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A Pandemic Term With "Highly Charged Issues": The U.S. Supreme Court 2020-2021

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Abstract
The 2020-2021 U.S. Supreme Court Term was expected by experts to be uninteresting, but it proved to be quite the opposite. There were surprising unanimous decisions, and some unexpectedly "highly charged issues." Several of the decisions will be important to mental health professionals (foster care and the conflict of gay and religious rights, juvenile life sentences, and "community caretaking"), and to health care providers more generally (the Affordable Care Act, Pharmacy Benefit Managers, and COVID cases). Other decisions of general interest included immigration cases, election laws, and college athletics. Some of the most important cases arose in the "Shadow Dockets," an often-ignored series of orders by the Court. The article discusses the most important cases of the Term (including those in the Shadow Docket), analyzes the meaning of the Term, and looks to the cases to be decided next Term.

Key Words Supreme Court · Gay Rights · Immigration · Abortion · APA Amicus Briefs

Introduction

When the October Term 2020 was gaveled into electronic session by the Chief Justice at 10:00 AM on October 5, 2020, there were only eight justices participating. Justice Ginsburg had passed away during the summer and nominee Amy Coney Barrett was going through a contested confirmation process in the Senate. The country was locked in a divisive election, and locked down by a pandemic. The President had COVID, and there were many legal issues related to the response to the pandemic.

Some commentators were predicting that the Supreme Court would, or might, completely gut healthcare for millions by declaring the Affordable Care Act unconstitutional, decide the election on its own, and take a case to overturn *Roe v. Wade*. As the Term began in October, however, I wondered whether there would be enough interesting cases to discuss. Aside from a couple of high-profile matters, many of the others had technical questions only a lawyer could love. We were mostly wrong. There were no wild shifts in the Court, the voters (not the Court) decided the election, and the Term "was chock full of highly charged issues."[1]

Among the interesting cases were the following holdings or results:

- Philadelphia violated the First Amendment (regarding religion) when, because of Catholic Charities' objection to serving same-sex couples, the city prohibited that charity from participating in the city's foster program;[2]
- States may regulate Pharmacy Benefit Managers without violating federal statutes;[3]
- None of the states or others challenging the constitutionality of the Affordable Care Act had "standing" to bring the case, so the Court would not decide the ACA constitutionality issue;[4]
- The Court clarified the procedures lower courts must follow in order to sentence juveniles to life imprisonment without the possibility of parole;[5]
- The Court decided a large number of cases involving immigration, asylum, and deportation;
- The "community caretaking exception" is not a constitutionally recognized doctrine for allowing authorities to enter a home without permission, but in emergencies,

[1] Vincent Martin Bonventre, *Supreme Shift II: A Conservative Super-Majority Delivers a Decidedly Conservative Term,* New York State Bar Association Latest News (Aug. 3, 2021), https://nysba.org/supreme-shift-ii-a-conservative-super-majority-delivers-a-decidedly-conservative-term/.

[2] Fulton v. Philadelphia, decided June 17, 2021.

[3] Rutledge v. Pharmaceutical Care Management Assn., decided December 10, 2020.

[4] California v. Texas, decided June 17, 2021.

[5] Jones v. Mississippi, decided April 22, 2021.

general search and seizure principles may allow such entry;[6]
- The Court held that there may be liability for prison authorities who kept a prisoner in unsanitary and dangerous cells;[7]
- The Court also decided other cases related to COVID, student athletes, disciplining students for social media posts outside of school, and disclosure of donors or nonprofit organizations; and its "Shadow Docket" became a matter of concern.

This article examines cases of special significance to mental and other health practitioners, beginning with the case in which the mental health professions filed an *amicus* brief. We will then look at a variety of other decisions of interest. The article concludes with an analysis of the Term and look at likely cases for next Term.

Note: The endnotes for this article provide cases, citations to other materials, and explanations of some concepts discussed in the article. Please see a note at the end of this article explaining information about the citations.

Foster Care and Freedom of Religion

The American Psychological Association filed an *amicus curiae* brief in only one case[8] decided by the Court this Term—*Fulton v. Philadelphia*.[9] Catholic Social Services (CSS) was a foster care service provider in Philadelphia—one of many providers of such services. Part of its work was interviewing and certifying potential foster-parent applicants.

Because of religious beliefs, CSS did not process applications from same-sex couples to provide the foster care certification (although other service providers did so). Philadelphia determined that CSS's policy regarding same-sex couples violated the city's ordinance banning discrimination based on sexual orientation, so the city no longer allowed referrals to CSS. (The CSS policy related only to the same-sex couples seeking to be foster parents, not to the child being placed.) The city would renew its foster care contract only if the CSS agreed to certify same-sex couples. CSS filed suit saying that the Philadelphia policy violated the First Amendment's Free Exercise and Free Speech clauses.[10]

In a unanimous decision, the Court held that the Philadelphia policy did violate the Free Exercise clause of the Catholic Service. It forced CSS to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs."[11] It was a narrow decision. The Philadelphia ordinance permitted an exception to the nondiscrimination policy at the discretion of a city officer, but the "city made it clear that it had no intention of granting an exemption."[12] The Court was unanimous that under these circumstances, the city's policy discriminated against CSS because of its religious beliefs, subjecting that policy to "strict scrutiny." This required that the city have a "compelling reason" for its regulation, and that the regulation be "narrowly tailored" to meet legitimate goals.[13]

This limited decision was based on the fact that the city's law permitted waivers, but the city refused to use a waiver to accommodate CSS's religious beliefs. That, the Court found, created the problem.[14] Because the city offers exemptions, but refuses an exemption for religious beliefs, the city discriminates based on religion. Thus, it is likely that if Philadelphia simply removes the waiver provision from the ordinance, it will have (at least for the time being) removed what the Court found problematic in this case.[15]

The Real Constitutional Battle in the Case

Behind *Fulton* was a bigger issue of how the Court should deal with claims of religious discrimination. A case in

[6] Caniglia v. Strom, decided May 17, 2021.

[7] Taylor v. Riojas, decided November 2, 2020.

[8] Brief of the American Psychological Association, American Academy of Pediatrics, American Medical Association, and American Psychiatric Association as *Amici Curiae* in Fulton v. Philadelphia, https://www.apa.org/about/offices/ogc/amicus/fulton.pdf (Aug. 20, 2020).

[9] Fulton v. Philadelphia, decided June 17, 2021. The decision was unanimous. Chief Justice Roberts wrote for the Court. Justices Alito, Thomas, and Gorsuch wrote a concurring opinion, and did not join the opinion of the majority.

[10] The relevant parts of the First Amendment are: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…" This provision was later applied to the states (cities are included as state entities).

[11] *Id.*

[12] *Id.*at 7.

[13] The Court noted that the city's ability to grant exceptions to the regulations allowed Philadelphia "to consider the particular reasons for a person's conduct." Where a system of exceptions exists, "the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Id.*

[14] The city had never actually granted a waiver, but the very fact that it was willing to do so meant that it would have to be willing to do so for religious objections, unless there were a compelling reason not to do so. *Id.* at 6-8.

[15] In his concurring opinion, Justice Alito noted this problem. "This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started." Alito, concurring at 8.

1990 (referred to as the "*Smith* case"),[16] in an opinion written by Justice Scalia, held that laws of general applicability that do not target specific religious practices do not violate the First Amendment. This narrowed the religious protection of religion from previous cases and has been unsatisfactory to several Justices, many commentators, and Congress.[17] On the other hand, those who do not want to expand religious protections (or return them to pre-*Smith* days), do not want to see the *Smith* case reconsidered. The Court did not use the *Fulton* case to reconsider *Smith*, which accounts for the unanimity of the outcome and the concurring opinions. Only three justices accepted the narrow majority opinion without additional comment (Roberts, Sotomayor, and Kagan); three concurred with two of those suggesting *Smith* should be reconsidered, but were not sure what should replace it (Barrett and Kavanaugh, with Breyer joining only part of the concurrence); and three said *Smith* should be overturned in this case (Alito, Gorsuch, and Thomas).

The most interesting of the concurring opinions was Justice Alito's (joined by Justices Gorsuch and Thomas). At 77 pages, it was the longest opinion in the case,[18] and provided a virtual roadmap for anyone filing a brief to overturn *Smith* in a future case. By my count, at least three justices want to overturn *Smith* and return to a stronger protection of religious freedom, at least two and perhaps three (including Chief Justice Roberts) would likely overturn *Smith* or interpret it in a way that would somewhat increase religious freedom, and three would probably retain *Smith* in its current form. It is likely in the next two Terms the Court will directly consider whether to change the current standard for reviewing claims of religious discrimination.

The APA Amicus Brief

The American Psychological Association (APA) was the lead organization on an *amicus* brief in *Fulton*, joined by the American Academy of Pediatrics, the American Medical Association, and the American Psychiatric Association.[19] (*Amicus curiae* briefs are "friends of the court" briefs used to present information or arguments the parties themselves may not have discussed.) A great strength of the APA brief was that it did not simply recycle legal arguments the parties had made—a weakness of too many organizational *amicus* briefs.[20] Rather, it said, it intended to "provide the Court with a review of the pertinent scientific and professional literature regarding the need for laws … that protect sexual minorities in the public child welfare system from stigma-based discrimination."[21] It also told the Court that it was providing an "accurate summary of the current state of scientific and professional knowledge" relevant to the case (set out in the notes).[22]

The brief's top-level arguments were that sexual minorities experience stigma which is "manifest" in the foster system;[23] there is no scientific evidence that sexual minority parents are less fit;[24] sexual minority couples are likely to adopt and foster children;[25] and "the need for foster parents is great."[26] The brief explained these points in a cogent and concise way,[27] presenting many citations to support its points. Despite many strengths, it was not entirely clear how the *amicus* brief related to the issues the Court had to

[16] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U. S. 872 (1990).

[17] Shortly after the *Smith* decision, Congress adopted laws intended to increase the protection of religious beliefs. "In enacting the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (codified at 42 U. S. C. §2000bb et seq.), and the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (codified at 42 U. S. C. §2000cc et seq.), Congress tried to restore the constitutional rule in place before Smith was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps." Alito at 11, concurring.

[18] All of the other opinions and syllabus were only 33 pages more, for a total of 110 pages.

[19] Brief of the American Psychological Association, American Academy of Pediatrics, American Medical Association, and American Psychiatric Association as *Amici Curiae* in Fulton v. Philadelphia, https://www.apa.org/about/offices/ogc/amicus/fulton.pdf (Aug. 20, 2020). The APA has a considerable history of filing *amicus* briefs in the Supreme Court (as well as other courts). The APA's *amicus* program is very nicely described in Nathalie Gilfoyle & Joel A. Dvoskin, *APA's Amicus Curiae Program: Bringing Psychological Research to Judicial Decisions*, 72 American Psychologist 753 (2017), https://arts-sciences.und.edu/academics/psychology/_files/docs/article-2-gilfoyle-and-dvoskin-2017.pdf.

[20] The Supreme Court Rules (37.1) emphasize, "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."

[21] *APA Fulton Brief* at 3.

[22] "This brief presents an accurate summary of the current state of scientific and professional knowledge concerning sexual orientation and families relevant to this case. Amici have made a good faith effort to account for the findings of all reliable and valid empirical research available in these areas. Most of the empirical studies and literature reviews cited herein have been published in reputable, peer-reviewed academic journals. *Amici* have also cited sources not subject to the same peer-review standards as journal articles, provided that they employ rigorous methods, are authored by established researchers, and accurately reflect professional consensus about the current state of knowledge." *Id.* at 3, note 4.

