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Civil Cases in the Supreme Court's October Term 2020

Thomas M. Fisher

The Supreme Court's October Term 2020 provided plenty of compelling storylines, principally the appointment of Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg. Other noteworthy features included telephonic oral arguments (featuring regular participation by Justice Thomas) and high-profile use of the so-called shadow docket for injunctions and stays (most famously in cases seeking to undo presidential election results in various States—and arising post-Term in the challenged Texas abortion statute). With all that excitement, the focus shifted away from the Court's civil docket in argued cases (the subject of this column); indeed, the Court's decision at the end of the term to hear the abortion-rights case *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, seemed to overshadow the usual late June download of blockbuster decisions.

Nonetheless, the Term provided many civil case decisions well worth considering. The latest challenge by many States (including mine) to Obamacare fizzled, but still yielded an instructive discourse on the requirements for Article III standing, as did less noteworthy cases involving claims for nominal damages as a remedy for a free speech violation, and statutory damages as a remedy for being wrongfully identified as a terrorist by a credit-reporting agency. One of many cases pending around the country seeking to hold fossil-fuel companies liable for global climate change provided a decision on appellate jurisdiction sure to stoke the fires of appellate practitioners and professors (including me). Personal jurisdiction doctrine got a plaintiff-friendly refresh, while, from child slave labor to Nazi art theft, it was not a good term for those seeking a federal judicial forum for injuries abroad. In the separation-of-powers arena, the Court continued its recent trend of applying robust scrutiny to Congress's creative administrative schemes yet failed to provide much clarity as to appropriate remedies in such cases.

Religious liberties claimants had a positive Term, with one caveat. In one case, the Court confirmed that successful Religious Freedom Restoration Act plaintiffs may claim damages from individual defendants. In another, it held that a religious foster-care program may not be excluded from government placements just because it will not, for religious reasons, place children with same-sex couples. Still, the Court did not resolve in a more general way whether religious rights or marriage rights prevail when the two collide, and indeed the Court denied certiorari at the end of the Term in a case where it could have provided an answer.

In the free speech context, the Court sided with a student who challenged her school's discipline for off-color—but also off-campus—social media posts. It also sided with charities who feared harassment of supporters if required to disclose donors to the State of California in the name of enabling detection of fraud. And it affirmed Arizona's right to prohibit absentee-ballot harvesting and to require voters to cast ballots in the proper precinct.

The Term also featured a few property-rights cases. Here, the Court ruled against yet another California law, this time one that gave union organizers access to the property of nonconsenting employers for recruiting purposes. And it ruled in favor of a pipeline company that exercised federal eminent domain power against a State.

Finally, in perhaps the most significant case of the Term, the Court ruled that, yes, the NCAA is subject to the Sherman Act. The only NCAA rules directly affected were those prohibiting schools from competing as to educational benefits, but as Justice Kavanaugh's concurring opinion illustrates, the logic of the opinion would seem to apply much more broadly. What is valuable about amateur sports? The NCAA's need to answer that question in a convincing way may be the most compelling legacy of the Term.

ANTITRUST

NCAA'S LIMITS ON ATHLETE COMPENSATION VIOLATE SHERMAN ACT

Since its founding, a defining characteristic of the NCAA has been its opposition to compensation for student-athletes. Beginning in 1948, it created a system to expel schools who paid athletes beyond the terms of approved scholarships. For nearly as long, schools, athletes, coaches, broadcasters, and others have litigated in vain to invalidate various NCAA rules and policies through antitrust theories. This term, in *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021)[1], someone finally succeeded, at least with respect to limits on education-related compensation, such as scholarships for graduate school, payments for tutoring, in-kind benefits such as computers, awards for academic achievement, and money for post-graduate internships.

The issue before the Court in *NCAA* was whether the rules limiting such student-athlete compensation violated section 1 of the Sherman Antitrust Act, which broadly prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade." 15 U.S.C. § 1 (2018). The plaintiffs—current and former Division I athletes—challenged these rules, and the district court and Ninth Circuit—employing the "rule of reason" test applicable to all but

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Footnotes

1. Together with American Athletic Conference v. Alston, No. 20-520.

the most severely anti-competitive activities (such as price fixing and market allocation) that are "per se" invalid—held that the NCAA's education-related benefits rule unreasonably precluded non-salary compensation.

In the Supreme Court, the NCAA argued that its compensation rules should be subject to a less stringent test than the rule of reason, which entails a fact-specific assessment of the pro-competitive and anti-competitive effects of a challenged restraint. It argued that, because the anti-competitive effects of depressing athlete compensation was well established—in contrast with any pro-competitive effects of differentiating amateur and professional sports—the rule-of-reason standard was unfair. The NCAA argued that "abbreviated deferential review" would be more appropriate because it operates as a joint venture that plays a critical role in safeguarding amateur collegiate athletics (and all the social objectives that entails) rather than as a commercial enterprise.

In an opinion by Justice Gorsuch, the Court unanimously held that the rule of reason properly applied to the NCAA's compensation restrictions, which it described as "horizontal price fixing in a market where the defendants exercise monopoly control." It explained that, while joint ventures may get some leeway not available to unitary actors, that did not extend beyond the rules necessary for the joint venture to operate. Here, some rules—such as those defining the rules of the game—are clearly essential for the basic functioning of a sports league and may be deferentially reviewed. Limits on athlete compensation, however, do not fall within that cooperation-facilitating category. And while the NCAA may serve social objectives beyond commercial profit, such considerations are irrelevant under the Sherman Act, which merely permits courts to decide whether actions are anticompetitive, not whether they are on balance good for society. The Court therefore refused to confer "a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade" or "overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money . . . ." (In a striking marginalization of the well-known baseball antitrust exception, the majority opinion acknowledged that "this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball," but just as quickly recounted the criticisms of that "something" with which it "dallied.")

Applying the rule of reason, the Court upheld the district court's determination that "substantially less restrictive means" existed for the NCAA to achieve its pro-competitive goal of differentiating amateur and professional sports for purposes of stimulating consumer demand. Here, part of the problem for the NCAA was that it had failed to adopt and maintain a consistent definition of amateurism over the years, and indeed did not seem ever to have defined it in terms of what might attract consumer demand. Indeed, the NCAA's evidence of how, if at all, a line between paid and unpaid athletes would meet demand for a supposed market for amateur sports (whatever that means) was relatively weak, as it consisted only of interviews with NCAA-connected witnesses selected by NCAA lawyers rather than expert analysis of standard consumer-demand measures. But at the very least, lifting restraints on education-related benefits would not confuse anyone wondering whether these athletes are amateurs or professionals. The NCAA worried that an unrestrained market for educational benefits such as paid internships, academic awards, and in-kind assistance would degenerate into sham arrangements for no-show jobs at car dealerships, payment for a minimum GPA, and fancy cars to get to class. But the Court stressed that, while schools must be free to compete in those areas, under the terms of the district court injunction the NCAA remains free to delineate limits as to what within those categories would be legitimately related to education.

" . . . while the NCAA may serve social objectives beyond commercial profit, such considerations are irrelevant under the Sherman Act . . ."

Justice Kavanaugh joined the Court's opinion *in toto*, but also wrote a separate concurring opinion expressing the view that the NCAA's restrictions on non-education-related compensation—which were not at issue in *Alston*—also raise serious antitrust concerns. As Justice Kavanaugh put it, "[u]nder the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification." In his view, for the NCAA to say that its product is college sports, which is defined by not paying the athletes, which in turn justifies restricting athlete compensation, is "circular and unpersuasive." More doctrinally, "a monopsony cannot launder its price-fixing of labor by calling it product definition." By way of comparison, "[a]ll of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks." And don't get him started on comparisons to capping income for lawyers, nurses, journalists, and movie camera crews. In short, "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate," and "[t]he NCAA is not above the law."

ARTICLE III STANDING

STATES LACK STANDING TO CHALLENGE ACA INDIVIDUAL MANDATE OWING TO CONGRESSIONAL REPEAL OF TAX PENALTY

California v. Texas, 141 S. Ct. 2104, 210 L. Ed. 2d 230 (2021), was the third major challenge to the Patient Protection and Affordable Care Act of 2010 to reach the Supreme Court, but it fared no better than the first two.[2] Stemming from the Act's "minimum essential insurance"—*i.e.*, individual mandate—requirement, Texas and its co-plaintiff States argued that the 2017 amendments zeroing out the financial penalty rendered the mandate invalid, along with the broader ACA itself through inseverability.[3] Without reaching the merits, the Court, in a majority opinion by Justice Breyer and joined by six others, rejected the States' standing owing to the absence of a "fairly traceable" injury to the "allegedly unlawful conduct." Justice Alito, joined by Justice Gorsuch, dissented.

2. *See National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519 (2012); *King* v. *Burwell*, 576 U. S. 473 (2015).

3. Full disclosure: The State of Indiana was a co-plaintiff in *California v. Texas*, though I did not play a significant role in the case.

" The State plaintiffs failed to establish standing on the basis of 'indirect' costs [due to] lack of traceability to unlawful actions of government officials . . ."

The individual mandate has always been one of the most controversial components of the ACA. Proponents hailed it as critical to the success of the ACA because it required even healthy people to stay in the market for insurance products and effectively subsidize premiums for the unhealthy. Opponents attacked it as a symbol of congressional overreach because, rather than regulate existing commerce, it forced many Americans to engage in commerce they would otherwise eschew. In *National Federation of Independent Business v. Sebelius*, the Court said that Congress lacks authority under the Commerce Clause to enact such a mandate, but the Chief Justice permitted it to remain in place on the theory that it constituted a permissible direct tax under Article I § 9. In the Chief Justice's view, one did not violate the individual mandate by failing to have health insurance; one violated it only by failing to pay the tax levied on those who fail to have health insurance.

In 2017, however, Congress set that tax at $0, seemingly negating the "tax" justification that held the individual mandate aloft. Led by Texas, a coalition of eighteen States challenged the individual mandate—and the entire ACA—anew, both citing the Court majority that rejected Commerce Clause authority for the mandate in *Sebelius* and invoking the federal government's claims in *Sebelius* that the individual mandate was central to the entire ACA financing scheme. Along the way, the Trump Administration refused to defend the ACA, so California and other States intervened as party defendants to take up the cause. Both the district court and the Fifth Circuit agreed with the plaintiff States, though the Fifth Circuit was unwilling yet to embrace a sweeping remedy of enjoining the entire ACA. It remanded the case for the district court to consider the possibility of a narrower remedy.

But in the Supreme Court, ultimately, the case foundered on Article III standing grounds. Plaintiff States had essentially argued two forms of injury: "indirect" costs from greater Medicaid enrollments owing to compliance with the individual mandate and "direct" costs from greater administrative burdens owing to the ACA more broadly. Two individuals who later joined the case argued that the payments required to comply with the individual mandate provided their injury.

The majority dispensed with the two individuals' standing arguments first. Without an injury "that is the result of a statute's actual or threatened enforcement" a plaintiff cannot satisfy the traceability requirement of standing. In the majority's view, the "Government's conduct in question" must be "'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain." Here, without the "tax," no government entity was responsible for enforcing the individual mandate (with no penalty to enforce, the IRS does not even monitor compliance). The majority held that "unenforceable statutory language alone is not sufficient to establish standing."

The State plaintiffs failed to establish standing on the basis of "indirect" costs for the same reason—lack of traceability to unlawful actions of government officials (since no officials enforced the mandate any longer). Moreover, because the costs the States alleged arose from the independent decisions of millions of residents to buy insurance, establishing traceability required showing those residents "will likely react in predictable ways," *i.e.*, that they will be prompted by the individual mandate—and not other reasons—to join Medicaid. On this point, the States showed only that the individual mandate prompted Medicaid enrollment while the tax was still in place; the State did not provide declarations showing enrollments owing to the individual mandate after the tax was repealed. As to the Plaintiff States' theory that they were injured by provisions of the ACA inextricably interwoven with the individual mandate (such as requirements to provide more coverage to more employees, to notify state health plan beneficiaries and the IRS of benefits information, and generally to cope with a web of rules and regulations), the Court deemed it fatal that such "other provisions . . . operate independently" of the individual mandate.

