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Supreme Court October Term 2019: A Review of Selected Major Rulings

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Supreme Court October Term 2019: A Review of Selected Major Rulings

SUMMARY

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September 4, 2020

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The Supreme Court term that began on October 7, 2019 was one of the most eventful in recent history. The Coronavirus Disease 2019 (COVID-19) pandemic colored much of the Court's work, leading the Court to close its building to the public indefinitely, postpone oral arguments originally scheduled for March and April of 2020, and, for the first time in history, telephonically conduct oral arguments in roughly a dozen cases over two weeks in May 2020. The Court, which typically recesses for the summer in late June, continued to issue opinions through the second week of July 2020 because of delays caused by the pandemic. And substantively, the October 2019 Term included the Court issuing several orders concerning litigation over various state-government responses to the pandemic.

Beyond the effects of the pandemic, the October 2019 Term was notable because the Court issued a host of significant decisions. Of particular note for Congress's work, the Court's term included these opinions

- *Bostock v. Clayton County*, holding that an employer who fires an individual for being gay or transgender violates Title VII of the Civil Rights Act of 1964;
- *Espinoza v. Montana Department of Revenue*, ruling that Montana violated the Free Exercise Clause by excluding religious schools from a program aiding private schools;
- *June Medical Services LLC v. Russo*, striking down a Louisiana law requiring abortion providers to obtain admitting privileges at a local hospital;
- *McGirt v. Oklahoma*, holding that a large portion of Northeastern Oklahoma reserved for the Creek Nation remains "Indian country" for purposes of the Major Crimes Act;
- *Seila Law v. Consumer Financial Protection Bureau (CFPB)*, holding that the CFPB's leadership structure—a single director who could only be removed from office for cause—violated separation-of-powers principles; and
- *Trump v. Mazars,* holding that adjudication over a congressional demand for certain presidential documents must consider unique separation-of-powers concerns implicated by such a demand.

Contents

Civil Rights and Employment Law 2
Bostock v. Clayton County 2
Freedom of Religion 7
Espinoza v. Montana Department of Revenue 7
Abortion 11
June Medical Services LLC v. Russo 11
Indian Law: Treaty Interpretation and Reservation Status 16
McGirt v. Oklahoma 16
Separation of Powers 21
Seila Law v. Consumer Financial Protection Bureau 21
Access to Personal Presidential Records 27
Trump v. Vance 28
Trump v. Mazars USA, LLP 30

Tables

Table A-1. Cases the Court Heard During the October 2019 Term 36
Table A-2. Per Curiam Opinions Issued by the Court without Oral Argument as of September 8, 2020 49

Appendixes

Appendix. Supreme Court's October 2019 Term 36

Contacts

Author Information 50

The Supreme Court term that began on October 7, 2019 was one of the most eventful in recent history.[1] The Coronavirus Disease 2019 (COVID-19) pandemic colored much of the Court's work.[2] The pandemic resulted in the Court indefinitely closing its building to the public, postponing oral arguments originally scheduled for March and April of 2020, and, for the first time in history, telephonically conducting oral arguments in roughly a dozen cases over two weeks in May 2020.[3] The Court, which typically recesses for the summer in late June, continued to issue opinions through the second week of July 2020 because of delays caused by the pandemic.[4] And substantively, the October 2019 Term included the Court issuing several orders concerning litigation over various state-government responses to the pandemic.[5]

Beyond the effects of the pandemic, the October 2019 Term was notable because of the substantive opinions that the Court issued throughout the term.[6] During the term, the Court issued a host of decisions that define the limits of Congress's powers vis-à-vis the President,[7] as well as several opinions concerning the role of government with respect to religion,[8] abortion rights,[9] tribal lands,[10] and the scope of federal civil rights protections for gay and transgender workers.[11] This report provides an overview of these opinions, including a discussion of their broader implications for Congress. In the **Appendix** to the report, **Table A-1** and Error! Reference source not found. provide brief summaries of all of the Court's written opinions issued during the October 2019 Term.

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[1] *See* J. OF THE SUPREME COURT OF THE UNITED STATES 1 (Oct. 7, 2019), https://www.supremecourt.gov/orders/journal/Jnl19.pdf.

[2] *See* Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/supreme-court-term.html (discussing the pandemic's effect on the October 2019 Term); *see also* Mark Sherman and Jessica Gresko, *Thomas Spoke, Roberts Ruled in Unusual Supreme Court Term*, ASSOCIATED PRESS (July, 10, 2020), https://apnews.com/2e55337e5aa46ce2c60a47212d2b5216 (exploring how the "coronavirus outbreak change[d] things at the Supreme Court"); Joan Biskupic, *Chief Justice Roberts Gave Everyone Something to Call a Win*, CNN (July 9, 2020), https://www.cnn.com/2020/07/09/politics/john-roberts-supreme-court/index.html ("All told, the decisions culminated an unprecedented term marked by the coronavirus pandemic, national strife and myriad cases involving the Trump agenda.").

[3] *See COVID-19 Announcements*, Supreme Court of the United States, https://www.supremecourt.gov/announcements/COVID-19.aspx (last visited Sept. 4, 2020).

[4] *See* Liptak, *supra* note 2 (observing that while the Court "typically ends its term in late June," "this year it issued its last decisions in July, which has not happened since 1996").

[5] *See, e.g.*, S. Bay United Pentecostal Church v Newsom, 140 S. Ct. 1613, 1613 (2020) (denying, by a 5-4 vote, a request to enjoin the Governor of California's executive order limiting attendance at places of worship); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020) (per curiam) (staying a lower court order prompted by the pandemic to count absentee ballots postmarked after April 7, 2020, the date of a Wisconsin election); *see generally* Stephen Wermiel, *SCOTUS for Law Students: COVID-19 and Supreme Court Emergencies*, SCOTUSBLOG (May 19, 2020, 2:45 PM), https://www.scotusblog.com/2020/05/scotus-for-law-students-covid-19-and-supreme-court-emergencies/.

[6] *See* Liptak, *supra* note 2 ("The term, which ended Thursday, included rulings that will be taught to law students for generations . . . .").

[7] *See supra* "*Seila Law v. Consumer Financial Protection Bureau*"; "*Trump v. Mazars USA, LLP*."

[8] *See supra* "*Espinoza v. Montana Department of Revenue*."

[9] *See supra* "*June Medical Services LLC v. Russo*."

[10] *See supra* "*McGirt v. Oklahoma*."

[11] *See supra* "*Bostock v. Clayton County*."

Civil Rights and Employment Law

Bostock v. Clayton County[12]

In perhaps the most notable opinion of the past term, the Supreme Court issued a decision consolidated under the title of *Bostock v. Clayton County* concerning a series of lawsuits brought by gay and transgender workers.[13] These workers alleged that their employers fired them because of their sexual orientation or gender identity and, in doing so, violated Title VII of the Civil Rights Act of 1964 (Title VII) by discriminating against them "because of . . . sex."[14] In a ruling that will have implications beyond Title VII, the *Bostock* Court held by a 6-3 vote that Title VII forbids employers from firing an employee for being gay or transgender.[15]

Background: Title VII prohibits employment discrimination on several different bases, including barring covered employers from discriminating against individuals "because of . . . sex."[16] The statute does not explicitly specify whether that prohibition applies to discrimination based on someone's sexual orientation or gender identity, although Congress has considered bills that would do so.[17] The Supreme Court has previously interpreted the statute's prohibition as more expansive than just a general bar on employers treating members of one sex different from members of another sex.[18] For instance, in *Price Waterhouse v. Hopkins*, a four-Justice plurality recognized that treating an employee differently because she failed to conform to stereotypes about how women should behave qualified as unlawful discrimination under Title VII.[19] And in *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that a male victim of sexual harassment by other men could bring a Title VII claim.[20]

In recent years, the question of whether Title VII prohibits employment discrimination based on sexual orientation has split lower federal courts.[21] Likewise, courts have reached divergent conclusions about whether Title VII protects transgender employees from employment discrimination.[22]

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[12] Jared P. Cole, CRS Legislative Attorney, authored this section of the memorandum.

[13] *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc); Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018); Bostock v. Clayton Cnty. Bd. of Commissioners, 894 F.3d 1335 (11th Cir. 2018) (en banc) (denying rehearing en banc).

[14] 42 U.S.C. § 2000e-2(a)(1).

[15] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[16] 42 U.S.C. § 2000e-2(a)(1).

[17] *Id*. *See* Equality Act, H.R. 5, 116th Cong. (2019).

[18] Title VII authorizes employers to make employment decisions based on sex when doing so is a "bona fide occupational qualification reasonably necessary to the normal operation" of employment. 42 U.S.C. § 2000e-2(e).

[19] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989).

[20] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

[21] *Compare* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (ruling that "sexual orientation discrimination is a subset of sex discrimination," and that "[s]exual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted"), *and* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."), *with* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir. 2017) (ruling that Title VII does not recognize discrimination claims based on sexual orientation and declining to recognize a claim under the sex-stereotyping theory of *Price Waterhouse*).

[22] *Compare* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th

Bostock concerned three consolidated cases, the first two of which centered on whether Title VII bars discrimination based on someone's sexual orientation. In *Zarda v. Altitude Express, Inc.*, an en banc panel of the Second Circuit[23] held that Title VII prohibits discrimination based on an employee's sexual orientation on three different grounds.[24] First, the lower court concluded that "because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted," discriminating on the basis of sexual orientation necessarily takes sex into account.[25] Second, drawing upon *Price Waterhouse*, the Second Circuit reasoned that decisions based on sexual orientation inappropriately rely on "assumptions or stereotypes about how members of a particular gender should be."[26] And third, the lower court maintained that such discrimination is associational discrimination akin to prohibited discrimination against employees in interracial relationships.[27] In contrast, in *Bostock v. Clayton County*, the Eleventh Circuit denied rehearing en banc in a case that dismissed a Title VII claim brought by a gay man, relying on prior circuit precedent holding that Title VII does not prohibit sexual orientation discrimination.[28] In the underlying decision, the court noted that it had previously rejected the argument that the Supreme Court's decisions in *Price Waterhouse* and *Oncale* supported a cause of action alleging sexual orientation discrimination.[29]

The third case, a decision by the Sixth Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ruled that an employer's termination of an employee for being transgender violated Title VII on two separate bases.[30] First, the lower court held that the firing was based on sex stereotypes about gender norms in violation of the rule of *Price Waterhouse*.[31] Second, the Sixth Circuit concluded that discrimination based on someone's transgender status is itself a per se violation of Title VII because: (1) it is "analytically impossible" to fire someone based on their transgender status without being motivated in part by their sex; and (2) "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping."[32]

The Supreme Court granted the petition for certiorari in the first two cases, *Altitude Express* and *Bostock*, on whether discrimination based on sexual orientation amounts to discrimination because of sex under Title VII.[33] The Court also granted the petition for certiorari in *Harris Funeral Homes* on whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender; or (2) as a form of sex stereotyping under *Price*

Cir. 2018) (recognizing that transgender employees may bring Title VII claims under the sex stereotyping theory of *Price Waterhouse* and holding that "discrimination on the basis of transgender and transitioning status violates Title VII"), *with* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (concluding that transgender people "are not a protected class under Title VII").

[23] For purposes of brevity, references to a particular circuit in this memorandum (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Second Circuit).

[24] Altitude Express, 883 F.3d 100, 131 (2d Cir. 2018) (en banc).

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] Bostock v. Clayton Cnty. Bd. of Commissioners, 894 F.3d 1335 (11th Cir. 2018) (en banc) (denying rehearing en banc).

[29] Bostock v. Clayton Cnty. Bd. of Commissioners, 723 F. App'x 964, 964–65 (11th Cir. 2018).

[30] Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018).

[31] *Id*. at 572.

[32] *Id*. at 575.

[33] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

Waterhouse.[34] The Court's final decision in *Bostock* consolidated all three of these cases in a majority opinion written by Justice Gorsuch.[35] Justice Alito, joined by Justice Thomas, issued a dissenting opinion;[36] and Justice Kavanaugh authored a separate dissent.[37]

Supreme Court's Decision: Justice Gorsuch's majority opinion focused on Title VII's text and its ordinary meaning to conclude that Title VII's prohibition of discrimination "because of . . . sex" extends to discrimination based on sexual orientation or gender identity.[38] In reaching that result, the Court made several preliminary observations. First, Title VII's language, the Court explained, incorporates the "but-for" standard of causation: if an outcome would not have occurred without, or "but-for," the purported cause, causation is established.[39] As Justice Gorsuch observed, there can be multiple but-for causes of the same event. The majority opinion gave an example: if a car crash occurred both because a defendant ran a red light and because a plaintiff failed to signal, both mistakes qualify as but-for causes.[40] Under Title VII, as long as sex is *one* factor that was the cause of the discrimination, illicit sex discrimination has occurred. It does not matter, the Court explained, if an employer also considered factors other than sex in making the employment decision, so long as sex remained a but-for cause of that decision.[41]

Second, the Court emphasized that Title VII's prohibition against discrimination is focused on discrimination against *individuals*, rather than different treatment across groups.[42] That is, the law prohibits discrimination against a single employee even if an "employer treated women as a group the same when compared to men as a group."[43] The focus on individuals means an employer cannot successfully defend its discrimination simply because both sexes were subject to the same discriminatory policy.[44]

Applying that analysis to the three cases, the Court ruled that discriminating against an employee based on sexual orientation or gender identity constituted discrimination based on sex in violation of Title VII. The Court reasoned that it is impossible to act on either basis without considering sex.[45] As an example, Justice Gorsuch pointed to a situation where two employees, a man and a woman, are attracted to men.[46] If an employer fires the man for being attracted to men, but not the woman who is also attracted to men, in the view of the majority, the employer has discriminated

[34] R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019).

[35] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–54 (2020).

[36] *Id*. at 1754 (Alito, J., dissenting)

[37] *Id*. at 1822 (Kavanaugh, J., dissenting).

[38] *Id*. at 1738–43 (majority opinion).

[39] *Id*. at 1739.

[40] *Id*.

[41] *Id*. The Court has applied a different causation standard for Title VII cases in the past. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) ("To construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them."). The majority opinion also noted that Congress amended Title VII (and partially superseded *Price Waterhouse*) to provide an alternative "motivating factor" standard. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e–2(m). Applying that standard, liability can sometimes attach "even if sex wasn't a but-for cause of the employer's challenged decision," but the *Bostock* majority believed it unnecessary to resolve the case under this more lenient standard for establishing liability. *Bostock*, 140 S. Ct. at 1739–40.

[42] *Bostock*, 140 S. Ct. at 1740.

[43] *Id*. at 1741.

[44] *Id*. at 1744.

[45] *Id*. at 1741.

[46] *Id*.

against him for traits the employer tolerates in a woman.[47] For the Court, the employee is singled out in part because of his sex—a but-for cause of the discrimination.[48] Likewise, the Court observed, if an employer fires a transgender man (assigned female gender at birth who now identifies as a man) for being transgender, the employer penalizes that person for being assigned the female gender at birth for traits that it would tolerate in a person assigned the male gender at birth.[49]

The majority opinion, while acknowledging the potential implications of the Court's decision for other areas of the law, such as other statutes that prohibit discrimination based on sex, as well as for religious liberty claims under the Constitution, declined to examine the application of its reasoning to circumstances outside the cases before it.[50] In doing so, it rejected the argument that, because the legislative authors of Title VII likely did not anticipate that the statute prohibited discrimination based on sexual orientation or gender identity, Title VII should not be interpreted to do so.[51] The Court ruled that the plain meaning of Title VII controlled, irrespective of the principal goals of its congressional authors.[52]

Dissenting Opinions: Justice Alito's dissenting opinion, which Justice Thomas joined, claimed that the majority was functionally legislating through the guise of a judicial decision. His opinion argued that discrimination based on sexual orientation or gender identity does not necessarily rely on "sex," because one could do so without considering a person's sex at all.[53] For instance, he reasoned, an employer could have a blanket policy of not hiring gay or transgender people, no matter their biological sex.[54] He argued that virtually no one in 1964 would have understood the statute to prohibit discrimination on the basis of sexual orientation or gender identity.[55] Justice Alito concluded his dissent by highlighting arenas in which the Court's reasoning would have "far-reaching consequences."[56] He argued, among other things, that the Court's holding will "threaten freedom of religion, freedom of speech, and personal privacy and safety."[57] For Justice Alito, given these potential policy consequences and given Title VII's silence on sexual orientation or gender identify, whether Title VII bars discrimination on these bases should be the product of legislative deliberation, rather than judicial construction.[58]

Justice Kavanaugh's dissent similarly criticized the majority opinion for judicially amending the text of Title VII.[59] He contended that the majority relied on a "literalist" reading of the statute, an approach that conflicted with the ordinary meaning of "discriminate because of sex," which Justice Kavanaugh argued was not commonly understood to encompass discrimination related to sexual orientation or gender identity.[60] He also stressed that while he rejected the Court's attempt

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 1753–54.

