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Civil Cases in the Supreme Court's October Term 2021

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Every Term of the Supreme Court has a blockbuster case or two that come to represent snapshots of the Court's philosophy and temperament. This one had enough to cover several Terms. Addressing multiple lines of unfinished business, the Court overturned *Roe, Casey*, and *Lemon*—and affirmed a right to carry a gun outside the home to boot. The Court could sensibly have filled the rest of its civil docket with ERISA interpretation issues, but it kept going. In cases that would have been a big deal in other Terms, it also permitted the federal government to mandate COVID vaccines for medical workers but not other employees, shot down arguably the most significant climate change regulation in history, and shored up the litigation power of state attorneys general in one case while undermining it in another. It overrode state constitutional exclusion of religious instruction from choice scholarship programs, permitted a football coach to pray at the 50-yard line, protected a right to have a pastor lay-on hands during execution, and permitted an assemblage to fly the Christian Flag in the public square just like other groups fly the Pride Flag. Under the Free Speech Clause, it permitted different rules for off-premises and on-premises signs (maybe) and said Ted Cruz could be repaid money he loaned to his U.S. Senate campaign from post-election donations.

All of that, and we have not even gotten to the nerdy stuff yet. The Court also held this Term that introduction of un-*Mirandized* inculpatory statements at trial does not give rise to a claim for damages, narrowed the circumstances where victims of civil rights violations at the hands of federal officials can sue for damages, and said that a victim of "malicious prosecution" in state court can sue for violation of constitutional rights so long as the prosecution ends without conviction. Finally, it ruled that emotional distress damages are not an available remedy for violation of federal grant conditions unless Congress expressly says so, and that Congress may use its Article I power to raise armies to abrogate states' immunity from damages lawsuits.

With so much excitement on the surface, however, it can be easy to overlook the interesting analytical and procedural disputes lurking in the background. Many debates this Term confronted not merely the value of originalism and textualism as interpretive devices, but the methods for undertaking both, and the independent meaning of constitutional structure. And at that level, it becomes clear that the legal currents run in multiple directions. Furthermore, many cases this Term require, for full appreciation, an understanding of the case's backstory, procedural history, or developments at the Court. Perhaps that assessment comes from familiarity with many of the cases and their lawyers, but my analysis of the decisions would be stunted without the background details, so I do my best to convey them here.

ABORTION

With abortion rights, something had to give. Over the past half-century, the Court had tested one unworkable standard after another, ultimately leaving district courts to balance costs and benefits of new and old abortion regulations based on an infinite array of geographic, scientific, and socioeconomic factors. The result: inconsistent and chaotic adjudications, even invalidation of regulations once deemed reasonable. Some state legislatures enacted statutes designed to force the Court's hand: either define the right to abortion in a coherent way that yields predictable litigation results or renounce the whole project. When it all came to a head this term, the Court chose door number two. But while other recent high-profile constitutional-rights decisions overturning longstanding precedents arrived without disruption (*see, e.g., Lawrence v. Texas* and *Obergefell v. Hodges*), reassessment of *Roe* suffered a leaked majority opinion targeting the court's integrity and the attempted assassination of a Justice. Undaunted, the Court returned the responsibility for balancing the competing interests attendant to abortion to state legislatures.

ROE AND *CASEY* OVERRULED—THE CONSTITUTION SECURES NO RIGHT TO ABORTION

In *Dobbs v. Mississippi Dep't Health*, No. 19-1392, an abortion provider sued to enjoin enforcement of a Mississippi law prohibiting abortion after 15 weeks' gestational age. Everyone knows the result: *Roe* and *Casey* are overruled; the Constitution guarantees no right to abortion; Mississippi's post-15-week ban is upheld. But the backstory and analysis are both worth considering in some depth.

In its certiorari petition filed June 15, 2020, Mississippi had originally framed the case to present the issue whether all pre-viability bans on elective abortion were unconstitutional (viability at present coming sometime after the 20th week), perhaps with the idea of chipping away at the right to abortion by convincing the Court to dispense with the viability standard. In that same vein, its petition presented two additional questions asking about the meaning of the *Casey* undue burden standard and about whether abortion providers could assert the abortion rights of their patients.

The Mississippi petition was fully briefed September 2, 2020, and set for conference September 29. As someone whose docket has for the last several years been chock full of cases defending state abortion regulations, I was highly skeptical about Missis-

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sippi's chances of convincing the Court to take the case, particularly considering the uncertainty about how the Chief Justice (whose vote at that point would have been critical for Mississippi) would vote on the merits in such a case. Only four votes are necessary to grant a cert petition, but would Justices Thomas, Alito, Gorsuch, and Kavanaugh vote to take the case without knowing how the Chief might ultimately vote? And what are Justice Kavanaugh's views, anyway?

Then, about two weeks after the *Dobbs* petition was fully briefed, and just over a week before it was to be considered at conference, the world changed dramatically—Justice Ruth Bader Ginsburg passed away. About a week after that, President Trump nominated Amy Coney Barrett to succeed Justice Ginsburg. Exactly one month later, the Senate confirmed her.

Meanwhile, the court held the *Dobbs* petition, redistributing it for a few successive conferences, during which time Mississippi filed supplemental certiorari-stage briefs, calling the Court's attention to new circuit decisions deepening the split over the meaning of the Court's existing abortion precedents. Even after Justice Barrett joined the Court on October 27, 2020, the Court held it for several weeks, which became several months. Finally, after 18 more re-listings, on May 17, 2021, the Court granted the petition—but limited it to question one, *i.e.*, whether any pre-viability abortion ban can ever survive judicial scrutiny. The answer: Well, yes.

Justice Alito delivered a five-justice majority opinion, which acknowledged the wide disagreements over the profound moral and ethical issues that abortion presents. But for our Nation's first 185 years, states, not the Supreme Court, determined whether and when abortion would be permissible—often outlawing it entirely. In *Roe* (1973), the Court, without grounding in law, established the trimester and "viability" frameworks, an "exercise of raw judicial power" that invalidated abortion bans and regulations in every state. In *Casey* (1992), the Court cited stare decisis principles to reaffirm *Roe*'s "central holding" that states could not prohibit abortion before "viability," but jettisoned the trimester scheme and instituted the "undue burden test." *Casey*, however, failed to achieve its goal of "settling" the abortion issue, and indeed created more avenues for disagreement by requiring lower courts to search whether abortion regulations impose "substantial" obstacles for "large" fractions of "relevant" women—and perhaps sometimes re-balancing the unquantifiable benefits and burdens of a particular law. The result was regulations upheld in some states but invalidated in others and judicial decisions assessing everything from the physical and psychological risks accompanying abortion to women's access to transportation and childcare, to providers' business decisions and struggles to recruit physicians, to the implications of local attitudes toward abortion—nearly anything *except* law.

None of this was justified, the Court ruled, because a right to abortion is neither textually secured by the Constitution nor "deeply rooted in the Nation's history and tradition" or "implicit in the concept of ordered liberty." As to text, the Court in *Roe* invoked everything from the First and Fourteenth Amendments to the Third, Fourth, and Ninth Amendments, all to find an undifferentiated right to privacy and autonomy from which abortion could be extracted. The Court's inability to decide what Constitutional text established a right to abortion belied any sincere textual argument. And embracing broad concepts such as "privacy" and "autonomy" amounts to unbounded license. The right to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"—as the Court put it in *Casey*—does not mean freedom to act on that definition. Being a Nation of ordered liberty means the people may strike a balance between competing interests, even when doing so contravenes someone's definition of existence or meaning. In that regard, *Roe* and *Casey* never came to grips with the reality that, until the late 20th century, no federal or state court recognized a constitutional right to abortion. To the contrary, abortion had long been a crime in every State, originally from "quickening" (movement in utero being the first confirmation of life in an era before modern medicine), but then throughout pregnancy from the 19th century forward. Not even the dissent contradicted this point.

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As for respecting *Roe* and *Casey* as precedent, the Court emphasized that stare decisis, while important for a stable legal structure, is "not an inexorable command"—and indeed is at its weakest when the Court interprets the Constitution. The relevant considerations: The nature and quality of the Court's precedential errors and reasoning, the "workability" of its doctrine, the disruption caused by its decisions, and the nature and degree of reliance on its precedents. Here, *Roe* and *Casey* were not just wrong, but "egregiously" so, particularly insofar as those cases used "exceptionally weak" reasoning to usurp power over question of profound moral importance on which the Constitution is silent. It was telling that no party argued the trimester framework or viability line—the implication being that no law supported those standards. The viability line is particularly weak because it changes with available technology. And the undue burden standard from *Casey* (applicable to pre-viability abortions) was equally arbitrary and less workable, as evidenced by the abundant splits in authority over "substantial obstacle," "large fraction," and other vague terminology.

Roe and *Casey* also failed the "collateral disruption" test. The constitutional law of abortion had, over the years, morphed into a law of abortion exceptionalism. The "large fraction" standard undermined the usual "no set of circumstances" test for facial constitutional challenges. The wide-open authority of abortion providers to assert their patients' abortion rights averted the usual rules against third-party standing. The possibility that changing circumstances might convert a valid abortion regulation to an invalid one, depending on the dynamics of abortion access, flouted res judicata and even severability principles. And the law governing informed consent in the abortion context "distorted First Amendment doctrines."

Nor did the right to abortion induce the sort of reliance that typically concerns the Court when it considers overturning precedent. Traditional reliance interests normally arise "where advance planning of great precision is most obviously a necessity." Even the *Casey* joint opinion acknowledged that most abortions are unplanned activities, so reliance in particular cases is missing. Yet *Casey* invoked an ambiguous reliance interest "'on the availability of abortion in the event that contraception should fail'" and "'[t]he

". . . Breyer is concerned that [*Dobbs*] threatens all precedents finding non-textual constitutional rights . . ."

ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.'" The Court rejected the notion that a broad social reliance on precedent could thwart a change of course. Really, all precedents induce society-level reliance, or at least adaptation, which is why the Court has looked for something more particularized and precise with this inquiry. Legislatures are far better equipped than courts to assess and credit the extent to which society has come to depend on abortion access.

In an extraordinarily self-aware conclusion to its stare decisis discussion, the Court addressed the worry—put forth in *Casey*, not to mention the voluminous public criticisms directed at the Court during the pendency of *Dobbs*—that overturning a right to abortion would damage the Court's credibility. The Court expressed its agreement that it should issue carefully thought-out opinions based in law to establish its credibility as a principled institution. Exceeding constitutional boundaries, however, is the real threat to institutional credibility. And while the joint opinion in *Casey* expressed an intention to settle the abortion issue nationally, it only inflamed tensions over abortion, which further undermined the Court's credibility.

Finally, the majority concluded that rational basis review is the most appropriate form of review for challenges to state abortion regulations. States may regulate abortion for legitimate reasons, including respect for and preservation of prenatal life among others, which justified Mississippi's post-15-week ban.

Justice Thomas joined the majority in full but also wrote separately to criticize the entire enterprise of finding substantive rights in the due process clause. "Substantive due process," he says, "is an oxymoron" lacking any constitutional basis. Thomas says the Court should reconsider all its due process cases in future litigation and consider whether any properly constitute privileges and immunities of U.S. citizenship. In Justice Thomas's view, "substantive due process" often yields disastrous ends, including not only *Roe* but also *Dred Scott*.

Concurring in result only, Chief Justice Roberts agreed that the viability line rule should be discarded, and the Mississippi law should be upheld, but would not overrule *Roe* and *Casey* all together. In his view, *Roe* and the right to choose are not dependent upon the viability standard. Instead, the right abortion should extend only as far as a reasonable opportunity to choose abortion, which Mississippi surely permitted by banning abortion only after 15 weeks.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. In his view, *Roe* and *Casey* are "embedded in core constitutional concepts of individual freedom." While he did not supply historical evidence of a right to abortion, Breyer criticized the majority for citing laws against abortion going back to the 13th century. Regarding history in the Constitutional Era, Breyer says that "'post-ratification adoption or acceptance of laws'" inconsistent with the Constitution cannot overcome the text. And with respect to that text, he criticizes the majority's originalist methodology of looking at the 14th amendment just as its ratifiers did, emphasizing those ratifiers were "men . . . not perfectly attuned to the importance of reproductive rights for women's liberty." According to his own interpretive philosophy, the "Constitution does not freeze for all time the original view of what [14th amendment] rights guarantee, or how they apply," citing as an example the right to interracial marriage embraced by *Loving v. Virginia*. Why is abortion an appropriate unenumerated right? In Breyer's view, "forcing a woman to give birth" is far more intrusive than other non-textual rights afforded by the Court (such as the rights to marriage, birth control, and sexual intercourse), so its existence should follow from those precedents as a matter of logic. Indeed, Breyer is concerned that this case threatens all precedents finding non-textual constitutional rights, citing Justice Thomas's concurrence, and comparing the situation to a game of Jenga.

Moving to stare decisis, Justice Breyer says no legal or factual change "supports overturning a half-century of settled law giving women control over their reproductive lives." This observation prompted a response from the majority that the dissent would have deemed unjustified an immediate decision to overturn *Plessy*. Breyer acknowledges that *Plessy* was wrong when decided, but that insinuates that "times changed" leading to *Brown* in a way they have not changed for abortion. In any event, he also contends that, abundant circuit conflicts over abortion standards notwithstanding, the standards imposed by *Roe* and *Casey* are "perfectly workable." Indeed, he contends rational basis (the easiest standard to meet in constitutional law) is somehow *less* workable. And he credits the reliance interests of "tens of millions of women" who avail themselves of the right to choose. In his view, *Roe* and *Casey* have enabled women to participate in the "economic and social life of the Nation" by facilitating "their ability to control their reproductive lives," and overturning them will be "disastrous, particularly for poor women." By holding "all [the Court] must say to override stare decisis is [that precedent is] 'egregiously wrong,'" the Court "makes radical change too easy and too fast."

