A PREVIEW OF THE SUPREME COURT'S 2019-20 TERM

"Supreme Court: The Next Chapter"
Featured lecture by **Jess Bravin,**
The Wall Street Journal

Friday,
Sept. 20, 2019
1:30 – 4:15 p.m.

Dineen Hall
Gray Ceremonial Courtroom

Followed by:
"Supreme Court Preview: The 2019-2020 Term"

Moderator:
Keith J. Bybee, *Vice Dean, College of Law*

Panel participants:
Hon. Rosemary S. Pooler, *Second Circuit Court of Appeals*

Jess Bravin, *The Wall Street Journal*

R. Reeves Anderson, *Arnold & Porter*

David M. Driesen, *University Professor*

Lauryn P. Gouldin, *Associate Dean for Faculty Research*

Full Law Alumni Weekend schedule and CLE information at
law.syr.edu/alumni-friends/law-reunion

Syracuse University
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NDNY - FCBA

IJPM Institute for the Study of
THE JUDICIARY, POLITICS, AND THE MEDIA
at Syracuse University

Syracuse Civics Initiative

Syracuse University College of Law;
the Institute for the Study of the Judiciary, Politics, and the Media;
the Syracuse Civics Initiative; and the NDNY-Federal Court Bar Association present

United States Supreme Court: The 2019-2020 Term

Program Materials

Friday, September 20, 2019
1:30 to 4:15 p.m.

Melanie Gray Ceremonial Courtroom, Dineen Hall
Syracuse University College of Law
950 Irving Avenue, Syracuse, NY 13244

Syracuse University College of Law and the Northern District of New York Federal Court Bar Association have been certified by the New York State Continuing Legal Education Board as Accredited Providers of continuing legal education in the State of New York.

"United States Supreme Court: the 201R-20 j q Term" complies with the requirements of the New York State Continuing Legal Education Board for **3.0 credits** towards the professional practice requirement. This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

Syracuse University
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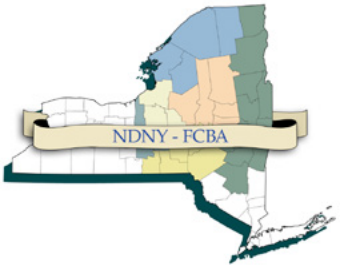

IJPM Institute for the Study of
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*Special thanks to Katherine Brisson, College of Law Class of 2020 and Syracuse Civics Initiative Fellow, for her excellent work in gathering and editing these materials.

**Syracuse University College of Law;
the Institute for the Study of the Judiciary, Politics, and the Media;
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United States Supreme Court: The 2019-2020 Term

Friday, Sept. 20, 2019

Melanie Gray Ceremonial Courtroom, Dineen Hall
Syracuse University College of Law, 950 Irving Avenue
Syracuse, NY 13244

Agenda

1:00-1:30 p.m.	CLE Registration
1:30-1:35 p.m.	Welcome and Introduction: **Craig M. Boise**, *Dean and Professor of Law*
1:35-2:35 p.m.	Keynote Lecture: **Jess Bravin**, *Correspondent for the United States Supreme Court, The Wall Street Journal*
2:35- 2:45 p.m.	Break
2:45-4:15 p.m.	Panel Discussion: "Supreme Court Preview: The 2019-2020 Term" Moderator: **Keith J. Bybee**, *Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor of Law* Panel participants: **Hon. Rosemary S. Pooler**, *Circuit Judge, United States Court of Appeals for the Second Circuit* **Jess Bravin**, *The Wall Street Journal* **R. Reeves Anderson**, *Supreme Court Litigator, Arnold & Porter* **David M. Driesen**, *University Professor* **Lauryn P. Gouldin**, *Associate Dean for Faculty Research*
4:15-5:30 p.m.	Happy Hour sponsored by NDNY-FCBA

This program is open to the public.

There is no charge for this CLE program.

If you are seeking CLE credit, please register by Sept. 6, 2019, as follows:

- College of Law Alumni, please **register here** where you can see the full schedule of reunion weekend activities.
- Members of the NDNY-FCBA, please **register here**.
- All others seeking CLE credit, please contact Chris Ramsdell at **ceramsde@law.syr.edu**. You may also call 315.443.9542 to register or with questions about the event.

Syracuse University
COLLEGE OF LAW

IJPM Institute for the Study of THE JUDICIARY, POLITICS, AND THE MEDIA at Syracuse University

Syracuse Civics Initiative

Program Participants

Jess Bravin, *The Washington Post* Supreme Court Reporter

Jess Bravin covers the U.S. Supreme Court for The Wall Street Journal, after earlier postings as United Nations correspondent and editor of the WSJ/California weekly.

Mr. Bravin is the author of "The Terror Courts," an award-winning account of military trials at Guantanamo Bay, and "Squeaky: The Life and Times of Lynette Alice Fromme," and a contributor to books including "Violence in America: An Encyclopedia," "Crimes of War 2.0," and "A Concise Introduction to Logic" (Second Edition). His work twice has been recognized with the Elizabeth Neuffer Memorial Prize (individually, for coverage of the International Criminal Court and, with colleagues, United Nations reform efforts), the American Bar Association's Silver Gavel Award (for coverage of the legal response to 9/11) and, for team coverage of the Supreme Court's healthcare case, prizes from the National Press Foundation, the New York News Publishers Association and the New York Press Club.

Prior to joining The Wall Street Journal, Mr. Bravin was a reporter for the Los Angeles Times, contributed to publications including the Washington Post, Harper's Bazaar and Spy magazine, evaluated scripts for a Hollywood talent agency, and managed a campaign for local school board. While in law school, he served on the University of California Board of Regents and as a City Council appointee to the Berkeley, Calif., Police Review Commission and Zoning Adjustments Board. Earlier, Mr. Bravin led the effort to designate Raymond Chandler Square (Los Angeles City Historic-Cultural Monument No. 597) in Hollywood, in honor of the hard-boiled novelist.

Mr. Bravin has taught at the University of California Washington Center, received a John Jacobs Fellowship at UC Berkeley's Graduate School of Journalism and Institute of Governmental Studies, and held the John Field Simms Sr. Memorial Lectureship in Law at the University of New Mexico School of Law. He is a graduate of Harvard College and the University of California, Berkeley, School of Law (Boalt Hall).

The Honorable Rosemary S. Pooler, Circuit Judge, United States Court of Appeals for the Second Circuit

Rosemary S. Pooler is a United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit. At the time of her appointment in 1998, she was a United States District Judge for the Northern District of New York.

Judge Pooler received her B.A. from Brooklyn College in 1959, an M.A. in History from the University of Connecticut in 1961, and her J.D. from the University of Michigan Law School in 1965. She also attended the Program for Senior Managers in Government of Harvard University in 1978 and earned a Graduate Certificate in Regulatory Economics from the State University of New York at Albany in 1978.

Judge Pooler engaged in the private practice of law in Syracuse from 1966 until 1972. She served as Assistant Corporation Counsel/Director of the Consumer Affairs Unit for the City of Syracuse from 1972 to 1973. From 1974 to 1975, Judge Pooler was a District Representative on the Common Council of the City of Syracuse. From 1975 until 1980 she was Chair and Executive Director of the Consumer Protection Board of the State of New York. She served as a member of the New York State Public Service Commission from 1981 until 1986. In 1987, Judge Pooler was Staff Director of the Committee on Corporations, Authorities and Commissions of the New York State Assembly. She was Visiting Professor of Law at Syracuse University from 1987 until 1988 and was Vice-President for Legal Affairs of the Atlantic States Legal Foundation from 1989 until 1990. In 1990, she became a Justice of the Supreme Court, Fifth Judicial District, State of New York, and served in this position until becoming a United States District Judge for the Northern District of New York in 1994.

Judge Pooler is a native of the City of New York.

Reeves Anderson, Arnold & Porter, Partner

Reeves Anderson represents businesses, individuals, states, and foreign governments in appeals and trial litigation involving novel or complex questions of constitutional, statutory, or international law. He has represented parties and *amici* in 40 cases before the US Supreme Court on topics ranging from water rights to sovereign immunity to commercial speech. Mr. Anderson also maintains an active practice before the federal courts of appeals and US district courts,

where he focuses mainly on cross-border and foreign-affairs disputes. His work has been featured in *Chambers Global*, *National Law Journal's Appellate Hot List*, and *American Lawyer*.

Mr. Anderson was appointed to the firm's Pro Bono Committee in 2011. His pro bono clients have included Georgia death row inmate Troy Davis and the Adoptive Couple in the landmark Supreme Court case *Adoptive Couple v. Baby Girl*.

Mr. Anderson graduated as valedictorian from North Carolina State University with degrees in political science and chemistry. He earned his JD from Yale Law School and a Master's degree from Trinity College in Dublin, Ireland. Mr. Anderson's legal research and commentary have been published in the *National Law Journal*, the *Virginia Journal of International Law*, and *Nature*, and cited by the *New York Times*, *Washington Post*, and other prominent news outlets. In 2015, he received the US Chamber Institute for Legal Reform's national Research and Policy Award.

Keith J. Bybee, Vice Dean and Paul E. and Honorable Joanne F. Alper '72 Judiciary Studies Professor of Law

Professor Bybee is Vice Dean and Paul E. and Hon. Joanne F. Alper '72 Judiciary Studies Professor at the College of Law. He holds tenured appointments in the College of Law and in the Maxwell School of Citizenship and Public Affairs. He also directs the Institute for the Study of the Judiciary, Politics, and the Media (IJPM), a collaborative effort between the College of Law, the Maxwell School, and the S.I. Newhouse School of Public Communications. Bybee's areas of research interest are the judicial process, legal theory, political philosophy, LGBT politics, the politics of race and ethnicity, American politics, constitutional law, codes of conduct, and the media. His books include *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (Princeton, 1998; second printing, 2002), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford, 2007), and *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (Stanford, 2010). His most recent book is *How Civility Works* (Stanford, 2016). He is currently at work on a grant-funded project examining the positive uses of fake news.

David M. Driesen, University Professor

Professor David M. Driesen, University Professor at the College of Law, focuses on environmental law, law and economics, and constitutional law. Professor Driesen has written three books: *The Economic Dynamics of Law* (Cambridge University Press), the textbook *Environmental Law: A Conceptual and Pragmatic Approach* (Aspen Kluwer with Robert Adler and Kirsten Engel) and *The Economic Dynamics of Environmental Law* (MIT Press), which won the Lynton Keith Caldwell Award—a prize offered by The American Political Science Association annually for the best book published in science, technology and environmental studies. He has also published two edited volumes, *Beyond Environmental Law: Policy Proposals for a Better Future* (Cambridge University Press with Alyson Flournoy) and *Economic Thought and U.S. Climate Change Policy* (MIT Press). He has published numerous articles with leading journals, such as *Cornell Law Review, Fordham Law Review, Ecology Law Quarterly, Harvard Environmental Law Review, and the Virginia Journal of International Law,* and several book chapters.

Driesen engages in public service mostly focused on defending environmental law's constitutionality and supporting efforts to address global climate disruption. He has written numerous amicus briefs in Supreme Court cases and has represented Senators Hillary Clinton and others in Clean Air Act litigation in the DC Circuit. He is a member scholar with the Center for Progressive Reform (CPR), and blogs often on climate disruption issues for CPR and for RegBlog. He has worked as a consultant for American rivers and other environmental groups on Clean Water Act issues and has testified before Congress on implementation of the 1990 Clean Air Act Amendments.

Professor Driesen was a Senior Project Attorney for The Natural Resources Defense Council, in its Air and Energy Program. Before that, he clerked for Justice Robert Utter of the Washington State Supreme Court and worked in the Special Litigation Division of the Washington State Attorney General's Office.

Driesen joined the College of Law faculty in 1995. He was the Distinguished Summer Scholar in 2008 at Vermont Law School, a Visiting Professor at the University of Michigan Law School in 2006, and a Visiting Scholar at Harvard Law School in the Spring of 2019.

Driesen holds a J.D. from the Yale Law School, a Master of Music from the Yale School of Music, and a Bachelor of Music from the Oberlin Conservatory. Currently, Professor Driesen performs with the Excelsior Cornet Band and the Syracuse University Brass Ensemble.

Lauryn P. Gouldin, Associate Dean for Faculty Research, Associate Professor

Professor Lauryn Gouldin teaches constitutional criminal procedure, criminal law, evidence, constitutional law, and criminal justice reform. Her scholarship focuses on the Fourth Amendment, pretrial detention and bail reform, and judicial decision-making. Her articles have appeared in the *University of Chicago Law Review, BYU Law Review, Denver Law Review, Fordham International Law Journal,* and the *American Criminal Law Review*, among others. In 2017, the AALS Criminal Justice Section recognized her article, "Defining Flight Risk," as the first runner-up in the Section's Junior Scholars Paper Competition. In 2015, in recognition of her excellence in teaching, Gouldin was selected by the Syracuse University Meredith Professors to receive a Teaching Recognition Award. In 2014 and 2015, the College of Law Student Bar Association honored Gouldin with the Outstanding Faculty Award. At their commencement, the Class of 2018 awarded her the College of Law's Res Ipsa Loquitur Award for outstanding service, scholarship, and stewardship.

Professor Gouldin graduated from Princeton University with a major in the Woodrow Wilson School of Public and International Affairs and received her J.D., magna cum laude, from New York University School of Law. Following law school, Gouldin clerked for the Hon. Leonard B. Sand in the Southern District of New York and for the Hon. Chester J. Straub of the US Court of Appeals for the Second Circuit. She also spent several years as a litigation associate at Wachtell, Lipton, Rosen & Katz, working on matters involving white collar and regulatory defense, internal investigations and compliance, and securities litigation. Before joining the College of Law faculty, Gouldin served as the Assistant Director of the Center for Research in Crime and Justice at New York University School of Law.

October Term 2019

October Sitting

Peter v. NantKwest Inc., No. 18-801 [Arg: 10.7.2019]

Issue(s): Whether the phrase "[a]ll the expenses of the proceedings" in 35 U.S.C. § 145 encompasses the personnel expenses the United States Patent and Trademark Office incurs when its employees, including attorneys, defend the agency in Section 145 litigation.

Ramos v. Louisiana, No. 18-5924 [Arg: 10.7.2019]

Issue(s): Whether the 14th Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.

Kahler v. Kansas, No. 18-6135 [Arg: 10.7.2019]

Issue(s): Whether the Eighth and 14th Amendments permit a state to abolish the insanity defense.

Bostock v. Clayton County, Georgia, No. 17-1618 [Arg: 10.8.2019]

Issue(s): Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107 [Arg: 10.8.2019]

Issue(s): Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

Altitude Express Inc. v. Zarda, No. 17-1623 [Arg: 10.8.2019]

Issue(s): Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

UTIER v. Financial Oversight and Management Board for Puerto Rico, No. 18-1521 [Arg: 10.15.2019]

Issue(s): Whether the de facto officer doctrine allows for unconstitutionally appointed principal Officers of the United States to continue acting, leaving the party that challenges their appointment with an ongoing injury and without an appropriate relief.

Aurelius Investment, LLC v. Puerto Rico, No. 18-1475 [Arg: 10.15.2019]

Issue(s): Whether the de facto officer doctrine allows courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principal officers.

U.S. v. Aurelius Investment, LLC, No. 18-1514 [Arg: 10.15.2019]

Issue(s): Whether members of Financial Oversight and Management Board for Puerto Rico are "Officers of the United States" within the meaning of the appointments clause of the United States Constitution, Art. II, § 2, Cl. 2.

From: https://www.scotusblog.com/

Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, No. 18-1334 [Arg: 10.15.2019]

Issue(s): Whether the appointments clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

Official Committee of Debtors v. Aurelius Investment, LLC, No. 18-1496 [Arg: 10.15.2019]

Issue(s): Whether the appointments clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

Mathena v. Malvo, No. 18-217 [Arg: 10.16.2019]

Issue(s): Whether the U.S. Court of Appeals for the 4th Circuit erred in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of the Supreme Court, *Montgomery v. Louisiana*, addressing whether a new constitutional rule announced in an earlier decision, *Miller v. Alabama*, applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question.

Rotkiske v. Klemm, No. 18-328 [Arg: 10.16.2019]

Issue(s): Whether the "discovery rule" applies to toll the one-year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq., as the U.S. Courts of Appeals for the 4th and 9th Circuits have held but the U.S. Court of Appeals for the 3rd Circuit (sua sponte en banc) has held contrarily.

Kansas v. Garcia, No. 17-834 [Arg: 10.16.2019]

Issue(s): (1) Whether the Immigration Reform and Control Act expressly pre-empts the states from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) whether the Immigration Reform and Control Act impliedly preempts Kansas' prosecution of respondents. **CVSG: 12/04/2018.**

November Sitting

Kansas v. Glover, No. 18-556 [Arg: 11.4.2019]

Issue(s): Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

Barton v. Barr, No. 18-725 [Arg: 11.4.2019]

Issue(s): Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] ... inadmissible" for the purposes of the stop-time rule, 8 U.S.C. § 1229b(d)(1).

CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd., No. 18-565 [Arg: 11.5.2019]

Issue(s): Whether under federal maritime law a safe-berth clause in a voyage charter contract is a guarantee of a ship's safety, as the U.S. Courts of Appeals for the 2nd and 3rd Circuits have held, or a duty of due diligence, as the U.S. Court of Appeals for the 5th Circuit has held.

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Allen v. Cooper, No. 18-877 [Arg: 11.5.2019]

Issue(s): Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states.

County of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260 [Arg: 11.6.2019]

Issue(s): Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Retirement Plans Committee of IBM v. Jander, No. 18-1165 [Arg: 11.6.2019]

Issue(s): Whether *Fifth Third Bancorp v. Dudenhoeffer*'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

McAleenan v. Vidal, No. 18-589 [Arg: 11.12.2019]

Issue(s): (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

Hernandez v. Mesa, No. 17-1678 [Arg: 11.12.2019]

Issue(s): Whether, when the plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.

Department of Homeland Security v. Regents of the University of California, No. 18-587 [Arg: 11.12.2019]

Issue(s): (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

Trump v. NAACP, No. 18-588 [Arg: 11.12.2019]

Issue(s): (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

Comcast Corp. v. National Association of African American-Owned Media, No. 18-1171 [Arg: 11.13.2019]

Issue(s): Whether a claim of race discrimination under 42 U.S.C. § 1981 fails in the absence of but-for causation.

Ritzen Group Inc. v. Jackson Masonry, LLC, No. 18-938 [Arg: 11.13.2019]

Issue(s): Whether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1).

Cases Not (Yet) Set for Argument

Opati v. Republic of Sudan, No. 17-1268

Issue(s): Whether, consistent with the Supreme Court's decision in *Republic of Austria v. Altmann*, the Foreign Sovereign Immunities Act applies retroactively, thereby permitting recovery of

punitive damages 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute. **CVSG: 05/21/2019.**

Atlantic Richfield Co. v. Christian, No. 17-1498

Issue(s): (1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with remedies the Environmental Protection Agency ordered is a jurisdictionally barred "challenge" to the EPA's cleanup under 42 U.S.C. § 9613 of the Comprehensive Environmental Response, Compensation and Liability Act; (2) whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA pre-empts state commonlaw claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies. **CVSG: 04/30/2019.**

Thole v. U.S. Bank, N.A., No. 17-1712

Issue(s): (1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof; (2) whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof. **CVSG: 05/21/2019**; and (3) whether petitioners have demonstrated Article III standing.

New York State Rifle & Pistol Association Inc. v. City of New York, New York, No. 18-280

Issue(s): Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

Guerrero-Lasprilla v. Barr, No. 18-776

Issue(s): Whether a request for equitable tolling, as it applies to statutory motions to reopen, is judicially reviewable as a "question of law."

Babb v. Wilkie, No. 18-882

Issue(s): Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

Dex Media Inc. v. Click-To-Call Technologies, LP, No. 18-916

Issue(s): Whether 35 U.S.C. § 314(d) permits appeal of the Patent Trial and Appeal Board's decision to institute an inter partes review upon finding that 35 U.S.C. § 315(b)'s time bar did not apply.

Monasky v. Taglieri, No. 18-935

Issue(s): (1) Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo, as seven circuits have held, under a deferential version of de novo review, as the U.S. Court of Appeals for the 1st Circuit has held, or under clear-error review, as the U.S. Courts of Appeals for the 4th and 6th Circuits have held; and (2) whether, when an infant is too young to acclimate to her surroundings, a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.

Ovalles v. Barr, No. 18-1015

Issue(s): Whether the criminal alien bar, 8 U.S.C. § 1252(a)(2)(C), tempered by 8 U.S.C. § 1252(a)(2)(D), prohibits a court from reviewing an agency decision finding that a movant lacked diligence for equitable tolling purposes, notwithstanding the lack of a factual dispute.

Maine Community Health Options v. U.S., No. 18-1023

Issue(s): (1) Whether—given the "cardinal rule" disfavoring implied repeals, which applies with "especial force" to appropriations acts and requires that repeal not to be found unless the later enactment is "irreconcilable" with the former—an appropriations rider whose text bars the agency's use of certain funds to pay a statutory obligation, but does not repeal or amend the statutory obligation, and is thus not inconsistent with it, can nonetheless be held to impliedly repeal the obligation by elevating the perceived "intent" of the rider (drawn from unilluminating legislative history) above its text, and the text of the underlying statute; and (2) whether—when the federal government has an unambiguous statutory payment obligation, under a program involving reciprocal commitments by the government and a private company participating in the program—the presumption against retroactivity applies to the interpretation of an appropriations rider that is claimed to have impliedly repealed the government's obligation.

Moda Health Plan Inc. v. U.S., No. 18-1028

Issue(s): Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government's obligation.

Land of Lincoln Mutual Health Insurance Co. v. U.S., No. 18-1038

Issue(s): Whether a temporary cap on appropriations availability from certain specified funding sources may be construed, based on its legislative history, to abrogate retroactively the government's payment obligations under a money-mandating statute, for parties that have already performed their part of the bargain under the statute.

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, No. 18-1048

Issue(s): Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.

Kelly v. U.S., No. 18-1059

Issue(s): Whether a public official "defraud[s]" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision.

Lucky Brand Dungarees Inc. v. Marcel Fashion Group Inc., No. 18-1086

Issue(s): Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties.

McKinney v. Arizona, No. 18-1109

Issue(s): (1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted; and (2) whether the correction of error under *Eddings v. Oklahoma* requires resentencing.

From: https://www.scotusblog.com/

Intel Corp. Investment Policy Committee v. Sulyma, No. 18-1116

Issue(s): Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

Georgia v. Public.Resource.Org Inc., No. 18-1150

Issue(s): Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

Espinoza v. Montana Department of Revenue, No. 18-1195

Issue(s): Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Romag Fasteners Inc. v. Fossil Inc., No. 18-1233

Issue(s): Whether, under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), willful infringement is a prerequisite for an award of an infringer's profits for a violation of Section 43(a), 15 U.S.C. § 1125(a).

Rodriguez v. Federal Deposit Insurance Corp., No. 18-1269

Issue(s): Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "*Bob Richards* rule," as three circuits hold, or based on the law of the relevant state, as four circuits hold.

Shular v. U.S., No. 18-6662

Issue(s): Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the act.

Banister v. Davis, No. 18-6943

Issue(s): Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*.

Holguin-Hernandez v. U.S., No. 18-7739

Issue(s): Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.

From: https://www.scotusblog.com/

THE WALL STREET JOURNAL.

U.S.

Supreme Court Wrap-Up: a Slate of Conservative, If Less Predictable, Rulings

Surprising coalitions emerged even as Justice Kavanaugh bolstered the majority bloc

While some cases split the Supreme Court along its conservative-liberal divide during the latest term, surprising coalitions emerged. PHOTO: JIM LO SCALZO/EPA-EFE/REX/SHUTTERSTOCK

By Jess Bravin and Brent Kendall
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WASHINGTON—Chief Justice John Roberts closed the Supreme Court's term with an assertion of institutional—and individual—power, casting tiebreaking votes that checked the Trump administration on its census plans and put partisan gerrymandering beyond the reach of federal courts.

Yet the chief justice's performance Thursday capped a year of uncertainty and occasional disarray at the court, which began its term last October a member short. With new Justice Brett Kavanaugh in the seat of retired Justice Anthony Kennedy, the court proved more conservative in some ways—and less predictable in others. While some cases split the court along its conservative-liberal divide, surprising coalitions emerged, suggesting a court preferring to tread cautiously toward the right rather than make a headlong rush.

Even Chief Justice Roberts, who now holds the court's ideological center as well as its formal leadership, couldn't always retain the reins. The chief justice found himself in dissent in 10 cases, including an antitrust ruling against Apple Inc., a case that upheld a Virginia ban on uranium mining and another Virginia matter where the justices let stand a lower-court ruling that found the commonwealth engaged in racial gerrymandering. That case scrambled the

ideological map, with Justices Clarence Thomas, Elena Kagan, Sonia Sotomayor and Neil Gorsuch joining Justice Ruth Bader Ginsburg's opinion that the Republican state House of Delegates had no legal standing to press the appeal.

The justices generally tilted their docket toward routine disputes over criminal procedure and business litigation rather than blockbuster cases involving fundamental rights and political tripwires. That came after a fiery start to the term, just after Justice Kavanaugh's nomination was nearly derailed over sexual-assault allegations from when he was in high school. His furious denials powered through his Republican-backed Senate confirmation on a near-party line vote, reinforcing the court's conservative majority but eroding its oft-professed identity as an institution apart from politics.

The court's business docket produced a few notable rulings. A 5-to-4 court, with Justice Kavanaugh forming a majority with the liberal wing, ruled Apple could be sued on allegations that it unlawfully monopolized sales for smartphone apps, a rare high-court victory for antitrust plaintiffs written by a Trump appointee who had been accused of narrowly viewing the reach of antitrust law.

In rare moves, the court rejected an employer's attempt to force truck drivers to arbitrate a wage dispute, and it sided with Securities and Exchange Commission efforts to sanction a stock broker for disseminating false statements, after a string of recent rulings that clipped the regulator's enforcement efforts.

At oral argument and in opinions, the justices wrestled not only with specific cases but the jurisprudential question that has hung over the court since conservatives solidified their grip: the weight of precedent, which will take center stage if the court decides to take up, at some point, a challenge to Roe v. Wade, the 1973 opinion recognizing abortion rights that President Trump once predicted his appointees "automatically" would overrule.

The court heard no abortion cases this term, but it entertained challenges to precedent in several areas of law, from its interpretation of the Fifth Amendment to whether state governments are immune from suit in the courts of other states.

The answers varied. The court refused to overturn precedent allowing successive prosecutions for the same acts in both federal and state courts; the dissenters, Justice Ginsburg on the left and Justice Gorsuch on the right, argued that the court had blessed a form of double jeopardy, or twice being tried for the same crime.

In the double-jeopardy case, Justice Thomas, who previously had expressed doubts, said in the end he was persuaded the precedent was correct. But he went on to call for the near abolition of *stare decisis*, the principle that adhering to precedent, even if subsequent judges consider it imperfect, is important to a society that relies on stability and predictability. The court's affirmation of "demonstrably erroneous decisions" enshrined the arrogance of past judges, he wrote.