[51] *Id*. at 1749.

[52] *Id*.

[53] *Id*. at 1758–59 (Alito, J., dissenting).

[54] *Id*.

[55] *Id*. at 1755

[56] *Id*. at 1778.

[57] *Id*.

[58] *Id*.

[59] *Id*. at 1822–23 (Kavanugh, J., dissenting).

[60] *Id*. at 1824–25.

to rewrite the statute as beyond the proper role of the judiciary, he admired the hard work of gay and lesbian Americans to achieve equal treatment under the law and agreed that as a policy matter they should not be treated as outcasts or inferior.[61]

Implications for Congress: The Court's decision will have important effects for millions of employees across the country as Title VII applies to employers with 15 or more employees.[62] And as both the majority and dissenting opinions appeared to acknowledge, *Bostock* could have important implications for other statutory and constitutional provisions.[63] For instance, Title VII contains an exception permitting sex discrimination when sex is a "bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation" of employment.[64] Courts have already wrestled with the circumstances in which sex is a BFOQ necessary to the operations of a business; they may now need to determine how *Bostock* applies in those circumstances.[65] In addition, courts have in the past examined the interplay between Title VII's general requirements and its exemptions for religious entities[66] and the Constitution's provisions protecting religious liberty.[67] Courts will likely be asked to apply *Bostock* in similar situations. Likewise, because Title VII and Title IX of the Education Amendments of 1972 both prohibit discrimination based on sex, courts often draw on Title VII to interpret Title IX.[68] Courts have already begun examining whether *Bostock* means that Title IX[69] and statutes that incorporate Title IX's provisions[70] also prohibit discrimination based on sexual orientation and gender identity.

While the Court's decision in *Bostock* will have important results both in the context of Title VII and in other areas, the majority opinion rested on the text of Title VII, rather than a constitutional provision. Congress may amend the law if it disagrees with the Court's decision. In the past, Congress has sometimes responded to judicial decisions interpreting Title VII by amending the text of the statute. For instance, after the Court held in *General Electric Co. v. Gilbert* that Title VII did not prohibit discrimination based on pregnancy,[71] Congress amended Title VII to do so.[72] Likewise, Congress may modify provisions in other statutes addressing sex discrimination, such as Title IX or the Affordable Care Act, including to clarify whether, post-*Bostock*, these statutes should be understood to apply to discrimination on the basis of sexual orientation or transgender status. Options might include supplying an explicit definition of what discrimination "because of

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[61] *Id*. at 1823, 1837.

[62] *See* Brief for Petitioner at 22, Altitude Express, Inc. v. Zarda, No. 17-1623 (2019); 42 U.S.C. § 2000e(b).

[63] *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting).

[64] 42 U.S.C. § 2000e-2(e). Generally this exception allows employers, in narrow circumstances, to make employment decisions based on an individual's sex when the "essence" of a job would be undermined by hiring members of both sexes. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

[65] *See, e.g.*, Everson v. Michigan Dep't of Corr., 391 F.3d 737, 747 (6th Cir. 2004) (ruling that gender is a BFOQ for certain positions at a women's prison).

[66] 42 U.S.C. §§ 2000e-1(a); 2000e-2(e)(2).

[67] *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

[68] 20 U.S.C. § 1681.

[69] *See, e.g.*, Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty., No. 18-13592, 2020 WL 4561817, at *12 (11th Cir. Aug. 7, 2020) ("With *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.").

[70] *See, e.g.*, Walker v. Dep't of Health & Human Servs., No. 20-CV-2834, 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020) (concluding that recent HHS rules which interpret "sex" under Title IX not to include gender identity or sexual orientation are "contrary to *Bostock*").

[71] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 128 (1976).

[72] Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

… sex" means.[73] In addition, Congress could carve out exceptions for particular circumstances or expand the scope of statutory exceptions that already exist, such as for religious entities.[74]

Freedom of Religion

Espinoza v. Montana Department of Revenue[75]

In *Espinoza v. Montana Department of Revenue*, the Supreme Court built on recent jurisprudence holding that the government may violate the First Amendment's Free Exercise Clause by excluding religious organizations from public aid programs.[76] While the Court had previously ruled that a state violated the Constitution by excluding religious organizations from a grant program funding playground materials,[77] this opinion extended that ruling to programs involving indirect financial aid.[78] *Espinoza* also suggested that more broadly, state constitutional provisions excluding religious organizations from receiving state aid could be subject to heightened scrutiny, and may prompt further challenges to such laws.[79]

Background: The Free Exercise Clause of the First Amendment provides that the government "shall make no law . . . prohibiting the free exercise" of religion.[80] In *Trinity Lutheran Church of Columbia v. Comer*, decided in 2017, the Supreme Court ruled that a state grant program excluding churches and other religious organizations from receiving grants to purchase rubber playground surfaces violated the Free Exercise Clause.[81] The Court held the program unconstitutional because it discriminated against organizations based on their religious status.[82] The Supreme Court acknowledged that in a prior case, *Locke v. Davey*, it had ruled that a state could, without violating the Free Exercise Clause, prohibit students from using publicly funded scholarships to pursue a degree in devotional theology.[83] In *Locke*, the Court recognized the state's "historical and substantial state interest" in not using government funds to support clergy.[84] *Trinity Lutheran* distinguished the earlier case, saying the state in *Locke* had permissibly chosen to deny a scholarship because of what the recipient "proposed to *do*—use the funds to prepare for the ministry."[85] By contrast, in *Trinity Lutheran*, the Supreme Court held that the state was impermissibly denying funds because of what the recipient "*was*"—a church.[86]

The *Trinity Lutheran* Court said that because the state's playground grant program required a religious organization "to renounce its religious character in order to participate in an otherwise

[73] 42 U.S.C. § 2000e-2(a).

[74] *See, e.g.*, 42 U.S.C. §§ 2000e-1(a); 2000e-2(e)(2).

[75] Valerie C. Brannon, CRS Legislative Attorney, authored this section of the memorandum.

[76] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).

[77] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

[78] *Espinoza*, 140 S. Ct. at 2251.

[79] *Id.* at 2257.

[80] U.S. CONST. amend. I.

[81] *Trinity Lutheran*, 137 S. Ct. at 2024.

[82] *Id.* at 2023.

[83] *Id.*; *see also* Locke v. Davey, 540 U.S. 712, 715 (2004).

[84] *Locke*, 540 U.S. at 725.

[85] *Trinity Lutheran*, 137 S. Ct. at 2023.

[86] *Id.*

generally available public benefit program,"[87] the program was subject to "the strictest scrutiny"[88] and could only be justified by "a state interest 'of the highest order.'"[89] The state claimed that its interest in avoiding state support for religion justified the law.[90] The Supreme Court rejected this argument, saying that such an interest could not "qualify as compelling" in light of the policy's "clear infringement on free exercise."[91]

The plaintiffs in *Espinoza* were parents of children who wanted to participate in a tuition scholarship program but were barred from doing so because the students attended religious schools.[92] The state program as originally created offered tax credits for donating to private organizations that granted scholarships to private schools, including religious schools.[93] The Montana Supreme Court, however, invalidated the tax credit program, holding that it violated a *state* constitutional provision known as the No-Aid Clause that prohibited the government from providing direct or indirect financial support to religious schools.[94]

Supreme Court's Decision: Chief Justice Roberts wrote the majority opinion in *Espinoza*, which held that applying the No-Aid Clause to disqualify religious schools from the tax credit program solely because of their religious character violated the U.S. Constitution.[95] The state argued that *Trinity Lutheran* did not govern because the No-Aid Clause excluded religious schools based on how they would *use* the funds—for religious education.[96] The Supreme Court disagreed, pointing to the text of the No-Aid Clause, which singled out "sectarian" schools, and observing that the state supreme court had applied the clause "solely by reference to religious status."[97] Distinguishing *Locke*, the Court emphasized that Montana had not merely excluded any "particular 'essentially religious' course of instruction," but barred all aid to religious schools.[98] Further, unlike the "'historical and substantial' state interest in not funding the training of clergy" at issue in *Locke*, there was no similar historically grounded interest in disqualifying religious schools from public aid.[99]

Because the No-Aid Clause "discriminate[d] based on religious status,"[100] the Supreme Court applied strict scrutiny to analyze the state supreme court's decision to bar religious schools and parents from the program.[101] Following *Trinity Lutheran*, the Court said that the state's general interest in separating church and state beyond what was required by the U.S. Constitution was

[87] *Id.* at 2024.

[88] *Id.* at 2022.

[89] *Id.* at 2024 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[90] *Id.*

[91] *Id.*

[92] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020).

[93] *Id.* at 2251.

[94] *Id.* at 2253.

[95] *Id.* at 2255.

[96] *Id.*

[97] *Id.* at 2255–56.

[98] *Id.* at 2257.

[99] *Id.* at 2257–58.

[100] *Id.* at 2257.

[101] *Id.* at 2260. The Court did not hold that this state constitutional provision was facially unconstitutional, but concluded that the No-Aid Clause could not be applied in a way that excluded religious schools based solely on their religious status. *Id.* at 2256, 2260. However, some of the language in the opinion did refer to the No-Aid Clause as a whole. *See, e.g., id.* at 2257 ("Montana's no-aid provision discriminates based on religious status.").

insufficiently compelling.[102] The Court also rejected Montana's arguments that the No-Aid Clause promoted religious freedom by protecting taxpayers' religious liberty and "keeping the government out of" the operations of religious organizations.[103] The Court did "not see how" denying religious organizations the option to participate in the government program promoted religious liberty.[104] And in response to Montana's claim that the No-Aid Clause advanced the state's interest in supporting public education, the Court ruled that the provision was "fatally underinclusive," as it excluded only religious private schools and still allowed public support to be diverted to nonreligious private schools.[105] Ultimately, Chief Justice Roberts concluded that while the state was not required to "subsidize private education," once it had decided to do so, it could not "disqualify some private schools solely because they are religious."[106]

Concurring and Dissenting Opinions: Justices Thomas, Alito, and Gorsuch each filed separate concurring opinions. In an opinion joined by Justice Gorsuch, Justice Thomas called for the Court to reconsider its Establishment Clause jurisprudence.[107] In brief, Justice Thomas restated his view that the Court should interpret the Establishment Clause more narrowly, asserting that the Court's current jurisprudence reflects a hostility to religion that "hamper[s] free exercise rights."[108] Justice Alito wrote separately to argue that anti-Catholic bias may have motivated at least some states in adopting no-aid provisions, maintaining that evidence of discriminatory motives was relevant to assessing the constitutionality of Montana's No-Aid Clause.[109] Justice Gorsuch's concurrence echoed concerns he raised in *Trinity Lutheran,* expressing doubt about the validity of free exercise decisions distinguishing religious use from religious status.[110]

Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented in three separate opinions. Justice Ginsburg, joined by Justice Kagan, focused on the procedural posture of the case, arguing that because the Montana Supreme Court had struck down the entire scholarship program, the state could no longer be characterized as impermissibly discriminating against religious schools.[111] After the state court decision, she pointed out, there was no differential treatment placing a burden on the parents' religious exercise; "secular and sectarian schools alike are ineligible for benefits."[112] Justice Breyer, joined in part by Justice Kagan, would have concluded that Montana could permissibly have excluded religious schools from the tax credit program.[113] He wrote that, as in *Locke*, Montana had permissibly "chosen not to fund" a religious activity: "an education

[102] *Id.* at 2260.

[103] *Id.*

[104] *Id.* at 2261.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 2263 (Thomas, J., concurring).

[108] *Id.* In particular, Justice Thomas reiterated his view that the Establishment Clause should apply only against the federal government, not the states, and asserted that a separationist view of the Establishment Clause is motivated by religious hostility, causing "free exercise rights . . . to suffer." *Id.* at 2263, 2266–67.

[109] *Id.* at 2267–68 (Alito, J., concurring).

[110] *Id.* at 2275 (Gorsuch, J., concurring).

[111] *Id.* at 2279 (Ginsburg, J., dissenting).

[112] *Id.* In response to this claim, the majority said that the state court's reasoning in invalidating the program violated the Free Exercise Clause, creating a reversible error of federal law "at the beginning." *Id.* at 2262 (majority opinion). Accordingly, the state supreme court should not have terminated the program, and its decision could not "be defended as a neutral policy decision." *Id.*

[113] *Id.* at 2281 (Breyer, J., dissenting).

designed to 'induce religious faith.'"[114] Finally, writing for herself, Justice Sotomayor asserted that the Montana Supreme Court had reached its decision based on state-law grounds, and that the majority opinion violated ordinary principles of judicial review when it—in her characterization—essentially ruled that the No-Aid Clause was facially invalid under the federal Free Exercise Clause.[115]

Implications for Congress: The Supreme Court's interpretation of Montana's No-Aid Clause will likely have significant national implications, given that the majority of states have some version of a no-aid clause in their state constitutions.[116] To the extent that other state provisions exclude religious organizations from generally available benefits programs solely because of their religious character, under *Espinoza,* such an exclusion is subject to strict scrutiny under the Free Exercise Clause.[117]

Further, any federal laws that exclude religious organizations from public aid programs because of the religious status of beneficiaries rather than the religious use of funds may be constitutionally suspect under *Espinoza*.[118] Even prior to *Espinoza*, the executive branch had argued that at least two federal statutes violate the Free Exercise Clause insofar as they could be applied to bar religious schools from receiving certain higher-education funds.[119]

Espinoza did not overrule *Locke*, though, suggesting that there may be circumstances where Congress is permitted to prohibit federal funds from being used for religious purposes.[120] In fact, such restrictions may sometimes be *required* under the First Amendment's Establishment Clause, which the Supreme Court has previously viewed as prohibiting "sponsorship, financial support, and active involvement of the sovereign in religious activity."[121] However, the Court also stated in *Espinoza* that the Establishment Clause is "not offended when religious observers and organizations benefit from neutral government programs."[122] There are a number of federal statutes restricting public funds from being used for religious worship, instruction, or other sectarian activity.[123] The Court's ruling in *Espinoza* may warrant review of those laws to ensure they are consistent with the Court's modern Free Exercise and Establishment Clause jurisprudence.[124] Both of the Religion Clauses remain relevant considerations when Congress determines whether and how to include religious entities in public aid programs.

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[114] *Id.* at 2285.

[115] *Id.* at 2292 (Sotomayor, J., dissenting). In response, the majority again pointed to the state court decision's "error of federal law" in failing to recognize that excluding religious schools violated the Free Exercise Clause. *Id.* at 2262. (majority opinion).

[116] Petition for a Writ of Certiorari at i, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195).

[117] *See Espinoza*, 140 S. Ct. at 2257.

[118] *See id.*

[119] Religious Restrictions on Capital Financing for Historically Black Colleges and Universities, slip op. at 28 (Op. O.L.C. Aug. 15, 2019), https://www.justice.gov/olc/file/1200986/download (discussing 20 U.S.C. §§ 1066c(c) and 1068e(1)).

[120] *See Espinoza*, 140 S. Ct at 2257–58 (discussing *Locke*).

[121] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[122] *Espinoza*, 140 S. Ct at 2254.