SECOND AMENDMENT

THE RIGHT TO SELF-DEFENSE MEANS NOT HAVING TO PROVE A NEED FOR ORDINARY FIREARMS IN PUBLIC

As if abortion did not supply sufficient controversy for one Term, the Court also tackled a gun-rights case, namely New York's century-old requirement that, to possess a firearm outside the home or place of business, an applicant must prove "proper cause" for a license. New York courts had defined "proper cause" to require an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community," *i.e.,* "particular threats, attacks or other extraordinary danger to personal safety." In *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-873, the Supreme Court invalidated the proper-cause requirement because "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home" and the New York law "prevent[s] law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."

Writing for a six-justice majority, Justice Thomas said that, when the plain text of the Second Amendment covers an individual's conduct and renders it presumptively protected, the govern-

ment can justify its regulation only by showing that it is consistent "with the Nation's historical tradition of firearm regulation." As established in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the focus of the Second Amendment inquiry is constitutional text and history, not means-end scrutiny (i.e., narrowly tailored to a compelling government interest) or balancing. According to the majority, "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable" than asking judges to engage in an empirical cost-benefit analysis. Such a test, the Court said, comports with tests applicable to laws directly regulating other enumerated constitutional rights, such speech and confrontation of witnesses.

Recognizing the need for guidance as to which historical analogues are relevant, the Court said that, "[w]hile we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," *Heller* and *McDonald* suggest "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." As the Court explained further, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "'central'" considerations when engaging in an analogical inquiry."

Here, the historical meaning of "bear" "naturally encompasses public carry"—after all, while citizens "keep" arms at home they usually "carry" them only in public—such that "[t]o confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections." So, contrary to New York's proper-cause law, "[t]he Second Amendment's plain text thus presumptively guarantees . . . a right to 'bear' arms in public for self-defense," and New York's law could survive only if proven to fit within the nation's historical tradition of firearms regulation.

For historical analogues, New York pointed to the 1328 Statute of Northampton, which, enacted in the wake of Edward II's armed deposition, prohibited citizens to "go or ride armed by night nor by day, in Fairs, Markets, nor in the presence of Justices or other Ministers, nor in no part elsewhere . . . ." Such a sweeping prohibition on carrying arms, it argued, sets historical example supporting New York's "proper purpose" statute. That's *too* far back, the Court said, given that it predates the appearance of handguns in Europe by about 200 years. In fact, the reference to being "armed" appears principally concerned with body armor, or at most carrying a lance, neither of which would characterize a peaceable citizen merely preparing for self-defense. And while many citizens in medieval England carried daggers for self-defense, New York pointed to no evidence that they were banned by the Statute of Northampton. And while Tudor and Stuart kings and parliaments enacted laws prohibiting small guns, those laws were concerned with ensuring use of effective weaponry, not public safety, and in any event had fallen into desuetude by the time the English began to populate North America in the early 17th century.

New York also cited colonial-era restrictions supposedly restricting weapons in public, but the Court was unimpressed, as such laws were uncommon—only three were cited— "merely codified the existing common-law offense of bearing arms to terrorize the people." Firearm restrictions in the antebellum period, furthermore, did not impose "a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime." Rather, the "manner of public carry was subject to reasonable regulation," including concealed-carry laws and surety requirements for those proven likely to breach the peace, neither of which "operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose." Nor did New York show substantial public-carry restrictions in the Reconstruction Era. While Texas forbade public carry absent "reasonable grounds for fearing an unlawful attack on [one's] person," that statute was outlier. Overwhelming evidence from other states—and the 1866 Freedmen's Bureau Act—established the right to keep and bear arms in public in that period.

". . . the focus of the 2nd Amendment inquiry is constitutional text and history, not means-end scrutiny . . . or balancing."

Finally, while cities and towns in Western Territories often prohibited citizens to carry firearms in public, such restrictions amounted only to temporary "legislative improvisations" not subject to judicial review and applicable only to a miniscule portion of the American population. This body of historical evidence, taken as a whole, was insufficient to justify New York's "proper cause" requirement for a public carry license.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. His first complaint is that the case came to the Court in the pleading stage, *i.e.*, without discovery or evidentiary hearings that bear out "the [majority's] negative characterizations" of New York's law. Without an evidentiary record, he said, the Court cannot determine how much discretion local officials are given in granting or denying permits, cannot assume applicants are denied meaningful judicial review of application denials, and cannot demonstrate how the proper-cause standard has been applied.

Justice Breyer also attacks the majority's history-only analysis because "no Court of Appeals has adopted this rigid history-only approach" and that the Court "do[es] not normally disrupt settled consensus among the Court of Appeals, especially not when that consensus approach has been applied without issue for over a decade." He contends in this regard that, while it focused on constitutional text and history, *Heller* "did *not* 'reject . . . means-end scrutiny.'" In Breyer's view, the majority's exclusive reliance on history gives little guidance to lower courts, "will often fail to provide clear answers to difficult questions," and "will be an especially inadequate tool when it comes to modern cases presenting modern problems." Further, he rejects the contention that no other constitutional right is compromised by means-ends scrutiny, pointing out that, if (using history) the Court determines that particular speech is covered by the First Amendment, "we then [use] means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech."

Notably, Justice Breyer called into question the entire originalist enterprise owing the judicial weakness in "resolving historical questions" and undertaking "searching historical surveys." The majority, however, rejoined that the job is not to resolve historical questions "in the abstract," but "to resolve *legal* questions presented in particular cases or controversies." Quoting W. Baude & S. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV.

". . . the majority said that 'Courts are entitled to decide cases based on the historical record compiled by the parties.'"

809, 810–811 (2019), the Court observed that that "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties." Citing the "principle of party presentation as embodied in *United States* v. *Sineneng-Smith*, 590 U. S. (2020), the majority said that "Courts are thus entitled to decide a case based on the historical record compiled by the parties."

Justice Breyer also disagrees with the substance of the Court's historical analysis, stating "[m]any of those historical regulations imposed significantly stricter restrictions on public carriage than New York's licensing requirements do today." Unlike the majority, Justice Breyer considers older, pre-ratification evidence to be probative because "the Framers of the Second Amendment" would have considered such evidence to represent a "significant chapter in the Anglo-American tradition of firearms regulation." Regarding the colonial era, Justice Breyer states the Court should not have dismissed the restrictive laws of three colonies as outliers because they "were successors to . . . comparable laws in England" and "predecessors to numerous similar (in some cases, materially identical) laws enacted by States after the founding." Likewise, laws from the Founding era, "like the colonial and English laws on which they were modeled—thus demonstrate a longstanding tradition of broad restrictions on public carriage of firearms." Nineteenth-century surety laws and broader bans also "demonstrate that even relatively stringent restrictions on public carriage have long been understood to be consistent with the Second Amendment." Regarding postbellum regulations, Justice Breyer writes that "States continued to enact generally applicable restrictions on public carriage, many of which were even more restrictive than their predecessors." He also chastises the Court for "disregard[ing] 20th-century historical evidence."

ADMINISTRATIVE LAW

VACCINE MANDATES, ON THE STAY DOCKET, GO 1 FOR 2

In the fall of 2021, President Biden, having declared that his patience with unvaccinated Americans was "wearing thin," imposed COVID vaccine requirements on workers through a series of emergency orders and rules affecting federal employees and contractors, Medicaid and Head Start providers, and employers subject to the Occupational Safety and Health Act. Each drew immediate legal challenges alleging violations of both the Administrative Procedure Act, substantive law governing each regulatory sector, and individual constitutional rights. Two of those challenges—to the Medicaid provider mandate and the OSHA mandate—garnered lower-court injunctions that prompted expedited Supreme Court review of stay petitions, resulting in final decisions on full briefing and argument. The Biden administration prevailed on the Medicaid provider mandate but lost on the OSHA mandate. Full disclosure: Indiana (my client) was a party challenging the Biden administration in both lawsuits.

MEDICARE AND MEDICAID PROVIDER MANDATE UPHELD

The Secretary of Health and Human Services announced an emergency rule requiring that facilities providing services to Medicare and Medicaid beneficiaries must guarantee that their employees—unless exempt for medical or religious reasons—are vaccinated against COVID-19. Failure to comply with the Secretary's order would cause participating facilities to lose federal funding. The Secretary issued the order after finding "good cause" that further delay would endanger patients, particularly because Medicare and Medicaid patients are often elderly, disabled, or in poor health. In separate actions, Louisiana and Missouri (joined by other states) challenged the order, and each respective district court issued preliminary injunctions against enforcement. The Fifth and Eighth Circuits denied the federal government's stay requests, so it applied for stays from the Supreme Court, which consolidated the cases for expedited briefing and argument.

In *Biden v. Missouri*, No. 21A240, the Court, in a 5-4 per curiam opinion, granted the applications for stay and issued an opinion that served as final resolution of the litigation over the interim rule. The central issues were whether a vaccine mandate was within the Secretary's regulatory power under the Social Security Act, whether the mandate was arbitrary and capricious even if within the Secretary's authority, and whether the Secretary sufficiently justified an emergency rule without notice and comment.

Concluding that the mandate fell within the Secretary's discretion, the Court observed that the Secretary "routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves." Under 42 U. S. C. §1395x(e)(9), Congress has given the Secretary broad authority "to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" The vaccination rule "fits neatly within the language of the statute," the Court said, because "COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease," transmission of which the Secretary determined would be reduced by a COVID–19 vaccine mandate. While recognizing that "the vaccine mandate goes further than what the Secretary has done in the past," the Court also observed that the Secretary had never "address[ed] an infection problem of this scale and scope before." The Secretary had never previously imposed a vaccine mandate, the Court said, because states had already imposed healthcare worker vaccine mandates for hepatitis B, influenza, and measles, mumps, and rubella. "In any event," the Court concluded, "there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what [the Secretary] does."

Other objections failed as well. The states had argued that the mandate contravened a statute prohibiting federal officials from supervising the way "medical services are provided" by Medicaid and Medicare providers, but the Court concluded that the states' argument "would mean that nearly every condition of participation the Secretary has long insisted upon is unlawful." In rejecting the argument that the vaccine mandate was arbitrary and capricious, the Court clarified that the judiciary's only task was "[to] ensur[e] that the agency has acted within a zone of reasonableness." Here, "[g]iven the rule-making record, it cannot be maintained that the Secretary failed to 'examine the relevant data and articulate a satisfactory explanation for' his decisions" or

failed to consider "that the rule might cause staffing shortages, including in rural areas."

And with respect to forgoing notice and comment, the Secretary was required only to find "something specific" commanding emergency action. Here, the Secretary's conclusion that vaccinations before "the winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths" was sufficient. That finding also meant that the Secretary need not "consult with [the] appropriate State agencies" or prepare a regulatory impact analysis about the rule's effect on small rural hospitals, which are required only for permanent rulemaking. Ultimately, in the Court's view, the "unprecedented circumstances" present in this case "provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."

Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett, dissented. In his view, the Government relied on a collection of statutory provisions only tangentially authorizing the Secretary's order. The Social Security Act does not confer authority on the Secretary to regulate health and safety at providers in a single act, but instead confers authority in separate statutes, facility-by-facility. And while the Court cited a statute authorizing "health and safety" regulations for hospitals participating in Medicaid and Medicare, "5 of the 15 facility-specific statutes do not authorize CMS to impose 'health and safety' regulations at all."

CMS also cited an assortment of other statutes that obliquely refer to authority to regulation for health and safety, but, said Justice Thomas, "[t]he Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide vaccine mandate." Previewing the major questions doctrine later explained in detail and embraced by the full court in *West Virginia v. EPA* (and the OSHA mandate case) Justice Thomas observed that Courts "presume that Congress does not hide 'fundamental details of a regulatory scheme in vague or ancillary provisions.'" Applying basic interpretive canons, including the requirement that Congress provide a clear statement when imposing conditions on grants to states, Justice Thomas rejected the theory that Congress implicitly authorized the Secretary to issue a vaccine mandate. The nationwide mandate disrupts the state-federal balance because vaccine requirements fit squarely in states' police power, so if Congress intended "to significantly alter the balance between state and federal power," it must "use exceedingly clear language."

Furthermore, while the Social Security Act authorizes the Secretary to issue regulations governing working conditions of Medicare and Medicaid providers, the vaccine mandate went beyond the workplace. "Here, the omnibus rule compels millions of healthcare workers to undergo an unwanted medical procedure that 'cannot be removed at the end of the shift'" (quoting *In re MCP No. 165*, 20 F. 4th 264, 268 (CA6 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc).

OSHA VACCINE MANDATE INVALIDATED

OSHA issued an emergency rule—technically called an "Emergency Temporary Standard"—requiring that all employers with at least 100 employees require employees either to vaccinate against COVID–19 or undergo weekly COVID–19 testing and wear a mask at work. Various states, businesses, trade groups, and nonprofit organizations filed petitions across the United States, eventually resulting in each regional Court of Appeals hosting review of a petition. The cases were consolidated, and in *National Federation of Independent Business v. Department of Labor,* No. 21A244, the Supreme Court granted NFIB's and a coalition of the states' applications to stay the emergency standard on the grounds that it exceeded OSHA's authority. While the Chief Justice and Justice Kavanaugh had voted with the federal government in the CMS vaccine mandate case, here they voted with the challengers and against the federal government.

"Though the risk of contracting COVID-19 certainly exists in many workplaces, it is not an 'occupational' hazard within the meaning of the statute."

As the Court put it in a 6-3 per curiam decision, "[t]he Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense," regardless of where they work. This "indiscriminate approach," however, "fails to account for th[e] crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure." The Occupational Safety and Health Act authorizes workplace safety standards, not broad public health mandates. Though the risk of contracting COVID–19 certainly exists in many workplaces, it is not an "occupational" hazard within the meaning of the statute. That said, OSHA may regulate "occupation-specific risks related to COVID–19" including "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace," such as for scientists researching the virus or workers in "particularly crowded or cramped environments." But the danger in those workplaces differs from the everyday COVID risks of the general population—a distinction that OSHA failed to consider. Allowing OSHA "to regulate the hazards of daily life" would impermissibly expand the agency's authority well beyond the existing boundaries.