[23] *Id.* at 4-14.

[24] *Id.* at 15-17.

[25] *Id.* at 18-26.

[26] *Id.* at 27-30.

[27] I assume the brief's claim is true that it is an "accurate summary of the current state of scientific and professional knowledge concerning sexual orientation and families relevant to this case."

decide—the extent to which the Philadelphia law abridged the religious rights of the Catholic Charity to decline to certify same-sex couples. Notably, it was not clear that stigma, discrimination, and the adequacy of same-sex parents were in doubt in the case.

One other positive element of the brief might be a model for other scientific *amici.* The brief was "in support of [Philadelphia]."[28] but unlike the parties, an *amicus* brief is free to (and a brief claiming to be a fair review of science *should*) present evidence that might cut against its favored party. The APA brief argued (as noted above) that "the need for foster parents is great," and it presented data to that effect.[29] This might suggest that removing an agency with significant foster placements would be harmful by reducing the total number of foster services in Philadelphia,[30] especially since other agencies were certifying same-sex foster couples in Philadelphia.[31]

The APA brief was not cited by any of the opinions (indeed, most *amicus* briefs are not cited by the Court).[32] The APA's brief may provide helpful information to other courts that have other issues related to foster youth, child rearing by same-sex couples, and similar issues. In the meantime, the Supreme Court is likely to have the basic religious freedom issue before it in the next Term or two.

Pharmacy Benefit Managers

Pharmacy benefit managers (PBMs) are among the most important, if often unnoticed, aspects of the delivery of prescription drugs in America. They are essentially the "intermediaries" between health insurance companies and patients, and pharmaceutical companies and pharmacies. They play a critical role in determining the formularies (list of drugs covered by insurance), purchasing and pricing from pharmaceutical companies, and payments to pharmacies. These are not small operations. Some of the largest PBMs are said to have higher revenues than the large pharmaceutical companies. (The three largest PBMs, Express Scripts, CVS, and UnitedHealth-OptumRx) probably have about 75% of the PBM market. They can, and sometimes do, engage in practices that increase their profits but are not in the interest of patients and pharmacies.

PBMs have attracted the attention of regulators. In addition to some federal regulation, there are increasing numbers of state regulations aimed at curbing what states see as market failures or abuses. This Term the PBMs asked the Supreme Court to protect them from state regulation. At issue was an Arkansas law (and a similar Iowa law) that sought to protect local pharmacies from PBM pricing practices. Because of their size and access to most pharmaceutical insurance reimbursement, they can simply tell pharmacies how much they will reimburse the pharmacy in filling a prescription for a particular drug. In some instances, PBMs will set a reimbursement price that is lower than the wholesale price at which local pharmacies can purchase the drug. The state laws in *Rutledge v. Pharmaceutical Care Management Association* required PBMS to reimburse pharmacies in the state at or above a pharmacy's wholesale cost.[33] The medical profession, by way of an American Medical Association *amicus* brief, weighed in on the side of Arkansas and community pharmacies (described in the notes).[34]

A favorite attack on state regulation of health benefits has been the Employee Retirement Income Security Act of 1974 (ERISA).[35] This is a complex act, but the relevant part of it preempts state law that "relate to" fringe benefit plans. States have the authority to regulate insurance, but ERISA limits what they can do when the insurance relates to fringe benefits. The Court unanimously held that ERISA does not preempt the Arkansas law, or similar state laws. It noted that the state law does not apply only to fringe benefit plans, nor does it unduly interfere with the central administration of benefit plans.[36] Because the state law was not preempted by the state law, the Arkansas regulation was upheld.

The unanimity and clear ruling in favor of the state regulation may be good news for states that wish to regulate

[28] *Id.* Front cover, "as *amici curiae* in support of respondents" [Philadelphia].

[29] *Id.* at 27-30.

[30] Again, it is not clear it is relevant in this case, but given the rest of the *amicus* brief, it is commendable that it included this section.

[31] The Court's opinion seemed to make this point too. "If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents." *Fulton* at 14.

[32] Mark Walsh, *When the Supreme Court Cites Your Amicus Brief*, ABA J. (Aug. 26, 2021), https://www.abajournal.com/web/article/when-the-supreme-court-cites-your-amicus-brief?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[33] Rutledge v. Pharmaceutical Care Management Assn., decided December 10, 2020. This was an 8-0 decision (Justice Barrett was not on the Court when the case was heard). Justice Sotomayor wrote for the Court. Justice Thomas joined the majority but wrote a concurring opinion to express doubts about the ongoing ERISA preemption jurisprudence.

[34] Brief of the American Medical Association, The Arkansas Medical Society, and The Litigation Center of the American Medical Association and the State Medical Societies as *Amici Curiae* in Support of Petitioner in Rutledge v. Pharmaceutical Care Management Assn. (March 2, 2020), https://www.supremecourt.gov/DocketPDF/18/18-540/134670/20200302163622018_Rutledge%20v.%20PCMA%20Amicus%20Brief%20of%20AMA%20et%20al.pdf. The brief essentially made the legal arguments in the case, generally those already made by the parties in their briefs. The brief was not cited in the decisions of the Court.

[35] 29 U. S. C. §1144.

[36] *Rutledge* at 4-9.

some of the practices of PBMs that have created complaints from consumers and pharmacies. Of course, the federal government is free to adopt regulations as well.

Mental health professionals will likely be interested in these developments not only because they are consumers, but also because what PBMs do will affect many of their patients—including those prescribed psychotropic medications. Of course, those with prescribing privileges have an even more direct interest in the future of these regulations.

Affordable Care Act—Still Again

In 2012 the Supreme Court upheld the Affordable Care Act's individual mandate as a "tax," while converting the mandatory state Medicaid expansion to discretionary expansion.[37] In 2015, the Court interpreted "state" to include the federal government for the purpose of subsidies in the insurance exchanges.[38] This Term the ACA was back before the Court, yet again.

In 2017, Congress eliminated the penalty for individuals not purchasing health insurance coverage—thus reducing to zero what the Court earlier had described as a "tax." Texas and several other states argued that if there is now a zero tax, then the centerpiece of the ACA, the individual mandate, had been repealed, essentially meaning that the whole act is now unconstitutional.[39]

There was considerable political discussion in the recent presidential election claiming this case might destroy the ACA, making *California v. Texas* one of the most anticipated cases of the Term. The technical basis for the Court's 7-2 decision (written by Justice Breyer) was that Texas and the other states did not have "standing." [40] That is, they did not have a legally recognized direct interest in the case that was sufficient to allow it to bring the case. Justices Alito and Gorsuch dissented in a biting description of the Court's ACA cases.[41] Justice Thomas, one of the most vociferous critics of the Court's earlier ACA opinions, wrote a concurring opinion to agree with Justice Alito's description of the first two decisions, but suggesting that in the current case, Texas did not have standing.

The American Psychiatric Association joined the American Medical Association and many other medical groups in an *amicus* brief.[42] The core of its argument was that even if the Court found, as Texas requested, that the zero-penalty individual mandate with zero was no longer a tax and therefore unconstitutional, it should sever that provision from the rest of the Act, thereby preserving the remainder of the Act. Of course, given the absence of standing, the Court did not consider those issues.

With Congress essentially removing the individual mandate, and the Supreme Court making state Medicaid expansion voluntary, the most unpopular aspects of the ACA were modified. It is not clear that anyone will have standing to raise the claims Texas was raising or to address most any other existential threats to the remaining ACA. Furthermore, given the propensity in recent years to sever unconstitutional provisions rather than strike down an entire statute, it is highly unlikely that the Court would do more than strike down a specific provision of the ACA if it found it unconstitutional. It may be that this is the last ACA case the Court will hear.

[37] National Federation of Independent Business v. Sebelius, 567 U. S. 519 (2012).

[38] King v. Burwell, 576 U. S. 473 (2015).

[39] Essentially, the argument was that if the individual mandate was the centerpiece of the ACA, that mandate was now gone and the rest of the ACA could not be severed from the individual mandate.

[40] California v. Texas, decided June 17, 2021. This was a 7-2 decision, with Justice Breyer writing for the Court. Justices Alito and Gorsuch dissented. This case also goes by "Texas v. California." Because the administration did not defend the case, California and some other states were permitted to defend it.

[41] "Today's decision is the third installment in our epic Affordable Care Act trilogy, and it follows the same pattern as installments one and two. In all three episodes, with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue. [In the first episode the Court had saved the ACA and individual mandate by holding the penalty for not purchasing insurance was a tax.] 84–498. Now, in the trilogy's third episode, the Court is presented with the daunting problem of a 'tax' that does not tax. Can the taxing power, which saved the day in the first episode, sustain such a curious creature?" Alito, dissenting at 1-2.

[42] Brief of *Amici Curiae* American Medical Association, American Academy of Allergy, Asthma and Immunology, Aerospace Medical Association, American Academy of Family Physicians, American Academy of Pediatrics, American College of Cardiology, American College of Emergency Physicians, American College of Medical Genetics and Genomics, American College of Obstetricians and Gynecologists, American College of Physicians, American College of Radiation Oncology, American College of Radiology, American Psychiatric Association, American Society of Gastrointestinal Endoscopy, American Society of Hematology, American Society of Metabolic and Bariatric Surgery, Endocrine Society, GLMA: Health Professionals Advancing LGBTQ Equality, Renal Physicians Association, Society for Cardiovascular Angiography and Interventions, Society of Interventional Radiology in Support of Petitioners, in California v. Texas (May 13, 2020), https://www.supremecourt.gov/DocketPDF/19/19-840/143469/20200513150051995_19-840%20Amici%20Brief%20AMA.pdf.

Juvenile Life Sentences and Other Sentencing Decisions

In *Miller v. Alabama*, the Supreme Court limited the ability of states to sentence defendants under 18, who are convicted of murder, to life without parole.[43] It based the decision on the Eighth Amendment's prohibition on cruel and unusual punishment. The decision meant that mandatory life without parole sentences were precluded, and that the sentencer had to have the option of sentencing the defendant under 18 to a lesser punishment. It suggested that "a lifetime in prison is a disproportionate sentence for all but the rarest children whose crimes reflect 'irreparable corruption.'"[44]

This Term the Court, in *Jones v. Mississippi,* was called upon to decide what findings a trial court must make before imposing a no possibility of parole sentence. In a 6-3 decision, the Court determined that a sentencing hearing is required at which the sentencing judge has the discretion to impose a lighter (possibility of parole) sentence.[45] However, the sentencing judge is not required to make a separate factual finding of permanent incorrigibility. Nor is it required that the judge record an explanation of the determination of incorrigibility before imposing the sentence. Three justices strongly dissented.[46] They expressed the view that the earlier cases are inconsistent with the majority's relative informality of process and findings.

Mental health professionals are commonly involved in sentencing hearings for juveniles in homicide cases. This case will not change that, and sentencing judges will have the discretion not to impose a no-parole life sentence. Sentencing judges, however, will be under less pressure to explain disagreements with mental health professionals than they would have had if the *Jones* case had required formal findings from the judges. Knowing that judges have the discretion to impose a lighter sentence, however, emphasizes the importance of thoughtful and useable reports in juvenile homicide cases.