[123] *See, e.g.*, 20 U.S.C. § 1011k(c); 29 U.S.C. § 3248(a)(3); 42 U.S.C. § 9920(c).

[124] Relevant to this inquiry, a number of federal statutes and regulations already provide that religiously affiliated institutions may not be excluded from generally applicable programs solely because of their religious character. *See, e.g.*, 42 U.S.C. § 604a(c); 34 C.F.R. § 75.52(a)(2); 45 C.F.R. § 87.3; *cf., e.g.*, 20 U.S.C. § 1412(a)(10)(A)(i)(III) (stating that a program includes students at religious schools).

Abortion

June Medical Services LLC v. Russo[125]

In *June Medical Services L.L.C. v. Russo*, the Supreme Court struck down a Louisiana law that required physicians who perform abortions to have admitting privileges at a hospital within 30 miles of the location where the procedure is performed.[126] A majority of the Court concluded that the law imposed an undue burden on a woman's ability to obtain the procedure. Justice Breyer authored an opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, that relied heavily on *Whole Woman's Health v. Hellerstedt*, a 2016 decision that invalidated a similar admitting privileges law from the State of Texas.[127] Justice Breyer maintained that the laws reviewed in *June Medical Services* and *Whole Woman's Health* were "nearly identical" and that the Louisiana law "must consequently reach a similar conclusion."[128] In a separate opinion, Chief Justice Roberts concurred in the judgment.[129] Emphasizing his continued belief that *Whole Woman's Health* was wrongly decided, the Chief Justice nevertheless contended that the legal doctrine of stare decisis required *June Medical Services* to be decided like *Whole Woman's Health*.[130]

Legal Background: Courts reviewing the constitutionality of abortion regulations apply a standard that a plurality of the Supreme Court adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 1992 decision concerning the legality of several Pennsylvania abortion restrictions.[131] In *Casey*, a plurality of the Court concluded that an abortion regulation violates the substantive component of the Fourteenth Amendment's Due Process Clause if it imposes an undue burden on a woman's ability to obtain the procedure.[132] The plurality explained that an undue burden exists if the purpose or effect on an abortion regulation is to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[133]

Evaluating Texas's admitting privileges law in *Whole Woman's Health*, the Court provided additional guidance on the undue burden standard. In an opinion written by Justice Breyer and joined by former Justice Kennedy and Justices Ginsburg, Sotomayor, and Kagan, the Court maintained that the standard requires a reviewing court to balance the health benefits conferred by an abortion regulation for women seeking the procedure against any burdens imposed on abortion access.[134] After examining the Texas law and considering the evidence collected by the district court, the Court concluded that the evidence before the district court showed that the law did not cure a significant health-related problem or provide any health benefit.[135] At the same time, however, the record demonstrated that the law caused the closure of abortion facilities, increased driving distances for women seeking abortions, and created longer wait times for the

[125] Jon O. Shimabukuro, CRS Legislative Attorney, authored this section of the memorandum.

[126] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

[127] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). For further discussion of Whole Woman's Health v. Hellerstedt, see CRS Report R44205, *Abortion and Whole Woman's Health v. Hellerstedt*, by Jon O. Shimabukuro.

[128] *June Medical Services*, 140 S. Ct. at 2133.

[129] *Id*. at 2134 (Roberts, C.J., concurring in the judgment).

[130] *Id*.

[131] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

[132] *Id*. at 876.

[133] *Id*. at 877.

[134] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

[135] *Id*. at 2311.

procedure.[136] Balancing these burdens against the absence of any health benefit, the Court concluded that the law imposed an undue burden under *Casey*.[137]

***June Medical Services* and the Fifth Circuit:** In 2017, a Louisiana federal district court invalidated the admitting privileges law at issue in *June Medical Services*.[138] A year later, the Fifth Circuit reversed the lower court's decision, distinguishing the Louisiana law from the Texas admitting privileges law invalidated in *Whole Woman's Health*.[139] The Fifth Circuit maintained that admitting privileges were easier to obtain in Louisiana and that only one of the state's six physicians who perform abortions made a good-faith effort to obtain such privileges.[140] The appellate court reasoned that if the remaining physicians obtained admitting privileges, existing abortion facilities would remain open and Louisiana residents would not suffer the same kinds of burdens the Supreme Court identified in *Whole Woman's Health*, such as fewer abortion clinics and longer wait times for the procedure.[141]

In *June Medical Services*, the Supreme Court considered not only the constitutionality of Louisiana's admitting privileges law, but a procedural question involving standing and whether abortion providers can challenge an abortion regulation on behalf of their clients. Louisiana argued that the petitioners—an abortion clinic and physicians who perform abortions—lacked standing because they did not have a sufficiently close relationship with abortion patients.[142] The state also contended that the petitioners' opposition to a health regulation intended to protect patients evidenced a conflict of interest with these patients, making them an unsuitable party to assert the rights of their clients.[143]

On the merits of the Louisiana law, the petitioners argued that admitting privileges conferred no health or safety benefits to women seeking abortions.[144] The petitioners further maintained that the law burdened abortion access by leaving just one physician to perform abortions at a single clinic in the state.[145] According to the petitioners, the Fifth Circuit not only discounted the burdens imposed by the law, but did not balance these burdens against the lack of any benefit conferred by the law, as required by *Whole Woman's Health*.[146]

The state argued that the admitting privileges requirement addressed serious safety concerns by serving as a kind of credential for physicians who perform abortion.[147] The state also contended that at least three of Louisiana's physicians who perform abortions did not act in good faith to obtain admitting privileges.[148] If the physicians obtained such privileges, the state maintained that

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[136] *Id*. at 2312.

[137] *Id*. In *Whole Woman's Health*, the Court also invalidated a separate requirement for abortion facilities to satisfy the same standards as ambulatory surgical centers after similarly balancing the benefits and burdens of that requirement. *Id*. at 2318.

[138] June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27 (M.D. La. 2017).

[139] June Med. Servs. L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).

[140] *Id*. at 807.

[141] *Id*. at 810–13.

[142] *See* Brief for the Respondent/Cross-Petitioner at 41, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323).

[143] *Id*. at 42.

[144] *See* Petition for a Writ of Certiorari at 21, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323).

[145] *Id*. at 26.

[146] *Id*. at 31.

[147] *See* Brief for the Respondent/Cross-Petitioner, *supra* note 142, at 81.

[148] *Id*. at 75.

abortion facilities would not close and the law would not impose a substantial obstacle to abortion access.[149]

***June Medical Services* Plurality Opinion:** In the plurality opinion, Justice Breyer concluded that the state waived its standing argument when it opposed the petitioners' initial request for a temporary restraining order against the admitting privileges law.[150] In a memorandum opposing the request, Louisiana had stated that there was "no question that the physicians had standing to contest [the law.]"[151] The plurality therefore determined that the state's "unmistakable concession" barred the Court's consideration of the argument.[152] Nevertheless, the plurality also emphasized the Court's long-standing recognition of abortion providers invoking the rights of their actual and potential patients in challenges to abortion regulations. Citing several of the Court's past decisions from both the abortion and nonabortion contexts recognizing third-party standing, Justice Breyer rejected overruling those past decisions.[153] In his concurring opinion, Chief Justice Roberts indicated his agreement with this portion of the plurality opinion.[154]

Addressing the merits of the admitting privileges law, Justice Breyer applied the undue burden standard, reiterating in line with the *Whole Woman's Health* majority that it requires balancing an abortion regulation's benefits against any burdens it imposes.[155] The plurality maintained that the district court faithfully engaged in this balancing and concluded that the district court's factual determinations were supported by ample evidence and were not clearly erroneous.[156]

With regard to any health benefit associated with an admitting privileges requirement, the plurality discussed both the district court's findings and similar findings by the district court in *Whole Woman's Health*. Writing for the Court in *Whole Woman's Health*, Justice Breyer had emphasized that deference should be given to the district court's evaluation of the record evidence.[157] In *June Medical Services*, the plurality deferred to the lower court's finding that an admitting privileges requirement serves no "relevant credentialing function" because privileges may be denied for reasons other than a doctor's ability to perform abortions.[158]

The plurality also maintained that direct and circumstantial evidence supported the district court's finding that the admitting privileges law burdened abortion providers.[159] For the plurality, this evidence refuted the Fifth Circuit's conclusion that some providers did not act in good faith to obtain admitting privileges. For example, in the plurality's view, direct evidence established that some of the providers were denied privileges for reasons other than their ability to perform abortions safely.[160] And the plurality also noted circumstantial evidence illustrating how application costs and reputational risks that accompany rejection could prevent providers from

[149] *Id*.

[150] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2117 (2020) (plurality opinion).

[151] *Id*. at 2118.

[152] *Id*.

[153] *Id*.

[154] *Id*. at 2139 n.4 (Roberts, C.J., concurring in the judgment).

[155] *Id*. at 2120 (plurality opinion).

[156] *Id*. at 2132.

[157] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

[158] *June Medical Services*, 140 S. Ct. at 2122.

[159] *Id*. at 2122–23.

[160] *Id*.

seeking privileges at some hospitals.[161] According to the plurality, the evidence collected by the district court supported its conclusion that enforcing the admitting privileges law would result in most of the state's abortion facilities closing.[162] For the plurality, fewer abortion facilities would also create additional burdens for women seeking abortions, such as longer wait times and increased driving distances.[163]

Accepting the district court's findings and legal conclusions, including its balancing of the burdens imposed by the admitting privileges law against the absence of any real health benefit, the plurality agreed with the lower court's determination that the Louisiana law imposed an undue burden on a woman's ability to obtain an abortion. Because the district court applied the undue burden standard in *June Medical Services* that the district court in *Whole Woman's Health* had applied, the plurality maintained that the same result was required.

Chief Justice Roberts' Concurrence: Concurring in the judgment, Chief Justice Roberts agreed that the Louisiana law and the Texas law at issue in *Whole Woman's Health* were nearly identical.[164] Although he dissented in *Whole Woman's Health* and indicated in his *June Medical Services* concurrence that the Texas case was wrongly decided, he nevertheless maintained that stare decisis required invalidating the Louisiana law.[165]

Despite his concurrence in the judgment, however, Chief Justice Roberts questioned how the plurality applied the undue burden standard in light of *Whole Woman's Health*.[166] Discussing balancing an abortion regulation's benefits and burdens, the Chief Justice contended that nothing in *Casey* suggested that courts should engage in this kind of weighing of factors.[167] According to the Chief Justice, *Casey* focused on the existence of a substantial obstacle as sufficient to invalidate an abortion regulation and did not "call for consideration of a regulation's benefits[.]"[168] Reviewing the burdens that the Louisiana law imposed, such as fewer abortion providers and facility closures, the Chief Justice agreed with the plurality that "the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law."[169] However, the Chief Justice further observed that "the discussion of benefits in *Whole Woman's Health* was not necessary to its holding."[170]

Existing precedent suggests that because only four Justices in *June Medical Services* viewed *Casey* to require courts to balance an abortion regulation's benefits and burdens, courts would likely construe Chief Justice Roberts's formulation of the undue burden standard to control. The Supreme Court has maintained that when a fragmented Court decides a case and five Justices do not agree to a single rationale for the decision, the Court's holding may be viewed as the position taken by the Justices who concurred in the judgment on the narrowest grounds.[171] Here, the Chief

[161] *Id*.

[162] *Id*. at 2129.

[163] *Id*. at 2129–30.

[164] *Id*. at 2133 (Roberts, C.J., concurring in the judgment).

[165] *Id*. at 2134.

[166] *Id*. at 2136.

[167] *Id*.

[168] *Id*. at 2139.

[169] *Id*.

[170] *Id*. at n.3.

[171] *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'") (quoting Gregg v.

Justice's concurrence in the judgment, applying the undue burden standard with a focus only on the burdens imposed by the Louisiana law, could arguably be viewed as the narrowest position supporting the judgment and could inform future challenges to abortion regulations.[172]

Dissenting Opinions: In a dissenting opinion, Justice Alito also questioned the use of a balancing test to determine whether an abortion regulation imposes an undue burden on the ability to obtain an abortion.[173] Justice Alito maintained that *Whole Woman's Health* "simply misinterpreted *Casey* . . . [and] should be overruled insofar as it changed the *Casey* test."[174] In a separate dissenting opinion, Justice Gorsuch criticized the balancing test not so much as a misinterpretation of *Casey*, but as an unpredictable test that will produce different results based on the factors considered by a given judge and the weight accorded to each of them.[175]

In another dissenting opinion, Justice Thomas reiterated his view that *Roe v. Wade* and its progeny were wrongly decided.[176] Contending that the Constitution does not constrain the states' ability to regulate or even prohibit abortion, Justice Thomas observed: "[T]he putative right to abortion is a creation that should be undone."[177] Justice Kavanaugh, also in dissent, maintained that additional fact finding was needed to assess whether Louisiana's admitting privileges law imposed a similar burden as the Texas law at issue in *Whole Woman's Health*.[178]

These dissenting opinions and Chief Justice Robert's concurring opinion evidence a skepticism with the balancing test used in *Whole Woman's Health* and *June Medical Services*. Given these opinions from five Justices, it seems possible that a different test to evaluate abortion regulations could be forthcoming.

Conclusion: The Court's evolving abortion jurisprudence, as evidenced by the various opinions in *June Medical Services,* may affect the work of Congress and other actors. Federal legislation to regulate abortion has been introduced in the 116th Congress.[179] And as states continue to adopt a variety of new laws to regulate the procedure, it seems likely that new legal challenges will occur.[180] How courts will apply the undue burden standard after *June Medical Services* is not entirely certain. In light of Chief Justice Roberts' concurrence, the Eighth Circuit vacated a 2017 preliminary injunction that prevented the enforcement of four Arkansas laws that sought to regulate abortion.[181] The court remanded the case for reconsideration in accordance with the concurrence, identifying the "appropriate inquiry" as whether the laws impose a substantial

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Georgia, 428 U.S. 153, 169 n.15 (1976)).

[172] *Compare* Hopkins v. Jegley, 2020 WL 4557687 (8th Cir. August 7, 2020) (remanding abortion case for reconsideration in light of Chief Justice Roberts' concurrence in *June Medical Services*), *with* Am. C. of Obstetricians & Gynecologists v. FDA, 2020 WL 3960625, at *17 (D. Md. July 29, 2020) (applying the balancing test as prescribed by *Whole Woman's Health v. Hellerstedt* because it "remains the most recent majority opinion delineating the full parameters of the undue burden test . . .").

[173] *June Medical Services*, 140 S. Ct. at 2153 (Alito, J., dissenting).

[174] *Id*. at 2154.

[175] *Id*. at 2179–80 (Gorsuch, J., dissenting).

[176] *Id*. at 2142 (Kavanaugh, J., dissenting).

[177] *Id*. at 2149.

[178] *Id*. at 2182 (Alito, J., dissenting).

[179] *See, e.g.*, Pregnant Women Health and Safety Act of 2020, S. 3226, 116th Cong. (2020).

[180] For additional information on recently enacted state abortion laws, see CRS Legal Sidebar LSB10346, *Reviewing Recently Enacted State Abortion Laws and Resulting Litigation*, by Jon O. Shimabukuro.

