



# Supreme Court 2019–2020: Insanity, Discrimination, and DACA—And a Pandemic

Steven R. Smith

Published online: 29 October 2020

© National Register of Health Service Psychologists 2020

## Abstract

The 2019–2020 Supreme Court session was an extraordinary session. One major ruling involved insanity defense and whether the two prongs of cognitive capacity and moral capacity were required. Sexual identity was ruled to be covered by the Civil Rights Act in relation to employment. Unanimous criminal jury decisions were ruled a required condition for conviction. The rescindment of DACA was overturned on procedural grounds. Other decisions related to conditions of abortion, habitual residence in international custody cases, police immunity from civil liability, guns, HIV, and capital punishment. Thirty-five percent of cases were unanimous (down from the recent average), and 22% were decided by a 5–4 vote (slightly above the recent average).

**Keywords** Insanity defense · Sexual identity · Employment discrimination · Unanimous jury decisions · International child custody · Police immunity

## Overview

When the Supreme Court Term was gavelled to order the first Monday in October 2019, many commentators predicted a significant, even a “blockbuster,” Term. It promised important cases and surprises, but not even the most prescient could have predicted just how extraordinary this Term would be. It did have a number of important (“blockbuster”) cases. Beyond that, COVID-19 disrupted the Court, as it did the rest of the country. It resulted in some cases being delayed, and in the first telephonic arguments in the history of the Court (with a few surprises there too).

The case highlights include the following in which the Court

- held that the Constitution does not require that a state adopt a traditional form of the “insanity defense;”<sup>1</sup>
- interpreted federal employment non-discrimination laws to prohibit discrimination based on sexual orientation or identity;<sup>2</sup>

<sup>1</sup> [Kahler v. Kansas](#).

<sup>2</sup> [Bostock v. Clayton County](#).

- determined that unanimous jury trials are required in state criminal trials;<sup>3</sup>
- held that the Administration had erred in the process used to modify the DACA program, and that the proper procedure will have to be used if DACA is to be stopped;<sup>4</sup>
- again struck down as unconstitutional a state law requiring physicians performing abortions to have admitting privileges at a nearby hospital;<sup>5</sup>
- engaged in an ongoing debate on the place of precedent (*stare decisis*) in its decisions—not a dry debate, but one addressing a critical element of its future cases, including abortion;
- also considered issues related to international child custody, police immunity from civil liability, Affordable Care Act payments to hospitals, guns, HIV, subpoenas of the personal papers of Presidents, robocalls, and capital punishment.

<sup>3</sup> [Ramos v. Louisiana](#).

<sup>4</sup> [Department of Homeland Security v. Regents of Univ. of Cal.](#)

<sup>5</sup> [June Medical Services L.L.C. v. Russo](#).

In this article we will first look at some of the cases of special significance to mental and other health practitioners, and then look at a variety of other interesting and especially important decisions. It concludes with an analysis of the Term and a look at likely cases for next Term. On September 18, Ruth Bader Ginsburg passed away, and we also briefly review her remarkable career.

## Insanity and the Constitution

The “insanity defense” has been a debated feature of Anglo-American law for centuries. A successful insanity defense means that the defendant is not guilty of the crime charged, even when it is beyond dispute that the defendant did the act that constituted the crime, and would have been guilty, except for the insanity. This Term the Supreme Court was called upon to determine whether the insanity defense is required by the Constitution. Kansas adopted a more limited insanity defense than has been common in American law (as have a small handful of other states), and the question was whether this statute limited the constitutional rights of criminal defendants in Kansas.<sup>6</sup>

There have been many formulations of the insanity defense, but they all essentially begin with the requirement that the defendant, at the time the crime was committed, suffered from a serious “mental disease or defect.” For 150 years, the most common statement of the defense came from *M’Naghten’s Case* in England (1848), which held that “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.”<sup>7</sup> American courts consider *M’Naghten* to have two branches, “cognitive capacity” (the defendant was not able to understand what he was doing when committing the crime), and “moral capacity” (able to “understand that the action was wrong”). Either arm qualifies as “insanity.” There are, in addition to the *M’Naghten* test, at least a dozen other permutations that have found some favor over the decades.

Kansas law recognizes only the cognitive capacity test (“the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged”). It does not recognize the moral capacity test. It does permit any evidence of mental illness at the *sentencing* stage of a trial. The constitutional question for the Court was whether

Kansas, by failing to recognize the moral capacity insanity defense, deprived the defendant Kahler, of “due process of law” under the Fourteenth Amendment.

James Kahler killed his estranged wife and her grandmother, and then his two daughters. He was tried by Kansas for capital murder, and wanted to use the “moral capacity” insanity defense (the one Kansas does not recognize). He was convicted and sentenced to death, and appealed on the basis that the narrow Kansas insanity defense was a violation of the Due Process Clause. In a 6-3 decision, the Court rejected his claim. The majority viewed the Constitution as giving states considerable latitude in structuring and defining criminal offenses and defenses. Only if a state’s insanity definition “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” is there a Constitutional due process violation.<sup>8</sup> The majority opinion noted that there are, and have been, a number of variations in the insanity defense among the states over time. In addition, the defendant could present any evidence of mental illness at the sentence phase of a trial.

The three dissenting justices concluded that “seven hundred years Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law” suggest that a moral capacity test must be recognized by states.<sup>9</sup> An unfortunate example used by the dissenters at the beginning of the dissent may somewhat confuse the issues (described in the notes).<sup>10</sup> The dissent includes a state-by-state summary of the insanity defense, which readers may find helpful. Although they were compiled by excellent legal minds, some caution

<sup>8</sup> *Kahler*, at 6, quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

<sup>9</sup> Justice Breyer, dissenting at 1. (Justices Ginsburg and Sotomayor joined the dissent.)

<sup>10</sup> The dissent raises an example of why the moral capacity branch matters. It imagines two defendants, both charged with murder. They both have severe mental illness. The mental illness causes the first defendant to think “the victim was a dog;” it causes the second to think “that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Under Kansas’ rule, it can convict the second but not the first.” There are not additional facts given in the hypothetical. *Id.* at 1-2.

It is clear in the first example that wrongly believing the person is a dog would be a defense because the defendant would not understand, given the delusion, that he is killing a person. As to the second defendant, however, it is not so clear (absent unstated facts). The question essentially is, why would a delusion that a dog told a defendant to kill a person implicate the moral capacity defense. How would he be morally justified in killing the victim even if the dog had, in fact, ordered him to do so?

On page 20, the dissent returns the hypothetical, restates it and asks, “Now ask, what moral difference exists between the defendants in the two examples? Assuming equivalently convincing evidence of mental illness, I can find none at all.” *Id.* at 20. One difference is that a defendant thinking he is shooting a dog does not believe, in fact, does not know, that he is committing a crime (or at least a serious crime). A defendant killing what he believes to be a person cannot legitimately (without more facts) think he is morally or legally justified in doing so just because a dog ordered him to do so.

<sup>6</sup> *Kahler v. Kansas*, decided March 23, 2020. Justice Kagan wrote for the majority in this 6-3 decision. Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor.

<sup>7</sup> *M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H. L. 1843).

should be exercised in reading the citations for individual states (as set out in the notes).<sup>11</sup>

The American Psychological Association (APA) filed an *amicus curiae* (“friend of the court”) brief in this case, one of only two it filed in cases before the Court this Term.<sup>12</sup> The brief was in cooperation with several other organizations, and led by the American Psychiatric Association.<sup>13</sup> Contrary to

<sup>11</sup> The appendix that begins on page 24 of the dissent was put together by some of the finest legal minds of the country—justices and their clerks. Its categorization of the “camps” into which states fall is understandable. In some cases, however, the reader should be cautious about the provision quoted for each state. It sometimes does not really capture the state law. In California, for example, the following is the entry, “In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.” Cal. Penal Code Ann. §25(b) (West 2014).” This is what that provision of the Code provides. It is not, however, literally what the law of California is. Note that there is no specific requirement that the cognitive or moral incapacity be because of mental illness. Even more strange, taken literally, it says that to be found not guilty by reason of insanity, the defendant must show both the cognitive incapacity *and* moral incapacity. That is not the law of California either.

Despite the apparently clear language of this statute, the California courts have held, “Although § 25(b), uses the conjunctive ‘and’ rather than the disjunctive ‘or,’ in view of the fact that the disjunctive M’Naghten test is among the fundamental principles of criminal law, and applying §25(b), as a conjunctive test would erase that fundamental principle and would raise difficult constitutional questions, it could not be assumed that the electorate intended such a fundamental, far-reaching change in the law of insanity when it adopted §25(b), as part of an initiative measure, popularly known as Proposition 8, in 1982. *People v. Skinner* (Cal. Sept. 16, 1985), 39 Cal. 3d 765, 217 Cal. Rptr. 685, 704 P.2d 752, 1985 Cal. LEXIS 335. “Pen C §25(b), was intended to reinstate the M’Naghten test for the insanity defense. Although that subdivision uses the word ‘and’ between the prongs of the test as to defendant’s capacity to understand the nature and quality of his or her act and as to defendant’s capacity to understand right and wrong at the time the crime was committed, the trial court in a murder prosecution erred in using the statutory language in instructing the jury since the traditional test used the word ‘or’ between the two prongs.” *People v. McCowan* (Cal. App. 3d Dist. June 5, 1986), 182 Cal. App. 3d 1, 227 Cal. Rptr. 23, 1986 A Cal. App. LEXIS 1687. “To find a criminal defendant insane, the trier of fact must conclude that a criminal defendant was incapable, at the time of the crime, of knowing and understanding the nature and quality of his or her act or incapable of distinguishing right from wrong.” (Pen C §25(b)). “The incapacity must be based on a mental disease or defect, even though that requirement is not specifically mentioned in §25(b).” *People v. Stress* (Cal. App. 4th Dist. Nov. 15, 1988), 205 Cal.App. 3d 1259, 252 Cal. Rptr. 913, 1988 App. LEXIS 1061. Thus, reading the quoted part of the statute, as cited in appendix of the dissent gives a misguided notion of what the insanity defense law is in California.

<sup>12</sup> The APA has a considerable history of filing *amicus* briefs in the Supreme Court (as well as other courts). The APA *amicus* program is very nicely described at 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](https://arts-sciences.und.edu/academics/psychology/_files/docs/article-2-gilfoyle-and-dvoskin-2017.pdf) [<https://perma.cc/5TF9-43QF>].

<sup>13</sup> Brief of American Psychiatric Association, American Psychological Association, American Academy of Psychiatry and the Law, Judge David L. Bazelon Center for Mental Health Law, and Mental Health America, as *Amici Curiae* in Support of Petitioner, James K. Kahler v. State of Kansas (June 7, 2019), <https://www.apa.org/about/offices/ogc/amicus/kahler.pdf> [<https://perma.cc/Q9QL-5P4U>].

the positive trend of recent years in which APA *amicus* briefs have focused on providing specialized information that the Court would not otherwise have available, the first 25 pages of the brief restated legal arguments and legal history.<sup>14</sup> The brief was well written, but repeated arguments the parties made, and generally did not specifically focus on areas in which psychologists and psychiatrists would be able to represent special knowledge as a friend of the court. The last seven pages, however, do provide very helpful information about the relationship between mental illness and the capacity to understand wrongfulness,<sup>15</sup> and provide evidence that mental health professionals can diagnose mental illness that may preclude “moral capacity.”<sup>16</sup> The three dissenting justices cited pages 25–26 and 28 of the *amicus* brief for the proposition that “individuals suffering from mental illness may experience delusions” which may lead them to be violent.<sup>17</sup>

### Does Any of This Matter?

The insanity defense has been the subject of intense debate for centuries because it goes to fundamental questions of the nature of criminal responsibility, due process, and free will. Harvard Law Professor Arthur Miller once suggested, however, that as a practical matter “focusing on [the insanity defense] is like worrying whether the violin is out of tune in the band playing on the deck of the *Titanic*.”<sup>18</sup> Perhaps that is overstated, but there is more talk than action when it comes to the insanity defense. The insanity defense is seldom pleaded even in felony cases (perhaps 1% of the cases) and very seldom successful when it is pleaded (probably under 5%), meaning it is successful in .05% of felony cases.<sup>19</sup> There are

<sup>14</sup> 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.” The excellent Gilfoyle-Dvoskin article cited above note this rule at, 753–54.