Justice Alito, joined by Justice Gorsuch, penned a thirty-two-page dissent. He found "plenty of evidence that [plaintiffs] incur substantial expenses in order to comply with obligations imposed by the ACA"—including benefit obligations, reporting obligations, and other administrative obligations—and would have checked the traceability box because "the provisions of the ACA that burden the States are inextricably linked to the individual mandate." Critically, he disputed the majority's articulation of the traceability standard—"'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain"—as a "flat-out misstatement of the law." The proper formulation, according to Justice Alito (quoting *Allen v. Wright*, 468 U.S. 737, 738 (1984)) is that the injury must be "'fairly traceable to the defendant's allegedly unlawful conduct.'" And here, Justice Alito explained, the States had alleged that the reporting requirement and other ACA requirements (principally the employer mandate) were unlawfully enforced because they are inseverable from the individual mandate, which is itself unlawful. Justice Alito complained that this theory of standing-by-inseverability went unanswered by the majority even though the plaintiff States had plainly preserved it.

Proceeding to the merits, Justice Alito would have ruled against the constitutionality of the individual mandate and declared it inseverable from the remainder of the ACA: "All the opinions in *NFIB* acknowledged the central role of the individual mandate's tax or penalty." On both counts, he sided with the plaintiffs agreeing with their central argument that the 2017 amendments setting the penalty to $0 slashed the "slender reed that supported the decision in *NFIB*" and rendered the mandate, and therefore the Act as a whole, unconstitutional. In Justice Alito's view, the critical question for severability "is not whether the ACA could operate in *some* way without the individual mandate but whether it could operate in anything like the manner Congress designed. The answer to that question is clear."

Justice Thomas, in response to Justice Alito, wrote a solo concurrence sympathizing with the view that the ACA had a "dubious history" in the Supreme Court but explaining that the Court did not "rescue[] the Act" this time and instead merely "adjudicat[ed] the particular claims plaintiffs chose to bring." He deemed the "standing-through-inseverability argument," while potentially persuasive, forfeited by plaintiffs' failure to articulate the theory below and before the Supreme Court—a claim that Justice Alito refutes in his dissent with citations to plaintiffs' multiple invoca-

tions of the argument at all levels. And while Justice Thomas still believes the Court got it wrong in its prior two Affordable Care Act decisions, "it does not err today."

NOMINAL DAMAGES CLAIM KEEPS CAMPUS SPEECH LAWSUIT ALIVE

Perhaps akin to the Plaintiff States in *California v. Texas,* civil rights plaintiffs challenging an unconstitutional policy sometimes have trouble maintaining standing if the defendant changes the policy. When injunctive relief is no longer necessary, and no real proof of economic damages exists, what justifies the involvement of courts? In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), the Court held 8–1 (with the Chief Justice dissenting) that a plaintiff's request for nominal damages satisfies the redressability element necessary to confer Article III standing where a plaintiff's claim is based on a past, completed violation of a legal right.

Former students of Georgia Gwinnett College, a public university, shared evangelistic reading materials on campus grounds. In 2016, a campus police officer stopped Chike Uzuegbunam from sharing Christian literature, informing him that Gwinnett College's policies prohibited distribution of religious materials outside two campus "free speech expression areas"—and even there, speech required a permit. Uzuegbunam complied and secured the speech permit, but then another officer told him to stop speaking in the *authorized* zone and suggested that people had complained. Those complaints, the officer explained, meant that Uzuegbunam's speech violated another campus policy—one that prohibited expression of anything that "disturbs peace and/or comfort of person(s)." Again, Uzuegbunam complied, and one of his friends also stopped speaking about religion on campus because of the encounters with police.

Both Uzuegbunam and his friend sued, alleging that the college officials charged with enforcement of the speech policies violated the First Amendment and seeking both injunctive relief and nominal damages, but not compensatory damages. The officials initially defended their power to zone and license others' speech—arguing that "Uzuegbunam's discussion of his religion "arguably rose to the level of 'fighting words'"—but sensibly abandoned that position and "decided to get rid of the challenged policies." The officials moved to dismiss the case as moot, but the students, while now disclaiming injunctive relief, argued that their claim for nominal damages kept the case alive. The lower courts agreed with dismissal, with the Eleventh Circuit embracing the (seemingly) formalistic theory that nominal damages can save a case only as a substitute for claimed but unproven compensatory damages.

The Supreme Court reversed in a majority opinion by Justice Thomas that examined the common law underpinnings of nominal damages. The Court cited Lord Holt and Justice Joseph Story's expositions on nominal damages to derive the rule that a party whose rights are invaded can always recover nominal damages even if they cannot provide the evidence necessary to obtain compensatory damages—the better to afford nonpecuniary rights the same status as quantifiable economic rights. Moreover, the common law did not require a plea for compensatory damages for an award of nominal damages to qualify as redress: "Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." And although a single dollar provides only a partial remedy, that is sufficient for the redressability requirement under the doctrine announced in *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). That said, a mere request for nominal damages does not satisfy the injury and traceability components of standing—though both were met here. In short, defendants' enforcement of the challenged policies injured Uzuegbunam in his exercise of First Amendment rights, so he could pursue a claim against them for nominal damages.

" . . .the Court held . . . that a plaintiff's request for nominal damages satisfies the redressability element necessary to confer Article III standing . . ."

Alone in dissent, Chief Justice Roberts concluded that the purpose and reality of nominal damages does not assuage harms suffered by a plaintiff and therefore does not count as sufficient redress to satisfy Article III standing requirements. While he did not dispute the majority's description of common law decisions, he did caution that "[a]ny lessons that we learn from the common law, however, must be tempered by differences in constitutional design"—including the Founders' separation of executive and judicial functions. The Crown's ultimate sovereignty over all governmental powers, including the jurisdiction of courts—rejected by our own Constitution—yielded a system where common law courts would issue advisory opinions requested by the Crown. As the Chief Justice observed, "[w]e would not look to such practice for guidance today if a plaintiff came into court arguing that advisory opinions were in fact an appropriate form of Article III redress." Despite that intentional departure from common law practice, if, under the majority's view, "nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar." The Chief Justice rejected such expansion of judicial power as incompatible even with the view of the authority of *Marbury*: "As John Marshall emphasized during his one term in the House of Representatives, '[i]f the judicial power extended to every *question* under the constitution' . . . then '[t]he division of power [among the branches of Government] could exist no longer, and the other departments would be swallowed up by the judiciary.'" And while the majority expressed concern for valuing non-pecuniary rights the same as those having more readily quantifiable value, the Chief Justice declared that he "would place a higher value on Article III."

The Chief Justice criticized the majority's "sweeping exception to the case-or-controversy requirement," but also proposed his own responsive "sweeping exception": "Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court need to pass on the merits of the plaintiff's claims." Citing precedential support and Rule 68(d), the Chief Justice suggested such an approach "may ultimately save federal courts from issuing reams of advisory opinions." Yet, that very possibility "also highlights the flimsiness of the Court's view of the separation of powers. The scope of our jurisdiction should not depend on whether the defendant decides to fork over a buck."

"Under Article III, an injury in law is not an injury in fact."

In concurrence, Justice Kavanaugh agreed with the Court's extensive treatment of the history and precedent on nominal damages but wrote separately to note that he agreed with the Chief Justice that a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits.

Unmentioned in any of the opinions is the significance of the decision for modern-day attorneys' fee awards. The Chief Justice's dissent did contend that historically nominal damages could substitute for unproven compensatory damages as a trigger for awarding fees and costs—in a system where a damages award of some sort was a prerequisite for fee shifting. In that system, the parties would litigate a larger claim for both liability and compensatory damages, and the court would award nominal damages as a fee-shifting trigger where liability was proven but compensatory harm was not. But under 42 U.S.C. § 1988, the defendant in a § 1983 action must pay fees and costs to a "prevailing party," which requires not an award of damages but only a substantively favorable decision from a court. The Court's decision in *Uzuegbunam* would thus seem to permit otherwise moot cases (where attorneys' fees could not be awarded) to proceed for the *sole* purpose of using nominal damages to justify attorneys' fees. In this framing, a rule requiring a claim for compensatory damages demonstrates its substantive rationale—the lack of such a claim means the *whole* litigation is about attorney fees. That said, the Chief Justice's suggestion that a civil rights defendant can moot a nominal-damages claim by accepting entry of judgment may, if ultimately adopted by the Court, negate the use of nominal damages as a hook for fees under § 1988.

TO HAVE STANDING, FCRA CLASS MEMBERS MUST ALL PROVE CONCRETE INJURY, NOT MERELY A STATUTORY VIOLATION

Five years ago, in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), the Court held that Congress may not create a cause of action for statutory damages for a mere technical violation of federal law; instead, the plaintiff must suffer actual, concrete injury to satisfy Article III standing. This term, in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), the Court further embraced the requirement that plaintiff class members show "concrete harm" to recover on a statutory claim in federal court.

After the September 11 attacks, TransUnion began to identify on its credit reports individuals—typically suspected terrorists, drug traffickers, and other serious criminals—who had been placed on a watchlist operated by the United States Treasury Department's Office of Foreign Assets Control (OFAC). But TransUnion's crude screening tool looked only for matching names without cross-checking birth dates or other identifiers to eliminate false positives. Consequently, TransUnion misidentified many law-abiding Americans as potential terrorists on their credit reports, leading to reputational harm and economic loss for many.

Sergio Ramirez was one of them. While finalizing a vehicle purchase at a Nissan dealership in Dublin, California, Ramirez was turned away because he was supposedly on a "terror list." Humiliated, he brought a class action suit under the Fair Credit Reporting Act (FCRA), alleging that TransUnion did not take reasonable care to ensure the accuracy of his report. He also alleged that TransUnion failed to provide his credit file information in the FCRA-required format upon request. The district court certified the class based on the existence of statutory injury among all class members. The jury awarded statutory damages of $984.22 per class member and punitive damages of $6353.08 per class member, for a total of $60 million. The Ninth Circuit later reduced the punitive damages to $3936.88 per class member, for a total of $40 million.

TransUnion appealed to the Supreme Court, arguing that many class members lacked standing. Of the 8,185 class members, who were all mistakenly flagged as potential matches, only 1,853—including Ramirez—shared their credit reports with lenders or other third-parties. The remaining 6,332, TransUnion argued, suffered no injury, had no Article III standing, and had to be excluded from the class.

The majority opinion, written by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Alito, Gorsuch, Barrett, sided with TransUnion. It reaffirmed the holding of *Spokeo* that, even where a plaintiff asserts an injury defined by statute, Article III requires proof of "concrete" injury, *i.e.*, that is "real, and not abstract" and not a mere technical violation of a statute such as FCRA, even where the statute provides liquidated "statutory damages" as a remedial substitute for actual damages. Physical harm, financial loss, and traditional intangible harms such as reputational damage, disclosure of private information, intrusion upon seclusion, and constitutional harms (such as abridgement of free speech and religious free exercise) are paradigmatic concrete injuries that bear the required "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." But harms for which Congress creates a cause of action do not necessarily satisfy that test: "Under Article III, an injury in law is not an injury in fact."

Here, class members that TransUnion mistakenly flagged as being on the OFAC watchlist and whose credit reports were disseminated, did suffer a traditionally recognized harm, namely injury akin to the common law tort of defamation. TransUnion rather feebly argued that even those class members were unharmed because their reports were merely "misleading" but not outright "false" because the reports identified the class members as a "potential match" with a name on the OFAC list. The Court was unimpressed: "The harm from being labeled a 'potential terrorist' bears a close relationship to the harm from being labeled a 'terrorist.'"