[181] Hopkins v. Jegley, 2020 WL 4557687, at *1 (8th Cir. August 7, 2020).

obstacle and not "whether benefits outweighed burdens."[182] At least one other court, however, has continued to engage in the balancing described in *Whole Woman's Health* and the *June Medical Services* plurality opinion.[183] Although it is not certain when the Supreme Court will next review an abortion regulation, a future case seems likely. In his dissent, Justice Gorsuch suggested that another case should be expected, particularly if courts are expected to balance a regulation's benefits and burdens.[184] He stated: "Some judges have thrown up their hands at the task put to them . . . . If everything comes down to balancing costs against benefits, they have observed, 'the only institution that can give an authoritative answer' is this Court[.]"[185]

Indian Law: Treaty Interpretation and Reservation Status

McGirt v. Oklahoma[186]

On July 9, 2020, the Supreme Court announced its decision in *McGirt v. Oklahoma*, a 5-4 decision ruling that land reserved for the Muscogee (Creek) Nation (Creek Nation) in the 19th century remained "Indian country" for criminal jurisdiction purposes.[187] In an opinion authored by Justice Gorsuch, the Court explained that Congress had established a reservation for the tribe in various treaties, including in an 1866 treaty that "forever set apart" certain land as "a home for said Creek Nation."[188] In a ruling that may have important consequences for not only criminal law in Oklahoma, but federal Indian law more generally, the Court then held that, despite subsequently creating the State of Oklahoma and limiting tribal sovereignty within that area, Congress had never disestablished that Creek reservation in what is now eastern Oklahoma.[189]

Background: States generally may *not* prosecute Indians for crimes committed in "Indian country," absent a grant of jurisdiction from Congress.[190] In relevant part, the Major Crimes Act reserves federal jurisdiction over certain serious crimes, like murder and kidnapping, as long as they are committed by an Indian within Indian country.[191] Other legislation has extended state criminal jurisdiction over major crimes in Indian country in some states, but not in Oklahoma.[192] The relevant federal criminal statute defines "Indian country" to mean (1) all land within an Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments that still have Indian titles.[193] An area qualifies as Indian country if it fits within any of these three categories, meaning a formal designation of Indian lands as a "reservation" is sufficient, but not necessary, for those lands to be considered Indian country.

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[182] *Id*. at *2.

[183] Am. C. of Obstetricians & Gynecologists v. FDA, 2020 WL 3960625, at *17 (D. Md. July 29, 2020).

[184] *June Medical Services*, 140 S. Ct. at 2180 (Gorsuch, J., dissenting).

[185] *Id.*

[186] Mainon A. Schwartz, CRS Legislative Attorney, authored this section of the memorandum.

[187] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020); *see* 18 U.S.C. § 1151 (defining "Indian country").

[188] *McGirt*, 140 S. Ct. at 2461.

[189] *Id.* at 2468.

[190] Negonsott v. Samuels, 507 U.S. 99, 102–03 (1993).

[191] 18 U.S.C. § 1153.

[192] *See, e.g.*, 18 U.S.C. § 1162.

[193] 18 U.S.C. § 1151.

It was against this legal backdrop that Jimcy McGirt, a member of the Seminole Nation of Oklahoma who was convicted by the state for serious crimes committed there, claimed that his conviction was unlawful because he was prosecuted for a crime committed within the Creek Nation's still-existing reservation.[194]

The Supreme Court's Decision: Oklahoma argued that eastern Oklahoma had always been exempt from the Major Crimes Act because of its unique history, but the Court squarely rejected that proposition: "When Oklahoma won statehood in 1907, the [Major Crimes Act] applied immediately according to its plain terms."[195] Oklahoma could not identify any subsequent grant of jurisdiction.[196] Thus, if McGirt committed his crimes *in Indian country*, Oklahoma lacked the authority to prosecute him. That meant the central questions before the Court were whether the Creek Nation had originally been granted a reservation, and if so, whether it continued to exist.

The Court answered both those questions in the affirmative. As to whether the Creek Nation's treaty lands were a reservation, the Court acknowledged that the Oklahoma land where McGirt committed his crimes has a complex history: "One thing everyone can agree on is this history is long and messy."[197] In the 1820s, the federal government relocated the Creek Nation and several other tribes (often referred to collectively as the Five Tribes) to what is now present-day Oklahoma.[198] As part of that relocation, the government signed a series of treaties with the Five Tribes that functionally created a reservation, ultimately giving them a vast area of land in present-day Oklahoma in exchange for the cession of tribal homelands further east.[199] Later treaties reduced that tract of land.[200] The final reduction occurred after the Civil War, when the Treaty of 1866 required each of the Five Tribes to surrender large parts of their new lands.[201]

The State of Oklahoma advanced the argument that the Creek lands were never a reservation at all because the treaties predated the widespread use of the term "reservation" and its accompanying policies.[202] The Court found that argument unconvincing, noting that neither the Solicitor General's amicus brief on Oklahoma's behalf nor the dissent adopted it.[203] Instead, Justice Gorsuch wrote, it "should be obvious" that "Congress established a reservation for the Creeks" because of the nature of the promises Congress made about the land.[204]

The question remained, then, whether Congress had ever disestablished the reservation. Though the Creek Nation experienced many changes in its relationship with the federal government—most notably related to tribal governance and a push for individual ownership of the land—the boundaries of its land generally remained unchanged until at least the early 1900s.[205] At that point, Oklahoma began to transition toward statehood, effectively including eastern Indian lands

[194] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[195] *Id.* at 2477.

[196] *Id.* at 2477–78.

[197] *Id.* at 2476.

[198] *Id.* at 2460–61; *id.* at 2483 (Roberts, C.J., dissenting).

[199] *Id.* at 2460–61 (majority opinion).

[200] *Id.* at 2461.

[201] *Id.*

[202] *Id.* at 2474.

[203] *Id.*

[204] *Id.* at 2460.

[205] *Id.* at 2463, 2465–66.

and western non-Indian lands within a single geographic entity[206] and allotting reservation lands to individual tribal members.[207] In its brief submitted to the Supreme Court, Oklahoma claimed that no one (including state law enforcement and prosecutors) had treated the relevant land like a reservation since at least 1907, after Oklahoma statehood.[208] It also argued that because Congress broke certain promises in the treaties that had established the reservation, Congress must have intended to disestablish it.[209]

As it set out to determine whether Congress intended to disestablish the Creek reservation land, the Court clarified the three categories of evidence it could consider, as described in *Solem v. Bartlett* in 1984.[210] Under the *Solem* framework, courts evaluating possible disestablishment of a reservation may examine: (1) the language of the governing federal statute; (2) the historical circumstances of the statute's enactment; and (3) subsequent events, such as Congress's later treatment of an affected area.[211] The *Solem* framework instructs courts to resolve any uncertainty in favor of the tribes: if the evidence is not clear, the reservation continues to exist.[212]

The majority explained that steps 2 and 3 exist only to clarify statutory texts, so

> [t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise."[213]

The Court further warned that states—"often in good faith, perhaps sometimes not"—have often overstepped their authority in Indian country, underscoring "the danger of relying on state practices" to evaluate reservation status.[214] Thus, the majority concluded, Oklahoma's arguments that eastern Oklahoma had not been considered or treated like a reservation for more than a century could not change the Court's assessment that Congress had "plainly . . . left the Tribe with significant sovereign functions over the lands in question."[215] Because "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation," the Court finished its *Solem* analysis with the first category of evidence; Oklahoma's arguments about the area's subsequent treatment were not relevant.[216]

Oklahoma argued that the *Solem* analysis was inapplicable because the Creek land became a "dependent Indian community" rather than a reservation once the Creek Nation received fee title to its land.[217] But the Court concluded that fee title is not incompatible with reservation status,[218]

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[206] *Id.* at 2477 (citing Oklahoma Enabling Act, Act of June 16, 1906, § 20, 34 Stat. 277).

[207] *Id.* at 2463 (citing, *e.g.*, Creek Allotment Agreement, ch. 676, 31 Stat. 861 (1901)).

[208] Brief for Respondent at 42–43, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

[209] *Id.* at 29–31.

[210] *McGirt*, 140 S. Ct. at 2468 (citing Solem v. Bartlett, 465 U.S. 463, 470–72 (1984)); *see also id.* at 2485–86 (Roberts, C.J., dissenting) (explaining and applying the "methodology" outlined in *Solem*).

[211] *Solem*, 465 U.S. at 470–72.

[212] *Id.* at 472.

[213] *McGirt*, 140 S. Ct. at 2468 (majority opinion) (alteration in original) (citation omitted) (first quoting Milner v. Dep't of the Navy, 562 U.S. 562, 574 (2011); and then quoting *Solem*, 465 U.S. at 470).

[214] *Id.* at 2471.

[215] *Id.* at 2466.

[216] *Id.* at 2467–69.

[217] *Id.* at 2474.

[218] *Id.* at 2475 (citing Maxey v. Wright, 54 S.W. 807, 810 (Indian Terr. 1900)).

rejecting the "untenable" assertion that the Creek Nation's choice to receive fee title to its lands "made their tribal sovereignty easier to divest rather than harder."[219]

Dissenting Opinion: Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, dissented from the Court's opinion.[220] In the dissent's view, "Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood," a view which the dissent accused the majority of avoiding by refusing to look at the statutes cumulatively rather than individually.[221] Then, instead of stopping at the first category of evidence in the *Solem* framework, the dissent would have proceeded to examine contemporaneous and subsequent treatment of the Creek lands, concluding that "no reservation persisted past statehood."[222]

Considerations for Congress: One certain consequence of *McGirt* is that the burden of prosecuting many serious offenses involving Indian offenders or victims in eastern Oklahoma will shift to the federal and tribal governments—at least, absent other federal statutory authority allowing the state to prosecute. Congress could pass a law expressly giving Oklahoma jurisdiction to prosecute the crimes named in the Major Crimes Act, perhaps through a vehicle similar to "P.L. 280," the 1953 law that expressly authorized various states to prosecute most crimes that occurred in Indian country in those states.[223] Alternatively, Congress could appropriate funds to offset the financial costs of increased federal and tribal prosecutions, which may include the retrials of individuals who were convicted of major crimes in Oklahoma state courts. The majority and the dissent disagreed about the likely magnitude of this burden. The majority pointed out that "even Oklahoma admits that the vast majority of its prosecutions will be unaffected" by this ruling,[224] while the dissent posited that "thousands of convictions . . . across several decades" will be drawn into question.[225]

Reprosecutions are unlikely to run afoul of the Double Jeopardy Clause,[226] but could face other hurdles, such as lapsed statutes of limitations or limited resources. *McGirt*'s dissent noted that the federal government "may lack the resources to reprosecute all of" the convictions unsettled by the majority opinion, and the "odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses," which may also translate to a need for more prosecutorial resources.[227]

Other consequences are less certain. *McGirt* holds only that the Creek reservation remains Indian country for the purposes of the Major Crime Act, but the majority's analysis seems likely to lead to determinations that other Five Tribes' reservations are likewise Indian country, possibly for purposes beyond the Major Crimes Act. The State of Oklahoma offered a lengthy list of potential legal implications, including new or altered applicability of various federal statutes and programs in areas such as: homeland security grants; nutritional programs; drug enforcement; tobacco regulation; timber protection; disability programs; schools; highway funding; primary care

[219] *McGirt*, 140 S. Ct. at 2475–76.

[220] *Id.* at 2482–2504 (Roberts, C.J., dissenting). Justices Alito and Kavanaugh joined the Chief Justice's dissent in full; Justice Thomas joined except as to footnote 9. *Id.* at 2482.

[221] *Id.* at 2489.

[222] *Id.* at 2500.

[223] Pub. L. No. 83-280 (1953), codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–26.

[224] *McGirt*, 140 S. Ct. at 2479 (majority opinion).

[225] *Id.* at 2500 (Roberts, C.J., dissenting).

[226] *See* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (affirming dual-sovereignty doctrine).

[227] *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting).

clinics; cultural artifacts; housing assistance; and historical preservation.[228] Some observers have speculated that the *McGirt* ruling could affect oil and gas regulation in the state.[229] Congress could enact legislation to provide clarity on application of these laws and programs to the Creek or Five Tribes' reservations.

Tax implications are also likely, as states generally lack authority to tax Indians in Indian country,[230] and tribes may in some circumstances tax non-Indians on reservation land.[231] The Five Tribes may gain more exclusive jurisdiction over adoptions and custody disputes involving Indian children,[232] though they already had the right to intervene in such proceedings or petition for transfer regardless of a child's location.[233] At least one lawsuit has been filed seeking disgorgement of fines and court costs levied by the State of Oklahoma against tribal members found guilty of misdemeanors and traffic offenses.[234]

Some of the open jurisdictional questions may be resolved through agreements and negotiations between states and tribal governments, though congressional actions remain an option. On July 15, 2020, the State of Oklahoma publicly released an apparent agreement with the Five Tribes titled *Murphy/McGirt* Agreement-in-Principle, which stated that "intergovernmental cooperation will best serve our shared interests in consistency, predictability, and a mutual respect for sovereign rights and interests."[235] The agreement called on Oklahoma's congressional delegation to implement legislation that would primarily restate existing federal Indian law principles, but also provide Oklahoma with jurisdiction over all offenders "with the exception of crimes involving Indians committed on Indian trust or restricted lands"—i.e., on a fraction of the original reservations.[236] However, on July 17, two of the Five Tribes apparently repudiated the call for federal legislation.[237]

Beyond Oklahoma, *McGirt* may have ramifications for other tribes who were once promised lands by treaty, but whose reservations Congress never clearly disestablished. It is difficult to assess how widespread such cases may be. Each such claim will likely be separately litigated because the *Solem* inquiry, even as clarified by *McGirt*, requires a fact-intensive investigation of the federal actions affecting each tribe. Multiple tribes outside Oklahoma have already invoked *McGirt* in attempts to reestablish sovereignty over reservation lands.[238] And a federal circuit court

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[228] *See* Brief for Respondent at 43–44, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

[229] *E.g.*, Dino Grandoni, *Now That Half of Oklahoma is Officially Indian Land, Oil Industry Could Face New Costs and Environmental Hurdles*, WASH. POST (July 17, 2020, 2:33 PM), https://www.washingtonpost.com/business/2020/07/17/supreme-court-oklahoma-oil-/.

[230] *See generally* Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

[231] *McGirt*, 140 S. Ct. at 2502 (Roberts, C.J., dissenting) (citing Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 198 (1985)); *see also* Brief for Muscogee (Creek) Nation as Amicus Curiae at 18 n.6, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

[232] *See* 25 U.S.C. § 1911(a).

[233] *Id.* § 1911(b), (c).

[234] Complaint, Pickup v. Dist. Ct. of Nowata Cnty., No. 4:20-cv-00346-JED-FHM (N.D. Okla. July 20, 2020), ECF No. 2.

[235] *See* Derrick James, *Oklahoma Tribes and AG Release Agreement in Principle*, MCALESTER NEWS-CAPITAL (July 16, 2020), https://www.mcalesternews.com/news/oklahoma-tribes-and-ag-release-agreement-in-principle/article_de770c46-c78a-11ea-9f3b-37bba8b7d797.html.

[236] *Id.*

[237] Sean Murphy, *2 Oklahoma Tribal Leaders Say They Don't Support Agreement*, WASH. POST (July 17, 2020, 7:32 PM), https://www.washingtonpost.com/national/2-oklahoma-tribal-leaders-say-they-dont-support-agreement/2020/07/17/bfc7d3e2-c885-11ea-a825-8722004e4150_story.html.

[238] *E.g.*, 28(j) Letter to Court dated July 14, 2020, Cayuga Indian Nation v. Seneca Cnty., Case No. 19-0032-cv (2d Cir.

recently relied on both *Solem* and *McGirt* to hold that the Oneida Reservation in Wisconsin—established by treaty in 1838—remains Indian country, and the tribe's on-reservation activities are not subject to a local government ordinance.[239]

On the broadest level, the choice of whether to disestablish any reservation still lies solely with Congress.[240] Congress could enact a statute disestablishing the Creek reservation (including or excluding the other Five Tribes' reservations), which would severely limit this decision's applicability in the future. If Congress chooses not to act, the uncertainties of jurisdiction may be settled among Oklahoma and the Five Tribes over time, whether by mutual agreement or through litigation in the courts.

Separation of Powers

Seila Law v. Consumer Financial Protection Bureau[241]

In *Seila Law v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court held that the CFPB's structure violates the Constitution's separation of powers.[242] In a 5-4 decision, the Court held that a statutory provision insulating the CFPB Director, the sole head of the agency, from removal except for cause interfered with the President's constitutional authority to execute the law.[243] *Seila Law* may have effects beyond the realm of consumer financial regulation, as the case was the latest articulation by the Roberts Court of the limits on Congress's authority to restrict the President's authority to remove an agency head for policy disagreements.

