THE SUPREME COURT REINFORCES BARRIERS TO COURT ACCESS: CASES FROM THE 2019–2020 TERM

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INTRODUCTION

As it did worldwide, the COVID-19 pandemic left its mark on the Supreme Court's 2019–2020 Term. In March and April of 2020, the Court canceled scheduled oral arguments, something it had not done since the influenza pandemic in October of 1919.[1] For the first time in its history, the Court heard cases by telephone conference call, rather than in-person, and allowed live audio broadcasts of those arguments.[2] Already known for deciding relatively few cases under Chief Justice Roberts's leadership, the Court issued only fifty-three signed opinions after briefing and oral argument, the fewest since 1862.[3] The presence of two Justices loomed over the Term—that of the Chief Justice, who voted with the majority in ninety-seven percent of all the decisions and dissented only twice; and that of Justice Ginsburg, whose illness prevented her from participating in some of the arguments during this, her last, Term.[4]

Despite the obstacles, the Court issued a number of consequential decisions, affecting high-profile subjects like immigration,[5] sexual orientation and gender identity,[6] abortion,[7] and President Trump's tax records.[8] The Court also decided cases that will affect individuals' ability to obtain relief from the courts when their rights are violated—which we refer to in this article as access to court.

The Supreme Court has recognized that access to court is "indispensable to a free government."[9] Going to court is "the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[10] Since its inception, the Supreme Court recognized the "invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[11] However, beginning in the late 1980s, under Chief Justice Rehnquist, the

1 *10th Annual Supreme Court Term in Review*, U.C. IRVINE SCH. L. (July 23, 2020) https://www.law.uci.edu/news/videos/supreme-court-review-2020.html.
2 *Id.*
3 *Id.*
4 *Id.*
5 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).
6 *See* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
7 *See* June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020).
8 *See* Trump v. Vance, 140 S. Ct. 2412 (2020).
9 Downes v. Bidwell, 182 U.S. 244, 282–83 (1901).
10 Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).
11 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109 (1765)).

Supreme Court began to make it more and more difficult for individuals to access the courts, particularly when seeking to assert claims against the government.[12] This trend continues today.

The particular subject matter of the Court's access-to-court decisions varies somewhat from year to year, depending on the issues contained in the petitions for certiorari that reach the Court. This article will focus on access-to-court rulings from the 2019–2020 Term, which saw the Court address the following issues: state sovereign immunity, discrimination claims, statutory construction, suits against religious employers, the Administrative Procedure Act, severability, statutes of limitation, and finality. In each of these areas, the Court made decisions that will broadly affect whether and how individuals can obtain relief from a court. The article concludes by previewing potentially significant access-to-court cases of the 2020–2021 Term.

12 *See, e.g.*, Matthew Diller et al., *Decisions on Federal Court Access During the Supreme Court's 1999-2000 Term: Some Social Security, a Little Federalism, and More of the Usual*, 34 Clearinghouse Rev. 405, 408–11 (Nov.–Dec. 2000).

I. STATE SOVEREIGN IMMUNITY

One of the most significant stories in constitutional law over the last thirty years is the Court's ongoing interest in federalism, as illustrated by its decisions recognizing states' immunity from suit by individuals based on violations of federal law. Over the years, the Supreme Court has decided a number of these cases, almost always finding for the state and expanding states' sovereign immunity.[13] This immunity from suit means that the individual plaintiff injured by a state actor is blocked from obtaining any relief in court. The 2019–2020 Term added to the Court's sovereign immunity case sheet with *Allen v. Cooper*.

Blackbeard the Pirate set the stage for the Court to decide *Allen v. Cooper*.[14] Blackbeard commandeered a slave ship and renamed her the *Queen Anne's Revenge* in 1717.[15] A year later, the ship ran aground off the coast of North Carolina.[16] *Queen Anne's Revenge* lay there until 1996 when a marine salvage company discovered it.[17] North Carolina assumed ownership, as the ship was discovered along its coastline, and contracted with the salvage company to recover it.[18] The company hired Frederick Allen, a local of North Carolina, to take photos of the salvage effort.[19] Mr. Allen did his job and registered copyrights of all his work. After North Carolina published some of Allen's photographs, he sued the State, alleging copyright infringement and seeking money damages.[20] North Carolina moved to dismiss based on sovereign immunity.[21] Although the district court allowed the infringement claim to proceed, the United States Court of Appeals for the Fourth Circuit agreed with North Carolina's arguments and reversed.[22] The Supreme Court granted certiorari.[23]

Despite calling copyright infringement "a modern form of piracy,"[24] the Court found North Carolina immune from suit based on the Eleventh

13 *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . ."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas, 491 U.S. 1 (1989)).