Dissenting in the state-sovereignty case, Justice Stephen Breyer asked why the conservative majority found it necessary to overrule precedent regarding an issue that almost never arises. It is one thing when a precedent proves unworkable, he wrote. "It is far more dangerous to

overrule a decision only because five Members of a later Court come to agree with earlier dissenters," he wrote. "Today's decision can only cause one to wonder which cases the Court will overrule next."

Justice Kennedy in 1992 had voted to uphold abortion rights in large part for reasons of stare decisis.

The issue that broke open the court's divisions, however, wasn't abortion, executive power or any of the other marquee topics of the Kavanaugh confirmation. It was capital punishment, a subject that has gone all but unmentioned during recent Supreme Court vacancies.

Condemned inmates typically seek a reprieve from the Supreme Court as their executions approach—either because they claim legal error in their conviction or sentence, or that the method slated to kill them would be unconstitutionally cruel and unusual. The majority made clear repeatedly that its patience for such actions had run out.

In February, the justices stepped in to lift a stay granted by a federal appeals court to a Muslim Alabama inmate who complained the state had denied his imam access to the death chamber, even though a Christian chaplain was on staff to stand alongside inmates of that faith in their last moments.

The majority's unsigned opinion said the inmate had waited too long to raise his complaint. Justice Kagan, dissenting for the liberals, called that decision "profoundly wrong."

When a similar case arose the following month—this time, a Buddhist inmate in Texas—votes switched. Justice Kavanaugh issued an opinion explaining why he voted to stay the execution, while Justices Thomas and Gorsuch indicated they opposed it. In April, the court switched again, denying a stay to an inmate who requested to die by nitrogen gas rather than lethal injection.

"Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay," Justice Gorsuch wrote in yet another 5-4 execution-method case in April.

Later, Justice Samuel Alito disclosed he had voted against a stay for the Buddhist inmate, while Chief Justice Roberts revealed he had joined Justice Kavanaugh in voting for it.

The Trump administration, too, filed emergency applications throughout the term, seeking to block lower-court rulings against government policies.

The justices allowed the administration to implement for now restrictions on military service by transgender individuals, but a 5-4 court, with the chief justice and the liberals in the majority, declined for now to reinstate a ban on asylum claims by immigrants who cross the southern U.S. border illegally.

The court also issued an interim order—again supported by the chief justice and the liberal wing—that prevented Louisiana from moving forward with restrictions that could have limited the availability of abortion in the state, a case the court likely will consider in full during its next term.

Other blockbuster cases are in the pipeline, including a review of gay and transgender rights in the workplace, and a Trump administration bid to cancel an Obama-era program that provided benefits to young illegal immigrants.

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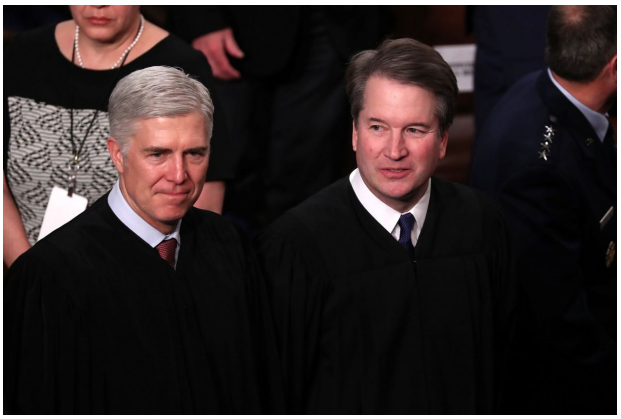
Justices Neil Gorsuch and Brett Kavanaugh staked out differences in tone and priorities in just-completed term



Justice Neil Gorsuch, left, and Brett Kavanaugh at the State of the Union address in February. PHOTO: JONATHAN ERNST/REUTERS

By Brent Kendall and Jess Bravin
June 28, 2019 6:45 pm ET

WASHINGTON—President Trump's two appointments to the Supreme Court have bolstered its rightward tilt, but they staked out differences in tone, priorities and methods during their first term together—particularly when it came to crime and commerce.

Justices Neil Gorsuch, in his second year on the court, and Brett Kavanaugh, in his first, came to the court as closely tied as any nominees in recent memory. They overlapped at the same Washington-area high school, clerked alongside each other for Justice Anthony Kennedy and each were appointed to a federal appeals court by President George W. Bush.

On the term's most significant, ideologically charged cases, the Trump appointees voted together. They found no constitutional remedy for partisan gerrymanders and authorized property owners to challenge local land-use regulations in federal court.

But the two justices carved out distinct identities. They disagreed some 20 times over the course of the court's term—a number that represented more than a quarter of the docket.

Like the late Justice Antonin Scalia, whose seat he filled, Justice Gorsuch takes a formalistic view of the law and seeks to apply the Constitution as he believes it originally was understood. That has sometimes put him on the side of criminal defendants asserting constitutional protections.

He joined the court's liberal wing to strike down, 5-4, a provision increasing sentences for felons who use firearms in a "crime of violence" as too vague. Justice Kavanaugh wrote the dissent.

Justice Gorsuch also joined Justice Ruth Bader Ginsburg in dissent from the court's decision allowing successive prosecutions for the same actions under both federal and state law.

"Gorsuch in criminal cases was the most likely to cross over and join with the liberals in cases that could have a long-term impact," said William Jay, an appellate lawyer with Goodwin Procter LLP.

Justice Gorsuch joined a 5-4 opinion by his liberal seatmate, Justice Sonia Sotomayor, enforcing Indian hunting rights under a 19th-century treaty that Wyoming claimed were terminated by their state's admission to the union in 1890. Justice Kavanaugh joined other conservatives in dissent.

Justice Kavanaugh at times showed a law-and-order streak, including in a case that saw him in a majority that sided with a Wisconsin police officer who took a blood sample from a drunken driver without a warrant. Justice Gorsuch dissented.

Other times, the roles reversed. Justice Kavanaugh wrote an opinion vacating a black defendant's murder conviction in Mississippi because of the prosecutor's extraordinary effort to keep African-Americans off the jury. Justice Gorsuch joined Justice Clarence Thomas in dissent, accusing the 7-2 majority of pandering to media interest in the case.

Justice Kavanaugh throughout the term was in closer alignment with Chief Justice John Roberts, agreeing with him more than 90% of the time, according to data compiled by the website SCOTUSblog. In contrast, Justice Gorsuch aligned with the chief justice on about 70% of the docket.

In the term's marquee business case, Justice Kavanaugh, joined by the court's liberal wing, wrote a 5-4 opinion that allowed consumers to sue Apple Inc. on allegations that it monopolized smartphone app sales. He jousted directly with Justice Gorsuch, who wrote for the conservative dissenters. Where Justice Kavanaugh found that Apple's arguments would make an end-run around the antitrust laws, Justice Gorsuch said his colleague's opinion created a "senseless" rule that would be difficult to apply.

In another commerce case this past week, Justice Kavanaugh was part of a majority that invalidated Tennessee rules that prohibited out-of-state retailers from obtaining alcohol licenses, while Justice Gorsuch said the court should have left the state alcohol regulations alone.

In one oddity of the term, each of the five conservative justices joined at least once with the court's liberals in 5-to-4 judgments. There were also cases where liberal justices split and at least one or two joined conservative rulings. Justices Stephen Breyer and Elena Kagan, for example, joined with conservatives to let a 40-foot cross remain in the Maryland highway median where it has stood since 1925, while Justice Kagan joined with conservatives in a 6-3 ruling allowing the government to shield more documents from the press and the public when they contain potentially sensitive information about companies.

Scott Keller, former Texas solicitor general now with law firm Baker Botts, said this term's alignments served as a reminder that "not all justices have the same judicial philosophies, and we shouldn't expect them to, even when they're appointed by the same president."

Nevertheless, Justices Gorsuch and Kavanaugh aligned on some of the biggest cases of the term. Both agreed in barring lawsuits alleging partisan gerrymandering and both would have let the Trump administration ask U.S. residents on the 2020 census if they are citizens. The two also were part of conservative majorities that rejected several last-minute death-penalty appeals, and both cast dissenting votes when the high court rejected a Trump administration bid to reinstate a ban on asylum claims by immigrants who cross the southern U.S. border illegally.

Stanford University law professor Pam Karlan, board chairman of the liberal American Constitution Society, said that despite some differences at the margins between the Trump appointees, the two performed as widely expected.

"If you have a lot of conservative justices, you will start seeing fissures among them when the method they use drives in different directions," Ms. Karlan said. But "there's nothing I saw that doesn't fit into the contemporary conservative movement."

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Zarda v. Altitude Express, Inc.

United States Court of Appeals for the Second Circuit

September 26, 2017, Argued; February 26, 2018, Decided

Docket No. 15-3775

Reporter

883 F.3d 100 *; 2018 U.S. App. LEXIS 4608 **; 130 Fair Empl. Prac. Cas. (BNA) 1245; 102 Empl. Prac. Dec. (CCH) P45,990; 2018 WL 1040820

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda, and WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda, Plaintiffs-Appellants, — v. — ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND, and RAY MAYNARD, Defendants-Appellees.

Subsequent History: As corrected April 4, 2018.

US Supreme Court certiorari granted by *Altitude Express v. Zarda, 2019 U.S. LEXIS 2931 (U.S., Apr. 22, 2019)*

Prior History: Donald Zarda brought this suit against his former employer alleging, inter alia, sex discrimination in violation of *Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq.* In particular, Zarda claimed that he was fired after revealing his sexual orientation to a client. The United States District Court for the Eastern District of New York (Bianco, J.) granted summary judgment to the defendants on the ground that Zarda had failed to show that he had been discriminated against on the basis of his sex. After the Equal Employment Opportunity Commission ("EEOC") decided *Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 15, 2015),* holding that sex discrimination includes sexual orientation discrimination, Zarda asked the district court to reinstate his Title VII claim. The district court, citing our decision in *Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)* **[**1]** , declined to do so. Zarda appealed and a panel of this Court affirmed.

We convened this rehearing en banc to consider whether Title VII prohibits discrimination on the basis of sexual orientation such that our precedents to the contrary should be overruled. We now hold that sexual orientation discrimination constitutes a form of discrimination "because of . . . sex," in violation of Title VII, and overturn Simonton and *Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005),* to the extent they held otherwise. **[**2]** We therefore VACATE the district court's judgment on the Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

Zarda v. Altitude Express, Inc., 2017 U.S. App. LEXIS 13127 (2d Cir., May 25, 2017)

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in support of Defendants-Appellees.

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Alice O'Brien, Eric A. Harrington, and Mary E. Deweese, National Education Association, Washington, DC, for Amicus Curiae The National Education Association, in support of Plaintiffs-Appellants.

Mary Bonauto, GLBTQ Legal Advocates & Defenders, Boston, MA; Christopher Stoll, National Center for Lesbian Rights, San Francisco, CA; Alan E. Shoenfeld, David M. Lehn, and Christopher D. Dodge, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, Washington, DC, and Boston, MA, for Amici Curiae GLBTQ Legal Advocates & Defenders ("GLAD") and National Center for Lesbian Rights ("NCLR"), in support of Plaintiffs-Appellants.

Thomas W. Burt, Microsoft Corporation, Redmond, WA; Sigismund L. Sapinski, Jr., Sun Life Financial (U.S.) Services Company, Inc., Windsor, CT; Todd Anten, Justin T. Reinheimer, and Cory D. Struble, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY, for Amici Curiae AdRoll, Inc.; Ben & Jerry's; Beterment; Boston Community **[**5]** Capital; Brandwatch; CBS Corporation; Citrix Systems, Inc.; City Winery; Davis Steadman Ford & Mace, LLC; DoorDash, Inc.; Dropbox, Inc.; Eastern Bank; Edelman; FiftyThree, Inc.; Freedom for All Americans Education Fund; Google Inc.; Greater Burlington Industrial Corporation; Gusto; Harvard Pilgrim Health Care, Inc.; IAC/InterActiveCorp; IHS Markit Ltd.; Indiegogo; INUS Group LLC; Johnston, Kinney & Zulaica LLP; Kargo; KEO Marketing Inc.; Kickstarter, PBC; Levi Strauss & Co.; Linden Lab; Lyft, Inc.; Mapbox, Inc.; National Gay & Lesbian Chamber of Commerce; OBOX Solutions; On 3 Public Relations; Physician's Computer Company; Pinterest; Puma Springs Vineyards; Quora Inc.; S&P Global Inc.; Salesforce; Shutterstock, Inc.; Spotify; Thumbtack; TodayTix; Trust Company of Vermont; Vermont Gynecology; Viacom, Inc.; and Wealthfront Inc., in support of Plaintiffs-Appellants.

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Matthew Skinner, LGBT Bar Association of Greater New York ("LeGaL"), New York, NY, for Amici Curiae LGBT Bar Association **[**6]** of Greater New York ("LeGaL"), Anti-Defamation League, Asian American Bar Association of New York, Association of the Bar of the City of New York, Bay Area Lawyers for Individual Freedom, Hispanic National Bar Association, Legal Aid at Work, National Queer Asian Pacific Islander Alliance, New York County Lawyers' Association, and Women's Bar Association of the State of New York, in support of Plaintiffs-Appellants.

Eric T. Schneiderman, Attorney General, Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, Andrew W. Amend, Senior Assistant Solicitor General of Counsel, State of New York, New York, NY; George Jepsen, Attorney General, State of Connecticut, Hartford, CT; Thomas J. Donovan, Jr., Attorney General, State of Vermont, Montpelier, VT, for Amici Curiae State of New York, State of Connecticut, and State of Vermont, in support of Plaintiffs-Appellants.

Joseph W. Miller, U.S. Justice Foundation, Ramona, CA; William J. Olson, Herbert W. Titus, Robert J. Olson, and Jeremiah L. Morgan, William J. Olson, P.C., Vienna, VA, for Amici Curiae Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation, **[**7]** in support of Defendants-Appellees.

Kimberlee Wood Colby, Christian Legal Society, Springfield, VA, for Amici Curiae Christian Legal Society and National Association of Evangelicals, in support of Defendants-Appellees.

Judges: Before: KATZMANN, Chief Judge, JACOBS,

CABRANES, POOLER, SACK, RAGGI, HALL, LIVINGSTON, LYNCH, CHIN, LOHIER, CARNEY, and DRONEY, Circuit Judges.* KATZMANN, C.J., filed the majority opinion in which HALL, CHIN, CARNEY, and DRONEY, JJ., joined in full, JACOBS, J., joined as to Parts I and II.B.3, POOLER, J., joined as to all but Part II.B.1.b, SACK, J., joined as to Parts I, II.A, II.B.3, and II.C, and LOHIER, J., joined as to Parts I, II.A, and II.B.1.a. JACOBS, J., filed a concurring opinion. CABRANES, J., filed an opinion concurring in the judgment. SACK, J., filed a concurring opinion. LOHIER, J., filed a concurring opinion. LYNCH, J., filed a dissenting opinion in which LIVINGSTON, J., joined as to Parts I, II, and III. LIVINGSTON, J., filed a dissenting opinion. RAGGI, J., filed a dissenting opinion.

Opinion by: KATZMANN

Opinion

[*107] KATZMANN, *Chief Judge*:

Donald Zarda,[1] a skydiving instructor, brought a sex discrimination claim under *Title VII of the Civil Rights Act of 1964* ("Title VII") alleging **[**8]** that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of . . . sex," we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII.[2] *See Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)*; *see also Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005)*.

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). *See, e.g., Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012)*; *Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009)*; *Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)*; *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000)*; *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999)*;[3] *Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996)*; *Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989)* (per curiam); *Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)* (per curiam); *see also Johnson v. Frank, EEOC Decision No. 05910858, 1991 EEOPUB LEXIS 2713, 1991 WL 1189760, at *3 (Dec. 19, 1991)*. But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "sexual orientation is inherently a 'sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641, at *5 (July 15, 2015)* (quoting *Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)* (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation **[**9]** discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by *Blum, 597 F.2d at 938*, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc*." *Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir.)*, *cert. denied, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017)*. One month later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively, 853 F.3d at 340-41*. In addition, a concurring opinion of this Court recently called "for the Court to

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* Judge Sack and Judge Lynch, who are senior judges, are eligible to participate in this en banc pursuant to 28 U.S.C. § 46(c)(1) and 28 U.S.C. § 294(c).

[1] Zarda died in a BASE jumping accident after the district court awarded partial summary judgment but prior to trial on the remaining claims. The executors of his estate have been substituted as plaintiffs. Zarda and the executors of his estate are referred to collectively as "Zarda" throughout this opinion.

[2] This opinion assumes *arguendo* that "sex" in Title VII "means biologically male or female," *Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 362 (7th Cir. 2017)* (en banc) (Sykes, J., dissenting), and uses the terms "sex" and "gender" interchangeably, as do the Supreme Court and other circuits cited herein.

[3] The First Circuit has since qualified *Higgins*, holding that a plaintiff may "bring[] sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor is the plaintiff's status as a gay or lesbian individual." *Franchina v. City of Providence, 881 F.3d 32, 54 (1st Cir. 2018)*.

revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII. *Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 202 (2d Cir. 2017)* (Katzmann, *C.J.*, concurring) ("Christiansen and *amici* advance three arguments, none previously addressed by this Court . . . ."); *see also id. at 204* ("Neither *Simonton* nor *Dawson* addressed [the but-for] argument.").

Taking note of the potential persuasive force of these new **[**10]** decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court. Having done so, we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of . . . sex." To the extent that our prior precedents held otherwise, they are overruled.

We therefore **VACATE** the district court's judgment on Zarda's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

BACKGROUND

The facts and procedural history of this case are discussed in detail in our prior panel decision. *See Zarda v. Altitude Express, 855 F.3d 76, 79-81 (2d Cir. 2017).* We recite them only as necessary to address the legal question under consideration.

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation **[**11]** to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay "and ha[d] an ex-husband to prove it." J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired shortly Zarda thereafter. **[*109]** Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." Special Appendix ("S.A.") 3. In particular, he claimed that **[**12]** "[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." S.A. 5.

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia*, sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda's Title VII claim should be dismissed because, although "Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation . . . [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation." Dist. Ct. Dkt. No. 109 at 3 (citing *Simonton, 232 F.3d at 35*). In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping **[**13]** discrimination under Title VII.

While Zarda's remaining claims were still pending, the EEOC decided *Baldwin*, holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *2015 EEOPUB LEXIS 1905, 2015 WL 4397641 at *10.* The Commission identified three ways to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination." *2015 EEOPUB LEXIS 1905, [WL] at *5.* First, sexual orientation discrimination, such as suspending a lesbian employee for displaying a photo of her female spouse on her desk while not

suspending a man for displaying a photo of his female spouse, "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." *2015 EEOPUB LEXIS 1905, [WL] at *6.* Lastly, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly "heterosexually defined gender **[**14]** norms." *2015 EEOPUB LEXIS 1905, [WL] at *7-8* (internal quotation marks omitted). Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin*. But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda's surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC's reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they **[*110]** had not discriminated based on sexual orientation.

The panel held that "Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII." *Zarda, 855 F.3d at 81.* However, the panel "decline[d] Zarda's invitation to revisit our precedent," which "can only be overturned by the entire Court sitting in banc." *Id. at 82.* The Court subsequently ordered this rehearing en banc to revisit *Simonton* and *Dawson*'s holdings **[**15]** that claims of sexual orientation discrimination are not cognizable under Title VII.

Discussion

I. Jurisdiction

We first address the defendants' challenge to our jurisdiction. Article III of the Constitution grants federal courts the authority to hear only "Cases" and "Controversies." *U.S. Const. art. III, § 2, cl. 1.* As a result, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)* (quoting *North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)).* The defendants argue that any decision on the merits would be an advisory opinion because Zarda did not allege sexual orientation discrimination in his EEOC charge or his federal complaint and therefore the question of whether Title VII applies to sexual orientation discrimination is not properly before us.

Irrespective of whether defendants' argument is actually jurisdictional,[4] its factual premises are patently contradicted by both the record and the position defendants advanced below. Zarda's EEOC complaint explained that he was "making this charge because, in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." S.A. 3.[5] Zarda specified that his supervisor "was hostile **[**16]** to any expression of [his] sexual orientation that did not conform to sex

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[4] This Court has squarely held that failure to present a Title VII claim to the EEOC before filing suit in federal court "is not a jurisdictional prerequisite, but only a precondition to bringing a Title VII action that can be waived by the parties or the court." *Francis v. City of New York, 235 F.3d 763, 768 (2d Cir. 2000)* (alterations and internal quotation marks omitted).

[5] The full quotation is, "I am not making this charge on the grounds that I was discriminated on the grounds of my sexual orientation. Rather, I am making this charge because, in addition to being discriminated against because of my sexual orientation, I was also discriminated against because of my gender." S.A. 3. Although inartful and perhaps even confusing, the best interpretation of this statement, read in the context of the entire charge, is that Zarda alleged that the sexual orientation discrimination he experienced was a subset of gender discrimination. Even if otherwise, the governing rule is that "[c]laims not raised in an EEOC complaint . . . may be brought in federal court if they are reasonably related to the claim filed with the agency." *Williams v. N.Y.C. Hous. Auth., 458 F.3d 67, 70 (2d Cir. 2006)* (internal quotation marks omitted). A claim is considered reasonably related if the alleged conduct "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Id.* (internal quotation marks omitted). Because Zarda's charge gave the Commission "adequate notice to investigate discrimination on both bases," it is irrelevant whether Zarda's EEOC complaint unequivocally alleged sexual orientation discrimination. *Id.* (internal quotation marks omitted).

stereotypes," and alleged that he "was fired . . . because . . . [he] honestly referred to [his] sexual orientation and **[*111]** did not conform to the straight male macho stereotype." S.A. 3, 5. Zarda repeated this claim in his federal complaint, contending that he was "an openly gay man" who was "discharge[ed] because of a homophobic customer" and "because his behavior did not conform to sex stereotypes," in violation of Title VII. J.A. 65, 69, 75.

Defendants plainly understood Zarda's complaint to have raised a claim for sexual orientation discrimination under Title VII. In their motion for summary judgment, defendants argued that Zarda's claim "relies on the fact that Plaintiff is homosexual, not that he failed to comply with male gender norms. Thus, Plaintiff[] merely attempts to bring a defective sexual orientation claim under Title VII, which is legally invalid." Dist. Ct. Dkt. No. 109 at 9 (citing *Dawson, 398 F.3d at 221*). The district court ultimately agreed.

Having interpreted Zarda's Title VII claim as one for sexual orientation discrimination for purposes of insisting that the claim be dismissed, defendants cannot now argue **[**17]** that there is no sexual orientation claim to prevent this Court from reviewing the basis for the dismissal. Both defendants and the district court clearly understood that Zarda had alleged sexual orientation discrimination under Title VII. As a result, Zarda's Title VII claim is neither unexhausted nor unpled, and so it may proceed.[6]

II. Sexual Orientation Discrimination

A. The Scope of Title VII

"In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse, 490 U.S. at 239*. The text of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1). This "broad rule of workplace equality," *Harris v. Forklift Sys., Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)*, "strike[s] at the entire spectrum of disparate treatment" based on protected characteristics, *L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978)* (quoting *Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)*), "regardless of whether the discrimination is directed against majorities **[**18]** or minorities," *Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71-72, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977)*. As a result, we have stated that "Title VII should be interpreted broadly to achieve equal employment opportunity." *Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988)* (citing *Griggs v. Duke Power Co., 401 U.S. 424, 429-36, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)*).

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase "because of . . . **[*112]** sex." However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in "impermissible consideration of . . . sex . . . in employment practices" when "sex . . . was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors." *42 U.S.C. § 2000e-2(m)*. Accordingly, the critical inquiry for a court assessing whether an employment practice is "because of . . . sex" is whether sex was "a motivating factor." *Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 23 (2d Cir. 2014)*.

Recognizing that Congress intended to make sex "irrelevant" to employment decisions, *Griggs, 401 U.S. at 436*, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, **[**19]** *Manhart, 435 U.S. at 711*, and non-conformity with gender norms, *Price Waterhouse, 490 U.S. at 250-51*. As this Court has recognized, "any meaningful regime of

[6] Defendants' additional argument, which is that the executors of Zarda's estate lack standing to pursue this action, is premised on the representation that the sexual orientation claim under Title VII was not raised before the district court so the estate may not now raise that claim on the deceased plaintiff's behalf. Because we find that the sexual orientation claim was properly raised, we need not address this argument.

antidiscrimination law must encompass such claims" because, if an employer is "'[f]ree to add non-sex factors, the rankest sort of discrimination'" could be worked against employees by using traits that are associated with sex as a proxy for sex. *Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119 n.9 (2d Cir. 2004)* (quoting *Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969)* (Brown, *C.J.*, dissenting from denial of rehearing en banc)). Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just "the principal evil[s] Congress was concerned with when it enacted" the statute in 1964, but also "reasonably comparable evils" that meet the statutory requirements. *Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).*

With this understanding in mind, the question before us is whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex." *Hively, 853 F.3d at 343.*[7]

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex **[**20]** discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of . . . sex" is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an **[*113]** employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex.

1. Sexual Orientation as a Function of Sex

a. "Because of . . . sex"

We begin by considering the nature of sexual orientation discrimination. The term "sexual orientation" refers to "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females" and is commonly categorized as "heterosexuality, homosexuality, or bisexuality." **[**21]** *See Sexual Orientation*, Black's Law Dictionary (10th ed. 2014). To take one example, "homosexuality" is "characterized by sexual desire for a person of the same sex." *Homosexual, id.; see also Heterosexual, id.* ("Of, relating to, or characterized by sexual desire for a person of the opposite sex."); *Bisexual, id.* ("Of, relating to, or characterized by sexual desire for both males and females."). To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. *Hively, 853 F.3d at 358* (Flaum, *J.*, concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' [sex] . . . meaningless."). Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is **[**22]** also protected. *See id.* ("[D]iscriminating against [an] employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, and (B) their sexual attraction to individuals of the same sex.").[8]

Choosing not to acknowledge the sex-dependent nature

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[7] Importantly, Title VII protection does not hinge on whether sexual orientation discrimination is "synonymous with sex discrimination." *Hively, 853 F.3d at 363* (Sykes, *J.*, dissenting). While synonyms are coextensive, sex discrimination obviously encompasses more than sexual orientation discrimination, including sexual harassment and other recognized subsets of sex discrimination.