But class members whose affected credit reports were not disclosed to third parties suffered no traditional concrete harm even though Congress deemed them to be victims of statutory harm. Back to the common law, "[p]ublication 'is essential to liability' for defamation," and these class members did not suffer the harm from publication. Indeed, said the Court, "[i]f those plaintiffs prevailed in this case, many of them would first learn that they were 'injured' when they received a check compensating them for their supposed 'injury.'" And while the Court expressly did not address whether present emotional suffering from a risk of future harm could confer standing (as plaintiffs had not pursued that theory), it generally rejected the theory that *risk* of future harm suffices for Article III standing now. In the end, "[n]o concrete harm, no standing." Accordingly, the Court reversed the judgment and remanded the case for new proceedings, presumably to narrow the class and re-litigate appropriate relief. (Perhaps, in light of

Uzuegbunam above, plaintiffs will amend their complaint and seek nominal damages.)

Justice Thomas, joined by the three liberal justices, dissented on the grounds that plaintiffs seeking to recover for violations of "private rights" (*e.g.*, trespass to land) need not show concrete harm, though a plaintiff asserting violations of public rights (*e.g.*, overgrazing public lands) would. Here, all class members asserted violations of private rights, namely, the failure to follow reasonable procedures in maintaining accurate credit files of individuals. In the dissent's view, the "injury-in-fact" requirement was created as an additional way to get into federal court if one's statutory rights were not implicated in a case; it was not designed to be the touchstone for *all* Article III standing inquiries: "Never before has this Court declared that legal injury is *inherently* insufficient to support standing." Justice Thomas also accused the majority of "reworking" *Spokeo* as to the sufficiency of risk of future harm. While the majority read *Spokeo* to mean that risk of harm may only justify injunctive relief, and only if sufficiently imminent, the dissent pointed out that the Court in *Spokeo* remanded for consideration whether risk of future harm was sufficient to meet the concreteness requirement. Ultimately, the dissent accused the majority of weakening the separation of powers: If Congress made a right against inaccurate credit reports, individuals must be able to vindicate that right.

Justice Kagan, joined by the two other liberal justices, wrote a separate dissent. While Justice Thomas thought private-rights plaintiffs need not prove concrete injury, Justice Kagan concluded that Congress—not the courts—is better suited to decide what suffices for concrete injury. In her view, as the Court trims Congress's power to create statutory torts actionable in federal court, it "transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement."

FEDERAL APPELLATE JURISDICTION

JURISDICTION TO REVIEW DISTRICT COURT'S REJECTION OF FEDERAL OFFICER OR CIVIL RIGHTS REMOVAL EXTENDS TO ALL GROUNDS REJECTED BY THE REMAND ORDER

In *American Electric Power v. Connecticut*, 564 U.S. 410 (2011), the Supreme Court ruled that state and local governments could not use federal common-law public-nuisance claims to extract relief from utilities for global climate change. The entire apparatus of congressionally authorized environmental regulation, the Court ruled, displaced any such common law claims. But that ruling has not stopped state and local governments from suing large corporations they deem responsible for climate change—now fossil fuel companies rather than utilities. In the past six years, cities and States have launched nearly a dozen different lawsuits in state courts across the nation pressing purportedly *state* (rather than federal) common-law public-nuisance theories, among other claims. Industry defendants, in turn, have removed those cases to federal court on a variety of grounds, including federal officer involvement, implicit federal questions, the outer Continental Shelf Lands Act, admiralty jurisdiction, and bankruptcy. Some federal district courts have rejected all grounds for removal, and a federal statute, 28 U.S.C. § 1447(d) generally restricts federal appellate jurisdiction over such rulings but permits appellate review of federal officer removals (and removals under the civil-rights-removal statute). But what about where a party removes to federal court on multiple grounds, one of which is appealable, but most of which are not? This term, in a public-nuisance climate-change case, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021), the Supreme Court held by a vote of 7-1, with Justice Sotomayor dissenting and Justice Alito recused, that a court of appeals may consider all grounds for removal if at least one provides a basis for appellate jurisdiction.[4]

" . . . the Supreme Court ruled that state and local governments could not use federal common law public nuisance claims to extract relief from utilities for global climate change."

Three years ago, Baltimore's mayor and city council filed suit in Maryland state court against various energy companies for promoting fossil fuels while purportedly concealing their environmental impact. The city alleged a number of state-law causes of action, including public nuisance and failure-to-warn claims, among others, and seeking damages for corresponding injuries it claims to have suffered as a consequence of global climate change. The defendants removed the case to federal court, invoking various grounds mentioned above. The district court, however, rejected all theories of federal jurisdiction justifying removal.

Critically, one basis for removal rejected by the district court was 28 U.S.C. §1442(a)(1), which provides a federal forum for any action against an "officer (or any person acting under that officer) of the United States or of an agency thereof, in an official or individual capacity, for or relating to any act under color of such office." Defendants had alleged that some of their challenged exploration, drilling, and production operations were conducted under the direction of federal officials. And 28 U.S.C. § 1447(d) provides that while remands orders are generally not appealable, "an order remanding a case to the state court from which it was removed pursuant to section 1442 [federal-officer removal] or 1443 [civil-rights removal] of this title shall be reviewable by appeal or otherwise." Accordingly, the companies' assertion of federal-officer removal was at least enough to initiate an appeal under § 1447(d).

In the Fourth Circuit, the City challenged the proper *scope* of the appeal, arguing that § 1447(d) authorized the court to review only the federal officer removal theory and no others. The Fourth Circuit agreed and refused to consider any basis for removal other than federal officer removal. The Supreme Court reversed and held that § 1447(d) permits appellate review of the *entire* remand order when a defendant appeals rejection of a federal-officer removal.

4. The State of Indiana filed a multistate amicus brief supporting Petitioners (the fossil-fuel companies) on which I served as counsel of record.

"The Court held that specific jurisdiction exists over claims that sufficiently 'relate to' a defendant's forum contacts, even even is the absence of a causal link."

In a majority opinion written by Justice Gorsuch, the Court first took cognizance of the plain statutory text of §1447(d), which refers to appeal of "an order," not merely of a basis for removal. So while the text of §1447(d) requires a "case . . . removed pursuant to section 1442 or 1443," that qualification does not preclude appellate consideration of the district court's entire order and the potential various theories that might underlie a defendant's bases for removal. Additionally, § 1447(d) does not require that § 1442 or § 1443 be the *sole* basis for removal. It requires only that the defendants' notice of removal must have asserted § 1442 (federal officer) or § 1443 (civil rights) as a basis for removal. "Once that happened," said Justice Gorsuch, "the whole" of the order remanding the case "became reviewable on appeal." Indeed, the Court's precedents, principally *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), confirm that, when a federal statute permits review of a court "order" that review may include any matter fairly included in that "order." In response to the City's consequentialist argument that the Court's interpretation of §1447(d) would yield litigation gamesmanship by allowing defendants to add frivolous §1442 or §1443 grounds to their removals, the Court was satisfied that ordinary sanctions would provide a sufficient deterrent and said its task "is to discern and apply the law's plain meaning as faithfully as we can, [and] not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *Lewis v. Chicago*, 560 U.S. 205, 217 (2010).

In dissent, Justice Sotomayor worried that the Court's interpretation allows defendants to "sidestep §1447(d)'s bar on appellate review by shoehorning a §1442 or §1443 argument into their case for removal." In her view, interpreting §1447(d) to allow appellate review of federal-officer (or civil-rights) removal grounds alone would accord with "Congress's longstanding policy of not permitting interruption of the litigation of the merits of a removed case" while still permitting appellate review of the two grounds Congress carved out for special treatment. She found the possibility of sanctions for frivolous uses of federal officer and civil rights removal grounds insufficient. "While sanctions may help ward off egregious misconduct," she said, "they are no fail safe."

Shortly after deciding the *BP* case, the Court had the opportunity to take another of these blockbuster climate-change cases presenting the question whether a public-nuisance climate-change claim must be treated as a federal claim, but the Court declined to do so. *Chevron Corp. v. City of Oakland*, 2021 WL 2405350 (2021) (mem.). So, now it remains with the various circuit courts to determine whether implicit federal question jurisdiction or other grounds for removal are valid. Whether via *BP* or another case, an entire cluster of issues surrounding the climate-change cases seems destined to return to the Court before long.

PERSONAL JURISDICTION

IN AN AUTOMOBILE PRODUCT LIABILITY SUIT, SPECIFIC JURISDICTION EXISTS WHERE DEFENDANT'S FORUM CONTACTS "RELATE TO" THE ASSERTED INJURY EVEN IF THOSE CONTACTS DID NOT CAUSE THE INJURY

For many lawyers, the subject of personal jurisdiction evokes fond memories of satisfying law school naps amidst mind-numbing lectures over forum contacts. For others, discussing the difference between general and specific jurisdiction excites the spirit and stirs the soul in contemplation of the true limits of a sovereign's judicial authority. For my part, I get hunger pangs pondering chopper rides to buy Whoppers® and onion rings.[5] Whatever your personal jurisdiction fantasy, this Term in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021),[6] the Court added to 1L case books by addressing the relationship necessary between forum contacts and injury to satisfy due process.

Recall that, in *International Shoe Co. v. Washington International Shoe Co.*, 326 U.S. 310 (1945), the Court held that a state court may exercise personal jurisdiction over an out-of-state defendant having "minimum contacts" with the forum State where exercising jurisdiction would comport with "traditional notions of fair play and substantial justice." The result has been the familiar alternatives of general ("home state") jurisdiction and specific ("arising out of") jurisdiction. In *Ford Motor Co.*, the Court considered whether specific jurisdiction existed over a product-liability claim stemming from an automobile accident in the forum State (where the victim resided) even though the assertedly defective automobile was designed, manufactured, and sold elsewhere.

In a unanimous decision, the Court held it did. Ford, which is incorporated in Delaware and headquartered in Michigan, did substantial business in the forum State of Montana, including advertising, selling, and servicing the allegedly defective vehicle model (though not the specific car at issue). Those intentional contacts with the forum State, it turns out, were sufficient to satisfy due process, even though they did not give rise to the accident in question. A five-justice majority opinion written by Justice Kagan rejected Ford's argument that the forum contacts must stand in a causal relationship to the asserted injury for specific jurisdiction to exist. The Court held that specific jurisdiction exists over claims that sufficiently "relate to" a defendant's forum contacts, even in the absence of a causal link. Here, the "related to" standard was satisfied because Ford had cultivated a market in the forum State for the models of cars at issue: Ford advertised and marketed its vehicles in the forum State and worked hard to foster ongoing connections to its cars' owners.

Justices Alito and Gorsuch authored concurring opinions questioning the majority's "relate to" standard. Justice Alito argued that the Court need not focus on the words "relate to" as an independent basis for specific jurisdiction, and that doing so "risks needless complications." And Justice Gorsuch, joined by Justice Thomas, elaborated on the "needless complications" referenced by Justice Alito, noting that a causal link would likely "be easy to

5. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

6. Consolidated with Ford Motor Company v. Montana Eighth Judicial District Court, No. 19-368.

prove." Justice Barrett took no part in the consideration or decision of the case.

U.S. JUDICIAL FORUM FOR INJURIES ABROAD

ALIEN TORT STATUTE: NO U.S. FORUM TO ADJUDICATE LIABILITY FOR INJURIES ABROAD ABSENT RELATED U.S. CONTACTS—GENERAL CORPORATE ACTIVITY IS INSUFFICIENT

Can federal courts provide appropriate forums to sue domestic corporations for aiding and abetting child trafficking and slavery on the theory that major operational decisions enabling those injuries occurred in the United States? In *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021),[7] an eight-Justice majority of the Court said no and thereby limited application of the Alien Tort Statute (ATS) to domestic conduct that directly causes injuries abroad. The majority, however, splintered into several competing viewpoints on the scope of the statute. Justice Thomas wrote the only opinion (actually, portions of an opinion) that garnered majority support. Separate groupings of conservative and liberal Justices filed concurring opinions. Justice Alito dissented.

