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U.S. Supreme Court Update
2019 Term

Hon. Carl E. Stewart Sr.
United States Fifth Circuit Court of Appeals

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U.S. Supreme Court Update

Presented by: Hon. Carl E. Stewart, Circuit Judge

U.S. Court of Appeals for the Fifth Circuit

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Introduction

In the Supreme Court's 2019–2020 term, the Court decided sixty-six cases. Five of those cases were consolidated with the Court issuing fifty-three signed decisions on the merits, two per curiam decisions, and six summary reversals for a total of sixty-one issued opinions. Of the sixty-six cases, fifty-four were on certiorari from the United States Courts of Appeals and twelve were on certiorari from state courts. Fifty-two cases were appeals from civil cases, eleven cases were appeals from criminal cases, and three cases were appeals from habeas proceedings. The Court affirmed the lower courts in twenty-two cases and reversed, remanded, or vacated the lower court in forty-four cases.

I. First Amendment

Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), decided with *St. James School v. Biel*; Reversed and Remanded, 7-2.

Holding: The "ministerial exception" under the Religion Clauses of the First Amendment foreclosed two teachers' employment discrimination claims.

Facts: In one case, a teacher at a Catholic elementary school sued her school employer under the Age Discrimination in Employment Act, alleging that she was demoted and that her teaching contract was not renewed so the school could replace her with a younger teacher. In the second case, a teacher at a different Catholic elementary school brought action against her school employer under the Americans with Disabilities Act, alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer. Both teachers were employed under nearly identical agreements that set out the schools' mission to develop and promote a Catholic

School faith community; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. Each teacher was also required to comply with her school's faculty handbook, which set out similar expectations. Finally, each educator taught religion in the classroom, worshipped with her students, prayed with her students, and had her performance measured on religious bases.

Reasoning: Under the ministerial exception, grounded in the First Amendment's Religion Clauses, courts should stay out of employment disputes involving employees in certain positions within churches and other religious institutions. In determining whether a position falls within the ministerial exception, "what matters, at bottom, is what an employee does" rather than the individual's title. Both teachers performed vital religious duties at their schools. Not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students to live their lives in accordance with the faith. The teachers prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Both of their schools expressly saw them as playing a vital part in carrying out the mission of the church. According to the Court, the schools' definition and explanation of the educators' roles within their respective institutions is important since judges cannot be expected to understand the role played by every person affiliated with religious tradition.

Justice Sotomayor dissented, lamenting that, as a result of the Court's decision, teachers at parochial schools could be "fired for any reason," even though they "taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic."

Barr v. American Association of Political Consultants Inc., 140 S. Ct. 2335 (2020); Affirmed, 6-3.

Holding: The exception for calls to collect government debt from a federal ban on robocalls to cellphones violates the First Amendment, but the exception is severable from the rest of the Telephone Consumer Protection Act of 1991.

Facts: Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) to prohibit most robocalls to cell phones. 47 U. S. C. §227(b)(1)(A)(iii). In 2015, Congress amended the TCPA to create an exception allowing robocalls to collect debts owed to or guaranteed by the U.S. The American Association of Political Consultants and three other organizations filed suit, claiming that the robocall restriction and exception violated the First Amendment. The

district court determined that while the restriction was content-based, the Government's compelling interest in collecting debt allowed these provisions to survive strict scrutiny. The Fourth Circuit vacated the judgment, holding that the law could not withstand strict scrutiny: the court invalidated the government-debt exception and severed it from the robocall restriction.

Reasoning: The Court affirmed the Fourth Circuit, reasoning that the government's stated justification of collecting government debt did not justify the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, and commercial advertising. The Court determined that the Government's arguments that the statute was content-neutral were unpersuasive. The Court cured the constitutional violation by invalidating the government-debt exception to the TCPA, severing that provision from the rest of the statute, and leaving the remainder of the TCPA intact. The Court reasoned that the Communications Act, of which the TCPA is part, has contained an express severability clause since 1934, and that even if it did not, the traditional presumption of severability would still apply, as the remainder of the law is capable of functioning independently.

II. Fourth Amendment

Kansas v. Glover, 140 S. Ct. 1390 (2020); Reversed and Remanded, 8-1.

Holding: Police have reasonable suspicion under the Fourth Amendment to stop vehicles registered to people with revoked licenses based on an inference that the registrants are driving the car.

Facts: A Kansas police officer ran a registration check on a truck. The check revealed that the truck was registered to Charles Glover, Jr. and that his license was revoked. The officer assumed that Glover was driving the vehicle and stopped the truck based on that assumption. Glover was indeed the driver, and the officer issued him a citation for violating Kansas traffic laws.

In a motion to suppress all evidence, Glover argued that the stop violated his Fourth Amendment rights because the officer lacked reasonable suspicion for the stop. The trial court granted the motion, concluding that it was unreasonable for the officer to infer that the registered owner of a vehicle is the driver. A Kansas appellate court reversed, and the Kansas Supreme Court reversed and denied the motion to suppress.

Reasoning: When a police officer lacks information to the contrary, it is reasonable to assume the driver of a vehicle is also the owner. If the owner's license is revoked, it is reasonable to conduct an investigative stop based on this assumption. Officers may make common sense judgments about human behavior. It does not matter that the driver may not always be the owner; the officer's assumption that the driver is often the owner is reasonable and therefore permissible under the Fourth Amendment.

Justice Kagan concurred to note that there may not be reasonable suspicion in a slightly different set of facts.

Justice Sotomayor dissented, arguing that the majority reduced the state's burden of proof for traffic stops by allowing officers' assumptions to suffice as reasonable suspicion.

Hernandez v. Mesa, 140 S. Ct. 735 (2020); Affirmed 5-4

Holding: The holding in *Bivens v. Six Unknown Federal Narcotics Agents* does not extend to a federal agent's cross-border shooting of a Mexican teenager.

Facts: Sergio Adrián Hernández, a 15-year-old Mexican teenager, was playing with friends in a culvert between El Paso, Texas, and Cuidad Juarez, Mexico. Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Hernández's friends on U.S. territory. Hernández ran into Mexican territory and stood by a pillar near the culvert. From U.S. territory, Mesa fired at least two shots across the border at Hernández, one of which struck Hernández in the face and killed him.

Hernández's parents sued officer Mesa alleging violation of their son's Fourth and Fifth Amendment rights. The district court granted Mesa's motion to dismiss, and a Fifth Circuit panel affirmed in part and reversed in part. The Fifth Circuit held that Hernández lacked Fourth Amendment rights, but his parents were entitled to a remedy under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that there is an implied cause of action against federal government officials who have violated the plaintiff's constitutional rights), and the officer was not entitled to qualified immunity. On rehearing en banc, the full Fifth Circuit affirmed the district court's dismissal of the parents' claims, holding that they had failed to state a claim for a violation of the Fourth Amendment and that the officer was entitled to qualified immunity because it was not "clearly established" that it was unconstitutional for an officer on U.S. soil to shoot a Mexican national on Mexican soil.

The Supreme Court granted certiorari in 2016 and reversed the en banc Fifth Circuit as to qualified immunity. The Court remanded the case so the Fifth Circuit could determine whether the shooting violated Hernández's

Fourth Amendment rights and whether his parents could assert claims for damages under *Bivens*. On remand, the en banc Fifth Circuit again affirmed the district court's dismissal of the complaint, holding that the excessive force claim was unlike any that had been decided previously and thus the plaintiffs were not entitled to any remedy under *Bivens*.

Reasoning: *Bivens* recognized an implied cause of action against federal officials who violate a plaintiff's Fourth, Fifth, and Eighth Amendment rights. Before the Court extends a *Bivens* remedy to a plaintiff, it must ask whether the plaintiff's claim arises in a "new context" or involves a new category of defendants. If so, the Court considers whether there are special factors that weigh against extending *Bivens*.

Here, the Court found that Hernández's claim arises is a new and significantly different context—a cross-border shooting. The new context coupled with the special factors of foreign relations and national security related to the U.S.'s relationship with Mexico counsel against extending the *Bivens* remedy here. Furthermore, Congress has repeatedly declined to recognize a damages award against federal officials who cause injury outside U.S. borders.

Justice Thomas joined the majority in full but wrote a separate concurrence to argue that the Court should disregard *Bivens* altogether.