14 Allen v. Cooper, 140 S. Ct. 994 (2020).

15 *Id.* at 999.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Allen v. Cooper, 895 F.3d 337, 343 (4th Cir. 2018).

23 Allen v. Cooper, 139 S. Ct. 2664 (2019) (granting certiorari).

24 Allen v. Cooper, 140 S. Ct. at 999 (2020).

Amendment, which states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[25] The Court acknowledged that the text of the Eleventh Amendment generally bars suits against a state by citizens of another state, but noted that, despite this, the Supreme Court has long applied the amendment more broadly to also preclude suits by a state's own citizens.[26] Thus, the Court held that amendment applied in Mr. Allen's case.

There are exceptions to state immunity, but over the last couple of decades, the Court has significantly narrowed them. Mr. Allen could not navigate these narrow straits. One exception allows a state to be sued if Congress has abrogated, or removed, the state's immunity.[27] For this to occur, Congress first has to clearly state its intention to abrogate in a statute, and it must also have the constitutional authority to take that step.[28]

In Mr. Allen's case, there could be no doubt that Congress abrogated the state's immunity. "The Copyright Remedy Clarification Act (CRCA) provides that a state 'shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court' for copyright infringement."[29] However, the case foundered on the shoals of the second requirement—that Congress must have the constitutional authority to abrogate. The Court looked at this requirement in an analogous case and that case controlled, thus leaving the "slate . . . anything but clean."[30]

Mr. Allen argued in defense of congressional authority; first, that Article I of the Constitution empowered Congress to legislate copyright protection and that to abrogate states' immunity from suit was necessarily a valid exercise of that power.[31] However, the Court had rejected that argument twenty years prior in a patent infringement case under the Patent Remedy Act, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[32]

25 U.S. Const. amend. XI; *Allen*, 140 S. Ct. at 999.

26 *Allen*, 140 S. Ct. at 1000.

27 *Id*. at 1000–01.

28 *Id*. at 1000–01 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000)).

29 *Id*. at 999 (quoting Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511(a)).

30 *Id*. at 1001.

31 *Id*. (citing U.S. Const. art. I, § 8, cl. 8) ("Congress has power under Article I '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'").

32 Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding Congress cannot use Article I to circumvent limits that state sovereign immunity places on federal jurisdiction).

It rejected the argument here, too, finding the Patent Remedy Act and the CRCA to be "basically identical statutes."[33] To decide for Allen, the Court would have had to overrule *Florida Prepaid*. It refused, stating that *stare decisis* is "a 'foundation stone rule of law'" and to overturn a decision requires a "'special justification,' over and above the belief 'that the precedent was wrongly decided.'"[34] Justice Thomas disagreed with this discussion of *stare decisis*, stating that the Court has a duty to correct erroneous precedents, and no "special justification" is needed.[35]

Next, Mr. Allen argued that Congress could abrogate the State's immunity under section 5 of the Fourteenth Amendment.[36] This provision unquestionably shifted the balance of power between state and federal governments. However, a couple of decades ago, the Court introduced what amounts to a strict scrutiny test that drastically heightened the requirements for using this power.[37] This test requires Congress to tailor the abrogation to remedy a pattern of intentional or at least reckless infringement by states of individuals' Fourteenth Amendment protections and to ensure "congruence and proportionality" between the injury to be prevented and the remedy Congress uses.[38] The *Florida Prepaid* Court applied this test to reject abrogation in the Patent Remedy Act, and the *Allen* Court found that precedent controlled the CRCA.[39] As occurred in *Florida Prepaid*, the Court found little evidence of systemic statutory infringement by the states: "In this

33 *Allen*, 140 S. Ct. at 998, 1001–02 (citing *Fla. Prepaid*). The Court refused to extend a holding that Article I's bankruptcy clause allows Congress to abrogate state immunity in bankruptcy proceedings, labeling that case a "good-for-one-clause-only holding" due to "bankruptcy exceptionalism." *Id.* at 1002–03 (citing Central Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006)).