Originally enacted as part of the Judiciary Act of 1789, the Alien Tort Statute provides federal courts with the jurisdiction to hear the claims of "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. §1350. Over the past two decades, the Court has held that the ATS does not itself create causes of action, *Sosa v. Alvarez-Machain*, 542 U. S. 692, 724 (2004), does not apply to extraterritorial conduct, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013), and does not authorize new common-law causes of action against foreign corporations, *Jesner v. Arab Bank, PLC*, 584 U.S. __ (2018).

Here, the plaintiffs were several individuals from Mali who worked on Ivory Coast cocoa farms as child slaves. They sued several firms, including U.S. corporations Nestlé and Cargill, for enabling their enslavement via "technical and financial resources" the companies provided the farms in exchange for the exclusive right to purchase cocoa. They alleged that the corporations "knew or should have known" the source of the farms' workforce and yet failed to exercise their "financial leverage" over the farms to stop them from using child slaves. The District Court dismissed the suit, finding that the corporate conduct that allegedly upheld the conditions on the cocoa farms occurred entirely outside of the United States and defendants' domestic "general corporate activity" did not implicate the ATS. The Ninth Circuit reversed and said ATS permits federal jurisdiction over corporate "financing decisions . . . originating" domestically that allegedly cause injury abroad.

The Court, however, rejected the lawsuit as an "improper[] . . . extraterritorial application of the ATS." It confirmed that "a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging 'mere corporate presence' of a defendant," and held that "[p]leading general corporate activity is no better." Here, the specific conduct that allegedly abetted forced labor, *i.e.*, "providing training, fertilizer, tools and case to overseas farms" happened abroad, not in the United States. And while plaintiffs alleged that relevant "decisionmaking" occurred in the United States, such allegations of "general corporate activity" are insufficient to turn an alleged extraterritorial tort into a domestic one.

"Can federal courts provide appropriate forums to sue domestic corporations for aiding and abetting child trafficking and slavery? . . . the Court said no . . ."

From here, the points of agreement between the Justices fractured, with no less than five different coalitions musing about the scope of the ATS.

First, Part III of Justice Thomas's lead opinion (joined by Justices Gorsuch and Kavanaugh), said that allowing the plaintiffs' suit to proceed would effectively create an additional cause of action under the ATS—a "job which belongs to Congress, not the Federal Judiciary." In Justice Thomas's view, "[a]liens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies, unless provided with an independent cause of action, only one of which—the Torture Victim Protection Act of 1991 (inapplicable here)—has been enacted in over two centuries. Relying on *Sosa*, Justice Thomas said that judicial authority to recognize remedies is limited to three historical torts relating to safe conducts, ambassadorial rights, and piracy. The limited capacity of federal courts to create new international torts was only reinforced by the holding in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), denying federal general common law. And relying on *Jesner*, Justice Thomas concluded that the potential impact on foreign relations of recognizing a new tort in this circumstance negates any remaining judicial discretion, particularly because the Department of Labor itself was involved in a partnership supplying the sorts of assistance to Ivory Coast farms that defendants in this case supplied.

Second, Justice Gorsuch wrote a concurring opinion stating in Part I (joined only by Justice Alito) that "[n]othing in the [text of the] ATS supplies corporations with special protections against suit" and in Part II (joined only by Justice Kavanaugh) that the Court should reject any authority to create new torts under ATS and thereby "clarify where accountability lies when a new cause of action is either created or refused: With the people's elected representatives."

Third, Justice Sotomayor submitted a concurring opinion, joined in full by Justices Breyer and Kagan, arguing that the Court should, contra Justice Gorsuch, embrace authority for judicial remedies "to ensure that federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress." She criticized Part III of Justice Thomas's opinion for threatening to overrule *Sosa* "in all but name" because it limits creation of new torts to the three traditional categories of international law (safe conduct, ambassadorial rights, and piracy). Justice Sotomayor would include within that sweep a broader class of "law of nation torts," including against "torturers, slave traders, and perpetrators of genocide," who constitute (quoting *Sosa*) the "'enemy of all mankind.'"

7. Consolidated with Cargill v. Doe I, No. 19-453.

"... a property dispute between a state and its own nationals falls under the 'domestic takings rule' and is not within the scope of intrernational law ..."

Finally, Justice Alito dissented alone. The "primary question" to him was "whether domestic corporations are immune from liability under the Alien Tort Statute." Justices Gorsuch and Sotomayor endorsed this framing as well—and commented that Justice Thomas's opinion never answers that question. (The cert petitions did not phrase a question in terms of immunity, but rather asked (in *Nestle*) whether courts have authority under ATS to impose liability on domestic corporations and (in *Cargill*) whether a domestic corporation is subject to liability under the ATS.) As evidenced by his participation in Justice Gorsuch's concurrence on the historical relationship between individual and corporate defendants following from the text of the statute, Justice Alito answers the question "no." And because he does not think the questions answered by Justice Thomas's opinion and Part II of Justice Gorsuch's opinion were fairly presented at this stage of the litigation, he would merely remand the cases for further proceedings. That said, Justice Alito allowed that Part III of Justice Thomas's opinion and Part II of Justice Gorsuch's opinion "make strong arguments that federal courts should never recognize new claims under the ATS."

FOREIGN SOVEREIGN IMMUNITIES ACT: NO U.S. FORUM TO ADJUDICATE NAZI ART THEFT BECAUSE A COUNTRY'S TAKING OF ITS OWN NATIONALS' PROPERTY IS NOT A TAKING "IN VIOLATION OF INTERNATIONAL LAW"

The lawsuit over Nazi art theft met the same fate as the one over abetting child slave labor—no federal judicial forum—at least under the principal theory advanced by the plaintiffs, *i.e.,* that the theft amounted to an act of genocide given its context. In *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), the Court, in a unanimous opinion by Chief Justice Roberts, held that an exception to the Foreign Sovereign Immunities Act (FSIA) that permits federal courts to exercise jurisdiction over foreign states for acts undertaken "in violation of international law" did not apply where the foreign state takes the property of its own nationals. Whether the claims ultimately find a home in U.S. courts under the theory that the plaintiffs were not German nationals at the time of the taking will be decided on remand.

At stake is the rightful ownership of pieces of the Guelphe Treasure (referred to in the opinion by its German name Welfenschatz), a centuries-old collection of medieval relics "occupy[ing] a unique position in German history and culture" purchased by a consortium of German Jewish art dealers toward the end of the Weimar Republic. In 1935, allegedly under political persecution and physical threats and at an unfair two-thirds discount, the consortium transferred the relics to Hermann Goering, at that point Prime Minister of Prussia and Hitler's deputy (and later, of course, Reichsmarschall). The descendants of the art dealers, two U.S. citizens and a citizen of the United Kingdom, pressed demands for compensation before a German commission specializing in resolving Nazi-era property claims. The commission, however, found that the sale of the relics had occurred without duress and for a fair price. Undeterred, the descendants took their case to federal court in Washington, D.C., arguing they were owed compensation by the German State.

In suing a foreign state in federal court, the plaintiffs had to find a way around the FSIA, a 1976 law establishing rules for litigation against foreign states in federal courts. As its title suggests, the Foreign Sovereign Immunities Act "creates a baseline presumption of immunity from suit." FSIA immunity does not apply, however, to actions that violate international law. The question in *Philipps* was whether the allegedly coerced sales qualified for that exception because they fit the category of actions in furtherance of genocide, or whether instead German immunity remained intact because the sales are governed by the international law of expropriation, under which "a sovereign's taking of its own nationals' property is not unlawful." The district court sided with the descendants on the grounds that Germany took possession of property under "an act of genocide," and the D.C. Circuit agreed because "genocide perpetrated by a state even against its own nationals is a violation of international law." Judge Katsas, however dissented from denial of rehearing en banc out of concern that permitting what amounts to a domestic takings claim to be heard in U.S. courts as a genocide claim would turn federal courts into war-crimes tribunals.

The Supreme Court reversed. In the unanimous majority opinion, Chief Justice Roberts observed that "international law customarily concerns relations among states, not between states and individuals." Accordingly, a property dispute between a state and its own nationals falls under the "domestic takings rule" and is not within the proper scope of international law because no clash of state interests occurs. Furthermore, the rationales underlying the domestic takings rule were well understood when the FSIA was enacted. After the Supreme Court refused to adjudicate claims arising from Cuba's nationalization of American sugar interests in 1960, Congress amended the Foreign Assistance Act of 1964 to "permit adjudications of claims . . . against other countries for expropriation of American-owned property" that occurred "in violation of the principles of international law." Critically, "nothing in the Amendment purported to alter any rule of international law, including the domestic takings rule," and courts applied it accordingly. A little over a decade later, Congress used nearly identical language in the FSIA, and courts have reached a "consensus" that a country expropriating property from its own nationals does not constitute a violation of international law.

Even so, the heirs argued that the forced sale of Jewish property was an act of genocide (and therefore a violation of international law) "because the confiscation of property was one of the conditions the Third Reich inflicted on the Jewish population to bring about their destruction." The Court was unmoved (legally, at least): "We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights." Indeed, even as international law has taken greater cognizance of how states interact with their own citizens, "[t]he domestic takings rule endured," as human rights declarations have been silent on property rights.

Part of the Court's concern was the sheer breadth of the sovereign immunity exception the heirs advocated. It would authorize a U.S. judicial forum for a wide array of property claims otherwise barred by sovereign immunity for violations of human rights law,

not merely claims for property taken as part of genocide. And because the FSIA includes separate exceptions for specific human rights abuses (such as torture and death), it would be unreasonable to infer an even larger exception where plaintiffs can use property loss as a hook to litigate more general human rights violations.

The Court also remarked that "we would be surprised—and might even initiate reciprocal actions—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago." The concern for reciprocal legal treatment by another sovereign underlies the entire opinion. The Court suggests that when interpreting "statutes affecting international relations," courts should "avoid, where possible, producing friction in our relations with other nations." As a final limit to the international ripples of this case, the Court reiterated the point from *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 115 (2013) and *Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 454 (2007), that "United States law governs domestically but does not rule the world."

SEPARATION OF POWERS AND ADMINISTRATIVE LAW

FOR-CAUSE RESTRICTION ON PRESIDENTIAL POWER TO REMOVE HEAD OF FEDERAL HOUSING FINANCE AGENCY DEEMED UNLAWFUL

In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Court struck down the for-cause restriction on the removal of the single director of the Consumer Financial Protection Bureau. The decision threw into doubt the constitutionality of similarly structured independent agencies headed by a single director. It also raised questions about remedy in such situations, including whether actions taken by a director whose tenure is unlawfully protected by a for-cause removal statute are void *ab initio*. In *Collins v. Yellen*, 141 S. Ct. 1761, 210 L. Ed. 2d 432 (2021), a case concerning another single-director independent agency created amidst the financial crisis, the Court ruled 8-1 that improper removal restrictions did not automatically void a director's official acts.

In 2008, Congress established the Federal Housing Finance Agency to stabilize the mortgage industry. The new agency placed Fannie Mac and Freddie Mae—large U.S. mortgage loan companies that had suffered massive losses—into conservatorship, infusing them with $100 billion in exchange for preferred shares and fixed-rate dividends. In essence, the companies traded much of their market value and profits for government financial support. Before long, notwithstanding the bailout, Fannie and Freddie were losing so much money that they were using their Treasury draws just to pay their Treasury dividend obligations—a circular operation that prevented the secondary housing market from benefiting from the federal government's infusion of capital. Accordingly, in 2012 FHFA and Treasury used rulemaking to amend the terms of the bailout, changing the previous fixed-rate dividend formula tied to the size of Treasury's investment into a variable-rate formula tied to the companies' net worth. Under that amendment, Fannie and Freddie would pay *only* quarterly surpluses (above a specified reserve) to Treasury as dividends. If they lost money, no dividends would be owed.