<sup>15</sup> APA Brief at 25–30.

<sup>16</sup> APA Brief at 30–32.

<sup>17</sup> Justice Breyer wrote for the dissent that “individuals suffering from mental illness may experience delusions—erroneous perceptions of the outside world held with strong conviction. They may believe, incorrectly, that others are threatening them harm (persecutory delusions), that God has commanded them to engage in certain conduct (religious delusions), or that they or others are condemned to a life of suffering (depressive delusions)...Such delusions may, in some cases, lead the patient to behave violently.” Breyer, dissenting, at 20–21.

<sup>18</sup> Arthur Miller, *Quotes*, 70 A.B.A. J. 44 (1984) (responding to the news that the AMA Board of Trustees supported eliminating the insanity defense from criminal trials).

<sup>19</sup> E.g., Jeffrey Stuart Janofsky, Mitchell H. Dunn, Erik J. Roskes, J. K. Briskin & Matthew Rudolph, *Insanity Defense Pleas in Baltimore City: An Analysis of Outcome*, 153 AM. J. PSYCHIATRY 1464 (1996); HENRY J. STEADMAN, MARGARET A. MCGREEVY, JOSEPH P. MORRISSEY, LISA A. CALLAHAN, PAMELA CLARK ROBBINS, & CARMEN CIRINCIONE, *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* (1993); APA Brief, *supra*, at 30–32.

several reasons for this. First, juries do not like the insanity defense. It is also difficult and expensive to present the defense. A defendant found not guilty by reason of insanity may spend more time incarcerated (in a prison mental hospital) than if found guilty of the crime, so raising it in all but the most serious offenses can be harmful. (Some states have adopted a verdict of “guilty, but mentally ill,” which, unlike insanity, finds the defendant guilty but changes the nature of imprisonment.)

The other thing that may not have great practical significance is the legal test for insanity—the subject of the *Kahler* case. When different instructions were used on mock juries, it made little difference in whether the jury would have found the defendant not guilty by reason of insanity.<sup>20</sup> Thus, in one sense, the argument in *Kahler* may be more academic than practical.

### It Does Matter to Expert Experts

*Kahler* illustrates the substantial range of statutes and court decisions among the states. As the Appendix in Justice Breyer’s dissent illustrates, there is no single “insanity defense” in the U.S.; rather, there are any number of them, depending on the jurisdiction in which the case is tried. Although *Kahler* involved the legal standard for the defense, the definition of “mental disease or defect” varies among jurisdictions, as does what experts are permitted to testify about. Even in the same state, there may be differences between the defense in state cases compared with federal cases tried in that state.

Careful use of language is also important. It can mean one thing to mental health experts but something entirely different to judges and jurors.

Before testifying, preparing a report, or even beginning work with a criminal defendant raising the insanity defense, mental health professionals should understand the aspects and elements of an insanity defense. They should also understand how the insanity defense differs from other similar sounding, but very different, legal concepts (competency to be tried, for example). The attorney with whom the mental health professional is working should be the first stop for ensuring that there is a clear understanding of the particular requirements and peculiarities of that jurisdiction. This generally requires a detailed conversation with the retaining party, scheduled in advance to go over the legal and practical questions. These are obviously very important issues to the people involved with the case, and fitting reports and testimony into the requirements of the law is a critical step to doing the best job

possible for those involved and for the system of justice overall.

### A Note on the Insanity Defense and Incompetency to Be Executed

It is also important for mental health professionals to be clear on the distinction between the insanity defense, which was the subject of the *Kahler* case, and incompetency. In the criminal arena there may be incompetency to be tried, and incompetency to be executed.

The insanity defense is measured as of the time of the *crime* and it results in the defendant being found not guilty. Incompetency to stand trial means that at the time of *trial*, defendants would be unable to sufficiently understand the nature and consequence of what is going on to assist in their own defense. The effect of being found incompetent is that the state can endeavor to help the defendant recover sufficient competency, but may not go on with the trial until sufficient competency is restored.

A strange incompetency to be executed case was decided shortly after the Court adjourned in July. Incompetency to be executed means that at the time of an execution, a defendant cannot rationally understand that he or she is being executed and the basis for the execution.<sup>21</sup> On July 16, just after the Court had adjourned, Wesley Purkey applied to the Court for a stay of execution.<sup>22</sup> (The federal government had begun executions that week.) The Court declined to stay the execution on a 5-4 vote. According to the dissent, a forensic psychiatrist who had examined Mr. Purkey in person determined that he “lacks a true understanding or rationality that the murder is the basis for his execution.”<sup>23</sup> He had been diagnosed with Alzheimer’s disease in 2019. He apparently had a history of paranoid delusional thinking.

The majority did not write an opinion in the case (it was presented to the Court as a stay, not a regular case in which there were oral arguments), so it is difficult to know the Court’s reasoning. The dissenter’s description of the government’s brief may give a clue that there was potentially a procedural problem (the stay may have been filed in the wrong place), and the forensic psychiatrist’s report may not have been convincing or it may have been confusing. Mr. Purkey was executed later that day, July 16.

<sup>21</sup> *Ford v. Wainwright*, 477 U. S. 399 (1986).

<sup>22</sup> *Barr v. Purkey*, decided July 16, 2020. This was a 5-4 decision. Because it was an “Orders” decision, there was no majority opinion.

<sup>23</sup> There were two dissents, representing four justices. Justice Sotomayor wrote the opinion that is discussed in this article. Justices Ginsburg, Breyer, and Kagan joined the dissent. Justice Breyer also wrote another dissent, joined by Justice Ginsburg (it should be available with the link above). Justice Breyer recounted arguments he had made in earlier cases that the death penalty might be unconstitutional because of unconscionable delays and unequal application.

<sup>20</sup> RITA JAMES SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967); Richard A. Pasewark, Robert L. Randolph & Stephen Bieber, *Insanity Plea: Statutory Language and Trial Procedures*, 12 J. PSYCHIATRY & L. 399 (1984); Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 117 (1999).

## Discrimination Against Gay and Transgender Employees: Defining “Sex”

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to “discriminate against any individual because of that individual’s race, color, religion, sex, or national origin.”<sup>24</sup> This Term, the Court heard *Bostock v. Clayton County* and was called upon to determine whether discrimination based on sexual orientation or sexual identity is within the statute’s definition of “sex.” By a 6-3 majority the Court held that Title VII does prohibit employment discrimination based on sexual orientation and identity.<sup>25</sup>

This was a question of statutory (not constitutional) interpretation, with three opinions (totally 172 pages) battling over the proper interpretation of Title VII. There was generally agreement that what the law *ought* to be was irrelevant. Instead, the outcome hinged on the meaning of the word “sex” in 1964, when the statute was passed. Reduced to its essence, the majority reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men.” If he fires the gay employee, “the employer discriminates against him for traits or actions it tolerates in his female colleague.”<sup>26</sup> “[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.”<sup>27</sup>

Justice Alito’s long (107 pages) dissent offered many 1960s-era dictionary definitions of “sex,” to indicate that in 1964, “sex” meant to refer to biological gender, not orientation or identity.<sup>28</sup> The dissenters suggested that the Court was usurping the authority of Congress because it was “legislating” by adopting a new provision of Title VII.<sup>29</sup>

<sup>24</sup> 42 U.S.C §2000e–2(a)(1). More specifically, the law makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

<sup>25</sup> *Bostock v. Clayton County*, decided June 15, 2020. Justice Gorsuch wrote for the majority in a 6-3 opinion. Justice Alito, joined by Justice Thomas wrote a dissenting opinion. Justice Kavanaugh wrote a separate dissent.

<sup>26</sup> *Id.* at 9-10. The Court used similar reasoning regarding transgender employees. “Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.” *Id.* at 10.

<sup>27</sup> *Id.* at 19.

<sup>28</sup> Justice Alito provided to lengthy appendices quoting many past and current dictionary definitions of “sex” to make this point. Justice Alito, dissenting at 55, 63.

<sup>29</sup> The opening sentence of Justice Alito’s opinion was “There is only one word for what the Court has done today: legislation.” *Id.* at 1. In his first paragraph, Justice Kavanaugh wrote, “Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.” Justice Kavanaugh, dissenting at 1-2.

The American Psychological Association (the APA took the lead on this brief, which was filed in cooperation with several other mental health organizations) filed an *amicus* brief in the case.<sup>30</sup> They had a lot of company—there were about 70 *amicus* briefs filed in the case. The APA brief emphasized two points. The first was that orientation and identity “are intrinsically related to sex” and the “relationship between a man and a man, or a woman and a woman, is homosexual *because of the sex of the individuals*”<sup>31</sup> (emphasis in original). This, of course, was the heart of the case, and similar to the central point in the Court’s opinion. A second type of argument in the brief dealt with various issues of stigma and stereotyping, which did not appear to be of great importance in the case, but might have helped set a tone for the Court. The brief was well referenced—the footnotes having more words than the Argument. Another group of medical organizations filed a brief directed at transgender discrimination.<sup>32</sup>

Although this decision was statutory, not a ringing constitutional pronouncement, it would be difficult to overstate the likely importance of the decision. First, in the employment area, it is now settled law that employers may not discriminate based on orientation or identity in any employment decisions—hiring, firing, compensation, fringe benefits, and so on. Harassment based on identity or orientation may similarly be an employment law violation, and employers must take steps to stop it. On the other hand, it may mean that giving employment preferences to gay employees would now be as illegal as preferences to straight employees. There are a few

<sup>30</sup> Brief of American Psychological Association, American Psychiatric Association, Association for Marriage And Family Therapy, Georgia Psychological Association, Michigan Psychological Association, and New York State Psychological Association as *Amici Curiae* in support of the Employees, in *Bostock v. [Clayton County,] Georgia* (July 3, 2019) available at <https://www.apa.org/about/offices/ogc/amicus/bostock.pdf> [<https://perma.cc/CPK7-8CHK>].

<sup>31</sup> *Id.* at 7, 11. Similarly, the brief said, “A person is transgender *because of the nonalignment of their gender identity with the sex to which they were assigned at birth; a person is gender nonconforming because of the nonconformity of their gender expression with the norms and expectations of gender expression for persons of the male or female sex.*” *Id.* at 11 (emphasis in original).

<sup>32</sup> Brief of the American Medical Association, The American College of Physicians and 14 Additional Medical, Mental Health and Health Care Organizations as *Amici Curiae* In Support of the Employees, *Bostock v. Clayton County* (July 3, 2019), [https://www.supremecourt.gov/DocketPDF/17/17-1618/107177/20190703172548842\\_Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1618/107177/20190703172548842_Amicus%20Brief.pdf) [<https://perma.cc/W5ZD-FV4L>]. The core of the argument of the brief was, “Employment discrimination against transgender people frustrates the treatment of gender dysphoria by preventing transgender individuals from living openly in accordance with their true gender identity and impeding access to needed medical care. Experiencing discrimination in one of the most important aspects of adult life—employment—makes it nearly impossible to live in full congruence with one’s gender identity. The fear of facing such discrimination alone can prompt transgender individuals to hide their gender identity, directly thwarting the goal of social transition. . . . Lack of treatment, in turn, increases the rate of negative mental health outcomes, substance abuse, and suicide.” *Id.* at 4-5. The brief was not cited in the opinions in the case.

exceptions to Title VII—religious employers, for example, but these would be relatively minor exceptions.

The importance of the decision goes well beyond employment, however. Justice Alito, in an appendix to his opinion, listed more than 100 federal statutes that prohibit “discrimination because of sex.”<sup>33</sup> The decision did not directly determine that the same interpretation would be given to all of those statutes. These were adopted at various times, so it is conceivable that the courts would interpret the same language differently among some of those statutes. It is likely, however, that these statutes will be overwhelmingly interpreted as prohibiting discrimination related to sexual orientation and identification. That represents an extraordinary change in federal policy.