[8] The lead dissent rejects this "linguistic argument," Lynch, *J.*, Dissenting Op. at 29 (hereinafter "Lead Dissent"), and advocates that Title VII's prohibition must be understood in the context of the prejudices and popular movements animating national politics at the time the statute was enacted, particularly concerns about the sexual exploitation of women, *id.* at 15-28. But the dissent's account does not and cannot rebut the fact that sexual orientation is a sexdependent trait.

of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex.[9] In support of this assertion, they point to *Price Waterhouse*, where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the applicant or employee's sex. 490 U.S. at 250. Relying on this language, these *amici* argue that a "truthful" response to an inquiry about why an employee was fired would be "I fired him because he is gay," not "I fired him because he is a man." But this semantic sleight of hand is not a defense; it is a distraction. The employer's failure to reference gender directly does not change the fact that a "gay" employee is simply a man **[**23]** who is attracted to men. **[*114]** For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit *amici*'s argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. *See* 42 U.S.C. § 2000e-2(m). As a result, firing an employee because he is "gay" is a form of sex discrimination.[10]

The argument has also been made that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation[.]" *Hively*, 853 F.3d at 362 (Sykes, *J.*, dissenting). Even if that were so, the same could also be said of multiple forms of discrimination that are indisputably prohibited by Title VII, as the Supreme Court and lower courts have determined. Consider, for example, sexual harassment and hostile work environment claims, both of which were initially believed to fall outside the scope of Title VII's prohibition. **[**24]**

In 1974, a district court dismissed a female employee's claim for sexual harassment reasoning that "[t]he substance of [her] complaint [was] that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." *Barnes v. Train*, No. 1828-73, 1974 U.S. Dist. LEXIS 7212, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974). The district court concluded that this conduct, although "inexcusable," was "not encompassed by [Title VII]." *Id.* The D.C. Circuit reversed. Unlike the district court, it recognized that the plaintiff "became the target of her supervisor's sexual desires *because she was a woman*." *Barnes v. Costle*, 561 F.2d 983, 990, 183 U.S. App. D.C. 90 (D.C. Cir. 1977) (emphasis added). As a result the D.C. Circuit held that "gender cannot be eliminated from [plaintiff's formulation of her claim] and that formulation advances a prima facie case of sex discrimination within the purview of Title VII" because "it is enough that gender is a factor contributing to the discrimination." *Id.* Today, the Supreme Court and lower courts "uniformly" recognize sexual harassment claims as a violation of Title VII, *see, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), notwithstanding the fact that, as evidenced by the district court decision in *Barnes*, this was not necessarily obvious from the face of the statute.

The Supreme Court has also acknowledged **[**25]** that a "hostile work environment," although it "do[es] not appear in the statutory text," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), violates Title VII by affecting the "psychological aspects of the workplace environment," *Meritor*, 477 U.S. at 64 (internal quotation marks omitted). As Judge Goldberg, one of the early proponents of hostile work environment claims, explained in a case involving national origin discrimination,

> [Title VII's] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of **[*115]** such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971). Stated differently, because Congress could not

[9] Notably, the government concedes that "as a logical matter . . . [y]ou could view sexual orientation as a subset of sex," however the government also insists that it could be "view[ed] . . . as a distinct category." Oral Arg. Tr. at 53:17-20.

[10] Lest there be any doubt, this Court's holding that sexual orientation discrimination is a subset of sex discrimination encompasses discrimination based on a person's attraction to people of the opposite sex, same sex, or both.

anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used. *See* Pullman-Standard v. Swint, 456 U.S. 273, 276, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) ("Title VII is a broad remedial measure, designed 'to assure equality of employment opportunities.'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973))).

The Supreme **[**26]** Court gave voice to this principle of construction when it held that Title VII barred male-on-male sexual harassment, which "was assuredly not the principal evil Congress was concerned with when it enacted Title VII," Oncale, 523 U.S. at 79-80, and which few people in 1964 would likely have understood to be covered by the statutory text. But the Court was untroubled by these facts. "[S]tatutory prohibitions," it explained, "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination "because of . . . sex" would encompass sexual orientation discrimination does not limit the reach of the statute.

The dissent disagrees with this conclusion. It does not dispute our definition of the word "sex," Lead Dissent at 21, nor does it argue that this word had a different meaning in 1964. Instead, it charges us with "misconceiv[ing] the fundamental public meaning of the language of" Title VII. *Id.* at 16 (emphasis omitted). According to the dissent, the drafters included "sex" in Title VII **[**27]** to "secure the rights of women to equal protection in employment," *id.* at 20, and had no intention of prohibiting sexual orientation discrimination, *id.* at 14-15. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a "reasonably comparable evil," Oncale, 523 U.S. at 79, to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on "the principal concerns of our legislators," id. at 79-80-the centerpiece of the dissent's statutory analysis. Rather, Oncale instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed "by the provisions of our laws." *Id.* The text before us uses broad language, prohibiting discrimination "because of . . . sex," which Congress defined as making sex "a motivating factor." 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to **[**28]** sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.[11]

[*116] b. "But for" an Employee's Sex

Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the "comparative test," determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different "but for that person's sex." Manhart, 435 U.S. at 711 (internal quotation marks omitted). To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. Hively, 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). Id. at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively **[**29]** would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. *Id.*

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[11] This holding is easily operationalized. A standard jury instruction in a Title VII case alleging sex discrimination informs the jury that a plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated against the plaintiff because of sex, meaning that the plaintiff's sex was a motivating factor in the defendant's decision to take the alleged adverse employment action against the plaintiff. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). In a case alleging sexual orientation discrimination under Title VII, an instruction should add that "because of sex" includes actions taken because of sexual orientation.

The government,[12] drawing from the dissent in *Hively*, argues that this is an improper comparison. According to this argument, rather than "hold[ing] everything constant except the plaintiff's sex" the *Hively* majority's comparison changed "two variables-the plaintiff's sex and sexual orientation." *853 F.3d at 366* (Sykes, *J.*, dissenting). In other words, the Seventh Circuit compared a lesbian woman with a heterosexual man. As an initial matter, this observation helpfully illustrates that sexual orientation is a function of sex. In the comparison, changing Hively's sex changed her sexual orientation. Case in point.

But the real issue raised by the government's critique is the proper application of the comparative test. In the government's view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it's between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires **[**30]** understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male **[*117]** employee who both exhibit the trait at issue. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.

To understand how the test works in practice, consider *Manhart*. There, the Supreme Court evaluated the Los Angeles Department of Water's requirement that female employees make larger pension contributions than their male colleagues. *435 U.S. at 704-05*. This requirement was based on mortality data indicating that female employees outlived male employees by several years and the employer insisted that "the different contributions exacted from men and women were based on the factor of longevity rather than sex." *Id. at 712*. Applying "the simple test of whether the evidence shows treatment of a person in a manner which **[**31]** *but for* that person's sex would be different," the Court compared a woman and a man, both of whose pension contributions were based on life expectancy, and asked whether they were required to make different contributions. *Id. at 711* (internal quotation marks omitted). Importantly, because life expectancy is a sex-dependent trait, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable). After identifying this correlation, the Court concluded that life expectancy was simply a proxy for sex and therefore the pension policy constituted discrimination "because of . . . sex." *Id.*

We can also look to the Supreme Court's decision in *Price Waterhouse*. Although that case did not quote *Manhart*'s "but for" language, it involved a similar inquiry: in determining whether discrimination based on particular traits was rooted in sex stereotypes, the Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." *490 U.S. at 258*. Otherwise said, the Supreme Court compared **[**32]** a man and a woman who exhibited the plaintiff's traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender non-conformity.

The government's proposed approach to *Hively*, which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. To understand why this is incorrect, consider the mismatch between the facts in the government's comparison and the allegation at issue: Hively did not allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction. If she had, that would be classic sex discrimination against a subset of women. *See* Lead Dissent at 37 n.20. Instead, Hively claimed that her employer discriminated on the basis of sexual orientation. To address that allegation, the proper question is whether sex is a "motivating factor" in sexual orientation discrimination, *see* *42 U.S.C. § 2000e-2(m)*, or, said more simply, whether sexual orientation is a function of sex.[13] But, contrary **[**33]**

[12] Both the Department of Justice and the EEOC have filed *amicus* briefs in this case, the former in support of defendants and the latter in support of Zarda. Because EEOC attorneys represent only the Commission, *42 U.S.C. § 2000e-4(b)(2)*, while the Department of Justice has litigating authority on behalf of the United States, *28 U.S.C. § 517*, this opinion refers to the Department of Justice as "the government."

[13] The lead dissent trivializes the role of sex as a motivating

[*118] to the government's suggestion, this question cannot be answered by comparing two people with the same sexual orientation. That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. Instead, just as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, both of whom were attracted to women.

The government further counters that the comparative test produces false positives in instances where it is permissible to impose different terms of employment on men and women because "the sexes are not similarly situated." Gov. Br. at 16-17 (quoting *Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 469, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981)*).[14] For example, the government posits that courts have rejected the comparative test when assessing employer policies regarding sex-segregated bathrooms **[**34]** and different grooming standards for men and women. Similarly, the lead dissent insists that our holding would preclude such policies if "[t]aken to its logical conclusion." Lead Dissent at 35. Both criticisms are misplaced.

A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was "discriminate[d] against . . . with respect to his compensation, terms, conditions, or privileges of employment," and (2) that the employer discriminated "because of . . . sex." *42 U.S.C. § 2000e-2(a)(1)*. The comparative test addresses the second prong of that test; it reveals whether an employment practice is "because of . . . sex" by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose "disadvantageous terms or conditions of employment."[15] *Harris, 510 U.S. at 25* **[*119]** (Ginsburg, *J.*, concurring); *see, e.g., Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109-10 (9th Cir. 2006)* (upholding grooming standards that do not "place[] **[**35]** a greater burden on one gender than the other"); *Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975)* (concluding that "slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities"); *Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975)* (same); *Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336-37, 160 U.S. App. D.C. 9 (D.C. Cir. 1973)* (holding that hair-length regulations, like "the requirement that men and women use separate toilet facilities[,] . . . do not pose distinct employment disadvantages for one sex").[16] Whether

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factor by suggesting that an employer who discriminates on the basis of sexual orientation is merely "noticing" an employee's gender. Lead Dissent at 46. This argument, which implies that an employee's sexual orientation is the primary motivating factor while his or her sex is merely collateral, cannot be squared with the Supreme Court's case law. For example, in *Manhart*, the employer's argument that it was motivated by employee's life expectancy could not save its policy because, irrespective of the employer's intention or what it claimed to notice, life expectancy was a function of sex. *435 U.S. at 712-13*.

[14] Ironically, the quoted language from *Michael M.* references instances where men and women are differently situated *because of the discrimination* borne by women-the fact that they are assigned parental responsibility at the moment an infant is born, are generally paid less than men, and are excluded from positions that are necessary for subsequent promotions. *450 U.S. at 469* (collecting cases reflecting "the special problems of women" (internal quotation marks omitted)). The *Michael M.* Court acknowledged that, when the sexes are not similarly situated because of discrimination, statutes may impose different standards in the interest of leveling the playing field. *Id.* However, Title VII commands equal treatment of sexes and neither the text of the statute nor *Michael M.* creates an exception permitting employers to engage in disparate treatment of men and women simply because they exhibit biological differences.

[15] As alleged, Zarda's termination was plainly an adverse employment action that is covered by Title VII. *See 42 U.S.C. § 2000e-2(a)(1)* ("It shall be an unlawful employment practice for an employer . . . to discharge . . . any individual because of such individual's . . . sex . . . .").

[16] Arguably this approach is consistent with the Supreme Court's analysis in *Oncale*, which, after acknowledging that male-on-male harassment can be "because of . . . sex," qualified that not all remarks with "sexual content or connotations" rise to the level of discrimination. *523 U.S. at 79-80*.

sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is "because of . . . sex," and has no bearing on the efficacy of the comparative test.

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently "but for" his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function **[**36]** of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.[17]

2. Gender Stereotyping

Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping provides yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination. Specifically, this framework demonstrates that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.

Since 1978, the Supreme Court has recognized that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," because Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart, 435 U.S. at 707* & n.13. This is true of stereotypes about both how the sexes are and how they should be. *Price Waterhouse, 490 U.S. at 250* ("[A]n employer who acts on the basis of a belief that a woman cannot . . . or must not [possess certain traits] has acted **[*120]** on the basis of gender."); *see also* Zachary R. Herz, Note, Price's *Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, *124 Yale L.J. 396, 405-06 (2014)* (distinguishing between ascriptive stereotypes that "treat[] a large **[**37]** group of people alike" and prescriptive stereotypes that speak to how members of a group should be).

In *Price Waterhouse*, the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. *See 490 U.S. at 250-52* (plurality); *see also id. at 259* (White, *J.*, concurring in the judgment); *id. at 272-73* (O'Connor, *J.*, concurring in the judgment).[18] Similarly, *Manhart* stands for the proposition that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," and held that female employees could not, by virtue of their status as women, be discriminated against based on the gender stereotype that women generally outlive men. *435 U.S. at 707-08, 711*. Under these principles, employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, *id. at 708*, or "as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII," *Dawson, 398 F.3d at 218*.

Accepting that sex stereotyping violates **[**38]** Title VII, the "crucial question" is "[w]hat constitutes a gender-based stereotype." *Back, 365 F.3d at 119-20*. As demonstrated by *Price Waterhouse*, one way to answer this question is to ask whether the employer who evaluated the plaintiff in "sex-based terms would have

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[17] The lead dissent argues that this conclusion is out of sync with precedents prohibiting sexual harassment and hostile work environments because, while those cases addressed particular employment "practice[s]," today's decision extends protection to "an entirely different category of people." Lead Dissent at 22. But "persons discriminated against based on sexual orientation" is no more a new category than "persons discriminated against based on gender stereotypes." In both instances, a man or woman is discriminated against based on a trait that is a function of sex and their claims fall squarely within the ambit of a well-recognized category: "persons discriminated against based on sex."

[18] One *amicus* and the lead dissent interpret dicta in *Price Waterhouse* as establishing that sex stereotyping is discriminatory only when it pertains to traits that are required for the employee's job. *See 490 U.S. at 251* (observing that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not"). We think this narrow reading is an inaccurate statement of *Price Waterhouse*, which did not indicate that stereotyping is impermissible *only* when the stereotyped trait is required for the plaintiff's job, and it is directly contradicted by *Manhart*'s holding that discriminating against women based on their longer life expectancy, which was certainly not an employment requirement, violated Title VII. *435 U.S. at 710-11*.

criticized her as sharply (or criticized her at all) if she had been a man." *490 U.S. at 258*. Similarly, this Court has observed that the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex. *See* *Back, 365 F.3d at 120 n.10* (quoting *Doe ex rel. Doe v. City of Belleville, 119 F.3d 563, 581-82 (7th Cir. 1997)*).[19]

Applying *Price Waterhouse's* reasoning to sexual orientation, we conclude that when, for example, "an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but takes no such action against women who are attracted to men, **[*121]** the employer "has acted on the basis of gender." *Cf.* *490 U.S. at 250*.[20] This conclusion is consistent with *Hively*'s holding that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, *853 F.3d at 346* (majority), and aligns with numerous district courts' observation that "stereotypes **[**39]** about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The gender stereotype at work here is that 'real' men should date women, and not other men," *Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)*; *see also, e.g.,* *Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255, 269 (D. Conn. 2016)*; *Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015)*; *Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014)*; *Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002)*.[21]

This conclusion is further reinforced by the unworkability of *Simonton* and *Dawson*'s holding that sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. *See generally* *Hively v. Ivy Tech Cmty. Coll., S. Bend, 830 F.3d 698, 705-09 (7th Cir. 2016)* (panel op.) (collecting cases), *vacated by* *Hively, 853 F.3d 339* (en banc). Under this approach "a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho' but not if she was harassed or fired for being perceived as a lesbian." *Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016)*. In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag," "gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation. *See, e.g.,* ***[**40]*** *Kay v. Indep. Blue Cross, 142 F. App'x 48, 51 (3d Cir. 2005)*. Claims of gender discrimination have been "especially difficult for gay plaintiffs to bring," *Maroney v. Waterbury Hosp., No. 3:10-CV-1415, 2011 U.S. Dist. LEXIS 28262, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011)*, because references to a plaintiff's sexual orientation are generally excluded from the evidence, *Boutillier, 221 F. Supp. 3d at 269*, or permitted only when "the harassment consists of homophobic **[*122]** slurs directed at a *heterosexual*," *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., 169 F. Supp. 3d 320, 332-33 (N.D.N.Y. 2016)* (emphasis added). *But see* *Franchina, 881 F.3d at 53* (holding that jury may consider evidence referencing plaintiff's sexual orientation for purposes of a sex discrimination claim). Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is "illogical," *Philpott v. New York, 252 F. Supp.*

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[19] In this respect, discerning whether a stereotype is based on sex is closely aligned with the comparative test articulated in *Manhart*, which can illustrate both (1) whether a trait is a function of sex and (2) whether assumptions about that trait reflect a gender stereotype.

[20] Some *amici* insist that stereotypes are mere evidence of discrimination and that stereotyping does not, by itself, constitute sex discrimination. Beyond establishing an adverse employment action, a Title VII plaintiff must always adduce evidence that an employer discriminated "because of" a protected trait and the Court agrees that sex stereotyping is legally relevant as "evidence that gender played a part" in a particular employment decision. *Price Waterhouse, 490 U.S. at 251* (emphasis omitted). But, *Price Waterhouse*'s reference to the evidentiary value of stereotyping in no way undercuts it conclusion that an employer may not "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." *Id.* And, just as the Supreme Court concluded that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," *id. at 250*, this Court concludes that an employer who acts on the basis of a belief that an employee cannot or should not have a particular sexual orientation has acted on the basis of sex.

[21] The Sixth Circuit has expressed the same observation, albeit in a decision declining to apply *Price Waterhouse* to sexual orientation discrimination. *See* *Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006)* ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.").

3d 313, 2017 WL 1750398, at *2 (S.D.N.Y. 2017), and produces "untenable results," Boutillier, 221 F. Supp. 3d at 270. In the face of this pervasive confusion, we are persuaded that "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist save as a lingering and faulty judicial construct." Videckis, 150 F. Supp. 3d at 1159 (quoting Prowel, 579 F.3d at 291). We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

The government resists this conclusion, insisting that negative views of those attracted to members of the same sex may not be based **[**41]** on views about gender at all, but may be rooted in "moral beliefs about sexual, marital and familial relationships." Gov. Br. at 19. But this argument merely begs the question by assuming that moral beliefs about sexual orientation can be dissociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible. Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. For this reason, it makes no difference that the employer may not believe that its actions are based in sex. In *Manhart*, for example, the employer claimed its policy was based on longevity, not sex, but the Supreme Court concluded that, irrespective of the employer's belief, the longevity metric was predicated on assumptions about sex. 435 U.S. at 712-13. The same can be said of sexual orientation discrimination.

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an **[**42]** impermissible basis for employment decisions.[22] This is true irrespective of whether the belief is grounded in fact, as in Manhart, id. at 704-05, 711, or lacks "a malevolent motive," Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991). Indeed, in *Johnson Controls*, the Supreme Court concluded that an employer violated Title VII by excluding fertile women from jobs that involved exposure to high levels of lead, which can adversely affect the development of a fetus. 499 U.S. at 190, 200. As the Court emphasized, "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination" under Title VII. Id. at 200. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, "because of . . . sex."

[*123] The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men.[23] Gov. Br. at 19-20. We believe the government has it backwards. *Price Waterhouse*, read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms. *See* Oncale, 523 U.S. at 78 (holding that Title VII "protects **[**43]** men as well as women"); Price Waterhouse, 490 U.S. at 251 ("We are beyond the day when an employer could evaluate

[22] We express no view on whether some exception, either under a different provision of Title VII or under the Religious Freedom Restoration Act, might immunize from liability discriminatory conduct rooted in religious beliefs.

[23] The lead dissent offers a variation on this argument, reasoning that prescriptive views about sexual orientation rest not on "a belief about what men or women ought to be or do," but "a belief about what *all* people ought to be or do," Lead Dissent at 52, which is to say, a belief that all people should be attracted to the opposite sex. *See also* Hively, 853 F.3d at 370 (Sykes, *J.*, dissenting) ("To put the matter plainly, heterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all."). It invokes the same idea when it contends that sexual orientation discrimination is not a function of sex because it "does not differentially disadvantage employees or applicants of either sex." Lead Dissent at 37. We think the dissent goes astray by getting off on the wrong foot. The dissent views the "key element" as whether "one sex is systematically disadvantaged in a particular workplace." *Id.* at 51. But Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* . . . sex." *See* 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also* Manhart, 435 U.S. at 708 ("The statute's focus on the individual is unambiguous."). Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. And this means that a man and a woman are both entitled to protection from the same type of discrimination, provided that in each instance the discrimination is "because of such individual's . . . sex." As we have endeavored to explain, sexual orientation discrimination is because of sex.

employees by assuming or insisting that they matched the stereotype associated with their group."). It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.[24]

[*124] 3. Associational Discrimination

The conclusion that sexual orientation discrimination is a subset of sex discrimination is further reinforced by viewing this issue through the lens of associational discrimination. Consistent with the nature **[**44]** of sexual orientation, in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes. For example, when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex. *See* Baldwin, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641, at *6.

This Court recognized associational discrimination as a violation of Title VII in Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008), a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court concluded that Holcomb had stated a viable claim, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id. at 138*. Although the Court considered the argument that the alleged discrimination was based on the race of Holcomb's wife rather than his own, it ultimately concluded that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee **[**45]** suffers discrimination because of the employee's *own* race." *Id. at 139*; *see also* Whitney v. Greater N.Y. Corp. of Seventh Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) ("[I]f [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.").

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. *See* Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994-95 (6th Cir. 1999) (holding that plaintiff had alleged discrimination where the employer was "charged with reacting adversely to [plaintiff] because of [his] race in relation to the race of his daughter"); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999)* (en banc); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Other circuits have indicated that associational discrimination extends beyond race to all

[24] The *Hively* dissent also argued that sexual orientation discrimination is not a form of sex discrimination because it does not discriminate comprehensively *within* a sex. In particular, the dissent suggested that in cases where a fired lesbian employee was replaced by a heterosexual woman a jury would not be able to understand that sexual orientation discrimination is a subset of sex discrimination. *See* 853 F.3d at 373. We think that jurors are capable of understanding that an employer might discriminate against some members of a sex but not others. To wit, the intuitive principle that "Title VII does not permit the victim of [discrimination] to be told that he [or she] has not been wronged because other persons of his or her race or sex were hired" is well established in the law. Connecticut v. Teal, 457 U.S. 440, 455, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982). By way of illustration, had the plaintiff in *Price Waterhouse* been denied a promotion while a gender-conforming woman was made a partner, this would have strengthened rather than weakened the plaintiff's case that she was discriminated against for failing to conform to sex stereotypes. We see no more difficulty with the concept that an employer cannot discriminate on the basis of sexual orientation than with the concept that one cannot discriminate based on an employee's gender non-conformity.

of Title VII's protected **[**46]** classes. *See* Hively, 853 F.3d at 349 (majority) (holding that Title VII prohibits associational discrimination on the basis of race as well as color, national origin, religion, and sex); Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) (stating, in the context of a race discrimination case, that "Title VII protects individuals **[*125]** who, though not members of a *protected class*, are victims of discriminatory animus toward protected third persons with whom the individuals associate" (internal quotation marks omitted) (emphasis added)).[25] We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.

This conclusion is consistent with the text of Title VII, which "on its face treats each of the enumerated categories exactly the same" such that "principles . . . announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa.[26] Price Waterhouse, 490 U.S. at 243 n.9. It also accords with the Supreme Court's application of theories of discrimination developed in Title VII race discrimination cases to claims involving discrimination based on sex. *See* Meritor, 477 U.S. at 63-67 (concluding that **[**47]** claims of hostile work environment, a theory of discrimination developed in the context of race, were equally applicable in the context of sex); *see also* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 349 (2017) (explaining that the 1972 amendments to Title VII "repeatedly equated the evils of sex discrimination with those of race discrimination").

As was observed in *Christiansen*, "[p]utting aside romantic associations," the notion that employees should not be discriminated against because of their association with persons of a particular sex "is not controversial." 852 F.3d at 204 (Katzmann, *C.J.*, concurring). If an employer disapproves of close friendships among persons of opposite sexes and fires a female employee because she has male friends, the employee has been discriminated against because of her own sex. "Once we accept this premise, it makes little sense to carve out same-sex [romantic] relationships as an association to which these protections do not apply." *Id.* Applying the reasoning of Holcomb, if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered **[**48]** associational discrimination based on his own sex because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him." Baldwin, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641, at *6.

In this scenario, it is no defense that an employer requires both men and women to refrain from same-sex attraction or relationships. In *Holcomb*, for example, the white plaintiff was fired for his marriage to a black woman. *See* 521 F.3d at 138. If the facts of *Holcomb* had also involved a black employee fired for his marriage to a white woman, would we have said that because both the white employee **[*126]** and black employee were fired for their marriages to people of different races, there was no discrimination "because of . . . race"? Of course not.[27] It is unthinkable that "tak[ing] action against an employee because of the employee's association with a person of another race," *id.* at 139, would be excused because two employees of different races were both victims of an anti-miscegenation workplace policy. The same is true of discrimination based on sexual orientation.[28]

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[25] In addition, numerous district courts throughout the country have recognized that employers violate Title VII when they discriminate against employees on the basis of association with people of another national origin or sex, not only with people of another race. *See, e.g., Montes v. Cicero Pub. Sch. Dist.* No. 99, 141 F. Supp. 3d 885, 900 (N.D. Ill. 2015) (national origin); Morales v. NYS Dep't of Labor, 865 F. Supp. 2d 220, 242-43 (N.D.N.Y. 2012), *aff'd*, 530 F. App'x 13 (2d Cir. 2013) (summary order) (race and national origin); Kauffman v. Maxim Healthcare Servs., Inc., No. 04-CV-2869, 2006 U.S. Dist. LEXIS 47514, 2006 WL 1983196, at *4 (E.D.N.Y. July 13, 2006) (sex and race); Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1460 (D. Colo. 1985) (race and national origin).

[26] The only exception, not relevant here, is for a "bona fide occupational qualification," which permits some differential treatment based on religion, sex, or national origin, but not based on race. 42 U.S.C. § 2000e-2(e).

[27] Indeed, if this were the case, the white employee *and* the black employee would have cognizable Title VII claims. *Cf.* Hively, 853 F.3d at 359 n.2 (Flaum, *J.*, concurring) (noting that "even if an employer allegedly discriminates against all homosexual employees," the "employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that *each individual* has a plausible sex-based discrimination claim" (emphasis added)).

[28] The lead dissent seeks to distinguish *Holcomb* by arguing

Although this conclusion can rest on its own merits, it is reinforced by the reasoning of *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*. In *Loving*, the Commonwealth of Virginia **[**49]** argued that anti-miscegenation statutes did not violate the *Equal Protection Clause* because such statutes applied equally to white and black citizens. *See id. at 7-8*. The Supreme Court disagreed, holding that "equal application" could not save the statute because it was based "upon distinctions drawn according to race." *Id. at 10-11*. Constitutional cases like *Loving* "can provide helpful guidance in [the] statutory context" of Title VII. *Ricci v. DeStefano, 557 U.S. 557, 582, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)*; *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, *115 Harv. L. Rev. 947, 949 (2002)* (arguing that, in the constitutional context, "the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination"). Accordingly, we find that *Loving*'s insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex.