When the companies' financial condition improved, and they started generating surpluses, Fannie and Freddie paid treasury about $124 billion more under the variable rate formula than they would have under the fixed rate formula—much to the chagrin of shareholders. The shareholders sued, alleging that (1) FHFA and Treasury did not have authority to amend the dividend formula and (2) FHFA is unconstitutional because the President may fire the director only for cause. In a majority opinion penned by Justice Alito, the Supreme Court upheld 9-0 FHFA's amendment of the dividend formula but invalidated 6-3 (with Justices Sotomayor, Kagan, and Breyer dissenting) the for-cause removal restriction, rejecting any distinction with the pre-*Seila* CFPB.

". . . the Court ruled 8-1 that improper removal restrictions did not automatically void a director's offical acts."

The Court upheld FHFA's amendment of the dividend formula as a legitimate exercise of its statutory power to act "in the best interests of the regulated entity or the agency." 12 U.S.C. § 4617(b)(2)(J)(ii). Critically, while the variable rate dividend formula may not have been in the best interests of Fannie and Freddie (because it forced disgorgement of all surpluses as dividends to Treasury), it represented a path to rehabilitation designed to ensure their continued support for the secondary mortgage market. Because the amendment ended the bailout/dividend circle, it freed up capital to back housing loans, to the benefit of the agency, *i.e.*, the public. Accordingly, it fell within FHFA's regulatory authority.

As to the for-cause removal restrictions—which the Trump administration refused to defend, resulting in the appointment of amicus to do so—the majority read *Seila Law* to mean that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Collins*, slip op. at 31. With the for-cause removal restriction here being identical to that invalidated in *Seila Law*, it is no surprise that the Court followed suit by invalidating this one as well. Court-appointed amicus argued that FHFA was distinguishable from CFPB because it administered fewer statutes and regulated fewer entities, but the Court said that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." The critical issue is the President's ability to control the agency and, in effect, keep it subject to political accountability, no matter its size.

The most constitutionally significant issue in this case arose in the context of the remedy: Where the claim is for past financial losses under the leadership of an unremovable agency head, what, if anything, is the plaintiff entitled to? This issue was left open by *Seila Law*, where the Court remanded for the lower courts to determine whether a civil investigative demand had been ratified by an acting director removable at will by the President. Here, a new dividend agreement had already displaced the one that allegedly caused the shareholders injury, so the remedy had to focus on past injury, not, as on remand in *Seila Law,* ongoing regulation. The critical question: When an agency acts for a lengthy but finite period under the leadership of an executive who, in contravention of the Constitution, is not removable at the President's discretion, what are the legal consequences? And here, given the amount of money Fannie and Freddie turned over to Treasury as dividends under the amended formula, the answer could carry a substantial price tag. Indeed, if the implication is

> **". . . a mere misunderstanding by the Director or President about the permissible grounds for removal . . . does not render the Director's actions unlawful."**

that everything an unremovable agency head undertakes might potentially have to be unwound, the consequences could be quite dramatic indeed.

The shareholders argued that because the FHFA director was subject to unconstitutional removal restrictions, his actions were void *ab initio*. The Court instead ruled 8-1 (with Justice Gorsuch the lone holdout) that the invalid removal restriction was severable and did not render appointment of the director improper. First, the dividend formula amendment was adopted by an *acting* director who was indeed removable at will. Second, while a confirmed director (not removable at will) carried out the amended dividend formula, the challenge here is not to *appointment* but to the terms of *removal*. Accordingly, to establish that the actions of a duly confirmed director in carrying out the dividend formula amendment were void, the plaintiffs would need to show that the removal restriction itself affected the 2012 amendment—for example by showing that the President had attempted to remove the director but had been prevented from doing so by the for-cause removal restriction. Accordingly, the Court did not grant the shareholders' request for relief—vacatur of the dividend formula amendment and refund of the alleged overpayment—and instead remanded the case for further consideration whether the shareholders could show that the President had attempted to remove the director but been stymied by the for-cause removal protections.

Justice Thomas wrote a concurring opinion to set forth his view that that "[t]he Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract." He identified and rejected (for reasons provided by the majority in other aspects of its discussion) four theories of unlawfulness in this case: (1) "the removal restriction renders all Agency actions void because the Directors serve in violation of the Constitution's structural provisions, similar to Appointments Clause cases . . ."; (2) the removal restriction "somehow taints all of the Director's actions"; (3) the removal restriction creates insufficiently meaningful presidential oversight, which means the Director exercises power that was never really his; and (4) the statutory authority for the dividend amendment must fall with the removal restriction. First, the separation-of-powers and Appointments Clause cases focused on inappropriate exercise of executive authority by non-executive officers or improper appointment—which was never an issue with the Director, who all agreed was an executive officer properly appointed by the President and confirmed by the Senate. Second, the mere existence of the unlawful removal restraint does not taint the Director's otherwise lawful actions absent some scenario where a Director purported to take action despite a President's attempted removal. Third, a mere misunderstanding by the Director or the President about the permissible grounds for removal—resulting in theoretically deficient Presidential oversight—does not render the Director's actions unlawful. And fourth, given the lack of an *inseverability* clause, it does not make sense to infer that the invalidity of the removal statute renders the conservatorship statute invalid as well. Justice Thomas urged the Fifth Circuit to consider on remand whether the lack of any persuasive theory of unlawfulness is a barrier to remedy for the plaintiffs.

Justice Kagan (joined by Justice Breyer and joined in part by Justice Sotomayor) wrote a separate opinion concurring in part and concurring in the judgement in part stressing that she disagrees with *Seila Law* yet thinks it controls on *stare decisis* grounds, but also thinks the majority improperly stretched it here. She also said that the Court's decision on remedy ameliorates the negative effects of what, in her view, is erroneous constitutional doctrine. Justice Sotomayor (joined by Justice Breyer) wrote an opinion concurring in part and dissenting in part arguing that *Seila Law* did not require invalidation of the removal restraints here.

Justice Gorsuch wrote a separate concurring opinion to stress his view that on remand the lower courts, rather than inquire whether the removal restriction caused the shareholders injury, should merely address whether traditional defenses such as laches apply. The Appointments Clause precedents cited by the majority, he said, mean that the unconstitutional removal restriction deprived the Directors of constitutional authority such that their actions implementing the dividend amendment should be set aside as *ultra vires*. Indeed, said Justice Gorsuch, "removal restrictions may be a greater constitutional evil than appointment defects" since Presidents inherit thousands of Executive Branch officials they may need to fire for sake of policy. For good measure, Justice Gorsuch laments that "the only lesson I can divine is that the Court's opinion today is a product of its unique context—a retreat prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands." Bear that in mind if ever someone challenges the independence of the Federal Reserve Board of Governors.

PATENT ADMINISTRATIVE JUDGE INVALIDLY APPOINTED TO BE FINAL EXECUTIVE BRANCH ARBITERS OF "INTER PARTES" REVIEW PROCEEDINGS

Lack of accountability to the President doomed yet another imaginative administrative scheme in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 210 L. Ed. 2d 268 (2021).[8] Five Justices, led by the Chief Justice's majority opinion, agreed that Congress violates the Constitution when it endows inferior officers with "unreviewable authority." Seven Justices agreed that ensuring that senior officers may exercise direct control over the decision-making process happening beneath them would be a sufficient remedy.

Arthrex, Inc. makes medical devices and develops procedures for orthoscopic surgeries. Via the relatively new process of inter partes review (which permits anyone to initiate a proceeding to cancel a previously issued patent), Arthrex went before the Patent Trial and Appeal Board (PTAB), an "executive adjudicatory body" (if that is not an oxymoron) within the Patent and Trademark Office (PTO). A panel of three administrative patent judges (APJs), appointed by the Secretary of Commerce ostensibly as "inferior officers" of the United States, heard the matter. Critically, such a proceeding is "the last stop for review within the Executive

8. Consolidated with *Smith & Nephew, Inc., v. Arthrex, Inc.*, No. 19-1452, and *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458.

Branch," meaning that neither the PTO Director nor the Secretary of Commerce—who *are* appointed by the President and confirmed by the Senate—has authority to review the PTAB's ruling.

Arthrex lost, meaning that the PTAB panel cancelled its patent—a decision that was not subject to further review within the Executive Branch. On petition for judicial review in the Federal Circuit, Arthrex argued that the authority wielded by the APJs who sit on the PTAB violates the Appointments Clause because they are functionally "principal officers" of the United States yet had been appointed by the Secretary of Commerce rather than nominated by the President and confirmed by the Senate. The Federal Circuit sided with Arthrex and attempted to fix the issue by removing the tenure protection of the APJs—allowing them to be removed at will by the Secretary—which the Federal Circuit believed would "prospectively 'render[] them inferior rather than principal officers." As the Chief Justice put it, "[t]his satisfied no one."

The Chief Justice, joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett in Parts I & II of his opinion, wrote that the APJs' exercise of "unreviewable authority" was "incompatible with their appointment by the Secretary of Commerce to an inferior office." APJs' "significant authority" to determine the "public rights of private parties" brought into play the question whether they were subject to the Appointments Clause. Only principal officers, appointed in accordance with the Appointments Clause, can render a final decision for the Executive Branch—*i.e.*, a decision not subject to further review within the Executive Branch—on important questions. The decisions of inferior officers, in contrast, must be subject to review by a superior executive officer, and, ultimately, by a principal. Here, the Secretary of Commerce's authority to remove APJs did not provide the necessary oversight over any particular decision of the APJs. And the availability of review by Article III courts does not satisfy the need for *Executive Branch* supervision. So, the system for appointing APJs violates the Appointments Clause.

Part III of the Chief Justice's opinion, joined only by Justices Alito, Kavanaugh, and Barrett, addressed the proper remedy for this Appointments Clause violation. At issue is the severability of the "repugnant" portions of the statute outlining the current review process of the PTO. Although "Arthrex asks us to hold the entire regime of inter partes review unconstitutional," in the Chief Justice's view, the Court's "governing principles chart a clear course: Decisions by APJs must be subject to review by the Director." Accordingly, "a limited remand to the Director [of the PTO] provides an adequate opportunity for review by a principal officer." In other words, the Chief Justice would sever from the remainder of the inter partes review statute those portions of the statute that make the APJs' decisions unreviewable by the Director.

Justice Gorsuch, who joined the majority opinion in Parts I & II, dissented as to the appropriate remedy. In his view, the reviewability statue is not the only culprit. Rather, "[i]t's the combination of these provisions—the exercise of executive power and unreviewability—that violates the Constitution's separation of powers." Accordingly, severing the reviewability statute was not the only solution—or the correct one. Other options included forcing PTAB panel members to be appointed by the President and confirmed by the Senate, or invalidating the cancellation power itself and reassigning it to the judiciary (where it formerly resided). But choosing among these options is not a matter of statutory construction, it is a matter of policy that must be left to Congress. "Faced with an unconstitutional combination of statutory instructions," he wrote, "the Court chooses to act as if the provision limiting the Director's ability to review [inter partes review] decisions doesn't exist." Then, "the Court gifts the Director a new power that he never before enjoyed, a power Congress expressly withheld from him and gave to someone else—the power to cancel patents through the IPR process." The proper course, therefore, was to "simply decline[] to enforce the statute in the case or controversy at hand," *i.e.*, to "set aside" the PTAB decision and leave further solutions to Congress.

"Only principal officers, appointed in accordance with the Appointments Clause, can render a final decision for the Executive Branch . . ."

