who objected to the mandate in its interim form—including two religious nonprofits run by Little Sisters of the Poor—sued to enjoin the final rule as well. In *Zubik v. Burwell*, 136 S.Ct. 1557 (2016), the Court, made aware that the parties might yet find a satisfactory resolution, remanded without deciding whether the self-certification accommodation violates RFRA and instructed the parties to develop an approach to accommodate employers' concerns while still providing women full and equal contraceptive coverage.

Following *Zubik*, with the Obama administration having given way to the Trump administration, the Departments—using the same "good cause" procedure used to promulgate the contraceptive mandate without notice-and-comment in the first

9. Together with Atlantic Coast Pipeline LLC v. Cowpasture River Preservation Association, No. 18-1587.

10. Together with Trump v. Pennsylvania, No. 19-454.

instance—published rules to exempt entirely from the contraception mandate all religious (and moral) objectors, whether they are religious organizations or other types of employers. Pennsylvania and New Jersey sued, alleging that the Departments lacked statutory authority to promulgate such exemptions and that they failed to follow notice-and-comment requirements required by the APA. Little Sisters of the Poor intervened to defend the new exemption. The district court entered a nationwide preliminary injunction against the exemption and the Third Circuit affirmed.

In an opinion by Justice Thomas, the Court reversed the preliminary injunction, holding that the Departments had the statutory authority to promulgate the final rules creating religious and moral exemptions from the contraceptive mandate. The same "as provided for" text of § 3000gg–13(a)(4) that granted HRSA the broad authority to mandate contraceptive coverage also gave it the authority to create exemptions. In particular, "as" modifies "provided" in a way that grants HRSA "sweeping authority" with respect to both coverage itself and the circumstances in which employers must provide it—*i.e.*, when exemptions apply. And while the Court did not need to consider whether RFRA, even apart from the ACA, required the Departments to provide the religious exemption, the Court rejected the argument that the Departments should not have considered RFRA at all in their rulemaking. The ACA, of course, does not declare RFRA inapplicable to health insurance regulations, and, on the face of it, the contraceptive mandate "is capable" of violating RFRA absent some exemption. Furthermore, the Court in *Hobby Lobby* and *Zubik* "all but instructed" the Departments to consider RFRA when formulating health insurance regulations, and failure to discuss RFRA in their solution would have opened the Departments up to claims that their rules were arbitrary and capricious.

The Court also held that the Departments promulgated the 2018 final rules in compliance with APA procedural requirements, including the necessary elements of notice. Publishing the 2018 final rules using a document labelled "interim Final Rules with Request for Comments," rather than one titled "General Notice of Proposed Rulemaking," did not make the Departments' notice invalid because the publication contained all of the necessary elements for notice. Since the Departments' IFR contained a detailed explanation of its position and provided the public an opportunity to comment on the regulation, the title caused no harm. Finally, the Court rejected the Third Circuit's application of a test requiring "open-mindedness" on the part of the Departments in response to public comments because the APA nowhere includes such a requirement. Because this was review of a preliminary injunction, however, and because plaintiffs have also claimed that the exemptions violate the APA's prohibition against "arbitrary and capricious" rulemaking, the Court, though it reversed the injunction, remanded the case for further proceedings.

Justice Alito, joined by Justice Gorsuch, concurred with the entirety of the Court's opinion, but wrote separately out of concern for what might happen on remand. To head off any claims that the exemption is arbitrary and capricious under the APA, he would address whether RFRA requires the religious exemption contained the Departments' 2018 final rule. Justices Alito and Gorsuch believe that RFRA does indeed compel the religious exemption because the prior self-certification accommodation violated RFRA under all three prongs of the RFRA analysis and had to be remedied.

". . . the Court rejected the argument that the Departments should have considered RFRA at all in their rulemaking."

Justice Kagan, joined by Justice Breyer, also concurred in the judgment, but wrote separately because she questioned whether the religious and moral exemptions can meet the reasoned-decision-making demand required by the APA. Unlike the majority and the dissent, Justice Kagan does not find the plain text of § 3000gg–13(a)(4) to provide a clear meaning, but would defer to the Departments under *Chevron*. On remand, she thinks the Departments will struggle to prove that their rulemaking was not arbitrary and capricious because, it her view, it provides a broader exemption than necessary to accommodate the Little Sisters and other religious objectors.