Certain *amici* supporting the defendants disagree, arguing that applying *Holcomb* and *Loving* to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these *amici* offer no empirical support for this contention, *amici* supporting Zarda cite research **[**50]** suggesting that sexual orientation discrimination has deep misogynistic roots. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, *69 N.Y.U. L. Rev. 197 (1994)*. But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, **[*127]** this approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale*, the Court explicitly rejected the argument that Title VII did not protect male employees from sexual harassment by male co-workers, holding that "Title VII's prohibition on discrimination 'because of . . . sex' protects men as well as women" and extends to instances where the "plaintiff and the defendant . . . are of the same sex." *523 U.S. at 78-79*. This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. **[**51]** *435 U.S. at 711*. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination "because of . . . sex."[29]

The fallback position for those opposing the associational framework is that associational discrimination can be based only on acts—such as Holcomb's act of getting married—whereas sexual orientation is a status. As an initial matter, the Supreme Court has rejected arguments that would treat acts as separate from status in the context of sexual orientation. In *Lawrence v. Texas*, the state argued that its "sodomy law [did] not discriminate against homosexual persons," but "only against homosexual conduct." *539 U.S. 558, 583, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* (O'Connor, *J.*, concurring). Justice O'Connor refuted this argument, reasoning that laws that target "homosexual conduct" are "an invitation to subject homosexual persons to discrimination." *Id.* More recently, in a *First Amendment* case addressing whether a public university could require student organizations to be open to all students, a religious student **[**52]** organization claimed that it should be permitted to exclude anyone who engaged in "unrepentant

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that the employer in *Holcomb* was prejudiced against black people, whereas here the employer is "hostile to gay men, not men in general." Lead Dissent at 57. But, this distorts the comparison by misattributing the prejudice at issue in *Holcomb*. The basis of the Title VII claim in *Holcomb* was not the race of the plaintiff's wife; rather, the plaintiff, who was white, "suffer[ed] discrimination because of his *own* race" as a result of the employer's "disapprov[al] of interracial association." *521 F.3d at 139*. Accordingly, the prejudice was not against all black people (or all white people) but against people marrying persons of a different race. That maps squarely onto this case where the prejudice is not against all men, but people being attracted to persons of the same sex.

[29] To the extent that *amici* are arguing that racism and sexism are necessary elements of a Title VII claim because these beliefs are invidious or malicious, we think their contentions are misguided. Malice, which the Supreme Court has described as an "evil motive," is not required by Title VII, *Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 530, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999)*; to the contrary, it is merely a basis on which an aggrieved employee may seek punitive damages, *see 42 U.S.C. § 1981a(b)(1)*.

homosexual conduct," because such individuals were being excluded "on the basis of a conjunction of [their] conduct and [their] belief that the conduct is not wrong," not because of their sexual orientation. *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 672, 689, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010)* (internal quotation marks omitted). Drawing on *Lawrence* and *Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993)*, a case brought under *42 U.S.C. § 1985(3)*, the Supreme Court rejected the invitation to treat discrimination based on acts as separate from discrimination based on status. *Christian Legal Soc., 561 U.S. at 689*; *see also Bray, 506 U.S. at 270* (rejecting the act-status distinction by observing that "[a] tax on wearing yarmulkes is a tax on Jews"). Although *amici*'s argument inverts the previous defenses of policies targeting individuals attracted to persons of the same sex by arguing that Title VII's prohibition of associational discrimination protects only acts, not status, their proposed distinction is equally unavailing.

[*128] More fundamentally, *amici*'s argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by "disapprov[al] of [a particular type of] association." **[**53]** *See Holcomb, 521 F.3d at 139*; *see also 42 U.S.C. § 2000e-2(m)* (asking whether the protected trait was "a motivating factor"). In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic, which is a status. *Holcomb, 521 F.3d at 139*; *Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 133 S. Ct. 2517, 2522, 186 L. Ed. 2d 503 (2013)* (defining "status-based discrimination," which is "prohibited by Title VII," as "discrimination on the basis of race, color, religion, sex, or national origin"). Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. *See 42 U.S.C. § 2000e-2(m)*.[30]

In sum, we see no principled basis for recognizing a violation of Title VII for associational discrimination based on race but not on sex. Accordingly, we hold that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination "because of . . . sex." Therefore, it is no less repugnant to Title VII than anti-miscegenation policies.

C. Subsequent Legislative [**54] Developments

Although the conclusion that sexual orientation discrimination is a subset of sex discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place substantial weight on subsequent legislative developments that they argue militate against interpreting "because of . . . sex" to include sexual orientation discrimination.[31] Having carefully considered each of *amici*'s arguments, we find them unpersuasive.

First, the government points to the *Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)*, arguing that this amendment to Title VII ratified judicial decisions construing discrimination "because of . . . sex" as excluding sexual orientation discrimination. Among other things, the 1991 amendment expressly "codif[ied] the concepts of 'business necessity' and 'job related'" as articulated in *Griggs, 401 U.S. at 429-31*, and rejected the Supreme Court's prior decision on that topic in *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)*. *See* Civil Rights Act of 1991 §§ 2(2), **[*129]** *3(2), 105 Stat. at 1071*. According to the government, this amendment also implicitly ratified the decisions of the four courts of appeals that had, as of 1991, held that Title VII does not bar discrimination based on sexual orientation.

In advancing this argument, the government attempts to

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[30] Because associational discrimination is premised on the employer's motivation and an employee's status, an associational discrimination claim does not require an act that consummates an association. For example, consider a scenario in which Holcomb had not been married to a black woman but merely expressed an interest in dating black women. If the employer terminated Holcomb merely on the basis of his desire to date black women, this would still be an instance "where an employee is subjected to adverse action because an employer disapproves of interracial association," and "the employee suffers discrimination because of the employee's *own* race." *Holcomb, 521 F.3d at 139*. The same is true in the context of sexual orientation.

[31] Because "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," we have "little legislative history to guide us in interpreting" it. *Meritor, 477 U.S. at 63-64*.

analogize **[**55]** the 1991 amendment to the Supreme Court's recent discussion of an amendment to the *Fair Housing Act* ("FHA"). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Court considered whether disparate-impact claims were cognizable under the FHA by looking to, *inter alia*, a 1988 amendment to the statute. *135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015)*. The Court found it relevant that "all nine Courts of Appeals to have addressed the question" by 1988 "had concluded [that] the [FHA] encompassed disparate-impact claims." *Id. at 2519*. When concluding that Congress had implicitly ratified these holdings, the Court considered (1) the amendment's legislative history, which confirmed that "Congress was aware of this unanimous precedent," *id.*, and (2) the fact that the precedent was directly relevant to the amendment, which "included three exemptions from liability that assume the existence of disparate-impact claims," *id. at 2520*.

The statutory history of Title VII is markedly different. When we look at the 1991 amendment, we see no indication in the legislative history that Congress was aware of the circuit precedents identified by the government and, turning to the substance of the amendment, we have no reason to believe **[**56]** that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII. It is also noteworthy that, when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination.[32] *See Williamson, 876 F.2d 69*; *DeSantis v. PT&T Co., 608 F.2d 327 (9th Cir. 1979)*; *Blum, 597 F.2d 936*. Mindful of this important context, this is not an instance where we can conclude that Congress was aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation. Indeed, the inference suggested by the government is particularly suspect given that the text of the 1991 amendment emphasized that it was "respond[ing] to Supreme Court decisions by *expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991 §§ 2(2), *3(2), 105 Stat. at 1071* (emphasis added). For these reasons, we do not consider the 1991 amendment to have ratified the interpretation of Title VII as excluding sexual orientation discrimination.

Next, certain *amici* argue that by not enacting legislation expressly prohibiting sexual orientation discrimination in **[**57]** the workplace Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII. According to the government's *amicus* brief, almost every Congress since 1974 has considered **[*130]** such legislation but none of these bills became law.

This theory of ratification by silence is in direct tension with the Supreme Court's admonition that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly when "it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990)* (citations and internal quotation marks omitted). This is because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." *Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)* (internal quotation marks omitted). After all, "[t]here are many reasons Congress might not act on a decision . . . , and most of them have nothing at all to do with Congress' desire to preserve the decision." *Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2052, 188 L. Ed. 2d 1071 (2014)* (Thomas, *J.*, dissenting). For example, Congress may be unaware of or indifferent to the status quo, or it may be unable "to agree upon how to alter the status quo." *Johnson v. Transp. Agency, 480 U.S. 616, 672, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987)* (Scalia, *J.*, dissenting). **[**58]** These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction on the bills identified by the government. *See LTV Corp., 496 U.S. at 659* ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal quotation marks omitted)). Accordingly, we decline to assign congressional silence a meaning it will not bear.

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[32] The fourth case cited by the government involved allegations of discrimination against a transgender individual, a distinct question not at issue here. *See Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084-87 (7th Cir. 1984)*. In addition, of the three cases actually on point, two predate *Price Waterhouse*, which was decided in May 1989, while the third was issued one month after *Price Waterhouse* but made no mention of it. Given that these cases did not have the opportunity to apply a relevant Supreme Court precedent, even if Congress was aware of them, there was reason for Congress to regard the weight of these cases with skepticism.

Drawing on the dissent in *Hively*, the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* 853 F.3d at 363-64 (Sykes, *J.*, dissenting). While it is true that Congress has sometimes used the terms "sex" and "sexual orientation" separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms **[**59]** are used in "the same act." *See* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574, 127 S. Ct. 1423, 167 L. Ed. 2d 295 (2007). By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 936 (2013), and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013)*; *Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010)*; *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C)*, § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); *Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998)*.

[*131] Moreover, insofar as the government argues that mention of "sexual orientation" elsewhere in the U.S. Code is evidence that "because of . . . sex" should not be interpreted to include "sexual orientation," our race discrimination jurisprudence demonstrates that this is not dispositive. We have held that Title VII's prohibition on race discrimination encompasses discrimination on the basis of ethnicity, *see* Vill. of Freeport v. Barrella, 814 F.3d 594, 607 (2d Cir. 2016), notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately, *see, e.g.*, 20 U.S.C. § 1092(f)(1)(F)(ii); 42 U.S.C. § 294e-1(b)(2). The same can be said of **[**60]** sex and sexual orientation because discrimination based on the former encompasses the latter.

In sum, nothing in the subsequent legislative history identified by the *amici* calls into question our conclusion that sexual orientation discrimination is a subset of sex discrimination and is thereby barred by Title VII.

III. Summary

Since 1964, the legal framework for evaluating Title VII claims has evolved substantially.[33] Under *Manhart*, traits that operate as a proxy for sex are an impermissible basis for disparate treatment of men and women. Under *Price Waterhouse*, discrimination on the basis of sex stereotypes is prohibited. Under Holcomb, building on Loving, it is unlawful to discriminate on the basis of an employee's association with persons of another race. Applying these precedents to sexual orientation discrimination, it is clear that there is "no justification in the statutory language . . . for a categorical rule excluding" such claims from the reach of Title VII. Oncale, 523 U.S. at 80; *see also* Baldwin, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641, at *9 ("Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay, or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the **[**61]** text that Congress has not included.").

Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational

[33] We also note that there has been a sea change in the constitutional framework governing same-sex marriage. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). In the wake of this transformation, the intersection of the modern constitutional framework and decades-old precedents regarding sexual orientation discrimination under Title VII created a "paradoxical legal landscape" in which a man could exercise his constitutional right to marry his same-sex partner on Saturday and "then be fired on Monday for just that act." Hively, 830 F.3d at 714 (majority). This decision frees this circuit's jurisprudence regarding sexual orientation from that paradox.

discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation **[*132]** discrimination is a form of sex discrimination.

Although sexual orientation discrimination is "assuredly not the principal evil that Congress **[**62]** was concerned with when it enacted Title VII," "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale, 523 U.S. at 80.* In the context of Title VII, the statutory prohibition extends to all discrimination "because of . . . sex" and sexual orientation discrimination is an actionable subset of sex discrimination. We overturn our prior precedents to the contrary to the extent they conflict with this ruling. *See Simonton, 232 F.3d at 35; Dawson, 398 F.3d at 218-20.*

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Zarda has alleged that, by "honestly referr[ing] to his sexual orientation," he failed to "conform to the straight male macho stereotype." J.A. 72. For this reason, he has alleged a claim of discrimination of the kind we now hold cognizable under Title VII. The district court held that there was sufficient evidence of sexual orientation discrimination to survive summary judgment on Zarda's state law claims. Even though Zarda lost his state sexual orientation discrimination claim at trial, that result does not preclude him from prevailing on his federal claim because his state law claim was tried under "a higher standard of causation than required by Title VII." *Zarda, 855 F.3d at 81.* Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination **[**63]** based on sexual orientation.

Concurring and dissenting opinions omitted; available at https://casetext. com/case/zarda-v-altitude-express-inc-1

Posted Tue, September 3rd, 2019 12:33 pm

Symposium: Justices to consider federal employment protection for LGBT employees

AMY HOWE

On Monday, October 7, the first Monday in October, the justices of the Supreme Court will return to the bench for the first oral arguments of the new term. The next day, the court will tackle a trio of cases that could prove to be some of the biggest of the term. At issue is whether federal employment discrimination laws, first passed by Congress in 1964, that bar discrimination "because of sex" protect gay, lesbian and transgender employees.

First up on October 8 are the cases of Donald Zarda and Gerald Bostock, which will be argued together. Zarda (who died in 2014, and who is represented in the Supreme Court by the executors of his estate) was a skydiving instructor who sometimes told female clients that he was gay to make them feel more comfortable when they were strapped to him for a jump. Gerald Bostock received good performance reviews while working as the child-welfare-services coordinator for Clayton County, Georgia, for over a decade. Both men were fired – according to them, because they were gay. Zarda and Bostock went to federal court in New York and Georgia, respectively, where they argued that firing them because they were gay violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination "because of sex." The U.S. Court of Appeals for the 11th Circuit ruled that Bostock's case could not go forward, because Title VII does not apply to discrimination based on sexual orientation. But the U.S. Court of Appeals for the 2nd Circuit reached the opposite conclusion: It reasoned that discrimination based on sexual orientation is a "subset of sex discrimination."

Bostock asked the justices to review the 11th Circuit's ruling, while Altitude Express – Zarda's former employer – did the same for the 2nd Circuit's decision. After considering the two cases at 11 consecutive conferences, the Supreme Court announced that it would take up both appeals.

In their briefs in the Supreme Court, Bostock and Zarda argue that the text of Title VII clearly applies to discrimination based on sexual orientation: Someone who is fired or otherwise the victim of discrimination because of his sexual orientation – in their cases, for being men who are attracted to men – is undoubtedly a victim of discrimination because of his sex. After all, they reason, a woman would not have been fired for being attracted to men. Moreover, Title VII also bars employers from discriminating against individuals who do not conform to conventional gender stereotypes such as the idea that women should be attracted to men and men should be attracted to women.

The fact that Title VII's ban on employment discrimination "because of sex" plainly encompasses discrimination based on sexual orientation, Bostock and Zarda continue, is all that matters, even if the Congress that enacted Title VII may not have intended to protect gay and lesbian employees. They point to a unanimous 1998 Supreme Court decision, authored by the late Justice Antonin Scalia, holding that same-sex sexual harassment can violate Title VII. In that case, Scalia wrote that although "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

Altitude Express and Clayton County push back, arguing that a ruling for Bostock and Zarda would "rewrite" Title VII. Title VII does not bar discrimination based on sexual orientation, they stress. All that Title VII does, Altitude Express contends, is ban employers from treating "employees of one sex better – or worse – than the other sex and doing so because" they are men or women. Title VII does not "reach – and certainly no one in 1964 would have thought it reached – employment actions based on sexual orientation, because those actions do not disadvantage employees of a particular sex."

In any event, Altitude Express and Clayton County continue, this is a complicated issue that is best suited for Congress, rather than the courts, to resolve. They note that Congress has repeatedly considered whether to make clear that Title VII bars discrimination based on sexual orientation, but it has declined to do so.

As might be expected in such a high-profile pair of cases, each side has garnered an array of "friend of the court" briefs. Over three dozen separate briefs were filed in support of Bostock and Zarda, including one brief by 206 companies – including business giants such as Apple, Facebook, Uber, Walt Disney and Coca-Cola. The businesses tell the justices that a ruling that Title VII bans discrimination based on sexual orientation would not be "unreasonably costly or burdensome" for employers. In fact, they suggest, making clear that Title VII prohibits sexual-orientation discrimination would create benefits for businesses, from providing "consistency and predictability" nationwide to making it easier to "recruit and retain top talent."

Clayton County and Altitude Express have slightly fewer allies, with just over two dozen "friend of the court" briefs supporting them. But significantly for them, the federal government filed a brief that echoes the defendants' argument that Title VII's ban on discrimination "because of sex" only bars employers from treating members of one sex differently from members of the opposite sex. The government adds that "Congress of course remains free to legislate in this area; and employers, including governmental employers, remain free to offer greater protections to their workers than Title VII requires." (Indeed, the government notes, in April of this year Attorney General William Barr specifically barred discrimination based on sexual orientation and gender identity at the Department of Justice.) But, the government concludes, "those are policy determinations, currently left to political and private actors, not the courts."

The second case on October 8 involves Aimee Stephens, who worked for six years as a funeral director and embalmer at R.G. & G.R. Harris Funeral Homes in Michigan. When Stephens began work at Harris Funeral Homes in October 2007, she dressed and appeared as a man and went by the name of Anthony. But when Stephens disclosed in 2013 that she intended to live and work as a woman for a year and would then have sex-reassignment surgery, the funeral home fired her. The owner of the funeral home, Thomas Rost, later testified that he fired Stephens because Stephens "was no longer going to represent himself as a man. He wanted to dress as a woman" – which Rost, who is a devout Christian, believes would violate "God's commands."

Stephens filed a discrimination charge with the Equal Employment Opportunity Commission, which filed a complaint against the funeral home in 2014. The EEOC alleged that firing Stephens because she is transgender violated Title VII. A federal district court agreed with the funeral home that Title VII's protections do not apply to transgender employees, but the U.S. Court of Appeals for the

6th Circuit reversed. The funeral home asked the Supreme Court to take up its case, and last spring the justices agreed to decide whether Title VII bars discrimination against transgender people, either because they are transgender or because the law bans sex stereotyping.
Stephens' arguments in her brief on the merits are analogous to those made by Bostock and Zarda. She emphasizes that discrimination occurs "because of sex" when someone is treated differently based on his or her sex. Even if Title VII only applies to the sex that an individual is assigned at birth, she contends, discrimination based on transgender status is still a decision made "because of sex": In her case, if she had been "assigned a female rather than a male sex at birth," the funeral home "would not have fired her for living openly as a woman."

Stephens contends that the funeral home also violated Title VII when it fired her because she did not "conform to its owner's views of how men and women should identify, look, and act." The Supreme Court, Stephens explains, "has long recognized that discharging an employee because of the employer's sex-based stereotypes violates Title VII."

The funeral home counters that what matters is the meaning of sex discrimination when Congress enacted Title VII in 1964. "In 1964, as today," it tells the justices, such discrimination occurs "when employers favor men over women, or vice versa, because of their sex. That is what Title VII forbids." Because the funeral home would have treated a female employee who wanted to dress as a man the same way it treated Stephens, it concludes, there is no discrimination here.

The funeral home warns that a ruling for Stephens will have sweeping implications. Not only will it rob women and girls of fair chances in sports, but it may require doctors and hospitals to "provide transition services even in violation of their religious beliefs."

U.S. Solicitor General Noel Francisco filed a brief on behalf of the EEOC – which had originally filed the complaint against the funeral home – arguing that the 6th Circuit's ruling should be reversed. Just as Title VII's bar on discrimination "because of sex" does not apply to discrimination based on sexual orientation, the government contends, it also does not ban discrimination based on transgender status "as such." Instead, Title VII only bans employers from treating women less favorably than men in the same position, and vice versa.

Similarly, the government continues, discrimination against transgender people because they don't conform to sex-based stereotypes about how men and women should behave does not, standing alone, violate Title VII. "Title VII's protections apply fully to transgender individuals," the government explains, "but the fact that a plaintiff is transgender does not change the legal standard or analysis": A transgender plaintiff still must show "that an employer treated members of one sex less favorably than" members of the opposite sex in the same position.

Before his retirement in 2018, Justice Anthony Kennedy provided the key vote in several cases involving gay rights. During the oral arguments in October, all eyes will likely be on Kennedy's successor, Justice Brett Kavanaugh, who in his first term on the court assumed (at least to some extent) Kennedy's role as a swing justice. But another Trump appointee, Justice Neil Gorsuch, could also play a pivotal role: Gorsuch has followed in the footsteps of Scalia, whom he succeeded, in demonstrating his devotion to the text of the statute. And no matter how the case comes out, the Supreme Court is likely to issue its decision in the spring or summer of 2020, potentially putting the court front and center in the presidential election.

Amy Howe, *Symposium: Justices to consider federal employment protection for LGBT employees*, SCOTUSBLOG (Sep. 3, 2019, 12:33 PM), https://www.scotusblog.com/2019/09/symposium-justices-to-consider-federal-employment-protection-for-lgbt-employees/

Hernandez v. Mesa

United States Court of Appeals for the Fifth Circuit

March 20, 2018, Filed

No. 12-50217

Reporter
885 F.3d 811 *; 2018 U.S. App. LEXIS 7161 **; 2018 WL 1391730

JESUS C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca; MARIA GUADALUPE GUERECA BENTACOUR, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez, Plaintiffs - Appellants v. JESUS MESA, JR., Defendant - Appellee

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Later proceeding at *Hernandez v. Mesa, 139 S. Ct. 306, 202 L. Ed. 2d 16, 2018 U.S. LEXIS 5471 (U.S., Oct. 1, 2018)*

US Supreme Court certiorari granted by, in part *Hernndez v. Mesa, 2019 U.S. LEXIS 3691 (U.S., May 28, 2019)*

Motion granted by *Hernandez v. Mesa, 2019 U.S. LEXIS 4278 (U.S., June 24, 2019)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas.

Hernandez v. Mesa, 137 S. Ct. 2003, 198 L. Ed. 2d 625, 2017 U.S. LEXIS 4059 (U.S., June 26, 2017)

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Judges: Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit **[**3]** Judges.* EDITH H. JONES, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, DAVIS, SMITH, DENNIS,** CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES,*** HIGGINSON, and COSTA, Circuit Judges.

Opinion

[*814] ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This appeal returned to the court en banc following remand from the United States Supreme Court. Prompted by the High Court, we have carefully considered a question antecedent to the merits of the Hernandez family's claims against United States Customs & Border Patrol Agent Mesa: whether federal courts have the authority to craft an implied damages action for alleged constitutional violations in this case. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) [hereinafter *Bivens*]. We hold that this is not a garden variety excessive force case against a federal law enforcement officer. The transnational aspect of the facts presents a "new context" under *Bivens*, and numerous "special factors" counsel against federal courts' interference with the Executive and Legislative branches of the federal government.

BACKGROUND

Because the plaintiffs' claims were dismissed on the pleadings, the alleged facts underlying this tragic event are taken as true. Fed. R. Civ. P. 12(b)(6); Toy v. Holder, 714 F.3d 881, 883 (5th Cir. 2013). Sergio Hernandez was a 15-year-old Mexican citizen without **[**4]** family in, or other ties to, the United States. On June 7, 2010, while at play, he had taken a position on the Mexican side of a culvert that marks the boundary between Ciudad Juarez, Mexico, and El Paso, Texas. The FBI reported that Agent Mesa was engaged in his law enforcement duties when a group of young men began throwing rocks at him from the Mexican side of the border. From United States soil, the agent fired several shots toward the assailants. Hernandez was fatally wounded.

Hernandez's parents alleged numerous claims in a federal lawsuit against Agent Mesa, other Border Patrol officials, several federal agencies, and the United States government. The federal district court dismissed all claims, but was reversed in part by a divided panel of this court. Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014). The panel decision allowed only a *Bivens* claim, predicated on Fifth Amendment substantive due process, to proceed against Agent Mesa alone. Id. at 277. This court elected to rehear the appeal en banc. Without ruling on the cognizability of a *Bivens* claim in the first instance,[1] we concluded unanimously that the plaintiffs' claim under the Fourth Amendment failed on the merits and that Agent Mesa was shielded by qualified immunity from any claim under the Fifth Amendment. We rejected **[**5]** the plaintiffs' remaining claims. *See* Hernandez v. Mesa, 785 F.3d 117, 119 (5th Cir. 2015) (en banc).

The Supreme Court granted certiorari and heard this case in conjunction with Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). In *Abbasi*, the Court reversed the Second Circuit and refused to imply a *Bivens* claim against policymaking officials involved in terror **[*815]** suspect detentions following the 9/11 attacks. The Court, however, remanded for reconsideration by the appeals court whether a *Bivens* claim might still be maintained against a prison warden.

The Court's decision in this case tagged onto *Abbasi* by rejecting this court's approach and ordering a remand for us to consider the propriety of allowing *Bivens* claims to proceed on behalf of the Hernandez family in light of *Abbasi*'s analysis.

DISCUSSION

The plaintiffs assert that Agent Mesa used deadly force

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* Judges Jolly and Davis, now Senior Judges of this court, participated in the consideration of this en banc case. Judges Willett and Ho joined the court after this case was submitted and did not participate in the decision.

** Judge Dennis concurs in the judgment.

*** Judge Haynes concurs in the judgment and with the majority opinion's conclusion that Bivens should not extend to the circumstances of this case.

[1] *See* Hernandez v. United States, 785 F.3d 117, 128-33 (5th Cir. 2015) (en banc) (Jones, J., concurring).

without justification against Sergio Hernandez, violating the Fourth and Fifth Amendments, where the fatal shot was fired across the international border. No federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. Thus, plaintiffs' recovery of damages is possible only if the federal courts approve a *Bivens* implied cause of action. *Abbasi* instructs us to determine **[**6]** initially whether these circumstances present a "new context" for *Bivens* purposes, and if so, whether "special factors" counsel against implying a damages claim against an individual federal officer. To make these determinations, we review *Abbasi*'s pertinent discussion about "*Bivens* and the ensuing cases in [the Supreme Court] defining the reach and the limits of that precedent." *Abbasi, 137 S. Ct. at 1854.*

In *Abbasi*, the Court begins by explaining that when Congress passed what is now *42 U.S.C. § 1983* in 1871, it enacted no comparable law authorizing damage suits in federal court to remedy constitutional violations by federal government agents. In 1971, the *Bivens* decision broke new ground by authorizing such a suit for *Fourth Amendment* violations by federal law enforcement officers who handcuffed and arrested an individual in his own home without probable cause. Within a decade, the Court followed up by allowing a *Bivens* action for employment discrimination, violating equal protection under the *Fifth Amendment*, against a Congressman.[2] The Court soon after approved a *Bivens* claim for constitutionally inadequate inmate medical care, violating the *Eighth Amendment*, against federal jailers.[3] According to the Court in *Abbasi*, these three cases coincided with the "*ancien regime* **[**7]** "[4] in which "the Court followed a different approach to recognizing implied causes of action than it follows now." *Abbasi, 137 S. Ct. at 1855.*

The "*ancien regime*" was toppled step by step as the Court, starting in the late 1970s, retreated from judicially implied causes of action[5] and cautioned that where Congress "intends private litigants to have a cause of action," the "far better course" is for Congress to confer that remedy explicitly. *Cannon v. Univ. of Chi., 441 U.S. 677, 717, 99 S. Ct. 1946, 1968, 60 L. Ed. 2d 560 (1979).* *Abbasi* acknowledges that the Constitution lacks as firm a basis as congressional enactments for implying causes of action; but the "central" concern in each instance arises from separation-of-powers principles. *Abbasi, 137 S. Ct. at* ***[*816]*** *1857.* Consequently, the current approach renders implied *Bivens* claims a "disfavored"[6] remedy. *Id.* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)).* The Court then lists the many subsequent cases that declined to extend *Bivens* under varying circumstances and proffered constitutional violations. *Id.*

Abbasi goes on to reiterate with an exacting description the two-part analysis for implying *Bivens* claims. We turn to the two inquiries by comparing *Abbasi*'s separation-of-powers considerations and its facts to the present case.