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented as to the constitutionality of the APJs and their status as inferior officers, but agreed with (and provided the winning votes for) the severability analysis and the remedial approach in Part III of the Chief Justice's opinion. The only substantive opinion he offered, however, was on the merits, where, in addition to joining Justice Thomas's dissent (summarized below), Justice Breyer's opinion added two points. First, "the Court should interpret the Appointments Clause as granting Congress a degree of leeway to establish and empower federal offices." This amounts to disagreement with the majority's holding that decision reviewability separates inferior from superior officers. In Justice Breyer's view, the Director's authority to exercise ancillary forms of control—assignment of cases, issuance of regulations and guidance, etc.—constitutes sufficient supervision.

Second, Justice Breyer advocated for a "functional examination of the offices and duties in question rather than a formalist, judicial-rules-based approach." The problem with the majority's formalism, in his view, is that "the Executive Branch has many different constituent bodies, many different bureaus, many different agencies, many different tasks, many different kinds of employees." Courts must appreciate that "[a]dministration comes in many different shapes and sizes" especially "in the context of administrative adjudication, which typically demands decisionmaking (at least where policy made by others is simply applied) that is free of political influence." Hearkening back to cases such as *Wiener v. United States*, 357 U. S. 349 (1958), and *Mistretta v. United States*, 488 U. S. 361, 409 (1989) (with an incidental cite along the way to *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1935)), he would have the Court consider and weigh Congress's objectives with a particular bureaucratic scheme along with the potential consequences. Here that would mean deferring to Congress's desire to secure APJ decisional independence and understanding that the Director can provide guidance at the policy level even without the power of case-by-case review.

Justice Thomas dissented on all fronts. In his view, "[n]either our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President," *i.e.* the PTO Director and the Secretary of Commerce. And while he certainly did not embrace Justice Breyer's full-throated Wilsonian apologia for the modern administrative state, he did remark on the Director's "greater functional power over the Board" compared with princi-

> **". . . the Court ruled 8-0 that . . . [the Religious Freedom Restoration Act] authorizes recovery of monetary relief from government officials sued in their personal capacities."**

pal officers in cases where the Court upheld the level of supervision over inferior officers. He relied in particular on the Director's expansive power to appoint APJs to specific cases and to direct rehearing by judges he selects of panel decisions he disagrees with. Quoting *Edmond* v. *United States*, 520 U. S. 651, 665 (1997), Justice Thomas concluded that "this broad oversight ensures that administrative patent judges 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Justice Thomas also criticized the majority's effort to treat inferior and superior officers as if they have two separate spheres of power: "Nowhere does the Constitution acknowledge any such thing as 'inferior-officer power' or 'principal-officer power.'"

Justice Thomas also offered the interesting observation that the majority refused to settle on the constitutional problem it was purporting to fix. The case was pled as an Appointments Clause problem, as if superior officers had been improperly hired without presidential nomination and Senate confirmation. Yet, says Justice Thomas, the Court "never expressly tells us whether administrative patent judges are inferior officers or principal. And the Court never tells us whether the appointment process complies with the Constitution." Indeed, he says, "[t]he closest the Court comes is to say that 'the source of the constitutional violation' is *not* 'the appointment of [administrative patent judges] by the Secretary.'" Perhaps the real issue is the Vesting Clause, *i.e.*, that the process vests executive power elsewhere besides the President in a scheme that does not ultimately report to the President. Thomas doubts that is an issue, but even if it were, "Senate confirmation of an administrative patent judge would offer no fix" because it would only further remove appointment authority from the President. Besides, "historical practice establishes that the vesting of executive power in the President did not require that every patent decision be appealable to a principal officer," and "[i]f no statutory path to appeal to an executive principal officer existed then, I see no constitutional reason why such a path must exist now."

As to remedy, Justice Thomas criticizes the Court for transferring final reviewing authority from the Board to the Director, which "underscores that it is ambivalent about the idea of administrative patent judges *actually* being principal officers." That is, if the Court took seriously the idea that the judges were principal officers improperly appointed, the precedents dictate that the proper remedy must be vacatur of the Board's decision and remand for a new hearing before properly appointed judges. And if the problem is merely the Director's lack of review authority, no predicate for a constitutional violation exists because the Director never "wrongfully declined to rehear the Board's decision" (which is the remedy ordered by the majority). Justice Thomas therefore doubts the Court's authority to issue a remedy—and supplies this zinger: "Perhaps the majority thinks Arthrex should receive some kind of bounty for raising an Appointments Clause challenge and *almost* identifying a constitutional violation. But the Constitution allows us to award judgments, not participation trophies."

RELIGIOUS FREEDOM

RFRA PERMITS MONETARY RELIEF

The federal Religious Freedom Restoration Act (RFRA) prohibits the government from imposing substantial burdens on religious exercise unless it uses the least restrictive means to advance a compelling interest. In *Tanzin v. Tanvir*, 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020), the Supreme Court ruled 8-0 (Justice Barrett recused) that, for violations of that legal protection, RFRA authorizes recovery of monetary relief from government officials sued in their personal capacities.

Muhammad Tanvir, Jameel Algibah, and Naveed Shinwari are three Muslim men who claimed that the FBI placed them on the No Fly List because they refused to inform on their religious communities. They sued FBI agents in the defendants' *official* capacities for an injunction to remove their names from the No Fly List and in their *personal* capacities for money damages. The men claimed that their wrongful inclusion on the No Fly List caused lost income and lost airline tickets. A year after they filed suit, the Department of Homeland Security removed them from the No Fly List, thereby mooting the injunction claim. The district court dismissed the damages claim upon concluding that RFRA does not permit such relief.

In permitting the damages claims, the Court's opinion, written by Justice Thomas, began with RFRA's text, which provides that persons whose exercise of religion has been unlawfully burdened may "obtain appropriate relief against a government." §2000bb-1(c). The United States argued that personal-capacity lawsuits are not "against a government" because damages are recoverable only from the individual's assets, not the government's. The Court explained that the "problem with this otherwise plausible argument is that Congress supplanted the ordinary meaning of 'government' with a different, express definition." *Id.*

Specifically, RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." §2000bb-2(1). The term "official," the Court said, includes not only the office itself, but also (quoting the OED) "to the actual person 'who is invested with an office.'" Further, "[t]he right to obtain relief against 'a person' cannot be squared with the Government's reading that relief must always run against the United States." *Id.* "In other words," said the Court, "the parenthetical clarifies that "a government" includes both individuals who are officials acting under color of law *and* other, additional individuals who are nonofficials acting under color of law." That understanding is also reasonable because Congress borrowed the "persons acting under color of law" phrasing from Section 1983, which permits personal-capacity claims. In summary, "a suit against an official in his personal capacity is a suit against a person acting under color of law. And a suit against a person acting under color of law is a suit against 'a government," as defined under RFRA. §2000bb-1(c).

Turning to whether "appropriate relief" means damages, the Court said that such "open-ended" text is inherently context dependent. Critically, Congress intended RFRA to restore both the free-exercise rights that existed before *Employment Division v. Smith*, 494 U.S. 872 (1990), and the remedies that were available

to redress injuries to such rights, which, under § 1983, included personal-capacity damages. "Given that RFRA reinstated pre-*Smith* protections and rights, parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*. That means RFRA provides, as one avenue for relief, a right to seek damages against Government employees." Furthermore, "[a] damages remedy . . . is also the *only* form of relief that can remedy some RFRA violations," such as lost plain tickets and lost income. From this context, the Court found it fair to presume that, had Congress meant to exclude damages from the term "appropriate relief," it would have done so explicitly.

That said, damages may not be available in every personal-capacity case where a RFRA plaintiff can prove monetary loss—qualified immunity may play a role. The Court noted toward the end of the opinion that all parties agreed that government officials are entitled to assert a qualified immunity defense where the alleged violation was not "clearly established." Yet the very author of the majority opinion, Justice Thomas, has forcefully criticized qualified immunity as a court-made defense in § 1983 cases—the very statute whose remedies were a model for RFRA. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring). And to be sure, the *Tanzin* footnote recounting the parties' positions on qualified immunity does not itself endorse the theory.

CITY MAY NOT EXCLUDE ARCHDIOCESE FROM FOSTER CARE PROGRAM JUST BECAUSE IT OPPOSES SAME-SEX MARRIAGE

In his opinion for the Court in *Obergefell v. Hodges,* 576 U. S. 644, 679 (2015), Justice Kennedy promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Yet the co-existence of the right of same-sex marriage with the rights of those morally opposed to it has been tested multiple times, with no clear resolution. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __ (2018), the Court ruled that Colorado officials unconstitutionally targeted the religious exercise of Jack Phillips when they prosecuted him for refusing to bake same-sex-wedding cakes, but its decision was highly fact-intensive and avoided pronouncing a general rule for such cases. One of the central questions is whether anti-discrimination laws are either (1) religion-neutral laws of general applicability entitled to rational-basis review under *Employment Division v. Smith,* 494 U.S. 872, 878–82 (1990), or (2) if heightened scrutiny applies, a sufficiently narrowly tailored means of advancing a compelling interest. The drama increases as *Smith* itself hangs by a thread—most Justices seem inclined to overturn it in the appropriate case. These dynamics converged this term in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021), where the Court came to a surprisingly *unanimous* conclusion (albeit via two separate groupings of Justices, those who wanted to overturn *Smith* and those who wanted to avoid doing so here): The Free Exercise Clause protects the right of Catholic Social Services (CSS) to provide foster care services to the City of Philadelphia without agreeing to certify same-sex couples as foster parents.

The Catholic Church has historically played a critical role in meeting the needs of children in Philadelphia over the past two centuries. As Philadelphia itself acknowledged, CSS has "long been a point of light in the City's foster-care system." The City's Department of Human Services executes standard annual contracts with state-licensed private agencies to place foster children with families certified by the private agencies according to statutory criteria. When the Department seeks to place a child, it sends contracted agencies a "referral" and then picks the most suitable available family. Throughout the process, the private agencies continue to support the foster families they certify.

"The Free Exercise Clause protects the right of Catholic Social Services to provide foster care . . . without agreeing to certify same-sex couples as foster parents."

CSS's religious views inform its foster-care work. CSS maintains the longstanding Catholic belief that, as an institution created by God, "marriage is a sacred bond between a man and a woman." Accordingly, CSS will not certify unmarried couples—regardless of sexual orientation—or same-sex married couples—though no same-sex couples have ever sought certification from CSS. CSS will, however, certify gays and lesbians as single foster parents and place children with them. If a same-sex couple sought certification, CSS would "direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples." Yet when a newspaper exposé deduced the implications of the Diocesan position on marriage for the CSS foster-care certification process, the Philadelphia Commission on Human Relations launched an inquiry and the City ultimately refused to contract with CSS unless it agreed to certify same-sex married couples. The City later claimed that CSS's refusal to certify same-sex married couples violated both (1) the agency's contract with the City and (2) the citywide Fair Practices Ordinance.

CSS and three foster parents certified by the agency brought free-exercise and free-speech claims but had no luck in the lower courts—the Third Circuit held that the standard-form contract terms banning discrimination constituted a neutral and generally applicable policy under *Smith*. CSS and the foster parents asked the Supreme Court to apply heightened scrutiny either because the City's policy was not generally applicable or because *Smith* should be overruled.

The Court ruled for CSS, but reprieved *Smith* for another day. Chief Justice Roberts, joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett, issued a majority opinion holding that "[t]his case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable." Citing *Smith* (which in turn quotes *Bowen v. Roy*, 476 U.S. 693, 708 (1986)), the Court observed that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions."' Here, the non-discrimination condition in the City's standard foster care contract was not generally applicable because its non-discrimination provision permits exceptions at the "sole discretion" of the Commissioner. Said the Court, "[n]o matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable." The operative question, moreover, is not whether the City has

"... the Court refused to 'set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech ... or how ordinary First Amendment standards must give way ...'"

a compelling interest in enforcing its non-discrimination policies generally, but whether it has a compelling interest in denying an exception to CSS while making exceptions available to other agencies. The City had none.