Background: Congress created the CFPB in the wake of the 2008 financial crisis. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[244] which established the CFPB as an independent financial regulatory agency within the Federal Reserve System.[245] The CFPB is charged with implementing and enforcing a variety of consumer protection laws.[246] The agency's authority includes the power to promulgate regulations under those statutes[247] and to enforce them by issuing subpoenas,[248] conducting adjudications,[249] and prosecuting civil actions in federal court.[250]

July 14, 2020), ECF No. 70-1; En Banc Supplemental Reply Brief of Penobscot Nation, Penobscot Nation v. Frey, Case Nos. 2016-1424, 2016-1435, 2016-1474, 2016-1482 (1st Cir. Aug. 13, 2020).

[239] *See* Oneida Nation v. Vill. of Hobart, 968 F.3d 664 (7th Cir. 2020).

[240] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress," because the power to breach a treaty "belongs to Congress alone," and the Court will not "lightly infer such a breach once Congress has established a reservation.").

[241] Jared P. Cole, CRS Legislative Attorney, authored this section of the memorandum.

[242] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).

[243] *Id*. The Court also held that this provision was "severable from the other statutory provisions bearing on the CFPB's authority." *Id*.

[244] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[245] 12 U.S.C. § 5491(a).

[246] *Id*. § 5511. Dodd-Frank entrusted the CFPB with enforcing a new consumer protection law, *id*. § 5536(a)(1)(B), as well as 18 other existing statutes. *See Seila Law*, 140 S. Ct. at 2193.

[247] *See* 12 U.S.C. §§ 5531(a)–(b), 5581(a)(1)(A), (b).

[248] *Id*. § 5562.

[249] *Id*. § 5563.

[250] *Id*. § 5564.

The Dodd-Frank Act established a somewhat unusual structure for the CFPB. Instead of creating a "traditional independent agency headed by a multi-member commission,"[251] Congress stationed a single director in charge of the CFPB.[252] That director is appointed by the President and confirmed by the Senate, for a term of five years.[253] The Dodd-Frank Act provides that during that time, the President may only remove the CFPB Director for "inefficiency, neglect of duty, or malfeasance in office,"[254] a provision that is generally understood to restrict the President from removing the Director for policy disagreements.[255]

The case originated when the CFPB, during an investigation of Seila Law LLC for potential violations of marketing laws, sought to enforce a civil investigative demand (similar to a subpoena) in federal court.[256] Seila Law LLC argued that the demand was invalid because the CFPB's single-Director structure was unconstitutional.[257] The dispute made its way to the Ninth Circuit, which upheld the constitutionality of the CFPB.[258] In so doing, the Ninth Circuit largely relied on the 2018 en banc decision of the D.C. Circuit in *PHH Corp. v. CFPB*.[259] The Supreme Court granted the petition for certiorari in the Ninth Circuit case on whether the CFPB's structure violates the separation of powers.[260]

Supreme Court's Decision: Chief Justice Roberts wrote the majority opinion for the Court, emphasizing that Article II of the Constitution places the executive power in one person—the President.[261] While lesser executive officers may help him carry out that executive power, in the view of the majority, the Constitution requires that the President must generally be able to hold officers accountable, including by removing them.[262] As Chief Justice Roberts explained, that principle derives from Article II's text, history, including decisions of the first Congress,[263] as well as the Court's precedent, including *Myers v. United States*.[264] The majority opinion characterized that decision, written in 1926 by Chief Justice Taft, as recognizing that the power to

[251] *Seila Law*, 140 S. Ct. at 2193.

[252] 12 U.S.C. § 5491(b)(1).

[253] *Id*. §§ 5491(b)(2), (c)(1).

[254] *Id*. at § 5491(c)(3).

[255] *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 98 (D.C. Cir. 2018) (en banc) ("Consider the case of *Humphrey's Executor*. There, President Roosevelt attempted to remove an FTC Commissioner based on policy disagreements. Of course, the Supreme Court put a stop to the President's effort to sway the agency, upholding the Commissioner's removal protection."); *id*. at 123 (Wilkins, J., concurring) (asserting that the CFPB's for cause removal restriction was not "properly construed to allow removal for mere policy disagreements"). *But see id*. at 124 (Griffith, J., concurring in the judgment) (concluding that the CFPB's removal restriction permits removal "for ineffective policy choices").

[256] *See Seila Law*, 140 S. Ct. at 2194.

[257] *See id*.

[258] Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680, 682 (9th Cir.).

[259] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018). That decision included a dissenting opinion by then-Judge Kavanaugh, now an Associate Justice of the Supreme Court. *See id*. at 164 (Kavanaugh, J., dissenting).

[260] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 427, 427 (2019). The Court also directed the parties to address whether, if CFPB's structure is unconstitutional, the statutory provision insulating the Director from removal is severable from the Dodd-Frank Act. *Id*. at 427–28.

[261] *See id*.; U.S. CONST. Art. II, § 1, cl. 1.

[262] *Seila Law*, 140 S. Ct. at 2197.

[263] *Id*.

[264] *See* 272 U.S. 52, 163–64 (1926).

remove executive officers is essential for the President to "take care" that the law is faithfully executed.[265]

In the past, the Court observed, it had upheld restrictions on the President's power to remove officers, but the majority opinion reasoned that those cases were limited to two exceptions to the general rule that the President must be able to remove executive officers at will.[266] In the 1935 case of *Humphrey's Executor v. United States*, the Court upheld a statutory provision that shielded the Commissioners of the multimember Federal Trade Commission (FTC) from removal except for cause.[267] The *Seila Law* Court understood that decision as upholding removal protections because the Commissioners of the FTC, at least as described in *Humphrey's Executor* in 1935, engaged in roles that merely aided factfinding for legislative or judicial actions.[268] And in the 1988 case of *Morrison v. Olson*, the Court upheld removal protections for an independent counsel overseen by the Attorney General and appointed to investigate crimes allegedly committed by certain government officials.[269] According to the *Seila Law* majority, *Morrison* upheld the removal restrictions on the independent counsel because they concerned an inferior officer with limited duties and tenure who exercised no policymaking or administrative authority.[270] The majority opinion characterized these exceptions as, at least until now, the "outermost constitutional limits" on Congress's authority to restrict the President's removal power.[271]

The majority opinion concluded that the CFPB's structure did not fit within either of these exceptions. The CFPB's single-Director structure contrasted with the model approved in *Humphrey's Executor*, a multimember expert body "balanced along partisan lines."[272] And the CFPB's wide ranging regulatory and enforcement authority contrasted, the Chief Justice reasoned, with the FTC's powers that the Court considered in 1935, which were limited to "specified duties as a legislative or as a judicial aid," such as conducting investigations and reporting to Congress, as well as making recommendations to courts.[273] Likewise, the majority opinion rejected *Morrison* as support for the CFPB's removal restriction, as the CFPB Director is not an inferior officer like the independent counsel in that case.[274] The Court observed that the duties of the CFPB Director are "far from limited" in the way that the independent counsel's

[265] *Seila Law*, 140 S. Ct. at 2197 (citing *Myers*, 272 U.S. at 164). *See* U.S. CONST. Art. II, § 1, cl. 3.

[266] *Seila Law*, 140 S. Ct. at 2198.

[267] Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935).

[268] *Seila Law*, 140 S. Ct. at 2198. Justice Kagan's dissent argued that the FTC's powers were much more substantial in 1935 than the majority opinion recognized, and that "in any case, the relevant point of comparison is the present-day FTC, which remains independent." *Id.* at 2239 n.10 (Kagan, J., dissenting). However, the majority opinion also stated that its conclusion in *Humphrey's Executor* "that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2 (majority opinion).

[269] Morrison v. Olson, 487 U.S. 654, 669 (1988).

[270] *Seila Law*, 140 S. Ct. at 2199–200.

[271] *Id.* ("These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—'represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'") (quoting PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[272] *Id.* at 2200. The FTC had (and continues to have) five commissioners; no more than three can come from the same political party. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935); 15 U.S.C. § 41.

[273] *Seila Law*, 140 S. Ct. at 2198, 2200 (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

[274] *Id.*

were.[275] While the independent counsel's jurisdiction was limited to specific government officials, the CFPB wields "the coercive power of the state" over millions of people and private businesses.[276]

Having distinguished these cases, the Court then asked whether it should "extend those precedents" to affirm a unique type of entity—an independent agency with substantial executive power led by a single Director.[277] The Court declined to do so, reasoning that the unprecedented nature of the CFPB's structure was itself evidence of a constitutional violation.[278] Chief Justice Roberts observed that Congress has created four other agencies with a similar design to the CFPB: the Comptroller of the Currency, the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency.[279] But the Court dismissed these examples, concluding that they were not suggestive of a sustained historical practice evidencing their constitutionality. For example, the Comptroller only enjoyed removal protection for one year during the Civil War, after which the position has remained subject to removal at will by the President.[280] As for the other three examples, the Court reasoned that these are modern innovations whose constitutionality has similarly been questioned.[281] Moreover, the Court concluded that none of those agencies are entrusted with the substantial regulatory and enforcement power over private parties that the CFPB enjoys.[282]

The Court also concluded that the CFPB's concentration of power in one person who is protected from removal is inconsistent with the Constitution's general structure.[283] According to the Chief Justice's majority opinion, the Framers chose to divide governmental power as a means of preventing its abuse: between the three branches of government, and again within the legislative branch.[284] But the Court viewed the executive power as unique in the constitutional structure in that it is placed with one person, the President, who is directly accountable to the whole nation through elections.[285] The majority opinion concluded that the CFPB's structure violated this constitutional framework by placing significant power in a single individual who is not accountable to the people or subject to the control of someone who is (the President).[286]

Responding to the argument that the statutory removal restriction at issue could be interpreted to retain substantial discretion in the President to remove the CFPB Director and maintain control over him, the Court concluded that no workable standard for removal had been advanced that was rooted in the statutory text.[287] And the Court likewise dismissed the argument in Justice Kagan's dissent for a pragmatic approach to structuring agencies that reflects the enormous technological and economic changes in society since the Constitution was written.[288] The majority opinion

[275] *Id*. at 2200–01.

[276] *Id*. at 2200.

[277] *Id*. at 2201.

[278] *Id*.

[279] *Id*. at 2201–02.

[280] *Id*. at 2201.

[281] *Id*. at 2201–02.

[282] *Id*.

[283] *Id*. at 2204.

[284] *Id*. at 2202–03.

[285] *Id*. at 2203.

[286] *Id*. at 2203–04.

[287] *Id*. at 2206.

[288] *Id*. at 2207.

instead concluded that the urge to respond to societal change with novel governmental structures "must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility."[289]

While the Chief Justice's analysis above was joined by Justices Thomas, Alito, Gorsuch and Kavanaugh, the question of the proper remedy in the case split the coalition.[290] Having concluded that a single Director heading the CFPB with removal protection violated the separation of powers, Chief Justice Roberts determined that the proper remedy in the case was to sever the statutory removal restriction from the rest of the Dodd-Frank Act.[291] This portion of the opinion was joined by Justices Alito and Kavanaugh, but not by Justices Thomas and Gorsuch, who issued an opinion dissenting from the severability analysis.[292] Justice Kagan, joined by Justices Breyer, Sotomayor, and Ginsburg, who dissented from the Court's analysis regarding the CFPB's constitutionality, concurred in the judgment as to the proper remedy in the case.[293]

Concurring and Dissenting Opinions: Justice Thomas, joined by Justice Alito, issued an opinion concurring and dissenting in part.[294] He agreed with the majority opinion that the CFPB's structure violated the Constitution.[295] But whereas the majority opinion viewed *Humphrey's Executor* as a narrow opinion with continued vitality, Justice Thomas would have overruled the 1935 case.[296] He argued that the decision was wrongly decided at the time and its underlying reasoning had been seriously eroded by subsequent decisions.[297]

He also dissented as to the majority opinion's remedy of severing the removal restriction.[298] Instead, Justice Thomas would have denied the petition to enforce the CFPB's demand for information from Seila Law LLC.[299] He reasoned that while the Chief Justice's decision to sever the removal provision resolved the constitutional violation, there were other statutory provisions that, if severed, would do the same.[300] For instance, if the Court held that the CFPB lacked the authority to issue the demand in the first place, that would similarly resolve the issue.[301] And because the statute's severability clause gave no guidance as to which provision must be severed here, the Court should simply deny enforcement of the demand,[302] presumably leaving the choice of amending the statute to Congress.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, issued a decision concurring in the judgment as to severability but dissenting as to substantive constitutional issue.[303] Her opinion disputed the majority's general rule that the President has unrestricted power to remove

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[289] *Id*.

[290] *See id*. at 2191; *id*. at 2211 (Thomas, J., concurring in part and dissenting in part).

[291] *Id*. at 2209 (plurality opinion).

[292] *Id*. at 2211 (Thomas, J., concurring in part and dissenting in part).

[293] *Id*. at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[294] *Id*. at 2211 (Thomas, J., concurring in part and dissenting in part).

[295] *Id*.

[296] *Id*. at 2219.

[297] *Id*. at 2216–18.

[298] *Id*. at 2219.

[299] *Id*. at 2220.

[300] *Id*. at 2224.

[301] *Id*.

[302] *Id*.

[303] *Id*. at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

officers except for two exceptions.[304] Instead, she argued, Congress enjoys discretion to structure administrative agencies as needed, so long as the President retains the ability to carry out his duties under the Constitution.[305] The Court's imposition of its own rule—not grounded, according to Justice Kagan, in the Constitution, history, or judicial precedent—impermissibly interferes with the authority of the political branches and "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges."[306] She also wrote, counter to the majority's concern that the CFPB's single-Director structure improperly shields the agency from presidential control, an agency headed by a single Director is actually *more* responsive to a President than a multimember Commission.[307] For Justice Kagan, a multimember structure diminishes accountability to the President because it is harder to control a group than a single person.[308] In fact, "that is why Congress so often resorts to hydra-headed agencies" in the first place.[309] Finally, although Justice Kagan disagreed with the Chief Justice's decision as to the constitutional issue, her opinion concurred with the Chief Justice's ruling as to the proper remedy in the case, to sever the offending removal restriction.[310]

Implications for Congress: Chief Justice Roberts' decision in *Seila Law* contains significant consequences for Congress's ability to structure federal agencies. The majority opinion applied a baseline constitutional rule of presidential power to remove officers at will, subject to the two "exceptions" of *Humphrey's Executor* and *Morrison*.[311] By characterizing those exceptions as the "outermost constitutional limits" of judicially recognized restrictions on the President's removal authority, and rejecting the expansion of those limits to uphold the CFPB, the Court may view attempts to create other agencies with structural independence from the President with skepticism unless they closely mirror the configurations approved in those two cases.[312] And the Court's emphasis on the CFPB's novelty as indicative of a constitutional infirmity further suggests that future attempts to create agencies with structural independence from the President must likely conform to prior historical examples.[313]

That said, while the Court's decision severed the CFPB Director's statutory removal restriction, this decision does not irrevocably tie Congress's hands. If Congress currently prefers the CFPB to possess insulation from presidential control, it could perhaps create an expert multimember Board with removal protections to head an agency with authorities in aid of judicial and legislative functions to fit within the exception of *Humphrey's Executor*.[314] Alternatively, Congress could

[304] *Id*. at 2226.

[305] *Id*.

[306] *Id*.

[307] *Id*. at 2242–43.

[308] *Id*. at 2243.

[309] *Id*. at 2243.

[310] *Id*. at 2224.

[311] *Id*. at 2199–200 (majority opinion).

[312] *Id.* Aspects of *Seila Law* may even question the status of some existing multimember commissions. The Court described the exception of *Humphrey's Executor* as limited to "multimember expert agencies that do not wield substantial executive power." *Id.*; *see also* Sunstein, Cass R. & Vermeule, Adrian, THE UNITARY EXECUTIVE: PAST, PRESENT, FUTURE (August 3, 2020). Forthcoming, Supreme Court Review, available at https://ssrn.com/abstract=3666130.