Justice Ginsburg, joined by Justice Sotomayor, dissented. She disagreed with the Court's conclusion that the same broad authority ACA gives HRSA to delineate required coverage also grants authority to create exemptions. In her view, the statutory text (1) specifies that "group health plans" and "health insurance issuers" must provide coverage for preventive health services, and (2) while HRSA may issue guidelines as to the type of preventive services that must be covered, that authority does not speak to *who* is required to cover preventative-care services. In addition, HRSA did not create the exemptions, and the agencies that did so (the IRS, EBSA, and CMS) are not named anywhere within 42 U.S.C. § 3000g–13(a)(4). Justice Ginsburg also concluded that the exemption is not required by RFRA to protect religious freedom. Because the exemption would "impose[] significant burdens on women employees" that Congress intended to remove by enacting the women's preventative-services provision, Justice Ginsburg concluded, RFRA does not permit or require the religious exemption. In her view, the prior self-certification accommodation was consistent with Congress's intent to provide women equal access to preventative health services and created a sufficient accommodation for religious objectors to satisfy both the ACA and RFRA.

Congress's Mere Refusal to Appropriate Money Does Not Cancel ACA Program Obligations that Congress Already Created. *Maine Community Health Options v. U.S.*, No. 18-1023.

Can Congress create a program authorizing government payment of claims, only to cancel the debt by refusing to appropriate money? In keeping with the pro-finance theme of other ACA cases, the answer in *Maine Community Health Options v. U.S.*, No. 18-1023,[11] was "no"—the program-authorized debt stands.

To encourage health insurers to offer statutorily defined minimum essential coverage through online exchanges, the ACA cre-

11. Together with Moda Health Plan, Inc. v. U.S., No. 18-1028, and Land of Lincoln Mut. Health Ins. Co. v. U.S., No. 18-1038.

"While Congress usually grants authority for government agencies to incur obligations only as it appropriates money . . . 'Congress can deviate from this pattern' . . ."

ated, for the first three years of ACA enforceability (2014-2016), the "risk corridors" program. The idea was to ensure that health insurers would neither lose too much nor profit too much as the ACA was lifting from the launch pad. After all, while insurers would, through the exchanges, gain access to millions of new customers supported by government subsidies, their obligations to offer minimally robust insurance plans to all comers at a "community rating"—notwithstanding preexisting conditions—posed substantial business risks. So, under a statutorily defined formula, Congress provided that, if a plan lost too much money each of those first three years, the government "shall pay" the plan to compensate for the losses. And, vice-versa, if a plan profited too much during those years, it "shall pay" the government.

As it happened, under the risk corridors program, the government owed billions more to losing plans than it received from profitable ones—a deficit that totaled $12 billion. But, each year, Congress enacted appropriations riders prohibiting the Centers for Medicaid and Medicare Services from making risk corridor payments.

When they didn't get paid, several insurance plans sued the Federal Government in the Court of Federal Claims under the Tucker Act (which waives sovereign immunity and creates federal jurisdiction for monetary claims not sounding in tort) for a portion of their losses during the three-year phase in period of the ACA. The U.S. Court of Appeals for the Federal Circuit ruled in favor of the Government, holding that while § 1342 of the ACA initially obligated the government to pay the full amounts owed to health insurers, the subsequent appropriations riders had repealed any such obligation.

In a majority opinion by Justice Sotomayor, the Court voted 8-1 to reverse, holding that the risk corridors statute created an "obligation" for the Government to pay insurers the full amount of losses under the statutory formula and that the payment obligation was not impliedly repealed through Congress's appropriation riders. While Congress *usually* grants authority for government agencies to incur obligations only as it appropriates money to pay those obligations, "Congress can deviate from this pattern" and "authorize agencies to enter into contracts" in advance of appropriations or even "create an obligation directly by statute" without specifying how it will be satisfied. Here, the "shall pay" language of § 1342 "imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions" (*i.e.*, participation in the exchanges). Moreover, the ACA nowhere limited the amount of compensable losses or required that the risk corridors program be revenue neutral. And while the negative appropriations riders (enforced via the Anti-Deficiency Act) limit how government officials may pay claims, they do not implicitly cancel government obligations created directly by an organic statute such as the ACA—unless, unlike here, the text of the rider is irreconcilable with maintaining the preexisting government obligation. "Indeed, finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment."

Finally, though the Tucker Act does not itself create a cause of action to enforce government obligations, § 1342 by its own terms is "one of the rare laws permitting a damages suit in the Court of Federal Claims." It does so because the "shall pay" requirement "can fairly be read as mandating compensation" and accordingly affords insurers both a right to payment for their losses and a "remedy" under the Tucker Act. According to the Court, it "falls comfortably within the class of money mandating statutes that permit recovery of money damages in the Court of Federal Claims."

Justices Thomas and Gorsuch joined in all of the majority opinion except the portion where the Court analyzed whether legislative history supported the argument that Congress impliedly repealed the payment obligation through its appropriations riders.