34 *Allen*, 140 S. Ct. at 1003 (first quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); then quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

35 *Id.* at 1007–08 (Thomas, J., concurring in part and concurring in the judgment). *See also* Ramos v. Louisiana, 140 S. Ct. 1390, 1421–22 (2020) (overruling, by a "badly fractured majority[,]" two precedent cases and explaining positions on *stare decisis*, with Justice Alito's dissent complaining that the majority gave the doctrine "rough treatment . . . [l]owering the bar for overruling our precedents. . . ." *Id.* at 1425 (Alito, Roberts, JJ., dissenting; Kagan, J., dissenting in part)).

36 *Allen*, 140 S. Ct. at 1001. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation" Section 1 of the Fourteenth Amendment, which prohibits states from depriving "any person of life, liberty, or property, without due process of law." *Id.* at 1003 (quoting U.S. CONST. amend. XIV, §§ 1, 5).

37 *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

38 *Allen*, 140 S. Ct. at 1004 (citing *City of Boerne*, 521 U.S. at 520). The Court has looked to the legislative record leading up to the passage of the law for evidence of infringement. *Id.*

39 *Id.* at 1005.

case as in [*Florida Prepaid*], the statute aims to 'provide a uniform remedy' for statutory infringement, rather than to redress or prevent unconstitutional conduct."[40] As a result, Mr. Allen could not sue the state.

As this case illustrates, in recent times, the Supreme Court has narrowed congressional power to abrogate state sovereign immunity. Its decisions "create an odd discrepancy between Congress' considerable substantive power to enact legislation that imposes requirements on states and its inability to enforce those standards by authorizing private parties to sue states when they breach valid requirements."[41] In other words, individuals who are harmed by state government violations of federal laws are being left without a remedy.

40 *Id.* at 1007 (quoting *Fla. Prepaid*, 527 U.S. 627, 647 (1999)).

41 Gill Deford et al., *The Supreme Court's 1998-1999 Term: Federalism, State Act, and Other Cases Affecting Access to Justice*, 33 Clearinghouse Rev. 375, 375–76 (1999).

II. STATING CLAIMS FOR DISCRIMINATION

The Court issued several opinions addressing discrimination claims. A pair of cases focused on the standard of causation set forth in two anti-discrimination statutes; one aimed at race and the other at age.[42] Anti-discrimination litigants regularly grapple with proof of causation, as it can be difficult to show that discriminatory animus is the primary motivating factor for a challenged action, and courts often require plaintiffs to show that it is. Here, the plaintiff experiencing race discrimination was required to meet this bar, while the plaintiff experiencing age discrimination was not. These contrasting results arise from the Court's interpretation of the relevant anti-discrimination statutes. A third major case considered whether employers' decisions to fire gay men because of their sexual orientation, and a transgender woman because of her gender identity, constituted prohibited sex discrimination under Title VII of the Civil Rights Act.[43]

A. *Comcast Corporation v. National Association of African-American Owned Media*

In this case, the National Association of African-American Owned Media (NAAOM) sued Comcast for refusing to carry their television channels, alleging Comcast violated 42 U.S.C. § 1981, which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[44] The question at hand was whether it was necessary for NAAOM to show that racial animus was the sole reason Comcast did not contract with them or "but-for" causation.[45] The district court found that NAAOM failed to state a claim for relief because it had not made this showing.[46] The United States Court of Appeals for the Ninth Circuit reversed, holding that race need only play "some role" in the decision-making process to state a claim, creating a circuit split.[47] With near unanimity (Justice Ginsburg concurred in part and joined the judgment in part), the Supreme Court reversed.[48] Justice Gorsuch, writing for the majority, cited "'textbook tort law' that a plaintiff seeking redress for

42 Comcast Corp. v. Nat'l Ass'n of African-American Owned Media, 140 S. Ct. 1009 (2020); Babb v. Wilkie, 140 S. Ct. 1168 (2020).
43 Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
44 *See Comcast Corp.*, 140 S. Ct. at 1013 (2020) (quoting 42 U.S.C. § 1981).
45 *Id.*
46 *Id.* at 1013.
47 *Id.* at 1014.
48 *Id.* at 1019.

a . . . legal wrong typically must prove but-for causation."[49] Thus, the Court agreed with the district court that, under § 1981, plaintiffs must show that their injury would not have occurred if they were white.