Justice Ginsburg dissented, arguing that conduct by a rogue federal officer is not a "new context." Even if it were, Justice Ginsburg concludes that permitting a remedy here would be beneficial to the Government's foreign policy and national security interests.

III. Sixth Amendment

Ramos v. Louisiana, 140 S. Ct. 1390 (2020); Reversed, 6-3.

Holding: The Sixth Amendment right to a jury trial, as incorporated against the states via the Due Process Clause of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense.

Facts: In 2016, Evangelisto Ramos was convicted of second-degree murder by a 10-2 vote of a Louisiana jury. At the time of Ramos's conviction, Louisiana law permitted non-unanimous juries to convict defendants. Louisiana changed the law to require unanimous convictions in 2019 but maintained the non-unanimity rule for crimes committed prior to 2019. Ramos appealed his conviction to the Louisiana Fourth Circuit Court of Appeals based on the new rule, but it affirmed his conviction.

Reasoning: Justice Gorsuch wrote for a 5-justice majority and explained that the original meaning of the Sixth Amendment required unanimous juries to convict defendants of serious federal offenses. Since the right to unanimous juries is "fundamental to the American scheme of justice, the right to a unanimous jury is now incorporated against the states.

Justice Gorsuch writes for the same majority and confronts the court's precedent in *Apodaca v. Oregon* and *Johnson v. Louisiana*. Forty-eight states have an unanimity requirement for convictions of serious offenses. Louisiana and Oregon stood alone as the two jurisdictions that permitted convictions by non-unanimous juries. The Court previously declined to hold each state's non-unanimous jury law unconstitutional in *Apodaca* and *Johnson*. In *Apodaca*, a 4-1-4 split court upheld Oregon's sentencing structure, but 5 justices agreed that the Constitution requires unanimous juries for federal (but not state) convictions. He concluded that *Apodaca's* precedential weight is greatly diminished. He also concluded that stare decisis (which would counsel the court to leave *Apodaca* undisturbed given the lower courts reliance on it) was not a valid argument for upholding precedent that was wrongly decided.

Justice Gorsuch wrote for a 3-justice plurality to refute the dissent's argument that stare decisis required the Court to affirm Ramos's conviction. He also wrote for a 4-justice plurality to respond to Louisiana's reliance interests in maintaining its non-unanimous conviction standard. Louisiana argued that it had a strong interest in finality in its criminal justice system and that a new rule would allow defendants to challenge their non-unanimous convictions in subsequent habeas proceedings. Justice Gorsuch dismissed Louisiana's concerns because new rules of criminal procedure are rarely applicable in habeas proceedings.

Justice Kavanaugh concurred in part and wrote separately to explain why *Apodaca* should be overruled using a seven-factor analysis. Justice Thomas concurred in the judgment only, and he wrote separately to argue that the Sixth Amendment's unanimous jury requirement should be incorporated against the states via the Fourteenth Amendment's Privileges and Immunities Clause.

Justice Alito dissented, arguing that stare decisis required following *Apodaca* and affirming Ramos's conviction. He noted that *Apodaca* has an immense reliance value in our legal system, and that the majority should be reluctant to disregard the principle of stare decisis.

IV. Miscellaneous Federal Civil Statutes

Rotkiske v. Klemm, 140 S. Ct. 355 (2019); Affirmed 8-1.

Holding: Absent the application of an equitable doctrine like tolling, the statute of limitations in the Fair Debt Collection Practices Act, 15 U.S.C. § 1692(k)(d), begins to run when the alleged FDCPA violation occurs, not when the violation is discovered.

Facts: In 2005, Kevin Rotkiske accumulated credit card debt, and his bank referred the debt to Klemm for collection. In 2008, Klemm filed a collections lawsuit against him but was unable to locate him for service of process. In 2009, Klemm refiled its suit and attempted to serve him at his last known address, but he no longer lived there. Someone else accepted service at his former address, Rotkiske failed to respond to the summons, and Klemm obtained a default judgment against him. Rotkiske was not aware of the lawsuit against him until he applied for a mortgage in September 2014.

Rotkiske then filed an action against Klemm arguing that it had violated the Fair Debt Collection Practices Act (FDCPA). Klemm moved to dismiss his claim as time barred, and the district court granted the motion to dismiss because FDCPA actions must be brought within a year of the date of any violation. Rotkiske argued that the FDCPA includes a "discovery rule". The discovery rule would pause Rotkiske's time to file suit until he knew or should have known about Klemm's unlawful actions. Both the Fourth and Ninth Circuits apply the discovery rule to the FDCPA. Sitting en banc, the Third Circuit affirmed the district court's dismissal of Rotkiske's suit.

Reasoning: The Court rejected Rotkiske argument as atextual. The language of § 1692(k)(d) unambiguously refers to the date of the alleged violation, not the date on which the violation was discovered. Though plaintiffs may assert equitable arguments for tolling the one-year limitation, Rotkiske failed to preserve those arguments in the Third Circuit.

Justice Sotomayor concurred to point out that the Court has only recognized a discovery rule in cases of fraud and concealment.

Justice Ginsburg dissented. She agreed with the majority that the discovery rule does not apply to the FDCPA, but she disagreed as to whether Rotkiske preserved his fraud challenge in the lower court.

Intel Corp. Investment Policy Committee. v. Sulyma, 140 S. Ct. 768 (2020); Affirmed, 9-0.

Holding: Under the requirement in the Employee Retirement Income Security Act of 1974 ("ERISA") that plaintiffs with "actual knowledge" of an alleged fiduciary breach must file suit within three years of gaining that knowledge, 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.

Facts: Retirement plans governed by ERISA must have at least one fiduciary, tasked with managing the plan prudently and solely in the interests of participants and their beneficiaries. Fiduciaries who breach these duties are personally liable. Plaintiffs with "actual knowledge" of an alleged fiduciary breach must file suit within three years of gaining that knowledge. Without knowledge, ERISA requires filing suit within six years of the last action which constituted a breach. Sulyma worked at Intel Corporation from 2010 to 2012 and participated in two Intel retirement plans, which invested in funds managed by the Intel Investment Policy Committee. The committee invested in large shares of alternative assets, such as hedge funds, which carried high fees. Sulyma's funds lagged behind other funds, and he filed a suit in 2015 claiming that the plan administrators had breached their fiduciary duties. He filed it within six years of the alleged breach, but more than three years after the administrators had disclosed their investment decisions to him. ERISA mandates various disclosures to plan participants, and Sulyma received numerous such disclosures while working at Intel. Sulyma testified that he did not remember reviewing those disclosures and was unaware that his money had been invested in hedge funds or private equity. The question before the court was whether actual knowledge can be inferred from a plaintiff having received disclosures.

Reasoning: The court determined that although ERISA does not define the phrase "actual knowledge," the meaning is plain. Legal dictionaries make clear that actual knowledge refers to real knowledge, as opposed to constructive or assumed knowledge. Other provisions in ERISA draw a distinction between a statute of limitations period beginning when the cause of action arises and one beginning when the plaintiff has or should have knowledge of the cause of action. The distinction in other parts of ERISA indicates that Congress did not intend actual knowledge to mean constructive knowledge and was intentional when it said "actual knowledge." Defendants cannot prove that plaintiffs have actual knowledge merely by pointing to the disclosures they have made.

Kansas v. Garcia, 140 S. Ct. 791 (2020); Reversed and Remanded 5-4.

Holding: Kansas statutes that criminalize fraudulent use of another person's Social Security number on state and federal tax forms are not expressly nor impliedly preempted by the Immigration Reform and Control Act of 1986 (IRCA).

Facts: Respondents are three defendants charged with identity theft in Kansas. Respondents Garcia and Morales were charged for using someone else's social security number on their I-9 tax forms. Ochoa-Lara was charged with identity theft for using another's social security number on his W-4 tax form. Defendants argued that IRCA preempted states from using information provided on federal tax forms because IRCA says that immigrants' I-9 forms can only be used for enforcement of the Immigration and National Act. The Kansas Supreme Court vacated all three defendants' convictions on this ground.