Foreshadowing a more full-throated exploration of the major questions doctrine in *West Virginia v. EPA* (as Justice Thomas did in dissent in the CMS vaccine-mandate case), the Court observed that when an agency "exercise[s] powers of vast economic and political significance," the Court expects "Congress to speak clearly." And with the potential to affect 84 million Americans and impose billions in compliance costs, "[t]here can be little doubt that OSHA's mandate qualifies as an exercise of such authority," said the Court. Though that observation did not carry the day in the CMS vaccine-mandate case, here, the Court concluded that Congress provided OSHA with no such clear authorization.

Justice Gorsuch, joined by Justices Thomas and Alito, filed a concurring opinion framing the inquiry as "not how to respond to the pandemic, but who holds the power to do so." Echoing the majority, he observed that, while Congress may delegate certain decision making to executive agencies, it must also speak clearly if it wants to assign decisions "of vast economic and political significance." When the Occupational Safety and Health Act was adopted fifty years ago, the country was not facing a pandemic, so it naturally did not provide the requisite clear statement about emergency power on so large a scale. Furthermore, OSHA ordinarily relied on its emergency temporary

". . . the Court invalidated efforts by EPA to force coal-fired power plants to switch to natural gas or renewable energy sources."

standards authorization only to pass "comparatively modest rules addressing dangers uniquely prevalent inside the workplace." Historically, medical procedures like a vaccine would be regulated by states with broader and more general governmental powers. And here, the "regulatory initiative" was merely "a legislative workaround" where Congress had already *rejected* a nationwide vaccine mandate, notwithstanding its willingness to pass other pandemic-related legislation.

More broadly, Justice Gorsuch observed that both the major questions and nondelegation doctrines operate as protections for separation-of-power principles and as guarantees that "any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." On one hand, the nondelegation doctrine prevents Congress from intentionally delegating *legislative* power; on the other, the major-questions doctrine protects *unintentional* delegation of legislative powers. Otherwise, Congress could "dash the whole scheme of our Constitution" and "intru[de] into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." Bringing the point home, Justice Gorsuch concludes that both doctrines "hold their lessons for today's case." Under the major questions heading, "OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate." And under the non-delegation heading, "if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority."

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. In his view, OSHA's vaccine rule constituted an exercise of what Congress intended OSHA to do: "ensur[e] health and safety in workplaces." COVID-19, he wrote, represented precisely the sort of "new hazard" and "physically harmful" "agent" that OSHA was authorized to address by emergency standard. Moreover, OSHA concluded that the virus presents a "grave danger" and the standard was "necessary" to reduce the risk. Under a "substantial evidence review," said Justice Breyer, the Court should defer to the agency's determination. Instead, the majority "impose[d] a limit found no place in the governing statute," which "substitutes judicial diktat for reasoned policymaking."

CONFIRMATION OF THE MAJOR-QUESTIONS DOCTRINE MEANS INVALIDATION OF THE CLEAN POWER PLAN

In *West Virginia v. EPA*, No. 20-1530, the Court invalidated efforts by EPA to force coal-fired power plants to switch to natural gas or renewable energy sources. But the real news here is the Court's interest in using the case to cement the major-questions doctrine—and the rich underlying battles over constitutional history and meaning that divide the Court. Indiana (my client) was a party to this suit.

The Obama-Trump-Biden presidential successions prompted policy whiplash over the future of coal-fired power plants. President Obama's administration promulgated the Clean Power Plan, which would have required coal-fired power plants to shift to renewable energy. That plan never went into effect, however, as it was enjoined amidst litigation brought by both industry and states (led by West Virginia) alleging that the CPP exceeded the authority delegated by Congress under the Clean Air Act. Before that litigation concluded, the Trump administration arrived and replaced the Clean Power Plan with the Affordable Clean Energy rule, which would have imposed technological requirements on coal plants but relieve them of having to shift to renewable energy. That administrative action was similarly enjoined in a lawsuit brought by a different set of states and environmental interest groups who alleged that the Trump EPA failed to follow proper administrative procedures when promulgating the ACE Rule. Alas, that litigation also fell short of final resolution before the Biden administration took office. President Biden, in turn, announced plans to rescind the ACE rule, even as its legality headed toward Supreme Court review.

At that point, several procedural and substantive questions—not to mention an abundance of hard-to-remember acronyms—lay strewn across the environmental-regulation field. If the ACE rule were unlawful, would the CPP plan spring back to life once the ACE rule was finally set aside? Or, would the Biden administration re-promulgate the CPP, which after all was the brainchild of the administration he shared with President Obama? And what of the alleged legal deficiencies of the CPP, which had never been finally resolved? Would they impede resumption of the CPP, whether by default with invalidation of the ACE rule or affirmative re-promulgation, or would challenges to the CPP have to begin anew?

The Supreme Court decided to wrap these and related issues into the litigation burrito known as *West Virginia v. EPA*, the result of which was invalidation of the Obama-Biden Clean Power Plan and explication of the major-questions doctrine.

The Clean Air Act's New Source Performance Standards (or NSPS) program authorizes EPA to regulate performance standards of stationary source categories that contribute significantly to public-health-endangering air pollution. First EPA sets standards for new or modified sources, then for existing sources not already covered by another Clean Air Act regulatory program. EPA has used NSPS only a handful of times, but in 2015 it promulgated the Clean Power Plan, which addressed carbon dioxide emissions via rules for both new and existing coal- and gas-fired power plants. Critically, the Clean Air Act requires EPA to regulate stationary sources not by outlawing pollutants altogether, but by identifying the "best system for emission reduction" or (acronym alert) BSER.

The Clean Power Plan's BSER included multiple components, perhaps the most noteworthy (and controversial) known as "generation shifting," which refers not to tensions between Boomers and Millennials but to sources of energy. EPA was directing coal-fired power plants to switch to natural gas and directing *all* power plants to include more wind and solar sources in their energy-generation mix. EPA identified three ways existing plants could implement "generation shifting": (1) reduce the plant's own production of electricity; (2) build a new natural gas plant; or (3) purchase emission allowances or credits as part of a cap-and-trade regime. Compliance would mean over $1 billion in costs, retirement of dozens of power plants, and elimination of thousands of

jobs, with electricity prices projected to climb 10% and GDP to fall by at least $1 trillion by 2040.

When industry and several states challenged the Clean Power Plan in court, the D.C. Circuit declined to stay it, but the Supreme Court granted a stay in 2016 pending final resolution in the D.C. Circuit. Before that court issued a decision, President Trump took office, and his administration requested the litigation be held in abeyance pending formal reconsideration of the Clean Power Plan.

In that formal reconsideration, EPA concluded that generation shifting could not be part of the BSER, which by statute is limited to "systems" (such as filters or scrubbers) that could be put into operation *at* a building or facility. Generation shifting, in contrast, did not have an application at the individual source—it was merely a directive to cease using coal to produce electricity. To replace the Clean Power Plan (which I will now reduce to CPP), EPA promulgated the Affordable Clean Energy (or ACE) Rule, where it identified a BSER consisting of equipment upgrades and operating practices.

Many pro-CPP states and environmental groups challenged both the repeal of CPP and the promulgation of the ACE rule—which constituted separate and technically independent administrative steps—in the D.C. Circuit. EPA defended its repeal-and-replace stratagem, but West Virginia (and other states that had sued to enjoin the CPP), along with industry, intervened to join the defense. On January 19, 2021—the day before President Biden's inauguration—the D.C. Circuit held that the Trump EPA was wrong, *i.e.*, that EPA had the authority under the Clean Air Act to impose its generation-shifting BSER. It therefore vacated both the CPP repeal and the ACE rule replacement and remanded to the EPA for further consideration.

With that, the CPP—with its generation-shifting BSER and high price tag—seemed ready to spring back to life. The Biden administration's assumption of office, after all, meant that EPA would not seek Supreme Court review. West Virginia and industry both intended to file certiorari petitions, and both had intervenor status to do so, but the Biden EPA's intention to initiate yet another regulatory program for power plants raised questions as to whether challenges to CPP and the ACE rule remained justiciable. Seeing the need to untangle this litigation mess in an orderly way, EPA moved to stay the D.C. Circuit's decision so that the Clean Power Plan would not go into effect until the Biden EPA could consider its next regulatory move. Meanwhile, West Virginia and other states, along with industry, immediately filed cert petitions, which the Court granted.

Writing for a six-justice majority invalidating the CPP, the Chief Justice first said that the state petitioners had standing to seek review because, absent reversal or contrary regulatory action, the stringent requirements of the Clean Power Plan would inflict injury upon them by requiring them to impose more stringent air quality standards within their borders. The Department of Justice argued that the case was moot since EPA had indicated an intention not to enforce the Clean Power Plan while it considered its own power plant regulation. The Court rejected that argument, however, because EPA could easily change course and could not demonstrate the lack of reasonable possibility that CPP enforcement might occur.

The second question for the Court was whether generation shifting—from 38% coal to 27% coal by 2030—can be a BSER within the meaning of the Clean Air Act's NSPS program. When a statute confers authority on an administrative agency, the Court must ask whether Congress intended to confer the power being asserted. This is where the major-questions doctrine reenters the picture: to ensure the executive branch does not exceed its power and exercise legislative authority, where the assertion of power threatens significant economic and political impact, the Court insists on greater expression and clarity in the statute. In short, for an administrative agency to exercise authority with major economic and political significance, the agency must point to clear statutory authorization. "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' "Said the Court, "[w]e presume that 'Congress intends to make major policy decision itself, not leave those decisions to agencies.'"

". . . for an administrative agency to exercise authority with major . . . significance, it must point to clear statutory authorization."

The major-questions doctrine applied in this case, the Court said, because the CPP represented a transformative expansion of EPA's regulatory authority. EPA relied on a rarely used gap-filler provision in the statute to adopt a program that "Congress had conspicuously and repeatedly declined to enact itself." "Given these circumstances," said the Court "there is every reason to 'hesitate before concluding that Congress' meant to confer on EPA the authority it claims."

In the past, EPA had used its BSER power only to require pollutant sources to operate more cleanly. It had never used that power to establish a generational and systematic shift of the energy industry. Indeed, the 2005 Mercury rule cited as precedent by EPA set emission limits based on the level of emissions achievable by installing new technology within a relevant time frame—which is to say, the regulated sources would have been able to comply by simply installing the technology. Here, in contrast, power plants could deploy no similar technology or measure to meet the emission limits.

Furthermore, while the CPP acknowledged that prior systems of emissions reductions it had imposed were more "traditional," namely, "efficiency improvements, fuel-switching," and "add-on controls," here, to "'control[] CO2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change,' it could not base the emissions limit on 'measures that improve efficiency at the power plants.'" But that observation by EPA—that something other than "traditional" technological fixes was necessary to achieve its climate change objectives—gives away the game. It amounted to an acknowledgment of "a very different kind of policy judgment," *i.e.*, one where "it would be 'best' if coal made up a much smaller share of national electricity generation" and even to "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." The Court found it "'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades."

Justice Gorsuch wrote a concurrence, joined by Justice Alito. Among other contributions, Justice Gorsuch offered a constitutional source for the major-questions doctrine and some observa-

". . . the critical distinction between the majority and dissent is not commitment to textualism, but concern about maintaining separation of powers . . ."

tions as to when it applies. As a derivative of the non-delegation doctrine, the major-questions doctrine traces back to Article I, which vests legislative power in Congress. In his view, "much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major-questions doctrine." As for application, at least three factors bear on whether agency action is subject to the major-question-doctrine: (1) implications of great "political significance"; (2) regulation of a "significant portion" of the economy; and (3) intrusion into a particular domain of state law. Assessed Gorsuch, "[w]hile this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the doctrine's application."

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. Justice Kagan believes that the major-questions doctrine, which raises the standard for some (but not all) questions of statutory interpretation, is unprecedented and unfounded. The Court has always required agencies to point to a clear congressional authorization, but the same standard applied to all assertions of regulatory power. Now, if the Court believes that the assertion of power represents an "extraordinary case," the agency must point to congressional authorization that is clearer than it otherwise would need to be under basic principles of statutory interpretation. (On that score, perhaps the most surprising assertion in Kagan's dissent is this: "The Clean Power Plan was not so big. It was not so new.").

In all events, said Justice Kagan, Congress made a broad delegation of power with the NSPS provision, which instructs EPA to decide upon the best "system" of emission reduction that can be adequately demonstrated. "System" is susceptible of many broad meanings, and a generation-shifting policy "fits comfortably within the conventional meaning of" the term and its statutory context. The "best system" is not limited to technology controls—in fact, Congress added the word "technological" to the NSPS provision regarding new sources, but struck it from the provision governing existing sources, which implies "system" is not so limited here. Throwing down the gloves, she calls the majority "purposive" in its interpretive approach and declares that "[t]he current Court is textualist only when being so suits it."

Yet the critical distinction between the majority and the dissent is not commitment to textualism, but concern about maintaining separation of powers, namely, by way of a meaningful non-delegation doctrine. With both sides citing Justice Scalia whenever possible, Justice Kagan and Justice Gorsuch engaged most directly on this issue.

Quoting Hamilton from The Federalist No. 11, Justice Gorsuch observed that it is "vital" that we take the Vesting Clause seriously "because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" Switching to Madison in The Federalist No. 37, he says that "by vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'"

Kagan rejected that interpretation of history. For the original meaning of the Vesting Clause, she contends that "[t]he records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch." Keeping it real, she observes that "[i]n all times, but ever more in 'our increasingly complex society,' the Legislature 'simply cannot do its job absent an ability to delegate power under broad general directives.'" In her assessment, "[m]embers of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue" or "to keep regulatory schemes working across time." So, "they rely . . . on people with greater expertise and experience . . . in agencies," particularly "when an issue has a scientific or technical dimension." And, she contends, the results are undeniable: "Over time, the administrative delegations Congress has made have helped to build a modern Nation."