[313] *Seila Law*, 140 S. Ct. at 2201 ("Such an agency has no basis in history and no place in our constitutional structure.").

[314] *Id.* ("Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency.").

subject the Director to supervision and narrow his jurisdiction while providing the Director with removal protections to fit within *Morrison*'s exception.[315]

Seila Law will also have implications for existing agencies. The Court identified three other agencies whose sole heads currently possess statutory removal protections.[316] It distinguished the Social Security Administration and the Office of Special Counsel as not wielding regulatory or enforcement authority akin to the CFPB, perhaps indicating that the Court does not consider those agencies to possess the substantial executive authority requiring presidential removal at will.[317] With respect to the Federal Housing Finance Agency, however, the Court noted that an en banc Fifth Circuit already ruled that the agency's structure violated the separation of powers.[318] The Court has granted certiorari in that case,[319] in which it could apply and further clarify the principles of *Seila Law*.

Access to Personal Presidential Records[320]

On July, 9 2020, the Supreme Court issued a pair of decisions written by Chief Justice Roberts concerning subpoenas issued for the President's personal financial records and tax returns. In *Trump v. Vance* the Court held that (1) the President is not categorically immune from *state* investigative subpoenas; and (2) state prosecutors (or state grand juries) need not satisfy a heightened standard to issue a subpoena for a sitting President's private papers.[321] In *Trump v. Mazars*, the Court similarly clarified that there is no categorical bar to *Congress* issuing a subpoena for the President's "personal information," but held that when evaluating such a subpoena, courts must adequately consider the "weighty" separation-of-powers issues involved.[322] Although making important threshold determinations, neither *Vance* nor *Mazars* directed that the subpoenaed documents be turned over to the requesting parties. Both opinions instead remanded the cases to the courts below for further proceedings, leaving the question of whether the President's personal records must be disclosed for another day.[323]

[315] Morrison v. Olson, 487 U.S. 654, 669 (1988).

[316] *Seila Law*, 140 S. Ct. at 2201.

[317] *Id*. at 2201–02. That said, application of the Court's baseline rule of presidential power to remove officers at will except for two narrow exceptions might call into question the structure of those agencies as well.

[318] *See* Collins v. Mnuchin, 938 F.3d 553, 587–88 (5th Cir. 2019).

[319] Collins v. Mnuchin, No. 19-422, 2020 WL 3865248, at *1 (July 9, 2020).

[320] Todd Garvey, CRS Legislative Attorney, authored this section of the memorandum.

[321] Trump v. Vance, 140 S. Ct. 2412, 2429, 2430 (2020).

[322] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2035 (2020).

[323] *Vance*, 140 S. Ct. at 2431; *Mazars*, 140 S. Ct. at 2036. On remand in *Vance*, President Trump challenged the state subpoena on various grounds, but notably did not "allege separate and discrete constitutional claims of the sort suggested by the Supreme Court." Trump v. Vance, No. 19 Civ. 8694, 2020 WL 4914390, at *21 n.13 (S.D.N.Y. Aug. 20, 2020). For example, the President did "not specify any presidential duties or policies that the District Attorney allegedly sought to manipulate, and . . . [did] not clearly allege that Mazars' compliance with the subpoena would impede any specific Article II duty." *Id*. Instead, the President challenged the subpoena on the grounds that it was "overbroad" and issued in "bad faith." *Id*. at *3. On August 20, 2020, the district court rejected those arguments. *Id*. That decision has been appealed to the U.S. Court of Appeals for the Second Circuit. The district court has not yet ruled in the *Mazars* remand.

Trump v. Vance

Background: *Vance* arose from a state-grand-jury subpoena issued by the New York County District Attorney in the course of an investigation into the business practices of President Trump and the Trump Organization.[324] The subpoena, which sought financial records from 2011 to the present, was not issued to the President or the Trump Organization, but to Mazars USA (Mazars), the President's personal accounting firm. President Trump then brought suit against Mazars and the District Attorney, seeking to block Mazars from complying with the subpoena on the ground that "under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process."[325] The district court dismissed the case, finding the President's immunity argument "repugnant to the nation's governmental structure and constitutional values," but choosing not to exercise jurisdiction under an abstention doctrine that generally discourages courts from intervening in an ongoing state criminal proceeding.[326] The Second Circuit disagreed, determining that abstention was inappropriate and holding that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President."[327]

The Supreme Court has previously considered arguments for a presidential immunity from judicial process. For example, the Court has held that the President enjoys "absolute immunity" from civil liability for his "official acts"[328] but is not immune from civil suits predicated on "private conduct" occurring prior to taking office.[329] In the criminal realm, the Court also determined in the landmark case of *United States v. Nixon* that a subpoena for documents may be issued (and enforced) against a sitting President as part of a federal criminal proceeding.[330] But prior to *Vance*, the Court had never directly addressed how presidential immunity applies, if at all, in the context of a *state* criminal investigation.

Supreme Court's Decision: The Court made two key holdings in *Vance*. First, the Court unanimously held that the President is not categorically immune from state criminal subpoenas.[331] And second, seven justices concluded that the Constitution does not require that state grand jury subpoenas for a President's personal documents satisfy a "heightened need standard."[332]

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[324] *Vance*, 140 S. Ct. at 2420.

[325] *Id.*

[326] Trump v. Vance, 395 F. Supp. 3d 283, 290 (S.D.N.Y. 2019). In the event that the Second Circuit disagreed with its abstention holding, the district court, as an alternative holding, also rejected the President's asserted immunity. *Id*. at 301.

[327] Trump v. Vance, 941 F. 3d 631, 637, 640 (2d Cir. 2019).

[328] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that "absolute immunity from damages liability predicated on [a President's] official acts" was a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history").

[329] Clinton v. Jones, 520 U.S. 681, 705 (1997) (rejecting a claim of temporary presidential immunity from civil suits predicated on "unofficial conduct").

[330] United States v. Nixon, 418 U.S. 683, 713 (1974). The *Vance* opinion clarified that the *Nixon* holding is supported by the practice of Presidents who have generally provided information in federal criminal proceedings since at least the administration of Thomas Jefferson. *Vance*, 140 S. Ct. at 2421–24. The Court also relied heavily on *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807) (No. 14,692d), an opinion in which Chief Justice John Marshall, presiding as a circuit justice over the Aaron Burr trial, held that the Constitution does not exempt the President from subpoenas issued as part of a criminal trial. *Vance*, 140 S. Ct. at 2421–23.

[331] *Vance*, 140 S. Ct. at 2429 ("[W]e cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. Our dissenting colleagues agree.").

[332] *Id.*

On the question of categorical immunity, the Court reasoned that presidential immunity from a subpoena is appropriate only where compliance would amount to a "constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."[333] The President asserted that state criminal subpoenas categorically constituted such an impairment by (1) distracting him from his duties; (2) creating a stigma that would "undermine his leadership"; and (3) subjecting him to harassment.[334] The Court, after noting numerous historical instances in which Presidents have previously either testified or provided documents in federal criminal proceedings, rejected all three arguments in the context of a state criminal investigation.[335] In so doing, the Court relied primarily on *Clinton v. Jones,* a previous opinion in which it had rejected similar assertions of impermissible distraction and interference arising from a subpoena in the context of a federal civil suit.[336] Even when the President is the target of the investigation, the Court reasoned that "[t]wo centuries of experience . . . confirm that a properly tailored criminal subpoena will not normally hamper the performance of a President's constitutional duties."[337] Nor could the stigma of being subpoenaed or concerns of harassment justify absolute immunity, according to the Court, especially in light of the various "safeguards" that deter abuse of specific state investigative subpoenas.[338]

The Court also held that the Constitution does not require a heightened showing of need before a state grand jury can issue a subpoena for a President's private papers. The Solicitor General, arguing on behalf of the government, took the position that a "threshold showing" of a "critical" and imminent need was necessary to support the state subpoena,[339] a legal standard derived from cases involving executive privilege. The Court rejected that argument, concluding that such a standard would "extend protection designed for official documents to the President's private papers" and conflict with the "public interest in fair and effective law enforcement" potentially "hobbl[ing] the grand jury's ability to acquire" information necessary for its investigation.[340]

The Court clarified, however, that its holding did not leave the President without recourse when faced within a state criminal subpoena. Although not categorically immune, a President remains free to challenge a *specific* state subpoena demand on various grounds, including that it impermissibly interferes with the President's official duties in violation of the Supremacy Clause or perhaps that the subpoena demands privileged information, including communications protected by executive privilege.[341]

Concurring and Dissenting Opinions: Justice Kavanaugh issued a concurring opinion joined by Justice Gorsuch, agreeing that the President possessed no absolute immunity from the state

[333] *Id*. at 2425 (citing *Clinton*, 520 U.S. at 702–03).

[334] *Id*. at 2425–29.

[335] *Id*. at 2421–29.

[336] *Id*. at 2426–27 (repeatedly noting that "nearly identical" arguments were rejected in *Clinton*).

[337] *Id*. at 2418.

[338] *Id*. at 2429. Examples of existing safeguards include grand jury secrecy rules; the fact that "grand juries are prohibited from engaging in 'arbitrary fishing expeditions' or initiating investigations 'out of malice or an intent to harass'"; and that the "Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Id*. at 2428 (quoting United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991)).

[339] *Id*. at 2429. As the Court noted, the proposed heightened standard "derived from executive privilege cases." *Id*.

[340] *Id*. at 2430.

[341] *Id*. ("Rejecting a heightened need standard does not leave Presidents with 'no real protection.'"). The President also retains objections that may be raised by ordinary citizens. *Id*. (noting that these objections include "the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth").

subpoena (and therefore concurring in the judgment), but somewhat diverging from the majority opinion on the question of whether to apply a heightened need standard.[342] Justice Kavanaugh would have applied a heightened standard adopted by the Court in *Nixon* under which a state prosecutor would need to "establish a 'demonstrated, specific need' for the President's information."[343]

Justices Thomas and Alito authored dissenting opinions. Although both rejected the President's position that he was immune from the merely being subject to *any* state subpoena, each Justice would have required additional considerations before *enforcing* a *specific* subpoena. Justice Thomas would have vacated and remanded the lower court opinion to address whether enforcement of the subpoena should be enjoined if the President can establish that "his duties as chief magistrate demand his whole time for national objects."[344] Justice Alito, similarly would have concluded that "a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President's discharge of the responsibilities of the office."[345]

Implications for Congress: The *Vance* opinion's direct implications for Congress are not readily apparent. The holding applies to state level criminal investigations, and therefore most directly affects the operation of state prosecutors and state grand juries. But the opinion's general separation-of-powers principles and rejection of the asserted Presidential immunity, especially in conjunction with the Courts holding in *Mazars*, may weaken other absolute and categorical immunity arguments that have been made in response to congressional demands for information.[346] The opinion may also prove important if Congress chooses to legislate on the issue of Presidential immunity generally.[347]

Trump v. Mazars USA, LLP

Background: The Supreme Court has previously established that because the power to issue and compel compliance with a congressional subpoena derives from the Constitution's grant of "legislative power," it may only be exercised in "aid [of the] legislative function."[348] Although the resulting investigative power is both "penetrating" and "far-reaching," the Court has generally implemented the required nexus between a subpoena and the legislative function by mandating that the subpoena serve a valid "legislative purpose."[349] In the past, this standard has queried whether the subpoenaed information is "related to, and in furtherance of, a legitimate task of

[342] *Vance*, 140 S. Ct. at 2431–33 (Kavanaugh, J. concurring).

[343] *Id*. at 2432 ("The *Nixon* 'demonstrated, specific need' standard is a tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the Presidency.") (quoting United States v. Nixon, 418 U.S. 683, 713 (1974)).

[344] *Id*. at 2434 (Thomas, J. dissenting) (quoting United States v. Burr, 25 F. Cas. 30, 34 (CC Va. 1807) (No. 14,692d)) (internal quotation marks omitted).

[345] *Id*. at 2448 (Alito, J. dissenting); *see also id.* at 2449 ("Thus, in a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.").

[346] *See* CRS Legal Sidebar LSB10301, *Legislative Purpose and Adviser Immunity in Congressional Investigations*, by Todd Garvey (discussing claims of absolute immunity for close presidential advisers).

[347] *See* Brett M. Kavanaugh, *Separation of Powers During the Forty Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1459–62 (2009) (discussing Congress's authority to affect presidential immunity through legislation).

[348] Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

[349] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

Congress."[350] Because Congress exercises authority over an immense range of subjects, the legislative purpose test has imposed only a handful of relatively narrow limitations on the topics appropriate for congressional investigation. Congress may not, for example, probe purely private conduct with no relation to the legislative function[351] or investigate for purposes of "law enforcement," for example by seeking to "try" or "punish" an individual for a "crime or wrongdoing."[352] Even if Congress has a legislative purpose for seeking information, committee investigations also remain subject to other external constitutional restrictions, including the separation of powers and the rights and privileges of the Bill of Rights.[353]

The *Mazars* opinion addressed the consolidated cases of *Trump v. Mazars USA, LLP* and *Trump v. Deutsche Bank*.[354] Both cases involved lawsuits filed by President Trump, his family, and the Trump Organization to block private financial entities from complying with subpoenas issued by House committees for various personal financial records, ranging from 2010 to the present and including the President's tax returns.[355] The challenged subpoenas were issued as part of different ongoing committee investigations: the House Committee on Oversight and Reform sought information in connection to its ongoing review of federal ethics laws; the House Financial Services Committee sought information in connection to its investigation into abuses of the financial system; and the House Permanent Select Committee on Intelligence sought information in connection to its investigation into foreign interference in U.S. elections.[356] President Trump and the other plaintiffs objected to these subpoenas, but did not argue that he was categorically immune from congressional subpoenas or that the information sought was privileged. Instead, the President asserted that the committees had no "legitimate legislative purpose" for inquiring into his private affairs and transactions and therefore no constitutional authority to compel the

[350] Watkins v. United States, 354 U.S. 178, 187 (1957).

[351] McGrain v. Daugherty, 273 U. S. 135, 173–74 (1927).

[352] *Id*. at 179; Quinn v. United States, 349 U.S. 155, 161 (1955).

[353] *Watkins*, 354 U.S. at 188. In *Mazars*, the Court stated that recipients of a subpoena "have long been understood to retain *common law* and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege." *Mazars*, 140 S. Ct. at 2032 (emphasis added). Although congressional committees will at times accept assertions of common law privileges like the attorney-client privilege during an investigation, the Court's statement in *Mazars* is in conflict with existing and historically long-held congressional views that Congress is not legally bound by the assertion of such privileges. *See, e.g.*, H. REP. NO 105-569 at 21 ("Moreover, as to judicially created attorney-client and deliberative process privileges for litigation, precedent dictates that those privileges do not apply to Congressional Committees. Chairman Cubin stated that it is 'for the Congress to determine at its sole and sound discretion to accept any claim of any attorney privilege that the executive exerts.'"); CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Walter J. Oleszek, and Ben Wilhelm at 40 (noting that a claim of attorney client privilege may "receive substantial weight" but "it is the congressional committee alone that determines whether to accept" such a claim); Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 443 (2016) (noting that "Congress treats" common law privileges as "as advisory rather than binding") For example, two standing House committees have existing rules stating that claims of "common-law privileges" made during hearings or investigations "are applicable only at the discretion of the Chair." *See* Rules Adopted by the Committees of the House of Representatives, RCP 116-25, 116th Cong. (2019) at 188, 225 (Rules of the Committee on Natural Resources, Committee on Science Space and Technology).

[354] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2028 (2020).

[355] *Id*. The suits were brought by the "President in his personal capacity, along with his children and affiliated businesses." *Id*. The grand jury subpoena at issue in *Vance* "essentially copied" the subpoena issued to Mazars by the Committee on Oversight and Reform. *See Vance*, 140 S. Ct. at 2420 n.2.