Other Sentencing Decisions

Armed Career Criminal Act

The Court is frequently called to decided cases under the federal Armed Career Criminal Act (ACCA), and this Term was no exception. The ACCA is a "fourth strike" law that substantially increases the sentence for a defendant found guilty of illegally possessing a firearm who has three or more prior convictions for a "violent felony." This Term, in *Borden v. United States*, the Court held that a crime in which the mental state (*mens rea*) requirement is "recklessness" does not count as a violent felony.[47] That is, crimes with recklessness *mens rea* do not count as a "strike" under ACCA.[48]

Crack Cocaine Sentence Reductions

The Court unanimously held that defendants who had been convicted of low-level crack-cocaine crimes were not eligible for retroactive sentence reductions under the Fair Sentencing and First Step Acts that reduced the disparity between power and crack cocaine. Because of a quirk (probably the result of sloppy drafting), the law Congress passed reduced the sentences for possession of moderate and large amounts of crack, but did not reduce sentences for possession of small amounts of crack.[49] Congress can, and probably will, solve the problem by passing an amended statute.

Death Penalty Cases

In recent Terms, a large number of death penalty cases have badly split the Court. This Term the Court reinstated an Arizona death sentence that the Ninth Circuit (because of ineffective assistance of counsel at the sentencing stage, described in the notes)[50] had overturned. In the 6-3 decision the Court held the Ninth Circuit had misapplied federal law

[43] Miller v. Alabama, 567 U. S. 460 (2012).

[44] Montgomery v. Louisiana, 577 U.S. 190, 195 (2016) (*Montgomery* made *Miller* retroactive).

[45] Jones v. Mississippi, decided April 22, 2021, was a 6-3 decision. Justice Kavanaugh wrote for the majority.

[46] Justice Sotomayor, dissenting, joined by Justices Breyer and Kagan.

[47] Borden v. United States, decided June 10, 2021. Justice Kagan wrote for the four-justice plurality. Justice Thomas, the fifth and deciding vote, did not join the Kagan opinion. Justice Kavanaugh wrote a dissenting opinion, joined by Chief Justice Roberts, and Justices Alito and Barrett.

[48] *Id.* (combining the majority and concurring votes).

[49] Terry v. United States, decided June 14. It was a unanimous decision, written by Justice Thomas. Justice Sotomayor wrote a concurring opinion calling on Congress to correct the apparent error.

[50] Shinn v. Kayer, decided December 14, 2020. The opinion was *per curiam,* meaning written for the Court, but not attributed to a specific justice. Three justices announced their dissent (Justices Breyer, Kagan, and Sotomayor), but did not write an opinion describing the basis for the dissent. The Court granted *certiorari* and vacated the judgment of the Ninth Circuit without oral argument. The Circuit has been known for not adhering very closely to Supreme Court precedents.

In this *Shinn* case the defendant, George Kayer, murdered the victim to rob him. He had previously been convicted of first-degree murder and used murder of **[for?]**"pecuniary gain," and, therefore, qualified for the death penalty in Arizona, which the judge imposed. He did not cooperate with his attorney's requests to delay sentencing. The state courts denied his appeals and the sought *habeas corpus* relief in federal court. The Supreme Court denied the writ of *habeas corpus,* holding that the state courts had done a fair job reviewing his case.

that gives deference to state court reviews in post-conviction cases.[51]

A number of death penalty decisions this Term are reflected only in the "Shadow Docket" (which is discussed more generally later in this article). The federal government again began carrying out executions in July 2020, which resulted in a number of requests for federal courts to stay the execution of specific individuals. In addition, many states have the death penalty and several of them conduct executions fairly regularly. Within the Court, there is a substantial division about almost all capital case issues. During the current Term, however, almost all the decisions went against delays or additional reconsideration of issues raised by defendants. Three justices have dissented from denial of petitions for *certiorari*, lifting lower courts' stays that were delaying execution. Justice Sotomayor has been the most frequent dissenter (or writer of special statements) in those cases, with Justices Breyer and Kagan less often.

The capital cases in the Shadow Docket dealt four kinds of issues (the cases mentioned below are set out in greater detail in the Notes). One type of issue involved the rule that mentally incompetent defendants should not be subject to execution.[52] Another was that the defendant may have been improperly convicted or sentenced to death, such that the issue should be reexamined.[53] A third kind of case involved the method of execution. In one case, an inmate who had COVID claimed the lethal injection would be especially painful,[54] and in another, the defendant argued that a brain operation created a risk of painful seizures.[55] In yet another, Justice Sotomayor raised the issue of how much pain is permissible in a specific method of execution.[56] Finally, there was a case in which the state had banned a prisoner's religious advisor from the execution, and the Court upheld the Circuit Court's prohibition on the execution until the state provided a way to allow the spiritual advisor to be present.[57]

Immigration Cases

The Court decided a large number of immigration cases this Term—nearly fifteen percent of the total cases. Immigration and naturalization statutes and regulations are complex, and many of them afford considerable administrative discretion. Furthermore, millions of persons already present in this country are subject to these rules, while each year more than a million are seeking to enter, legally or otherwise." They range from first-time asylum-seekers and refugees, drug smugglers, students, criminals, workers, repeat deportees, and visitors. They may be families, adult individuals, or unaccompanied minors. Each of these may fit in a different legal category. It is not surprising, therefore, that there are many legal issues each year. Although a significant number of those people have legal problems, and perhaps mental health issues (e.g., related to the trauma preceding seeking asylum), a relatively small percentage will have access to legal or mental health services.

In light of the current interest in immigration, it is worth taking a brief review of this Term's immigration cases. In two cases the Court unanimously made it more difficult for asylum seekers to establish credibility of their testimony—a

[51] Federal law limits the ability of federal courts to overturn state judgments in *habeas corpus* petitions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2254(d), provides that where a state court "has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal *habeas* court may not disturb the state court's decision unless its error lies "beyond any possibility for fairminded disagreement." (*Shinn* at 4.)

[52] Bourgeois v. Watson, decided December 11, 2020. The Court declined to stay the execution. Justices Sotomayor and Kagan dissented. The dissenters noted that the Federal Death Penalty Act states "a sentence of death shall not be carried out upon a person who is mentally retarded." 18 U. S. C. §3596(c) (FDPA) "The Court today allows the execution of Alfred Bourgeois to proceed even though Bourgeois, who has an IQ between 70 and 75, argues that he is intellectually disabled under current clinical standards. I would grant his petition to address whether the FDPA prohibits his execution." *Id, at 1*.

[53] Bernard v. United States, decided December 10, 2020. Justices Breyer, Kagan, and Sotomayor dissented from the denial of a stay. Justice Sotomayor suggested that the defendant had made "troubling allegations that the Government secured his death sentence by withholding exculpatory evidence and knowingly eliciting false testimony against him." In another case, Whatley v. Warden, Georgia Diagnostic and Classification Prison, Justice Sotomayor objected to the denial of *cert.* in a case in which, during a capital sentence hearing, the defendant was required to go through a bizarre reenactment of the killing of the victim. *Whatley* was decided April 19, 2021. Justice Sotomayor dissented.

[54] United States v. Higgs, decided January 15, 2021. The Court lifted a stay that was preventing the federal government from proceeding with the execution. Justices Sotomayor, Breyer, and Kagan dissented.

[55] Johnson v. Precythe, decided May 24, 2021. Justices Breyer, Kagan, and Sotomayor dissented in two opinions.

[56] Henness v. DeWine, decided October 5, 2020. Justice Sotomayor wrote a statement to "address the Sixth Circuit's novel and unsupported conclusion that pain is constitutionally tolerable so long as it is no worse than the suffering caused by a botched hanging."

[57] Dunn v. Smith, decided February 11, 2021. Justices Kagan, Sotomayor, Breyer, and Barrett were in the majority (requiring the state to allow the spiritual advisor), and Chief Justice Roberts, and Justices Kavanaugh and Thomas disagreed. It is unclear how Justices Alito and Gorsuch voted, but at least one of them had to vote with the majority. On a practical level, Justice Kavanaugh, joined by Chief Justice Roberts, suggested, "States that want to avoid months or years of litigation delays because of this RLUIPA issue should figure out a way to allow spiritual advisors into the execution room, as other States and the Federal Government have done." Justice Kavanaugh, *dissenting* at 2.

critical issue in such cases—when they appeal to the Board of Immigration Appeals.[58]

Temporary Protected Status permits foreign nationals to remain the U.S. while there are unsafe conditions in their home countries. They may sometimes seek a green card toward lawful status ("adjustment of status"). This Term the Court held unanimously that the statute allows that adjustment only if persons were lawfully admitted to the U.S. at the border; it does not apply if they entered the country without authorization.[59]

Long-time immigrants who entered the U.S. without legal authorization may apply for relief from deportation based on the harm deportation would do to family members who are lawfully in the U.S. This relief is not available if the deportable person has been convicted of a crime of moral turpitude. In *Pereida v. Wilkinson* the Court held that the statute provides that applicants for the relief have the burden of proving that they have not been convicted of a disqualifying crime.[60]

Federal law provides that noncitizens who have been removed from the U.S., but are again found back in the country (without legal authorization), should be removed without delay. That swift removal usually happens. In some cases, however, the noncitizen argues that deportation might result in their persecution (e.g., torture), and this generally involves a hearing. The Court held in *Johnson v. Guzman Chavez* that in those cases the noncitizen is not entitled to bail.[61] In another case of prior removal, a foreign national living in the U.S. in 1988 was removed as a result of a DUI conviction. At the time DUI considered to be a "violent felony." In 2017, he was again in the U.S. and indicted on the crime of "reentry upon removal." In defense, he argued that DUIs were determined not to be violent felonies (in another case decided after his first removal), so his prior removal was invalid. The Supreme Court unanimously rejected that claim, and said he could be convicted of the reentry violation.[62]

In a decision that favors those who are subject to removal hearings, the Court held that the official notice of the hearing must be in a single notice of the hearing, not a series of partial notices.[63] The ruling has the practical effect of making some of those who received flawed notices eligible to avoid removal.

At the end of the Term the Court removed from its docket a case that challenged the "remain in Mexico" policy (officially, the "Migrant Protection Protocols") in which some people seeking asylum in the U.S. stayed in Mexico pending the hearing on their case. The Court dismissed the case because the Biden administration said it was ending the practice.[64] A few weeks later, however, a district court, affirmed by the Fifth Circuit, found that the Biden Administration's policy of ending "remain in Mexico" violated the Administrative Procedures Act. On August 22, 2021, the Court did not overturn the lower courts' orders,[65] thereby requiring that the Biden administration reinstate, at least for now, the "remain in Mexico" policy.[66]

"Community Caretaking" Exception

Some police and social services agencies have traditionally understood that there is a "community caretaking" provision that permits warrantless entry, and sometimes searches, of homes to provide necessary support or assistance to

[58] Garland v. Ming Dai, decided June 1, 2021. This was a unanimous decision. Justice Gorsuch wrote for the Court. The case was combined with Garland v. Alcaraz-Enrique, which raised similar issues.

[59] Sanchez v. Mayorkas, decided June 7, 2021. Justice Kagan wrote for a unanimous Court.

[60] Pereida v. Wilkinson, decided March 4, 2021. This was a 5-3 decision (Justice Barrett took no part in the case). Justice Gorsuch wrote for the majority. Justices Breyer, Sotomayor, and Kagan dissented.