Perhaps stinging most from Justice Kagan's "purposive" accusation, Gorsuch's rejoinder went for the jugular: "Echoing Woodrow Wilson, the dissent seems to think 'a modern Nation' cannot afford such sentiments." The allusion to Wilson was especially potent given a separate footnote where Gorsuch called out Wilson's contention that "the mass of the people were 'selfish, ignorant, timid, stubborn, or foolish'" as well as Wilson's well known "disdain for particular groups." Gorsuch allowed that "lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident." So, "when Congress seems slow to solve problems . . . the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives." Why is the Vesting Clause important? Because "[t]he framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."

REPRESENTING THE STATE

Who is permitted to defend state statutes against attack in federal court? Under federal statutes and procedural rules, that is the responsibility of a state's attorney general. But the availability of other champions has become critical in recent years as some attorneys general have eschewed their traditional duty to defend state law and have sided instead to advance their contrary political commitments. For example, several state attorneys general refused to defend traditional marriage laws, which in California had the effect of depriving any defense whatever for a constitutional amendment defining marriage adopted by referendum. In *Hollingsworth v. Perry*, the Supreme Court in 2013 ruled that the political sponsors of the referendum did not have Article III standing to intervene in federal court to defend the law they had fought so hard to enact, even though the California Supreme Court had ruled that sponsorship status conferred litigation rights under state law. And in *Virginia House of Delegates v. Bethune-Hill*, the Court rejected an attempt by the Virginia House and its speaker to appeal invalidation of legislative districts where the attorney general refused to do so, even though the House had participated as a party in the case all along. This Term, however, the Court considered cases raising questions as to whether legislators may

sometimes intervene to defend a statute when an attorney general does not, and whether an attorney general may intervene to defend a statute when a governor abandons that defense. Contra the results in *Hollingsworth* and *Bethune-Hill*, the Court in these cases refused to leave state statutes undefended.

DUTY TO DEFEND: IN KENTUCKY, THE AG AND GOVERNOR TAKE TURNS

Kentucky authorizes multiple officials to defend state statutes in federal court—the attorney general and the governor. But what happens when, after one official begins defending a controversial statute and the other refuses, the voters force a change in both offices that switches their institutional views? In *Cameron v. E.M.W. Women's Surgical Center*, No. 20-601, the Supreme Court held, by a vote of 8-1, that the newly sympathetic official—here the attorney general—could intervene on appeal at the rehearing stage to pick up the defense that the new governor was abandoning.

In 2018 the Kentucky legislature adopted a statute outlawing the use of an abortion procedure known as dilation and evacuation on a live human fetus. EMW Women's Surgical Center, an abortion clinic, and two of its doctors sought to enjoin enforcement of the law. The complaint named, among others, the attorney general and secretary for Health and Family Services. At the time, the attorney general was Andrew Beshear, a pro-choice Democrat who opposed the challenged laws. The plaintiffs agreed to dismiss the claims against the attorney general without prejudice, but, critically, the attorney general formally reserved all rights, claims, and defenses relating to whether he is a proper party in the action, including for any subsequent appeals. The secretary, an appointee of pro-life Republican Governor Andrew Bevin, remained in the case, and, represented by the governor's counsel, defended the statute.

The district court permanently enjoined enforcement of the statute as an undue burden on a woman's right to choose abortion. The secretary appealed, but shortly after briefing concluded in the Sixth Circuit, pro-choice attorney general Beshear was elected governor, and Daniel Cameron, a pro-life Republican, was elected attorney general. With the change in sympathies in each office, the new secretary appointed by Governor Beshear requested that lawyers from the office of new Attorney General Cameron present the oral argument—no doubt because the lawyers representing the secretary in their role as counsel to the governor had moved to the attorney general's office.

Eventually, the Sixth Circuit affirmed the district court's judgment in a 2-1 vote. Two days later, the secretary notified the attorney general that he would discontinue any efforts to appeal, but would not oppose a motion by the attorney general to intervene and continue the state's defense of the statute. The office of attorney general, having previously appeared for the secretary to present oral argument, moved to withdraw as counsel for the secretary and to intervene on behalf of the Commonwealth. It also filed a petition for rehearing en banc within the fourteen-day deadline. Hoping to take its win and go home, EMW opposed each request.

The Sixth Circuit denied the attorney general's motion in intervene, again by a 2-1 vote. The panel held that (1) the motion was untimely because years of litigation had passed before the attorney general sought to intervene, (2) the attorney general sought "'extraordinary' forms of review to which litigants are not generally entitled," and (3) that intervention would prejudice the EMW because the attorney general's petition included an argument (third-party standing) that the secretary had not previously raised. The en banc petition therefore died on the vine. But the Supreme Court granted certiorari on the question whether the Sixth Circuit should have allowed the attorney general to intervene.

". . . the Supreme Court held . . . the attorney general . . . could intervene on appeal . . . to pick up the defense that the new governor was abandoning."

Justice Alito, writing for six justices, dismissed EMW's argument that courts of appeal are jurisdictionally barred from considering a non-party's motion to intervene when that non-party is bound by the district court judgment, given that such a non-party could have filed a separate notice of appeal. No statute or rule imposes a jurisdictional bar against any non-party's motion to intervene, and no grounds exist even for imposing a mandatory claims-processing rule of the type EMW suggests. EMW was arguing that the attorney general was bound by the judgment only as a function of the earlier dismissal agreement, but that agreement only referred to the judgment as it stood after all appeals and reserved "all rights, claims, and defenses . . . in any appeals arising out of this action." That reservation "easily covers the right to seek rehearing en banc and the right to file a petition for a writ of certiorari." Accordingly, the Court "refuse[d] to adopt a categorical claims-processing rule that bars consideration of the attorney general's motion." That said, the Court disclaimed any "attempt to set out a general rule governing the right of non-parties to appeal or to move for appellate intervention."

Still, no rule expressly permits intervention in a court of appeals or sets for a standard for determining whether intervention is appropriate. Without a statute or rule that provides a "general standard" in deciding whether an intervention on appeal should be allowed, the Court considered the same "policies underlying intervention" in district courts. And here, the Kentucky attorney general has a "substantial legal interest that sounds in deeper, constitutional considerations" and that a state "clearly has a legitimate interest in the continued enforceability of its statutes." Respect for state sovereignty also includes the state's authority to structure its executive branch in a way that empowers multiple officials to defend the state's interest in federal court. Congress embraced a "fair opportunity" for states to defend their laws in federal court via 28 U.S.C. § 2403(b), which requires a federal court to notify the state attorney general and allow the state to intervene whenever a "state law 'affecting the public interest is drawn in question.'" With that principle in mind, said the Court, "[t]he Sixth Circuit panel failed to account for the strength of the Kentucky attorney general's interest in taking up the defense of HB 454 when the secretary for Health and Family Services elected to acquiesce."

As to timeliness, the Court dismissed EMW's claim that the attorney general's motion to intervene was not timely, stating that although the litigation had been ongoing for years, the attorney general's need to intervene did not arise until the secretary ceased defending the statute. Timeliness should be measured from that

"Justice Sotomayor dissented . . . this 'decision will open the floodgates for government officials to evade the consequences of . . . decisions made by their predecessors of different political parties.'"

point, and the attorney general filed a motion to intervene within days.

Finally, the Court held that intervention would not meaningfully prejudice EMW just because the attorney general's petition included a new argument (third-party standing), as it was not the only issue, need not have been entertained, and indeed could just as easily have been raised by the secretary. The identity of the appellant does not create prejudice. EMW also argued that it was prejudiced because Governor Beshear had a history of refusing to defend abortion restrictions, and it was deprived of the benefit of his policy decision not to defend this statute. The Court stated this sort of "claimed expectation" does not amount to unfair prejudice because they had no legally cognizable expectation that the state would refuse to defend the law until all available forms of review were exhausted.

Justice Kagan, joined by Justice Breyer, concurred in the judgment but not in the majority opinion. She agreed that the timely appeal rule does not address a situation where a non-party seeks to intervene during an appeal timely brought by a party to the case. And while she acknowledges the general concern that permitting appellate intervention by non-parties threatens to circumvent the timely appeal rule, that concern "does not sensibly apply here because of the change in circumstances between the time to appeal and the time of the motion to intervene"—namely the decision of the secretary not to continue the appeal. The attorney general's motion to intervene "was not an attempt to escape the consequences of failing to adhere to appellate deadlines." And while Justice Kagan agreed that the attorney general should have been allowed to intervene, "contra the majority, in invocation of, or lofty observations about, the Constitution are here needed." In her view, "the considerations governing intervention motions—applying equivalently to any person seeking to intervene, including the attorney general—show why the Sixth Circuit went wrong in closing off the suit."

Justice Sotomayor dissented, expressing concern that this "decision will open the floodgates for government officials to evade the consequences of litigation decisions made by their predecessors of different political parties." In her view, a party—including a state no matter the official embodiment in any given case—cannot assume a certain position in a legal proceeding, then change that position "simply because his interests have changed." She adds that "[a] state official's late-breaking effort to change his theory of state law comes with costs to judicial efficiency and finality, and it disrupts the expectations not only of the adversarial litigant, but other parties who may have litigated based on their understanding of . . . the State's position." The consequences of elections and "[s]hifts in the political winds" do not support a special carveout to longstanding principles of estoppel, she concludes.

DESIRE TO DEFEND: A LEGISLATURE CAN AUTHORIZE ITS LEADERS TO DEFEND A STATE STATUTE IN FEDERAL COURT

In a challenge to North Carolina's Voter ID law, the Court in *Berger v. North Carolina NAACP,* No. 21-248, held that leaders of the General Assembly could intervene to defend a state statute in federal court even where a state's attorney general was already defending the law.

After the people of North Carolina amended the state constitution to require photo ID of those who vote in person, the General Assembly enacted such a requirement, but the Governor, who opposes Voter ID laws, vetoed the bill—which the General Assembly promptly overrode. The law was immediately challenged by the NAACP, who sued members of the State Board of Elections alleging that the North Carolina Voter ID law violates the Equal Protection Clause.

The Attorney General of North Carolina assumed responsibility for defending the Board, though he had voted against an earlier Voter ID law when he was a state senator. Concerned that the Attorney General may not offer a full-throated defense of a law he once opposed, the speaker of the State House of Representatives and president pro tempore of the State Senate moved to intervene on the grounds that North Carolina law expressly empowered them to do so, on behalf of the General Assembly, in any lawsuit challenging a North Carolina statute or state constitutional provision. Without their intervention, they argued, important state interests would not be adequately represented. The district court denied the motion to intervene.

The NAACP moved for a preliminary injunction and offered five expert reports. The attorney general provided none in response, and instead filed a single affidavit stressing the need for "clarity." The legislative leaders sought to file an amicus brief, five expert reports, and a few other declarations. The district court refused to consider any of the materials and granted the preliminary injunction. Separate panels of the Fourth Circuit took up the preliminary injunction and intervention rulings. One panel reversed the preliminary injunction and another reversed denial of the motion to intervene. The en banc court, however, decided to rehear the intervention issue and affirmed, deciding that the legislative leaders failed to satisfy a "heightened presumption" that the attorney general "adequately represent[ed]" their interests.

In an eight-justice majority opinion written by Justice Gorsuch, the Court ruled for the legislative leaders. The Court observed that, while most states authorize a single voice, typically the state's attorney general, to represent the state in litigation, North Carolina has also authorized the leaders of its two legislative houses to do so in some circumstances. And under the federal rules of civil procedure, a court must permit a party to intervene on timely motion if the party has an interest that may be impaired, unless an existing party adequately represents that interest.

Here, the legislative leaders have an interest in the litigation that the attorney general did not adequately represent. After all, a state statute authorized this intervention, and federal courts should rarely question whether a state's interests will be impaired if a duly authorized representative/party is excluded from the litigation challenging a state law. To hold otherwise would disrespect a state's chosen structure, undermine federalism's accommodation of local interests and experimentation, and, if it incentivizes suits against officials who sympathize with the plaintiffs,

create a "hobbled litigation." The Court cited both *Hollingsworth* and *Bethune-Hill* for the proposition that states may designate agents to defend its sovereign interests in federal court, including legislators.

As for adequate representation, the Fourth Circuit had said that, where a state attorney general represents state officials in litigation, "a proposed intervenor's governmental status makes a heightened presumption of adequacy more appropriate, not less." "But, respectfully," said the Court, "that gets things backward." Rather, "[a]ny presumption against intervention is *especially* inappropriate when wielded to displace a State's prerogative to select which agents may defend its laws and protect its interests." To refine the point: "Normally, a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions." Regardless, the record showed that the attorney general of North Carolina did not adequately represent the interests of the legislative leaders. The attorney general declined to offer expert reports, declined to seek a stay of the preliminary injunction, and remained mostly concerned with stability and certainty. The legislative leaders sought to supplement the Board's voice and provide a different perspective, which further demonstrated why the state empowered the leaders to participate in litigation.

Justice Sotomayor alone dissented. In her view, the federal rules of civil procedure do not afford states a right to have multiple parties represent the same interest. Here, the parties share the same interest: ensuring the validity and enforcement of the Voter ID law. The majority's ruling lacks a precedential basis and establishes no limiting principle regarding intervention as of right: None of the Court's precedents "establish that state law can require a federal court to allow additional state actors to intervene when another state actor is already ably and fully representing the State's interests in the litigation." The Court and the legislative leaders point to various "failures" of the attorney general, but those amount to the type of discretionary, strategic decisions that attorneys general often make. In any event, said Justice Sotomayor, appellate courts should defer to the district court's assessment as to whether the proposed intervenor's interests are adequately represented.