An interesting side effect of *Bostock* relates to the strong position of the majority that Title VII must read for the plain words without reference to the specific understanding of Congress when it passed the law. The same phrase of Title VII addressed by the Court in *Bostock* (“discriminate against any individual because of that individual’s race, color, ... sex...”) was interpreted to allow private firms’ affirmative action program because Congress *intended* the provision to help minorities, despite the apparent prohibition on discrimination.<sup>34</sup> What effect *Bostock* might have on such private affirmative action programs was not addressed by and of the opinions in the decision.

## Religious Objections

Some religious organizations expressed concern that the *Bostock* decision might require them to violate their religious belief in employment decisions. At the end of the Term, the Court decided a case that likely reduces that concern. Courts have provided a “ministerial exception” for religious organizations in employment discrimination cases.<sup>35</sup> This Term the Court held that the “ministerial” exemption is not limited to

“ministers.”<sup>36</sup> At issue this Term were two elementary teachers who taught religion, prayed with their students, and were involved with students’ spiritual development. Both were dismissed and wished to bring employment discrimination cases. The Court held that the ministerial exception precluded that. Courts should not interfere with the operation of religious organizations at a level where an employee holds an important position within a religious organization.<sup>37</sup> A variety of factors (not fully defined by the Court) determine if a position falls within the ministerial exception, but it depends on what employees actually do, not what they are called. Performing “vital religious duties” (as both of these teachers did), brings them under the exception.

The ministerial exception is not a broad exception to employment discrimination law. It applies to only some of the employees of religious organizations. In the context of the *Bostock* it does mean that for those with “vital religious duties,” antidiscrimination laws generally do not apply. This would include the sexual orientation and identification protection of *Bostock*.

## Unanimous Criminal Jury Decisions

Two states, Louisiana and Oregon, permit juries to convict defendants of felonies by a vote of 10-2, that is, by a less than unanimous vote. The question in *Ramos v. Louisiana* was whether the Sixth Amendment prohibits nonunanimous conviction in state criminal cases.<sup>38</sup> The relevant part of the Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury.”<sup>39</sup> There were two issues in this case. The first is whether it is significant that the Sixth Amendment includes no reference to a “unanimous” jury. The second (hidden) issue is that when it was adopted, the Sixth Amendment applied only to *federal* criminal trials, not to state defendants.

In terms of the unanimous verdict, the Court has repeatedly held that the right to a “jury trial” was understood by Congress and the states that ratified the Sixth Amendment to mean a unanimous verdict. That had been the understanding in British law, as it was in almost all states at the time the amendment

<sup>33</sup> The list of these statutes is set out in Alito, dissenting, at 66-81.

<sup>34</sup> *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The language and approach in *United Steelworkers* are about as different as possible regarding the language of the statute. The Court in *United Steelworkers* said that discrimination based on race was prohibited by the words of the statute, but should not be interpreted contrary to the meaning of the statute in light of what Congress intended. It said that “reliance upon a literal construction of [Title VII] is misplaced. ... It is a ‘familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.’” *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). The prohibition against racial discrimination in ... Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.” *Id.* at 201.

<sup>35</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (holding that the First Amendment prevented employment discrimination legal action by, or on behalf of, a religious school teacher, especially having been given the title of “minister”). This was based on the principle that religious organizations can “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).

<sup>36</sup> *Our Lady of Guadalupe School v. Morrissey-Berru*, decided July 8, 2020. This was a 7-2 decision. Justice Alito wrote for the majority. Justice Sotomayor filed a dissenting opinion, joined by Justice Ginsburg.

<sup>37</sup> *Id.* at 9-10.

<sup>38</sup> *Ramos v. Louisiana*, decided April 20, 2020, in a 6-3 decision. The majority opinion was written by Justice Gorsuch. There were three concurring opinions (Justices Sotomayor, Kavanaugh, and Thomas). There was a dissenting opinion by Justice Alito, joined by Chief Justice Roberts and Justice Kagan.

<sup>39</sup> The full text of the Sixth Amendment reads, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

was adopted. (But, as we will see in a moment, there was an important exception.)

As for the application of the Sixth Amendment to the states, the Court over the decades has used the Fourteenth Amendment to “incorporate” many of the provisions of the Bill of Rights to the states, including the various provisions of the Sixth Amendment. The problem, however, was in 1972, a badly divided Court held that Sixth Amendment right to a jury trial applied to the states, but it did not include the requirement of a unanimous verdict.<sup>40</sup> The 1972 cases involved the same Louisiana and Oregon jury laws before the Court this Term. In 2020, however, the Court reached a different answer to the same question. The majority held that the Sixth Amendment criminal-jury rights are incorporated against the states through the Fourteenth Amendment. That right also applies the unanimous verdict requirements to the states.

The Court was, as it had been in 1972, divided.<sup>41</sup> Five justices held that the Due Process Clause of the Fourteenth Amendment was the basis for the decision, although only four justices joined portions of that decision. Justice Thomas concurred.<sup>42</sup> Three justices dissented,<sup>43</sup> essentially finding that there was not sufficient reason to overturn the 1972 case, the *stare decisis* issue discussed later.

This case will not have a major impact on jury trials, nor on the work of mental health professionals who participate in jury studies. The effect of this decision will, however, extend beyond Oregon and Louisiana because a number of states told the Court that they were interested in experimenting with nonunanimous juries.<sup>44</sup> As a result of this decision, those efforts will not go forward.

<sup>40</sup> *Apodaca v. Oregon*, 406 U. S. 404 (1972) (plurality opinion).

<sup>41</sup> The Court was sufficiently split that it requires a small map to determine which justice was where on the decision. This is how the Report of Decisions described the alignment, “GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which GINSBURG, BREYER, SOTOMAYOR, and KAVANAUGH, JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and an opinion with respect to Part IV–A, in which GINSBURG and BREYER, JJ., joined. SOTOMAYOR, J., filed an opinion concurring as to all but Part IV–A. KAVANAUGH, J., filed an opinion concurring in part. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, and in which KAGAN, J., joined as to all but Part III–D.”

<sup>42</sup> *Ramos v. Louisiana*, Thomas concurring at 6–8. No other justice joined this concurrence. Justice Thomas was the sixth justice in the majority. He would have used the “Privileges or Immunities Clause” of the Fourteenth Amendment as the basis for the decision. The two clauses appear in the same sentence of the Fourteenth Amendment. (“No State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphases added). For more than a century, the Court has declined to try to decide what the privileges or immunities clause means. Justice Thomas has an interesting argument that it is a better “fit” in incorporating the first eight amendments to the states than due process is.

<sup>43</sup> Justice Alito, dissenting, joined by Chief Justice Roberts and Justice Kagan.

<sup>44</sup> The majority opinion noted that “a ruling for Louisiana would invite other States to relax their own unanimity requirements. In fact, 14 jurisdictions have already told us that they would value the right to ‘experiment’ with nonunanimous juries.” *Ramos* at 25.

## DACA: The Limits of Lawmaking by Memorandum

In 2012 the Obama Administration issued a “memorandum” establishing (without congressional approval or formal rulemaking) the Deferred Action for Childhood Arrivals (DACA) program. DACA granted renewable suspensions of deportation to undocumented aliens brought to the U.S. as children by their parents (“Dreamers”), and under other laws, the more than 700,000 Dreamers who received suspended deportation also could gain work rights and certain social benefits. Two years later, the Obama Administration further extended DACA to the parents of Dreamers (Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA). In 2015, the Fifth Circuit upheld a district court’s nationwide injunction barring implementation of DAPA. The Supreme Court upheld that decision on a 4–4 vote.<sup>45</sup> In 2017, there was a change of administration, and the Attorney General told the Department of Homeland Security (DHS) that DACA suffered the same legal defects as DAPA, so the Administration should rescind the program. DHS did so, once again by memorandum without formal rulemaking or congressional action.

The case before the Court this Term challenged the way the rescission of DACA occurred.<sup>46</sup> (An interesting irony is the president of the University of California, the named plaintiff challenging the rescission process, was Janet Napolitano, who had, as then-DHS Secretary, issued the first memorandum, establishing DACA.) The decision of the Court dealt solely with the process by which the rescission took place—there was general agreement that DHS could rescind it, if done properly with the right analysis and findings. The Court held that the rescission was “arbitrary and capricious” because (1) the rescission memorandum did not address the option of revoking DACA’s work and social benefits while continuing to suspend deportation, and (2) DHS did not adequately weigh DACA recipients’ “reliance interests” in continuing to live in the U.S. “While the agency was not required to pursue these accommodations, it was required to assess the existence and strength of any reliance interests....”<sup>47</sup> That is, the wisdom of the decision to rescind DACA was not an issue, only bases and the process used to make the decision.<sup>48</sup>

<sup>45</sup> *United States v. Texas*, 579 U. S. \_\_\_ (2016) (*per curiam*).

<sup>46</sup> *Department of Homeland Security v. Regents of Univ. of Cal.*, decided June 18, 2020. This was a 5–4 decision, with Chief Justice Roberts writing for the majority. Justices Thomas (joined by Justices Alito and Gorsuch), Alito, and Kavanaugh each wrote dissenting opinions.

<sup>47</sup> *Id.* at 26.

<sup>48</sup> An especially good review of the case is Glenn C. Smith, *In Significant DACA-Rescission Ruling, Chief Justice Roberts Again “Threads the Needle,”* JURIST (July 7, 2020), <https://www.jurist.org/commentary/2020/07/glenn-smith-daca-scotus/> [<https://perma.cc/T6UU-UNTG>].

The dissents argued that DHS had a compelling reason for rescinding DACA—that it was unlawful.<sup>49</sup> Furthermore, DACA was being rescinded by the very same memorandum process that created it.<sup>50</sup> It also noted that the majority provides a handy way for an outgoing administration to force a new administration to manage an unlawful program for some time,<sup>51</sup> and endless delays (the litigation over DACA has extended through four years following the change of administration).<sup>52</sup>

The Association of American Medical Colleges, American Psychiatric Association, American Medical Association, American College of Obstetricians and Gynecologists, and many other organizations filed an *amicus* brief in this case.<sup>53</sup> The brief argued that the failure of the regulation to consider “reliance interests” would have especially difficult consequences in the medical fields.<sup>54</sup>

## Abortion

*June v. Russo* involved a Louisiana state law requiring abortion providers to have “active admitting privileges at

a hospital” within 30 miles of where an abortion is performed.<sup>55</sup> Ordinarily, this would have been an easy (and short) case because the Court, in 2016, decided a case (from Texas) that involved almost exactly the same statutory provision.<sup>56</sup> But it was neither easy nor short (a total of five opinions covering 138 pages).

The four plurality justices emphasized that the Louisiana law (like the Texas law) substantially burdened the right to abortion without any corresponding benefit to the health of women seeking abortions.<sup>57</sup> (Under earlier Court precedents, “undue burdens” on abortion are unconstitutional.<sup>58</sup>) Justice Breyer wrote that the state could not present even one example in which a woman would have had better treatment if her doctor had admitting privileges. For a variety of reasons, admitting privileges were hard for abortion providers to obtain so enforcing the law had little or no benefit, but there was a cost—reduced availability of abortion services.

In the 2016 case, Justice Kennedy was the fifth, deciding, vote. But, of course, he has retired. The fifth vote in 2020 came from Chief Justice Roberts—truly the “swing vote” because in 2016 he had voted to uphold the law essentially identical to the law he voted this Term to invalidate. Chief Justice Roberts’ turn-about was essentially based on *stare decisis*. That is, he disagreed with the earlier decision and “still believes that the case was wrongly decided,”<sup>59</sup> but felt obligated to follow it.<sup>60</sup>

The four dissenting justices (in three different opinions) emphasized a variety of reasons the Court should have allowed the Louisiana law to stand. They questioned whether physicians should have “standing” (authority to go to court) to raise their patients’ right to abortion. Physician standing is frequently the way abortion rights cases get to court. This might become an issue in future abortion cases. (Chief Justice Roberts agreed only in a footnote that there was standing.) There were also concerns about the legitimacy of the Court’s “abortion jurisprudence,” and a desire to return the case to lower courts for better fact finding.