[61] Johnson v. Guzman Chavez, decided June 29, 2021. This was a 6-3 decision, with Justice writing for the majority. Justices Breyer, Sotomayor, and Kagan dissented. There was a remarkable battle over a footnote, as the announcement of the decision indicates: "ALITO, J., delivered the opinion of the Court, except as to footnote 4. ROBERTS, C. J., and KAVANAUGH and BARRETT, JJ., joined that opinion in full. THOMAS, J., filed an opinion concurring except for footnote 4 and concurring in the judgment, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined." Footnote 4 is fairly straightforward; "We have jurisdiction to review the decision below. See Jennings v. Rodriguez, 583 U. S. ___, ___–___ (2018) (plurality opinion) (slip op., at 8–11)."

[62] United States v. Palomar-Santiago, decided May 24, 2021. Justice Sotomayor delivered the opinion for a unanimous Court.

[63] Niz-Chavez v. Garland, decided April 29, 2021. This was a 6-3 decision. Justice Gorsuch wrote for the Court. Chief Justice Roberts, and Justices Kavanaugh and Alito dissented.

[64] Mayorkas v. Innovation Law Lab, reported on SCOTUSblog.com as of June 21, 2021: "The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction. See United States v. Munsingwear, Inc., 340 U. S. 36 (1950)."

[65] Biden v. Texas, Order in Pending Case, 21A21 (Aug. 24, 2021), https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf. The lower courts cited last Term's case, Homeland Security v. University of California (2020), https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf, in which the Supreme Court ordered the Trump Administration to continue the DACA program, because it had violated the Administrative Procedures Act in stopping that program.

[66] Amy Howe, *Court Won't Block Order Requiring Reinstatement of "Remain in Mexico" Policy*, SCOTUSBLOG (Aug. 24, 2021), https://www.scotusblog.com/2021/08/court-wont-block-order-requiring-reinstatement-of-remain-in-mexico-policy/.

members of the community.[67] The community caretaking function became, in effect, a "stand-alone doctrine that justifies warrantless [entry] and searches and seizures in the home."[68]

In *Caniglia v. Strom,* the police, believing Caniglia might be suicidal, spoke with him at his home. Caniglia agreed to go to a hospital for a psychiatric evaluation, but only if the police agreed not to take his firearms, which they promised not to do so. When Caniglia was gone, however, the police entered the house and took the guns. Caniglia later sued, claiming the police violated the Fourth Amendment in entering the house and taking the guns without a warrant. The police had essentially used "community caretaking" as the legal basis for the action.

The Court unanimously held that different search and seizure rules apply to the home compared with an automobile (automobile searches were where "community caretaking" language had arisen). Therefore, the police could not rely on a general "community caretaking" standard to justify their actions in the home, as opposed to a car. The police will have to establish the reasonableness of entering the home and seizing material—in this case firearms.[69]

Five justices in three concurring opinions emphasized that there are caretaker-like functions that the authorities may undertake to prevent violence, restore order, and provide assistance to those seriously injured or threatened with injury.[70] Justice Alito noted that "every state has laws allowing emergency seizures for psychiatric treatment, observation, or stabilization."[71] Justice Kavanaugh, also concurring, wrote that in his view, "the Court's exigency precedents … permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."[72] In a separate case, Justice Kavanaugh emphasized that *Caniglia* did not change the Court's longstanding holdings allowing "officers to enter a home without a warrant when officers reasonably believe that an occupant is threatened with serious injury."[73]

Although these comments generally refer to "police," they also apply to other state agencies entering a home or seizing property. Social service agencies should review their policies in light of the *Caniglia* decision to ensure that they are within the bounds of the community necessity and Fourth Amendment reasonableness standards the Court discussed. Relying on the protection of a specific "community caretaking" exception is no longer viable. Where exigent circumstances preclude obtaining a warrant, the process, procedures, and careful recordkeeping for home entry (and related searches or seizures) should be carefully set out and implemented by government agencies.

Other Search and Seizure Cases

The Court decided two other significant search and seizure cases this Term.

The Case of the Fleeing Misdemeanant

The Court has held that when officers are in "hot pursuit" of a *felony* suspect, they can generally pursue and arrest the person, even enter the home of the suspect (without a warrant) if the suspect flees there.[74] The question in *Lange v. California* was whether an officer can similarly pursue a *misdemeanor* suspect. In this case, Lange was reasonably suspected of DUI and an officer tried to stop him, but Lange drove to his nearby home and entered the attached garage. The officer followed him into the garage, examined him, and arrested him on a DUI misdemeanor. The question then became whether this was an illegal search and seizure.[75]

[67] Caniglia v. Strom, decided May 17, 2021. This was a unanimous decision, with Justice Thomas writing for the Court. There were three concurring opinions, all of which addressed the "community caretaking functions." The confusion about a community caretaking exception to the warrant requirement arose from a 1973 case, in which the Supreme Court noted that on public highways, police are often called upon to undertake noncriminal "community caretaking functions." Public highways, however, are substantially different for search and seizure purposes than homes are. That difference was at the core of the *Caniglia* case.

[68] *Id.* at 1.

[69] *Id.* at 2-4.

[70] Chief Justice Roberts and Justice Breyer, concurring at 1.

[71] Justice Alito, concurring at 2. Justice Alito also noted that the problem of the elderly person who had not been seen and might have had an incapacitating event, as an example of uninvited entry that deserves some consideration.

[72] Kavanaugh, concurring, at 3-4. He goes on to say, "The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter."

[73] Sanders v. United States, decided June 1, 2021. This "Shadow Docket" case was an instruction to a lower court to reconsider its earlier ruling in light of Caniglia v. Strom. Justice Kavanaugh concurred to make a point of the fact that the Court has long said that police officers may enter a home without a warrant if they have an "objectively reasonable basis for believing that an occupant [is] seriously injured or threatened with such injury." Justice Kavanaugh, concurring at 3.

[74] United States v. Santana, 427 U. S. 38 (1976)

[75] Lange v. California, decided June 23, 2021. Justice Kagan wrote for the Court. The Court agreed on the outcome of the case, but was split on some of the particulars, as the official description of the opinions reveals: "KAGAN, J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined, and in which THOMAS, J., joined as

The Court held that pursuing a fleeing misdemeanor suspect does not always justify a warrantless entry into the home. Rather, it requires a "case-by-case assessment of exigency when deciding whether a suspected misdemeanant's flight justifies a warrantless home entry."[76] Misdemeanors have a range of seriousness and the ability to destroy evidence varies, so what is a reasonable search is not subject to a bright-line rule.

Is Shooting a Seizure?

Two officers approached a car driven by Roxanne Torres. When they tried to speak with her, she drove away. The officers, saying they feared for their safety, shot at the car, injuring Torres, but she drove off.[77] Torres sued the officers, claiming that the shooting constituted an unreasonable seizure under the Fourth Amendment.[78] Thus, the question in *Torres v. Madrid* was whether this was a seizure—even though she was not successfully seized, she drove off.[79]

The majority of the Court held that "seizure" requires the use of force with intent to restrain.[80] Using this standard, the Court concluded that "the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her."[81] The majority's decision does not determine that the officers are liable to Torres. Liability will depend on the reasonableness of the seizure and the officers' qualified immunity. Which brings us to the issue of official immunity.

Public Officials' Liability and Immunity

The murder of George Floyd by state officers and subsequent events has placed a spotlight on both criminal liability and civil liability for violation of constitutional and other fundamental rights. (For legal purposes, city officers are state officers.) Both state and federal public officials (or jurisdictions) can be liable for violating these rights. In the case of state officials, there is a federal statute (42 U.S.C. §1983) that provides for liability for violating federal rights while acting under "color of state law."[82] As we saw in the *Torres* case, Ms. Torres was suing state officials under §1983 for "seizing" her in violation of the Fourth Amendment.

For federal officials, there is no similar statutory provision, but the Court has implied a right to sue federal officials for constitutional violations (commonly known as "*Bivens* actions").[83] Both federal and state officials (in §1983 and

Footnote 75 (continued)

to all but Part II–A. KAVANAUGH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which KAVANAUGH, J., joined as to Part II. ROBERTS, C. J., filed an opinion concurring in the judgment, in which ALITO, J., joined."

[76] *Id.* at 3-9.

[77] Torres v. Madrid, decided March 25, 2021. This was a 5-3 decision (Justice Barrett did not participate in the case). Chief Justice Roberts wrote for the majority. Justices Thomas, Alito, and Gorsuch dissented.

[78] The lawsuit was based on 42 U. S. C. §1983 (deprivation of constitutional rights by persons acting under color of state law).

[79] What followed next is extraordinary. "Steering with her right arm, Torres accelerated through the fusillade of bullets, exited the apartment complex, drove a short distance, and stopped in a parking lot. After asking a bystander to report an attempted carjacking, Torres stole a Kia Soul that happened to be idling nearby and drove 75 miles to Grants, New Mexico. The good news for Torres was that the hospital in Grants was able to airlift her to another hospital where she could receive appropriate care. The bad news was that the hospital was back in Albuquerque, where the police arrested her the next day. She pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle." *Torres* at 2.

[80] The dissenting justices strongly disagree with this conclusion. Justice Gorsuch, writing for the three dissenters, said that the majority justices "disregard the Constitution's original and ordinary meaning, dispense with our conventional interpretive rules, and bypass the main currents of the common law. Unable to rely on any of these traditional sources of authority, the majority is left to lean on (really, repurpose) an abusive and long-abandoned English debt-collection practice. But there is a reason why, in two centuries filled with litigation over the Fourth Amendment's meaning, this Court has never before adopted the majority's definition of a 'seizure.' Neither the Constitution nor common sense can sustain it." Gorsuch, dissenting, at 1.

[81] *Torres* majority opinion, at 10-11.

[82] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. §1983.

[83] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). Some federal statutes specifically provide for federal government liability, and those express liability provisions generally pre-

Bivens cases) have a "qualified immunity," and it is this immunity that is most commonly disputed. Essentially the qualified immunity means that there is not liability for the action of a state official unless the law is "clearly established" in a way that gives officials "clear warning" that their acts are unconstitutional.[84]

Taylor v. Riojas, decided this Term, provides a vivid example of §1983 liability.[85] *Taylor* involved an inmate incarcerated in Texas. He was placed in two cells in terrible conditions that the Court called "shockingly unsanitary" and very cold in one case (described in the notes).[86] He brought a §1983 action against the correctional officers. The Fifth Circuit held that these conditions violated the Eighth Amendment (cruel and unusual punishment), but that the officers had a qualified immunity defense because the law was not clear that prisoners could not constitutionally be treated this way. The Supreme Court granted *certiorari* and, without oral arguments or briefing, vacated the judgment and remanded it to the Fifth Circuit. It was clear that the conditions as described in the jail cells were so bad that they could not have been consistent with the Eighth Amendment.

In another case this Term, a prisoner in jail became violent and repeatedly lashed out at police with punches and kicks.[87] He was eventually restrained with handcuffs (behind his back) and leg irons. He was placed on his stomach with pressure on his back and torso. After 15 minutes, he experienced abnormal breathing and stopped moving. He was pronounced dead. His parents subsequently sued based on excessive force, and the lower courts dismissed the case based on qualified immunity (the district court) or there was not excessive force used under the circumstances (the appeals court). In a 6-3 decision, the Court remanded the case for additional consideration by the appeals court, without deciding whether the officers used unconstitutional excessive force.