RELIGIOUS LIBERTY

STATES MAY NOT EXCLUDE USE OF TUITION SCHOLARSHIPS FOR RELIGIOUS INSTRUCTION

In *Carson v. Makin*, No. 20-1088, the Court may have finally resolved all Religion Clause Questions surrounding the use of school vouchers at religious schools.

Sixty years ago, in *Capitalism and Freedom*, Nobel Laureate Milton Friedman championed the idea that state governments should provide families with tuition-assistance scholarships to send their children to private schools. Such scholarships, he thought, would both enable families to fund the best education for their children and incentivize public schools to innovate and compete for students. Before it could achieve critical mass, however, the movement to implement government-provided tuition-assistance scholarships had to answer whether offering scholarships to pay tuition at religious schools amounts to an establishment of religion. Such questions arose not only from the generally worded Establishment Clause of the U.S. Constitution, but also from more exacting state legislative barriers to religious schools and "no-aid" constitutional provisions adopted by many states in the latter decades of the 19th century following the anti-Catholic advocacy of Maine U.S. Senator James G. Blaine, who unsuccessfully proposed such an amendment to the U.S. Constitution.

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It has taken decades, but successive answers have arrived. Twenty years ago, in *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002), the Court held "that a benefit program under which private citizens 'direct government aid to religious schools wholly as a result of their own genuine and independent private choice' does not offend the Establishment Clause." Yet two years after that, in *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that Washington could, out of concern for avoiding an establishment of religion, exclude use of government scholarships for ministerial training—a result that called into question any free exercise right use government scholarships at religious schools. Then, two years ago, in *Espinoza v. Montana Department of Revenue,* the Court held that the Free Exercise Clause precludes states from excluding religious *institutions* from a private school tuition scholarship program. Nominally left open, however, was whether states could preclude scholarships for religious *instruction* on the theory that such support more directly threatened an establishment of religion.

The Court turned to that question this Term in *Carson v. Makin* and ruled that religious instruction, like religious institutions, is protected by the Free Exercise Clause from exclusion. It is perhaps fitting that the Court reached this decision in a case from Senator Blaine's home State of Maine, though Maine's exclusion of religious schools from its scholarship program took the form of a statute rather than a "baby-Blaine" state constitutional amendment. In all events, the Free Exercise Clause secures inclusion of religious schools in state programs offering private school tuition to students and families.

Maine operates a tuition assistance program that provides payments for any family whose school district does not operate a public secondary school. The school administrative unit pays the tuition at the public or approved private school where the parents decide to send their children. For private schools to qualify under this tuition regime, they must meet certain requirements under Maine's compulsory education law. In 1981 Maine's legislature implemented a rule that permitted only "nonsectarian" schools may receive tuition assistance funds—"sectarian" schools being those "associated with a particular faith or belief system" that "promote the faith or belief system." The First Circuit upheld Maine's exclusion because private schools in Maine were the functional equivalent of public schools elsewhere and because Maine was excluding sectarian schools not merely because of their status and religious affiliation but because of the religious content of their instruction.

In a majority opinion by the Chief Justice, the Supreme Court, by a vote of 6-3, rejected any distinction between Maine's exclusion of religious schools and Minnesota's similar exclusion invalidated in *Espinoza.* Discrimination against religious groups was "odious to our Constitution," the Court said. By "conditioning the

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availability of benefits" on nonsectarian status, Maine's tuition program "'effectively penalizes the free exercise' of religion" in violation of the First Amendment. And while the Maine exclusion could theoretically survive if narrowly tailored to "advance interests of the highest order," the state's disestablishment interests—embodied by its Blaine-inspired "no aid" constitutional provision—did not justify discrimination that excluded some community members from receiving a generally available public benefit based on their religious identity.

The distinction between religious status and religious use was a non-starter, the Court said, because education in the faith and inculcation in religious teachings are at the core of a religious school's mission. And to ask questions about whether and how a religious organization uses government aid "would also raise serious concerns about state entanglement with religion and denominational favoritism." And while *Locke v. Davey* had permitted Washington to preclude using scholarships for a "'vocational religious' degree," that decision "expressly turned on the 'historic and substantial state interest' against using 'taxpayer funds to support church leaders'" and "cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."

With respect to the First Circuit's contention that Maine private schools were really proxies for public schools, the Court observed that the benefit at issue was "*tuition* at a public *or* private school . . . with no suggestion that the 'private school' must somehow provide a 'public' education." Furthermore, the program's operation showed important differences between public and eligible private schools. Not only do private schools not accept all students, but their tuition "is often *not* free," as private schools charge well above the maximum assistance. And while private school curricula must follow state-mandated parameters, replication of public-school education was not required. In other words, "it is simply not the case that these schools, to be eligible for state funds, must offer an education that is equivalent—roughly or otherwise—to that available in the Maine public schools."

Justice Breyer, joined by Justice Kagan and joined in part by Justice Sotomayor, dissented. In his view, the "'play in the joints'" between the Establishment and Free Exercise clauses provides the government with enough leeway to further antiestablishment interests. Together, the Religion Clauses "chart a 'course of constitutional neutrality'" between government and religion. To fulfill the Religion Clauses' "original purpose of avoiding religious-based division," states must retain sufficient leeway "to enact laws sensitive to local circumstances." While precedent supports the principle that states *may* fund religious schools with public funds, it does not support a rule that a state *must* allocate public funds to religious education. Here, Maine did not discriminate on the face of religious identity, but instead barred funds used "to promote religious beliefs through a religiously integrated education." In Breyer's view, that distinction "falls squarely within the play in the joints between th[e] two [Religion] Clauses." Maine's nonsectarian requirement was valid because it "supports . . . the Religion Clauses' goal of avoiding religious strife."

LEMON IS DEAD, AND THE FIRST AMENDMENT PERMITS A COACH TO PRAY AT PUBLIC-SCHOOL SPORTING EVENTS

As any fan of the movie *Hoosiers* knows, public-school coaches have been leading athletes in prayer since the advent of organized sports—a common locker room practice that continued well after the Supreme Court declared classroom prayer anathema to the Establishment Clause in *Engel v. Vitale*, 370 U. S. 421 (1962). Eventually, the Court's decisions in *Lee v. Weisman*, 505 U. S. 577 (1992) (barring prayer at public-school graduations) and *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000) (barring student-led public-address prayers at public-school football games), made clear that public schools could not get away with sanctioning prayer at school events. For many, however, prayer is as critical to life as oxygen, and coaches and athletes often take a knee at sporting events to offer thanks to the Almighty. Public-school coaches have free exercise rights, yet when they engage in prayer in front of a crowd at a school event, some observers may infer official sanction, even if none exists. In *Kennedy v. Bremerton School District*, No. 21-418, the Court sided with a public-school coach who prayed alone at the 50-yard line immediately after football games and in the process dispensed with the long-criticized *Lemon* test (and its related "endorsement" permutations) for Establishment Clause analysis.

Joseph Kennedy served as an assistant football coach at Bremerton High School since 2008 until he was forced to take administrative leave in October 2015 for failing to comply with the school's directives regarding his private prayers immediately following each game. Kennedy had earlier admitted that he led prayers and faith-related speeches in which some of his players joined, but he discontinued those practices at the school board's instruction after it expressed concerns about the constitutionality of such practices under the Establishment Clause. Kennedy, however, felt that he had made a promise to God to say a quiet prayer of gratitude on the field immediately following each game and that the school board's directive to discontinue that practice ran contrary to his religious convictions. Following three games in October 2015, while his players were engaged in other activities, Kennedy continued his tradition of kneeling to pray at the 50-yard line.

The school placed Kennedy on administrative leave for "engaging in 'public and demonstrative religious conduct while still on duty as an assistant coach'" when he prayed those three times in October 2015. In the school's view, "because Mr. Kennedy 'was hired precisely to occupy' an 'influential role for student athletes,' any speech he uttered was offered in his capacity as a government employee and unprotected by the First Amendment.'"

To analyze the dispute, the Court, in majority opinion authored by Justice Gorsuch and joined by five other Justices, used the familiar *Pickering-Garcetti* framework for breaking down the interplay "between free speech rights and government employment." The overarching question is whether the public employee is speaking as a part of official duties—in which case the employer's control prevails—or "as a citizen addressing a matter of public concern"—in which case the Court balances the

competing interests in individual speech and efficient public services. Here, the Court concluded that Kennedy's prayers represented his own private speech because he was not addressing his players, his team was otherwise engaged singing the school fight song, and the prayers took place when coaches were free to briefly engage in "any manner of private speech" such as taking a phone call or visiting with friends. To hold that his prayer constitutes government speech just because it occurs amidst his coaching responsibilities would imply that teachers who wear religious scarves or pray quietly over lunch also engage in government speech.

With respect to balancing, the school's central contention was that prohibiting Kennedy's prayer would avoid an unlawful establishment of religion. This is where *Lemon* enters the discussion. In the school's view, Coach Kennedy's public prayer at a football game might imply official endorsement of religion, which would constitute an Establishment Clause violation under *Lemon* and its public-display applications in *County of Allegheny v. American Civil Liberties Union*, *Greater Pittsburgh Chapter*, 492 U. S. 573, 593 (1989). The status of *Lemon* and the entire endorsement regime, however, has been in doubt for a while, as the Court in a series of Establishment Clause cases has refused even to acknowledge its existence. This is the test that Justice Scalia once colorfully compared to a ghoul in horror movie that is never quite dead and repeatedly "sits up in its grave and shuffles abroad." *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398 (1993) (Scalia, J., concurring in judgment). At last, the time had arrived to drive a stake through the heart of *Lemon*. In the Court's view, "the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'" which did not include concerns about mere "endorsement." History teaches instead that the Founders were concerned about governmental use of religion to coerce citizens' religious beliefs and practices. Here, however, Kennedy's players did not even join him in the three prayers for which he was fired, so no threat of coercion existed, as even the School District conceded.

On balance, therefore, Coach Kennedy's interests prevailed: "The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression."

Justice Sotomayor, joined by Justices Breyer and Kagan, dissented. In her view, the Establishment Clause is concerned about the *appearance* of a violation, so, rather than limiting the inquiry to the three instances for which Kennedy was put on leave, the Court should have taken into consideration all facts and circumstances leading to his termination to assess whether a reasonable observer would think that a government entity is facilitating religious practice. In her telling, "this case is not about the limits on an individual's ability to engage in private prayer at work," but "whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched." Given Kennedy's long tradition of leading religious activity with the team and the public's awareness of that practice, Kennedy's actions after those three games in October 2015 would likely be seen as the school's facilitation of religion.

Sotomayor also expressed concern that players might have felt coerced into participating in Kennedy's religious practices (though again, none participated). Ultimately, said Justice Sotomayor, the Court "set[] the Establishment Clause to the side" and devoted its attention to the Free Exercise and Free Speech Clauses. It underplayed the tension between the Free Exercise and Establishment Clauses and ignored circumstances where the two might conflict, to be resolved only by highly factual case-by-case balancing. The decision here, she said, constitutes a blanket ruling that ignores the Establishment Clause altogether.

"The Free Exercise and Free Speech Clause . . . protect an individual engaging in a personal religious observance from government reprisal."

RLUIPA SECURES A RIGHT TO LAYING-ON-OF-HANDS AND AUDIBLE PRAYER DURING EXECUTION

The Religious Land Use and Institutionalized Persons Act (RLUIPA) requires that, as a condition of accepting federal grants, state prisons may not substantially burden a prisoner's exercise of sincerely held religious beliefs unless that burden is narrowly tailored to advance a compelling government interest. Prisoners, who may sue directly under RLUIPA, frequently invoke its protection to ensure access to Kosher or Hillel diets or to secure opportunities for communal worship. This Term, in *Ramirez v. Collier*, No. 21-5592, the Court held that RLUIPA applies in the death chamber to protect a condemned prisoner's right to be prayed over and touched by a worship leader at the moment of execution.

A Texas court sentenced John Ramirez to death for murder during a robbery where the loot totaled $1.25. After appeals and various procedural delays, Texas set an execution date. Ramirez requested that his spiritual advisor be allowed to "lay hands" on and "pray over" him in the execution chamber while the execution is taking place. His pastor, "who has ministered to Ramirez for four years, agrees that prayer accompanied by touch is a 'significant part of our faith tradition as Baptists.'" Texas said it would permit the pastor to be in the chamber but refused the requests for audible prayer and touching. The Court stayed the execution while it considered the matter.

Evaluating the RLUIPA claim, the Court, in an eight-justice majority opinion written by Chief Justice Roberts, ruled for Ramirez. It observed that Texas did "not dispute that any burden their policy imposes on [Petitioner's] religious exercise is substantial," which meant that Texas had the burden to prove that refusal to accommodate the exercise "both (1) furthers 'a compelling governmental interest,' and (2) is the 'least restrictive means of furthering that compelling governmental interest.'" The latter standard—least restrictive means—is one of the toughest standards for governments to meet; yet, states typically receive substantial deference in how they undertake executions. Not here, where the state had to prove not merely a compelling general interest, but also a compelling interest in specific application to this prisoner. While the Court found a compelling government interest in "monitoring an execution and responding effectively during any

". . . a city cannot prevent a Christian group from flying a religious-themed flag as part of a public forum . . ."

potential emergency," "preventing disruptions of any sort and maintaining solemnity and decorum in the execution chamber," and avoiding further emotional trauma to the victim's family members, the suggestion of threat to these interests here was mere "conjecture." A long history whereby states and the federal government have permitted clergy to engage in audible prayer near the prisoner at the moment of execution suggests the possibility of accommodation.