Though the plaintiffs argued that § 1981 provided an exception to the but-for causation requirement, the Court disagreed, stating that "taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule."[50] The Court also found that the burden to show such causation exists at the pleading stage and throughout the case.[51] Only Justice Ginsburg broke rank to express disagreement with Comcast's assertion that § 1981 only governs the decision to enter into a contract, writing that § 1981 also prohibits discrimination in the earlier phases of contract formulation:[52]

> An equal 'right . . . to make . . . contracts, is an empty promise without equal opportunities to present or receive offers and negotiate over terms. . . . It is implausible that a law 'intended to . . . secure . . . practical freedom,' would condone discriminatory barriers to contract formation.[53]

This decision resolved a circuit split between the Ninth Circuit and others, such as the Seventh, which imposed the stricter but-for causation standard on § 1981 plaintiffs.[54] While the decision disappointed lawyers fighting race discrimination, it did not adopt the narrowest definition of actionable conduct under § 1981, averting the outcome advocates most feared.[55]

B. *Babb v. Wilkie*

In this case, a pharmacist working at a Veteran's Affairs (VA) hospital alleged discrimination under the Age Discrimination in Employment Act (ADEA).[56] The pharmacist, Babb, claimed that the VA made personnel decisions based on her age that reduced her chances of promotion and

49 *Id.* at 1012, 1014.
50 *Id.* at 1014.
51 *Id.* at 1014–15.
52 *Id.* at 1020 (Ginsburg, J., concurring in part and concurring in the judgment).
53 *Id.* (citations omitted).
54 *Id.* at 1013–14.
55 *See, e.g.*, Press Release, NAACP Legal Defense and Educational Fund, Supreme Court Increases Burden for Claims of Race Discrimination Under Crucial Civil Rights Statute (Mar. 23, 2020), https://www.naacpldf.org/wp-content/uploads/Comcast-Decision-Statement.pdf.
56 *See* Babb v. Wilkie, 140 S. Ct. 1168 (2020).

reduced her pay.[57] The District Court for the Middle District of Florida held that the VA showed non-discriminatory reasons for the employment decision and therefore did not violate the ADEA.[58] The United States Court of Appeals for the Eleventh Circuit affirmed, citing binding precedent, "but added that it might have agreed with her if it were writing on a clean slate."[59]

The Supreme Court considered whether the lower courts were correct that the ADEA imposed liability only when age was a but-for cause of the employment decision.[60] The VA argued that it should prevail even if Babb showed that age played a part in their decision and that Babb should be required to show that, but for her age, the adverse decision would not have occurred.[61] Babb countered that she should prevail if age played *some* role in the decision.[62] Justice Alito, writing for an eight-member majority, held that the federal-sector employer section of the ADEA (which applies to the VA) does not require a showing of but-for causation.[63] Rather, the statute requires that personnel decisions "shall be made free from any discrimination based on age[;]" therefore, its "plain meaning" is that "personnel actions be untainted by any consideration of age."[64]

On the other hand, once discrimination under the ADEA is shown, the Court held that but-for causation must still be considered when formulating the appropriate remedy. To obtain reinstatement, back pay, compensatory damages, or similar forms of relief, the plaintiff must show that the adverse decision would not have occurred but for age discrimination.[65] If the employee shows that discrimination was a factor, but did not ultimately cause the outcome, they are limited to "injunctive or other forward-looking relief."[66] While this means it is easier to make an initial showing of discrimination under the ADEA than under § 1981, ADEA plaintiffs still must show but-for causation to receive most kinds of relief.

A third discrimination case, *Bostock v. Clayton County, Georgia*, involving discrimination on the basis of sexual orientation and identity, is a blockbuster opinion breaking new ground in sex discrimination law by making clear that discrimination against homosexual and transgender people is a form of

57 *Id.* at 1171.
58 *Id.* at 1172.
59 *Id.* at 1172 (quoting Babb v. Sec'y, Dep't of Veterans Affs., 743 Fed. App'x 280, 287 (11th Cir. 2018)) (internal quotation marks omitted).
60 *Id.* at 1171; 743 F. App'x at 287–88.
61 *Babb*, 140 S. Ct. at 1172.
62 *Id.*
63 *Id.* at 1170–71.
64 *Id.* at 1171 (quoting 29 U.S.C. § 633a(a)).
65 *Id.* at 1177–78.
66 *Id.* at 1178.

illicit sex discrimination.[67] The *Bostock* opinion considers the nature of the prohibited discrimination itself, based on the text of the applicable statute, and has already had an enormous impact on how sex discrimination is understood under federal law.[68] It is an important statutory interpretation case and will be discussed in that section. In contrast, the *Comcast* and *Babb* decisions were relatively narrow, technical opinions in nearly unanimous decisions without major implications for race or age discrimination. But, for court access purposes, they are significant, demonstrating the importance of closely examining the wording of statutes governing causation.