Reasoning: IRCA does not expressly preempt state law on identity theft because IRCA only applies to employers and employer's recruiters. IRCA does not apply to state laws imposing either civil or criminal sanctions on employees or applicants. Though parts of IRCA prohibit the use of information "contained in" I-9s, it would be unreasonable to conclude that the information could never be used in other contexts. IRCA does not impliedly preempt state law because Kansas's identity theft laws do not impede on the government's role in immigration, and there is no evidence that Congress intended to displace state identity theft laws in the statute.

Justice Thomas concurred to say that the Court should abandon the idea of implied preemption that looks to Congress's purposes and objectives.

Justice Breyer concurred in part on the express preemption holding. He dissented on the issue of implied preemption and argued that Congress has expressed its intent to occupy the field of policing fraud in federal work authorization applications.

Allen v. Cooper, 140 S. Ct. 994 (2020). Affirmed 9-0.

Holding: Congress lacked authority to abrogate states' sovereign immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990.

Facts: In 1996, a marine salvage company named Intersal, Inc., discovered the shipwreck of the Queen Anne's Revenge off the North Carolina coast. The state of North Carolina legally owned the shipwreck, and it contracted with Intersal to conduct recovery operations. Intersal hired videographer Frederick Allen to

document the recovery efforts. Allen recorded videos and took photos of the recovery for more than a decade. He registered copyrights in all of his works.

When North Carolina published some of Allen's videos and photos online, Allen sued for copyright infringement. North Carolina moved to dismiss the lawsuit on the ground of state sovereign immunity. Allen countered that the Copyright Remedy Clarification Act of 1990 (CRCA) removed the States' sovereign immunity in copyright infringement cases. The district court agreed with Allen, finding that CRCA's text indicated a clear congressional intent to abrogate state sovereign immunity. The court acknowledged that *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, precluded Congress from using its Article I powers—including its authority over copyrights—to abrogate state sovereign immunity. But the court held that Congress could accomplish its objective under Section 5 of the Fourteenth Amendment. The Fourth Circuit reversed, reading *Florida Prepaid* to prevent abrogation under both Article I and Section 5 of the Fourteenth Amendment.

Reasoning: The Court first focused on the presence of "unequivocal statutory language" in the CRCA to abrogate states' sovereign immunity. Finding such language, the Court then turned to whether Congress had the authority to abrogate state immunity. The Court concluded that the Article I, § 8 Intellectual Property Clause power did not authorize Congress to abrogate state immunity under *Florida Prepaid*. Nor did § 5 of the Fourteenth Amendment give Congress authority to abrogate because the statute was not "congruent and proportional" to the injury Congress tried to prevent. Congress therefore lacked authority to abrogate state immunity.

Justice Breyer concurred in part, noting that Florida Prepaid compelled the outcome but was unfair to artists and creators who are unable to sue states for stealing their intellectual property.

Comcast Corp. v. National Assoc. of African American-Owned Media, 140 S. Ct. 1009 (2020). Reversed 9-0.

Holding: A plaintiff who sues for racial discrimination under 42 U.S.C. § 1981 must demonstrate that race was a but-for cause of his injury throughout the course of the lawsuit.

Facts: Byron Allen, an African American actor and comedian, owns Entertainment Studios Network (ESN). He also created the National Association of African American-Owned Media. He sued Comcast under § 1981 over its decision not to carry ESN's channels. He argued that Comcast's

decision was at least partially based on racial animus against ESN because it is the only wholly African American owned multi-channel media company.

The district court dismissed his complaint under Rule 12(b)(6) for failure to state a plausible claim. The district court dismissed his claim because he did not allege that racial animus was the but-for cause of Comcast's decision. On appeal, the Ninth Circuit held that "mixed-motive" cases are allowed under § 1981 and that plaintiffs need only prove that racial animus was a motivating factor in a defendant's decision. The Ninth Circuit applied the mixed-motive analysis and reversed because Allen's complaint asserted that Comcast had entered into contracts with white-owned but lesser known networks during the relevant time period.

Reasoning: The Court concluded that the history and text of § 1981 imputed a "but-for" causation standard. Plaintiffs have the burden of proof on that standard throughout the lawsuit, including at the time of their initial pleadings. § 1981 was a part of the 1866 Civil Rights Act, and language indicating a but-for causation standard appears in other parts of the statute. Furthermore, § 1981 was closely aligned with tort law when it was passed, and the but-for causation standard predominates in tort law.

Though Title VII of the Civil Rights Act of 1964 permits relief when plaintiffs merely prove that animus was a motivating factor, Title VII is the exception rather than the rule. The unique history of Title VII as it relates to private discrimination sets it apart from other laws.

Justice Ginsburg concurred in part and concurred in the judgment, noting that she disagreed with the strict but-for causation standard but that it was compelled by precedent.

Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020); Remanded and Vacated, 7-2.

Holding: Because the phrase "questions of law" in the Immigration and Nationality Act's Limited Review Provision includes the application of a legal standard to undisputed facts, the United States Court of Appeals for the Fifth Circuit erred in holding that it lacked jurisdiction to consider Petitioners' "factual" due diligence claims for equitable tolling purposes.

Facts: Both Pedro Pablo Guerrero-Lasprilla and Ruben Ovalles were immigrants who lived in the United States who committed drug crimes and were ordered removed. Neither filed a motion to reopen removal proceedings within ninety days of the final order, but both asked the BIA to reopen their removal proceedings, arguing that the 90-day time limit should be equitably

tolled. The BIA denied their requests stating that petitioners had not demonstrated requisite due diligence, and they asked the Fifth Circuit to review the BIA's decision. The Fifth Circuit denied their requests for review, stating that whether they acted diligently was a factual question. The limited review provision only allows review for constitutional claims or questions of law when removal rests upon certain crimes like the ones committed by petitioners. Both petitioners claim the underlying facts were not in dispute, and argue that the application of the equitable tolling due diligence standard to undisputed facts is a question of law.

Reasoning: The Court noted that nothing in the INA's language precludes the conclusion that Congress intended for "questions of law" to mean the application of a legal standard to established facts. The inquiry as to whether facts meets a given legal standard is often characterized as a legal inquiry, such as in a Federal Rule of Civil Procedure 12(b)(6) motion, which asks if facts alleged, taken as true, state a claim for relief. There is a principle in statutory construction that there is a presumption of favoring judicial review of administrative action, and that presumption can only be overcome by clear and convincing evidence of intent to preclude judicial review. In this case, "questions of law" can be reasonably interpreted to include questions of application of law to established facts. Excluding mixed questions of law and fact would foreclose review of BIA determinations so long as they stated the correct legal standard. Furthermore, the same statutory section containing the limited review provision includes the phrase "judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions." This phrase shows Congress understood questions of law and fact to include application of law to facts. Furthermore, statutory history strongly suggests that the phrase "constitutional claims or questions of law" as a substitute for habeas review, which must include misapplication of a standard to facts to be an adequate substitute.

Babb v. Wilkie, 140 S. Ct. 1168 (2020); Reversed and Remanded, 8-1.

Holding: The plain meaning of the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA") demands that personnel actions be untainted by any consideration of age, but but-for causation is important in determining the appropriate remedy that may be obtained.

Facts: Noris Babb was born in 1960 and is a clinical pharmacist at the Veterans Affair Medical Center in Bay Pines, Florida. In 2014, she brought suit against the VA claiming she was subjected to age discrimination. In 2013,

she was denied advancement and training opportunities, placed in a new position, and her holiday pay was reduced. The VA moved for summary judgment and offered non-discriminatory reasons for the challenged actions. The court used the *McDonnell Douglas Corp. v. Green* framework and determined that the VA had proffered legitimate, non-pretextual reasons. Babb appealed, arguing that the district court should not have used that framework, and that under the ADEA's federal sector provision, an action is unlawful if age is a factor. The Eleventh Circuit upheld the grant of summary judgment to the VA.

Reasoning: The relevant provision states that personnel actions "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The VA argued that this imposes liability only when age is a but-for cause of a decision. The Court determined that a plain reading of the statute requires a contrary holding. "Free from" means "untainted." Personnel decisions cannot be made with any age discrimination whatsoever. It is not anomalous to hold the federal government to a stricter standard than other employers, and Congress deliberately created a distinct scheme for the federal government. However, whether there is but-for causation will necessarily factor into considerations of remedies, as one who can only demonstrate they were subjected to unequal consideration cannot receive remedies such as reinstatement and backpay.