Further, the Court observed that "there appear to be less restrictive ways to handle any concerns," such as reasonable restrictions on the volume of audible prayer, requiring silence at specific moments during the execution to read the death warrant or monitor the prisoner's vital signs, and subjecting religious advisors to immediate removal and prosecution if they cause a disturbance. Texas already allows spiritual advisors in the execution chamber, the Court said, so it did not "see how letting the spiritual advisor stand slightly closer" and reach out to touch "a part of the prisoner's body well away from the site of any IV line" would create a materially greater threat to anyone's safety. Through appropriate training and planning, the Court said, Texas could ameliorate any risks posed by the pastor's closer proximity to and contact with the prisoner. That said, the Court reviewed the case at the preliminary injunction phase, so Texas could, on remand, attempt to marshal additional proof that is policies are narrowly tailored for Ramirez. Of course, "such proceedings might also contribute to further delay in carrying out the sentence. The state will have to determine where its interest lies in going forward."

Justice Thomas dissented on the grounds that Ramirez had failed to exhaust his administrative remedies before filing his RLUIPA claim and had engaged in repeated inequitable conduct to delay his execution. Ramirez has a history of using last-minute demands for stays of execution on various grounds, none of which ultimately merited relief. Further, Ramirez's litigation position shifted as the case went along—first demanding a religious advisor in the chamber who need not touch him, then (when Texas agreed to that) demanding touching. All of that, in Justice Thomas's view, revealed that Ramirez's religious exercise claims were insincere and made for delay. In addition, as the case is about equity, the Court should have given more weight to the interests of the state and the victim's family in finally carrying out the execution, with 18 years having passed since Ramirez committed his crime. The Court, he concluded, "grants equitable relief for a demonstrably abusive and insincere claim filed by a prisoner with an established history of seeking unjustified delay, harming the State and Ramirez's victims in the process."

FREE SPEECH (BUT ALSO MORE RELIGIOUS EXERCISE)

UNANIMOUS COURT SAYS TO LET THE CHRISTIAN FLAG FLY

Just as a public school cannot prevent a football coach from praying at the fifty-yard-line, a city cannot prevent a Christian group from flying a religion-themed flag as part of a public forum program—so said a unanimous Court in *Shurtleff v. City of Boston*, No. 20-1800.

Three flag poles stand outside Boston City Hall, one for the American flag, one for the Massachusetts flag, and one for the City of Boston flag. When a private group is using the plaza near City Hall's entrance, the city of Boston offers that group the opportunity to replace the city's flag with the group's flag of choice. The pole has featured flags of foreign countries, a community bank, and the Pride Flag, to name a few. Between 2005 and 2017, city officials approved 50 unique flags at 284 ceremonies. The city had never declined an application to fly a flag. However, when Harold Shurtleff and a group called Camp Constitution submitted a request to fly a Christian flag during its event on the plaza the city denied the request. The city would permit the event on the plaza, though it would include clergy speakers and "commemorate the civic and social contributions of the Christian community," but not the Christian flag, which included a cross.

The city denied the flag permit ostensibly out of concern for violating the Establishment Clause because, in its view, "raising the flag would express government speech." As Shurtleff's ensuing First Amendment challenge made its way through the lower courts, Boston prevailed on the theory that the decision whether to permit a flag was government speech, such that Camp Constitution had no First Amendment right at stake.

The critical inquiry for the Supreme Court, then, was the nature of the flag-flying speech at stake. In an opinion for six justices written by Justice Breyer, the Court principally considered three factors: the history of the expression at issue; the public's likely perception as to the identity of the speaker; and "the extent to which the government has actively shaped or controlled the expression." History, the Court found, tilts in Boston's favor both because flags traditionally symbolize seats of authority and because Boston has a tradition of flying its own flag over City Hall. The second (identity-of-speaker) consideration was not determinative because passersby were just as likely to correlate a temporary flag with the private party gathered at the plaza as they with the city. Critically, however, Boston had not usually attempted to "shape or control" the expression of groups on the plaza; indeed, Boston never turned down *any* prior flag applications or established policies or guidance as to what flags were inappropriate. It represented to the public that it sought "to accommodate all applicants" wishing to hold events and fly flags on the plaza's "public forum." And it had no policies or guidance in place concerning messages that could or could not be communicated by applicants or their flags. Consequently, the flags constituted private speech, not government speech, so denying Shurtleff and Camp Constitution the opportunity to fly a Christian flag because of the religious viewpoint it symbolizes violated the Free Speech Clause.

Justice Alito concurred in the judgment, but wrote a separate opinion joined by Justices Thomas and Gorsuch. While agreeing that Boston violated Shurtleff's free speech rights, Justice Alito rejected "the triad of factors" embraced by the Court (i.e., government control, history, public perception), which, in his view, "obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression." Concerned that government-speech doctrine can become a tool for suppressing disfavored viewpoints, Alito said that "courts must focus on the identity of the speaker." Both in this case and

in relevant precedents, said Alito, the Court failed to train its focus on that question.

So, rather than simply ask in the abstract whether the government has actively shaped or controlled expression, courts should be asking whether, in exercising such control, government has acted as speaker or as censor: "Censorship is not made constitutional by aggressive and direct application." And the ease with which the Court dispensed with its historical inquiry in this case illustrates the limited utility of that inquiry—what matters is not what the form of speech usually signifies, but what the speech in the *present* case signifies. Finally, asking about public perception is ill-advised because the likelihood of misattribution should not license greater government censorship of private speech. Overall, said Justice Alito, the Court's "factorized approach" "allows governments to exploit public expectations to mask censorship."

As a replacement test for whether regulated speech is government speech, Justice Alito would ask only whether "a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech." Indeed, such a test fully explains the results of precents applying government-speech doctrine, including where private individuals voluntarily assumed the role of conveying the government's message and where government merely facilitated or subsidized private speech. And here, while the City maintained an intention to use the flag-raising program to express a government message of "support for 'the diverse national heritage of the City's population,'" its argument "is a transparent attempt to reverse engineer a governmental message from facts about the flag raisings that occurred."

Justice Gorsuch also filed a separate concurring opinion where, joined by Justice Thomas, he presaged his opinion in *Kennedy*, decided just over one month later, finally killing the *Lemon* test. The fundamental problem in this case, he said, is that the City of Boston used *Lemon's* offshoot endorsement test to assess its First Amendment obligations. In short, he said, "to justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound." Warning government officials in similar positions: "This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie."

DIFFERING RULES FOR OFF-PREMISES AND ON-PREMISES SIGNS HELD CONTENT NEUTRAL

Seven years ago, in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), the Court shook up First Amendment doctrine governing content-neutral time, place, and manner laws when it rejected the long-accepted view that a speech-neutral justification was sufficient to render a law content neutral. Instead, said the Court in that case, content neutrality had to be determined from the face of the regulation, and a regulation making facial content distinctions would be subjected to strict scrutiny. The Court in *Reed* applied strict scrutiny to invalidate an ordinance that applied differing size and placement standards to nearly two-dozen categories of signs—and which effectively preferred non-commercial, ideological signs over others, such political campaign signs, commercial signs, and event signs. This Term, in *City of Austin v. Reagan Nat'l Advertising of Austin, LLC,* No. 20-1029, the Court was asked to apply that doctrine to a sign ordinance that favored on-premises signs over off-premises signs. The Court deemed the ordinance to be content neutral.

". . .the Court was asked to apply [strict scrutiny] to a sig n ordinance that favored on-premises over off-premises signs."

The City of Austin prohibits construction of any new "off-premises sign," *i.e.,* a sign advertising a business or other entity at another location. The code grandfathered existing signs, for which it allowed changes to the face of the sign but prohibited "change[s] to the method or technology used to convey a message." Reagan, which owns billboards around the country, wanted to change existing signs to digitized signs, but the city refused, so Reagan filed suit alleging that prohibiting digital off-premises signs but permitting digital on-premises signs violated the First Amendment. In its view, because one could not determine whether a sign was permitted without reading the content of the sign, the ordinance drew content-based distinctions subject to strict scrutiny.

The Court, in a 6-3 decision, with a five-justice opinion by Justice Sotomayor, rejected that argument. The Court said that a rule saying regulation cannot be content neutral if it requires reading the sign at issue is "too extreme an interpretation of this Courts precedent." Unlike *Reed,* where the regulations treated types of content differently, here, "a sign's substantive message . . . is irrelevant to the application of the provisions." While *Reed* said that some laws might implement content-based distinctions by regulating speech according to "function or purpose," Austin's regulations turned on sign location and not message. In other words, "the message on the sign matters only to the extent that it informs the sign's relative location," and regulating a sign's "function or purpose" is permissible when such a regulation is not an attempt to "swap[] an obvious subject-matter distinction for a 'function or purpose' proxy." According to the Court, because "[t]he on-/off-premises distinction is . . . similar to ordinary time, place, or manner restrictions," strict scrutiny did not apply. Otherwise, many of the Court's First Amendment precedents permitting location-based restrictions, including for charitable solicitations and residential picketing, would of doubtful validity. The Court remanded the case to the Fifth Circuit to determine in the first instance whether the sign regulation survives intermediate scrutiny.

Justice Breyer concurred but argued that *Reed* was wrongly decided. "[T]he First Amendment [is] better served when judge-made categories . . . are treated, not as bright-line rules, but instead as rules of thumb," he said. Breyer would look instead at "whether a regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." He deemed the Austin sign ordinance content neutral under either standard.

Justice Alito concurred in the judgment but dissented in part. He observed that the plaintiff's grandfathered "off-premises" signs were affected by Austin's regulations only insofar as they could not become digital signs. In Alito's view, "[t]he distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter. Even if the message on a billboard were written in a secret code, an observer would have no trouble determining whether it had been digitized." Yet, Justice Alito rejected the majority's conclusion that "'the sign code provisions . . . do not discriminate' on the basis of 'the topic discussed or the idea or

". . .the Court described [the statute]'s restrictions as a deterrent to candidate loans that creates a barrier . . .and reduces . . . political speech."

message expressed.'" Instead, "[t]he provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required," he said. Permitting a coffee shop to post a sign advertising coffee but not a sign promoting "social or political matters," he wrote, "constitutes discrimination on the basis of topic or subject matter." Why that discrimination is irrelevant for the electronic sign restriction, Alito did not say. In contrast, Justice Thomas, joined by Justices Gorsuch and Barrett, dissented all the way down, precisely because the regulations discriminate against off-site content without a compelling reason.

LIMITING THE SOURCES FOR REPAYING A CANDIDATE'S LOAN TO HIS OWN CAMPAIGN CONSTITUTES AN UNJUSTIFIED BURDEN ON POLITICAL SPEECH

Candidates for federal office may fund their campaigns through an unlimited amount of their own money. A candidates' campaign, a separate legal entity, can borrow an unlimited amount from third-party lenders or from the candidate and receive individual contributions subject to statutory caps. Campaigns may continue to receive contributions after election day strictly to repay campaign debts. Section 304 of the Bipartisan Campaign Reform Act (sometimes referred to as McCain-Feingold) limits the use of post-election contributions. A candidate's loan to his campaign may not be repaid more than $250,000 from post-election contributions. The FEC promulgated several regulations to enforce section 304, including by requiring that any repayment exceeding $250,000 be done within 20 days of the election using only *pre*-election funds. 11 C.F.R. § 116.11(c)(2)). In *Federal Elections Commission v. Cruz*, No. 21-12, the Court invalidated these restrictions under the First Amendment.

Prior to election day 2018, Ted Cruz loaned $260,000 to his U.S. Senate campaign—one of the most expensive in history. By election day, his campaign accrued approximately $340,000 of debt. The campaign began repaying Cruz after the 20-day window closed, meaning that, under the FEC rule, $10,000 of his personal loans (the excess over $250,000) would remain unpaid. Cruz and his campaign sued the FEC alleging section 304 and its implementing regulation violate the First Amendment.

In a six-justice majority opinion written by Chief Justice Roberts, the Court described Section 304's restrictions as a deterrent to candidate loans that creates a barrier to entry for some candidates and reduces the amount of core political speech. It then rejected FEC's anti-corruption justification, namely, that "post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good."

One problem is that the loan-repayment limitation was yet another "prophylaxis-upon-prophylaxis" approach to campaign finance limits—individual contributions already being limited and publicly disclosed in the name of preventing corruption (or its appearance). Another is that FEC could not identify a single case of quid-pro-quo corruption occasioned by post-election loans. Media reports on the theoretical risks of candidate loans were insufficient. Besides, those reports merely hypothesized about donors using post-election contributions to leverage "influence or access," the limitation of which is not a legitimate objective in a democracy that depends for proper functioning on influence and access. The Court was similarly unimpressed with the Government's production of various polls, articles, and statements from Members of Congress to support the claim that Section 304 reduces the *appearance* of corruption. Again, the sources could not distinguish between mere influence and access and actual quid-pro-quo corruption, and with such blurred lines the First Amendment favors more money and more speech, not less. Besides, some evidence suggested that the loan repayment restriction was a means of protecting incumbents from self-financed upstart candidates.

Finally, the Court dismissed any comparison between "gifts" to candidates and post-election contributions. Gifts to Senators, unlike campaign contributions, are limited to $250, but everyone agrees the $2,900 contribution limit applies to post-election donations. And repayment of a loan, unlike a gift "could only arguably enrich the candidate if the candidate does not otherwise expect to be repaid." The Court declined to give deference to Congress's legislative judgment on that score—particularly in view of the incumbent-protection tendencies of campaign-finance limits.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. In her view, "Section 304 'entails only a marginal restriction' on speech because it regulates contributions alone," adding that "every contribution regulation has some kind of indirect effect on electoral speech, and we have understood them to impose only minimal burdens." Section 304 is not a direct regulation on speech because it does not regulate how much a candidate can lend his campaign or the amount a candidate can spend "for expression."