This should pretty clearly be the end of the abortion provider “hospital privileges requirement” a number of states

<sup>49</sup> Two of the three dissents also took aim at the Chief Justice’s effort to avoid political controversy. “Today’s decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision.” Justice Thomas, dissenting at 3. “DACA presents a delicate political issue, but that is not our business.” Justice Alito, dissenting at 2.

<sup>50</sup> For example, “DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward. The majority’s demanding review of DHS’ decision-making process is especially perverse given that the 2012 memorandum flouted the APA’s procedural requirements—the very requirements designed to prevent arbitrary decision-making.” Justice Thomas, dissenting at 16.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> Justice Alito noted that “the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.” Alito, dissenting at 2.

<sup>53</sup> Brief for Association of American Medical Colleges [and more than 30 other organizations, including the American Medical Association, and American Psychiatric Association] *Amici Curiae*, In Support of Respondents, Department of Homeland Security v. Regents of University of California (October 4, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-587/118129/20191004130646281\\_Brief%20for%20AAMC%20et%20al%20Supporting%20Respondents.pdf](https://www.supremecourt.gov/DocketPDF/18/18-587/118129/20191004130646281_Brief%20for%20AAMC%20et%20al%20Supporting%20Respondents.pdf) [<https://perma.cc/H47T-QDWZ>]

<sup>54</sup> “In this case, the government failed to make any serious effort to consider any of the substantial reliance interests affected by the rescission of the Deferred Action for Childhood Arrivals (DACA) program. This is particularly true with respect to the health care sector, for which the avoidance of unnecessary harm is a guiding principle. At this moment, an estimated 27,000 health care workers and support staff depend on DACA for their authorization to work in the United States. Among those 27,000 are nurses, dentists, pharmacists, physician assistants, home health aides, technicians, and others. The number also includes nearly 200 medical students, medical residents, and physicians who depend on DACA for their eligibility to practice medicine.” *Id.* at 2-3.

<sup>55</sup> *June Medical Services L. L. C. v. Russo*, decided June 29, 2020. This was a 5-4 decision. There was no opinion that was joined by five members of the Court. The plurality of four justices in the majority was written by Justice Breyer. Chief Justice Roberts issued a concurring opinion, but did not join the plurality opinion. The four dissenting justices joined most of an opinion by Justice Alito, but there were also additional dissenting opinions by Justices Thomas and Gorsuch.

<sup>56</sup> *Whole Woman’s Health v. Hellerstedt*, 579 U. S. \_\_\_\_ (2016).

<sup>57</sup> *June Medical Services*, Justice Breyer, plurality opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Breyer had earlier written the majority opinion in *Whole Woman’s Health*.

<sup>58</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992).

<sup>59</sup> *June Medical Services*, Chief Justice Roberts, concurring at 2.

<sup>60</sup> “The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore, Louisiana’s law cannot stand under our precedents.” *Id.* Chief Justice Roberts, however disagreed with Justice Breyer’s view that there should be a balancing of the benefits and harms of the statute.



passed. States seeking to nibble away at abortion rights will undoubtedly look elsewhere. Beyond that, it is difficult, from this case, to discern the future of abortion rights. Chief Justice Roberts seemed to narrow application of the “undue burden” and this was a special case—almost identical to one decided only four years earlier. The four dissenting justices, often with some passion, criticized the opinions of the majority justices, suggesting some appetite for deciding additional cases.

A few health care organizations filed *amicus* briefs in this case.<sup>61</sup> Organizations representing obstetricians and gynecologists were especially interested in it,<sup>62</sup> resulting in a strong disagreement, and even some name-calling (set out in the notes).<sup>63</sup>

<sup>61</sup> The Association of American Physicians and Surgeons (which should not be confused with the “National Board of Physicians and Surgeons”) filed an *amicus* brief. The brief argued, “Abortion, like other outpatient surgical procedures, sometimes results in patient hospitalization. Requiring abortion providers to maintain admitting privileges will improve communication between physicians in the transfer of patients to the hospital and allow them to participate in the care of their patients while in the hospital, in line with their ethical duty to ensure their patients’ continuity of care.” Brief of Association of American Physicians and Surgeons as *Amicus Curiae* in Support of Respondent—Cross-Petitioner, June Medical Services v. Russo 2 (December 27, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-1323/126828/20191227104605915\\_18-1323%20-1460%20bsac%20AAPS%2D%2DPDFA.pdf](https://www.supremecourt.gov/DocketPDF/18/18-1323/126828/20191227104605915_18-1323%20-1460%20bsac%20AAPS%2D%2DPDFA.pdf) [<https://perma.cc/3V2M-AWRD>]. Especially notable was that “Medical Staff Professionals” filed an *amicus* brief. Brief of Medical Staff Professionals, *Amici Curiae* in Support of June Medical Services, June Medical Services v. Russo (December 2, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-1323/124147/20191202175610979\\_18-1323%20Amici%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/18/18-1323/124147/20191202175610979_18-1323%20Amici%20Brief.pdf) [<https://perma.cc/32MR-9LJK>]. This is apparently not an association, but rather a group of individuals (“healthcare practitioners, managers, and consultants”) who filed under the Medical Staff Professionals title. The brief, among other things, particularly pointed out the process of obtaining and keeping medical staff privileges.

<sup>62</sup> Brief of *Amici Curiae* American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics American College of Nurse-Midwives, American College of Osteopathic Obstetricians and Gynecologists, American College of Physicians, American Osteopathic Association, American Public Health Association, American Society for Reproductive Medicine, North American Society for Pediatric and Adolescent Gynecology, Society for Maternal-Fetal Medicine, and Society of Ob/Gyn Hospitalists, *Amicus Curiae* In Support of June Medical Services, June Medical Services v. Russo (December 2, 20219), [https://www.supremecourt.gov/DocketPDF/18/18-1323/124091/20191202145531124\\_18-1323%2018-1460%20tsac%20American%20College%20of%20Obstetricians%20and%20Gynecologists%20et%20al.pdf](https://www.supremecourt.gov/DocketPDF/18/18-1323/124091/20191202145531124_18-1323%2018-1460%20tsac%20American%20College%20of%20Obstetricians%20and%20Gynecologists%20et%20al.pdf) [<https://perma.cc/8T8V-4D6S>].

<sup>63</sup> The American Association of Pro-Life Obstetricians and Gynecologists also filed an *amicus* brief. American Association of Pro-Life Obstetricians and Gynecologists *Amicus Curiae*, in Support of [Russo] Louisiana Dept. of Health and Hospitals, June Medical Services v. [Russo] (December 27, 2019), [https://www.supremecourt.gov/DocketPDF/18/18-1323/126927/20191227154424488\\_AAPLOG%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/18/18-1323/126927/20191227154424488_AAPLOG%20Amicus%20Brief.pdf) [<https://perma.cc/F94B-S9XS>]. The brief was solely directed at arguing that the American College of Obstetricians and Gynecologists was not presenting reliable science. It summarized its argument: “The American College of Obstetricians and Gynecologists has always presented itself to the Court as a source of objective medical knowledge. However, when it comes to abortion, the College today is primarily a pro-abortion political advocacy organization.” *Id.* at 2. It concluded that the “Court should read ACOG’s *amicus* brief not as an authoritative recitation of settled science, but as a partisan advocacy paper on behalf of a mere subset of American obstetricians and gynecologists. *Id.* at 27-28.

Justice Breyer cited the brief American College of Obstetricians and Gynecologists (ACOG) (twice) and the “Medical Staff Professionals” (three times) related to the privileging process and lack of value in hospital privileges for abortion providers.

In another abortion case, the Court was asked to review a Kentucky abortion statute that requires an ultrasound image to be shown to the woman as part of informed consent to an abortion.<sup>64</sup> Several medical groups filed an *amicus* brief in favor of a review,<sup>65</sup> but the Court declined to hear the case.

## The Invisible Case: *Stare Decisis* or the “Dustbin of History”?<sup>66</sup>

*Stare decisis*, the adherence to prior decisions or precedents, was a recurring issue this Term.<sup>67</sup> It was present in the unanimous jury (*Ramos v. Louisiana*) and abortion (*June v. Russo*) cases, but appeared repeatedly in other cases and in decisions about whether to accept cases. It is an enduring debate through constitutional history, but probably is more intense now because of its relevance to abortion and *Roe v. Wade*.<sup>68</sup>

There is a tension between two fundamental tenets of Supreme Court decisions. One is a strong commitment to following precedent. It allows for social continuity and certainty in the law—the law is not a whim of current justices. On

<sup>64</sup> Ky. Rev. Stat. § 311.727(2) requires that prior to an abortion (except in emergency situations), the physician show the woman a display an ultrasound image of the child, provide a medical description of the ultrasound, including the dimensions of the child and the presence of any external members or internal organs, and if a fetal heartbeat is audible, auscultate the fetal heartbeat so that it can be heard.

<sup>65</sup> Brief for *Amici Curiae* American College of Obstetricians and Gynecologists, the American Medical Association, the North American Society for Pediatric and Adolescent Gynecology, the American College of Osteopathic Obstetricians and Gynecologists, and the American Academy of Family Physicians Supporting Petitioners, EMW Women’s Surgical Center v. Meier (October 28, 2019) [https://www.supremecourt.gov/DocketPDF/19/19-417/120550/20191028184956458\\_19-417%20ACOG%20et%20al.%20-%20cert.%20amicus%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-417/120550/20191028184956458_19-417%20ACOG%20et%20al.%20-%20cert.%20amicus%20brief.pdf) [<https://perma.cc/CJ8V-DXRJ>]. The brief primarily argued that the law interferes with the informed consent process, requiring physicians provide information that the patient may ask not be provided. It thereby “unduly interferes with the patient-clinician relationship, which is built on trust, honesty, and confidentiality.” *Id.* at 5-6, 19-23.

<sup>66</sup> “Today, Louisiana’s and Oregon’s laws are fully—and rightly—relegated to the dustbin of history.... While overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance.” Justice Sotomayor, concurring in *Ramos v. Louisiana*, at 4-5, discussed above. The “dustbin” phrase is commonly attributed to Leon Trotsky when the Mensheviks walked out of the All-Russian Congress of Soviets in 1917: “You are pitiful, isolated individuals! You are bankrupts. Your role is played out. Go where you belong from now on – into the dustbin of history!”

<sup>67</sup> For a good review of *stare decisis* see, Brandon J. Murrill, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT, CONGRESSIONAL RESEARCH SERVICE REPORT (September 24, 2018), <https://fas.org/sgp/crs/misc/R45319.pdf>, [<https://perma.cc/NG3E-9EDQ>].

<sup>68</sup> Jonathan Turley, “The Dustbin of History”: Could Roe Be Next To Be Swept Away After *Ramos*?, RES IPSA LOQUITUR (April 23, 2020), <https://jonathanturley.org/2020/04/23/the-dustbin-of-history-could-be-roe-next-to-be-swept-away-after-ramos/>.

the other hand, courts should not be repeating the mistakes of the past. When a justice feels a past decision was a mistake, one way of putting the *stare decisis* question is: how much of a mistake was it before the Court should overrule it and correctly state the law.

In truth, whatever their commitment to *stare decisis*, every justice has voted to overturn decisions that other justices think should be preserved. In fact, Justice Kavanaugh noted that “in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents.”<sup>69</sup> Issues of adherence to precedent probably most often arise when there has been a jurisprudential shift over time (“liberal” to “conservative” or vice versa). That has happened over the last thirty years or so, as it did (in an opposite direction) from 1930–1960.

The debate over *stare decisis* broke out even when members of the Court all agreed on a case. For example, in *Allen v. Cooper* all justices agreed on the outcome of the case and what the principle was that should govern it. (The case involved state liability for copyright infringement.)<sup>70</sup> In two of the three opinions, the only difference (among seven justices) was essentially an argument how strong *stare decisis* should be if they had disagreed with the earlier decision (described in the notes).<sup>71</sup> We can expect to see the *stare decisis* debate continue in future terms.