In addition to the possibility of damages against officials for violating an individual's rights through §1983, this Term demonstrated two other mechanisms for damages for the misconduct of federal officers. The first of those is that a number of federal laws now provide officials may be sued for misconduct that harms someone. This Term the Court was called upon to determine whether the Religious Freedom Restoration Act of 1993 (RFRA) permitted such damages. In *Tanzin v. Tanvir,* practicing Muslims claimed that FBI agents "placed them on the Do Not Fly List in retaliation for their refusal to act as informants against their religious community."[88] The Court held that RFRA does give someone whose religious liberties have been unlawfully abridged the right to seek "appropriate relief" including money damages.[89] Thus, there is a private right of action against government officials who violate RFRA.

Finally, a traditional (since 1946) way to seek money damages for the negligence of agents of the federal government was addressed by the Court this Term. It is the Federal Tort Claims Act (FTCA).[90] The act permits lawsuits against the federal government for certain torts committed by federal officials. These claims are usually based on the tort law of the state in which the conduct occurred.[91] For example, if a physician or mental health professional working in a federal facility commits malpractice, the federal government may be sued through FTCA for that harm. This Term, the Court heard a FTCA case brought by James King who had a violent encounter with officers in a federal task force. They mistook King for a fugitive.[92] Sadly from King's standpoint,

Footnote 83 (continued)

clude *Bivens* implied liability actions. *Bivens* is controversial because the liability was imposed by the Court, not by Congress.

[84] Brosseau v. Haugen, 543 U.S. 194 (2004); Hope v. Pelzer, 536 U.S. 730 (2002).

[85] Taylor v. Riojas, decided November 2, 2020. The decision was 7-1, with Justice Thomas dissenting (without opinion). Justice Barrett did not participate in the case. This was a *per curiam* opinion.

[86] The Court described the conditions this way: "Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in "'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "'packed inside the water faucet.'" Taylor v. Stevens, 946 F. 3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage."

[87] Lombardo v. St. Louis, decided June 28, 2021. This was a 6-3 decision. This was a *per curiam* opinion, but it appears that six justices agreed with it. The three dissenting justices were Justices Thomas, Alito, and Gorsuch.

[88] Tanzin v. Tanvir, decided December 10, 2020. This was a unanimous decision (Justice Barrett did not participate). Justice Thomas wrote for the Court.

[89] 107 Stat. 1488, 42 U. S. C. §2000bb et seq.

[90] 28 U. S. C. §2674. The act waived sovereign immunity of the federal government with a number of limitations.

[91] There are six elements that the successful FTCA plaintiffs must plead and prove. They are "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." FDIC v. Meyer, 510 U. S. 471, 475–476 (1994), quoted by the Court in *Brownback*, citing §1346(b).

[92] Brownback v. King, decided February 25, 2021. This was a unanimous decision, written by Justice Thomas.

the federal court dismissed the FTCA case because under the relevant state law (state law is used in FTCA cases), the officers would have been entitled to a qualified immunity that requires "malice" (that is, negligence is not enough). King also tried to use a *Bivens* action for his injuries. The Court remanded the case to the Sixth Circuit for further consideration of the FTCA claim (described in the notes).[93]

There is currently increased interest in using private litigation to hold federal and state agents and agencies accountable for misconduct that harms people. The cases this Term suggest the complexity of these issues. It currently appears that the trend is probably going toward narrowing the qualified immunities and somewhat expanding governmental liability.

Other Significant Decisions

The Court decided many other cases this Term that will have substantial impact on the law and American society and life. What follows is a brief summary of several of those cases.

COVID and the Supreme Court

By March 2020, COVID precluded the Court having in-person oral arguments and conferences. The Court delayed several cases from last Term to this Term. It also began holding oral arguments by audio connection of the members of the Court and attorneys representing the parties. The audio arguments continued throughout this Term and were available live to the public. The usual oral argument process of justices jumping in at random to ask questions (and sometimes interrupt the answers) was not possible with the remote arguments, so the Chief Justice called on each justice in order of seniority to ask questions. Some people, including attorneys arguing before the Court, were unhappy that the process precluded a freer give and take. Others noted that the orderly process allowed thoughts to be pursued more coherently. Justice Thomas, who seldom asked questions in the traditional format, was active in the audio format—routinely asking significant questions.

COVID presented several unusual legal problems for the Court. Almost immediately, there were challenges to shutdown orders. The cases that made their way to the Supreme Court generally dealt with First Amendment claims that governments were prohibiting religious services, while at the same time allowing similar large non-religious gatherings. Early in the pandemic the Court rejected these claims (in Shadow Docket orders).[94] That changed in November 2020, with *Roman Catholic Diocese of Brooklyn v. Cuomo*.[95] The Court issued an injunction against COVID rules that disadvantaged religious organizations and meetings compared with comparable secular institutions. This was followed by other similar decisions, including *Tandon v. Newsom*[96] and a number of other 5-4 cases in the Shadow Docket with the same outcome as *Roman Catholic Diocese*.[97] What changed from the early cases (upholding state regulations of churches) to a number of later cases striking them down, was that Justice Barrett had replaced Justice Ginsburg and they saw religious liberties differently. Many of the cases came from the Ninth Circuit and at one point the Court seemed frustrated that the Ninth Circuit could not get it right.[98]

COVID also disrupted the election. A number of states changed their election laws, sometimes by executive order. That created several problems, but one common claim was that the Constitution gives authority to the *legislature* (or Congress) to determine the time, place, and manner of elections; it does not give it to federal courts, governors, or state election officials. In a few instances the Court limited a deviation from the Constitutional provision,[99] but by and large they did not decide these election cases.[100]

The fast-changing nature of the pandemic and some deference to government entities made the Court reluctant to order changes where a regulation was short-lived, or about

[93] Ordinarily, a FTCA plaintiff cannot both use the FTCA and then try a *Bivens* action too, so King may be precluded from the *Bivens* action. Justice Sotomayor, however, made an argument that the plaintiff might be permitted to proceed with the *Bivens* action. *Brownback,* Sotomayor, concurring.

[94] South Bay United Pentecostal Church v. Newsom, decided May 29, 2020; Calvary Chapel Dayton Valley v. Sisolak, decided July 24, 2020. In these cases, Chief Justice Roberts sided with Justices Ginsburg, Breyer, Kagan, and Sotomayor as the fifth vote in 5-4 cases.

[95] Roman Catholic Diocese of Brooklyn v. Cuomo, decided November 25, 2020. This was a 5-4 decision. The opinion was *per curiam*. There were several concurring and dissenting opinions. Chief Justice Roberts dissented on the basis that the state of New York had already changed the rules that were the subject of the case. Justices Breyer, Kagan, and Sotomayor dissented.

[96] Tandon v. Newsom, decided April 9, 2021. This was a 5-4 *per curiam* opinion. Dissenting were Chief Justice Roberts, and Justices Kagan, Breyer, and Sotomayor.

[97] High Plains Harvest Church v. Polis, decided December 15, 2020; South Bay United Pentecostal Church v. Newsom, decided February 5, 2021. Other cases were noted by the Court in *Tandom.*

[98] "This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See Harvest Rock Church v. Newsom, 592 U. S. ___ (2020); South Bay, 592 U. S. ___; Gish v. Newsom, 592 U. S. ___ (2021); Gateway City, 592 U. S. ___." *Tandom* at 4.

[99] Democratic National Committee v. Wisconsin State Legislature, decided October 26, 2020. This was a 5-3 decision. Merrill v. People First of Alabama, decided October 21, 2020. This was a 5-3 decision.

[100] E.g., Republican Party of Pennsylvania v. Degraffenreid, decided February 22, 2022; *In re* Bowyer*, No. 20-858*, writ denied, March 1, 2020; Pearson v. Kemp, No. 20-816, dismissed November 25, 2020.

to expire.[101] Federal agencies and states quickly learned this technique and used it a number of times. For example, in *Alabama Association of Realtors v. Department of Health and Human Services*, there was a challenge to authority of the Centers for Disease Control (CDC) to order an eviction moratorium.[102] Justice Kavanaugh, the fifth vote to deny a stay on the CDC order, announced his reason. "I agree [that the CDC] exceeded its existing statutory authority by issuing a nationwide eviction moratorium. Because the CDC plans to end the moratorium in only a few weeks, … I vote at this time to deny the application to vacate the District Court's stay of its order…. In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."[103] Just three days after the July 31 expiration of the moratorium to which Justice Kavanaugh referred, and without any new Congressional authority, the CDC reinstated an eviction order.[104] That case quickly made its way back to the Court. A reasonable prediction was that Justice Kavanaugh might feel bamboozled by this maneuver. Even Chief Justice Roberts, despite being a steady support for government response to COVID, could see this as taking advantage of the Court's reliance on assurances from the federal government.[105] It took little time for this prediction to become reality. The Court struck down the reinstated regulation, in a 6-3 decision (see notes regarding the vote in this case).[106]

[101] Danville Christian Academy, Inc. v. Beshear, decided December 17, 2020 (because "of the timing and the impending expiration of the Order, we deny the application.")

[102] Alabama Association of Realtors v. Department of Health and Human Services, decided June 29, 2021.This appeared to be a 5-4 decision, with Chief Justice Roberts, and Justices Breyer, Kagan, Sotomayor, and Kavanaugh voting not to grant the stay.

[103] *Id.* Justice Kavanaugh, concurring. Citations are removed from the quotation.

[104] Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf.

[105] When the Chief Justice thought that he and the Court were being tricked by the Trump Administration, he became a real stickler for following every comma in the statutes, and apparently considered the motives of the administration in taking action.

[106] Alabama Assn. of Realtors v. Department of Health and Human Servs., decided August 26, 2021. Although the Court did not announce the vote, this was apparently a 6-3 decision. The opinion was *per curiam.* Justices Breyer, Sotomayor, and Kagan dissented. The majority was fairly forceful in rejecting the claims of the federal government. "It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts….This claim of expansive authority …is unprecedented….[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* at 1-2, 7, 8. The dissenting justices essentially said that the increase in COVID cases justified the CDC to special action and that the revised version (August) version of the regulation was substantially revised. Justice Breyer, dissenting, joined by Justices Sotomayor and Kagan.

College Athletics and Antitrust—A Major Change Ahead

This Term the Court applied the antitrust law to the National Collegiate Athletic Association in a way that portends dramatic changes ahead.[107] The case involved what is a fairly narrow slice of NCAA rules—those having to do with the "educational benefits" schools may provide athletes. (The reasons for this narrow focus are set out in the notes.)[108] The NCAA permits limited educational benefits. The issue in this case was "enhanced" educational benefits that go beyond what the NCAA permitted. These include such things as paid post-eligibility internships, payments for academic tutoring, and scholarships for post-eligibility graduate school.[109]

The Supreme Court agreed with the district court and the Ninth Circuit that NCAA limitations violate the antitrust laws. It upheld the injunction of the district court making it illegal for the NCAA to limit most academic compensation. That injunction applied to multi-conference organizations but did not apply to rules individual conferences might impose. Of course, it did not require schools (or conferences) to provide increased educational benefits; it just enjoined the NCAA and multi-conference organizations from prohibiting them. In normal markets, the expectation is that if a school starts providing such benefits, its competitors will likely respond—and only the antitrust violation precluded this competition from occurring.