[356] *Mazars*, 140 S. Ct. at 2027–28.

disclosure of the information sought.[357] The House intervened in each case to protect its institutional interests.[358]

Applying the deferential legislative-purpose standard used by the Court in previous cases,[359] the opinions below concluded that the challenged subpoenas were valid as the committees had a valid legislative purpose for seeking the President's personal records in that the requests were intended to inform possible legislation.[360] On appeal to the Supreme Court, *Mazars* presented the Court with its first opportunity to directly consider the legislative purpose test in an investigation of the President.

Supreme Court's Decision: As a threshold matter, the Court began by characterizing the case as a "significant departure from historical practice." Interbranch disputes[361] over congressional access to information, the Court observed, have historically been resolved through a "tradition of negotiation and compromise" rather than through litigation.[362] As a result, *Mazars* was the "first of its kind to reach" the Court.[363] That "longstanding practice" of judicial nonintervention was "a consideration of great weight" that, the Court reasoned, "imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that [those] branches . . . themselves have reached.'"[364]

With that background in mind, the *Mazars* opinion clarified that in the context of congressional investigations the President must, as a constitutional matter, be treated differently than others.[365] Writing for a seven-Justice majority, Chief Justice Roberts described the courts below as having mistakenly "treated these cases much like any other," applying standards and principles established in "precedents that do not involve the President's papers."[366] Subpoenas for the President's personal records, the Court determined, involve significant separation-of-powers concerns that trigger a different, more scrutinizing approach to the scope of Congress's power. But as in *Vance*, the Court again rejected as inappropriate invitations to import the heightened "demonstrated, specific need" or "demonstrably critical" standards that had been used in prior

[357] *Id*. at 2028.

[358] Mazars and Deutsche Bank took no position on the case. *Id*.

[359] *See* CRS Legal Sidebar LSB10301, *Legislative Purpose and Adviser Immunity in Congressional Investigations*, by Todd Garvey.

[360] *Mazars*, 140 S. Ct. at 2028–29.

[361] Although the committee subpoenas were not issued directly to the President and the lawsuits were brought by the President (in his private capacity) against a private bank and accounting firm, the Court nevertheless viewed the case as an "interbranch conflict" between the President and the House of Representatives. *Id*. at 2035 ("Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information.").

[362] *Id.* at 2031.

[363] *Id*. Investigative disagreements between the branches have previously reached the lower federal courts. *See, e.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008); United States v. U.S. House of Representatives, 556 F. Supp. 150, 151–52 (D.D.C. 1983).

[364] *Mazars*, 140 S. Ct. at 2031 (alterations in original) (internal quotation mark omitted) (quoting NLRB v. Noel Canning, 573 U.S. 513, 524, 526 (2014)).

[365] *Id*. at 2026. *See also* United States v. Burr, 25 F. Cas. 187, 192 (CC Va. 1807) (No. 14,694) (noting that the court would not "proceed against the president as against an ordinary individual"). The *Mazars* opinion also treated a congressional investigation as "different" from a "judicial proceeding." *Mazars*, 140 S. Ct. at 2026.

[366] *Mazars*, 140 S. Ct. at 2033.

cases involving executive privilege.[367] Instead, the Chief Justice identified at least four "special considerations" to help lower courts to appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President" when a committee subpoena seeks the President's private papers.[368]

- First, a reviewing court should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers."[369] The Court elaborated that Congress's "interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs."[370]
- Second, courts "should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective."[371] Specific demands, the High Court reasoned, are less likely to "intrude" on the operation of the Presidency.[372]
- Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[373] To this end, Congress's position is strengthened when a congressional committee can provide "detailed and substantial evidence" of its legislative purpose.[374]
- Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena."[375] Here the Court reasoned that in comparison to the burdens imposed by judicial subpoenas like those addressed in *Vance*, the burdens imposed on the President by congressional subpoenas "should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."[376]

These "special considerations" appear to subject congressional subpoenas for the President's personal records to a less deferential standard than other congressional subpoenas. The Court did not apply these considerations to the committee subpoenas at issue, but instead left that task to the lower courts on remand. Moreover, the Court cautioned that "other considerations," besides those specifically identified, might also be relevant, as "one case every two centuries does not afford enough experience for an exhaustive list" of factors to be considered by a reviewing court.[377]

Dissenting Opinions: Justices Thomas and Alito issued dissenting opinions.

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[367] *Id*. at 2032–33 ("We disagree that these demanding standards apply here. . . . We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."). The Court also rejected the House's proposed approach, which it characterized as failing to "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Id.* at 2033.

[368] *Id.* at 2035 (quoting Clinton v. Jones, 520 U.S. 681, 698 (1997)).

[369] *Id*.

[370] *Id*. at 2036.

[371] *Id*.

[372] *Id*.

[373] *Id*.

[374] *Id*.

[375] *Id*.

[376] *Id*.

[377] *Id.*

Justice Thomas would have held that "Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not."[378] That conclusion, he argued, flows from a lack of historical precedent prior to 1830, including the fact that "no founding-era Congress issued a subpoena for private, non-official documents."[379] Justice Thomas also cast doubt on the validity of *McGrain v. Daugherty*, the Court's 1927 opinion recognizing a broad congressional subpoena power, describing that opinion as "lack[ing] any foundation in text or history" at least as regards its application to private documents.[380] In Justice Thomas's view, if the committee wished to require disclosure of the information it seeks, it could do so only under the impeachment power.[381]

Justice Alito found the majority's "special considerations" to be "inadequate" to protect the President's interests.[382] Because "legislative subpoenas for a President's personal documents are inherently suspicious," he would have gone further and required the House to justify its need for the information more fully. The committees, Justice Alito would have held, should be made to "provide a description of the type of legislation being considered," "spell out its constitutional authority to enact the type of legislation that it is contemplating," "justify the scope of the subpoenas in relation to the articulated legislative needs" and "explain why the subpoenaed information, as opposed to information available from other sources, is needed."[383]

Implications for Congress: The Court neither approved nor rejected the individual committee subpoenas issued to Mazars or Deutsche Bank. Nor did it hint at how each individual subpoena should fare in the face of the new considerations other than to observe generally that "[l]egislative inquiries might involve the President in appropriate cases."[384] However applied, the majority opinion sought to chart a course for reviewing subpoena requests for the President's personal information that was somewhere between the standard favored by the House, which the Court described as "ignor[ing] that these suits involve the President," and the standard advanced by the President and the Solicitor General, which would have applied "the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives."[385]

The identified considerations do, however, indicate that the enforceability of the subpoenas must be addressed on a case-by-case basis. Although the committee subpoenas overlap, each committee provided different justifications to support their demands.[386] As a result, the nature of each committee's need for the President's personal information varies, and it is therefore conceivable—and perhaps likely—that the lower courts, though applying the same standards, will reach different conclusions as to the validity of the individual committee subpoenas. It appears, for example, that a committee articulating a specific and detailed need for a narrow set of documents is in a stronger position than one who can assert only a generalized need for a broad

[378] *Mazars*, 140 S. Ct. at 2037 (Thomas, J. dissenting).

[379] *Id*. at 2040.

[380] *Id*. at 2045.

[381] *Id*. at 2045–47.

[382] *Id.* at 2048 (Alito, J. dissenting).

[383] *Id*.

[384] *Mazars*, 140 S. Ct. at 2033 (majority opinion).

[385] *Id*.

[386] *Id*. at 2027–28.

array of documents, or one that is using the President as a "case study."[387] Ultimately, the *Mazars* "special considerations"[388] are likely to spur ongoing and perhaps protracted litigation regarding the validity of the existing committee subpoenas.

Given the *Mazars* opinion's focus on the office of the President and its specific role in the separation of powers, the opinion itself does not purport to extend beyond subpoenas for presidential records, to also affect congressional investigations of other executive branch officials or agencies.[389] Although not directly addressed by the Court, those investigations and any resulting subpoenas, would appear to remain subject to the traditional—and more deferential—"legislative purpose" test. As to future investigations of the President, the opinion provides congressional committees with four central considerations when issuing subpoenas for presidential records. For example, it would appear that committees will be in a stronger position if they issue a narrow and targeted subpoena while thoroughly articulating the committee's need for the information and its close relationship to the committee's legislative purpose.[390]

However interpreted, the *Mazars* opinion appears to add an arrow to the President's quiver when responding to congressional investigations. Future subpoenas for presidential records may very well be met with arguments that the committee lacks authority to seek presidential information grounded in the considerations identified by the majority opinion. These arguments may be made not only in court, but also much earlier in the investigative process during political negotiations between the legislative and executive branches over disputed information.[391] For example, Congress may be faced with claims that the President need not comply with congressional subpoenas because the information sought can be obtained elsewhere, or that unlike in judicial fact finding which requires "full disclosure of all the facts," "efforts to craft legislation involve predictive policy judgments" that may not require "every scrap of potentially relevant evidence."[392] And these claims relate only to the threshold question of whether a given subpoena is within Congress's authority to issue. Once these arguments are addressed, committees and courts must still resolve any objections based on applicable privileges.

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[387] *Id*. at 2036.

[388] *Id.* at 2035.

[389] The majority opinion repeatedly refers to the office of the Presidency and its role in the separation of powers, rather than the executive branch writ large. *See, e.g., id.* at 2034 ("The President is the only person who alone composes a branch of government."); *id*. at 2035 ("Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information."); *id.* ("We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is 'related to, and in furtherance of, a legitimate task of the Congress,' courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake . . . .") (citations omitted); *id*. at 2036 (referring to "President's unique constitutional position").

[390] *Id*. at 2035–36.

[391] *See* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey at 28 (noting Congress's reliance on the "traditional process of negotiation, accommodation, and compromise to encourage compliance").

[392] *Mazars*, 140 S. Ct. at 2036.

Appendix. Supreme Court's October 2019 Term

Table A-1. Cases the Court Heard During the October 2019 Term

Name of Case	Case Number	Date of Opinion	Central Question(s) Presented (*Italics*) and Holding (Bold) (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	Area(s) of Law[a]
Agency for Int'l Development v. Alliance for Open Society	19-177	6/29/20	*Following the Supreme Court's decision in* Agency for International Development v. Alliance for Open Society International Inc. *ruling that a law requiring United States-based organizations to adopt a policy opposing prostitution violated the First Amendment, whether the First Amendment further bars enforcement of that law with respect to legally distinct foreign entities operating overseas that are affiliated with respondents.* **Because foreign affiliates of American nongovernmental organizations possess no First Amendment rights, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act's funding requirement that organizations have "a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. § 7631(f), is not unconstitutional as applied to them.**	Constitutional Law
Allen v. Cooper	18-877	3/23/20	*Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states.* **Congress lacked authority to abrogate the states' sovereign immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990.**	Constitutional Law Copyright Law
Atlantic Richfield Co. v. Christian	17-1498	4/20/20	*(1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with remedies the Environmental Protection Agency (EPA) ordered is a jurisdictionally barred "challenge" to the EPA's cleanup under 42 U.S.C. § 9613 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); (2) whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA pre-empts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.* **The Montana Supreme Court erred by holding that respondent landowners were not potentially responsible parties under CERCLA and thus did not need EPA's approval to take remedial action.**	Environmental Law

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	**Area(s) of Law[a]**
Babb v. Wilkie	18-882	4/6/20	*Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.* **The plain meaning of 29 U.S.C. § 633a(a), the federal-sector provision of the ADEA, demands that personnel actions be untainted by any consideration of age, and while age need not be a but-for cause of an employment decision, but-for causation is important in determining the appropriate remedy that may be obtained.**	Civil Rights
Banister v. Davis	18-6943	6/1/20	*Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under* Gonzalez v. Crosby. **Because a Federal Rule of Civil Procedure 59(e) motion to alter or amend a habeas court's judgment is not a second or successive habeas petition under 28 U.S.C. § 2244(b), Banister's appeal was timely.**	Criminal Law & Procedure
Barr v. American Assn. of Political Consultants, Inc.	19-631	7/6/20	*Whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.* **The Fourth Circuit's judgment—that the robocall restriction's government-debt exception in 47 U.S.C. § 227(b)(1)(A)(iii) violates the First Amendment but is severable from the remainder of the statute—is affirmed.**	Communications Law Constitutional Law
Barton v. Barr	18-725	4/23/20	*Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] . . . inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).* **In determining eligibility for cancellation of removal of a lawful permanent resident who commits a serious crime, an offense listed in 8 U.S.C. § 1182(a)(2) committed during the initial seven years of residence can preclude cancellation of removal even if it was not one of the offenses that provided the grounds for removal.**	Immigration
Bostock v. Clayton County[b]	17-1618	6/15/20	*Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.* **An employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.**	Civil Rights Law Labor & Employment Law

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	Area(s) of Law[a]
Chiafalo v. Washington	19-465	7/6/20	*Whether a Washington state law that fines presidential electors who vote contrary to how the law directs is unconstitutional because a state has no power to enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment.* **A State may enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.**	Constitutional Law
CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.	18-565	3/30/20	*Whether under federal maritime law a safe-berth clause in a voyage charter contract is a guarantee of a ship's safety or a duty of due diligence.* **The plain language of the safe-berth clause in the parties' subcharter agreement—requiring petitioners to designate a safe berth for a vessel to load and discharge cargo—establishes a warranty of safety.**	Admiralty & Maritime Law
Colorado Dept. of State v. Baca	19-518	7/8/20	*Whether Article II or the 12th Amendment bars a state from requiring its presidential electors to follow the state's popular vote when casting their electoral-college ballots.* **The Tenth Circuit's judgment is reversed for the reasons stated in *Chiafalo v. Washington*, which held that a State may enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.**	Constitutional Law
Comcast Corp. v. National Association of African American-Owned Media	18-1171	3/23/20	*Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.* **A plaintiff who sues for racial discrimination in contracting under 42 U.S.C. § 1981 bears the burden of showing that race was a but-for cause of the plaintiff's injury, and that burden remains constant over the life of the lawsuit.**	Civil Rights
County of Maui, Hawaii v. Hawaii Wildlife Fund	18-260	4/23/20	*Whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.* **Because the CWA forbids "any addition" of any pollutant from "any point source" to "navigable waters" without the appropriate EPA permit, 33 U.S.C. §§ 1311(a), 1362(12)(A), the CWA requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.**	Environmental Law

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	Area(s) of Law[a]
Department of Homeland Security v. Regents of the University of California[b]	18-587	6/18/20	*(1) Whether the Department of Homeland Security's (DHS) decision to wind down the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.* **DHS's decision to rescind the DACA program was arbitrary and capricious under the Administrative Procedure Act.**	Administrative Law Immigration
Department of Homeland Security v. Thuraissigiam	19-161	6/25/20	*Whether, as applied to the respondent, 8 U.S.C. § 1252(e)(2) is unconstitutional under the Suspension or Due Process Clauses.* **As applied here, 8 U.S.C. § 1252(e)(2)—which limits the habeas review obtainable by an alien detained for expedited removal—does not violate the Suspension or Due Process Clauses.**	Constitutional Law Immigration
Espinoza v. Montana Department of Revenue	18-1195	6/30/20	*Whether invalidating a generally available and religiously neutral student-aid program because the program affords students the choice of attending religious schools violates the religion clauses of the United States Constitution.* **Applying the Montana Constitution's "no-aid" provision to a state program providing tuition assistance to parents who send their children to private schools discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Federal Constitution's Free Exercise Clause.**	Constitutional Law
Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC[b]	18-1334	6/1/20	*Whether the Appointments Cause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.* **The Appointments Clause does not restrict the appointment or selection of members of Puerto Rico's Financial Oversight and Management Board, who are appointed by the President without the Senate's advice and consent.**	Constitutional Law Bankruptcy Law
GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC	18-1048	6/1/20	*Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.* **The Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories to those agreements.**	Civil Procedure International Law