67 Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).

68 *See, e.g.*, Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After* Bostock v. Clayton County, 69 Kan. L. Rev. 409 (2021).

III. STATUTORY INTERPRETATION

Each Supreme Court Term typically includes a number of statutory interpretation cases,[69] and this Term was no exception. While the Court announced no new principles, it did reinforce some classic concepts that are broadly applicable to any case involving the meaning of a statute. Most of these decisions show the Court adhering closely to the explicit statutory text and demonstrate a reluctance to go beyond the text of the statute to account for other considerations that might favor relief.

In this vein, several statutory construction cases emphasized the importance of relying on the plain language of the statute at issue. For example, in *Intel Corporation Investment Policy Committee v. Sulyma*, the Court unanimously emphasized that: "'[w]e must enforce plain and unambiguous statutory language' in . . . any statute, 'according to its terms.'"[70] And in *Rotkiske v. Klemm*, Justice Thomas wrote, "We must presume that Congress 'says in a statute what it means and means in a statute what it says there.'"[71] The majority in *Bostock v. Clayton County, Georgia* stated this proposition even more forcefully: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[72]

A. *Bostock v. Clayton County, Georgia*

Bostock was a significant statutory interpretation case as well as perhaps the most important discrimination case of the Term. The consolidated case involved gay men who were fired because of their sexual orientation and a transgender woman who was fired because of her gender identity.[73] Writing for a five-member majority, Justice Gorsuch held that the fact that Congress did not specify whether the phrase "discrimination because of sex" included discrimination based on homosexual or transgender identity meant that Title VII did include such discrimination, since "homosexuality and transgender status are inextricably bound up with a person's sex."[74] The Court explained

69 *See, e.g.*, Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) (reviewing a number of such cases); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018).

70 Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 776 (2020) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

71 Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019) (internal citation omitted).

72 *Bostock*, 140 S. Ct. at 1737.

73 *Id.* at 1738–39.

74 *Id.* at 1742, 1744.

that where the statutory language is clear, Congress's intent in drafting that statute is not dispositive to its interpretation.

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands.[75]

Thus, the Court found that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[76]

This case demonstrated that even a conservative Court would hold that anti-discrimination laws protect homosexual and transgender people when it found that the statutory language was clear. Other plaintiffs seeking to redress discrimination should therefore look closely at the statutory language to argue that it sets out clear protections against the discrimination at issue.

B. *County of Maui v. Hawai'i Wildlife Fund*

Another notable statutory interpretation case, *County of Maui v. Hawai'i Wildlife Fund*, reviewed a provision of the Clean Water Act (CWA).[77] The CWA forbids the addition of any pollutant from a "point source" into "navigable waters" without the appropriate permit.[78] Several environmental groups sued the County of Maui, claiming that it was discharging pollutants from its wastewater reclamation facility into the Pacific Ocean.[79] The Ninth Circuit held that a permit was required when "pollutants are *fairly traceable* from the point source to navigable waters such that the discharge is the functional equivalent" of a direct discharge.[80] Granting certiorari, the Supreme Court considered whether the CWA required the county to obtain a permit for pollutants that originate from a specific point source, the wastewater treatment facility, but are conveyed through another source (here,

75 *Id.* at 1737.
76 *Id.* at 1742.
77 *See* Cnty. of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462 (2020).
78 *Id.* at 1468 (citing 33 U.S.C. §§ 1311(a), 1362(12)(A)).
79 *Id.*
80 *Id.* at 1469 (quoting 886 F.3d 737, 749 (2018)).

groundwater) into navigable waters.[81] More broadly, the Court considered when a pollutant could reasonably be said to have come "from" a point source.[82]