The educational benefits modification itself was a modest change to NCAA rules. Behind it, however, was a lot of bad news for the NCAA. The oral argument reflected general uneasiness in the Court with other NCAA rules;[110] the

[107] National Collegiate Athletic Assn. v. Alston, decided June 21, 2021. This was a unanimous decision. Justice Gorsuch wrote for the Court. Justice Kavanaugh filed a concurring opinion.

[108] The Supreme Court was considering whether to uphold a Ninth Circuit decision which in turn upheld a federal district court opinion. The district court had found that the NCAA was in violation of the antitrust laws, but its remedy essentially dealt only with the academic compensation, denying a remedy that the former student athletes which included non-academic compensation. Both the NCAA and the former student athletes appealed to the Ninth Circuit which upheld the decision of the district court. The NCAA then appealed that decision to the Supreme Court, but the student athletes did not appeal the denial of non-academic compensation. Therefore, that non-academic compensation issue was not before the Supreme Court in this case. *Id.* at 13-14.

[109] *Id.* at 12.

[110] The transcript and audio of the oral argument in the case are available on the Supreme Court's website, https://www.supremecourt.gov/oral_arguments/audio/2020/20-512. Justice Thomas, followed by several other justices said, "it just strikes me as odd that the coaches' salaries have ballooned and they're in the amateur ranks, as are the players." Oral argument transcript (link above) at 10-11. (The several pages following this question include a funny incident in which Seth Waxman, arguing for the NCAA and a very experienced Supreme

decision itself hints that there are other issues to be resolved, and Justice Kavanaugh wrote, "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[111] The NCAA is apparently reading the same tea leaves. It almost immediately allowed student athletes to profit from "name, image, likeness" advertising.[112] At the end of July the NCAA called a "constitutional convention" for November 2021 to consider "dramatic" changes to its rules.[113]

Disciplining Students for Out of School Speech

B. L. (a high school minor) failed to make the varsity cheerleading squad and posted a vulgar Snapchat to her friends complaining about it. The message was not sent from the school or during school hours. Nonetheless, the school disciplined her, removing her from the junior varsity squad. Her parents went to federal court claiming a free speech (First Amendment) violation. They relied on a case from the 1970s in which the Court held that in-school speech (black arm bands in that case) is protected by the First Amendment unless it is substantially disruptive or an invasion of the rights of others.[114]

The Supreme Court held that off-campus speech is entitled to First Amendment protection, and that off-campus, non-school time speech reduces any interest the school has in regulating the speech.[115] It is possible that off-campus speech could be so disruptive of school activities that a school could regulate it, but in the cheerleader case the school had not demonstrated serious disruption.

Unanimous Juries Redux

Last Term the Supreme Court held that a unanimous jury is required in state cases to convict someone of a serious offense.[116] The federal system, and all but two states (Louisiana and Oregon), previously required unanimous juries. This Term the question was whether to apply the unanimous-jury decision retroactively, that is, to those criminal defendants whose cases were final and all appeals had been exhausted before the case last Term.[117] That would have required that the two states retry anyone who had been convicted with a less than unanimous jury, years ago in some instances.[118] The Court held that the unanimous verdict should not be applied retroactively. Justice Kavanaugh, in writing for the majority noted that although theoretically the Court might apply a new rule retroactively if it is truly a "watershed," the Court has not done so in 32 years.[119]

Required Disclosure of Donors and the First Amendment

In 1958, in *NAACP v. Alabama*, the Supreme Court held unconstitutional a state law requiring the disclosure of an organization's membership list. The Court determined such a law would likely chill the freedom of association, because some people would avoid joining or speaking up rather than expose themselves to retaliation by individual or government reprisals.[120] The *NAACP* case has been followed by a number of other cases, except where there is a very strong public interest in disclosure (e.g., political contributions). This Term the Court continued that trend, striking down a California law that essentially required that nonprofits provide the Attorney General a list of major contributors.[121] Not surprisingly, the NAACP and many other organizations filed

Footnote 110 (continued)

Court advocate, referred to Justice Thomas as "Chief Justice." Justice Thomas thanked him for the promotion.)

[111] Justice Kavanaugh, concurring at 2.

[112] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy* (June 30, 2021) (NCAA press release) https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy. Several states had adopted laws permitting NIL deals by college athletes. One of the reasons for the interim NCAA rule beyond the antitrust issues was likely the inconsistency of rules across the country. The NCAA indicates it is trying to have Congress address the issue.

[113] Meghan Durham, *NCAA Board of Governors to Convene Constitutional Convention: Committee to Provide Recommendations for Restructuring Association Across All Three Divisions* (July 30, 2021) (NCAA press release) https://www.ncaa.org/about/resources/media-center/news/general-ncaa-board-of-governors-to-convene-constitutional-convention.

[114] Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503 (1969). The Court in *Tinker* said that students do not shed their constitutional rights to free speech "at the school house gate." *Id.* at 506.

[115] Mahanoy Area School Dist. v. B. L., decided June 23. Justice Breyer wrote for the eight-justice majority. Justice Thomas dissented.

[116] Ramos v. Louisiana, 590 U. S. ___ (2020), also available at https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf.

[117] Edwards v. Vannoy, decided May 17, 2021. This was a 6-3 decision, with Justices Breyer, Kagan, and Sotomayor dissenting.

[118] The unanimous jury is a somewhat unusual situation because in 1970 the Court held that the Constitution did not require a unanimous verdict for states. Apodaca v. Oregon, 406 U. S. 404 (1972) (plurality opinion).

[119] *Edwards* at 3-7.

[120] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[121] Americans for Prosperity Foundation v. Bonta, decided July 1, 2021. This was a 6-3 decision. Chief Justice Roberts wrote for the six-justice majority (although parts of the decision were not joined by the other justices in the majority). Justice Sotomayor wrote for the dissenters (Justices Breyer and Kagan). The specific requirement of California was that the nonprofit organizations in the state provide a copy of Schedule B to the federal tax Form 990. Schedule B requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year.

amicus briefs with the Court opposing the California law.[122] The Court found that the California law violated the First Amendment rights of association and speech. It concluded that "California's blanket demand for Schedule Bs is facially unconstitutional" because there was not a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." Furthermore, the disclosure requirement was not narrowly tailored to the interest it promoted.[123] Three justices dissented. They noted, among other things, that there is evidence that donors face threats, harassment and reprisals if their affiliations are made public, but Schedule B is "a nonpublic reporting requirement."[124] Somewhat surprisingly, given the history of membership/contribution cases, this case produced a 6-3 division on the Court and was seen as a right-left split.

The "Shadow Docket"

The phrase "Shadow Docket" has appeared several times in preceding pages; it deserves a word of explanation. The Shadow Docket is an informal term of relatively recent vintage used to describe the many orders of the Court and statements of individual justices regarding some cases presented to the Court.[125] There are hundreds of orders by the Court each Term. Most of those are accepting or denying *cert.*, *amicus* briefs, requests from parties, requests for hearings, the admission of lawyers to practice before the Court, and a variety of other housekeeping matters. There is nothing particularly shadowy about any of these items. They are all publicly available on the Court's website. For example, the "Journal" for the past Term—about 600 pages of it—is available online (https://www.supremecourt.gov/orders/journal/Jnl20.pdf). In addition, the Court publishes an Orders List for each Term (https://www.supremecourt.gov/orders/orderofthecourt/20) as well as other formats of the orders and decisions.

The part of the Shadow Docket that is most intriguing for commentators is probably the "Opinions Relating to Orders." It has the written statements of the Court, and individual justices. It also includes the action of the Court in some cases in which there was not full briefing or oral argument. These statements by justices are often to dissent from the decision of the Court. Justices may concur to signal (to future litigants) good issues to litigate; create a record that clarifies the meaning of the decision; or explain how the case is consistent or inconsistent with prior cases. The references to Shadow Docket in this article are to these "Opinions Related to Orders" (https://www.supremecourt.gov/opinions/relatingtoorders/20#list). These opinions have become much more common over the years. In this past Term, there were approximately sixty such opinions related to about fifty cases.

The "Shadow" reference reflects that these are not as visible as full opinions. In part that is just because they are a little harder to find and much harder to sort through. In some cases, it is not possible to tell what the vote was, which justice voted what way, and what the reasoning of the Court was. In a few cases it becomes difficult to know exactly what the Court was holding or otherwise muddies what the law actually is.[126]

Although the Shadow Docket has been of interest to academic observers and Court watchers for years, this year it has recently attracted the attention of Congress.[127] It is not clear what Congress might try to do with problems related to the Shadow Docket, but the interest from Congress will probably increase. The Court may quietly endeavor to make changes that address the concerns.

Other Decisions of Interest

Abortions

In a little-noticed decision in the "Shadow Docket," the Court stayed an injunction issued by a lower court regarding an "abortion drug" (used to induce abortions). The lower court stopped the enforcement of the FDA regulation because of COVID. Those FDA regulations required in-person appointments with physicians or other health care professionals in order to receive the drug. The majority of the Court held that it was improper for the district court

[122] Brief *Amici Curiae* of the American Civil Liberties Union, American Civil Liberties Union Foundation, NAACP Legal Defense and Educational Fund, Knight First Amendment Institute at Columbia University, Human Rights Campaign, and Pen American Center, In Support of Petitioner, Thomas More Law Center v. Becerra (March 1, 2021), https://www.supremecourt.gov/opinions/20pdf/19-251_p86b.pdf. The brief noted that California does not have a good record of maintaining the confidentiality of information provided to it.

[123] *Americans for Prosperity* at 13.

[124] Justices Sotomayor, Kagan, and Breyer dissenting, at 15. One of the reasons the ACLU, NAACP, and others filed an *amicus* brief (for an "as applied" violation of the First Amendment) is that California has done a poor job of maintaining the confidentiality of such information.

[125] Although "shadow docket" has been used to refer to a number of different court processes or doctrines, its application to the U.S. Supreme Court is of recent origin. It is attributed to William Baude in 2015. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).

[126] Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harvard L. Rev. 123 (2019).

[127] *The Supreme Court's Shadow Docket*: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Committee on the Judiciary, 117th Cong. (2021).

to suspend, during COVID, the in-person requirements to obtain the drug. (There are details about this case in the notes.)[128]

In September 2021, also a "Shadow Docket" case, the Court declined to block a Texas statute which was intended to preclude abortion after a fetal heartbeat is present (about six weeks of gestation).[129] The statute prohibits state officials from enforcing the law, but allows almost any private citizen to seek money damages from anyone performing an abortion or who "aids and abets" an abortion.[130] In due course, this law will likely be declared unconstitutional, but it seems to have been engineered to make it difficult to enjoin the law until there is sufficient time to consider some complex legal questions (set out in the Notes).[131] Some commentary on this case suggests that it may presage an overturning of *Roe v. Wade* and *Casey,*[132] but I do not think that it does. Because this was a procedural issue related to injunctions, it provides modest evidence about the constitutionality of the Texas statue and other abortion decisions.[133]

Computer Fraud and Abuse

The Computer Fraud and Abuse Act (CFAA) makes it illegal (generally a felony) to "exceed authorized access" on a computer. The Supreme Court adopted a narrow reading of that phrase. It held that the statute penalizes those who access information they were not entitled to obtain, but does not punish someone who misuses information the user was entitled to access.[134] In this case, a police officer accessed license-plate data to give information to a friend. The officer could legitimately access the license-plate data base (and may have committed a different crime). Because he legally had access to the information, however, he did not violate the CFAA.