The Court dodged the Free Exercise question surrounding Philadelphia's Fair Practices Ordinance—which forbids sexual-orientation discrimination in "public accommodations"—by concluding the ordinance did not apply. As the Chief Justice observed, "[c]ertification is not 'made available to the public' in the usual sense of the words," because "[i]t involves a customized and selective assessment that bears little resemblance of staying in a hotel, eating in a restaurant, or riding a bus." Because certification constitutes a private, case-by-case process, it is not a *public* accommodation, and the ordinance was irrelevant, despite the City's attempt to use it to justify excluding CSS from the foster care program.

Justice Barrett filed a three-paragraph concurring opinion, joined by Justice Kavanaugh and (except as to the first paragraph) Justice Breyer, implying that *Smith* is ripe for reconsideration, but agreeing that this is not the case for doing so. While Justice Barrett finds the historical record "more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws," she sees robust "textual and structural arguments" for overturning *Smith*. Still, she is wary of "swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime." She ultimately provided no definitive answer to whether *Smith* should be overruled or, if so, what should replace it, but her concurrence sets forth important terms for debate in future cases where *Smith* is in the crosshairs.

Justice Alito filed an extensive, detailed concurring opinion, joined by Justices Thomas and Gorsuch, even more forcefully condemning *Smith*. Justice Alito examined the "startling consequences" flowing from *Smith*; the substantial body of precedent created by its predecessor doctrine; the ordinary public meaning of the Free Exercise Clause in 1791; and the multifactor test for overruling precedent. According to Justice Alito, *Smith* should be replaced with the test announced in *Sherbert v. Verner*, 374 U.S. 398 (1963): "A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest." Justice Alito criticized the Court for avoiding this fundamental question: "After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in confused and vulnerable state." He sharply concluded: "Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I."

Finally, Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Thomas and Alito joined. Like Justice Alito, Justice Gorsuch criticized the majority for its "circumnavigation" of the core question of whether *Smith* should be overruled. In his view, the Court improperly reframed the case in a way no party or amicus had suggested just to avoid the *Smith* question, particularly via "an uncharitably broad reading (really a revision) of" the Philadelphia ordinance. Justice Gorsuch cautioned that failing to revisit *Smith* will only increase the already-high stakes in cases over the rights of those with moral objections to same-sex marriage, including in the (continuing) litigation against Colorado Christian baker Jack Phillips in the recurring *Masterpiece Cakeshop* saga. Justice Gorsuch stressed that "[t]hese cases will keep coming until the Court musters the fortitude to supply an answer."

Notably, two weeks after issuing the decision in *Fulton*, the Court denied certiorari in *Arlene's Flowers, Inc. v. Washington*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021), another case by a wedding vendor with religious objections to same-sex marriage where the Court could reconsider *Smith*. Justices Thomas, Alito and Gorsuch voted to grant the petition.

FREE SPEECH AND ELECTIONS

THE LONG ARM OF SCHOOL DISCIPLINE DOES NOT ALWAYS REACH SOCIAL MEDIA

Social media ultimately makes fools of us all—the First Amendment pretty much guarantees it. At the end of freshman year, B.L., a student at a public high school in Pennsylvania, tried out for varsity cheerleading and a private softball team. She made neither, but was offered a spot on the junior varsity cheerleader squad while a classmate made the varsity team. Her frustrated response on Snapchat from her hangout at the local convenience store: A photo of B.L. and a friend, middle fingers extended, bearing the caption, "Fuck school fuck softball fuck cheer fuck everything." Her school was not amused. It suspended B.L. from the junior varsity cheerleading team. In *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 210 L. Ed. 2d 403 (2021), the Court, by a vote of 8-1, held that the First Amendment protected B.L.'s social media outburst.

Justice Breyer, writing for majority, began by confirming that schools may sometimes regulate off-campus student speech. In cases such as "severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers," schools maintain legitimate regulatory interests even though they occur off campus. Still the Court refused to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community." The Court did, however, "offer three features of off-campus speech" that may distinguish off-campus from on-campus speech and figure in the somewhat narrower authority to regulate off-campus. First, a school rarely acts *in loco parentis* when a student engages in off-campus speech. Second, the ability to regulate off-campus speech would effectively include all student speech, so courts should be more

skeptical of efforts to regulate it. Third, as "nurseries of democracy," public schools have "an interest in protecting a student's unpopular expression."

Here, "the special interests offered by the school are not sufficient to overcome B.L.'s interest in free expression." She was merely criticizing the team, its coaches, and the school. Her particular words, while vulgar, "did not involve features that would place it outside the First Amendment's ordinary protection." That is, they were not "fighting words" or obscenity—no worse than "Fuck the draft." *See Cohen* v. *California*, 403 U. S. 15, 19–20 (1971). And she expressed herself after school, off campus, on her own phone, to her Snapchat friends (at least one of whom betrayed her to the larger school community). In Justice Breyer's view, she did not "target any member of the school community with vulgar or abusive language." Furthermore, the school had no real interest in preventing substantial disruption (the standard under *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)). At most, some cheerleaders were upset and students spent a few minutes discussing it in algebra class. A general concern for student (or cheerleader) morale was insufficient. Indeed, the school's only real interest was in teaching good manners, but that did not apply unless the school stands in the role of *in loco parentis,* "[a]nd there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior" while she was at the Cocoa Hut convenience store. And while B.L.'s words were perhaps needlessly coarse, "sometimes it is necessary to protect the superfluous in order to preserve the necessary."

Justice Alito, joined by Justice Gorsuch, filed a concurring opinion to set forth his understanding of the proper First Amendment framework. For Justice Alito, it is particularly important to focus on asking "[w]hy does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?" The Court has not expressly addressed that question, he said, because the answer is so obvious: "Because no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech in these ways." But the question must be re-asked "when a public school regulates what students say or write when they are not on school grounds and are not participating in a school program," *i.e.*, why does public school enrollment yield reduced First Amendment rights? The answer must lie in the level of implicit delegation of parental authority to schools, which is to say that "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip." Here, any such delegation was lacking, for "whatever B. L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity."

Justice Thomas dissented because, as he sees it, "schools historically could discipline students in circumstances like those presented here." Schools could, for example, discipline students for off-campus speech that tended to "subvert the master's authority," including one case where a student merely called a teacher "old." Indeed, in Justice Thomas's view, well-accepted punishment for truancy should be seen as a variety of punishment for off-campus activity that tends to undermine school discipline. And because B.L.'s speech tended to degrade and subvert a school program, those precedents should apply here. The majority's effort to identify "pragmatic guideposts" regarding off-campus speech choses "intuition over history," a problem that goes back to the Court's decision in *Tinker* to jettison the historical *in loco parentis* model for the school's relationship to the student. Here, the Court at least acknowledged *in loco parentis*, but it still "fails to address the historical contours of that doctrine, whether the doctrine applies to off-campus speech, or why the Court has abandoned it."

". . . as 'nurseries of democracy,' public schools have 'an interest in protecting a student's unpopular expression."

CALIFORNIA MAY NOT COMPEL NONPROFITS TO DISCLOSE MAJOR DONORS

In *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021),[9] the Court struck down California's charitable-donor-reporting requirements as a threat to supporters of unpopular causes. Under a decades-old regulation that until recently had largely gone unenforced, charitable organizations in California must file with the California attorney general their IRS form 990 with attachments and schedules listing the names and addresses of donors who, within the last tax year, contributed upwards of $5,000 or provided more than 2% of the organization's total funding. Lax enforcement ended in 2010 when the Attorney General served "thousands of deficiency letters" forcing charities either to disclose their donors or face fines and suspension of their registration as a tax-exempt charity.

That enforcement led California-based charities Americans for Prosperity Foundation and Thomas More Law Center to sue the California attorney general for violation of their, and their donors', First Amendment Rights. They have always filed their form 990 with the attorney general, but not the "Schedule B" disclosures listing their donors. Providing that information to the attorney general, they said, "would make their donors less likely to contribute and subject them to the risk of reprisals." Indeed, at trial, Americans for Prosperity was able to show past threats and harassment, including an online post from a technology contractor that he could easily walk into the CEO's office and slit his throat. Thomas More Law Center supplied evidence of "threats, harassing calls, intimidating and obscene emails and even pornographic letters." The record also included evidence of "bomb threats, protests, stalking, and physical violence" directed at these charities. The district court, which found that the attorney general "was unable to ensure the confidentiality of donors' information" (*e.g.*, the AG's office had inadvertently posted thousands

9. Together with Thomas More Law Center v. Bonta, No. 19-255

"... Justices concluded that the charity-donor disclosure requirement represented a 'dramatic mismatch' with the State's professed goal of detectng fraud ..."

of Schedules B to its website), twice enjoined the enforcement, but the Ninth Circuit twice reversed, holding that the disclosure requirement "satisfied exacting scrutiny."

The Supreme Court reversed the Ninth Circuit, and while a majority agreed with facial invalidation of the disclosure regulation, the Court could not agree on the proper level of scrutiny. Six Justices saw a sufficient comparison to *NAACP v. Alabama*, where the Court rejected efforts by the State to demand membership lists from the civil rights group in "an effort to oust them from the state." But they could not agree what doctrinal standard that decision, or subsequent decisions, employed. The Chief Justice, writing for himself along with Justices Kavanaugh and Barrett, concluded that "exacting scrutiny" (requiring a "substantial relation between the disclosure requirement and a sufficiently important governmental interest") was the appropriate standard. Justice Thomas, on the other hand, would use strict scrutiny (requiring "least restrictive means" to reach a "compelling" interest) because "the right to associate freely" is "subject to the same scrutiny as laws directly burdening other First Amendment rights." Meanwhile, Justice Alito, joined by Justice Gorsuch, was unwilling to slice the baloney between "exacting" and "strict" scrutiny. Since "the choice between exacting and strict scrutiny has no effect on the decision . . . I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases" involving the "compelled disclosure of associations."

Yet Justices Thomas, Alito, and Gorsuch all joined the portion of the Chief Justice's opinion elaborating on the difference between "narrow tailoring" and "least restrictive means"—and explaining why "exacting scrutiny" requires only the former. The Court explained (contra the dissent) why narrow tailoring (at least) applies even to restrictions imposing only a "modest" burden on speech: "[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."

In that vein, the six conservative Justices concluded that the charity-donor disclosure requirement represented a "dramatic mismatch" with the State's professed goal of detecting fraud (which was, concededly, an important interest). No one doubts that, in an appropriate case where the State suspects wrongdoing, the attorney general could subpoena a charity's Schedule B. The question is, what is gained by requiring all charities to provide it routinely without suspicion? In the district court, alas, California provided no instances where a "pre-investigation" Schedule B in any way advanced the State's fraud detection efforts and offered no evidence why more targeted demands would be insufficient. "The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints."

Furthermore, five Justices held that, give the evidence of threats and intimidation directed at unpopular charities, the burden on speech was sufficient to justify facial invalidation using overbreadth doctrine. The core rationale for invalidating this disclosure requirement as to Americans for Prosperity and Thomas More Law Center—the threat of chill compared with the lack of significant utility to the State and the availability of less chilling alternatives—is "true in every case." So, facial invalidation is justified.

Justice Thomas, however, departed from the majority as to the proper remedy. He rejected facial invalidation of the regulation using overbreadth doctrine, the legitimacy of which he has long doubted. Justice Thomas does not specify cases where the disclosure requirement might be lawful but critiques the majority for decreeing facial invalidation merely because it "suspects" (his word) that the law will be invalid in all applications. Justice Thomas ultimately concurred in the judgment because he did not read it to be dependent on the overbreadth determination. Still, he allowed, "[o]ne can understand the Court's reasoning as based on the fundamental legal problems with the law (that are obvious in light of the facts of this suit) that will, in practice, prevent California from lawfully applying the disclosure requirement against a substantial number of entities, including petitioners."