A. New Context

The plaintiffs assert that because the allegedly unprovoked **[**8]** shooting of a civilian by a federal police officer is a prototypical excessive force claim, their case presents no "new context" under *Bivens*. This court, including our colleagues in dissent, disagrees.[7] The fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative. The detainees in *Abbasi* asserted claims for, *inter alia*, strip searches under both the *Fourth* and *Fifth Amendments*, but the Supreme Court found a "new context" despite similarities between "the right and the mechanism of

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[2] *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).*

[3] *Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).*

[4] *Abbasi, 137 S. Ct. at 1855* (citing *Alexander v. Sandoval, 532 U.S. 275, 287, 121 S. Ct. 1511, 1520, 149 L. Ed. 2d 517 (2001)).*

[5] *See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977); Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).*

[6] "Indeed," the Court states, its current approach suggests the possibility that the analysis in the three *Bivens* cases providing a damage remedy "might have been different if they were decided today." *Abbasi, 137 S. Ct. at 1856.* The dissent never acknowledges that *Bivens* claims are, post-*Abbasi*, a disfavored remedy.

[7] Although the dissent purports to agree this is a "new context" for *Bivens* purposes, most of its reasoning about "special factors" asserts, contradictorily, that this case is "no different" than *Bivens* suits against federal law enforcement officers in wholly domestic cases.

injury" involved in previous successful *Bivens* claims. Abbasi, 137 S. Ct. at 1859. As *Abbasi* points out, the *Malesko* case rejected a "new" *Bivens* claim under the Eighth Amendment,[8] whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*; and *Chappell* rejected a *Bivens* employment discrimination claim in the military,[9] although such a claim was allowed to proceed in *Davis v. Passman*. The proper inquiry is whether "the case is different in a meaningful way" from prior *Bivens* cases. Abbasi, 137 S. Ct. at 1859.

Among the non-exclusive examples of such "meaningful" differences, the Court points to the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion **[**9]** into the functioning of the federal government's co-equal branches. Abbasi, 137 S. Ct. at 1860-61. The Court found it an easy conclusion that there were meaningful differences between prior *Bivens* claims and claims alleged in *Abbasi* for unconstitutional "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." Id. at 1860. Even more significant, the Court decided that claims against the prison warden for "compelling" allegations of detainee abuse and prison regulation violations also arose in a "new context" under *Bivens*. Id. at 1864. Despite close parallels between claims alleged against the warden and *Carlson*, the Court explained that "even a modest extension [of *Bivens*] is still an extension," *id.*, and the Court remanded for additional consideration of the "special factors."

Pursuant to *Abbasi*, the cross-border shooting at issue here must present a **[*817]** "new context" for a *Bivens* claim. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any "constitutional" right benefitting him raises novel and disputed issues. There has been no direct judicial guidance concerning **[**10]** the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.[10] To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).[11] Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. *See* Verdugo-Urquidez, 494 U.S. at 274- 75, 110 S. Ct. at 1066. In *Hernandez*, the Supreme Court itself described the plaintiffs' Fourth Amendment claims as raising "sensitive" issues. Hernandez v. Mesa, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017).

Likewise, the plaintiffs can prevail on a substantive due process Fifth Amendment claim only if federal courts accept two novel theories. The first would allow a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim simply because *Verdugo* might prevent the assertion of a comparable Fourth Amendment claim. *But cf.* Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989) ("[*A*]*ll* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."). The second theory would require the extension **[**11]** of the *Boumediene* decision,[12] both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's *de facto* control of the territory surrounding the Guantanamo Bay detention facility. *See* Boumediene, 553 U.S. at 771, 128 S. Ct. at 2262 ("The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the *complete and total control* of our Government.") (emphasis added). Moreover, even nine years later, no federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional

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[8] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

[9] Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983).

[10] We will consider the potential intrusion on the Executive and Legislative branches in detail in the next section of this opinion.

[11] *See also* Zadvydas v. Davis, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500, 150 L. Ed. 2d 653 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (citing Verdugo-Urquidez, 494 U.S. at 269, 110 S. Ct. at 1063; Johnson v. Eisentrager, 339 U.S. 763, 784, 70 S. Ct. 936, 947, 94 L. Ed. 1255 (1950)).

[12] Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

provisions or geographically to locales where the United States has neither *de facto* nor *de jure* control. Indeed, the courts have unanimously rejected such extensions.[13]

[*818] The plaintiffs assert that because this is just a case in which one rogue law enforcement officer engaged in misconduct on the operational level, it poses no "new context" for *Bivens* purposes. On the contrary, their unprecedented claims embody not merely a "modest extension"—which *Abbasi* describes as a "new" *Bivens* context—but a virtual repudiation of the Court's holding. *Abbasi* is grounded in the conclusion that *Bivens* claims are now a distinctly **[**12]** "disfavored" remedy and are subject to strict limitations arising from the constitutional imperative of the separation of powers. The newness of this "new context" should alone require dismissal of the plaintiffs' damage claims. Nevertheless, we turn next to the "special factors" analysis assuming arguendo that some type of constitutional claims could be conjured here.

B. Special Factors

The plaintiffs argue that this case involves no "special factors"—no reasons the court should hesitate before extending *Bivens*. However remarkable this position may seem, it is unremarkable that the plaintiffs hold it. Indeed, they must. The presence of "special factors" precludes a *Bivens* extension. Given *Abbasi*'s elucidation of the "special factors" inquiry, there is more than enough reason for this court to stay its hand and deny the extraordinary remedy that the plaintiffs seek.

Abbasi clarifies the concept of "special factors" by explicitly focusing the inquiry on maintaining the separation of powers: "separation-of-powers principles are or should be central to the analysis." *Abbasi, 137 S. Ct. at 1857.* Before *Abbasi*, the Court had instructed lower courts to perform "the kind of remedial determination that is appropriate **[**13]** for *a common-law tribunal*." *See, e.g., Wilkie v. Robbins, 551 U.S. 537, 550, 127 S. Ct. 2588, 2598, 168 L. Ed. 2d 389 (2007)* (emphasis added) (quoting *Bush v. Lucas, 462 U.S. 367, 378, 103 S. Ct. 2404, 2411, 76 L. Ed. 2d 648 (1983)).* Underscoring the Court's steady retreat from the "*ancien regime*" discussed above, that language appears nowhere in *Abbasi.* Instead, *Abbasi* instructs courts to "concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi, 137 S. Ct. at 1857-58.* In light of this guidance, the question for this court is not whether this case is distinguishable from *Abbasi* itself—it certainly is—but whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id. at 1858.* If such reasons exist, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Applying *Abbasi's* separation-of-powers analysis reveals numerous "special factors" at issue in this case. To begin with, this extension of *Bivens* threatens the political branches' supervision of national security. "The Supreme Court has **[*819]** never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." **[**14]** *Doe v. Rumsfeld, 683 F.3d 390, 394, 401 U.S. App. D.C. 256 (D.C. Cir. 2012).* In *Abbasi*, the Court stressed that "[n]ational-security policy is the prerogative of the Congress and the President." *Abbasi, 137 S. Ct. at 1861.* The plaintiffs note the Court's warning that "national security" should not "become a talisman used to ward off inconvenient claims." *Id. at 1862.* But the Court stated that "[t]his danger of abuse" is particularly relevant in "domestic cases." *See id.* (citations omitted). Of course, the defining characteristic of this case is that it is *not* domestic. National-security concerns are hardly "talismanic" where, as here, border

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[13] *Bahlul v. United States, 840 F.3d 757, 796 (D.C. Cir. 2016)* (en banc) (Millett, J., concurring) ("That holding, however, was 'explicitly confined [] 'only' to the extraterritorial reach of the Suspension Clause,' and expressly 'disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.'" (quoting *Rasul v. Myers, 563 F.3d 527, 529, 385 U.S. App. D.C. 318 (D.C. Cir. 2009)* (quoting *Boumediene, 553 U.S. at 795, 128 S. Ct. at 2275-76*))), *cert. denied*, ***138 S. Ct. 313, 199 L. Ed. 2d 232 (2017)***; *Al Bahlul v. United States, 767 F.3d 1, 33, 412 U.S. App. D.C. 372 (D.C. Cir. 2014)* (en banc) (Henderson, J., concurring) ("Whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause." (citations omitted)); *Ali v. Rumsfeld, 649 F.3d 762, 771, 396 U.S. App. D.C. 381 (D.C. Cir. 2011)* ("[The Court] explicitly confined its constitutional holding 'only' to the extraterritorial reach of the Suspension Clause and disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." (citations omitted)); *Igartúa v. United States, 626 F.3d 592, 600 (1st Cir. 2010)* ("The *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

security is at issue. *See, e.g.*, *United States v. Delgado-Garcia, 374 F.3d 1337, 1345, 362 U.S. App. D.C. 512 (D.C. Cir. 2004)* ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States.").

In particular, the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security. Congress has expressly charged the Border Patrol with "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." *6 U.S.C. § 211(e)(3)(B).* Although members of the Border Patrol like Agent Mesa may conduct activities analogous to domestic law enforcement, this case involved shots fired across the border within the scope of Agent **[**15]** Mesa's employment.[14] In a similar context—airport security—the Third Circuit recently denied a *Bivens* remedy for a TSA agent's alleged constitutional violations. *Vanderklok v. United States, 868 F.3d 189, 207-209 (3d Cir. 2017).* Relying on *Abbasi*, the Third Circuit's analysis is instructive:

> [The plaintiff] asks us to imply a *Bivens* action for damages against a TSA agent. TSA employees [ ] are tasked with assisting in a critical aspect of national security—securing our nation's airports and air traffic. The threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause.

Id. at 207. The same logic applies here.[15] Implying a private right of action for damages in this transnational context increases the likelihood that Border Patrol agents will "hesitate in making split second decisions." Considering the "systemwide" impact of this *Bivens* extension, there are "sound reasons to think Congress might doubt [its] efficacy." *Abbasi, 137 S. Ct. at 1858.*

Extending *Bivens* in this context also risks interference with foreign affairs and diplomacy more generally. **[**16]** This case is hardly *sui generis*: the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil. These are often delicate diplomatic matters, and, as **[*820]** such, they "are rarely proper subjects for judicial intervention." *Haig v. Agee, 453 U.S. 280, 292, 101 S. Ct. 2766, 2774, 69 L. Ed. 2d 640 (1981).* In fact, in 2014 the United States and Mexican governments established the joint Border Violence Prevention Council as a forum for addressing these sorts of issues.[16] The incident involving Agent Mesa initiated serious dialogue between the two sovereigns, with the United States refusing Mexico's request to extradite Mesa but resolving to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents."[17]

Given the dialogue between Mexico and the United States, the plaintiffs are wrong to suggest that Mexico's support for a new *Bivens* remedy obviates foreign affairs concerns. It is not surprising that Mexico, having requested Mesa's extradition, now supports a damages remedy against him. But the Executive Branch denied **[**17]** extradition and refused to indict Agent Mesa following a thorough investigation.[18] It would undermine Mexico's respect for the validity of the Executive's prior determinations if, pursuant to a *Bivens*

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[14] Given the transnational context of this case, denying a remedy here does not, as the plaintiffs suggest, repudiate *Bivens* claims where constitutional violations by the Border Patrol are wholly domestic. *See, e.g., De La Paz v. Coy, 786 F.3d 367, 374 (5th Cir. 2015)* (deferring to prior Fifth Circuit decisions "to the extent that they permit *Bivens* actions against immigration officers who deploy unconstitutionally excessive force when detaining immigrants on American soil").

[15] Although the dissent contends that the *Vanderklok* court focused on the lack of TSA law enforcement training, we believe public safety was the court's overriding concern. *See Vanderklok, 868 F.3d at 209* ("Ultimately, the role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context.").

[16] DHS, *Written Testimony for a H. Comm. on Oversight & Gov't Reform Hearing* (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southernborder-and-approaches-campaign-joint-task-force-west.

[17] DOJ, *Federal Officials Close Investigation into the Death of Sergio Hernandez- Guereca* (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigationdeath-sergio-hernandez-guereca.

[18] *See Hernandez, 785 F.3d at 132* (Jones, J., concurring) ("Numerous federal agencies, including the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under *18 U.S.C. § 3184*.").

claim, a federal court entered a damages judgment against Agent Mesa. In any event, diplomatic concerns "involve[ ] a host of considerations that must be weighed and appraised"—a sign that they must be "committed to those who write the laws rather than those who interpret them." *Abbasi, 137 S. Ct. at 1857* (citations omitted).

Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation. *Abbasi* emphasized that Congress's silence may be "relevant[] and . . . telling," especially where "Congressional interest" in an issue "has been frequent and intense." *Id. at 1862* (citations omitted). It is "much more difficult to believe that congressional inaction was inadvertent" given the increasing national policy focus on border security. *Abbasi, 137 S. Ct. at 1862* (citations omitted).

Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional. For instance, in *section 1983*, Congress expressly limited damage remedies to "citizen[s] of the United States or other person[s] within the **[**18]** jurisdiction thereof." *42 U.S.C. § 1983*. Given that *Bivens* is a judicially implied version of *section 1983*, it would violate separation-of-powers principles if the implied remedy reached further than the express one. Likewise, under the Federal Tort Claims Act—a law that comprehensively waives federal sovereign immunity to provide damages remedies for injuries inflicted by federal employees—Congress specifically excluded "[a]ny claim arising in a foreign country." *28 U.S.C. § 2680(k)*. Congress also exempted federal officials from liability under the Torture Victim Protection Act of 1991. *See 28 U.S.C. §§ 2671 et seq.*[19] **[*821]** Taken together, these statutes represent Congress's repeated refusals to create private rights of action against federal officials for injuries to foreign citizens on foreign soil.[20] It is not credible that Congress would favor the judicial invention of those rights.[21]

Nor, under *Abbasi*, does the plaintiffs' lack of a damages remedy favor extending *Bivens*. The Supreme Court has held that "even in the absence of an alternative" remedy, courts should not extend *Bivens* if any special factors counsel hesitation. *Wilkie, 551 U.S. at 550, 127 S. Ct. at 2598*. Thus, the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension. Here, the **[**19]** absence of a federal remedy does not mean the absence of deterrence. *Abbasi* acknowledges the "persisting concern [ ] that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Abbasi, 137 S. Ct. at 1863*. For cross-border shootings like this one, however, criminal investigations and prosecutions are already a deterrent. While it is true that numerous federal agencies investigated Agent Mesa's conduct and decided not to bring charges, the DOJ is currently prosecuting another Border Patrol agent in Arizona for the crossborder murder of a Mexican citizen. *See United States v. Swartz*, No. 15-CR- 1723 (D. Ariz. Sept. 23, 2015). The threat of criminal prosecution for abusive conduct is not hollow. In some instances, moreover, a state-law tort claim may be available to provide both deterrence and damages. That claim is unavailable here because the DOJ certified that Agent Mesa acted within the scope of his employment, and so the Westfall Act protects him from liability. *See 28 U.S.C. § 2679(b)(1), (d)*. The plaintiffs concede that Agent Mesa was acting within the scope of his employment. Regardless, *Abbasi* makes clear that, when there is "a balance to be struck" between countervailing **[**20]** policy considerations like deterrence and national security, "[t]he proper balance is one for the Congress, not the Judiciary, to undertake." *Abbasi, 137 S. Ct. at 1863*.

Finally, the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues already discussed. The plaintiffs argue that extraterritoriality cannot constitute a special factor because this would multiply extraterritoriality's significance. But this misunderstands the *Bivens* inquiry and misreads Supreme Court precedent. The plaintiffs' argument relies on *Davis v. Passman*, in which the defendant argued that his conduct was immunized by the *Speech or Debate Clause* and, alternatively, that the Clause was a "special

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[19] President George H.W. Bush stressed this interpretation of the TVPA when signing the legislation. *See* Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992), http://www.presidency.ucsb.edu/ws/index.php?pid=20715.

[20] Of course, there are some very narrow exceptions. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, *18 U.S.C. §§ 1595, 1596, 3271* (creating private right of action for noncitizens against federal employees who engage in sex trafficking outside the United States).

[21] Congress has also repeatedly authorized the payment of damages for injuries to aliens in foreign countries through limited administrative claims procedures. *See, e.g.*, *22 U.S.C. § 2669-1*. The existence of such procedures is additional evidence that Congress's failure to provide a remedy in this instance is intentional.

factor" for *Bivens* purposes. The Court held that the scope of the immunity and weight of the special factor were "coextensive." *See* Davis, 442 U.S. at 246, 99 S. Ct. at 2277. In other words, if the Clause did not immunize the defendant's conduct, then it was not a special factor. Similarly, the plaintiffs here suggest that extraterritoriality is not a "special factor" if the Constitution applies extraterritorially. This argument conflates the applicability of a constitutional immunity with the scope of a constitutional right, and thereby **[**21]** **[*822]** turns the *Bivens* inquiry upside down. *Bivens* remedies are not "coextensive" with the Constitution's protections. Indeed, in *United States v. Stanley*, the Supreme Court rejected a similar *Davis*-based argument, finding it "not an application but a repudiation of the 'special factors' limitation." 483 U.S. 669, 686, 107 S. Ct. 3054, 3065, 97 L. Ed. 2d 550 (1987).

Plaintiffs also suggest that relying on extraterritoriality as an indicator of a "new context" and as a "special factor" double counts the significance of extraterritoriality and stacks the deck against extending *Bivens*. But *Abbasi* explicitly states that one rationale for finding a "new context" is "the presence of *potential special factors*." Abbasi, 137 S. Ct. at 1860 (emphasis added). To the extent that this court double counts the significance of extraterritoriality, the Supreme Court has not foreclosed our doing so.

Indeed, the novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel hesitation. As the Eleventh Circuit recently averred, the legal theory itself may constitute a special factor if it is "doctrinally novel and difficult to administer." Alvarez v. U.S. Immigration & Customs Enf't, 818 F.3d 1194, 1210 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2321, 198 L. Ed. 2d 724 (2017). An extraterritorial *Bivens* extension is "doctrinally novel." The Supreme Court "has never created or even favorably mentioned a non-statutory **[**22]** right of action for damages on account of conduct that occurred outside the borders of the United States." Vance v. Rumsfeld, 701 F.3d 193, 198-99 (7th Cir. 2012) (en banc). Nor has any court of appeals extended *Bivens* extraterritorially. *See* Meshal v. Higgenbotham, 804 F.3d 417, 424-25, 420 U.S. App. D.C. 1 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325, 198 L. Ed. 2d 755 (2017). Extraterritoriality, moreover, involves a host of administrability concerns, making it impossible to assess the "impact on governmental operations systemwide." Abbasi, 137 S. Ct. at 1858.[22]

But novelty is by no means the only problem with an extraterritorial *Bivens* remedy. The presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad. According to the Supreme Court, "[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116, 133 S. Ct. 1659, 1664, 185 L. Ed. 2d 671 (2013). Even when a statute's substantive provisions do apply extraterritorially, a court must "separately apply the presumption against extraterritoriality" when it determines whether to provide a private right of action for damages. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106, 195 L. Ed. 2d 476 (2016). By extension, even if the Constitution applies extraterritorially, a court should hesitate to provide **[**23]** an extraterritorial damages remedy with "potential **[*823]** for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." Id. at 2106.

The D.C. Circuit squarely addressed the issue of extraterritoriality in the *Bivens* context and concluded that it constituted a "special factor." *See* Meshal, 804 F.3d at 425-26. Like this case, the D.C. Circuit's decision in *Meshal v. Higgenbotham* involved a challenge to "the individual actions of federal law enforcement officers" for an injury that occurred on foreign soil. Id. at 426. Refusing to extend *Bivens*, the court noted that "the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies."

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[22] The critical administrability issue, of course, is the uncertain scope of an extraterritorial *Bivens* claim. A court could attempt to tailor its holding to the facts of this case, thereby making sure the plaintiffs win—at least, at the motion to dismiss stage. But that will hardly deter the next plaintiff in the next case. During enforcement operations on the U.S.-Mexico border, it is not unusual for Border Patrol officers to be shot at or otherwise attacked from the Mexico side during patrols on land, on water, and in the air. If the dissenters' position here prevails, whenever Border Patrol officers return fire in self-defense, and someone gets hurt in Mexico, *Bivens* suits will follow. Moreover, nothing written by the dissent herein assures that if *Bivens* should apply here, no case will be filed against the Nevada-based operator of a drone flown far beyond our borders.

Id. at 425. Given this presumption, the court concluded that extraterritoriality was a special factor. Concurring, Judge Kavanaugh stressed that "[i]t would be grossly anomalous . . . to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Id. at 430* (Kavanaugh, J., concurring). We agree. Not only would it be "anomalous," it would contravene the separation-of-powers concerns that lie at the heart of the "special factors" **[**24]** concept.

Having weighed the factors against extending *Bivens*, we conclude that this is not a close case. Even before *Abbasi* clarified the "special factors" inquiry, we agreed with our sister circuits that "[t]he only relevant threshold— that a factor 'counsels hesitation'—is remarkably low." *See De La Paz v. Coy, 786 F.3d 367, 378 (5th Cir. 2015)* (quoting *Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009)* (en banc)). Here, extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs. It would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad. And it would create a remedy with uncertain limits. In its remand of *Hernandez*, the Supreme Court chastened this court for ruling on the extraterritorial application of the *Fourth Amendment* because the issue is "sensitive and may have consequences that are far reaching." *Hernandez, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017).* Similar "consequences" are dispositive of the "special factors" inquiry. The myriad implications of an extraterritorial *Bivens* remedy require this court to deny it.

For these reasons, the district court's judgment of dismissal is **AFFIRMED**.

JUDGMENT ON REHEARING EN BANC

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of **[**25]** the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

JAMES L. DENNIS, Circuit Judge, concurring in the judgment.

HAYNES, Circuit Judge, concurring.

EDWARD C. PRADO, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting.

Concurring and dissenting opinions omitted

Posted Thu, August 29th, 2019 11:48 am

SCOTUS for law students: Battling over mootness

STEPHEN WERMIEL

Mootness is not often the stuff of headlines. But a current dispute over Second Amendment rights and a New York City gun regulation has put mootness in the spotlight.

Last January, the Supreme Court agreed to hear a petition, 18-280, by the New York State Rifle & Pistol Association challenging New York City's curb on transporting licensed handguns outside the home. The New York regulation, which allowed handguns to be transported only to specified shooting ranges within the city, was upheld by a federal district judge in New York and by the U.S. Court of Appeals for the 2nd Circuit. The lower courts rejected claims that the city regulation violates the Second Amendment, that it interferes with interstate commerce and that it impedes the right to travel.

The Supreme Court's decision to hear the case marked the first time since 2010 that the justices have agreed to tackle a dispute over the scope of gun rights. Although gun-rights groups have filed numerous briefs urging the court to expand Second Amendment rights, the court had so far declined to take up the issue. Commentators have suggested that the replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh last fall may have given the court a majority favoring strengthened rights of gun owners.

In the 2008 case *District of Columbia v. Heller*, the court ruled for the first time that the Second Amendment confers a right of individuals to possess guns, at least in their homes for purposes of self-defense. Since then, gun-rights groups have hoped to expand the right beyond the home and beyond self-defense; gun-regulation advocates have pressed to limit gun rights or even to overrule the *Heller* decision. The issues have divided communities, political parties and the nation.

Soon after the court agreed to hear the New York City case, perhaps because of the prospect of a ruling that might expand the scope of Second Amendment rights, New York City officials moved to amend the challenged regulation and then asked the justices to dismiss the case as moot.

What is mootness and when does it apply? As a general matter, a case becomes moot when the parties no longer have an interest that can be resolved by the court's decision.

The rule is derived from Article III of the U.S. Constitution, which defines "the judicial power" as extending to "cases" and "controversies." The Supreme Court has long interpreted this language to mean that federal courts have jurisdiction to decide only those cases in which the parties have concrete interests that will be resolved by a judicial decision. Those tangible interests must be present at every stage of the lawsuit, the court has said, from initial filing to final decision.

A principal theory behind the case and controversy requirement – and behind the mootness doctrine, as well – is that courts will reach the best decisions when the cases they decide are litigated in a process that is truly adversarial on behalf of parties who have a real stake in the outcome.

When tangible interests are no longer present for the parties in a dispute, a case may become moot. The theory, again, is that parties to a case may not make the best arguments and engage in zealous advocacy if they no longer have genuine, tangible interests in the outcome.

Typically, a dispute will become moot because no issues remain that will have a real effect on the litigants. In one well-known example, *DeFunis v. Odegaard,* the Supreme Court ruled that the claim of a white law student that he was denied admission to law school because of his race and the operation of an affirmative action plan was moot because the student had been allowed to attend law school while the case was pending and was close to graduating. A determination by the Supreme Court that the student was or was not denied admission because of his race would not have affected that individual student's status or interests, the justices said.

There are exceptions to the mootness doctrine. Perhaps the most notable exception applies when the case involves circumstances that exist only for a short, fixed time period and that may be over by the time the litigation reaches the Supreme Court. In cases involving pregnancy and abortion, for example, a woman will almost certainly have either terminated the pregnancy or delivered a baby well before the dispute can reach the appellate stages. The Supreme Court has carved out an exception for cases that are "capable of repetition, yet evading review." In other words, if the issues may arise again and will often or always face timing challenges, the federal courts should not dismiss such cases for mootness and may continue to hear the litigation.

Another exception to mootness occurs when the defendant in the case voluntarily decides to halt the contested practice that is the basis of the lawsuit. Because the defendant's cessation of activity is voluntary, the theory goes, the defendant could also decide to resume the contested activity after the case is dismissed as moot. Therefore, courts should be cautious in dismissing for mootness in such circumstances.

Enter the New York gun case. When New York amended its regulations, lawyers for the city quickly asked the Supreme Court to dismiss the case as moot. The challenged regulations would no longer be enforced, the city argued, and any ruling on the constitutionality of those regulations would have no impact on anyone. The city also noted that New York state changed its gun licensing law to require communities to allow transport of guns within the state. The city "no longer has any stake in whether the Constitution requires localities to allow people to transport licensed handguns to second homes or firing ranges outside of municipal borders," the city said in its motion asking the Supreme Court to dismiss the case as moot.