Students, Free Speech, and Damages

A student at a public college in Georgia was, for practical purposes, precluded by the college from distributing

[128] The FDA has three requirements for obtaining the drug mifepristone, two of which were relevant in this case. Those were the "In-Person Dispensing Requirement"—the drug could be dispensed only in a hospital, clinic, or medical office, by or under the supervision of a certified healthcare provider); and the "In-Person Signature Requirement"—requiring that the certified healthcare provider give a copy of a Patient Agreement Form to the patient and review it with the patient, and that the patient sign the form acknowledging that she had read and received the form and received the counseling). A federal district judge in Maryland issued a nation-wide injunction essentially agreeing with ACOG's arguments. The FDA went to the US Supreme Court, requesting a stay of the injunction. On October 8, 2020, the Court declined to stay the injunctions, but gave the district court judge 40 days to consider whether to "dissolve, modify, or stay the injunction. (American College of Obstetricians and Gynecologists v. FDA (I), decided October 8, 2020, https://www.supremecourt.gov/opinions/20pdf/20a34_nmjp.pdf. There was no identified author of the decision to delay consideration of the case. Justices Alito and Thomas dissented and would have granted the stay immediately. There were eight justices on the Court at the time.) On January 12, 2021, the Court took up the case again and this time stayed the district court's order. (American College of Obstetricians and Gynecologists v. FDA (II), decided January 12, 2021. The Chief Justice wrote a brief concurring opinion and Justices Sotomayor and Kagan dissented). Chief Justice Roberts wrote a concurrence to indicated that in his view the issue as presented by the case was not whether the FDA's regulations placed an undue burden on a right to an abortion generally, but "my view is that courts owe significant deference" to the public health authorities. Justices Sotomayor and Kagan dissented, saying that the issue was the undue burden on women, given the difficulties of the pandemic (particularly going to medical facilities during COVID).

[129] Whole Woman's Health v. Jackson, decided September 1, 2021. The opinion was *per curium*, in a 5-4 decision. Dissents were written by Chief Justice Roberts, and Justices Breyer, Kagan, and Sotomayor.

[130] The unprecedented part of this is that it is not clear what injunction, and against whom, a temporary injunction could legitimately be issued. For that reason, it will take some time to sort through the legal issues. It is possible to imagine other states or cities taking the same approach to other constitutional rights—for example, perhaps California or San Francisco (in the Ninth Circuit) might pass a law allowing private individuals the authority to sue anyone who owns a gun or aids and abets someone in purchasing a gun or ammunition.

[131] Justice Roberts, in his dissent, noted that the statute is "unprecedented." Joined by Justices Breyer and Kagan, he also noted, "Defendants argue that existing doctrines preclude judicial intervention, and they may be correct." *Robert, dissenting* at 2. His then concluded that the novelty of it (both in this case and as a model for other statutes) "counsel at least preliminary judicial consideration before the program…take effect." *Id.* at 3. The majority's decision noted, however, that those seeking an injunction must make a strong showing that they are "likely to succeed on the merits." *Whole Woman's Health* at 1. Federal courts can enjoin the enforcing laws, "but not the laws themselves." *Id.* With that in mind, "it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit [the Court's] intervention. (Each of the private defendants had filed an affidavit that they had not intention of enforcing the law.) The Court also noted that it is not clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law." *Id.* at 2. This caused the majority to conclude that it those seeking to enjoin the Texas law have not med their burden" of showing they will likely prevail against these defendants on the merits.

[132] Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833 (1992); Roe v. Wade, 410 U. S. 113 (1973).

[133] The majority made it clear that it was not considering the constitutionality of the Texas law. It said, "this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law." *Whole Woman's Health* at 2. The Court has accepted an abortion case for the next Term. Dobbs v. Jackson Women's Health Organization, No. 19-1392, which raises different abortion issues than does the Texas statute. It prohibits abortions after 15 weeks of gestation.

[134] Van Buren v. United States, June 3, 2021. This was a 6-3 decision. Justice Barrett wrote for the majority. Justice Thomas wrote a dissent in which Chief Justice Roberts and Justice Alito joined.

religious literature or engaging in religious speech. He sued the college, requesting nominal damages (typically "$1") and an injunction against the college.[135] The college changed its policies, so the injunction was no longer necessary. With that, the federal courts dismissed the student's case, saying that it was "moot." The question before the Court was whether nominal damages are something of value to support legal standing. In an 8-1 decision, the Court said yes, a claim for nominal damages can be enough, assuming the other legal requirements are met (e.g., the plaintiff was injured and the injury resulted from official conduct). Justice Thomas, who wrote for the majority, noted that nominal damages were available in early English and American law.

Chief Justice Roberts dissented.[136] It was his first solo dissent in his years on the Court. He and Justice Kavanaugh (concurring) both suggested that defendants could just pay the nominal damages without confessing fault and be done with the case. That may be entirely possible in some cases, but in others it may trigger attorneys' fees or other consequences. One of the Chief Justice's concerns may be that there are an unending number of circumstances in which someone's rights are violated, although there are not significant damages. It is possible this case may have a bigger impact than the majority expected. It may encourage a large number of technically correct legal claims against institutions without any corresponding substantially legally permissible damages.

Election Laws

The Court upheld, in a 6-3 decision, changes in the Arizona election law.[137] Those changes require voters who vote in person to vote in their own precinct, and for those who vote by mail, only an election official, postal worker, or family member may collect the ballot ("ballot harvesting"). The legal question in the case was whether these provisions violate Section 2 of the Voting Rights Act. (A number of other, COVID-related, election decisions were discussed above in "COVID and the Supreme Court.")

Patents and Copyrights

In *Google v. Oracle*, Oracle claimed that in developing the Android phone operating system, Google engineers copied about 11,000 lines of Oracle (Java) code—which was about .4% of the Java program.[138] The jury in the case found that Google's use of those lines was "fair use" as defined in the copyright law. The Court noted that computer programs differ from traditional copyrighted works which creates special "fair use" considerations. The Court went through four factors to determine fair use: "the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work."[139] The Court essentially agreed with the jury that this was fair use.

In another case, *Minerva Surgical v. Hologic*, the Court, upheld, but narrowed, a technical doctrine (assignor estoppel) that protects patent purchasers from the seller of the patent who later tries to claim the patent is not valid (described in the notes).[140] This is an important doctrine in biotech and other fast-moving technologies that quickly build on past patents.

Control of Executive Agencies

Congress has created administrative agencies, but sometimes limited the ability of the President to dismiss the chairs or change the makeup of the agencies. In some cases, Congress has provided for a single-person "chair" to be the board of the agency, in others it has it has made lower-level administrators (sometimes called agency "judges") exempt from review within the agency. In recent years, the Court has found several of these limitations to be unconstitutional, because they limit the authority of the President to be in charge of the executive branch of the government. (Most executive-branch officers who are appointed by the President

[135] Uzuegbunam v. Preczewski, decided March 8, 2021. This was an 8-1 decision, with Justice Thomas writing for the Court. Justice Thomas, joined by Chief Justice Roberts and Justice Alito dissented.

[136] Justice Roberts, dissenting. "Perhaps defendants will wise up and moot such claims by paying a dollar." *Id. at 15.*

[137] Brnovich v. Democratic National Committee, decided July 1. Justice Alito wrote for the six-justice majority. Justice Kagan wrote for the three dissenters.

[138] Google v. Oracle America, decided April 5, 2021. This was a 6-2 decision (Justice Barrett did not participate). Justice Alito wrote for the majority, with Justices Thomas and Alito dissenting.

[139] *Id.* at 13-14.

[140] Minerva Surgical, Inc. v. Hologic, Inc., decided June 29, 2021. This was a 5-4 decision with Justice Kagan writing for the majority. Justice Barret wrote a dissent joined by Justices Thomas, and Gorsuch. Justice Alito dissented separately. The simplified version of the facts is that the inventor/patentor sold the company (and patent) to Hologic. He continued to work in the area and invented a new device. Hologic accused him of infringing the patent he had sold to them, and the inventor defended on the grounds that the original patent (as modified by Hologic) was invalid. This issue split the Court 5-4. The five-justice majority held that the assignor estoppel does apply, but only when a claim of patent invalidity "conflicts with an explicit *or implicit* representation made in assigning the patent rights" (emphasis added). The assignor may, however, still claim that changes made in the patent claims (which Hologic had done) made the current statement of the patent invalid. The four dissenting justices would have eliminated the assignor estoppel. Of course, other parties, who did not assign any patent rights in a case, are free to raise the claims of invalidity.

serve at the pleasure of the President.) As a result, President Biden and future Presidents could replace change the heads of many of these agencies when taking office.

This Term there were two additional administrative agency cases. The Court held unconstitutional the process by which patent "judges" are appointed and can come to judgments without any review by the director of the Patent and Trademark Office (PTO) (the director is subject to oversight by the President).[141] In this case, the Court allowed the director of the PTO to review the decisions of the PTO judges, even although no such review is contained in the statute.

The second case involved a statute in which Congress had limited the ability of the President to remove the chair of the Federal Housing Finance Agency.[142] In effect, the Court "severed" the removal authority from the rest of the statute, which essentially allows the President to replace the head (or members) of the agency, but leaves the rest of the statute in place.[143]

Products Liability

The Court expanded the ability of those injured by defective products to sue the manufacturer.[144] This case involved a suit against Ford for an accident in Montana (in 2015) caused by a defective 1996 Explorer. The car had been assembled in Kentucky, purchased by a dealer in Washington, and originally sold to a customer in Oregon. Then it went through a number of sales before reaching the driver killed in it in Montana. Ford claimed that it did not have sufficient connections with Montana to be sued there,[145] but the Court disagreed.

Property Rights and Labor Organizing

California has a law allowing union organizers to enter agricultural property for up to three hours, 120 days a year.[146] This, of course, is for the purpose of organizing the workers into a union. The landowners complained that this amounted to a partial taking of their land by the state.[147] The Constitution allows the government to take land for public purposes, but requires reasonable compensation.[148] The question is not the reasonableness of the regulation, but the extent to which it interferes with the use (including the value) of the land. Minor regulation or interference is not a taking, but as the interference increases, it becomes a taking. For a property owner, having a state inspector come on the property briefly for a safety inspection twice year is one thing, but allowing perhaps a dozen people to come on the property for three hours, 120 times a year (whether for organizing or anything else) would be different. In a 6-3 decision, the Court held that the California regulations were a taking of property. If, therefore, the state wishes to authorize the substantial entry onto the land, it will have to pay fair compensation.[149]

Statute of Limitations and Rape in the Military

Rape under military law was once a capital offense, and as such had no statute of limitations. The death penalty was eliminated for rape, but it was unclear what happened to the

[141] United States v. Arthrex, decided June 21, 2021. Essentially this was a 5-4 decision, although it was 7-2 on the remedy of allowing the director to review and change the rulings of the PTO judges.

[142] Collins v. Yellen, decided June 23, 2021. The decision was 5-4 for part of it and 7-2 for another part. It was a little complicated (running 81 pages). Here is how the Reporter of Decisions described the results, "ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, KAVANAUGH, and BARRETT, JJ., joined in full; in which KAGAN and BREYER, JJ., joined as to all but Part III–B; in which GORSUCH, J., joined as to all but Part III–C; and in which SOTOMAYOR, J., joined as to Parts I, II, and III–C. THOMAS, J., filed a concurring opinion. KAGAN, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER and SOTOMAYOR, JJ., joined as to Part II. GORSUCH, J., filed an opinion concurring in part. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined."