The three liberal Justices, led by Justice Sotomayor, dissented. Because she viewed the burden on plaintiffs as "modest," Justice Sotomayor would have held the requirement constitutional given "a correspondingly modest showing" from California of its legitimate governmental interest, which "given the size of its charitable sector," she deemed to be "especially compelling." The majority went too far, in her view, in "jettison[ing] completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government to close scrutiny." The way she reads the majority opinion, "a subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny." Worse still, from her perspective, [r]egardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored."

VOTING RIGHTS ACT DOES NOT PRECLUDE ARIZONA'S OUT-OF-PRECINCT AND MAIL-IN-BALLOT COLLECTION LAWS

The Supreme Court has frequently applied Section 2 of the Voting Rights Act to legislative districting claims, but in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021),[10] the Court for the first time applied it "to regulations that govern how ballots are collected and counted." In so doing the Court confirmed the principal role of States as election-rule-makers under the Constitution.

From the passage of the Voting Rights Act in 1965 until 2013, Section 5 of the Act was its main workhorse. It required state and

10. Consolidated with Arizona Republican Party v. Democratic National Committee, No. 19-1258 (U.S.).

local jurisdictions with historically poor voting rights to obtain federal clearance before implementing new election rules or practices—in effect conferring on the Department of Justice control over even the finest details of many States' election codes. The problem was that Congress, while it renewed the Voting Rights Act multiple times, never changed the coverage formula, and it became outdated, with the result that many southern States with higher minority voting rates than northern States still had to preclear any changes to their election laws. The Supreme Court invalidated the coverage formula in *Shelby County v. Holder*, 570 U.S. 529 (2013), rendering Section 5 dormant. Since then, election law activists have increasingly targeted state voting laws using Section 2 of the Voting Rights Act, which forbids election procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 52 U.S.C. § 10301. The Supreme Court originally understood Section 2 to provide no greater protection than the Fifteenth Amendment itself (which the Voting Rights Act was designed to enforce). Under Congress's 1982 amendments to Section 2, however, the Section 2 goes further and creates a violation where, under the "totality of circumstances," "[election processes] are not equally open to participation" by members of protected classes. *Id.*

In *Brnovich*, activists targeted two Arizona election rules. The first—known as the "out-of-precinct policy"—permitted voters to cast ballots only in the correct precinct. The second—often referred to as a "ballot harvesting" restriction—prohibited third-party collection of mail-in ballots except for family members and postal workers. The Democratic National Committee and others argued that the "out-of-precinct policy" violated Section 2 because it disproportionately disqualified minority ballots. They argued that the ballot-collection restriction contravened Section 2 because it disproportionately affected Native Americans living in remote areas, who would otherwise find it difficult to access far-away polling stations. Arizona, for its part, argued that its election procedures, taken as a whole, make it easy to vote and difficult to cheat and that Section 2 prohibits only those rules that cause substantial disparities in minority election participation rather than, as with these two regulations, mere incidental differences.

In a 6-3 decision (with Justices Kagan, Breyer, and Sotomayor dissenting), the Court upheld the Arizona laws. Writing for the majority, Justice Alito first observed that "Arizona law generally makes it very easy to vote." And he identified "equal opportunity" as the touchstone of Section 2: Each racial group must be equally able to access the ballot box. That said, Section 2 does not prohibit *all* election rules that happen to yield *some* disparate racial impact, as nearly all do, including routine registration and ballot-completion requirements. The Voting Rights Act does not prohibit the "usual burdens of voting" even when such burdens exhibit a modest disparate racial impact.

The majority proposed a non-exhaustive list of considerations for courts to use in evaluating Section 2 claims: (1) the size of the burden imposed by a challenged voting rule, (2) the degree to which a voting rule deviates from standard practice in 1982 when Section 2 was amended, (3) the size of the disparate impact on racial or ethnic groups, (4) opportunity to vote under the totality of all voting rules and practices, and (5) the strength of state interests served by the challenged rule. The Court concluded that Arizona's precinct-only and anti-harvesting rules reasonably advanced election integrity and administration interests (offices up for election can vary by precinct, and permitting uncontrolled ballot harvesting often begets coercion of voters by harvesters) and imposed only light burdens on voters. Accordingly, the Court upheld both.

Justices Gorsuch and Thomas joined the majority opinion but also concurred separately to draw attention to the issue of whether Section 2 of the Voting Rights Act furnishes an implied right of action.

Justice Kagan penned a dissent joined by Justices Breyer and Sotomayor warning that efforts to suppress minority votes continue today. She argued that the majority ignored Section 2's broad "totality of the circumstances" inquiry in favor of an array of new, extra-textual obstacles to Section 2 claims.

". . . the Supreme Court considered . . . a regulation requiring that agriculture employers afford labor union representatives periodic access to business property . . ."

TAKINGS AND CONDEMNATION

CALIFORNIA LAW GRANTING UNIONS ACCESS TO EMPLOYER'S PROPERTY CONSTITUTES A PER SE TAKING

When the government physically appropriates private property, it effectuates a per se taking triggering a right to "just compensation" when economic loss to the property owner is trivial. Regulation that merely restricts private property use—though it might inconvenience the property owner—does not, however, usually constitute a regulatory taking: Such regulation is compensable only when it deprives the owner of *all* economically beneficial use. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), the Supreme Court considered in which category to place a state law prescribing a temporary physical occupation, here a regulation requiring that agriculture employers afford labor union representatives periodic access to business property for purposes of signing up workers.

California law affords union organizers physical access to agricultural employers' property for up to four 30-day periods in one calendar year. To gain access, union organizers need only apply to the State's Agricultural Labor Relations Board and notify the employer. Cedar Point Nursery and Fowler Packing Company, two fruit growers, alleged that the regulation, by giving union organizers unconsented physical access to their property, constituted a per se taking requiring compensation. The district court held against the fruit growers, reasoning that the regulation was not a physical appropriation of private property and should be assessed as a regulatory taking. The Ninth Circuit affirmed, holding that the access regulation only allows temporary access and therefore is not a physical taking.

In a 6-3 decision written by Chief Justice Roberts (from which Justices Breyer, Sotomayor, and Kagan dissented), the Supreme Court reversed and held that the access law was a physical occupation. The Court emphasized that the right to exclude is a critical

"... an unusual 5-4 majority ... held that private companies exercising fedeal eminent domain power 'can condemn all necessary rights-of-way' in which States have an interest."

stick in the property rights bundle, and by depriving fruit growers of their right to exclude union organizers for up to 120 days each year, the California regulation amounted to a physical taking. The Court specifically rejected the argument that a temporary right of access under limited circumstances is not a per se taking: Aside from mere trespasses, *all* government-sanctioned physical invasions are per se takings. And it repudiated the dissent's argument that "latitude toward temporary invasions is a practical necessity for governing in our complex modern world" by observing that "the complexities of modern society . . . only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained." That said, the Court also acknowledged that government may condition licensing and other benefits on some right of access for legitimate regulatory purposes, such as pesticide inspections: "When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy." Paraphrasing the Court's precedents, if refusal to issue the permit would not itself be a taking, conditioning its issuance on physical access for inspection does not either.

Justice Kavanaugh joined the majority opinion but wrote a separate concurrence to argue that the Supreme Court's precedent in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), also supports the Court's decision. There, union organizers had a right to access employer property when necessary, such as when workers lived on company property and organizers had no other way to reach them. But such dire conditions did not exist in *Cedar Point Nursery*, as union organizers were never prevented from contacting farm workers. In short, said Justice Kavanaugh, "the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows."

Justice Breyer dissented, joined by Justices Sotomayor and Kagan, on the theory that California's regulation does not physically "appropriate" any private property. Instead, just as countless other regulations restrict how property owners can enjoy their property, the access regulation only modifies the employer's right to exclude. The dissent went on to question the practicality of a blanket rule that deems all government-mandated physical access to be *per se* takings. As noted above, Justice Breyer worried that such an absolute rule would not permit solutions to the complex regulatory problems of "modern life."

FERC MAY AUTHORIZE A PRIVATE COMPANY TO CONDEMN STATE-OWNED LAND FOR PIPELINE RIGHT-OF-WAY

The modern-life complexities of pipeline building received a boost in a case where federal eminent domain power intersected with sovereign immunity. In *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021), an unusual 5-4 majority led by Chief Justice Roberts and joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh held that private companies exercising federal eminent domain power "can condemn all necessary rights-of-way" in which States have an interest.

To construct a 116-mile pipeline from Pennsylvania to New Jersey, PennEast Pipeline company obtained a certificate of public convenience and necessity under the Natural Gas Act from the Federal Energy Regulatory Commission. That certificate authorized PennEast to exercise federal eminent domain power to create a corridor for the pipeline. New Jersey objected to PennEast's plan to condemn property in which it had either a possessory interest or easement (such as for conservation) and asserted sovereign immunity as a defense, arguing that the Natural Gas Act did not authorize private parties to condemn the property of nonconsenting States.

In his majority opinion siding with PennEast, the Chief Justice deemed the case an "unexceptional instance" of an "established practice": "Since the founding, the Federal Government has exercised its eminent domain authority through both its own officers and private delegatees. And it has used that power to take property interests held by both individuals and States." The Court cited examples going back to the 19th century. In *Kohl v. United States*, 91 U.S. 367 (1875), the Court recognized that "'[t]he powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States." In *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894), it permitted delegation of the federal eminent domain power to a private company. And in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941), the Court upheld a congressional enactment authorizing construction of a dam that would flood state-owned lands, concluding that state ownership of land was no barrier to federal condemnation. The Court did not, however, cite any cases where the United States had delegated its eminent domain authority to a private company, who had then exercised that power over a State's property.

These cases not only evince federal eminent domain authority, said the majority, but they also demonstrate that "the States consented in the plan of the convention to the exercise of federal eminent domain power, including condemnation proceedings brought by private delegatees." According to the Chief Justice (quoting *Alden v. Maine*, 527 U.S. 279, 279 (1999), "the plan of the Convention reflects the 'fundamental postulates implicit in the constitutional design.'" Further, regarding to the "exercise of federal eminent domain within the States," the Court has said that one such "postulate" is "that the government of the United States is invested with full and complete power to execute and carry out its purposes." And while the majority could not identify private condemnation suits against States at common law, it contended that States cannot use their sovereign immunity to separate the federal eminent domain power from the duly authorized condemnation suits of a federal delegate, lest States thereby diminish the eminent domain power of a co-equal sovereign. Besides, doing so would only turn States from defendants into plaintiffs when private federal delegates took the property without instituting condemnation actions on the front end.

Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, wrote in dissent that the majority's reliance on the "plan of the Convention" had no "textual, structural, or historical support."

Indeed, the fact that the federal government may exercise eminent domain power only by way of congressional enactment using its Commerce Clause power defeats any inference that the issue here is resolved by reference to implicit arrangements at the Constitutional Convention. Justice Barrett would instead resolve the dispute under the Court's existing precedent governing attempted abrogation of the Eleventh Amendment under Congress's Article I power, namely, by applying *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996), and concluding that no such power to abrogate exists. And while other means certainly exist for PennEast to get New Jersey's property, the process matters: "Sovereign immunity limits how Congress can obtain state property for pipelines."

Justice Gorsuch, joined by Justice Thomas, agreed with Justice Barrett's dissent in full, but wrote separately to "address one recurring source of confusion" on the relationship between the Eleventh Amendment and federal subject-matter jurisdiction. He argues that the Eleventh Amendment's plain text prevents PennEast, as the citizen of another State, from bringing this suit against New Jersey into a Federal Court. The majority responded to this theory with the observation that the "plan of the convention" rationale is properly understood as a *waiver* of sovereign immunity, including to the specific form of immunity (in diversity cases) restored by the Eleventh Amendment. But Justice Gorsuch contends that, because it expressly carves out the exercise of federal judicial power, Eleventh Amendment immunity, as distinct from sovereign immunity more generally, is not waivable.

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