## Other Significant Decisions

### Child Custody and Child Abduction

Mental health professionals who commonly deal with child custody evaluations sometimes have to deal with international questions, as when one parent lives in the United States, and the other parent in another country. A question may then arise

<sup>69</sup> Justice Kavanaugh, concurring, at 2. Justice Kavanaugh cited as examples, *Knick v. Township of Scott*, 588 U. S. \_\_\_\_ (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U. S. \_\_\_\_ (2019); *Janus v. State, County, and Municipal Employees*, 585 U. S. \_\_\_\_ (2018); *Hurst v. Florida*, 577 U. S. \_\_\_\_ (2016); *Obergefell v. Hodges*, 576 U. S. 644 (2015); *Johnson v. Cite as*: 590 U. S. \_\_\_\_ (2020) 3 KAVANAUGH, J., concurring in part United States, 576 U. S. 591 (2015); *Alleyne v. United States*, 570 U. S. 99 (2013). Kavanaugh, concurring at 2–3.

<sup>70</sup> *Allen v. Cooper*, decided March 23, 2020. The Court was unanimous. Justice Kagan wrote for the majority, with Justice Thomas writing a concurring opinion, and Justice Breyer (joined by Justice Ginsburg) also writing a concurring opinion.

<sup>71</sup> Justice Kagan’s majority opinion included a couple of references that reversing an earlier decision demands “special justification.” *Id.* at 9, 16. Justice Thomas’ concurring opinion declined to join those *stare decisis* paragraphs, indicating “If our [decision in another, earlier case] were demonstrably erroneous, the Court would be obligated to correct the error, regardless of whether other factors support overruling the precedent.” Justice Thomas, concurring at 1 (internal quotation marks omitted.) Finally, Justice Breyer (with Ginsburg) made a point in a separate decision of noting that he disagreed with an earlier decision, but recognized that the earlier decision “controls.” Justice Breyer, concurring at 2.

about which country’s courts should have the authority to determine custody and related issues. The Hague Convention on the Civil Aspects of International Child Abduction (to which the U.S. is a party) provides that the courts of the country where the child has “habitual residence” have jurisdiction to decide custody.<sup>72</sup> Furthermore, if a parent takes the child to another country, that country is obligated to return the child to the country of “habitual residence.” This can be important for many reasons, including that countries have different rules and standards for custody.

The convention has no definition of the critical term “habitual residence.” This Term the Court was called upon to define that term.<sup>73</sup> The definition was not precise. The Court held that determining habitual residence depends on the “totality of the circumstances,”<sup>74</sup> and that “locating a child’s home is a fact-driven inquiry, courts must be sensitive to the unique circumstances of the case and informed by common sense.”<sup>75</sup> Determining where a child is at home or feels at home likely invites the testimony of experts who have examined the child.

An exception to the Convention’s obligation to return a child to the country of habitual residence is where “there is a grave risk that [the] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>76</sup> This again invites expert testimony on the risk of returning the child to a country where there might be “psychological harm” or otherwise “intolerable” circumstances. Because those terms are also not defined, the lower courts that consider these cases will have considerable latitude in allowing expert testimony and deciding what is harmful or intolerable.

### Immigration and Foreign Citizens Cases

In addition to international custody cases, the Court decided a number of other cases involving immigration, foreign citizens, and international agreements.

- The Court interpreted federal statutes implementing the International Convention Against Torture (CAT).<sup>77</sup> The practical effect of the ruling is to allow those seeking

<sup>72</sup> Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), implemented in the United States by the International Child Abduction Remedies Act, 22 U. S. C. §9001 et seq. (a child wrongfully removed from the country of “habitual residence” generally must be returned to that country).

<sup>73</sup> *Monasky v. Taglieri*, decided December 11, 2019. Justice Ginsburg wrote for the Court. Although this was a 9-0 decision, two justices wrote concurring opinions.

<sup>74</sup> The Court’s formal statement was that “we hold that a child’s habitual residence depends on the totality of the circumstances specific to the case.” *Id.* at 2.

<sup>75</sup> *Id.* at 8 (internal quotation marks omitted).

<sup>76</sup> Art. 13(b) of the Treaty, discussed by the Court a 3, and 13-14.

<sup>77</sup> 8 U. S. C. §1252(a)(2)(C).

- asylum in the U.S. to challenge in court their removal from the U.S. on the basis that they would likely be tortured in the country to which they would be returned.<sup>78</sup>
- The court-review process, however, may not apply to those in the process of arriving in the U.S. (even those raising CAT claims). Asylum seekers arriving in the U.S. must show a “credible fear of persecution” in order to stay in the country and pursue the asylum claim. Under U.S. law, if the “credible fear” is not initially established, it can be reviewed by an administrative immigration judge, but there is not access to a federal judicial review. The Court held this Term that the process does not violate due process, and that the right to *habeas corpus* does not apply in such cases.<sup>79</sup>
  - The Court also considered permanent residents (“green card” holders), who may be removed from the U.S. if they are convicted for serious crimes. Under federal statutes, that removal is often automatic, but there is an exception that allows an immigration judge to cancel removal if the green card holder has resided in the U.S. for “seven continuous years” and has not committed an “aggravated felony.”<sup>80</sup> The calculation of the seven years ends, under a “stop-time rule” of the statute, if residents are convicted of crimes that would make them inadmissible to or removable from the U.S.<sup>81</sup> This Term, the Court held that the conviction of a crime that would have rendered the person “inadmissible” invokes the “stop-time rule” thereby making the resident subject to automatic removal.<sup>82</sup>
  - The Court also found that a cross-border shooting by federal border patrol agents did not give rise to civil liability (this case is discussed in the “Immunity” material below).<sup>83</sup>

<sup>78</sup> *Nasrallah v. Barr*, decided June 1, 2020. This was a 7-2 decisions, with Justice Kavanaugh writing for the Court. Justice Thomas dissented, joined by Justice Alito. This case means that Convention Against Tortures final orders of removal can be reviewed by federal appeals courts both in terms of the law in the case, but also the facts in the case.

<sup>79</sup> *Department of Homeland Security v. Thuraissigiam*, decided June 25, 2020, by a 7-2 margin. Justice Alito wrote for the majority. Justice Breyer wrote a concurring opinion, joined by Justice Ginsburg. Justice Sotomayor wrote a dissenting opinion, joined by Justice Kagan. The Constitution prohibits the “suspension” of the writ of habeas corpus, “unless when in Cases of Rebellion or Invasion the public Safety may require it.” (Article I, Section 9). The majority of the Court held that constitutional provision did not apply to certain immigration matters, so Congress did have the authority to limit access to federal courts in the asylum law.

<sup>80</sup> The Court noted, “The statutory list of aggravated felonies is long: murder, rape, drug trafficking, firearms trafficking, obstruction of justice, treason, gambling, human trafficking, and tax evasion, among many other crimes. §§1101(a)(43)(A)–(U).” *Barton* at 2, cited *infra*.

<sup>81</sup> 8 U. S. C. §§1229b(a), (d)(1)(B). The period of continuous residence is “deemed to end” upon conviction of a crime that would make the person inadmissible to, or removable from the U.S.

<sup>82</sup> *Barton v. Barr*, was decided April 23, 2020. It was a 5-4 decision with Justice Kavanaugh writing for the majority. Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan.

<sup>83</sup> See *Hernández v. Mesa*, decided February 25, 2020.

- U.S. law makes it illegal for someone to knowingly or recklessly “encourage someone to enter or reside in the U.S. in violation of the law.”<sup>84</sup> An immigration consulting/law firm was convicted of charging immigrants to file fraudulent work-permit applications, thereby encouraging people to reside in the U.S. in violation of the law.<sup>85</sup> Because of inappropriate procedures by the Ninth Circuit in considering the appeal (described in the notes),<sup>86</sup> the Court unanimously remanded the case with instructions to decide the case with proper process.

## Police and Government Official Immunity

In the aftermath of the killing of George Floyd and others, questions have arisen about the “immunity” of government officials, notably including police. It is common for the Court to decide “immunity cases” each term, and this Term was no exception. There are several important elements of these cases. First, they involve *civil* liability, not criminal liability. In fact, the legal immunity from *criminal* prosecution is limited for police, as the charges brought against the officers in Minneapolis demonstrate. Indeed, there can be both federal and state criminal charges—that is not double jeopardy, as the Court decided last Term.<sup>87</sup> In other words, even if a state declines to bring criminal charges (or botches the case), the federal government can bring felony charges of its own against police officers.

The potential civil liability (and immunity) for state officers is different than for federal officers. For *state officers* (including police) a federal statute (42 U.S.C. §1983) imposes liability for an intentional violation by state officials of a clearly

<sup>84</sup> 8 U. S. C. §1324 makes it a federal felony to encourage or induce “an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.” §1324(a)(1)(A)(iv). Conviction can result in a prison term up to five years. If, however, the crime is “done for the purpose of commercial advantage or private financial gain” the prison term can be up to ten years. §1324(a)(1)(B)(i).

<sup>85</sup> *United States v. Sineneng-Smith*, decided May 7, 2020. This was a unanimous decision, with Justice Ginsburg writing for the majority.

<sup>86</sup> In the appeal at the Ninth Circuit, after the briefs were filed, and after oral argument, but before it announced a decision, the Ninth Circuit asked three organizations to brief legal points neither of the parties had raised at trial or on appeal. The Court noted that “no extraordinary circumstances justified” the Ninth Circuit judges “takeover of the appeal.” *Id.* at 8. In addition, the three organizations the Ninth Circuit asked to file briefs (the Federal Defender Organizations of the Ninth Circuit, the Immigrant Defense Project, and the National Immigration Project of the National Lawyers Guild) were hardly balanced. They would have all been expected to very strongly advocate for the defendant in the case. Although the Court did not address this bias issue, it may have created a “we know what is going on” atmosphere surrounding the case. It was interesting that the Court attached an Addendum to its opinion setting out and explaining the instances in which the Court itself had asked for non-party briefing or representation. *Id.* at 10-11.

<sup>87</sup> *Gamble v. United States*, decided June 17, 2019. It was a 7-2 decision.

established constitutional right (e.g., life, search or seizure, torture).<sup>88</sup> Over the years the courts have developed a “qualified immunity” doctrine that limits liability to where the state official should have known conduct was improper because it violated a “clearly established” law (generally a court decision). This broad qualified immunity has been criticized, and either Congress or the Supreme Court could change it, which seems likely. Justice Thomas essentially issued an invitation for a future case that would raise the §1983 immunity issue directly.<sup>89</sup>

As for federal officers, there is no federal statute generally imposing civil liability for the violation of federal civil rights, although individual federal laws impose liability in some limited contexts. The Court has implied a civil liability for federal officials in some circumstances,<sup>90</sup> but because Congress has not authorized this liability, the Court has been very reluctant to expand it. The Court has established a qualified immunity doctrine similar to §1983 state liability described above.

This Term the Court considered whether there can be civil liability for actions taken by a federal official in the U.S., but that harm a foreign national in another country. In this case a Border Patrol Agent shot from the U.S. and killed a Mexican national who was just across the border in Mexico.<sup>91</sup> The issue was whether the parents of the Mexican national could sue the U.S. officials for damages. The Court declined to expand liability to include those injured outside the U.S. Because this liability was implied by the Court (not specifically authorized by Congress), the Court has been and remained reluctant to expand the implied liability.

## Affordable Care Act Debts

The Affordable Care Act (ACA), to encourage private insurers to participate in online health insurance exchanges,

<sup>88</sup> 42 U. S. C. §1983, provides, “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.” The exception stated in the section is for actions against “judicial officers.”

<sup>89</sup> *Baxter v. Bracey*, decided June 14, 2020. Justice Thomas, dissenting from the denial of *certiorari*. “I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for *certiorari*.” *Id.* at 6.