As to Section 302's justifications, Justice Kagan states that "[p]reventing *quid pro quo* corruption or its appearance is a compelling interest by any measure." By regulating how candidate loans can be repaid using post-election contributions, Section 304 addresses the "special danger" of donors contributing directly to a candidate's pockets. Justice Kagan dismisses the Court's claim that repayment using post-election contributions does not enrich the candidate, stating that repayment results in "significant financial gain to the officeholder, courtesy of donors," and that "post-election donations reflect an expectation of payback from the recipient." And where the Court sees candidates confident in repayment of personal loans, Kagan see vulnerability: "A candidate with a loan outstanding has plenty of reason to feel anxious—and to see the loan's repayment as a gratitude-inducing personal benefit. The donor takes him off a sharp hook." But even if the majority is right that a candidate will be confident of repayment from the get-go, "he may have that confidence exactly because he knows that a raft of lobbyists will be eager to pay for political benefits. And with his bank account depleted, he has a great temptation to perform his part in such an exchange."

In response to the meager evidence cited by the Court, Kagan contends that "[t]he common sense of Section 304—the obviousness of the theory behind it—lessens the need for the Government to identify past cases of *quid pro quo* corruption involving

candidate loan repayments." Even so, she concludes that "the Government and its *amici* have marshalled significant evidence showing that the loan repayments Section 304 targets have exactly the danger Congress thought," such that "Section 304 prevents . . . corruption, at barely discernable cost to First Amendment freedoms."

CIVIL RIGHTS: CLAIMS, REMEDIES, AND IMMUNITIES

FAILURE TO READ *MIRANDA* WARNINGS DOES NOT PROVIDE A BASIS FOR A § 1983 CLAIM

We all know that failing to read *Miranda* warnings before a custodial interrogation renders any resulting incriminating statements involuntary and inadmissible at trial. But does a failure to Mirandize thereby constitute a violation of the suspect's Fifth Amendment rights susceptible to a claim for damages under 42 U.S.C. § 1983? In *Vega v. Tekoh*, No. 21-499, the Court said no.

Responding to reports that Terence Tekoh, a nurse assistant at a Los Angeles medical center, had sexually assaulted a female patient, Deputy Sheriff Carolos Vega Vega questioned Tekoh at length without informing Tekoh of his *Miranda* rights. Tekoh eventually provided a written statement apologizing for inappropriately touching a patient. Tekoh was arrested and prosecuted for the assault. During is two criminal trials, two different judges ruled that Tekoh was never in custody and permitted the confession as evidence. The second trial resulted in an acquittal.

Following the two criminal trials, Tekoh sued Vega and others under 42 U.S.C. § 1983 seeking damages for violating his Fifth Amendment right against compelled self-incrimination. The case went to trial, and Tekoh asked the court to instruct the jury that Vega violated his Fifth Amendment rights if (1) Vega took a statement from Tekoh in violation of *Miranda* and (2) used that statement against Tekoh at trial. The court refused that instruction on the grounds that *Miranda* is a "prophylactic rule," and not a free-standing constitutional boundary. The jury rejected Tekoh's claim under a broader "totality of circumstances instruction, but the Ninth Circuit reversed and remanded for trial on the theory that use of an un-*Mirandized* statement at a criminal trial could serve as the basis of a § 1983 claim.

In a 6-3 opinion by Justice Alito, the Supreme Court rejected that rationale. *Miranda* was clear that a violation of its prescribed rules was not tantamount to a violation of an individual's Fifth Amendment rights. Rather, it prescribed "prophylactic" rules to protect Fifth Amendment rights, and the Court has consistently referred to it as such. Indeed, the rule has not provided a bright-line test. It has remained flexible since its adoption, occasionally requiring a cost-benefit analysis when extended to new circumstances. At all times, though, the "fruits" of an un-*Mirandized* statement could be admitted at trial even as the "fruits" of a substantive Fifth Amendment violation could not, which illustrates a meaningful difference. Furthermore, even if one generally concedes that *Miranda* equals "law" of the United States that might nominally fall within the ambit of Section 1983 (even if not as a substantive Fifth Amendment standard), the benefits of permitting a Section 1983 do not outweigh the costs. A cause of action under § 1983 for failure to *Mirandize* adds little deterrent value, complicates judicial economy, and presents numerous procedural issues—not least of which is that federal courts would likely be called upon to second-guess state-court resolution of *Miranda* claims. Thus, the violation of the *Miranda* rules does not provide a valid basis for a § 1983 claim.

"*Miranda* was clear that a violation of its . . . rules was not . . . a violation of an individual's Fifth Amendment rights."

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented on the grounds that a right enforceable via Section 1983 is anything that creates specific obligations on a governmental unit that an individual may ask the judiciary to enforce. *Miranda* sets forth a constitutional rule that grants a corresponding right: if the police fail to provide *Miranda* warnings to a suspect before interrogation, the suspect is entitled to have any resulting confession excluded from trial. In her view, it follows that failure to provide *Miranda* warnings is actionable under Section 1983.

SMUGGLER'S INN BLUES: NO DAMAGES CLAIM AGAINST A BORDER PATROL AGENT FOR EXCESSIVE-FORCE, OR AGAINST ANYONE FOR FIRST AMENDMENT RETALIATION

Just over a half century ago, in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court announced that, despite the lack of any congressional authorization to sue federal agents for violating one's constitutional rights, it would create such claims for limited circumstances. Since then, it has permitted such claims where federal law enforcement applied excessive force under the Fourth Amendment, where a congressional staffer claimed sex discrimination in violation of the Fifth Amendment, and where a prisoner claimed insufficient care under the Eighth Amendment. But the most recent of those was over forty years ago, and more recently the Court has gown highly skeptical of *Bivens* out of concern that creating damages claims usurps legislative authority. Rather than overturn *Bivens*, however, the Court has narrowed the circumstances where plaintiffs may assert *Bivens* claims in "new contexts." The Court has articulated the test in various ways—*e.g.*, whether "special factors" counsel hesitation in creating a claim or whether the court finds a "reason to pause" before doing so. In *Egbert v. Boule,* No. 21-147, the Court rejected a *Bivens* excessive-force claim against a Border Patrol Agent and any sort of *Bivens* First Amendment retaliation claim, reducing the inquiry to "whether there is any reason to think that Congress might be better equipped to create a damages remedy."

Robert Boule lives directly on the border of the U.S. and Canada, where he owns the "Smuggler's Inn." Boule served as a confidential informant for the federal government and has helped federal agents seize shipments of various illegal drugs coming across the border through his inn. To make money, Boule would intentionally shuttle miscreants to the border—in a vehicle bearing the license plate "SMUGLER" no less—and lodge them at his inn while informing federal agents, including Erik Egbert, of his clients' activities. In this case, Boule informed Egbert of a Turkish national flying from New York to Seattle that Boule would shuttle from the airport to Smuggler's Inn. Egbert saw Boule's car return home, suspected the Turkish national was in the car, and approached the inn to make inquiries. Boule, however, told Egbert to leave his property, which prompted Egbert to pick Boule

". . . no *Bivens* action is available for claims of retaliation in violation of the First Amendment."

up and slam him against the car before throwing him to the ground. Egbert then checked the Turkish national and confirmed his paperwork was in order.

Boule complained to Egbert's supervisor, alleging excessive force. He also filed an administrative claim with Border Patrol under the Federal Tort Claims Act. Both complaints yielded findings of no wrongdoing. Boule then claimed Egbert retaliated by reporting his SMUGLER license plate for illegal conduct and by triggering an IRS audit of Boule. Invoking *Bivens,* Boule sued Egbert for excessive force and retaliation.

In an opinion written by Justice Thomas and joined by four others, the Court rejected the claims. First, though the claim in this case, like the one in *Bivens* itself, alleged excessive force against a federal law enforcement official, Boule's claim amounted to a "new context" because it named a Border Patrol Agent, rather than an FBI agent, as defendant. According to the Court, "While *Bivens* and this case do involve similar allegations of excessive force," such "superficial similarities are not enough to support the judicial creation of a cause of action." Here, given the role of a Border Patrol Agent, Boule's claim carried "national security implications." Besides, "*Bivens* never meaningfully undertook" the "special-factors inquiry." Here, furthermore, Congress is better situated to create remedies given such border-security concerns—and indeed has already provided the process for submitting administrative complaints and initiating administrative investigations of accused officers. Finally, no *Bivens* action is available for claims of retaliation in violation of the First Amendment. Again, Congress is better suited than the courts to provide a remedy, particularly because *Bivens* claims raise social costs (such as by inhibiting discharge of law enforcement duties) and "[e]xtending *Bivens* to alleged First Amendment violations would pose an acute risk of increasing such costs." Retaliation claims are easy to assert but challenging to litigate given the need to probe motives of government officials. And if the Court's *Bivens* precedents permitted similar claims to proceed, they are largely irrelevant because they "predate[] our current approach."

If all of this sounds like general repudiation of *Bivens*, Justice Gorsuch agrees. Concurring in the judgment, he would consign *Bivens* to the stare decisis ash heap, writing *Bivens* crossed a line into judicial lawmaking that Court has been trying to "atone for" ever since. Instead of undoing *Bivens* piece-by-piece through case-specific analysis—he asks, "[w]hen might a court *ever* be "better equipped" than the people's elected representatives to weigh the "costs and benefits" of creating a cause of action?—the Court should overturn it. And because he "struggle[s] to see how this set of facts differs meaningfully from those in *Bivens* itself," Gorsuch would "take the next step and acknowledge explicitly what the Court leaves barely implicit" and "forthrightly return the power to create new causes of action to the people's representatives in Congress."

Justice Sotomayor concurred in part and dissented in part. She concurred that the First Amendment retaliation claim fails, but only because it is unsupported by precedent, and not based on what she terms the Court's "new test." Sotomayor dissented from the Court's Fourth Amendment holding, however, concluding that Boule's claim does not present a new context and that no special factors counsel against permitting a claim here.

UNDER THE "FAVORABLE TERMINATION" RULE, A § 1983 CLAIM FOR "MALICIOUS PROSECUTION" ACCRUES IF A PROSECUTION ENDS WITHOUT A CONVICTION

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court held that courts should decide when a Section 1983 claim accrues by analogizing the claim to a similar common-law tort, such as the torts of malicious prosecution or false arrest. There, the Court applied this approach to hold that a Section 1983 claim "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid" is analogous to a common-law malicious prosecution claim and thus does not accrue until "the conviction or sentence has been [invalidated]." *Id.* at 486–87. Ever since, the practice of analogizing 1983 claims to common-law claims for the purpose of determining the accrual date has become so common that courts have confused common-law analogies with the constitutional claims themselves. In the process many have adopted the elements of these common-law claims, including the rule that a Section 1983 "malicious prosecution" claim requires "affirmative indications of innocence to establish favorable termination," which a mere dismissal of prosecution fails to meet. In *Thompson v. Clark*, No. 20-659, the Supreme Court ruled that no such "affirmative indication of innocence" was required and that a § 1983 "malicious prosecution" claim accrues when the prosecution ends without conviction—but real debate is over whether such a constitutional claim exists at all.

Larry Thompson lived with his fiancée, sister-in-law, and baby. His sister-in-law was mentally ill and called the police alleging Thompson was sexually abusing the baby. When the police showed up, Thompson refused to let them in without a warrant. They entered anyway and Thompson resisted. Police handcuffed Thompson and took the child for examination, which yielded no signs of abuse. The prosecutor initially charged Thompson with obstructing governmental administration and resisting arrest, but later moved to dismiss the charges.

Thompson sued under section 1983 and raised several, purportedly separate, claims against the officers, which, owing to the confusion sown by *Heck*, he denominated using common-law (rather than constitutional) labels, including false arrest, malicious prosecution, fabricated evidence, and unlawful entry. Applying the "affirmative innocence" rule, the district court granted judgment as a matter of law to the officers on the malicious prosecution claim. It allowed the remaining claims to proceed to trial, but the jury ruled *against* Thompson on each. Thompson's appeal thus focused on the "malicious prosecution" claim. In his view, the prosecutor's dismissal of the charges against him constituted "favorable termination" giving rise to a valid claim. The Second Circuit ruled against Thompson, relying on precedents requiring "affirmative indication of innocence" as a necessary predicate for a malicious prosecution claim under section 1983.

The Supreme Court, in a 6-3 decision, reversed, with Justice Kavanaugh writing the majority opinion. As a starting point, the

majority opinion asserted that the Court's precedents recognize a Fourth Amendment claim for malicious prosecution, citing *Manuel* v. *Joliet*, 580 U. S. 357, 363–364, 367–368 (2017), and *Albright* v. *Oliver*, 510 U. S. 266, 271 (1994) (plurality opinion); see also *id.,* at 290–291 (Souter, J., concurring in judgment).

Echoing *Heck*, the majority then explained the Court's practice of looking to the elements of the most similar tort in 1871. Kavanaugh concluded that Thompson was asserting a violation of his Fourth Amendment rights through a claim comparable to the tort of malicious prosecution, which requires that "the prosecution 'terminated in the acquittal or discharge of the accused.'" Under this standard, the Court observed, "[i]n most American courts . . . the favorable termination element of a malicious prosecution claim was satisfied so long as the prosecution ended without conviction." The critical point was not the *reason* for the termination (such as innocence) but that the prosecution was "'terminated, disposed of, or . . . at an end.'" Some courts even went so far to expressly say that acquittal or evidence of innocence were not required for favorable termination. Accordingly, Thompson had received "favorable termination" of his prosecution, and his malicious prosecution claim under § 1983 could proceed. Critically, however, the defendant officers "are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity."

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. Justice Alito disagreed that the Fourth Amendment houses a "malicious prosecution" claim, saying, "the Fourth Amendment and malicious prosecution have almost nothing in common." The Fourth Amendment is about seizure and does not protect against unreasonable "initiation of charges." Indeed, one can file a valid Fourth Amendment claim for being improperly seized without ever being prosecuted. Likewise, one can file a malicious prosecution claim without ever being seized. And the plurality in *Albright* merely observed "that *if* any provision of the Constitution provided a home for Albright's prosecution-without-probable-cause claim, the Fourth Amendment was a better bet than the Fourteenth Amendment's Due Process Clause." Even at that, however, "the plurality did not conclude or even suggest that a prosecution-without-probable-cause claim could be brought under the Fourth Amendment." Nor did the Court in *Manuel* have occasion to address that question because that plaintiff had alleged unlawful detention before trial.