Justice Thomas dissented, arguing that the Court's reading of the statute was too broad and would disturb the "settled expectations of federal employers and employees."

Thole v. U. S. Bank N.A, 140 S. Ct. 1615 (2020); Affirmed, 5-4.

Holding: Participants in a defined-benefit retirement plan who are guaranteed a fixed payment each month regardless of the plan's value lack Article III standing to bring a lawsuit against the fiduciaries under ERISA.

Facts: James Thole and Sherry Smith are two retirees and participants in U.S. Bank's retirement plan. The retirement plan is a defined-benefit plan, meaning participants receive a fixed payment each month regardless of the value of the plan or whether the fiduciaries make good or bad investment decisions. Thole and Smith are contractually entitled to receive the same monthly payments for the rest of their lives. Plaintiffs filed a lawsuit against U.S. Bank for alleged mismanagement of the plan. They sued under the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court dismissed their lawsuit for lack of standing, and the dismissal was upheld by the Eighth Circuit.

Reasoning: To establish standing under Article III of the Constitution, a plaintiff must demonstrate an "injury in fact." Thole and Smith's benefits are fixed and will not change regardless of how the plan is managed. Thole and Smith cannot claim standing as assignees because the plan's claims have not been legally or contractually assigned for them. The general cause of action under ERISA does not affect the Article III standing analysis. Finally, Thole and Smith do not allege that the mismanagement was so egregious as to substantially increase the risk that the plan would fail and be unable to pay future benefits. Because they suffered no injury, the Court determined that they have no standing to bring suit.

Justice Sotomayor dissented, arguing that the Court's decision would preclude pension holders from being federal suits to stop mismanagement of their plans until the plans were near default.

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020), decided with *Altitude Express, Inc., et. al., v. Moore* and *R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission.*
Reversed and Remanded in *Bostock*, 6-3. Affirmed in *Moore* and *R.G. and G.R. Harris Funeral Homes, Inc.*, 6-3.

Holding: An employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

Facts: In *Bostock*, Gerald Bostock was fired by the county after he began participating in a recreational softball league for gay people. The Eleventh Circuit held that Bostock was not protected by Title VII.

In *Moore*, Altitude Express fired Zarda days after he mentioned he was gay. The Second Circuit held that Zarda was protected by Title VII.

In *R.G. and G.R. Harris Funeral Homes*, Aimee Stephens (who presented as a man when she was hired) was fired after telling her employer that she intended to present as a woman moving forward. The Sixth Circuit held that Stephens was protected by Title VII.

Reasoning: Title VII prevents discrimination "because of" sex. "Because of" incorporates the but-for causation standard, and the standard prohibits employer's from making decisions even partially based on sex. Discrimination based on homosexuality or transgender status requires employers to consider an employee's sex. Being gay is defined as being a male who dates males or a woman who dates women. In the same way, being transgender means being

born into one sex and later changing that identity. Therefore, discrimination based on sex or transgender status includes discrimination based on sex.

The Court rejected Defendants' arguments that Title VII's prohibition on sex discrimination was limited to discrimination along biological lines. Though "sex" referred to biological distinctions between males and females in 1964, the plain text of the statute prohibits the instant discrimination. The Court declined to wade through the legislative history of Title VII, finding that the statute unambiguously prohibited the discrimination Defendants engaged in.

Justice Alito dissented to argue that the majority's analysis was not based on the plain text of the statute. He concluded that the majority effectively rewrote the statute to reflect society's current values. Justice Kavanaugh also dissented, concluding that Title VII does not prohibit discrimination based on sexual orientation or transgender status.

Dept. of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891 (2020), decided with *Trump v. NAACP* and *Wolf v. Vidal*; Vacated, Reversed, and Remanded, 5-4.

Holding: The Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious under the Administrative Procedure Act (APA).

Facts: In 2012, the U.S. Department of Homeland Security (DHS) adopted a program—known as the Deferred Action for Childhood Arrivals (DACA)—to postpone the deportation of undocumented immigrants who had been brought to the United States as children. DACA assigned them work permits, which allowed them to obtain social security numbers, pay taxes, and become part of "mainstream" society in the United States.

After his election in 2016, President Trump began to phase-out DACA. Though no one disputes that President Trump could rescind DACA, the Plaintiffs argued that his termination was based on a mistake in the law. President Trump argued that he could end DACA because President Obama created it without proper statutory authority and without an end-date, thus making it an unconstitutional act by the Executive Branch.

Plaintiffs challenged the rescission of DACA, arguing that it violated the Administrative Procedure Act (APA) because it was arbitrary and capricious, and because it was a substantive rule that did not comply with the APA's notice-and-comment requirements. They also argued that the rescission deprived them of their due process and equal protection rights under the Fifth Amendment. The Ninth Circuit rejected the Government's motion to dismiss

for lack of jurisdiction and granted Plaintiffs' preliminary injunction, restoring DACA.

Reasoning: The Court first determined that final agency decisions are reviewable under the APA. The APA requires agencies to supply "reasoned analysis" for their decisions, and the rescission memorandum failed in several key aspects. It failed to consider more moderate outcomes (like limiting eligibility for benefits while still halting deportation), relied solely on the opinion of the Attorney General, and failed to address the degree of reliance on the DACA program. Agencies need not address all policy alternatives before changing course, but they must assess important aspects of issues they attempt to solve. Lastly, the Court determined that Plaintiffs had not maintained a plausible inference that there was an equal protection violation.

Justice Sotomayor filed a partial concurrence agreeing that the agency decision was reviewable but arguing that it was too soon to dismiss Plaintiffs' equal protection claim.

Justice Thomas concurred in the judgment on the equal protection claim but dissented as to the APA claim. He concluded that DACA was unlawful when implemented and that the Trump administration had authority to rescind it. Justice Kavanaugh concurred in part and dissented in part, arguing that the Department of Homeland Security had provided a reasonable explanation for its rescission decision.

Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (20200; Vacated and Remanded, 5-4

Holding: The Consumer Financial Protection Bureau's leadership by a single director removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

Facts: In 2017, the Consumer Financial Protection Bureau ("CFPB") issued a civil investigative demand (similar to a subpoena) to Seila Law LLC. Seila Law asked the CFPB to set aside the demand, claiming that the CFPB's structure violated the separation of powers since their sole Director is removable only for cause. When the CFPB did not set aside their demand, Seila Law refused to comply with the demand. CFPB filed a petition to enforce the demand in district court. Seila Law argued again in court that the CFPB's structure violated the separation of powers. The district court disagreed and ordered Seila Law to comply. The Ninth Circuit affirmed, concluding that Seila Law's challenge was foreclosed by *Humphrey's Executor v. United States*, 295 U.S. 602 869 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988).

Reasoning: The Court vacated and remanded, explaining that the CFPB's structure is unconstitutional as it contravenes the President's unrestricted removal power found in Article II and no exception applies. The Court states that neither *Humphrey's Executor* nor *Morrison* creates exceptions that apply to these facts: *Humphrey's Executor* allowed Congress to give for-cause removal protection to a nonpartisan multimember body of experts who had staggered terms, performed only "quasi-legislative" and "quasi-judicial functions," and did not exercise executive power. *Morrison* approved for-cause removal protection for an inferior officer: independent counsel with limited duties and no policymaking or administrative authority. Following *Free Enterprise Fund v. Public Company Accounting Oversight Board,* the Court declined to extend such protections to "a new situation."

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), decided with *Trump v. Pennsylvania*; Reversed and Remanded, 7-2.

Holding: The Departments of Health and Human Services, Labor and the Treasury (collectively, the "Departments") had authority under the Patient Protection and Affordable Care Act (the "ACA") to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees.

Facts: The ACA requires covered employers to provide women with "preventive care and screenings." In 2011, the Health Resources and Services Administration (the "HRSA"), a division of the Department of Health and Human Services, issued guidelines that require health plans to provide access to FDA-approved birth control at no cost to their female employees. In 2017, the Departments issued rules that allowed private employers with sincerely-held religious beliefs or moral objections to opt out of providing the contraceptive coverage. Two states, Pennsylvania and New Jersey, challenged the new rules, arguing that they violate both the ACA and the Administrative Procedure Act (the "APA").