<sup>90</sup> *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

<sup>91</sup> *Hernández v. Mesa*, decided February 25, 2020. This was a 5–4 decision, with Justice Alito writing for the majority and Justice Ginsburg writing for the dissent. *Hernández* was a 5–4 decision. Four justices would have expanded the implied liability to cover this case; at least two justices (Thomas and Gorsuch) suggested that the Court should consider whether the judicially-created liability for federal officials should be eliminated. “The analysis underlying *Bivens* cannot be defended...It is time to correct this Court’s error and abandon the doctrine altogether.” Thomas, dissenting at 6.

provided that the federal government would cover the insurance losses for three years.<sup>92</sup> The Act, however, did not appropriate any money for these “risk corridors,” perhaps under the very optimistic assumption that insurers would break even. In fact, they lost \$12 billion. Congress (following the 2010 election) prohibited any appropriated funds from being used to pay insurance companies for their risk corridor losses.

Four insurance companies sued the U.S., seeking reimbursements for their losses, and this Term the Court held that the government must pay for their losses under the ACA.<sup>93</sup> The Court said that Congress could have expressly repealed the obligation (in the appropriation bill), but instead had only prohibited the expenditure of the money, which the Court said did not amount to an implied repeal of the obligation.

This is not the last word on the ACA. It will be back before the Court again, next Term, in *California v. Texas*.<sup>94</sup> The case essentially deals with the constitutionality of individual mandates (explained in the notes).<sup>95</sup>

## Guns: The Case That Shot Blanks

A highly anticipated case this Term was *New York State Rifle & Pistol Association v. New York City*, which involved extraordinary restrictions on the ownership and transportation of firearms.<sup>96</sup> After the Court had accepted the case, however, both New York City and New York State changed the firearm laws. In a 6–3 *per curiam* (by the court, not an identified justice) opinion the Court sent the case back to the lower courts for consideration of the claims under the new New York rules. Justices Alito, Gorsuch, and Thomas dissented.<sup>97</sup> They would have decided the case, and made it clear that they

<sup>92</sup> The ACA required both that insurance companies pay some money to the federal government if their profits from the ACA got too high, and that the government pay the insurance plans if they lost too much money. 42 U.S.C. §1342, §18063.

<sup>93</sup> *Maine Community Health Options v. United States*, decided April 27, 2020. This was an 8–1 decision, with Justice Sotomayor writing for the major and Justice Alito dissenting.

<sup>94</sup> There is already considerable interest, with many *amicus* briefs in this case. For links to all of the documents at [SOCUSblog.com](https://www.scutusblog.com) see <https://www.scutusblog.com/case-files/cases/california-v-texas/>.

<sup>95</sup> If you are thinking that the Court already decided the constitutionality of the individual mandate, you are right. But there are new circumstances. Here is how Amy Howe summarizes the issue: “In 2017, Congress enacted an amendment to the ACA that set the penalty for not buying health insurance at zero – but left the rest of the ACA in place. That change led to the dispute that is now before the court: A group of states led by Texas (along with several individuals) went to federal court, where they argued that because the penalty for not buying health insurance is zero, it is no longer a tax and the mandate is therefore unconstitutional. And the mandate is such an integral part of the ACA, they contended, that the rest of the law must be struck down as well. California and the other states joined the lawsuit to defend the mandate.” Amy Howe, *Justices Grant Affordable Care Act Petitions*, [SCOTUSBLOG.COM](https://www.scotusblog.com) (March 2, 2020), <https://www.scotusblog.com/2020/03/justices-grant-affordable-care-act-petitions/>.

<sup>96</sup> *New York State Rifle & Pistol Assn., Inc. v. City of New York*, decided April 27, 2020. This was a 6–3 *per curiam* decision. Justice Kavanaugh concurred; and Justice Alito dissented, joined by Justices Thomas and Gorsuch.

saw the New York law as unconstitutional. Justice Kavanaugh, who joined the majority, issued a concurring opinion agreeing with the dissent that the lower courts are misapplying the Supreme Court's Second Amendment decisions and asserting that the Court "should address that issue soon."<sup>98</sup>

This case was watched because the Court could have clarified the Second Amendment "right to keep and bear arms." By dismissing the case, the Court did not reach the gun (or related travel) issues. Surprising Court observers, the Court also denied *certiorari* in ten other Second Amendment cases,<sup>99</sup> but it is likely that the Court will eventually hear a gun-rights case.<sup>100</sup> On the other side of the gun issue was a brief by the American Medical Association asking the Court to take a case to decide the civil liability of an online service connecting gun sellers and buyers (sometimes referred to as a "Craiglist for guns," although actually unrelated to Craiglist). The Court declined to hear the case.<sup>101</sup>

## Contraception

The Affordable Care Act offered a short and ambiguous provision regarding contraceptive coverage, a gap that a regulatory agency (primarily the Health Resources and Services Administration) has had to fill.<sup>102</sup> Contraception was included by regulation, but there have been religious objections by some employers to covering contraceptive services. There have been several rounds of regulations seeking to resolve the conflict between providing contraceptive coverage and the religious beliefs of the "Little Sisters of the Poor" and others. In 2017, the agency

<sup>98</sup> *New York State Rifle*, Justice Gorsuch concurring, at 1.

<sup>99</sup> The failure to take any one of these ten cases was a surprise. In *Rogers v. Grewal*, petition for *certiorari* denied, June 15, 2020, Justices Thomas and Kavanaugh dissented from the denial of *cert* in a Second Amendment case, saying that the Court needs to clarify the law. It is very likely the Justices Alito and Gorsuch would be willing to hear the right 2<sup>nd</sup> Amendment case (they filed concurrences in the New York case). It takes four justices to grant *cert*, so it may be that Justices Alito and Gorsuch (and perhaps Chief Justice Roberts) would be willing to take the right case that clearly raises the issues they would like to consider.

<sup>100</sup> Justice Thomas, joined by Justice Gorsuch, dissented in the denial of *cert* to one of these cases, *Rogers v. Grewal*, dissent from the denial of *cert*, June 15, 2020. They argued that the lower courts are misapplying Second Amendment jurisprudence and the Court needs to provide greater guidance on the rights of gunowners.

<sup>101</sup> Brief of American Medical Association and Wisconsin Medical Society, *Amici Curiae*, In Support of Petition for *Certiorari*, Daniel v. Armslist (August 19, 2019) [https://www.supremecourt.gov/DocketPDF/19/19-153/112730/20190819102831354\\_19-153%20Amicus%20Brief%2D%2DPDF.pdf](https://www.supremecourt.gov/DocketPDF/19/19-153/112730/20190819102831354_19-153%20Amicus%20Brief%2D%2DPDF.pdf) [<https://perma.cc/5P32-2HRV>]. The online service did not sell guns, but rather matched potential buyers and sellers. The buyer connected with a seller and used the gun to kill three people. The Wisconsin Supreme Court held that Armslist was protected from liability by the Communications Decency Act which immunizes an interactive computer service provider from liability for passively displaying content created by third parties.

<sup>102</sup> The act (now codified at 26 U. S. C. §5000A(f)(2); §§4980H(a), (c)(2)) requires employers to provide women with "preventive care and screenings" without "any cost sharing requirements." "Preventive care and screenings," is left undefined by the statute, so it has to be determined by regulations.

expanded the religious exemption, providing a "moral exemption" regarding contraception for employers (nonprofits and for-profits with no publicly traded components) that had "sincerely held moral" objections to providing forms of contraceptive coverage. That regulation is the subject of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.<sup>103</sup>

The Court held that the regulations were within the very broad scope of authority the ACA gave to the agency to adopt regulations related to the undefined term "preventive care." The regulations had created the contractive mandate, and they could determine the best way of implementing them.<sup>104</sup>

This is probably not the end of the seven-year battle for the Little Sisters of the Poor. The Court left an opening for the lower courts to once again consider striking down the regulations as arbitrary and capricious.<sup>105</sup> In the meantime, however, the regulation granting the exception to the contraceptive mandate stands for a relatively few number employers who wish to take advantage of it.

## HIV/AIDS International Program

A major U.S. program for fighting HIV/AIDS worldwide has provided billions of dollars to agencies abroad.<sup>106</sup> That act requires that non-governmental organizations (NGOs) receiving funds under the program agree to have a "policy explicitly opposing prostitution and sex trafficking" ("the Policy Requirement"). Some grant recipients in foreign countries, generally affiliates of U.S. NGOs, are opposed to having such a policy. These grantees challenged the Policy Requirement as a violation of First Amendment rights of free speech.

In 2013, the Court held that the Policy Requirement was unconstitutional as applied to *American* grantees.<sup>107</sup> The question

<sup>103</sup> *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, a 7-2 decision. Justice Thomas wrote for the majority. Justice Ginsburg wrote a dissent, joined by Justice Sotomayor.

<sup>104</sup> The American College of Obstetricians and Gynecologists and other medical groups filed an *amicus* brief arguing that contraception is an essential preventive service. "Contraception not only helps to prevent unintended pregnancy, but also helps to protect the health and well-being of women and their children." Brief of American College of Obstetricians and Gynecologists, American Nurses Association, American Academy of Nursing, Physicians for Reproductive Health, and Nurses for Sexual and Reproductive Health, *Amici Curiae* in Support of Respondents and Affirmance, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* 4-5 (Apr. 8, 2020) [https://www.supremecourt.gov/DocketPDF/19/19-431/141177/20200408152340136\\_19-431%20and%2019-454%20Amici%20Curiae.pdf](https://www.supremecourt.gov/DocketPDF/19/19-431/141177/20200408152340136_19-431%20and%2019-454%20Amici%20Curiae.pdf) [<https://perma.cc/BS2H-5BXG>]. It was cited only by Justice Ginsburg in her dissent. Justice Ginsburg, dissenting at 5, 17.

<sup>105</sup> Justice Alito predicted as much. He would have decided that the Religious Freedom Restoration Act requires the exemption that the current regulation allows. Alito, concurring at 2.

<sup>106</sup> United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("the Leadership Act"), 22 U. S. C. §7601 et seq. One estimate is that the program has saved 17 million lives, primarily in Africa. *Agency for International Development* at 1.

<sup>107</sup> *Agency for International Development v. Alliance for Open Society*, 570 U. S. 205 (2013).

this Term was whether the same rules applied to foreign organizations (including affiliates of U.S. organizations). The Court held that the foreign organizations do not have the same First Amendment rights as U.S. organizations because it is a well-settled principle that “foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.”<sup>108</sup> Nor do foreign organizations become entitled to such rights as a result of an affiliation with U.S. organizations.<sup>109</sup> This decision means that foreign organizations are free to have whatever policies they wish, but they will be ineligible for funds under the Leadership Act.

## Other Interesting Decisions

This was an especially busy year for the Court, with a large number of important, closely watched cases. Here are a few highlights.

### Subpoenaing Presidents’ Personal Records

The most anticipated cases (at least by the news media) were cases involving the subpoena of a President’s personal and family records, while in office. The cases involved congressional subpoenas,<sup>110</sup> and a state grand jury subpoena.<sup>111</sup> The reality is that some balance is needed between “nobody is above the law” and onerously interfering with the office of President. The Court rejected the assertion of absolute presidential immunity, holding that the President may be subject to the subpoenas, but with limitations. In the case of the congressional subpoenas, the lower courts must assess whether the papers are necessary, the subpoena is limited in scope and has a legitimate legislative purpose, and whether the subpoena would unduly interfere with his ability to do the work as President. The state grand jury subpoenas will have to be reviewed by the lower courts in which the President will have the opportunity to raise specific objections to the scope and privacy implications of the subpoenas.<sup>112</sup>

<sup>108</sup> *Agency for Int’l Development v. Alliance for Open Society*, decided June 29, 2020. This was a 5-3 decision (Justice Kagan did not participate in the case). Justice Kavanaugh wrote for the majority, and Justice Breyer wrote a dissent, which Justices Ginsburg and Sotomayor joined. *Id.* at 3.

<sup>109</sup> The Court noted that “separately incorporated organizations are separate legal units with distinct legal rights and obligations.... Even though the foreign organizations have affiliated with the American organizations, the foreign organizations remain legally distinct from the American organizations.” *Id.* at 5.