[143] The Court left open the possibility that the lower courts might also order some restitution for tor investors harmed by the actions of the Federal Housing Finance Agency.

[144] Ford Motor Co. v. Montana Eighth Judicial Dist., decided March 25, 2021. This was a unanimous decision, although only five justices joined Justic Kagan's opinion, and three wrote concurring opinions. Justice Barrett did not participate in the case.

[145] Due process requires that there be sufficient connections between the parties to a case and the jurisdiction in which the case is tried. More formally, a defendant's "contacts" with the forum state must be such that "the maintenance of the suit" is "reasonable" and "does not offend traditional notions of fair play and substantial justice." *Id.* at 4.

[146] The law is based on the California Agricultural Labor Relations Act of 1975 and related regulations. Cal. Lab. Code Ann. §§1152, 1153(a); Cal. Code Regs., tit. 8, §20900(e). The law and regulations allow two union representatives, plus an additional representative for every employee above 30 employees. Thus, at one plant of one of the plaintiffs, there are 500 workers, so the law would the law would allow 33 union representatives in the plant up to three hours a day, 120 days a year.

[147] Cedar Point Nursery v. Hassid, decided June 23, 2021. This was a 6-3 decision, with Chief Justice Roberts writing for the majority, and Justice Breyer writing for the dissenters.

[148] The Fifth Amendment (applicable to the states through the Fourteenth Amendment) provides that property may not be taken for public use "without just compensation."

[149] The dissent suggested that California simply pay, perhaps a nominal amount, for the right to enter the land. Justice Breyer dissenting, at 16. It is not clear to many people that the amount would be so nominal. The value of property might well decline meaningfully for many properties in which third parties have a right to enter for 120 days a year for three hours each time.

statute of limitations. The Court this Term unanimously held that the absence of a statute of limitations was not changed when the death penalty was dropped.[150]

Amicus Briefs: Solitary Confinement and Psychological Injury

Although there was no case this Term involving solitary confinement, a number of mental health professionals have filed *amicus* briefs with the Court over several Terms urging the Court to take a solitary confinement case. They seek to have the Court grant *certiorari* for the purpose of ruling solitary confinement to be a violation of the Eighth Amendment (cruel and unusual punishment).[151] They cite studies demonstrating, "Solitary confinement deprives prisoners of these necessities and subjects them to conditions so harsh that they amount to torture, leaving prisoners with permanent psychological and physical scars."[152] Although the Court has not recently accepted such a case, it is clear that there is some feeling on the Court that it should do so.[153] They also argue that the Court has given prison officials "fair notice that using solitary confinement can be harmful and unlawful," and it is, therefore, appropriate to impose liability for its improper use. It would not be surprising to see the Court accept a case to consider the psychological harm associated with solitary confinement, and the possibility of liability for its excessive use.

Analysis of this Term and a Look at Next Term

This Term was almost a Thematic Apperception Test for Court commentators. There were many conflicting, inconsistent conclusions about the Court. Some say it was ideologically predictable, others unpredictable; too free to discard precedent, or excessively precedent-bound; "muscularly" conservative, or without the fortitude to be conservative; and "conservative" or "liberal."[154] The amazing range of data for a single term now allows some evidence for almost any position. Beyond that, when necessary, commentators create the data by looking at subsets of cases ("politically charged" or "pro-business"). Into that fray I jump, with the understanding that a single Term is frequently misleading, so even the most reliable analyses need to be taken with a few grains of salt.

There are various ways of counting cases at the Court, but the most common count is that the Court decided 67 cases this Term.[155] The 67 includes 57 cases that were formally briefed and argued, eight summary reversals (reversing a lower court without oral argument), and the two COVID religious cases in the Shadow Docket. Other Shadow Docket cases are not included in that count.[156] The Court was unanimous in 26 (43%) of the cases—slightly below the ten-year average of 46%. Perhaps most notable were the unanimous decisions in cases that looked particularly contentious at the outset—e.g., the Philadelphia religion foster care, crack-cocaine sentence reductions, and NCAA-college athlete payments. The consensus is that there were only eight 5-4 opinions, among the lowest percentage (12%) of 5-4 cases over the last 15 years—the average during that time is 20%. It should be noted, however, that the consensus numbers reported above include only two of the COVID and religion cases (*Roman Catholic Diocese* and *Tandon*), and that there were a number of other similar cases found in the "Shadow Docket" and "Orders" of the Court that were 5-4, so in my view, the eight cases understate the true number of 5-4 decisions.

Justice Kavanaugh was in the majority in 97% of all cases. Chief Justice Roberts and Justice Barrett were in the majority 91%, and Justice Gorsuch 90%. As for the other justices, they were in the majority (all cases) Justice Alito (83%), Justice Thomas (81%), Justice Breyer (76%), Justice Kagan (75%), and Justice Sotomayor (69%). In "divided cases"—that is, when unanimous cases are removed—the percentages

[150] United States v. Briggs, decided December 10, 2020. Justice Alito wrote for the Court. (Justice Barrett had not yet joined the Court when this case was heard).

[151] A recent example of such a brief is Brief of *Amici Curiae* Professors and Practitioners of Psychiatry, Psychology, and Medicine In Support of Petitioner, On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit, in Hamner v. Burls, https://www.supremecourt.gov/DocketPDF/19/19-1291/145603/20200615132454737_19-1291%20Hamner%20Amicus.pdf (June 15, 2020).

[152] *Id.*at 5.

[153] Apodaca v. Raemisch, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of certiorari).

[154] Rob Natelson, *The Liberal Supreme Court: A Review of the Recent Term,* Independence Institute (July 15, 2021), https://i2i.org/the-liberal-supreme-court-a-review-of-the-recent-term/.

[155] Most of the data in the analysis section comes from the SCOTUSblog.com Stat Pack. It is the most widely accepted compilation of data on the Court. https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf

[156] Note that in some of the data that follows, not all of the 67 cases could be included, so the percentages do not always add to 100%.

are: Justice Kavanaugh (95%), Chief Justice Roberts and Justice Barrett (84%), Justice Gorsuch (82%), Justice Alito (70%), Justice Thomas (66%), Justice Breyer (58%), Justice Kagan (55%), and Justice Sotomayor (45%).

The level of agreement between justice pairs is also interesting. Chief Justice Roberts and Justice Kavanaugh agreed 94%, similar to Justices Breyer and Kagan (93%) and Justices Breyer and Sotomayor (also at 93%). The agreement between Justices Sotomayor and Alito was 53%, and Justices Sotomayor and Thomas was 55%.

There has been speculation about whether Justice Barrett replacing Justice Ginsburg resulted of cases being decided differently. Relying purely on voting outcome (and, of course, not including interactions with other justices), the 5-4 decisions regarding church COVID restrictions would likely have been different. It is possible that one or two of the other 5-4 decisions would have been different as well. Of course, some of the 6-3 decisions might have been 5-4, but would not have changed the outcome.

The last week of the Term is frequently the time that a justice will announce retirement plans. There were no announcements. There had been some speculation that Justice Breyer might announce. Indeed, he has been under some pressure to do so, while there is a Democratic President and Democratic control of the Senate. Court watchers noted that he had hired four clerks for the coming Term, which commonly signals an expectation of completing the Term. The new speculation is that he might announce a retirement early in the coming Term, effective at the end of the Term.

The Court has already taken a number of cases for the next Term, a few of which are already being called "blockbusters."[157] The case receiving the greatest attention is *Dobbs v. Jackson Women's Health Organization* from Mississippi.[158] At issue is a Mississippi statute that bans most abortions after 15 weeks. *Roe v. Wade* permitted states to regulate abortions only after "viability"—the time after which the fetus could live outside the womb. Although the vast number of abortions are performed by the 15th week, viability has been the standard since *Roe*.[159] Another closely watched case for next Term involves a gun control law from New York. The case raises the question of the degree to which of banning guns outside the home violates the Second Amendment. The Court's earlier gun cases involved guns in the home used for self-defense. This case raises the question of whether refusing to allow "concealed-carry licenses for self-defense violates the Second Amendment."[160] Many commentators believe that there is a good chance that the Court will accept a case dealing with racial preferences in college admissions, perhaps the Harvard case in which the claim is discrimination against Asian Americans.[161]

Among the other issues the Court has accepted for the next Term are a case in which a state excludes from a student aid program students who are attending schools that provide some religious instruction; three cases involving the calculation of reimbursement of healthcare (generally Medicare and Medicaid); capital cases involving the review of convictions (including the Boston Marathon bomber) and methods of execution; and (for college faculty and others in TIAA) a case involving Northwestern in which the claim is that it charged participants (in TIAA and Fidelity plans) fees substantially above alternatives available. I will go out on a limb and predict there will be some surprises next Term. It will be worth staying tuned to the work of the Court.

I never come to the end of reviewing the work of the Court over a year that I don't have a moment of gratitude—and that feeling is especially strong this year. Agree or disagree with individual decisions, our democracy is fortunate to have the mechanisms for resolving disagreement in sensible, peaceful ways.

[157] Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant But Divided*, SCOTUSblog.com (July 2, 2021), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/ ("a blockbuster docket next term," "blockbuster decisions by next June").

[158] Here is the *Dobbs* case coverage from SCOTUSblog.com, https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/.

[159] Dobbs v. Jackson Women's Health Organization, No. 19-1392. The formal statement of the issue is: "Whether all pre-viability prohibitions on elective abortions are unconstitutional."

[160] New York State Rifle & Pistol Association Inc. v. Corlett, No. 20-843. The formal issue is stated as follows: "Whether the state of New York's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." For coverage see https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-v-corlett/.

[161] The Court has been asked to grant *cert.* for this case. Students for Fair Admissions v. President & Fellows of Harvard College. For the petitions and briefs see: https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/.

A Note on Notes: Endnotes and References The citations in this article are to the Slip Opinions of the Court as published on the Court's website. In Slip Opinions the Court separately paginates each opinion within a case. Therefore, in a case, the majority opinion begins on page one, a concurring opinion will again begin on page one, and a dissenting opinion will once again begin on page one. When opinions are published in hard copy in the U.S. Reports and other bound sources, however, pagination is continuous.

The opinions published by the Court are subject to correction and minor modification. The Court has been criticized for these changes and has now adopted the practice of noting the date of such revisions. That is included in the "Revised" column on the Court's opinion website provided above.

For other materials, many citations have included a link to the cited material. For non-court citations, there are generally perma.cc links, which are permanent as of the date they were recorded.

The general format of the citations is based on traditional legal citations, modified to provide some additional information about the cases decided this Term.

U.S. Supreme Court decisions are readily available (and free) on the Court's website. It is www.supremecourtus.gov. The website for the opinions for this Term is https://www.supremecourt.gov/opinions/slipopinion/20#list. Note that the Court's opinion page collapses into the months of the Term. To see the opinions for the entire Term, click the "Expand all" located next to "2020." The "Opinions Relating to Orders," is in a separate web page. It is at https://www.supremecourt.gov/opinions/relatingtoorders/20. Again, it is necessary to "Expand all" to see all of the Orders Opinions for the Term.

There are a number of other very good sources for someone following the Court. One source for free, same-day, digested notification of the decisions of the Supreme Court is http://www.law.cornell.edu/bulletin. An excellent site for all things Supreme Court is SCOTUSblog at http://www.scotusblog.com/.

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