Reasoning: As legal authority for both exemptions, the Departments invoked § 300gg–13(a)(4), which states that employer health plans must provide women with "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [the HRSA]." The phrase "as provided for" allows HRSA both to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers' religious or moral objections. The Court also rejected the plaintiffs' argument that the

Departments did not follow the proper procedures under the APA when it enacted the rules finalizing the exemptions. It reasoned that the Departments provided sufficient notice and that they did not need to show they responded to any comments on the rules with an open mind. Finally, because the exemptions were consistent with the ACA, the Court did not need to weigh in on the Government's argument that the exemptions were either required or authorized by the Religious Freedom Restoration Act, which bars other federal laws from placing a substantial burden on an individual's free exercise of his or her religion.

Justice Ginsburg filed a dissenting opinion that was sharply critical of the majority's ruling. "Today," she wrote, "for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree."

V. Miscellaneous Constitutional Claims

June Medical Services LLC v. Russo, 140 S. Ct. 2103 (2020); Reversed, 5-4.

Holding: Louisiana's Unsafe Abortion Protection Act, requiring doctors who perform abortions to have admitting privileges at a nearby hospital, is unconstitutional.

Facts: In 2014, the Louisiana legislature passed Act 620, which is nearly identical to the Texas admitting-privileges law that the Court invalidated in *Whole Woman's Health v. Hellerstedt* (2016). The Louisiana law required any doctor who performs abortions to hold "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed. . . " Five abortion clinics and four abortion providers sued Louisiana over Act 620, alleging it was unconstitutional, and the suits were consolidated. The district court declared Act 620 unconstitutional and granted Plaintiffs' preliminary injunction. The Fifth Circuit reversed, disagreeing with the district court's factual findings.

Reasoning: Justice Breyer wrote for four justices, and Chief Justice Roberts concurred in the judgment only. Justice Breyer explained that the district court's findings were not clearly erroneous and had ample evidentiary support. The Fifth Circuit did not contest the applicable legal standards, including the standard articulated in *Planned Parenthood of Southeastern Pa. v. Casey* and *Whole Woman's Health* that courts must weigh the law's "asserted benefits against the burdens." The Court reasoned that the district court did not err in

determining that the law posed a substantial obstacle to women seeking an abortion, offered no significant health-related benefits, and imposed an undue burden on a woman's constitutional right to choose an abortion. Given the record evidence, the Court agreed that the law would drastically reduce the number of abortion providers, making it impossible for many women to obtain safe abortions in the state. The Court noted that the appellate court "is not to decide factual issues de novo."

Chief Justice Roberts concurred, concluding that stare decisis required adherence to Whole Woman's Health.

Justice Alito dissented, arguing that the majority misused the concept of stare decisis. He also concluded that the balancing test from *Whole Women's Health* was not the controlling standard since Chief Roberts rejected it previously.

Justice Gorsuch dissented on the grounds that the Court over exceeded its authority in striking down the law. Justice Kavanaugh dissented on similar grounds, but he also argued that five justices voted to reject the *Whole Women's Health* balancing test.

Chiafalo v. Washington, 140 S. Ct. 2316 (2020); Affirmed, 9-0.[1]

Holding: A state may penalize a presidential elector for faithlessly voting on the Electoral College ballot.

Facts: When Americans cast ballots for presidential candidates, their votes actually go toward selecting members of the Electoral College, whom each state appoints based on the popular returns. With two partial exceptions, every state appoints a slate of electors selected by the political party whose candidate has won the state's popular vote. The states have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. Three Washington electors, Peter Chiafalo, Levi Guerra, and Esther John (the "Electors"), violated their pledges to support Hillary Clinton in the 2016 presidential election. In response, the State fined the Electors $1,000 apiece for breaking their pledges to support the same candidate its voters had. The Electors challenged their fines in state court, arguing that the

[1] This case was effectively decided with *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316 (2020). *Baca* involved a similar set of facts. A Colorado elector—Michael Baca—violated his pledge to support Clinton in the 2016 presidential election by voting instead for John Kasich, the then governor of Ohio. In response, Colorado's Secretary of State removed Mr. Baca as an elector and discarded his vote. After witnessing Mr. Baca's removal from office, two other electors—Polly Baca and Robert Nemanich—voted for Clinton despite their desire to vote for Kasich. The three electors sued. In a per curiam opinion, the Court denied the electors' claims "for the reasons stated in [*Chiafalo*]." *Id.*

Constitution gives members of the Electoral College the right to vote however they please.

Reasoning: Contrary to the Electors' argument, Article II's use of the term "electors" and the Twelfth Amendment's requirement that the electors "vote," and that they do so "by ballot," do not establish that electors must have discretion. Indeed, Article II conveys broad power to the states over who becomes an elector. And the power to appoint an elector (in any manner) includes power to condition his or her appointment, absent some other constitutional constraint. But nothing in the Constitution expressly prohibits states from taking away presidential electors' voting discretion. Moreover, the long settled and established practice is that electors vote for pre-selected candidates.

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020); Stay Granted, 5-4.

Holding: 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.

Facts: The Democratic National Committee and the Democratic Party of Wisconsin sought to enjoin enforcement of certain election laws, arguing that, due to the COVID-19 public health emergency, these laws impose unconstitutional burdens on citizens' right to vote in the then upcoming April 7, 2020 primary election. Five days before the election, the district court entered a preliminary injunction that ordered absentee ballots mailed and postmarked after election day to be counted so long as they are received by April 13.

Reasoning: In a per curiam opinion, the Supreme Court did not weigh in on the "wisdom" of Wisconsin's decision to go ahead with its election as scheduled but rather addressed a "narrow, technical question about the absentee ballot process." The court concluded that "[e]xtending the date by which ballots may be cast by voters . . . for an additional six days after the scheduled election day fundamentally alters the nature of the election," because the plaintiffs had not even asked the district court to do so. "By changing the election rules so close to the election date," the Court continued, the district court had run afoul of the Court's repeated admonition that "lower federal courts should ordinarily not alter the election rules on the eve of an election." That change was particularly problematic since it would require election officials to refrain from disclosing election results until all the absentee ballots were received on April

13; "if any information were released during that time," the Court warned, "that would gravely affect the integrity of the election process."

Justice Ginsburg dissented, arguing that the Court's stay would force Wisconsin voters to choose between going to the polls, "endangering their own and others' safety," or "los[ing] their right to vote, through no fault of their own."

VI. Criminal

McKinney v. Arizona, 140 S. Ct. 702 (2020); Affirmed, 5-4.

Holding: When a capital sentencing error regarding improperly considering aggravating and mitigating circumstances is found on collateral review, a state appellate court may reweigh the evidence.

Facts: James McKinney burglarized several houses and killed two people in 1991. An Arizona jury convicted him of murder, and under Supreme Court precedent, a defendant convicted of murder may be sentenced to death if there is at least one aggravating circumstance. The trial court found aggravating circumstances for both murders, weighed them with mitigating circumstances, and sentenced McKinney to death. The Ninth Circuit determined that Arizona courts had failed to properly consider McKinney's Post-Traumatic Stress Disorder, running afoul of *Eddings v. Oklahoma* (1982), which requires capital sentences to consider relevant mitigating evidence. When McKinney's case returned to the Arizona Supreme Court, he argued that he was entitled to resentencing by the jury, but the Arizona Supreme Court instead itself weighed the aggravating and mitigating circumstances and upheld his death sentences.

Reasoning: In *Clemons v. Mississippi* (1990), the Supreme Court determined that the Mississippi Supreme Court itself could reweigh permissible aggravating and mitigating evidence after that court had decided that one of the aggravators used in the defendant's initial trial was unconstitutionally vague. While McKinney attempted to distinguish *Clemons*, the Court stated that the analysis in *Clemons* hinged on the ability of appellate courts to weigh such evidence. The Court also held that *Clemons* was good law despite the holding in *Ring v. Arizona* and *Hurst v. Florida*. Under those cases, a jury must find the aggravating circumstance exists, but a jury is not constitutionally

required to weigh the circumstances. While a jury did not find the aggravating circumstances in McKinney's case, McKinney's case became final on direct review before *Ring and Hurst*, which do not apply retroactively on collateral review. The Court rejected McKinney's argument that the 2018 Arizona Supreme Court decision reweighing aggravators and mitigators constituted a reopening of direct review, as the Arizona Supreme Court stated it was conducting an independent review in a collateral proceeding.

Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020); Vacated and Remanded, 9-0.

Holding: A defendant's argument for a specific sentence preserved his claim on appeal that the sentence imposed was unreasonably long.

Facts: Gonzalo Holguin-Hernandez was convicted of drug trafficking and sentenced to 5 years in prison and five years of supervised release. When he was convicted, he was serving a term of supervised release related to an earlier crime. The government asked the court to find that Holguin-Hernandez had violated the conditions of supervised release and impose an additional consecutive prison term consistent with the sentencing guidelines: 12 to 18 months in prison. Holguin-Hernandez's lawyer argued against the additional sentence, but the court sentenced him to an additional 12-month term. Holguin-Hernandez appealed, arguing that the 12-month sentence was unreasonably long. The Court of Appeals held the petitioner waived this argument by not objecting to the reasonableness of the sentence in the district court.

Reasoning: By informing the court of the action they wish to take, a party generally brings to the court's attention his objection to a contrary decision. Where a defendant advocates for a shorter sentence than the one imposed, the judge should understand that the defendant was making the argument that a longer sentence was greater than necessary. Defendants are not required to use the term "reasonableness" to preserve such claims as the rule makers of Federal Rule of Criminal Procedure 51 intended to do away with formal exceptions to trial court rulings. Rule 51 does not require an objecting party to use particular language.

Shular v. United States, 140 S. Ct. 779 (2020); Affirmed, 9-0.

Holding: The definition of "serious drug offense" under the Armed Career Criminal Act (ACCA) requires only that the state offense involve the conduct

specified in the statute; it does not require that the state offense match certain generic offenses.

Facts: Shular pled guilty in a district court to possessing a firearm after having been convicted of a felony, and possessing with intent to distribute cocaine and cocaine base. The court sentenced him to imprisonment for fifteen years, which is the mandatory minimum under the ACCA for defendants with prior convictions for a "serious drug offense." A state offense is a "serious drug offense" if it involves manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. The district court imposed the enhanced sentence because of Shular's prior convictions under Florida law. In 2012, Shular pled guilty to five counts of selling cocaine and one count of possessing cocaine with intent to sell, all in violation of a law which makes it a crime to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." For these offenses, knowledge of the illicit nature of the substance is not an element, but lack of knowledge is an affirmative defense. These six counts, in the district court's view, counted as serious drug offenses. Shular appealed. The government contended that in determining if a state offense counts as a serious drug offense, the court should ask whether the elements of the state offense involve the conduct identified in the ACCA (manufacturing, distributing, etc.) Shular disagreed, arguing that the court must first identify the elements of the "generic" offense, then ask whether the elements of the state offense match those of the generic crime. Shular argues that the generic offenses in the ACCA include a mens rea element of knowledge that the substance is illicit, which does not match the Florida statute, and that therefore he should not be subject to the sentencing enhancement. The Eleventh Circuit affirmed the sentence.

Reasoning: The Court noted that it has used what is called the "categorical approach" to determine whether prior convictions qualify for ACCA enhancement. This approach does not consider the particular facts underlying the convictions or the label assigned to the crimes by the state. Under some statutes, this approach requires the court to come up with a "generic" version of a crime, including the elements of the offense as commonly understood. That step is required when statutes refer generally to an offense without specifying its elements. However, other statutes using this approach ask if the conviction meets some other criteria. The Court determined that the second approach is warranted because the terms used in the ACCA (manufacturing, distributing, etc.) describe conduct a court can compare to a state crime's elements. Those terms are unlikely names for generic offenses while they can undoubtedly describe conduct. The Court concluded that traditional canons of statutory

interpretation make clear that Congress intended this section of the ACCA to describe conduct, not generic offenses.

Kahler v. Kansas, 140 S. Ct. 1021 (2020); Affirmed, 6-3.

Holding: The Fourteenth Amendment's Due Process Clause does not require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong.

Facts: In 2009, Kraig Kahler was charged with capital murder after he shot and killed his wife, his two daughters, and his wife's grandmother. Experts for the prosecution and defense agreed that Kahler had several mental health disorders including major depressive disorder and paranoia, and he refused to take the various antidepressants and anti-anxiety medications that he was prescribed.

At trial, the defense expert testified that he believed Kahler did not make the rational choice to kill his family members and had temporarily lost control. Kansas law prohibits juries from considering mental disease or defect as a defense to the crime unless it negates the mental state of the offense. Kansas does not have any of the modern insanity tests that allow acquittal when defendants fail to appreciate the wrongness of their actions or act because of irresistible impulses. The jury convicted Kahler and sentenced him to death. The Kansas Supreme Court affirmed his conviction and sentence.

Reasoning: States have flexibility to craft their own versions of the insanity defense, and the Court declines the opportunity to adopt one particular version of the insanity defense. Since Kansas allows mental illness to be considered if it negates the mental state of an offense, Kansas's insanity statute does not offend notions of traditional justice.

Justice Breyer dissented, arguing that Kansas's insanity statute eliminated the core protections of the insanity defense. He argues that the traditional insanity defenses are so rooted in the conscience of our people that they are fundamental and therefore must be incorporated against the states via the Due Process Clause of the Fourteenth Amendment.

United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020); Vacated and Remanded, 9-0.

Holding: The Ninth Circuit abused its discretion when it decided whether 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutionally broad because that argument was not raised by the respondent.

Facts: Evelyn Sineneng-Smith operated an immigration consulting firm in California, and was indicted for multiple violations of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), which makes it a felony to encourage or induce someone to enter the United States, knowing or in reckless disregard of the fact that it will be against the law, with an added penalty if done for the purpose of financial gain. Most of her clients worked in the home health care industry without authorization. She charged them thousands of dollars to file applications that could never lead to lawful residence. She was convicted and appealed to the Ninth Circuit. The Ninth Circuit invited amici to brief and argue issues framed by the panel, including an issue never briefed by Sineneng-Smith about whether the statute was overbroad under the First Amendment. The Ninth Circuit then determined that it was overbroad.

Reasoning: The Court explained that in the United States' adversarial system of adjudication, courts follow the principle of party presentation, wherein courts rely on the parties to frame the issues. In Sineneng-Smith's appeal, the Ninth Circuit invited amici to present on the issue of whether the statute was unconstitutionally broad under the First Amendment, even though the issue was not raised by respondent, and only allocated respondent's counsel 10 minutes at oral argument. No extraordinary circumstances justified the Ninth Circuit taking over this appeal and determining an issue beyond Sineneng-Smith's own conduct.

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Reversed, 5-4.

Holding: Land in northeastern Oklahoma reserved for the Creek Nation since the 19th century remains a reservation for the purpose of the Major Crimes Act (the "MCA"), which gives the federal government exclusive jurisdiction to try certain crimes committed by "[a]ny Indian" in "Indian country."

Facts: Petitioner Jimcy McGirt was convicted by an Oklahoma state court of three sexual offenses. He unsuccessfully argued in state postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation.

Reasoning: In order for a state to try in its courts Native Americans who commit crimes on indigenous lands, Congress must clearly express its intent to disestablish a reservation. Congress established a reservation for the Creek Nation in 1833. Although Congress sought to pressure many tribes to parcel their lands into smaller lots owned by individual tribal members and to abolish the Creeks' tribal courts, that does not show Congress clearly intended to

disestablish the Creek Reservation. Therefore, the Creek Reservation persists today as a legal entity. Since the term "Indian Country" in the MCA refers to Native American reservations, the Creek Reservation is part of Indian Country. Because the federal government maintains exclusive jurisdiction over such lands, McGirt should have been tried in a federal—not state—court. Oklahoma warned of the potential consequences that would follow a ruling for McGirt, like unsettling an untold number of convictions and frustrating the State's ability to prosecute future crimes. The Court dismissed these concerns, concluding that Oklahoma and the tribes have proven again that they can work successfully together as partners and will continue to do so.

Justice Roberts dissented, arguing that "the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out."

Justice Thomas also dissented, contending that the Court had no jurisdiction to review the case.

Trump v. Vance, 140 S.Ct. 2412 (2020); Affirmed and Remanded, 7-2.