Not so fast, replied Paul Clement, representing the New York Rifle & Pistol Association. The case is not moot for several reasons, Clement argued. First, the city's regulatory changes still take the basic position that the city can regulate transport of licensed guns without regard for the Second Amendment. Second, the city could re-impose regulations, although the change in New York State law makes that more difficult. Third, the new regulations still prohibit those transporting guns outside the city from making interim stops, such as at gas stations or coffee shops. The challengers also accused the city of trying to avoid having to file a brief defending the regulations by suggesting mootness.

This passionate level of dispute over mootness is not the norm. Mootness is often seen as a dry, narrow, procedural issue. But throw the scope of Second Amendment gun rights into the mix, and the gloves have come off.

The battle escalated in mid-August when U.S. Senator Sheldon Whitehouse, D-R.I., filed a friend-of-the-court brief for himself and four other Democratic senators. The brief, unique in its tone, warned that if the justices expand Second Amendment rights and fail to dismiss the case as moot, the ruling will fuel a growing public perception that the Supreme Court is acting politically and not applying legal principles. The brief accuses gun-rights groups of "an industrial-strength influence campaign" aimed at the court. "The Supreme Court is not well," Whitehouse concluded, suggesting that the court "heal itself" before there are serious public demands to restructure it.

The Whitehouse brief prompted strong, critical commentary from conservative groups, transforming the mootness fight into a proxy for warfare over the direction of the Supreme Court. "To Save a Bad Gun Law, Democratic Senators Threaten the Supreme Court," a Heritage Foundation headline proclaimed.

For their part, the justices have taken no action, scheduling the question of mootness for consideration at their first conference after their summer recess, on October 1. New York's lawyers had hoped for quicker action, perhaps a mid-summer order dismissing the case, but for now they will have to wait.

Stephen Wermiel, *SCOTUS for law students: Battling over mootness*, SCOTUSBLOG (Aug. 29, 2019, 11:48 AM), https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness/

Posted Tue, July 2nd, 2019 12:08 pm

Justices call for reargument in dispute about Oklahoma prosecutions of Native Americans

RONALD MANN

As the dust finally settles from last Thursday's decisions in *Department of Commerce v. New York* and *Rucho v. Common Cause*, we can take a moment to notice the single hardest case of the term – the one case that the justices could not decide. Despite hearing oral argument all the way back in late November, and receiving a round of supplemental briefing by January, the justices left for the summer without offering a resolution of *Carpenter v. Murphy*. Rather, we are left with a bare notation that the case has been "restored to the calendar for reargument."

This case, in which Justice Neil Gorsuch is recused, forces the justices to seek a narrow path between two obstacles. As summarized in my prior posts, the case involves the question whether Oklahoma has jurisdiction to prosecute major crimes that Native Americans commit on the territory that was set aside in the 19th century as a reservation for the Five Civilized Tribes – land that covers the eastern half of Oklahoma, including the city of Tulsa.

On the one hand, the state argues that a decision in favor of the defendant, Patrick Murphy, would leave a prosecutorial void over an immense area, threatening the validity of a large number of past convictions and forcing a wholesale development of new institutions for prosecutions by federal and Native American authorities. On the other hand, a ruling for the state could require the justices to replace a settled "clear-statement" regime for the disestablishment of Native American reservations with a multi-factored arrangement in which authority over the land might have passed from the tribes to the state at an undefined date based on a loose amalgam of historical practice.

The justices' desire to avoid either of those outcomes was apparent in their December request for supplemental briefing, which asked the parties to explore whether any statute might authorize Oklahoma prosecutions even if the land remained a reservation. The decision to set the case for reargument suggests that nothing in those briefs afforded any simple way to avoid that conundrum.

Ronald Mann, *Justices call for reargument in dispute about Oklahoma prosecutions of Native Americans*, SCOTUSBLOG (Jul. 2, 2019, 12:08 PM), https://www.scotusblog.com/2019/07/justices-call-for-reargument-in-dispute-about-oklahoma-prosecutions-of-native-americans/

Posted Wed, June 5th, 2019 12:58 pm

Solicitor general files invitation briefs

AMY HOWE

U.S. Solicitor General Noel Francisco recently filed a bevy of briefs in response to the Supreme Court's "invitations" to provide the justices with the federal government's views on cases in which a petition for certiorari has been filed. If – as they overwhelmingly do – the justices follow the government's recommendations, these petitions may not lead to many new cases for the court's merits docket next term, because the government has recommended that review on the merits be granted in only two cases.

[…]

The solicitor general recommended that review be granted – at least in part – in *Opati v. Sudan*, a case that stems from the 1998 attacks by al Qaeda on the U.S. embassies in Kenya and Tanzania, which killed over 200 people and injured over 1,000 more.

The Foreign Sovereign Immunities Act generally bars lawsuits against foreign countries in U.S. courts unless one of a few narrow exceptions applies. One of those exceptions, known as the "terrorism exception," was originally enacted in 1996 and allows lawsuits against countries designated as state sponsors of terrorism. After the U.S. Court of Appeals for the District of Columbia Circuit ruled in 2004 that the exception only waived a foreign country's immunity from suit, and did not provide the basis for a lawsuit, Congress in 2008 enacted a new terrorism exception, which specifically created a cause of action. Although the FSIA normally prohibits punitive damages, the 2008 amendments specifically allowed them; the 2008 amendments also indicated that any cases brought under the earlier version of the exception that were still pending should be treated as if they had been filed under the new version.

The case before the Supreme Court was filed by victims of the 1998 attacks and their family members against Sudan, which was designated a state sponsor of terrorism in 1993. A federal court awarded them over $10 billion in damages, including approximately $4 billion in punitive damages. On appeal, the D.C. Circuit vacated the punitive damages award, explaining that the current version of the terrorism exception does not allow punitive damages for conduct that occurred before this version was enacted.

Last year the plaintiffs asked the Supreme Court to review the D.C. Circuit's decision vacating the punitive damages award; the justices then asked the federal government to weigh in. In a brief filed late last month, the federal government recommended that the justices grant review to decide whether the current version of the terrorism exception allows punitive damages for pre-enactment conduct. The government explained that the D.C. Circuit's decision to the contrary was wrong and that the issue is an important one that "affects, in these cases alone, billions of dollars in punitive damages awarded to approximately 150 U.S. government employees and contractors murdered or injured in the line of duty who were targeted because of their service to the United States."

However, the government recommended that the court decline to review another issue presented by the plaintiffs' petition, involving whether the D.C. Circuit should have taken up the question at all when it was not an issue on which the court's jurisdiction hinged.

The government also recommended a denial in *Sudan v. Opati*, a cross-petition in which the Sudanese government had asked the justices to take up a variety of questions decided against it in the lower court, including whether – for purposes of the terrorism exception – the term "extrajudicial killing" is limited to summary executions by state actors and whether the terrorism exception withdraws immunity for emotional-distress claims brought by victims' family members.

The solicitor general made the same recommendation in *Sudan v. Owens*. In this petition, the Sudanese government had asked the justices to review the D.C. Circuit's rulings on whether the plaintiffs had shown that federal courts had the power to hear the case under the terrorism exception, as well as the lower court's holding on when injuries are caused by a defendant's actions for purposes of the terrorism exception. The federal government urged the Supreme Court to deny review, telling the justices that there is no conflict between the D.C. Circuit's decision and the rulings of either the Supreme Court or other courts of appeals; moreover, the government added, the D.C. Circuit's analysis "does not warrant review based on foreign-relations concerns."

The government's recommendation in *Poarch Band of Creek Indians v. Wilkes*, involving tribal immunity, was more nuanced. The case arises from a 2015 car accident: Barbie Spraggins, an employee of an Alabama casino owned by the Poarch Band, was driving a casino pick-up truck when she hit a car driven by Casey Wilkes. Both Wilkes and Alexander Russell, a passenger in the car, were seriously injured; Wilkes suffered a traumatic brain injury. When

Wilkes and Russell sued the tribe and the casino in state court, the Alabama Supreme Court allowed the lawsuit to go forward, holding that nonmembers can sue tribes for their injuries.

The tribe asked the Supreme Court to review the state court's decision, and last fall the justices asked the U.S. solicitor general to weigh in. In a brief filed at the end of May, the government acknowledged that what it described as the Alabama Supreme Court's "novel holding" was "flatly inconsistent" with the U.S. Supreme Court's tribal-immunity cases.

However, the government added, the justices should not grant review at this time. First, it suggested, the tribe's case is not the right one in which to consider whether the Supreme Court should continue to adhere to its prior rulings on tribal sovereign immunity. But more importantly, the government continued, the tribe is considering a change to its tribal code that would waive the tribe's immunity for lawsuits like Wilkes and Russell's. If that change is adopted, the government explained, "which could occur as early as June 6, 2019, the Court should grant the petition," vacate the Alabama Supreme Court's judgment, and send the case back to the state courts for further proceedings in light of the change to the law. But if the change is not made, the government argued, the justices should simply deny review, because even if the Alabama Supreme Court's decision is wrong, it is an "outlier."

Amy Howe, *Solicitor general files invitation briefs*, SCOTUSBLOG (Jun. 5, 2019, 12:58 PM), https://www.scotusblog.com/2019/06/solicitor-general-files-invitation-briefs-2/

Supreme Court Review: Issues of Presidential Power

David M. Driesen
University Professor, Syracuse University

The Supreme Court for many years has shown a special solicitude for presidential power and frequently struck down or narrowly interpreted congressional efforts to limit it. President Trump recently appointed two judges with a record of sympathy toward perhaps even broader assertions of presidential power to the Supreme Court—Brett Kavanaugh and Neil Gorsuch. These appointments raise questions about whether President Trump has captured the Supreme Court, as authoritarians eroding democracies in Poland and Hungary have done. Figuring that out proves difficult, because most autocrats recently capturing their judiciaries in order to erode democracies have appointed judges with views making them likely to uphold the authoritarians' measures. This implies that judicial capture in the United States may prove difficult to distinguish from simple logical extensions of pro-presidential jurisprudence. This presentation discusses one trend that points toward capture, increasing Supreme Court intervention favoring the President prior to final rulings in the lower courts, and two cases on the docket for the coming term that might offer some clues about whether this Court will continue to sanction increases in presidential power. One of these cases, *Department of Homeland Security v. Regents of the University of California*, addresses the legality of President Trump's decision to terminate a program protecting immigrants brought here as children from deportation, called Deferred Action for Childhood Arrivals (DACA). The other, *Financial Oversight Board v. Aurelius Investment*, reviews an Appointments Clause challenge to a statute establishing an oversight board handling issues of Puerto Rican debt.

The Supreme Court usually focuses on resolving conflicts between circuits that have reached final decisions about important questions. While the rules governing Supreme Court review prior to final judgments in the lower courts leave more room for flexibility than the final order doctrine governing appellate review in the federal courts of appeal, Supreme Court practice has strongly discouraged review prior to final judgment, often multiple judgments, in the courts of appeal. A forthcoming Harvard Law Review article, however, explains that President Trump's solicitor general has made an unusually large number of requests for review prior to final judgment, and the Court has responded by granting enough of these requests to effectuate a substantial departure from prior practice.

Two examples of this early review follow, with some reference to some others. The first concerns President Trump's effort to build a wall on our southern border. An impasse over this issue shut down the federal government, but Trump ultimately signed on to a budget deal reopening the government without substantial funding for his wall. He promptly vowed to use emergency powers to circumvent the congressional decision not to more fully fund the wall and has more recently reportedly demanded that federal officials build the wall even in the absence of money under authorities available to President Trump. In one of the cases arising from the battle over the wall, *Trump v. Sierra Club,* the District Court for the Northern District of California issued a permanent injunction prohibiting the reprogramming of certain funds for construction of a stretch of wall. The Supreme Court intervened before the Ninth Circuit had ruled on the case's merits to stay the District Court's injunction. *Sierra Club,* 2019 WL 3369425 (mem.). This intervention may have the effect of ending the case in favor of the President, without briefing or oral argument on the merits. One of the wall cases pending in the lower courts may yet reach the Supreme Court in the coming term, because the Court's special

solicitude toward presidential power may lead to an expedited certiorari grant. These cases raise various issues of statutory interpretation and justiciability. *See, e.g., California v. Trump*, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (finding plaintiffs likely to prevail on the merits but declining to issue a preliminary injunction); *In Re Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (granting government motions for summary judgment); *United States House of Representatives v. Mnuchin*, 379 F.3d. Sup. 8 (D.D.C. 2019) (denying standing to congressmen). The Court has generally taken an especially miserly approach to justiciability in challenges to presidential power and a cert. grant may lead to a decision revealing whether that trend will continue. And one wonders whether the Court will give any weight to vindicating congressional power over the purse in evaluating Trump's statutory arguments, if it decides reaches the merits of a wall case.

The DACA case grant of certiorari also illustrates this trend toward early intervention. The memorandum decisions granting certiorari ordered the District Court to consider justiciability arguments before demanding that the government complete the administrative record. *In re United States*, 138 S. Ct. 443 (2017) (mem.). Such micromanagement of District Court proceedings has not traditionally been a hallmark of the Supreme Court's approach. But the Court did something similar in the census cases to limit lower court efforts to look behind an administrative record that the Court ultimately held to be a mere pretext for a political decision. In short, the Court has recently begun to go beyond merits review after final judgment in the courts of appeal to actively address preliminary rulings in the district courts.

The merits of the DACA case will prove challenging. President Obama's Department of Homeland Security created DACA under its authority to set "enforcement priorities" under the Immigration and Naturalization Act. It also created a second policy, call Deferred Action for

Parents of Americans and Permanent Law Residents (DAPA), which protected immigrant parents of children with American citizenship from deportation. Both of these programs raised two difficult issues, one procedural and one substantive. Procedurally, they raised the issue of whether these policies constituted rules triggering obligations to undertake notice and comment rulemaking, or mere enforcement guidance that does not require APA rulemaking. Substantively, they raised the question of whether the power to set enforcement priorities authorizes more or less exempting an entire class of illegal immigrants from deportation. President Obama's DAPA policy generated an adverse 2-1 ruling in the Fifth Circuit Court of Appeals, which the Supreme Court affirmed by an equally divided vote. *See Texas v. United States,* 809 F.3d 134 (5th Cir. 2015), *affirmed by an equally divided Court sub nom. United States v. Texas,* 136 S. Ct. 2271 (2016) (mem.).

The Trump administration repealed DACA, claiming that the DAPA ruling obliged it to do so. So, the case challenging the rescission raises the issue of whether the authority to set immigration priorities permits DACA and whether the Trump administration needs to go through notice and comment rulemaking. In addition, the Trump administration has argued that decisions about immigration enforcement are committed to agency discretion by law and therefore not judicially reviewable.

The first two issues present close questions that could easily produce a 5-4 ruling on a politically charged matter along ideological lines, which would harm the Court's dwindling reputation. *See* David M. Driesen, *President Trump's Executive Orders and the Rule of Law,* 87 UMKC L. REV. 489, 520-22 (2019). No court should allow an administration to shield its actions from review by claiming commitment to agency discretion by law, when its decision rests on a claim of lacking any discretion to continue previous policy. But such a ruling might attract

conservative Justices, as it allows the Court to vindicate the President without having to squarely decide to end a policy protecting innocent children who have only known America from being deported to some country they may never have even visited.

The second case I wish to highlight concerns a long-term trend of giving the President more and more control over administration. And a ruling in this case may offer some clues about how much further this conservative court may go in ushering in complete presidential control over administration, as advocated by Justice Scalia in his dissent in *United States v. Morrison.*

The case concerns the constitutionality of the Financial Oversight and Management Board (Board) created by a statute designed to address Puerto Rico's debt crisis. The statute creating the Board provides for bipartisan control over the board by requiring the President to choose experts from lists chosen by majority and minority congressional leaders to fill six of the seven positions on the Board. The President may ignore the leadership's recommendations under the statute, but doing so triggers the need for Senate confirmation of his appointees.

This raises several questions. First, does the congressional authority provided in Article IV of the Constitution to make rules for the territories authorize this arrangement? This question intersects with the issue of whether the Board's officials are territorial officers or "officers of the United States" within the meaning of the Appointments Clause. The second major question involves whether they are principal officers that the President cannot appoint without the approval of the Senate or instead Inferior officers. In either case, a question arises as to whether Congress can limit the nomination power by allowing congressional leadership to presumptively limit the President's choices to their own nominees.

While older case law, traditions of territorial governance, the Necessary and Proper Clause, and respect for legislation favor upholding the law, a decades old trend toward formalism

in cases of encroachment on presidential power disfavors the law. In a forthcoming article Professor Emeritus Bill Banks and I show that the modern Court has more or less abandoned the Necessary and Proper Clause in separation of powers cases and also gives no weight to legislative acts in deciding constitutional questions, thereby abandoning much of *McCullough v. Maryland's* legacy, which all of you studied in law school, at least in certain classes of cases.

More narrowly, the case affords an opportunity for a presidentialist Court to subtly advance the unitary execute theory, which reads the Constitution as giving the President sole control over the executive branch of government. In *United States v. Morrison,* the Supreme Court upheld the Independent Counsel Act in the face of a Scalia dissent articulating this unitary executive theory. *Morrison* establishes the constitutional predicate for the recently completed Mueller investigation. Part of the majority ruling in *Morrison* upheld allowing judicial appointment of the independent counsel on the grounds that his authority proved too narrow to make him a principal officer requiring a presidential appointment. Justice Scalia dissented on the grounds that an Inferior Officer, whom the judiciary may appoint, must be subordinate to other officers. In other words, the majority made the scope of responsibilities the determining factor, while Scalia made subordination the determining factor in determining inferiority of an officer. The Court could subtly tighten the unitary executive theory's grip on the polity by distinguishing *Morrison* and characterizing these officers, in spite of their relatively narrow responsibilities, as principal Officers of the United States. Such a precedent could form a predicate for later limiting or eliminating independent agencies, which, I argue in a forthcoming book, constitute hallmarks of robust democracies around the world. While I do not expect the Puerto Rican debt cases to garner nearly as much attention as the DACA cases (both cases consolidate several lower court rulings for review), the Puerto Rican debt cases might prove more constitutionally significant in the long run.

Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.

Regents of the Univ. of Cal. v. United States, Dept. of Homeland Sec., 279 F. Supp. 3d 1011, 2018 U.S. Dist. LEXIS 4036 (N.D. Cal., Jan. 9, 2018)

Summary:

SUMMARY*

Immigration

In an action challenging the Department of Homeland Security's rescission of Deferred Action for Childhood Arrivals (DACA), the panel affirmed the district court's grant of preliminary injunctive relief, and affirmed in part the district court's partial grant and partial denial of the government's motion to dismiss for failure to state a claim.

Begun in 2012, DACA allows those noncitizens who unwittingly entered the United States as children, who have clean criminal records, and who meet various educational or military service requirements to apply for two-year renewable periods of deferred action—a **[**2]** revocable decision by the government not to deport an otherwise removable person from the country. In 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum that announced the related Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), which allowed deferred action for certain noncitizen parents of American citizens and lawful permanent residents, and expanded DACA. All of the policies outlined in the 2014 Johnson memorandum were enjoined nationwide in a district court order upheld by the Fifth Circuit and affirmed by an equally divided Supreme Court. After a new presidential administration took office, Acting Secretary of Homeland Security Elaine Duke issued a memorandum in September 2017 rescinding DACA.

Suits were filed in the Northern District of California by the Regents of the University of California, a group of states led by California, the City of San Jose, the County of Santa Clara and Service Employees International Union Local 521, and a group of individual DACA recipients led by Dulce Garcia. The cases were consolidated, and the district court ordered the government to complete the administrative record. Seeking to avoid **[**3]** providing additional documents, the government filed a petition for mandamus, which this court denied. The government petitioned the Supreme Court for the same mandamus relief; the Court did not reach the merits of the administrative record dispute, but instructed the district court to rule on the government's threshold arguments challenging reviewability of its rescission decision. The district court entered a preliminary injunction requiring DHS to adjudicate renewal applications for existing DACA recipients, and the court partially granted and partially denied the government's motion to dismiss.

The panel held that neither the *Administrative Procedure Act* nor the *Immigration and Nationality Act* (INA) barred judicial review of the decision to rescind DACA. With respect to the APA, the panel reviewed the cases of *Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)*, *Montana Air Chapter No. 29 v. Federal Labor Relations Authority, 898 F.2d 753 (9th Cir. 1990)*, and *City of Arlington v. FCC, 569 U.S. 290, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013)*. The panel concluded that, where the agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law because the agency lacked authority, the APA's "committed to agency discretion" bar to reviewability, *5 U.S.C. § 701(a)(2)*, does not apply. The panel also concluded that the Acting Secretary based the rescission of **[**4]** DACA solely on a belief that DACA was beyond the authority of DHS. Accordingly, the panel determined that the rescission was within the realm of agency actions reviewable under the APA.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

With respect to the INA, the panel rejected the government's contention that review was barred by 8 U.S.C. § 1252(g), which precludes judicial review of "any cause or claim by or on behalf of any alien arising from the decision or action of the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders." The panel explained that, under Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999), the rescission does not fall within the three discrete actions mentioned in 8 U.S.C. § 1252(g).

Having concluded that neither the APA nor the INA precludes judicial review, the panel turned to the merits of the preliminary injunction and considered whether the agency was correct in concluding that DACA was unlawful. The Attorney General's primary bases for concluding that DACA was illegal were that the program was "effectuated . . . without proper statutory authority" and that it amounted to "an unconstitutional exercise of authority." More specifically, the Attorney General asserted that "the DACA policy has the same legal and constitutional defects that the courts **[**5]** recognized as to DAPA" in the Fifth Circuit litigation. The panel considered the DAPA litigation, comparing aspects of DAPA and DACA, and concluded that that DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit's conclusion that the related DAPA program exceeded DHS's statutory authority. Thus, the panel concluded that, because the Acting Secretary was incorrect in her belief that DACA was illegal and had to be rescinded, plaintiffs are likely to succeed in demonstrating that the rescission must be set aside under the APA as arbitrary and capricious.

The panel next concluded that the district court did not abuse its discretion in issuing a nationwide injunction, noting that such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress.

Finally, addressing the district court's order granting in part and denying in part the government's motion to dismiss, the court concluded that the district court properly dismissed plaintiffs' APA notice-and-comment claim, and their claim that the DACA rescission violates their substantive due process rights. The panel **[**6]** further concluded that the district court also properly denied the government's motion to dismiss plaintiffs' APA arbitrary-and-capricious claim, their claim that the new information-sharing policy violates their due process rights, and their claim that the DACA rescission violates their right to equal protection.

Concurring in the judgment, Judge Owens wrote that, as he believed the Plaintiffs' Equal Protection claim has some likelihood of success on the merits, he concurred in the judgment affirming the preliminary injunction. However, Judge Owens disagreed with the majority's conclusion that otherwise unreviewable agency action is reviewable when the agency justifies its action by reference to its understanding of its jurisdiction. Therefore, Judge Owens would hold that § 701(a)(2) precludes the court from subjecting DACA's rescission to arbitrary-and-capricious review. Judge Owens would also affirm the preliminary injunction and remand for consideration whether Plaintiffs have demonstrated a likelihood of success on the merits of their Equal Protection claim.

As for the government's appeal from the motions to dismiss, Judge Owens dissented from the majority's holding to affirm the district **[**7]** court's denial of the motion to dismiss Plaintiffs' APA arbitrary-and-capricious claim. However, he concurred in the majority's holding to affirm the district court's dismissal of Plaintiffs' APA notice-and-comment claim. He also concurred in the judgment to affirm the district court's ruling on Plaintiffs' Due Process claims. He also agreed with the majority's decision to affirm the district court's denial of the motion to dismiss the Equal Protection claim and hold that the Equal Protection claim offers an alternative ground to affirm the preliminary injunction.

Posted Thu, June 20th, 2019 3:12 pm

Justices add Puerto Rico appointments clause case to next term's docket (Corrected)

AMY HOWE

The Supreme Court added another argument to its calendar for the fall. In an unusual Thursday order, the justices announced that they would take up a group of cases involving the constitutionality of President Barack Obama's appointments to the oversight board created to get Puerto Rico back on its financial feet. The cases will be fast-tracked so that they can be argued when the justices return from their summer recess in October.

In 2016, Puerto Rico was in the middle of a serious financial crisis. It owed over $110 billion in debt and unfunded pension liabilities and, as a result, was struggling to provide basic services to its residents. Congress responded by creating an independent board, the Financial Oversight and Management Board, to oversee the restructuring of the commonwealth's massive debt and to make fiscal, legal and governance reforms to bring financial stability back to Puerto Rico.

Aurelius Investment, a hedge fund that invested in distressed Puerto Rico bonds, challenged the appointment of the board members, as did (among others) a labor organization that represents employees of Puerto Rico's electric utility. The U.S. Court of Appeals for the 1st Circuit ruled that the provision of the federal law that allowed members of the board to be appointed without being confirmed by the Senate was unconstitutional. However, the appeals court declined to invalidate the actions that the board had already taken. Relying on a doctrine known as the "de facto officer doctrine," it reasoned that reversing the board's actions would have "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now" and would "likely introduce further delay into a historic debt restructuring process that was already turned upside down" by "the ravage of hurricanes."

The board asked the Supreme Court to review the 1st Circuit's decision on the appointments question, as did the federal government and a committee of unsecured creditors, while Aurelius and the labor organization asked the justices to weigh in on whether the de facto officer doctrine should apply. The justices will consider all these questions in October. Additional orders from today's conference are expected on Monday at 9:30 a.m.

An earlier version of this post described one of the groups asking the justices to review the lower court's decision on the appointments question as a committee of unsecured debtors, not of unsecured creditors.

Recommended Citation: Amy Howe, *Justices add Puerto Rico appointments clause case to next term's docket (Corrected)*, SCOTUSBLOG (Jun. 20, 2019, 3:12 PM), https://www.scotusblog.com/2019/06/justices-add-puerto-rico-appointments-clause-case-to-next-terms-docket/

Posted Wed, September 11th, 2019 6:59 pm

Court allows government to enforce restrictive asylum rule nationwide (UPDATED)

AMY HOWE

Note: This post has been updated to include a discussion of what conclusions can (and cannot) be drawn about the justices' votes on the government's request.

The Trump administration won a major (if, at least for now, only temporary) victory on immigration today at the Supreme Court. The justices gave the government the go-ahead to enforce a new rule that would bar most immigrants from applying for asylum if they pass through another country – such as Mexico – without seeking asylum there before arriving in the United States. The U.S. Court of Appeals for the 9th Circuit had blocked the government from implementing the new rule in Arizona and California, but now the government can enforce it nationwide while it appeals a decision by a federal judge in California to the 9th Circuit and, if necessary, the Supreme Court. Tonight's order drew a dissent from Justice Sonia Sotomayor (joined by Justice Ruth Bader Ginsburg); there were no other recorded dissents.