Justice Alito dissented. Though he assumed correct the Court's conclusion that § 1342 created a government obligation unrescinded by the appropriations riders, Justice Alito concluded that the obligation was not enforceable via the Tucker Act. Citing the Court's decisions this term in *Comcast Corp. v. National Association of African-American Owned Media* (regarding proof necessary to maintain a § 1981 claim) and *Hernandez v. Mesa* (rejecting a cause of action to enforce the Fourth Amendment against a federal officer's cross-border shooting), Justice Alito expressed frustration at the Court's reversion to creating rights of action for damages that Congress has not authorized. Here, he said, "the Court infers a private right of action that has the effect of providing a massive bailout for insurance companies that took a calculated risk and lost." And the Court's "money mandating" test for creating that right of action has only an "uncertain foundation"—particularly in light of statements in *Comcast* casting doubt on the practice of predicating rights of action on mandatory language in a statute. In Justice Alito's view, the briefing and argument did not fully address how the "money mandating" test fit within the Court's larger implied-right-of-action doctrine, and he would request additional briefing and argument on the issue.

INTELLECTUAL PROPERTY

Rather quietly, the 2019 Term became a relatively big term for intellectual property cases, with seven argued cases arising from various corners of the IP universe—four of which are summarized below.

Blackbeard's Revenge: State Immune from Documentary Piracy Claim. *Allen v. Cooper,* No. 18-877.

Reasonable people can debate which is more surprising: that the Court addressed a case arising from the wreck of a pirate ship, or that the case had nothing to do with either congressional letters of marque or civil asset forfeiture. In *Allen v. Cooper,* No. 18-877, the Court addressed state sovereign immunity against claims of copyright infringement arising from a documentary about the wreck of Blackbeard's flagship, the *Queen Anne's Revenge*, off the coast of North Carolina in 1718. Three hundred years later, Blackbeard continues to wreak havoc on private enterprise.

Intersal, Inc., discovered the shipwreck in 1996. The State of

North Carolina, the legal owner of the wreck, hired Intersal to handle recovery operations, and Intersal hired videographer Frederick Allen to document the recovery efforts. Allen took photos and videos of the salvage operation for nearly a decade and registered copyrights for all of his photos and videos. North Carolina, however, in an effort to promote Tar Heel tourism, published several of Allen's videos and photos online without permission. Allen sued the State for copyright infringement and contested North Carolina's sovereign immunity defense on the grounds that Congress had abrogated such immunity in the Copyright Remedy Clarification Act of 1990 (CRCA). The district court acknowledged that, under *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 727 (1999), Congress could not use its Article I powers over intellectual property (in that case, patents), to deprive States of sovereign immunity. It ruled for Allen anyway, however, on the grounds that because CRCA protected copyrights as a species of property, it was appropriate legislation under Section 5 of the Fourteenth Amendment, through which Congress does have the power to abrogate sovereign immunity. The Fourth Circuit reversed and held that *Florida Prepaid* prevents Congress from depriving States of sovereign immunity under both Article I and Section 5 of the Fourteenth Amendment.

The Court affirmed unanimously. In an opinion by Justice Kagan, the Court held that *Florida Prepaid* precluded Congress from using both its Article I power over intellectual property and its Fourteenth Amendment power to enforce constitutional rights to abrogate States' immunity from copyright infringement suits in the CRCA. There was no way to distinguish Congress's power over copyrights from its power over patents, the Court said, and Allen offered no "special justification" for overturning *Florida Prepaid*. And with respect to Congress's Section 5 power, while states may not intentionally deprive individuals of property without providing an adequate remedy, CRCA, just like the Patent Remedy Act abrogation invalidated in *Florida Prepaid*, sweeps far more broadly and authorizes damages claims even for unintentional infringements. Furthermore, the legislative record was devoid of evidence suggesting that States historically and systematically engaged in intentional infringement of copyrighted material for which a more sweeping remedy might be justified—just as the Court had concluded in *Florida Prepaid* concerning the congressional record for state patent infringements. In short, the law's broad scope was disproportionate to any constitutional wrongs Congress might have had authority to remedy.

Justice Thomas concurred with the majority that the CRCA does not validly abrogate States' sovereign immunity, but disagreed with the majority's discussion of *stare decisis* and with the majority's discussion of future copyright legislation. On *stare decisis,* Justice Thomas reiterated his view that no "special justification" is necessary to overrule erroneous precedents, though he did not view *Florida Prepaid* to be demonstrably erroneous. Justice Thomas observed that while the parties agreed, and the Court asserted, that copyrights are a species of property, the question remains open whether copyrights are "property" under the original meaning of the Fourteenth Amendment.

Justice Breyer, joined by Justice Ginsburg, also concurred. In his view, *Florida Prepaid* controls; he wrote separately to register his dissent from that case and many of the Court's other sovereign-immunity precedents.