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	Area(s) of Law[a]
Georgia v. Public.Resource.Org Inc.	18-1150	4/27/20	*Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.* **Under the government edicts doctrine, the annotations beneath the statutory provisions in the Official Code of Georgia Annotated are ineligible for copyright protection.**	Copyright Law
Guerrero-Lasprilla v. Barr[b]	18-776	3/23/20	*Whether a request for equitable tolling, as it applies to statutory motions to reopen, is judicially reviewable as a "question of law."* **Because the phrase "questions of law" in the Immigration and Nationality Act's Limited Review Provision, 8 U.S.C. § 1252(a)(2)(D), includes applying a legal standard to undisputed or established facts, the Fifth Circuit erred in holding that it had no jurisdiction to consider petitioners' "factual" due diligence claims for equitable tolling purposes.**	Civil Procedure Immigration
Hernandez v. Mesa	17-1678	2/25/20	*Whether, when the plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. **A cross-border shooting by a United States Border Patrol agent does not give rise to a damages claim pursuant to *Bivens*.**	Civil Rights Constitutional Law
Holguin-Hernandez v. United States	18-7739	2/26/20	*Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.* **Petitioner's district-court argument for a specific sentence (nothing or less than 12 months) preserved, for purposes of Fed. Rule Crim. Proc. 51(b), his claim on appeal that the sentence imposed was unreasonably long.**	Criminal Law & Procedure
Intel Corp. Investment Policy Committee v. Sulyma	18-1116	2/26/20	*Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act (ERISA), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.* **Under ERISA requirement that plaintiffs with "actual knowledge" of an alleged fiduciary breach must file suit within three years of gaining that knowledge, 29 U.S.C. § 1113(2), a plaintiff does not necessarily have "actual knowledge" of the information contained in disclosures that he receives but does not read or cannot recall reading.**	Civil Procedure Pensions & Benefits Law

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June Medical Services LLC v. Russo	18-1323	6/29/20	*Whether the U.S. Court of Appeals for the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court's binding precedent in* Whole Woman's Health v. Hellerstedt. **The Fifth Circuit's judgment, upholding a Louisiana law that requires abortion providers to hold admitting privileges at local hospitals, is reversed.**	Constitutional Law Health care Law
Kansas v. Garcia	17-834	3/3/20	*(1) Whether the Immigration Reform and Control Act (IRCA) expressly preempts states from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) whether IRCA impliedly preempts Kansas' prosecution of respondents.* **The Kansas statutes under which respondents, three unauthorized aliens, were convicted—for fraudulently using another person's Social Security number on state and federal tax-withholding forms submitted to their employers—are not expressly preempted by IRCA; and respondents' argument that those laws are preempted by implication is rejected.**	Constitutional Law Immigration
Kansas v. Glover	18-556	4/6/20	*Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.* **When a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.**	Constitutional Law Criminal Law & Procedure
Kahler v. Kansas	18-6135	3/23/20	*Whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense.* **Due process does not require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong.**	Constitutional Law Criminal Law & Procedure

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	**Area(s) of Law[a]**
Kelly v. United States	18-1059	5/7/20	*Whether a public official "defraud[s]" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision.* **Because the scheme to reduce the number of George Washington Bridge toll lanes dedicated to Fort Lee, New Jersey, morning commuters as political retribution against Fort Lee's mayor did not aim to obtain money or property from the federal Port Authority, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.**	Criminal Law & Procedure
Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania[b]	19-431	7/8/20	*Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.* **The Departments of Health and Human Services, Labor, and the Treasury had authority under the Patient Protection and Affordable Care Act of 2010 to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees; and those rules satisfy the Administrative Procedure Act's notice requirements.**	Administrative Law Health care Law
Liu v. Securities and Exchange Commission	18-1501	6/22/20	*Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though the Supreme Court has determined that such disgorgement is a penalty.* **In a Securities and Exchange Commission enforcement action, a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under 15 U.S.C. § 78u(d)(5).**	Securities Law
Lomax v. Ortiz-Marquez	18-8369	6/8/20	*Whether a dismissal without prejudice for failure to state a claim counts as a strike under 28 U.S.C. § 1915(g).* **A Prison Litigation Reform Act of 1995 provision that generally prevents a prisoner from bringing suit *in forma pauperis* if he has had three or more prior suits "dismissed on the ground[ ] that [they] . . . fail[ed] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), refers to any dismissal for failure to state a claim, whether with prejudice or without.**	Civil Procedure

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Lucky Brand Dungarees Inc. v. Marcel Fashion Group Inc.	18-1086	5/14/20	*Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties.* **Because the trademark action at issue challenged different conduct—and raised different claims—from an earlier action between the parties, Marcel cannot preclude Lucky Brand from raising new defenses, including a defense that Lucky Brand failed to press fully in the earlier suit.**	Civil Procedure Trademark Law
Maine Community Health Options v. United States[b]	18-1023	4/27/20	*(1) Whether an appropriations rider whose text bars the agency's use of certain funds to pay a statutory obligation can be held to repeal the obligation implicitly; and (2) whether the presumption against retroactivity applies to an appropriations rider that is claimed to have impliedly repealed the government's obligation.* **The Patient Protection and Affordable Care Act's now expired "Risk Corridors" statute—which set a formula for calculating payments to health care insurers for unexpectedly unprofitable plans during the first three years of online insurance marketplaces—created a Government obligation to pay insurers the full amount of their computed losses; and petitioners properly relied on the Tucker Act to sue for damages in the Court of Federal Claims.**	Appropriations Law Health care Law
Monasky v. Taglieri	18-935	2/25/20	*(1) Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo, under a deferential version of de novo review, or under clear-error review and (2) whether, when an infant is too young to acclimate to her surroundings, a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.* **Under the Hague Convention on the Civil Aspects of International Child Abduction, a child's "habitual residence" depends on the totality of the circumstances specific to the case, not on categorical requirements such as an actual agreement between the parties.**	International Law
McKinney v. Arizona	18-1109	2/25/20	*(1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted; and (2) whether the correction of error under* Eddings v. Oklahoma *requires resentencing.* **When a capital sentencing error under *Eddings v. Oklahoma* is found on collateral review, a state appellate court may reweigh aggravating and mitigating evidence, as permitted by *Clemons v. Mississippi* on collateral review.**	Constitutional Law Criminal Law & Procedure

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McGirt v. Oklahoma	18-9526	7/9/20	*Whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction.* **Land in Northeastern Oklahoma reserved for the Creek Nation since the 19th century remains "Indian country" for purposes of the Major Crimes Act, which places certain crimes under federal jurisdiction if they were committed by "[a]ny Indian" within "the Indian country."**	Criminal Law & Procedure Indian Law
Nasrallah v. Barr	18-1432	6/1/20	*Whether, notwithstanding 8 U.S.C. § 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief.* **8 U.S.C. § 1252(a)(2)(C) and (D) do not preclude judicial review of a removable noncitizen's factual challenges to an order denying relief under the international Convention Against Torture, which protects noncitizens from removal to a country where they would likely face torture.**	Immigration
New York State Rifle & Pistol Association Inc. v. City of New York, New York	18-280	4/27/20	*Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.* **Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule on transporting firearms is moot, and any claim for damages with respect to that rule may be addressed in the first instance by the Court of Appeals and the District Court on remand.**	Constitutional Law Criminal Law & Procedure
Opati v. Republic of Sudan	17-1268	5/18/20	*Whether, consistent with the Supreme Court's decision in* Republic of Austria v. Altmann, *the Foreign Sovereign Immunities Act applies retroactively, thereby permitting recovery of punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute.* **Plaintiffs in a suit against a foreign state for personal injury or death caused by acts of terrorism under 28 U.S.C. § 1605A(c) may seek punitive damages for preenactment conduct.**	Civil Procedure International Law
Our Lady of Guadalupe School v. Morriseey-Berru[b]	19-267	7/8/20	*Whether the First Amendment's religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.* **The First Amendment's Religion Clauses foreclose the adjudication of the employment-discrimination claims of the Catholic school teachers in the two cases before the Court.**	Civil Rights Law Labor & Employment Law

Name of Case	Case Number	Date of Opinion	**Central Question(s) Presented (*Italics*) and Holding (Bold)** (as Quoted from SCOTUSBlog.com and the Supreme Court Syllabus with minor alterations)	**Area(s) of Law[a]**
Patent and Trademark Office v. Booking.com B. V.	19-46	6/30/20	*Whether, when the Lanham Act states generic terms may not be registered as trademarks, the addition by an online business of a generic top-level domain (".com") to an otherwise generic term can create a protectable trademark.* **A term styled "generic.com" is a generic name for a class of goods or services—and thus ineligible for federal trademark protection—only if the term has that meaning to consumers.**	Trademark Law
Peter v. NantKwest Inc.	18-801	12/11/19	*Whether the phrase "[a]ll the expenses of the proceedings" in 35 U.S.C. § 145 encompasses the personnel expenses the United States Patent and Trademark Office incurs when its employees, including attorneys, defend the agency in Section 145 litigation.* **The Patent and Trademark Office cannot recover the salaries of its legal personnel as "expenses" in civil actions brought by patent applicants pursuant to 35 U.S.C. § 145.**	Patent Law Civil Procedure
Ramos v. Louisiana	18-5924	4/20/20	*Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.* **The Louisiana Court of Appeal's holding that nonunanimous jury verdicts are constitutional is reversed.**	Constitutional Law Criminal Law & Procedure
Retirement Plans Committee of IBM v. Jander	18-1165	1/14/20	*Whether* Fifth Third Bancorp v. Dudenhoeffer*'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.* **The judgment is vacated, and the case is remanded to give the Second Circuit the opportunity to decide whether to entertain the parties' arguments on ERISA's duty of prudence.**	Civil Procedure Pensions & Benefits Law
Ritzen Group Inc. v. Jackson Masonry, LLC	18-938	1/14/20	*Whether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1).* **A bankruptcy court's order unreservedly denying relief from the automatic stay of creditor debt-collection efforts outside the bankruptcy forum, see 11 U.S.C. § 362(a), is final and immediately appealable under 28 U.S.C. § 158(a).**	Bankruptcy Law

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Rodriguez v. Federal Deposit Insurance Corp.	18-1269	2/25/20	*Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "Bob Richards rule," as three circuits hold, or based on the law of the relevant state, as four circuits hold.* **The rule of *In re Bob Richards Chrysler-Plymouth Corp*., 473 F. 2d 262 (9th Cir. 1973)—which specifies how federal tax refund proceeds should be allocated among members of an affiliated group of corporations that file a consolidated return—is not a legitimate exercise of federal common lawmaking.**	Tax Law
Romag Fasteners Inc. v. Fossil Inc.	18-1233	4/23/20	*Whether, under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of Section 43(a), 15 U.S.C. § 1125(a).* **A plaintiff in a trademark infringement suit is not required to show that a defendant willfully infringed the plaintiff's trademark as a precondition to an award of profits.**	Trademark Law
Rotkiske v. Klemm	18-328	12/10/19	*Whether the "discovery rule" applies to toll the one-year statute of limitations under the Fair Debt Collection Practices Act.* **Absent the application of an equitable doctrine, the Federal Debt Collection Practices Act's statute of limitations for bringing a private civil action against debt collectors who engage in certain prohibited practices, 15 U.S.C. § 1692k(d), begins to run when the alleged violation occurs, not when it is discovered.**	Banking Law Civil Procedure
Seila Law LLC v. Consumer Financial Protection Bureau	19-7	6/29/20	*Whether vesting substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.* **The Consumer Financial Protection Bureau's leadership by a single Director removable only for inefficiency, neglect, or malfeasance violates the separation of powers.**	Constitutional Law Banking Law
Shular v. United States	18-6662	2/26/20	*Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used to determine a "violent felony" under the act.* **For purposes of the Armed Career Criminal Act's sentence enhancement for a defendant convicted of being a felon in possession of a firearm who has at least three convictions for "serious drug offense[s]," 18 U.S.C. § 924(e)(1), the "serious drug offense" definition requires only that a state offense involve the conduct specified in the statute; it does not require that the state offense match certain generic offenses.**	Criminal Law & Procedure

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Thole v. U.S. Bank, N.A.	17-1712	6/1/20	*(1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof; (2) whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof; and (3) whether petitioners have demonstrated Article III standing.* **Because petitioners, whose defined-benefit retirement plan guarantees them a fixed payment each month regardless of the plan's value or its fiduciaries' investment decisions, have no concrete stake in this Employee Retirement Income Security Act of 1974 lawsuit against the fiduciaries, they lack Article III standing.**	Pensions & Benefits Law
Thryv, Inc. v. Click-To-Call Technologies, LP	18-916	4/20/20	*Whether 35 U.S.C. § 314(d) permits appeal of the Patent Trial and Appeal Board's decision to institute an* inter partes *review upon finding that 35 U.S.C. § 315(b)'s time bar did not apply.* **35 U.S.C. § 314(d) precludes judicial review of a Patent Trial and Appeal Board's decision to institute *inter partes* review upon finding that § 315(b)'s time bar did not apply.**	Patent Law
Trump v. Mazars USA, LLP[b]	19-715	7/9/20	*Whether various congressional committees have constitutional and statutory authority to issue a subpoena to the accountant for President Trump and several of his business entities demanding private financial records belonging to the president.* **The courts below did not take adequate account of the significant separation of powers concerns implicated by congressional subpoenas for the President's information.**	Constitutional Law
Trump v. Vance	19-635	7/9/20	*Whether a grand-jury subpoena served on a custodian of the president's personal records, demanding production of nearly 10 years' worth of the president's financial papers and his tax returns, violates Article II and the Supremacy Clause of the Constitution.* **Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.**	Constitutional Law Criminal Law & Procedure

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United States v. Sineneng-Smith	19-67	5/7/20	*Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.* **The Ninth Circuit panel's drastic departure from the principle of party presentation constituted an abuse of discretion where the court addressed a question never raised by respondent, namely, whether 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutionally overbroad.**	Constitutional Law Immigration
United States Forest Service v. Cowpasture River Preservation Assn.	18-1584	6/15/20	*Whether the United States Forest Service has authority to grant rights-of-way under the Mineral Leasing Act through lands traversed by the Appalachian Trail within national forests.* **Because the Department of the Interior's decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the land over which the Trail passes into land within the National Park System, the Forest Service had authority under the Mineral Leasing Act to grant a natural-gas pipeline right-of-way through lands in the George Washington National Forest traversed by the Appalachian Trail.**	Environmental Law

Source: Created by CRS.

Notes: List includes cases granted via a writ of certiorari or cases in which the Court has otherwise opted to have a merits hearing.

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

b. Lead Case of Several Consolidated Cases.

Table A-2. Per Curiam Opinions Issued by the Court without Oral Argument as of September 8, 2020

Name of Case	Case Number	Date of Opinion	Opinion's Central Holding (as Quoted from Supreme Court Syllabus)	Area(s) of Law[a]
Andrus v. Texas	18-9674	6/15/20	**Because there is a significant question whether the court below properly considered whether counsel's clearly deficient performance prejudiced Andrus, the judgment of the Texas Court of Criminal Appeals is vacated and the case is remanded for the court to address the prejudice question.**	Constitutional Law Criminal Law & Procedure
Barr v. Lee	20A8	7/14/20	**The District Court's order preliminarily enjoining the executions of four federal prisoners is vacated.**	Constitutional Law Criminal Law & Procedure
Davis v. United States	19-5421	3/23/20	**There is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error.**	Criminal Law & Procedure
Republican National Committee v. Democratic National Committee	19A1016	4/6/20	**The District Court's order granting a preliminary injunction is stayed to the extent it requires Wisconsin to count absentee ballots postmarked after April 7, 2020, the date of the State's election.**	Constitutional Law
Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano	18-921	2/24/20	**A Puerto Rico trial court had no jurisdiction to issue payment and seizure orders after a pension benefits proceeding was removed to Federal District Court but before the proceeding was remanded back to the Puerto Rico court; thus the orders are void.**	Civil Procedure Pensions & Benefits Law
Sharp v. Murphy	17-1107	7/9/20	**The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in *McGirt v. Oklahoma*.**	Criminal Law & Procedure Indian Law
Thompson v. Hebdon	19-122	11/25/19	**The judgment is vacated, and the case is remanded for the Ninth Circuit to revisit whether Alaska's political contribution limits are consistent with this Court's First Amendment precedents.**	Constitutional Law

Source: Created by CRS.

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

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