Holding: Article II and the Supremacy Clause of the Constitution do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president.

Facts: In 2019, the office of New York County District Attorney Cyrus R. Vance, Jr.—acting on behalf of a grand jury—served a subpoena duces tecum on Mazars USA, LLP ("Mazars"). Mazars is the personal accounting firm of President Trump. The subpoena sought financial records relating to the President and his businesses as part of a grand jury's inquiry into whether the President violated New York criminal law. President Trump, acting in his personal capacity, sued Vance and Mazars in federal court to enjoin enforcement of the subpoena, arguing that a sitting president enjoys absolute immunity from state criminal process under Article II and the Supremacy Clause.

Reasoning: In *United States v. Burr* (1807), Chief Justice John Marshall, presided over the treason trial of Aaron Burr and granted his motion to subpoena President Jefferson. In rejecting the prosecution's argument that a President was not subject to such a subpoena, Marshall held that a President does not "stand exempt" from the Sixth Amendment's guarantee that the accused have compulsory process for obtaining witnesses for their defense. And in *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court granted the

Watergate Special Prosecutor's request for a subpoena duces tecum directing President Nixon to produce, among other things, tape recordings of Oval Office meetings. The Court rejected Nixon's claim of an absolute privilege of confidentiality for all presidential communications. These cases indicate that there is no absolute bar on presidents receiving state criminal subpoenas. Moreover, state criminal subpoenas do not necessarily pose a unique threat to the ability of the president to discharge his other duties such that presidents require absolute immunity from them. For instance, a properly tailored criminal subpoena will not necessarily distract the president from his responsibilities. And there is nothing inherently stigmatizing about a president receiving a subpoena. Finally, the Court observed that federal law prevents individuals from using a subpoena simply to harass the president.

For three reasons, a state grand jury subpoena seeking a president's private papers need not satisfy a heightened need standard. First, although a president cannot be treated as an "ordinary individual" when executive communications are sought, *Burr* teaches that, with regard to private papers, a president stands in "nearly the same situation with any other individual." Second, there has been no showing here that heightened protection against state subpoenas is necessary for the president to fulfill his Article II functions. Finally, absent a need to protect the president, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence.

The Court remanded the case so that President Trump could "raise further arguments" challenging the subpoena in this case, "as appropriate."

Justice Thomas dissented, agreeing that a president is not entitled to immunity from the issuance of the subpoena, but arguing that a president may be entitled to relief from the enforcement of the subpoena.

Justice Alito also dissented, asserting that the majority treats the subpoena at issue like "an ordinary grand jury subpoena," which it is not. "The Presidency," Alito argued, "deserves greater protection."

Davis v. United States, 140 S. Ct. 1060 (2020); Vacated and Remanded, Per Curiam.

Holding: There is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error.

Facts: In 2016, Charles Davis pled guilty to being a felon in possession of a firearm and possessing drugs with the intent to distribute them. Davis was sentenced to 40 months in federal prison, with his sentence to start after time

in prison for state offenses. Davis did not object to his sentence at the time, but he argued on appeal to the Fifth Circuit that his federal sentence should run concurrently with, rather than consecutively to, his state sentences because they were part of the "same course of conduct." However, the court refused to consider his argument at all. Although an appellate court normally reviews an argument that a criminal defendant did not raise in the district court for "plain error," the court ruled that Davis' argument involved a question of fact. And, in the Fifth Circuit, questions of fact that the district court could have resolved if the defendant had objected cannot be plain error.

Reasoning: In a per curiam opinion, the Court concluded that the Fifth Circuit needed to take another look at Davis's case. The Court determined that Federal Rule of Criminal Procedure 52(b), which states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention," does not "immunize" questions of fact from plain-error review. The Court also observed that the Court's cases do not provide precedential support for the Fifth Circuit's practice. Given its review of the Federal Rules of Criminal Procedure and relevant precedent, the Court concluded that "there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error."

Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020), decided with *Trump v. Deutsche Bank AG*; Vacated and Remanded, 7-2.

Holding: Although Congressional committees were not required to demonstrate a specific need for the records they sought, nor to show that the records were demonstrably critical to a legislative purpose, the subpoenas at issue raised separation of powers concerns.

Facts: In April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Trump, his children, and affiliated businesses. The House Committee on Financial Services issued a subpoena to Deutsche Bank seeking any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by the bank. It issued a second subpoena to Capital One for similar information. The Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank that mirrored the subpoena issued by the Financial Services Committee. And the House Committee on Oversight and Reform issued a subpoena to the President's personal accounting firm, Mazars USA, LLP, demanding information related to the

President and several affiliated businesses. Although each of the committees sought overlapping sets of financial documents, each supplied different justifications for the requests, explaining that the information would help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U.S. elections. Petitioners—President Trump in his personal capacity, along with his children and affiliated businesses—contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, argue that any of the requested records were protected by executive privilege.

Reasoning: The President contends that congressional subpoenas for the President's information should be evaluated under the standards set forth in *United States v. Nixon*, 418 U.S. 683 (1974) and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), which would require the House to show that the requested information satisfies a "demonstrated, specific need," and is "demonstrably critical" to a legislative purpose. *Nixon* and *Senate Select Committee*, however, involved subpoenas for communications between President Nixon and his close advisers, over which the President asserted executive privilege. Since the subpoenas at issue involve nonprivileged, private information, they need only serve valid legislative purposes. In assessing whether a subpoena directed at the president's personal information is related to a legitimate legislative purpose, courts must take adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the president. Several special considerations inform this analysis. First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the president and his papers. Congress may not rely on the president's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial, the better. Fourth, courts should assess the burdens imposed on a president by a subpoena, particularly because they stem from a rival political branch that has an ongoing relationship with the president and incentives to use subpoenas for institutional advantage. Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

Justice Thomas dissented, arguing that Congress can never issue a legislative subpoena for private, unofficial documents, no matter whom they belong to.

Justice Alito also dissented, agreeing with his colleagues in the majority that "the lower courts erred and that these cases must be" sent back for another look, but asserting that, under the new test outlined by the majority, the subpoenas should fail "unless the House is required to show more than it has put forward to date."

Andrus v. Texas, 140 S. Ct. 1875 (2020); Vacated and Remanded, 6-3.

Holding: Counsel provided constitutionally deficient performance under *Strickland v. Washington*. The Texas Court of Criminal Appeals was therefore required to consider whether petitioner was prejudiced by the inadequacy of counsel.

Facts: Petitioner Terence Andrus is a Texas inmate who was sentenced to death for the 2008 shootings of two people during an attempted carjacking in a grocery-store parking lot. The lawyer who was appointed to defend Andrus didn't meet with him for almost eight months, and then only met with him outside of court six times in roughly four years. The attorney admitted that he did not do any work until just before jury selection began. At the trial, the lawyer did not present any mitigating evidence of Andrus's very difficult childhood. After the Texas Court of Criminal Appeals rejected Andrus's request for post-conviction relief, Andrus asked the Supreme Court to review his case.

Reasoning: Claims that an attorney's performance was so poor that it violated a defendant's constitutional right to the assistance of counsel are reviewed under a standard outlined by the Court in *Strickland v. Washington*. It is a two-part test that looks first at whether the attorney's performance was objectively unreasonable and then, if so, at whether that deficient performance prejudiced the client.

In a per curiam opinion, the Court concluded that Andrus's counsel was constitutionally deficient. The record, the Court explained, makes clear that although Andrus's lawyer "nominally" put on a case to spare Andrus's life, he performed virtually no investigation even though there was a "vast" body of mitigating evidence. And, indeed, because the lawyer did such a poor job investigating, some of the evidence that he did present actually harmed Andrus's case and helped the state. For example, Andrus's mother, whom the defense called as a witness, testified that Andrus's home life had been

"tranquil" and he had gotten involved in drugs on his own, without being impeached by her own drug sales or the $10,000 life-insurance policy that she could collect if Andrus were executed. All of the circumstances taken together, the court concluded, point in the direction of deficient performance by Andrus's lawyer. But, the court continued, it "is unclear" if the Texas Court of Criminal Appeals considered whether Andrus was prejudiced by his lawyer's poor performance (the second part of the *Strickland* test). While acknowledging the "tidal wave" of mitigating evidence, the Court remanded the case to the Court of Criminal Appeals so that it could address *Strickland*'s "prejudice" prong in the first instance.