The government came to the Supreme Court seeking emergency relief late last month. The Trump administration wanted to be able to implement an interim rule that it had enacted to address the crisis along the U.S.-Mexico border. U.S. Attorney General William Barr explained that the rule was aimed at reducing the "burdens associated with apprehending and processing hundreds of thousands of" immigrants along the southern border while carving out exceptions to protect immigrants who legitimately fear torture or persecution in their home countries. After immigrant- and refugee-rights groups challenged the new rule, U.S. District Judge Jon Tigar barred the government from enforcing the rule anywhere in the United States. Tigar concluded that the interim rule "is likely invalid because it is inconsistent with the existing asylum laws," such as the provision barring asylum for an immigrant who can be removed to another country where he will be safe.

The 9th Circuit narrowed the scope of Tigar's order. It prohibited the government from enforcing the new rule in the geographic area covered by the 9th Circuit – which would include the U.S.-Mexico border in California and Arizona – but allowed the government to enforce the rule elsewhere in the United States (including along the 1,254-mile border that Mexico shares with Texas). The court of appeals also left open the possibility that the district court could add to the record and once again extend the scope of its order to cover the entire nation.

The government asked the justices to allow it to enforce the rule nationwide while its appeals to the 9th Circuit and, if need be, the Supreme Court itself, are pending. The government stressed that the interim rule "serves important national purposes," such as protecting "the integrity of our borders," and "is part of a coordinated and ongoing diplomatic effort regarding the recent surge in migration."

The challengers pushed back, telling the justices that the government's rule would work a "tectonic change to U.S. asylum law" by eliminating "virtually all asylum at the southern border, even at ports of entry, for everyone except Mexicans." And that, they continued, "would not only upend four decades of unbroken practice," but also "place countless people, including families and unaccompanied children, at grave risk." The government's invocation of a crisis at the border, the challengers added, "cannot justify ignoring the laws Congress passed." And the government's "claims of urgency" are simply not accurate, because the number of immigrants seeking asylum in June and July of this year actually decreased "significantly." But even if the situation were as urgent at the government asserts, the challengers maintained, any changes to immigration law to address this problem would be "an issue for Congress, which is well aware of border crossing numbers and the number of asylum seekers."

The picture changed on September 9, when Tigar entered a new order once again barring the government from enforcing the asylum rule anywhere in the United States. The government returned to the Supreme Court the next day, asking the justices to rule promptly and allow it to enforce the rule nationwide. The government stressed that the ban on enforcement of the rule "greatly impairs the government's and the public's interest in maintaining the integrity of the border, in preserving a well-functioning asylum system, and in conducting sensitive diplomatic negotiations." The government agreed with Tigar that it is important for the entire country to have a consistent immigration policy. But the way to do that, it argued, is for the Supreme Court to take up and resolve conflicts among the courts of appeals, "not for an individual district court to enter a universal injunction the moment it confronts a rule or policy that it views as unlawful."

Tonight, the Supreme Court gave the government the go-ahead to enforce the rule nationwide while its appeal winds its way through the 9th Circuit and, if necessary, the Supreme Court. Consistent with the court's ordinary practice when granting or denying temporary relief, the justices did not explain the reasoning behind their decision, nor did they indicate whether all seven of the justices who did not publicly dissent had voted in favor of the stay; all we know is that there were at least five votes – the number required for a stay – for the government. As Greg

Stohr of Bloomberg points out, Justice Samuel Alito did not publicly dissent earlier this year when the justices blocked the execution of a Buddhist inmate who wanted to have his spiritual adviser in the execution chamber with him. Six weeks later, however, Alito wrote an opinion in which he indicated that he had in fact dissented in the case and explained why.
In her five-page dissent, Sotomayor suggested that the new rule may be "in significant tension" with federal laws governing immigration. She added that it was "especially concerning" that the new rule "topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere—without affording the public a chance to weigh in."

Sotomayor criticized the Supreme Court's decision to intervene at this stage of the process. "Granting a stay pending appeal should be an 'extraordinary' act," she stressed, but "it appears the Government has treated this exceptional mechanism as a new normal" – and, she lamented, the justices have acquiesced.

Amy Howe, *Court allows government to enforce restrictive asylum rule nationwide (UPDATED)*, SCOTUSBLOG (Sep. 11, 2019, 6:59 PM), https://www.scotusblog.com/2019/09/court-allows-government-to-enforce-restrictive-asylum-rule-nationwide/

Posted Mon, September 9th, 2019 12:03 pm

Overview of the court's criminal docket for OT 19 – sizeable and significant

RORY LITTLE

The Supreme Court has already granted review in 50 cases for the term that opens on Monday, October 7. More will be granted when the court returns for its "long conference" (following the summer recess) on October 1. By my broad definition (which includes immigration and civil-related-to-criminal cases), 20 of the 50 cases already granted (40%) involve criminal-law or related issues. After consolidations, this represents 16 hours of argument – and 10 of those hours will occur in the first two months. From this end of the telescope, the cases look important, and a few will certainly have broad impact.

Opening day – two big cases

Monday, October 7, will open with two very significant criminal-case arguments, one before and one after lunch (with a patent case sandwiched in the middle).

First, the justices will consider whether a state may (as Kansas has) constitutionally eliminate any defense of insanity to criminal charges. This presents both due process and Eighth Amendment questions, and involves intricate mental gymnastics regarding the difference(s) between insanity and a permissible defense of lacking criminal mens rea. A Kansas statute has, since at least 2007, allowed a defense to criminal charges that a defendant "lacked the culpable mental state required," but then also provides that "mental disease or defect is not otherwise a defense." Under such jury instructions, James Kahler was convicted of the grisly murder of his ex-wife, two teenage daughters, and their great-grandmother, and sentenced to death. Kahler argues, with the support of an array of medical, philosophical, historical and other amici curiae, that criminally punishing the insane has always been viewed as "cruel and unusual" and that an insanity defense, that is, a lack of moral culpability, is constitutionally different from the absence of mens rea. By contrast, Kansas, and also the United States as amicus, argue that the Constitution does not deny states the ability to decide for themselves how mental states should be accommodated in criminal law.

After lunch, the court will address the likely far easier question whether the "unanimous verdict" requirement for criminal jury trials under the Sixth Amendment necessarily applies to all the states under the 14th Amendment's incorporation doctrine. Only two states (Louisiana and Oregon) allow non-unanimous criminal conviction verdicts, and the court fractured in at least three different directions when it last considered this question in 1972. Almost 50 years later, and in light of the conservative justices' more recent endorsement of incorporation in *McDonald v.*

City of Chicago as well as the court's decision last term in *Timbs v. Indiana* (fully incorporating the Eighth Amendment's excessive fines clause against the states), an outcome here against Louisiana seems almost inevitable. (Justice Brett Kavanaugh's opinion last term in *Flowers v. Mississippi*, detailing the history of race discrimination in criminal jury selection, is also relevant.) Few Supreme Court decisions are ever slam dunks, and two amicus briefs on behalf of 15 jurisdictions do raise important questions of retroactive versus prospective effects and other state variations in criminal jury-trial procedures. The implications of the court's ruling in this case (*Ramos v. Louisiana*) will undoubtedly be significant. But increasingly, Justice Hugo Black's theory of "total incorporation" seems, except for the Sixth Amendment's grand jury clause, virtually complete.

The second week, and a focus on immigration

The second argument week of the term will see another two criminal cases. On October 16, in *Mathena v. Malvo*, the court will consider the life-without-parole (LWOP) sentence imposed on the juvenile "D.C. sniper," Lee Malvo, who with an adult partner (since executed) shot and killed 10 people in the Washington, D.C., area in 2002. The constitutionality of LWOP sentences for juveniles under the Eighth Amendment has bedeviled the court twice previously: Such sentences have been declared unconstitutional when mandatory, but not when discretionary. This case will examine what exactly that means. The year-old retirement of Justice Anthony Kennedy, who authored the most recent decision on the issue, makes the outcome difficult to predict.

That same day, the court will consider *Kansas v. Garcia*, a criminal case involving immigration forms. The Kansas Supreme Court invalidated the conviction of three defendants for using other people's social security numbers, because a federal statute prohibits the use of information on a federal employment-authorization Form I-9 for any "purposes other than" authorization. But the false SSNs were also found on other documents that the defendants submitted. After the court asked for the views of the federal government, the U.S. Solicitor General recommended review and has filed an amicus brief on behalf of Kansas seeking reversal.

By my count, six other cases granted for the coming Term, in addition to *Garcia*, are cases with criminal immigration implications: the three consolidated DACA ("deferred action for childhood arrival" cases); two consolidated equitable-tolling cases; and *Barton v. Barr*, a complex statutory question involving the application of a "stop-time rule" to permanent residents found to have committed certain offenses. The court's early-term focus on immigration questions undoubtedly reflects the current national concerns about immigration issues and their consequences.

The rest

The foregoing discussion still leaves 11 additional criminal cases already granted for argument this term. We "can't catch them all," but here are some highlights.

Virtually no term goes by without at least one Fourth Amendment case. In *Kansas v. Glover* – Kansas is really under the microscope this term! – the court will consider whether it is reasonable to suspect that the registered owner of a vehicle is currently its driver. Deputy Sheriff Mark Mehrer learned that the registered owner of a pickup truck he saw moving on the road had a suspended license, and he stopped the vehicle. Indeed, the driver, Charles Glover, was the owner and was charged with driving on a revoked license as a habitual violator. But the trial court suppressed evidence, finding the inference that the registered owner must be the driver to be unreasonable, and the Kansas Supreme Court ultimately affirmed (after the state court of appeals had reversed). The U.S. solicitor general has filed as amicus in support of Kansas' petition, and the case will be argued on November 4.

Similarly, at least one death-penalty case is almost always on the court's annual docket. OT 19 is no exception. In *McKinney v. Arizona* the justices will address questions revolving around the use and evaluation of mitigating evidence in capital cases.

Two cases involve significant reprises from prior terms. *Hernandez v. Mesa* is the case in which a federal Border Patrol agent shot across the U.S.-Mexico border and killed 15-year-old Sergio Hernandez Guereca. When the boy's parents' wrongful-death lawsuit reached the Supreme Court in 2017, the eight-justice court remanded in a per curiam 5-3 decision. The parents now ask the Supreme Court to reverse the United States Court of Appeals for the 5th Circuit and rule that they should be allowed to file a claim against the officer for damages directly under the Constitution (technically referred to as a "*Bivens* action," after a 1971 case by that name). The court, however, has been disinclined to expand the *Bivens* concept in recent years.

Meanwhile, last term the justices were unable to decide the case of *Carpenter v. Murphy* (now *Sharp v. Murphy*), with Justice Neil Gorsuch recused, so they restored the case to the docket for reargument (still not scheduled) this term. The question is which authority (the state or federal authorities on behalf of Indians) has jurisdiction to prosecute major crimes allegedly committed by Indians in territory covering about half of the state of Oklahoma. Has the immense Muscogee (Creek) reservation been "disestablished?" Or is there some other way to avoid the immense territorial implications of the case, which were seemingly not clear even after oral argument and supplemental briefing? Especially if retroactive, a decision for Murphy could have far-reaching implications. However it is decided, this could be the big sleeper decision of the term.

In *Kelly v. United States*, the court granted certiorari on the last day of the previous term to review the high-profile "Bridgegate" fraud convictions of public officials who ordered the closing of traffic lanes on the George Washington Bridge from New Jersey to New York City, causing massive traffic jams, as "political payback" while publicly proclaiming a neutral "traffic study." In light of recent limiting decisions (see *McDonnell v. United States* and *Skilling v. United States*), the justices will consider whether further restrictions on the application of federal criminal fraud statutes are required.

In *Shular v. United States*, the justices will once again confront the much-critiqued "categorical approach" to evaluating which state offenses count as predicates for enhanced federal sentencing.

Somewhat refreshingly, the court granted review on a typewritten pro se prisoner petition for certiorari in *Banister v. Davis*, a habeas case. Once the court requested a response from Texas, Banister enlisted a former assistant solicitor general and clerk to Justice Sonia Sotomayor to represent him, and the case, although dry, will be significant to the habeas bar. Last for this overview, and perhaps least, an odd New York City regulation raised significant questions about how Second Amendment gun control laws should be evaluated. But the regulation and a New York state licensing statute have since been amended, and New York has asked that the case be dismissed as moot. Although some justices may be itching for a Second Amendment vehicle, chances are this case will not be it.

Conclusion

The Supreme Court's docket is a bit of an optical illusion: it always looks very different at the start from the way it is perceived by the following July. Big cases argued in October are decided by early spring and by then are overshadowed by new grants of review, which we now perceive, "if foreseen at all, … dimly." So stay tuned. The sense of imminence and uncertainty is one reason the court and its machinations provide such an irresistible attraction!

[**Disclosure**: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among the counsel to the respondent in *Kansas v. Glover*. The author of this post is not affiliated with the firm.]

Rory Little, *Overview of the court's criminal docket for OT 19 – sizeable and significant*, SCOTUSBLOG (Sep. 9, 2019, 12:03 PM), https://www.scotusblog.com/2019/09/overview-of-the-courts-criminal-docket-for-ot-19-sizeable-and-significant/

Malvo v. Mathena

United States Court of Appeals for the Fourth Circuit

January 23, 2018, Argued; June 21, 2018, Decided

No. 17-6746, No. 17-6758

Reporter
893 F.3d 265 *; 2018 U.S. App. LEXIS 16768 **

LEE BOYD MALVO, Petitioner - Appellee, v. RANDALL MATHENA, Chief Warden, Red Onion State Prison, Respondent - Appellant. HOLLY LANDRY, Amicus Supporting Appellee.LEE BOYD MALVO, Petitioner - Appellee, v. RANDALL MATHENA, Chief Warden, Red Onion State Prison, Respondent - Appellant. HOLLY LANDRY, Amicus Supporting Appellee.

Subsequent History: US Supreme Court certiorari granted by *Mathena v. Malvo, 2019 U.S. LEXIS 1905 (U.S., Mar. 18, 2019)*

Prior History: [1]** Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. (2:13-cv-00375-RAJ-LRL; 2:13-cv-00376-RAJ-LRL). Raymond A. Jackson, District Judge.

Malvo v. Mathena, 254 F. Supp. 3d 820, 2017 U.S. Dist. LEXIS 87914 (E.D. Va., May 26, 2017)

Disposition: AFFIRMED.

Counsel: ARGUED: Matthew Robert McGuire, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant.

Craig Stover Cooley, Richmond, Virginia, for Appellee.

ON BRIEF: Mark R. Herring, Attorney General, Trevor S. Cox, Acting Solicitor General, Donald E. Jeffrey III, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant.

Michael Arif, ARIF & ASSOCIATES, P.C., Fairfax, Virginia, for Appellee.

Danielle Spinelli, Beth C. Neitzel, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Amicus Curiae.

Judges: Before NIEMEYER, KING, and DIAZ, Circuit Judges.

Opinion by: NIEMEYER

Opinion

[*266] NIEMEYER, Circuit Judge:

In Virginia in 2004, a defendant convicted of capital murder, who was at least 16 years old at the time of his crime, would be punished by either death or life imprisonment without the possibility of parole, unless the judge suspended his sentence. After a Virginia jury convicted Lee Boyd Malvo of two counts of capital murder based on homicides that he committed **[**2]** in 2002 when he was 17 years old, it declined to recommend the death penalty, and he was instead sentenced in 2004 to two **[*267]** terms of life imprisonment without parole, in accordance with Virginia law.

Thereafter, Malvo, again seeking to avoid the death penalty, pleaded guilty in another Virginia jurisdiction to one count of capital murder and one count of attempted capital murder — both of which he also committed when 17 years old — and received two additional terms of life imprisonment without parole.

After Malvo was sentenced in those cases, the Supreme Court issued a series of decisions relating to the sentencing of defendants who committed serious crimes when under the age of 18. It held that such defendants cannot be sentenced to death; that they cannot be sentenced to life imprisonment without parole unless they committed a homicide offense that reflected their permanent incorrigibility; and that these rules relating to juvenile sentencing are to be applied retroactively, meaning that sentences that were legal when imposed must be vacated if they were imposed in violation of the Court's new rules. *See* *Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*; *Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*; *Miller v. Alabama, 567 U.S. 460, 132 S. Ct.*

2455, 183 L. Ed. 2d 407 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

In these habeas cases filed under 28 U.S.C. § 2254, we conclude that even though Malvo's **[**3]** life-without-parole sentences were fully legal when imposed, they must now be vacated because the retroactive constitutional rules for sentencing juveniles adopted subsequent to Malvo's sentencings were not satisfied during his sentencings. Accordingly, we affirm the district court's order vacating Malvo's four terms of life imprisonment without parole and remanding for resentencing to determine (1) whether Malvo qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his "crimes reflect permanent incorrigibility" or (2) whether those crimes instead "reflect the transient immaturity of youth," in which case he must receive a sentence short of life imprisonment without the possibility of parole. Montgomery, 136 S. Ct. at 734.

I

A

Over the course of almost seven weeks in the fall of 2002, Lee Malvo and John Muhammad — better known as the "D.C. Snipers" — murdered 12 individuals, inflicted grievous injuries on 6 others, and terrorized the entire Washington, D.C. metropolitan area, instilling an all-consuming fear into the community.

The violence began on September 5, 2002, when Malvo — who was at the time 17 years old — ran up to a **[**4]** man's car in Clinton, Maryland, shot him six times with a .22 caliber handgun, and stole his laptop and $3,500 in cash. *See* Muhammad v. Kelly, 575 F.3d 359, 362 (4th Cir. 2009). Ten days later, again in Clinton, Maryland, Malvo approached a man who was in the process of closing a liquor store and shot him in the abdomen at close range with the handgun. *Id.*

Muhammad and Malvo then went south for a short period. On September 21, Muhammad used a high-powered, long-range Bushmaster assault rifle to shoot two women who had just closed a liquor store in Montgomery, Alabama. Malvo was seen approaching the women as the shots were being fired and then rummaging through their purses. One of the women died from her wounds. Muhammad, 575 F.3d at 362. Two days after that, a woman in Baton Rouge, Louisiana, was fatally shot in the **[*268]** head with a Bushmaster rifle after closing the store where she worked. Again, Malvo was seen fleeing the scene with her purse. Id. at 362-63.

Shortly thereafter, Muhammad and Malvo returned to the Washington, D.C. area and, from October 2 until their capture on October 24, embarked on a series of indiscriminate sniper shootings with the Bushmaster rifle that left 10 more people dead, 3 seriously wounded, and the entire region "gripped by a paroxysm of fear," **[**5]** convinced that "every man, woman, and child was a likely target." Muhammad v. State, 177 Md. App. 188, 934 A.2d 1059, 1065-66 (Md. Ct. Spec. App. 2007). On October 2, shortly after 6 p.m., they shot and killed a man while he was in a grocery store parking lot in Montgomery County, Maryland. Id. at 1066. The next day, they murdered five people — four in the morning at different locations in Montgomery County, and a fifth that evening in Washington, D.C. Id. at 1067-69. The following day, they shot and seriously wounded a woman in Spotsylvania County, Virginia, while she was loading goods into her car. Id. at 1070. On October 7, they shot and gravely injured a 13-year-old boy in Prince George's County, Maryland, while he was on his way to school; two days later, they shot and killed a man at a gas station in Prince William County, Virginia; two days after that, they shot and killed another man at a gas station in Spotsylvania County, Virginia; and three days after that, they shot and killed a woman outside a Home Depot store in Fairfax County, Virginia. Id. at 1070-72. On October 19, they shot and seriously wounded a man while he was leaving a restaurant in Ashland, Virginia, and on October 22, they shot and killed a bus driver in Montgomery County, Maryland, the last of their sniper shootings. Id. at 1068, 1072.

Malvo and Muhammad were **[**6]** apprehended in the early hours of October 24 at a rest area in Frederick County, Maryland, while sleeping in a blue Chevrolet Caprice. A loaded .223 caliber Bushmaster rifle was found in the car, and a hole had been "cut into the lid of the trunk, just above the license plate, through which a rifle barrel could be projected." Muhammad, 934 A.2d at 1075. Modifications had also been made to the car's rear seat to allow access to the trunk area from the car's passenger compartment. *Id.* After his arrest, Malvo told authorities in Virginia that "he and his 'father,' John Allen Muhammad, had acted as a sniper team . . . in an effort to extort ten million dollars from the 'media and the government'" and that he had been the triggerman in 10 of the shootings. Later, however, when testifying as a witness at Muhammed's first-degree murder trial in Montgomery County, Maryland, Malvo stated that "he had been the actual shooter of [the 13-year old boy] in

Prince George's County and of [the bus driver] in Montgomery County" and that "Muhammad had been the actual triggerman on all other occasions." *Id. at 1078*.

In January 2003, a grand jury in Fairfax County, Virginia, returned an indictment charging Malvo as an adult with (1) capital **[**7]** murder in the commission of an act of terrorism, in violation of *Va. Code Ann. § 18.2-31(13)*; (2) capital murder for killing more than one person within a three-year period, in violation of *§ 18.2-31(8)*; and (3) using a firearm in the commission of a felony, in violation of *§ 18.2-53.1*. The prosecutor in that case sought the death penalty. Malvo pleaded not guilty to the charges, and, to ensure an impartial jury pool, the case was transferred to the Circuit Court for the City of Chesapeake, Virginia.

At the trial, which took place during November and December 2003, Malvo acknowledged his involvement in the killings but asserted an insanity defense based on **[*269]** the theory that he had been indoctrinated by Muhammad during his adolescence and was operating under Muhammad's control. To that end, defense counsel presented testimony from more than 40 witnesses who collectively described how Malvo was physically abused and largely abandoned as a child growing up in Jamaica and Antigua; how, when he was 15 years old, he befriended John Muhammad, an American veteran who had taken his three children to live in Antigua without their mother's knowledge; how Muhammad became a surrogate father for Malvo and brought him illegally to the United States **[**8]** in May 2001; how Malvo briefly reunited with his mother in the United States but then moved across the country in October 2001 to rejoin Muhammad, who had recently lost custody of his children; and how Muhammad then intensively trained Malvo in military tactics for nearly a year, telling Malvo that he had a plan to get his children back and force America to reckon with its social injustices. The jury rejected Malvo's insanity defense and convicted him of all charges, including the two capital murder charges.

At the sentencing phase of trial, the jury was instructed to choose between the death penalty and life imprisonment without parole. During this phase, Malvo's counsel presented additional evidence on Malvo's background and history, and he stressed Malvo's youth and immaturity in arguing that Malvo should be spared the death penalty. The jury returned its verdict on December 23, 2003, finding "unanimously and beyond a reasonable doubt after consideration of [Malvo's] history and background that there [was] a probability that he would commit criminal acts of violence that constitute a continuing serious threat to society" and also "that his conduct in committing the offense was outrageously **[**9]** or wantonly vile, horrible or inhuman in that it involved depravity of mind." Nonetheless, the jury, "having considered all of the evidence in aggravation and mitigation of the offense," "fix[ed] his punishment at imprisonment for life" for each of his two capital murder convictions.

After the jury was excused and a presentence report was prepared, the court conducted a final sentencing hearing on March 10, 2004, sentencing Malvo to two terms of life imprisonment, as required by Virginia law. *See* *Va. Code Ann. § 19.2-264.4(A)* (2004) (providing, for capital murder convictions, that where "a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life"). Under Virginia law, a defendant sentenced to life imprisonment for a capital murder offense committed on or after January 1, 1995, is ineligible for any form of parole. *See* *Va. Code Ann. §§ 53.1-165.1*, *53.1-40.01*. The court also sentenced Malvo to three years' imprisonment for the firearm conviction.

Following his conviction and sentencing in the Chesapeake City Circuit Court, Malvo entered an "*Alford* plea" pursuant to a plea agreement, *see* *North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)* (authorizing a defendant to waive trial and to consent to punishment without admitting participation in the acts constituting **[**10]** the crime), in the Circuit Court for the County of Spotsylvania, Virginia, pleading guilty to one count of capital murder, one count of attempted capital murder, and two counts of using a firearm in the commission of a felony. The plea agreement indicated that Malvo's attorney had advised Malvo that he faced death or imprisonment for a term of life for the capital murder charge and a sentence of 20 years to life imprisonment for the attempted capital murder charge. In the agreement, Malvo waived his "right to an appeal" and admitted that "the Commonwealth ha[d] sufficient evidence to convict **[*270]** [him]." The Commonwealth in turn agreed to dismiss two pending charges and agreed that sentencing Malvo to two terms of life imprisonment without parole, as well as eight years' imprisonment for the firearm offenses, was the "appropriate disposition in this case."

The Spotsylvania County Circuit Court held a plea and sentencing hearing on October 26, 2004, at which it

confirmed that Malvo understood "that by pleading guilty [he was] giving up constitutional rights" — specifically, his "right to a trial by jury" and his "right to confront and cross examine [his accusers]" — and that he was also "probably **[**11]** giving up [his] right to appeal any decisions made by this Court." After ensuring that Malvo understood the nature of the charges against him and had concluded, after consulting with his lawyers, that his *Alford* plea was "in [his] best interests," the court accepted Malvo's guilty pleas, finding that they "were freely, voluntarily, and intelligently made." It also "accepted and approved" the plea agreement itself. The court then sentenced Malvo to two terms of life imprisonment without parole for his capital murder and attempted capital murder convictions, plus eight years' imprisonment for the firearm convictions.

B

Nearly eight years after the conclusion of Malvo's Virginia prosecutions, the Supreme Court held that the *Eighth Amendment* prohibits juvenile homicide offenders from receiving "mandatory life-without-parole sentences" and that, before sentencing such an offender to life without parole, the sentencing court must first consider the "offender's youth and attendant characteristics." *Miller, 567 U.S. at 476, 483*. In light of *Miller*, Malvo filed two applications for writs of habeas corpus in the U.S. District Court for the Eastern District of Virginia pursuant to *28 U.S.C. § 2254*, one challenging the life-without-parole sentences imposed **[**12]** by the Chesapeake City Circuit Court and the other addressing the same sentences from the Spotsylvania County Circuit Court.

The district court denied and dismissed with prejudice both applications, concluding that *Miller* was not "retroactively applicable to cases on collateral review," *28 U.S.C. § 2244(d)(1)(C)*, and that Malvo's habeas applications therefore were time-barred under *§ 2244(d)*'s 1-year period of limitation. After Malvo appealed, his case was placed in abeyance while this court and the Supreme Court addressed whether *Miller* was to be applied retroactively. On January 25, 2016, the Supreme Court held that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Montgomery, 136 S. Ct. at 732*. Accordingly, we remanded Malvo's case comprising his two habeas applications to the district court for further consideration in light of *Montgomery*.