<sup>110</sup> *Trump v. Mazars USA, LLP*, decided July 9, 2020. This was a 7-2 decision, with Chief Justice Roberts writing for the Court and Justices Thomas and Alito dissenting.

<sup>111</sup> *Trump v. Vance*, decided July 9, 2020, in a 7-2 decision. The opinion for the majority was written by Chief Justice Roberts. Justices Thomas and Alito dissented.

<sup>112</sup> The Court emphasized that the law allows challenges to subpoenas based on undue burden, bad faith, or overbreadth. In addition, the respect owed to the office should inform the conduct of the subpoena. The President might be able to challenge the subpoena as an attempt to influence or intimidate in violation of the Supremacy Clause, or that it would impede his constitutional duties. *Id.* at 17-21.

### Consumer Financial Protection Bureau (CFPB)

The CFPB (created by the Dodd-Frank law), has extensive powers, and an extraordinary administrative agency structure. It has a single Director with a five-year term, who cannot be removed by the President (except for cause). It receives its funding not from Congress, but from the Federal Reserve. The Court held that having a federal agency with a single director, who cannot be removed by the President, violates the Constitution.<sup>113</sup> The Court saved the agency by “severing” the single-director-no-removal provision from the rest of the law. That likely means that the President can remove the director at will, but most of the other powers of the CFPB remain. The CFPB will likely be back at the Court, perhaps because of problems with funding by the Federal Reserve.<sup>114</sup>

### Robocalls: Winning the Case and Losing the War

This case is evidence that there is some poetic justice in the universe.<sup>115</sup> The Telephone Consumer Protection Act of 1991, “prohibits robocalls to cell phones and home phones,” but an amendment to the act allows robocalls to collect debts owed to the federal government. Political robocallers claimed this violated the First Amendment by allowing some kind of speech (federal debt collection), but prohibiting others, so they sought to have the law declared unconstitutional. The Court agreed that the law as amended violates free speech. But the appropriate remedy was to prohibit the federal debt calls too.<sup>116</sup> Thus, after the considerable time, and expense of years of litigation, the political robocallers technically won the case, but they still cannot make their robocalls.

<sup>113</sup> *Seila Law LLC v. Consumer Financial Protection Bureau*, decided June 29, 2020. Chief Justice Roberts wrote for the majority in a 5-4 decision. All other independent agencies have multiple directors.

<sup>114</sup> The Constitution give Congress the authority to spend federal funds, and the CFPB receives its appropriation through the Federal Reserve, not through congressional appropriations. The Federal Reserve funds are not money the CFPB earns through fees or the like.

<sup>115</sup> *Barr v. American Assn. of Political Consultants, Inc.*, decided July 6, 2020. The decision was fractured on details (see below), but the decision was essentially 6-3 on the First Amendment issue, and 7-2 on the severability issue. Here is how the Reporter of Decisions described the division: “KAVANAUGH, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined, and in which THOMAS, J., joined as to Parts I and II. SOTOMAYOR, J., filed an opinion concurring in the judgment. BREYER, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined as to Part II.”

<sup>116</sup> The Court reached this conclusion by determining that the provision allowing the government-debt calls could be “severed” from the rest of the law. Thus, the unconstitutional exemption (for government-debt calls) was, in effect, removed from the law, leaving the rest of the law constitutional.

## Intellectual Property—Generic.com® and Suing States for Copyright

The Court held that adding a “.com” to a generic word (like Psychologist.com, or in this case Booking.com) may make the term trademarkable.<sup>117</sup> A legitimate mark must signify to consumers a term “by which the goods of the applicant may be distinguished from the goods of others.” Some psychologists may be interested in this because community or consumer surveys of how people perceive a term are likely to be important in these .com trademark cases.<sup>118</sup>

In another case, the Court held that federal copyright law does not ordinarily abrogate state sovereign immunity law, so copyright holders generally cannot sue state entities without states’ consent to such suits.<sup>119</sup> That does not mean, however, that mental health professionals, faculty, and staff at state universities are free to ignore copyright, because the Court suggested that intentional or systematic infringement might give rise to liability.<sup>120</sup>

## Oklahoma—About Half is a Creek Nation Reservation

The Court held that the eastern half of Oklahoma (including Tulsa) is part of a Creek Nation reservation.<sup>121</sup> This was a question of jurisdiction (especially criminal jurisdiction) not property ownership. The practical effect is that for crimes involving Native Americans, serious crimes will have to be tried in federal court, and lesser crimes may be tried in tribal courts. It is likely that a large number of Native Americans who are currently in Oklahoma prisons will have to be released or re-tried in federal courts.

## 2020 Election Issues

The Court reversed several lower court decisions that sought to change state election laws because of COVID. Those lower court decisions changed Texas’s absentee ballot rules,<sup>122</sup>

<sup>117</sup> *Patent and Trademark Office v. Booking.com B. V.*, decided June 30, 2020. This was an 8-1 decision, with Justice Ginsburg writing for the Court. Justice Sotomayor wrote a concurring opinion and Justice Breyer dissented.

<sup>118</sup> Justices Sotomayor (concurring) and Breyer (dissenting) expressed significant degrees of skepticism about overreliance on consumer surveys to establish a trademark, but it seems inevitable that those surveys will likely play a significant role in many .com trademark applications.

<sup>119</sup> *Allen v. Cooper*, decided March 23, 2020. The Court was unanimous.

<sup>120</sup> *Id.* at 11-13.

<sup>121</sup> *McGirt v. Oklahoma*, decided July 9, 2020. This was a 5-4 decision, with Justice Gorsuch writing for the majority. Chief Justice Roberts filed a dissenting opinion, joined by Justices Alito and Kavanaugh. Justice Thomas also filed a dissent.

<sup>122</sup> *Texas Democratic Party v. Abbott*, decided June 26, 2020. The Court unanimously voted not to dissolve a stay, stopping an order that required Texas to change its absentee voter rules. A federal district court had ordered Texas to expand absentee voting, but the Fifth Circuit stayed that order. The Supreme Court refused to vacate the stay.

extended the period for absentee votes in a Wisconsin primary election,<sup>123</sup> and changed Idaho’s rules for qualify ballot initiatives.<sup>124</sup> In each case, the majority of the Court held that lower courts had overreached into election matters that were for state determination.

## Religious Schools and State Funds

Montana had a state system that provided some scholarships for private schools, but excluded students at religious schools.<sup>125</sup> This Term the Court held that the effect was to penalize religion (discriminate against the “free exercise” of religion).<sup>126</sup> While a state need not fund private schools (or their students), if it does so, it cannot broadly disqualify religious schools and their students.

## Faithless Electors

Votes for President are actually cast as votes for electors from the state who will cast votes in the Electoral College. Political parties choose the people who will be Electoral College voters, and the delegates of the winner of that state are then eligible to cast the actual votes for President. But once in a while, a “faithless” elector will vote for somebody else. This Term the Court unanimously held that states can penalize or

<sup>123</sup> *Republican National Committee v. Democratic National Committee*, decided April 6, 2020. This was a 5-4 decision, with a *per curiam* opinion for the majority. Justice Ginsburg filed a dissent, joined by Justices Breyer, Sotomayor and Kagan. The federal court in Wisconsin had ordered the state to accept absentee ballots for a week longer than state law called for. The Supreme Court stayed that order.

<sup>124</sup> *Little v. Reclaim Idaho*, decided July 30, 2020. This was an order without a formal opinion from the Court. Justice, and it is not entirely clear what the vote of the Court was. Perhaps it is reasonable to speculate that the vote was 6-3 or 5-4. A federal court in Idaho had ordered that, in light of COVID, Idaho change its rules regarding a citizen petition to place an initiative on the November ballot. (The actions taken by the district court are described by Chief Justice Roberts as follows, “The District Court in this case ordered Idaho either to certify an initiative for inclusion on the ballot without the requisite number of signatures, or to allow the initiative sponsor additional time to gather digital signatures through an online process of solicitation and submission never before used by the State. When the State chose neither option, the District Court authorized the sponsor to join with a third-party vendor to develop and implement a new online system over the course of nine days.” (*Id.* Chief Justice Roberts concurring, joined by Justices Alito, Gorsuch, and Kavanaugh.) Justice Sotomayor, joined by Justice Ginsburg, dissented.

<sup>125</sup> *Espinoza v. Montana Dept. of Revenue*, decided June 30, 2020. This was a 5-4 decision. Chief Justice Roberts wrote for the Court. Justices Alito (joined by Justice Gorsuch) wrote a concurring opinion. Justices Ginsburg, Breyer, and Sotomayor wrote dissenting opinions. Justice Kagan joined the opinions by Justices Ginsburg and Breyer.

<sup>126</sup> The prohibition on any funding for religious schools is a provision in the Montana constitution. A similar provision is present in a number of states. It is known as a “Blaine Amendment” after House Speaker James Blaine, who failed, in the 1870s, to get an amendment to the Constitution to preclude public funding for religious schools. When the U.S. constitutional amendment failed, many states adopted their own version of the amendment. This was essentially based on anti-Catholic concern, as Justice Alito describes in detail. Justice Alito, *concurring* at 2-13.

even remove and substitute a new elector when there is a faithless elector.<sup>127</sup>

### Capital Punishment Postscript

Several days after the Court adjourned, federal prisoners who had received capital sentences in federal courts sought to stop their execution on the basis that the use of pentobarbital as the means of execution was cruel and unusual punishment.<sup>128</sup> In the first case, a five-justice majority held that this method of execution has been used without incident in over 100 state executions, and there was very little chance the prisoners could prevail on their claim.<sup>129</sup> The ruling cleared the way for one execution, occurring shortly thereafter, on July 14.<sup>130</sup> (The case of a second inmate, Wesley Purkey, was discussed earlier in the article.)

### Analysis of the Term

The Court was gaveled to order on October 7, 2019, and adjourned on July 9, 2020, somewhat later than usual (for reasons noted below). Despite deciding the lowest number of cases since the 1860s, it was an extraordinary Term. In the words of one observer, it was “a buffet of blockbuster.”<sup>131</sup>

During this Term, the Court decided 60 cases, including 53 “signed” merits opinions after oral argument, two *per curiam* opinions (after oral argument), and five summary reversals.<sup>132</sup>

<sup>127</sup> *Chiafalo v. Washington*, decided July 6, 2020. This was a unanimous opinion, although Justice Thomas concurred in the result, but wrote a separate opinion. Approximately 15 states punish faithless electors—and the number is likely to grow after this decision. Some (like Washington) fine faithless electors, others (like Colorado) do not count their vote and remove them. The *Chiafalo* case was from Washington. The Colorado case has a one-sentence opinion referring to *Chiafalo*. *Colorado Dept. of State v. Baca*.

<sup>128</sup> *Barr v. Lee*, decided July 14, 2020. This was a *per curiam* opinion (by the Court). It was a 5-4 decision, with Justice Breyer dissenting (joined by Justice Ginsburg) and Justice Sotomayor (joined by Justices Ginsburg and Kagan).

<sup>129</sup> *Id.* at 2. The Court also mentioned that it has never held that a state’s method of execution qualifies as cruel and unusual punishment. *Id.* Justice Breyer, in dissent, noted his earlier opinion that he believes the death penalty “may well violate the constitution.” (Breyer, dissenting at 1.) Justice Sotomayor dissented, saying that there was no urgency in deciding this case, and the lower courts should be given a chance to review it more fully. (Justice Sotomayor, dissenting).

<sup>130</sup> According to a witness to his execution, Daniel Lewis Lee’s final words were, “You’re killing an innocent man.” *U.S. Carries Out the First Federal Execution in Nearly Two Decades*, LOS ANGELES TIMES (July 14, 2020), <https://www.latimes.com/world-nation/story/2020-07-14/us-carries-out-the-1st-federal-execution-in-nearly-2-decades> [<https://perma.cc/5REH-H6YQ>].

<sup>131</sup> Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, NEW YORK TIMES (July 10, 2020).