Justice Alito dissented, arguing that the court's decision was "hard to take seriously" because the lower court had specifically concluded that Andrus had not shown that he was prejudiced by his counsel's poor performance.

Barr v. Lee, 140 S. Ct. 2590 (2020); Vacated and Remanded, 5-4.

Holding: The district court's order preliminarily enjoining executions of four federal prisoners is vacated.

Facts: Federal death-row inmates brought action against Attorney General and others, challenging the federal single-drug lethal injunction protocol, which used a single dose of pentobarbital sodium, under the Eighth Amendment.

Reasoning: In a per curiam opinion, the Court stressed that the inmates' Eighth Amendment claim "faces an exceedingly high bar." The Supreme Court, the opinion noted, "has yet to hold that a State's method of execution qualifies as cruel and unusual," in all likelihood because states have generally tried to make their methods of execution more humane, rather than more painful. And although the inmates have presented evidence suggesting that pentobarbital, the drug that the federal government has selected for its lethal-injection protocol, will cause the inmate to experience "a form of respiratory distress that temporarily produces the sensation of drowning or asphyxiation," the Government has countered that such a condition occurs only after the inmate has become unconscious or dies. The Court consequently concluded that the inmates had not shown that they are likely to succeed on that claim. "It is our responsibility," the Court said, "'to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously,' so that 'the question of capital punishment' can remain with 'the people and their representatives, not the courts, to resolve.'"

Justice Breyer dissented, contending that because "the resumption of federal executions promises to provide examples that illustrate the difficulties of administering the death penalty consistent with the Constitution . . .[,] the solution may be for this Court to directly examine the question whether the death penalty violates the Constitution. "

Justice Sotomayor also dissented, warning that the majority had set a "dangerous precedent" by granting the Government's request to allow the executions to proceed. In accepting the government's "artificial claim of urgency to truncate ordinary procedures of judicial review," Justice Sotomayor cautioned, "there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring to the way in which the Government plans to execute them."

VII. Habeas

Banister v. Davis, 140 S. Ct. 1698 (2020); Reversed and Remanded, 7-2.

Holding: 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) (AEDPA).

Facts: Almost twenty years ago, Gregory Banister struck and killed a bicyclist while driving. A Texas jury found him guilty of aggravated assault with a deadly weapon and he was sentenced to 30 years in prison. State courts upheld his conviction in direct appeal and in collateral proceedings. Banister then filed a habeas petition in federal court, raising many claims including constitutionally ineffective assistance of counsel. The district court ruled against him, and Banister filed a Rule 59(e) motion asking the court to alter its judgment. The court denied his motion, and Bannister appealed to the Fifth Circuit. The Fifth Circuit denied his appeal is untimely, stating that the appeal was a successive habeas petition because it attacked the district court's resolution of the issues on the merits. Unlike a Rule 59(e) motion, a successive habeas petition does not postpone the time available to file an appeal, so the clock started running from when the district court denied his petition, and Bannister's appeal was now late.

Reasoning: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides incarcerated people with one full opportunity to pursue federal habeas relief. § 2244 (b) the AEDPA generally filing second or successive habeas applications. The Court determined that § 2244 (b) of the

Antiterrorism and Effective Death Penalty Act (AEDPA) did not displace Rule 59(e) in federal habeas litigation. The Federal Rules of Civil Procedure generally govern habeas proceedings, but they give way to the extent that they are inconsistent with any habeas specific rules. Texas contended that AEDPA's limitation on successive habeas petitions conflicted with Rule 59(e)'s ordinary application. The Court explained that before AEDPA, "abuse-of-the-writ" principles nevertheless limited a petitioner's ability to file repetitive applications, but in only one case between the 1946 adoption of Rule 59(e) and the 1996 enactment of AEDPA did a court dismiss a Rule 59(e) motion as successive. The Court noted that AEDPA did not redefine what qualifies as a successive petition, and asserted that Rule 59(e), which gives a person a narrow, 28-day window for relief, did not contradict AEDPA's purpose of reducing delay and promoting finality. The Court distinguished this case from Gonzalez v. Crosby, 545 U.S. 524 (2005), which held that a Rule 60(b) motion was a successive application, stating that Rule 59(e) is quite different. Rule 60(b), unlike Rule 59(e), allows an attack of a judgment years after it is rendered. considered the meaning of "second or successive application." The court held that a Rule 59(e) motion is therefore part of the first habeas petition.

VIII. COVID-19 Regulations

South Bay United Pentecostal Church, et al. v. Newsom; Application for Injunctive Relief Denied, 5-4 (May 29, 2020).

Holding: COVID-19 orders that restrict religious gatherings and secular gatherings even handedly do not violate the Free Exercise Clause of the First Amendment.

Facts: California Governor Gavin Newsom issued a stay at home order that limited attendance at places of worship to 25% capacity or a maximum of 100 people. South Bay United typically holds multiple services each week with several hundred participants, and it sued to enjoin Newsom's order as a violation of the Free Exercise Clause.

Reasoning: Concurring in the denial of injunctive relief, Chief Justice Roberts reasoned that local officials are in the best position to make decisions related to public health in the wake of COVID-19. Because California limited places of worship but also limited places like restaurants and gyms, it did not impede on the Free Exercise rights of churchgoers.

Justice Kavanaugh wrote for the 4 dissenting justices who would grant the state's application for injunctive relief. argues that the limits imposed on churches by California's COVID-19 order Kavanaugh limits churches more severely than it limits secular gatherings. He argues that the state cannot limit churches in such a way without violating the Free Exercise Clause. Absent a compelling justification for California's treatment of churches, Justice Kavanaugh would grant the request for injunctive relief.

Roman Catholic Diocese of Brooklyn, New York v. Cuomo; Application for Injunctive Relief Granted, Per Curiam (November 25, 2020).

Holding: New York's COVID-19 order that limits attendance in places of worship without imposing similar restrictions on secular businesses violates the Free Exercise Clause.

Facts: Much like California in *South Bay United Pentecostal Church,* New York restricted in-person attendance at houses of worship to 25 people at most. Secular businesses could operate without capacity restrictions, though they were required to social distance patrons and frequently sanitize public spaces.

Reasoning: The Court granted relief because the Diocese showed a strong likelihood of success on the merits since New York's regulations were not neutral towards religion. Churches in "red zones" for COVID-19 could not admit more than 10 people to worship, but essential businesses in the same areas had no such limits.

Justice Gorsuch concurred, arguing that states had been given too much leeway to curtail religious freedoms in the name of responding to COVID-19. Since New York did not limit bike shops in the red zone, it also should not have limited places of worship. He also argues that *Jacobson v. Massachusetts* (1905) does not permit the court to apply rational basis review in cases such as this one. *Jacobson* challenged the state's requirement that individuals receive the smallpox vaccine or pay a fine, and the Court upheld the requirement applying what was essentially rational basis review. Here, *Jacobson* does not supplant the Court's precedent requiring states to present compelling justifications for curtailing religious rights under the Free Exercise Clause. There is no pandemic exception to the traditional First and Fourteenth Amendment analysis.

Justice Kavanaugh also concurred along the same grounds as his dissent in *South Bay United Pentecostal Church.* He noted the seriousness of the

pandemic, but he also noted that it did not provide a reason to violate the Constitution.

Chief Justice Roberts dissented, arguing that the Diocese's complaint was now moot since it is no longer in a red zone (and therefore no longer subject to the challenged restrictions). Chief Justice Roberts argues that he was not attempting to create a pandemic exception in in *South Bay United Pentecostal Church* (as Justice Gorsuch suggests) but rather was noting that the Court has a history of deferring to local officials in matters of health and safety.

Justice Sotomayor dissented as well, arguing that New York did not violate the Free Exercise Clause when it responded to the pandemic. She wrote to speak of the dangers of limiting states' abilities to respond to the pandemic. She argued that New York made key public health determinations about the risk of virus spread in places of worship where people congregate for long times and sing and speak versus places like bike shops where people merely pass through and are generally spreading droplets into the air. She also noted that the Court had rejected similar challenges like the one in *South Bay United Pentecostal Church*, and that there was no justification for departing from that decision now.