By memorandum and order dated May 26, 2017, the district court granted both of Malvo's habeas applications, vacating his four sentences of life imprisonment without parole and remanding to the Chesapeake City Circuit Court and the Spotsylvania County Circuit Court for resentencing in accordance with *Miller* and *Montgomery*. *See Malvo v. Mathena, 254 F. Supp. 3d 820 (E.D. Va. 2017)*. In entering that order, the district court **[**13]** rejected the Warden's argument that because the trial courts retained discretion under Virginia law to suspend Malvo's life sentences in whole or in part, those sentences were not mandatory and therefore were not covered by the *Miller* rule. The court explained that the constitutional rule announced in *Miller* and restated in *Montgomery* provided relief not only from **[*271]** *mandatory* life-without-parole sentences but also potentially from *discretionary* life-without-parole sentences. The district court also rejected the Warden's argument that in sentencing Malvo, the Chesapeake City Circuit Court had actually considered whether Malvo was one of those rare juvenile offenders whose crimes reflected irreparable corruption, as required by *Miller*. And finally, the court rejected the Warden's argument that Malvo, in entering the *Alford* plea in Spotsylvania County Circuit Court, waived the *Eighth Amendment* rights announced in *Miller*. In conclusion, the district court recognized that it was "completely possible that any resentencing conducted in accordance with *Miller* and *Montgomery* [might] result[] in the same sentences," *id. at 834*, but it concluded that Malvo was entitled to the procedure described in those cases before being **[**14]** sentenced to life without parole.

From the district court's May 26, 2017 order, the Warden filed this appeal.

II

In its *Eighth Amendment* jurisprudence, the Supreme Court recognizes that persons under the age of 18 as a class are constitutionally different from adults for purposes of sentencing. Juveniles inherently lack maturity; they do not have a fully formed character and a fully developed sense of responsibility; and they are both more susceptible to external influences and less able to control their environment than are adults. Juveniles are also more capable of change than adults and therefore more capable of being reformed. Because of these attributes of youth, juveniles are not as morally culpable as adults when engaging in similar conduct. In light of these characteristics, the Court recognizes that juveniles as a class are less deserving of the most severe punishments. But it also recognizes that a rare few juveniles may nonetheless be found to be permanently incorrigible.

Giving effect to these observations, the Supreme Court

has developed a juvenile-sentencing jurisprudence beginning with its 2005 decision in *Roper*, where it held that the death penalty cannot be imposed on juvenile offenders. **[**15]** *See* 543 U.S. at 571. That decision was followed by *Graham*, where the Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The *Graham* Court explained that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but it must give such defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id. at 75*; *see also id.* ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life," but "[i]t does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society").

Two years later in *Miller*, the Court held that a juvenile offender convicted of homicide cannot receive a mandatory sentence of life without parole. It explained, "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller, 567 U.S. at 476*. The Court stated, moreover, that not only must "a judge or jury . . . have the opportunity **[**16]** to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," *id. at 489*, but also the sentencer must actually "take into account **[*272]** how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *id. at 480*. The Court did not, however, adopt "a categorical bar on life without parole for juveniles," *id. at 479*, instead reserving the possibility that such a severe sentence could be appropriately imposed on "the rare juvenile offender whose crime reflects irreparable corruption," *id. at 479-80* (quoting *Roper, 543 U.S. at 573*).

Finally, in 2016, the Court decided *Montgomery*, holding that *Miller* announced a new "substantive rule" of constitutional law that applies retroactively "to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *136 S. Ct. at 725, 732*; *see also Teague v. Lane, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)* (plurality opinion) (recognizing that a new rule of constitutional law applies retroactively only if it qualifies as a substantive rule or a watershed rule of criminal procedure). Articulating the *Miller* rule, the *Montgomery* Court stated that "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge [must] take into account 'how children are different, **[**17]** and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *136 S. Ct. at 733* (quoting *Miller, 567 U.S. at 480*). It then stated:

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the *Eighth Amendment* for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, *it rendered life without parole an unconstitutional penalty for a class of defendants because of their status — that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, Miller announced a substantive rule of constitutional law*. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant — here, the vast majority of juvenile offenders — faces a punishment **[**18]** that the law cannot impose upon him.

Id. at 734 (alteration in original) (emphasis added) (internal quotation marks and citations omitted); *see also id.* ("Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence"). The Court explained further that *Miller* contained both a substantive rule and a procedural component: "*Miller*'s substantive holding" was that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity," and its procedural component implementing the substantive rule requires "[a] hearing where youth and its attendant circumstances are considered as sentencing factors" in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Id. at 735* (internal quotation marks omitted).

III

In this appeal, the Warden contends that notwithstanding this new *Eighth Amendment*

jurisprudence governing the sentencing of juveniles, the district court **[*273]** erred in awarding habeas corpus relief to Malvo, giving three reasons in support of his contention. *First*, he argues that "Malvo has no entitlement to relief under **[**19]** *Miller*" because "*Miller*'s new rule explicitly applies to *mandatory* life-without-parole sentences," whereas "the Virginia Supreme Court has conclusively held that Virginia does not impose mandatory sentences for any homicide offense" because judges retain the discretionary right to suspend sentences; *second*, that "Malvo received all that *Miller* would entitle him to during his trial in Chesapeake [City]" and therefore is not entitled to resentencing in that jurisdiction; and *finally*, that "Malvo's voluntary decision to enter into a plea agreement with stipulated sentences in Spotsylvania to eliminate the possibility of [the death penalty] waive[d] any claim he would have had under *Miller*" as to the two life-without-parole sentences he received in that jurisdiction. We consider these arguments in turn.

A

First, the Warden contends that because the *Miller* rule is limited to *mandatory* sentences of life imprisonment without parole, it does not implicate Malvo's sentences, which were, under Virginia law, subject to the sentencing court's discretion to suspend the sentence in whole or in part. He argues that because Malvo had the *opportunity* under Virginia law to request that his life sentences **[**20]** be suspended, he did not receive *mandatory* life-without-parole sentences and therefore is not entitled to any relief under *Miller*. Responding to the district court's conclusion that *Montgomery* clarified that the rule in *Miller* applies more broadly than only to mandatory life-without-parole sentences, the Warden contends that *Miller* itself did not sweep so broadly and that only the *Miller* rule applying to mandatory sentences was made retroactive in *Montgomery*. Indeed, he argues that the district court violated the rule established in *Teague* "by crafting a new rule of constitutional law based on *Montgomery*'s discussion of *Miller* and applying that new rule retroactively." In other words, as the Warden argues, "the principles of finality discussed in *Teague* prohibit federal courts from expanding new rules of constitutional law beyond their holdings," and "the correct approach is to recognize that . . . *Miller*'s new rule is defined by *Miller* itself, not *Montgomery*."

In response, Malvo contends that he did indeed receive mandatory life-without-parole sentences within the meaning of *Miller* because Virginia law provided then and still provides that when a jury declines to recommend the death **[**21]** penalty for a defendant convicted of capital murder, the defendant must be sentenced to life imprisonment without parole. *See* Va. Code Ann. § 19.2-264.4(A); *see also id.* §§ 53.1-165.1, 53.1-40.01. He asserts further that Virginia trial courts were not aware at the time of his sentencings in 2004 that they were empowered to suspend capital murder sentences. Finally, he argues that, in any event, the *Miller* rule is not limited to *mandatory* life-without-parole sentences but also applies, as noted in *Montgomery*, to *all* life-without-parole sentences where the sentencing court did not resolve whether the juvenile offender was "irretrievably corrupt" or whether his crimes reflected his "transient immaturity."

As the Warden asserts, the Virginia Supreme Court has now twice recognized that Virginia trial courts have long had the authority to suspend life sentences in whole or in part even following a capital murder conviction — an interpretation of Virginia law that is, of course, binding here. *See* Jones v. Commonwealth (Jones II), 293 Va. 29, 795 S.E.2d 705, 712 (Va. 2017) **[*274]** (reaffirming the holding in Jones v. Commonwealth (Jones I), 288 Va. 475, 763 S.E.2d 823, 824-25 (Va. 2014) (holding that when a Virginia trial court sentenced a juvenile homicide offender for capital murder in 2001, it had the authority to suspend part or all of his life sentence)). But also, as Malvo asserts, it is far from **[**22]** clear that anyone involved in Malvo's prosecutions actually understood at the time that Virginia trial courts retained their ordinary suspension authority following a conviction for capital murder. We need not, however, resolve whether any of Malvo's sentences were mandatory because *Montgomery* has now made clear that *Miller*'s rule has applicability beyond those situations in which a juvenile homicide offender received a *mandatory* life-without-parole sentence.

To be sure, all the penalty schemes before the Supreme Court in both *Miller* and *Montgomery* were mandatory. Yet the *Montgomery* Court confirmed that, even though imposing a life-without-parole sentence on a juvenile homicide offender pursuant to a mandatory penalty scheme *necessarily* violates the *Eighth Amendment* as construed in *Miller*, a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's "crimes reflect permanent incorrigibility," as distinct from "the transient immaturity of youth." *Montgomery, 136 S. Ct. at 734*. And we are not free to conclude, as the Warden argues, that *Montgomery*'s articulation of the *Miller* rule was mere dictum. To the **[**23]** contrary, *Montgomery*

stated clearly that, under *Miller*, the *Eighth Amendment* bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility. Indeed, this scope was the basis for its holding that *Miller* announced a substantive rule that applies retroactively to cases on collateral review. *See id.* And because *Montgomery* explicitly articulated the rule in *Miller* that it was retroactively applying, the district court could not have violated *Teague* in applying that rule. The Warden may well critique the Supreme Court's ruling in *Montgomery* — as did Justice Scalia in dissent, *see* *Montgomery, 136 S. Ct. at 743* (Scalia, J., dissenting) ("It is plain as day that the majority is not applying *Miller*, but rewriting it") — but we are nonetheless bound by *Montgomery*'s statement of the *Miller* rule.

At bottom, we reject the Warden's argument that Malvo "has no entitlement to relief under *Miller*" on the ground that *Miller* applies only to mandatory life-without-parole sentences and instead conclude that *Miller*'s holding potentially applies to any case where a juvenile homicide offender was sentenced to life imprisonment without the possibility of parole.

B

The Warden next contends that **[**24]** even if *Miller* applies to discretionary life-without-parole sentences, "Malvo received all that *Miller* would entitle him to during his trial in Chesapeake," and thus the two life-without-parole sentences that he received in that proceeding must be permitted to stand. In advancing this argument, the Warden notes that "[o]ver the course of six weeks, the jury heard an enormous amount of mitigation evidence that was nearly all focused on [Malvo's] youth, upbringing, and impressionability," and that it also "heard from multiple expert witnesses who testified specifically about how Malvo's age and upbringing affected his competency." He argues further that "the trial court and the jury actually considered [Malvo's mitigation] evidence in imposing the sentences in this case" and that "the jury's finding of future dangerousness and **[*275]** vileness shows that Malvo is the 'rare juvenile offender whose crime reflect[ed] irreparable corruption.'" Moreover, according to the Warden, the fact "[t]hat Malvo chose not to use the evidence he introduced to argue for a sentence less than life without parole does not change the fact that he had the opportunity to present the relevant evidence and argue for **[**25]** leniency, which is all that the *Eighth Amendment* requires."

The problem with the Warden's argument, however, is that, as a matter of Virginia law, the jury was not allowed to give a sentence less than life without parole. It was charged with deciding between the death penalty and life without parole, and it selected the more lenient of the two. Thus, even though the jury did find future dangerousness and vileness, as the Warden notes, it also considered Malvo's mitigation evidence and found that he deserved the lighter of the two sentences that it *could* give — life without parole.

Moreover, the Chesapeake City jury was never charged with finding whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility, a determination that is now a prerequisite to imposing a life-without-parole sentence on a juvenile homicide offender. Nor were Malvo's "youth and attendant circumstances" considered by either the jury or the judge to determine whether to sentence him to life without parole or some lesser sentence. *Montgomery, 136 S. Ct. at 735*.

We thus conclude that Malvo's sentencing proceedings in the Chesapeake City Circuit Court did not satisfy the requirements of the *Eighth Amendment* as articulated in *Miller* and *Montgomery*.

C

Finally, **[**26]** the Warden contends that "Malvo's voluntary decision to enter into a plea agreement with stipulated [life-without-parole] sentences in Spotsylvania . . . waive[d] any claim he would have had under *Miller*" as to those two sentences. The Warden notes that "Malvo received a substantial benefit" in "avoid[ing] a second trial at which he could have been sentenced to death" and contends that Malvo must therefore "be held to the terms of his bargain." He cites *Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*, and *Dingle v. Stevenson, 840 F.3d 171 (4th Cir. 2016)*, to argue that both the "Supreme Court and this Court have made clear that guilty pleas are not open to revision when future changes in the law alter the calculus that caused the defendant to enter his plea."

At the outset, we conclude that the resolution of this issue is not governed by *Brady* or *Dingle*. In *Brady*, the defendant pleaded guilty to a crime that carried the possibility of the death penalty in order to avoid that penalty, receiving instead a 50-year sentence of imprisonment (later reduced to 30 years). When the Supreme Court later held that the death-penalty provision involved in Brady's case was unconstitutional, Brady sought to set aside his plea agreement as invalid. The *Brady* Court rejected Brady's argument,

noting **[**27]** that "even if we assume that Brady would not have pleaded guilty except for the death penalty provision . . ., this assumption merely identifies the penalty provision as a 'but for' cause of his plea," but it "does not necessarily prove that the plea was coerced and invalid as an involuntary act." *397 U.S. at 750*. Rather, "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty," even one subsequently invalidated. *Id. at 755*.

In *Dingle*, we applied *Brady* to similar circumstances, concluding that a plea **[*276]** agreement could not be set aside as involuntary and invalid because it was entered into by Dingle to avoid the death penalty when that penalty was later determined to be unconstitutional in the circumstances. We noted in *Dingle* that the Supreme Court had "not suggested that a substantive rule would stretch beyond the proscribed sentence to reopen guilty pleas with a different sentence." *840 F.3d at 174*.

Thus, in both *Brady* and *Dingle*, the defendants sought to use new sentencing case law to attack their convictions — their guilty pleas — without any claim that the sentences they actually received were unlawful. The question in both cases was thus whether to set aside the guilty-plea ***[**28]*** *convictions* when the *penalties that induced the pleas* were later found to be unconstitutional. In both cases that relief was denied, and the legality *vel non* of the avoided sentences was thus held not to cast doubt on the validity of the guilty plea. In this case, by distinction, Malvo seeks to challenge his *sentences*, not his guilty-plea *convictions*, on the ground that they were retroactively made unconstitutional under the rule announced in *Miller*. Thus, whereas the defendants in *Brady* and *Dingle* sought to use new sentencing law as a sword to attack the validity of their guilty pleas, here the Warden seeks to use Malvo's lawful guilty plea as a shield to insulate his allegedly unlawful life-without-parole sentences from judicial review. We conclude that *Brady* and *Dingle* do not provide him with that shield.

Nonetheless, that brings us to the more formidable question of whether Malvo waived his constitutional challenge to his sentences by signing the plea agreement.

In that agreement, Malvo agreed that Virginia's summary of the facts could be proven in the case were it to go to trial, accepting that summary "in lieu of presentation of any evidence by the Commonwealth." And, after expressly **[**29]** waiving his rights to a speedy and public trial by jury, to compel the production of evidence and attendance of witnesses, to have a lawyer, to not testify against himself, and to be confronted by his accusers, he entered an *Alford* guilty plea and waived his right to an appeal. With respect to punishment, he stated in his plea agreement, "I understand that the Commonwealth's Attorney has agreed that the following specific punishment is the appropriate disposition in this case": "life in prison without parole" for the offenses of capital murder and attempted capital murder and a term of years for the other offenses. Finally, he acknowledged that "the Court [could] accept or reject this plea agreement." It is noteworthy, however, that in the plea agreement, Malvo did not himself agree that life-without-parole sentences were appropriate punishments for his crimes. That is not to say, of course, that Malvo did not expect that he was avoiding the death penalty by receiving life sentences without parole. *See* *Va. S. Ct. Rule 3A:8(c)(1)(C)*.

To begin, it is far from clear that a broad waiver of a *substantive* constitutional right, as the Warden maintains happened here, would even be enforceable. *See* *Montgomery, 136 S. Ct. at 729, 734* (explaining **[**30]** that "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether *beyond the State's power* to impose" and that, "[l]ike other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant — here, the vast majority of juvenile offenders — faces a punishment *that the law cannot impose upon him*" (alteration in original) (emphasis added) (internal quotation marks omitted)); *see also* *United States v. Lemaster, 403 F.3d 216, 220 & n.2 (4th Cir. 2005)* (holding that, just as "a defendant may **[*277]** waive his right to appeal directly from his conviction and sentence," he may also "waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary," but noting that there is a "narrow class of claims that we have allowed a defendant to raise on direct appeal despite a general waiver of appellate rights," including a claim that the "sentence imposed [was] in excess of the maximum penalty provided by statute," and indicating that "we see no reason to distinguish between waivers of direct-appeal rights and waivers of collateral-attack rights").

But, in any event, the plea agreement in this case does not **[**31]** provide any form of *express* waiver of Malvo's right to challenge the constitutionality of his sentence in a collateral proceeding in light of future Supreme Court holdings, nor was he advised during his

plea colloquy that his *Alford* plea would have that effect. He did expressly waive constitutional rights relating to trial and his right to direct appeal, but nothing with respect to the right to pursue future habeas relief from his punishment. Consequently, the Warden's waiver argument must rest on some form of *inherent* or *implied waiver* of his right to challenge his sentences as unconstitutional.

In the circumstances, we decline to hold that Malvo implicitly waived his right to argue, based on intervening Supreme Court holdings, that his sentences were ones that the State could not constitutionally impose on him. *Cf.* *Class v. United States, 138 S. Ct. 798, 804-05, 200 L. Ed. 2d 37 (2018)* (explaining that while "a guilty plea does implicitly waive some claims, including some constitutional claims," it "does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence'" (quoting *United States v. Broce, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)))*. We thus conclude that, while Malvo's convictions remain valid, nothing in his plea agreement precludes him from **[**32]** obtaining habeas relief under the new rule in *Miller*. Accordingly, we reject the Warden's argument that Malvo waived his right to challenge his sentences.

IV

To be clear, the crimes committed by Malvo and John Muhammad were the most heinous, random acts of premeditated violence conceivable, destroying lives and families and terrorizing the entire Washington, D.C. metropolitan area for over six weeks, instilling mortal fear daily in the citizens of that community. The Commonwealth of Virginia understandably sought the harshest penalties then available under the law, and the Warden now understandably seeks to sustain the penalties that were then legally imposed with arguments that are not without substantial force.

But Malvo was 17 years old when he committed the murders, and he now has the retroactive benefit of new constitutional rules that treat juveniles differently for sentencing. Because we are bound to apply those constitutional rules, we affirm the district court's grant of habeas relief awarding Malvo new sentencings. We make this ruling not with any satisfaction but to sustain the law. As for Malvo, who knows but God how he will bear the future.

AFFIRMED

End of Document

State v. Kahler

Supreme Court of Kansas

February 9, 2018, Opinion Filed

No. 106,981

Reporter
307 Kan. 374 *; 410 P.3d 105 **; 2018 Kan. LEXIS 13 ***; 2018 WL 794538

STATE OF KANSAS, Appellee, v. JAMES K. KAHLER, Appellant.

Subsequent History: US Supreme Court certiorari granted by, Motion granted by *Kahler v. Kan., 2019 U.S. LEXIS 1741 (U.S., Mar. 18, 2019)*

Prior History: **[***1]** Appeal from Osage District Court; PHILLIP M. FROMME, judge.

Disposition: Affirmed.

Syllabus

BY THE COURT

1. Under the first step of the two-part test for prosecutorial error set forth in *State v. Sherman, 305 Kan. 88, 378 P.3d 1060 (2016)*, an appellate court analyzes whether the prosecutor's statements fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.

2. It is within a prosecutor's permissible latitude to object that the defense is about to go beyond the admitted evidence in its summation to the jury.

3. An appellate court will review allegations of judicial misconduct that were not preserved at trial when the defendant's right to a fair trial is implicated. Further, *K.S.A. 2016 Supp. 21-6619(b)* provides the authority for this court to notice unassigned errors in death penalty appeals.

4. The appellate standard of review on claims of judicial misconduct is unlimited. The reviewing court will examine the particular facts and circumstances of the case to determine whether the judicial conduct, including comments other than jury instructions, manifests bias, prejudice, or partiality, or otherwise significantly undermines the fairness or reliability **[***2]** of the proceedings.

5. A district judge is charged with preserving order in the courtroom and with the duty to see that justice is not obstructed by any person. A judge may caution venire persons to refrain from making comments that could contaminate the jury pool, but the better practice would be to clarify that panel members will be provided an opportunity to raise any personal concerns they may have outside the presence of the other venire members.

6. A trial judge has broad discretion to control the courtroom proceedings, but when it is necessary to comment on a counsel's conduct, especially in the jury's presence, the judge should do so in a dignified, restrained manner; avoid repartee; limit comments and rulings to those reasonably required for the orderly progress of the trial; and refrain from unnecessarily disparaging persons or issues. Specifically, when a judge finds it necessary to request that counsel complete a voir dire examination more quickly, the better practice would be for the judge to make the request out of the presence of the venire panel.

7. It is misconduct for a judge, after having admonished defense counsel during opening statement about making statements without **[***3]** witness support, to give a special instruction after the opening statements, advising the jury that statements, arguments, and remarks of counsel are not evidence and may be disregarded if not supported by the evidence, when the instruction is prefaced by the judge's remark that the court normally does not do so.

8. While the trial court is allowed to question witnesses from the bench in order to fully develop the truth, the better practice is for the judge to discuss the matter with counsel outside the presence of the jury and request counsel to pose the questions necessary to clarify the matter.

9. A trial judge's erroneous ruling on a party's objection, standing alone, is not grounds for a finding of judicial

misconduct. A trial judge's statement "it's improper" when ruling on an objection is not per se misconduct.

10. Remarks to the jury that are legally and factually accurate and that do not demonstrate bias, prejudice, or partiality to either party do not constitute judicial misconduct.

11. The party asserting judicial misconduct has the burden to show that any misconduct found to exist actually prejudiced that party's substantial rights.

12. Under the facts of this case, the district **[***4]** court erred when it refused to give the defense's requested instruction on expert witness credibility because the instruction was legally appropriate and factually supported. Therefore, the next step on appellate review is to apply the harmless error paradigm set out in *State v. Ward, 292 Kan. 541, 565, 256 P.3d 801 (2011)*.

13. *K.S.A. 22-3220*, replacing the traditional insanity defense with a mens rea approach, does not violate the defendant's right to due process under the United States or Kansas Constitutions.

14. It is not legally appropriate to give a felony-murder instruction as a lesser included offense instruction for a capital murder charge, and a trial court does not commit clear error by failing to give such an instruction sua sponte.

15. Prohibiting the defense from asking prospective jurors about their views on the death penalty in the presence of the other venire persons is not erroneous when defense counsel is permitted to make such an inquiry individually, outside the presence of the other venire persons.

16. Cumulative trial errors, when considered collectively, may require reversal of a defendant's conviction when the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. The cumulative **[***5]** error rule does not require reversal if the evidence is overwhelming against the defendant.

17. The *Eighth Amendment to the United States Constitution* prohibits the infliction of cruel and unusual punishments. The United States Supreme Court has identified three subcategories of categorical proportionality *Eighth Amendment* challenges: (1) Based on the nature of the offense; (2) based on the characteristics of the offender; and (3) based on a combination of the offense and the offender, implicating a particular type of sentence as it applies to an entire class of offenders.

18. In analyzing an *Eighth Amendment* categorical proportionality challenge based on an offender's characteristics, the court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the *Eighth Amendment's* text, history, meaning, and purpose, the court must determine in the exercise of its own independent judgment whether the punishment in question is unconstitutionally cruel and unusual.

19. Pursuant to our decision in *State v. Kleypas, 305 Kan. 224, 335-37, 382 P.3d 373 (2016)*, we again decline to **[***6]** declare a categorical prohibition against imposing a death sentence based on the broad classification of mental illness.

20. It is not unconstitutionally duplicative to use the same conduct of the defendant to establish both an element of capital murder and the existence of an aggravating circumstance.

21. The aggravating factor that the crime was committed in a heinous, atrocious, or cruel manner is not so vague and duplicative that it fails to narrow the class of persons who are constitutionally death penalty eligible.

22. The standard of review on appeal as to the sufficiency of evidence regarding an aggravating circumstance is whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the existence of the aggravating circumstance beyond a reasonable doubt.

23. Shooting deaths are not inherently heinous, atrocious, or cruel. But where a defendant previously electronically stalked, threatened physical harm, and allegedly battered one of the victims, before methodically going through a house shooting each of the victims in turn; and where the victims were conscious long **[***7]** enough to suffer the physical pain of their injuries and the mental anguish of their impending death; while also being aware that other victims were being shot, the evidence was sufficient to support the jury's verdict that the capital murder was committed in a heinous, atrocious, or cruel manner.

Counsel: Meryl Carver-Allmond, of Capital Appellate

State v. Glover

Supreme Court of Kansas

July 27, 2018, Opinion Filed

No. 116,446

Reporter
308 Kan. 590 *; 422 P.3d 64 **; 2018 Kan. LEXIS 362 ***; 2018 WL 3596262

STATE OF KANSAS, Appellant, v. CHARLES GLOVER, Appellee.

Subsequent History: US Supreme Court certiorari granted by *Kansas v. Glover, 139 S. Ct. 1445, 203 L. Ed. 2d 680, 2019 U.S. LEXIS 2407 (U.S., Apr. 1, 2019)*

Prior History: Review of the judgment of the Court of Appeals in *54 Kan. App. 2d 377, 400 P.3d 182 (2017)* **[***1]** . Appeal from Douglas District Court; PAULA B. MARTIN, judge.

State v. Glover, 54 Kan. App. 2d 377, 400 P.3d 182, 2017 Kan. App. LEXIS 54 (June 30, 2017)

Disposition: Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Syllabus

BY THE COURT

1. A routine traffic stop is a warrantless seizure under the *Fourth Amendment to the United States Constitution* and is therefore unreasonable unless the officer who initiates the stop has a reasonable and articulable suspicion, based on facts, that the person stopped has committed, is committing, or is about to commit a crime.

2. Courts evaluate the existence of a reasonable suspicion under a totality-of-the-circumstances analysis that requires a case-by-case assessment.

3. The State bears the burden to justify a warrantless seizure, and it must do so with actual evidence. In determining whether the State has met its burden, a court cannot draw inferences in favor of the State from a lack of evidence in the record. Doing so impermissibly relieves the State of its burden.

4. An officer cannot begin a traffic stop to investigate whether the driver of a vehicle has a valid license based solely on the fact the vehicle's registered owner has a suspended or revoked driver's license. The officer must be able **[***2]** to point to specific and articulable facts from which the officer can rationally infer that the driver of the vehicle—not just the registered owner—has a suspended driver's license.

Counsel: Andrew Bauch, assistant district attorney, argued the cause, and John Grobmyer, legal intern, Charles E. Branson, district attorney, and Derek Schmidt, attorney general, were with him on the brief for appellant.

Elbridge Griffy IV, of Lawrence, argued the cause and was on the brief for appellee.

Judges: LUCKERT, J.

Opinion by: LUCKERT

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