<sup>132</sup> Most of the data in this section come from the SCOTUSBLOG.com Stat Pack for the Term. It is an excellent resource. Adam Feldman, *FINAL STAT PACK FOR OCTOBER TERM 2019* (July 10, 2020), <https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/> [<https://perma.cc/B2SV-HBZQ>].

Of those 60 cases, 22 (35%) were unanimous, and 13 (22%) were 5-4. This is somewhat more contentious than the ten-year average, which is 48% unanimous, and 20% 5-4. Given the nature of the cases this Term, that is not surprising.

It was a remarkable Term for Chief Justice Roberts. He presided over the impeachment trial of President Trump in the Senate in the PM, after hearing cases in the AM. He also presided over the Court’s accommodations to the COVID-19 pandemic (discussed below). He is not only the administrative head of the courts, but is now the “median” or “swing” justice. He was in the majority in 12 of the 13 decisions in which the Court split 5-4 (the exception was the Oklahoma Reservation case). He was in the majority in all cases 97% of the time, and in 95% of “divided cases”—the highest of any of the justices this Term. This was somewhat historic—the first time since 1949 that a Chief Justice has been in the majority so often. In some of the most critical decisions, Chief Justice Roberts sided with the “liberal” wing—including the abortion, gay and transgender employment cases, DACA, and two presidential subpoena cases. More often (nine of the 5-4 decisions), however, he sided with the more conservative justices. The commentators have had many theories about the Chief Justice this Term—that he is tacking to the left at a rapid clip, trying to keep the Court out of any major election-year disputes, showing his dislike of pretextual claims (from the President or anyone else), wanting to demonstrate that the judiciary is apart from the partisanship of the other branches of government, etc. It may be any or all of those. Or it could have primarily been the nature of the cases that the Court heard this Term. It is, however, fairly clear that Chief Justice Roberts has an especially strong concern for the place of the Court in our government, and in the minds of the public.

Justice Kavanaugh agreed with Chief Justice Roberts most often (93% of all cases). Among the others, these justices agreed with each other 90% or more of the time: Justices Ginsburg-Breyer (93%), Justices Alito-Thomas (92%), and Breyer-Kagan (90%). In 5-4 cases, three sets of justices agreed with each other all the time: Thomas-Alito, Ginsburg-Breyer, and Sotomayor-Kagan. At the other extreme, the lowest agreement was between Justices Sotomayor and Thomas (45%), Justices Alito and Sotomayor (47%) and Justices Thomas and Ginsburg (50%). In the 5-4 cases, there were six pairs of justices who never agreed with one another (listed in the notes).<sup>133</sup>

### COVID-19 and the Court

Some of the big news for the Term came not from the law, but from medicine: COVID-19. The Court was in the process of preparing a final set of oral arguments when, on March 16, it

<sup>133</sup> Thomas-Sotomayor, Thomas-Kagan, Ginsburg-Kavanaugh, Breyer-Kavanaugh, Alito-Sotomayor, and Alito-Kagan.



announced that it was postponing them.<sup>134</sup> The Court then rescheduled 10 oral arguments and held them by telephone. Other cases were held over to next Term. The telephone arguments, during the first two weeks of May, necessitated a change in format. Each justice was called on (in order of seniority) by the Chief Justice to ask questions. This was in contrast for the free-for-all of questions that characterizes usual in-person arguments. Justice Thomas, who usually does not ask many questions, was an active participant in the phone arguments.

These arguments were broadcast live, in contrast to the usual process of releasing the recordings of arguments at the end of each week. That public access was on balance a good thing. There are disagreements among Court-watchers about whether this form of argument was as an improvement or terrible. Technically, the arguments went off with few hitches—a couple of failures to unmute (with which all Zoomers can identify), and “the flush heard round the world.”<sup>135</sup>

The pandemic also almost immediately confronted the Court with legal issues too. In addition to the election issues noted earlier, in late May, a church in San Diego asked the Court for a temporary injunction enjoining enforcement of the California governor’s COVID-19 order, which allowed churches to operate with less than 100 attendees or 25% occupancy (whichever was lower). Meanwhile, businesses, malls, and stores were allowed to reopen with less stringent limitations. The church objected that greater burdens were placed on religion than secular activity. The Court denied the church’s request for an injunction. The Chief Justice wrote an opinion explaining why he opposed granting the injunction, and indicating that substantial deference should be given to executive officials handling COVID-19 issues. Three dissenters who supported the injunction wrote dissenting opinions.<sup>136</sup> The church issue arose again, after the Term ended, in July.<sup>137</sup> Nevada adopted rules that

allowed some commercial establishments (casinos, bowling alleys, breweries, and gyms) to operate at 50% capacity, but limited places of worship to 50 persons, regardless of the capacity. Churches (who wanted the 50% rule too) asked that this rule be enjoined as a violation of the First Amendment. The majority of the Court (again including Justice Roberts) declined to issue an injunction.<sup>138</sup>

## Justice Ruth Bader Ginsburg

On September 18, 2020, Justice Ruth Bader Ginsburg passed away at age 87. In 2009, she had been diagnosed with pancreatic cancer. During the past Term, Justice Ginsburg had been hospitalized twice for gallbladder-related issues. Following the end of the Term she announced that there was a recurrence of pancreatic cancer. She had served on the Court since 1993.

Ruth Bader Ginsburg had an amazing legal mind. Despite being a star law student, it was a time before women were accepted into the profession, and she had difficulty finding a job as an attorney. As a law professor and attorney, she became a leader in equal opportunity and legal rights for women. She won five of six gender equality cases she argued before the Court, helping change the approach of the courts to gender discrimination. She was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1980. In 1993, President Clinton nominated her to the Supreme Court, and she was confirmed by the Senate seven weeks later on a 96-3 vote. (It was a different political era.) She was the second woman to serve on the Court. During her 27 years on the Court, she was viewed as a fairly consistent vote for the liberal side of the Court. She was especially known for her opinions—majority and dissents—involving gender equality.

Justice Ginsburg was active in oral arguments, her questions often going to the heart of the issue before the Court. She produced opinions quickly, in most Terms faster than any of the other justices. She also had a crisp writing style, focused on the legal question and coming to clear legal conclusions.

<sup>134</sup> In a press release on March 16, 2020, the Court announced, “In keeping with public health precautions recommended in response to COVID-19, the Supreme Court is postponing the oral arguments currently scheduled for the March session (March 23-25 and March 30-April 1). The Court will examine the options for rescheduling those cases in due course in light of the developing circumstances. The Court will hold its regularly scheduled Conference on Friday, March 20. Some Justices may participate remotely by telephone.” [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_03-16-20.](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20)

<sup>135</sup> David Hejmanowski, *Flush Heard Around the World*, DELAWARE GAZETTE (May 8, 2020), <https://www.delgazette.com/opinion/columns/83610/flush-heard-around-the-world>.

<sup>136</sup> *South Bay United Pentecostal Church v. Newsom*, decided May 29, 2020 (this link contains both the concurrence and the dissent). There was no opinion of the Court because it was a denial of a temporary injunction, and without oral argument. Justice Kavanaugh wrote a dissent, joined by Justices Thomas and Gorsuch. Chief Justice Roberts wrote a concurring opinion explaining why he opposed the injunction. None of the other justices wrote an opinion, so it is difficult to know with certainty how they voted. It seems likely the Justices Ginsburg, Breyer, Sotomayor, and Kagan voted against the injunction. Justice Alito did not sign the dissent, but he may well have been a fourth vote to grant the injunction. It appears that the vote was probably either 6-3 or 5-4.

<sup>137</sup> *Calvary Chapel Dayton Valley v. Sisolak*, decided July 24, 2020. This was an order, so there was no opinion of the Court. It was a 5-4 decision. There were three dissenting opinions.

<sup>138</sup> There was no opinion explaining the decision of the majority, so the reasoning of the majority (Chief Justice Roberts, and Justices Breyer, Ginsburg, Kagan, and Sotomayor, is uncertain. Undoubtedly, the concurring opinion of Chief Justice Roberts in the May case, *South Bay United Pentecostal Church*, case provides some hint of his reasoning (“Similar or more severe restrictions apply to comparable secular [entities as were placed on churches] (*Id.* at 1, Chief Justice Roberts, concurring). But the Nevada church’s argument was that different rules were placed on other, similar, organizations than on churches. (Some organizations in Nevada had limitations similar to churches, including museums, art galleries, and zoos, so perhaps that was enough to convince the majority that churches were at least not being singled out.)

She also became a cultural icon—“The Notorious RGB.” From workout manuals to movies, she was something of a rock star. The public gathered around courthouses throughout the country when her death was announced. In public she often seemed shy, but was actually friendly and funny. She was married to Marty Ginsburg for 56 years (he died in 2010)—he was a gourmet cook, but she was not (apparently their children once banned her from the kitchen). Justices Ginsburg and Scalia were close friends, despite taking polar opposite views on many legal issues. Both were opera enthusiasts, sometimes playing bit roles in operatic productions. Their families spent some holidays together. In the day of hostile political differences, it is perhaps a lesson in personal civility and affection, despite policy differences.

Justice Ginsburg’s death in the middle of a presidential campaign set off a major political struggle about whether a successor could be named and confirmed before the election. There were even threats of “Court packing” by one party if the other party rushed through a nomination. As this article was being completed, it was unclear whether that could occur, or what effect it would have on the election.

### The Next Term

The next Term (the “October 2020 Term”) will begin on October 5. There very probably will be only eight justices that day, and perhaps for much of the Term. In recent years, when the Court has worked with eight justices, it has usually managed cases reasonably well. When there is a 4-4 tie vote on a case, the lower court decision is upheld, but the Court generally has managed to avoid many 4-4 splits.

The Court has already taken a number of cases for next Term. The constitutionality of the Affordable Care Act will once again be before the Court, and that has already produced a flood of *amicus* briefs. Among the other issues are cases related to the sentencing of juveniles to life in prison without the possibility of parole, two cases seeking to hold law-enforcement officials personally liable for civil damages, state regulation of pharmacy benefit managers, a faceoff between Google and Oracle on software copyrights, and arbitration (as always).<sup>139</sup> The next Term will also include a return of issues we saw this Term—whether the unanimous jury requirement should be applied retroactively, more on robocalls, religious freedom and Catholic charities, and immigration and removal cases.

<sup>139</sup> There was so much in the current Term that we did not have a chance to discuss an international arbitration case, in which the Court held that the treaty did not preclude extended arbitration remedies that extend beyond the provisions of the definition in the treaty. *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*. The arbitration case for next Term concerns the details of arbitration agreements.

There will be, of course, an election a month after the Court reconvenes. The President and party controlling the Senate will affect the makeup and future appointments to the Supreme Court. In turn the court may play a significant role in that election, perhaps with a vacancy immediately available. A 4-4 split in such as case would be problematic. When the opening gavel falls, the Court will be meeting electronically. Live or electronic, it promises to be another remarkable Term.

### Author’s Note: Cited Notes for This Article

The citations in this article are to the Slip Opinions of the Court as published on the Court’s website referenced above. 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 most of the cases in these Endnotes, clicking on the name of the case will take you to the opinion on the Supreme Court’s website. For other materials, many citations have included a link to the cited material. For many non-court citations, there are 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.supremecourt.gov](http://www.supremecourt.gov). The website for the opinions for this Term is <https://www.supremecourt.gov/opinions/slipopinion/19#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 “201.” The “Opinions Relating to Orders,” is in a separate web page. It is at <https://www.supremecourt.gov/opinions/relatingtoorders/19>. 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/>.

## Additional Information

The author thanks, for their wonderful suggestions, corrections, and assistance, Hannah Arterian, Angelo Corpora, Eric Drogin, Morgan Sammons, Glenn Smith, Lera Smith, and Gary VandenBos.

**Publisher's Note** Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

**Steven R. Smith**, JD, is Professor Emeritus and Dean Emeritus, California Western School of Law. He received his JD from the University of Iowa College of Law. Smith served as a public member of the APA Ethics Committee, ABPP Board of Trustees, and National Register Board of Directors. He may be reached at [ssmith@cwsl.edu](mailto:ssmith@cwsl.edu).