In Justice Alito's view, the Court created a new hybrid tort with uncertain dimensions, apparently with the following elements (having no grounding in Fourth Amendment precedents): "(1) the defendant 'initiat[ed]'charges against the plaintiff in a way that was 'wrongful' and 'without probable cause,' (2) the 'malicious prosecution resulted in a seizure of the plaintiff,' and (3) the prosecution must not have ended in conviction." Most importantly, Justice Alito is concerned that the resulting claim for "*wrongful* initiation of charges" waters down the malice component of *malicious* prosecution, particularly since the Court "raises the possibility" that the new tort "may require nothing more than the absence of probable cause." Linking this deficiency back to the original question presented by the case, he asks, "if the Court's new tort has nothing to do with malicious prosecution, what possible reason can there be for borrowing that tort's favorable-termination element?" Justice Alito would have rejected the claim entirely.

FEDERAL GRANT CONDITIONS ARE LIKE CONTRACTS, SO EMOTIONAL DISTRESS DAMAGES ARE NOT AVAILABLE REMEDIES UNLESS CONGRESS SO SPECIFIES

"The critical point was not the reason for the termination . . . but that the prosecution was 'terminated, disposed of, or at an end.'"

Both the Rehabilitation Act of 1973 and the Patient Protection and Affordable Care Act establish financial assistance programs that impose conditions of participation, including rules against discrimination based on disability. And both statutes expressly permit beneficiaries to sue participating facilities for violating those conditions, but the question remains as to what remedies are available. In *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, the Supreme Court ruled that, where Congress does not provide otherwise, remedies available in private actions to enforce federal spending conditions are limited by reference to the common law of contracts, which permitted recovery of economic harms, but not emotional distress damages.

Jane Cummings is deaf and legally blind. She sought physical therapy from respondent Premier Rehab Keller and requested an American Sign Language interpreter at her appointments, which Premier Rehab declined to provide. Cummings sued for disability discrimination under the Rehabilitation Act and the Affordable Care Act, which govern recipients of federal benefits payments such as Premier Rahab. In her complaint, Cummings included a claim for emotional distress, which the lower courts concluded was not available under either law.

In a 6-3 decision, with the majority opinion written by the Chief Justice, the Supreme Court affirmed. Spending power legislation is "much in the nature of a contract," which requires the consent of recipients, who "cannot 'knowingly accept' the deal with the Federal Government unless they 'would clearly understand . . . the obligations' that would come along with doing so." Spending conditions must ensure that the entity receiving federal funds has notice it will be liable for violating those conditions, and that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." Using the contract analogy, a form of relief in a private action to enforce grant conditions is appropriate only if the recipient has notice of "what sort of penalties might be on the table" in the event of breach. Here, both the Rehabilitation Act and the Affordable Care Act "are silent as to available remedies," but federal funding recipients have notice of remedies traditionally available in breach of contract suits—remedies that, per hornbook law, do not include emotional distress damages. Said the Court: "We therefore cannot treat federal funding recipients as having consented to be subject to damages for emotional distress. It follows that such damages are not recoverable under the Spending Clause statutes we consider here."

The Court rejected arguments from various quarters (including Justice Breyer's dissent) that emotional distress damages are sometimes available as a contract remedy under the "special rule that 'recovery for emotional disturbance' is allowed in a particular circumstance" where emotional disturbance is a particularly likely result of the breach. The question, said the Court, is not whether the claimed remedy was *ever* available, but it was "traditionally" or

". . . the Court rules . . . that Congress may use its Article I war and defense powers to abrogate states' sovereign immunity."

"generally" available in contract actions. It would be inconsistent, after all, to "treat funding recipients as on notice that they will face not only the *usual* remedies available . . . but also other *unusual*, even rare remedies." Requiring funding recipients to know the contours of every contract doctrine, "no matter how idiosyncratic or exceptional," "has no place in our Spending Clause jurisprudence." Such an approach would "push[] the notion of 'offer and acceptance' past its breaking point" and force courts to search for implied remedies without restriction, removing a critical limitation on judicial authority.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. While he agreed with the Court's methodology of looking for common law contract remedies, Justice Breyer contended that "contracts analogous to these statutes *did allow* for recovery of emotional distress damages." In his view, while emotional distress damages are generally not available for commercial contracts, they are available for contracts entered for nonpecuniary gain—marriage, common carriers, innkeepers, and places of public resort. A "breach of promise not to discriminate" falls into the latter category because the purpose of such a promise "is clearly nonpecuniary." In fact, Justice Breyer states that the major and foreseeable harm incurred by a breach of a promise not to discriminate is emotional distress: "It is difficult to believe that prospective funding recipients would be unaware that intentional discrimination based on race, sex, or disability is particularly likely to cause emotional suffering." This is consistent, Justice Breyer writes, with the exception to the Restatement's general rule barring recovery of emotional distress damages—that such damages *are* available when "*the breach is such a kind that serious emotional disturbance was a particularly likely result*."

UNDER "THE PLAN OF THE CONSTITUTIONAL CONVENTION," CONGRESS MAY USE ITS POWER TO "RAISE AND SUPPORT ARMIES" TO ABROGATE STATES' SOVEREIGN IMMUNITY

In *Torres v. TX Dep't Public Safety,* No. 20-603, the Court ruled 5-4 that Congress may use its Article I war and defense powers to abrogate states' sovereign immunity. This is but the latest stop on a weaving three-decade journey that began with broad holdings about congressional power, but has since degenerated into a series of exceptions, shifting standards of facial constitutional review, vague assessments of the "plan of the Constitutional convention" and examination of when a congressional power is "complete in itself." This case reveals a debate over constitutional structure even more than history and text, and puts the Chief Justice and Justice Kavanaugh with the progressive wing of the Court.

The broad story begins at common law, but for sake of brevity (don't laugh) let's pick up with *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), where the Court, in a plurality opinion, said that Commerce Clause permits Congress to abrogate state sovereign immunity. Just seven years later, in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), it reversed course and held that Article I powers—including the Commerce Clause but also powers over copyrights, patents, and other subjects—generally cannot support abrogation of states' sovereign immunity. Those powers were subject to "the plan of the constitutional convention" whereby states retained sovereign immunity notwithstanding cession of power to the central government. The Court reaffirmed that conclusion in a few cases—including as to abrogation in state court, s*ee Alden v. Maine*, 527 U.S. 706 (1999)—and as to abrogation under the Patent and Trademark Clause of Article I, see *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999).

But the Court has since established exceptions, the shifting grounds for which are getting hard to follow. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), it held that Congress *can* abrogate sovereign immunity from money damages actions brought in bankruptcy proceedings, even though the bankruptcy power is, like the Commerce Clause, an Article I power. Said the Court: "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to the bankruptcy laws." The Plan giveth, and the Plan taketh away.

States have long wondered whether *Katz*, justified or not, was a class of one or portended some larger congressional power revanchism. Two years ago, in *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Court revisited whether the intellectual property powers authorize congressional abrogation of sovereign immunity, and stayed the course, confirming in a majority opinion by Justice Kagan that *Katz* was "good for one clause only."

Alas, that assurance did not last long. In October Term 2020, the Court, in *PennEast Pipeline Co., LLC v. New Jersey*, held that states do not have a sovereign immunity defense against private companies exercising the federal eminent domain power. As it did in *Katz*, the Court cited the "plan of the constitutional convention," this time holding that states had consented to federal supremacy with respect to eminent domain, even when that power is delegated to a private entity under Congress's Article I Commerce Clause powers. Now, in *Torres,* "the plan of the convention" came back for more, this time to vindicate congressional abrogation of states' sovereign immunity under the power to "raise and support Armies."

After the Vietnam War, Congress provided protections to returning soldiers under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This act gave returning service members the right to reclaim former jobs with state employers and allows them to sue employers who refuse to accommodate them. Le Roy Torres served as a Texas State Trooper. He was deployed to Iraq where he developed constrictive bronchitis from exposure to toxic burn pits. Upon his return, the Texas Department of Public Safety refused to accommodate his condition and employ him in a different role. Torres sued in Texas state court arguing Texas violated USERRA, but Texas argued that the claim is barred by sovereign immunity and that Congress's attempt to abrogate that immunity is invalid.

The Court, in an opinion by Justice Breyer, rejected Texas's sovereign immunity defense and upheld the abrogation in USERRA. Citing *PennEast*, the Court asked "whether the federal power at issue is 'complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention.'" Here, it concluded, Congress's power to build and maintain armed forces is complete in itself—because the Constitution

spells out war powers in broad phrases and divests the states of like powers—and the states consented to the exercise of that power at the Convention.

The nature of state susceptibility to suit applied in *Torres*—*i.e.*, whether its holding recognizes congressional abrogation or antecedent state waiver—is not entirely clear. On one hand, the Court links the "complete in itself" inquiry with the "plan of the convention" inquiry, which is usually about abrogation. Yet it sets this case and *PennEast* apart from *Katz*, saying that "congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention." Other times it describes all three as instances of "waiver": "A waiver pursuant to the plan of the Convention, as we found in *PennEast* and *Katz*, displaces the background principles of state sovereign immunity wherever those suits proceed"; and "[w]e recognize that waiver today, as we have before in *PennEast* and *Katz*."

Justice Kagan concurred, though she acknowledged that "our sovereign immunity decisions have not followed a straight line." Where the majority's rationale remained muddled, Kagan traced a careful distinction between "plan of the convention" analysis and "complete in itself" analysis. In *Allen,* where she authored the majority opinion that "described *Katz*'s 'plan of the Convention' analysis as 'good for one clause only'" she had "thought then that our precedents had shut the door on further Article I exceptions to state sovereign immunity." Alas, "*PennEast* proved me wrong." Yet, she said, *PennEast* was really about a *new* test—the "complete in itself" test—which asks whether the states consented to federal control of some enumerated powers entirely, thereby waiving their sovereign immunity. With USERRA, said Kagan, "the war powers—more than any other power, and surely more than eminent domain—were 'complete in themselves.' They were given by the States, entirely and exclusively, to the Federal Government." Accordingly, Congress may abrogate sovereign immunity using those powers.

Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett, dissented. Justice Thomas agreed that the case involves a "plan of Convention" inquiry but disagrees with the majority's analysis. "*Katz* and *Penn-East*," he said, "centered on whether or not the plan of the Convention—*i.e.,* the Constitution itself—required States to surrender their sovereign immunity." But those cases stand in contrast with "those that involve congressional 'abrogation' of state sovereign immunity," which depend on statements from Congress, not the Constitution itself. Still, "the line between 'plan-of-the-Convention waiver' and 'congressional abrogation' is a murky one," he wrote, because "[b]oth inquiries ask the same basic question: whether Congress has authorized suit against a nonconsenting State" using valid authority. Here, he observed, "[t]he parties agree that this case involves only plan-of-the-Convention waiver. Thus, the question presented is whether, in ratifying the Constitution, the states surrendered their immunity in their own courts against private damages actions authorized by Congress' war powers."

Here, he said, the majority stumbled. First, Congress amended USERRA in the wake of *Seminole Tribe* to provide that an action may only be brought "'*in accordance with the laws of the State*.'" 38 U.S.C. §4323(b)(2). Such "laws of the State" presumably include laws that prohibit suit, he said. Yet because this case is about "plan-of-convention" waiver, the real question is whether that text amounts to restoration of states' choices over immunity, even if constitutional waiver applies in the first instance. The Court, said Justice Thomas, "breezes past USERRA's language" and merely asserts that USERRA authorizes private litigation against state employers.

Second, this case arose in state court, and the Court already concluded in *Alden v. Maine* that states had not consented in the "plan of the Convention" to "*any* congressionally created private damages suits in state court." Critically, observed Justice Thomas, "[t]hat holding plainly applied to *all* Article I powers" and the Court "did not engage in a clause-by-clause parsing of Article I's various powers, nor did we even mention which Article I power" was at stake in *Alden.* Said Justice Thomas, "[t]he question that *Alden* answered plainly embraces the one that the Court answers today. And there is no serious dispute that *Alden*'s explicit holding is irreconcilable with the Court's holding here." He observed that "[b]oth *Katz* and *PennEast* considered plan-of-the-Convention waivers applicable to federal, not state, court," which meant that neither decision "undermined *Alden*'s categorical holding."

Even apart from *Alden*, the test for plan-of-the-Convention cases, he said, is "'compelling evidence that the Founders thought such a surrender inherent in the constitutional compact.'" No compelling evidence suggests the Founders saw such a surrender inherent Article I war powers. Additionally, constitutional history, structure, and precedent cut against the majority's interpretation. According to Justice Thomas, states considered themselves fully sovereign nations at the time of the Founding. And he observes that, until the last two decades, the Court maintained that subjecting states to answer in private suits was an affront to sovereign dignity. He rejects the "complete-in-itself test" as a "contrivance" to avoid the implications of precedent through "a method that has the certainty and objectivity of a Rorschach test." Ultimately, the majority's "completeness" analysis amounts to saying that "a congressional power to pre-empt state law alone demonstrates a State's surrender of sovereign immunity," a theory "foreclosed by *Seminole Tribe*" that "proves too much." Harkening back to *Pennsylvania v. Union Gas* and other pre-*Seminole Tribe* precedents, Justice Thomas worries that the majority's "completeness" analysis merely repackages the "discredited approach to sovereign immunity" where the Court merely relied on the breadth of the commerce power to hold that states had yielded power over their sovereign immunity to Congress.

Revanchism, via "plan of the Convention" and "completeness," may have arrived.

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