Government Edicts Doctrine Precludes Copyright Protection for Case Annotations. *Georgia v. Public.Resource.Org, Inc.,* No. 18-1150.

"There was no way to distinguish Congress's power over copyrights from its power over patents . . ."

Even as the Court this Term limited government copyright *liability* under sovereign immunity, it also restricted the government's ability to claim copyright *protection* under the "government edicts doctrine," which, without context, might sound like a dispensation for government speech. This Term, in *Georgia v. Public.Resource.Org, Inc.,* No. 18-1150, the Court used it to block government officials from claiming copyright protection for annotations to the official state code. The case began when an NGO, Public.Resource.Org, published the Official Code of Georgia Annotated and distributed copies to organizations and Georgia officials. In response, Georgia's Code Revision Commission, which created the annotations, sent cease-and-desist letters, and then filed suit, alleging copyright infringement. The district court ruled for the Commission on the grounds that, because the annotations were not enacted laws, they were eligible for copyright protection. The Eleventh Circuit reversed on the basis of the government edicts doctrine, which precludes officials empowered to speak with the force of law from being the authors of works created during the course of official duties.

In an opinion by the Chief Justice, the Court affirmed by a vote of 5-4, holding that the government edicts doctrine applies to the annotations. The Court had previously recognized that the doctrine excludes legal materials produced by judges from copyright protections, and now it extended its application to non-binding explanatory legal materials created by a legislative body.

Justice Thomas, joined by Justice Alito and joined in part by Justice Breyer, dissented because he viewed the extension of the doctrine to be a modification of the Copyright Act, which he believes should be made by Congress, not the Court.

Justice Ginsburg also dissented (joined by Justice Breyer), arguing that the annotations should not be subject to the government edicts doctrine because they were not created in a legislative capacity, even though they were created by a legislative body's administrators.

Grounds for Disgorgement for Trademark Violation Expanded. *Romag Fasteners, Inc. v. Fossil, Inc.,* No. 18-1233.

Switching from copyrights to trademarks, the Court in *Romag Fasteners, Inc. v. Fossil, Inc.,* No. 18-1233, expanded grounds for disgorgement of profits for trademark infringement. After Romag and Fossil entered into an agreement for Fossil to use Romag's magnetic snap fasteners in Fossil's leather goods, Romag discovered that counterfeit Romag fasteners were being used by Chinese factories manufacturing Fossil's products. Romag filed a trademark infringement suit and sought an award of profits pursuant to 15 U.S.C. §1125(a). The jury found that Fossil acted "callously" but not "willfully," which prompted the district court to deny the profits award.

In an opinion by Justice Gorsuch, the Court voted 9-0 to

vacate and remand, holding that willful infringement is not a prerequisite to an award of profits under 15 U.S.C. § 1117(a). While proof of willfulness is a required precondition for an award of profits in a trademark dilution suit under § 1125(c) of the Lanham Act, no such showing has ever been required by § 1125(a) actions for false or misleading use of trademarks.

Justice Alito, joined by Justices Breyer and Kagan, concurred, observing that willfulness is not a prerequisite to an award of profits under 15 U.S.C. §1117(a) and that pre-Lanham Act case law and relevant authorities indicate that willfulness is an important consideration but not an absolute precondition to awarding profits under § 1117(a).

Justice Sotomayor separately concurred in the judgment, but not the majority opinion, because the majority did not acknowledge that courts of equity would typically only award profits for willful infringement, but very rarely for innocent infringement. In her view, the majority presented the matter as though courts of equity were equally likely to award profits in cases of willful infringement as in cases of innocent infringement.

Booking.com Not Generic, Can Be Registered with PTO. *U.S. Patent and Trademark Office v. Booking.com B.V.,* No. 19-46.

Finally, though no doubt the Justices had to cancel their summer travel plans owing to the pandemic, they nonetheless, in *U.S. Patent and Trademark Office v. Booking.com B.V.,* No. 19-46, permitted web travel giant Booking.com to register its name as a trademark. The PTO had refused to register "Booking.com" as a mark because it deemed the term a generic name for online hotel-reservations. On review in the U.S. District Court for the Eastern District of Virginia, the court found that based in large part on evidence of consumer perception, the term "booking" by itself was generic, but "Booking.com" was not, and the Fourth Circuit affirmed.

The Court affirmed 8-1, holding, in Justice Ginsburg's final majority opinion, that a term is a generic name only if, taken as a whole, it has a generic meaning to consumers. "Booking.com," however, was not generic for federal trademark registration because evidence showed that consumers perceived it to be a specific business. The Court rejected the PTO's proposed rule that a generic word combined with a generic top-level domain ("generic.com") creates a generic term.

Justice Breyer alone dissented, embracing PTO's proposed generic + generic = generic rule.

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