The county of Maui, joined by the solicitor general as amicus curiae, argued that any travel through groundwater means that a pollutant is no longer fairly traceable to the point source and thus the discharge must be excluded from the permitting program.[83] The Court largely upheld the Ninth Circuit's decision, citing the statute's language, structure, and purpose as well as legislative history and congressional intent.[84] Justice Breyer's 6-3 majority opinion, joined by all but Justices Thomas, Gorsuch, and Alito, found the Ninth Circuit's holding too broad because requiring only that a pollutant be "fairly traceable" to a source could allow the EPA "to assert permitting authority over the release of pollutants that reach navigable waters many years after their release . . . and in highly diluted forms."[85] The majority suggested factors courts can use to determine when a discharge through groundwater is the functional equivalent of a direct discharge, such as:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.[86]

The Court remanded the case to the Ninth Circuit to apply these factors.[87] Justice Alito, in his separate dissent, accused the court of "devis[ing] its own legal rules" that cannot "be applied with a modicum of consistency."[88]Justice Thomas chastised the majority for failing to closely adhere to the text of the statute in order to effectuate its apparent purpose.[89]

This case is notable because a six-member majority relies as much on the statute's purpose as it does the text and structure.[90] The majority

81 *Id.* at 1468–69.
82 *Id.* at 1470.
83 *Id.*
84 *Id.* at 1470–72.
85 *Id.* at 1470.
86 *Id.* at 1476–77.
87 *Id.* at 1477–78.
88 *Id.* at 1482 (Alito, J., dissenting).
89 *Id.* at 1479.
90 *See id.* at 1471–72.

even cites the legislative history of the statute for support.[91] Thus, it is an exception to the prevalence of textualism in federal statutory interpretation cases.[92]

C. *United States Forest Service v. Cowpasture River Preservation Association*

In another notable statutory construction case, *United States Forest Service v. Cowpasture River Preservation Association*, the Court was asked to interpret congressional silence.[93] This case involved a challenge to the issuance of a permit by the U.S. Forest Service to allow the Atlantic Coast Pipeline to run beneath the Appalachian Trail.[94] Environmental groups opposed the project, arguing that this stretch of land was a national park under the Act for Administration.[95] The nature of the land was central to the question considered by the Court: whether the land at issue is considered a national park, through which no pipeline permit may issue, or other federal lands, though which a permit is allowed. Neither relevant statute—the Mineral Leasing Act or the National Trails System Act—addressed this question explicitly.[96]

A seven-member majority, led by Justice Thomas, concluded that where Congress failed to be specific in writing a statute, interpretation required a narrow reading.[97] The majority held that because Congress did not specify that the Department of the Interior's assignment of responsibility for the Appalachian Trail to the National Park Service converted the land through which the trail passes into national park land, there was no such conversion.[98]

The Court emphasized that the case involved private property rights, noting that "[o]ur precedents require Congress to enact exceedingly

91 *Id.*

92 *See* Tara Leigh Grove, Note, *Which Textualism?* 134 Harv. L. Rev. 265, 265 n.1 (Nov. 2020) (noting textualism "has in recent decades gained considerable prominence within the federal judiciary") (citing Elena Kagan, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan in the Reading of Statutes*, YouTube (Nov. 15, 2015), https://youtu.be/dpEtszFToTg (at 8:28, noting "w[e are] all textualists now.")). Scholars have also observed "a discernable decline in the rate at which the Court invokes legislative history." *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275, 1277 n.1 (Mar. 2020) (citing additional scholarship).

93 *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1843 (2020).

94 *Id.* at 1841–42.

95 *Id.* at 1842, 1848 (citing Mineral Leasing Act, 30 U.S.C. §§ 181–287, and National Trails System Act, 16 U.S.C. § 1244(a)(1)).

96 *U.S. Forest Serv.*, 140 S. Ct. at 1843–44.

97 *Id.* at 1847–48.

98 *Id.*

clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[99] While the respondents argued that the delegation of authority over the trail changed the character of the adjoining land, the Court disagreed, noting that:

> Congress has used express language in other statutes when it wished to transfer lands between agencies. Congress not only failed to enact similar language in the Trails Act, but . . . [t]he entire Trails Act must be read against the backdrop of the Weeks Act, which states that lands acquired for the National Forest System—including the George Washington National Forest—"shall be permanently reserved, held, and administered as national forest lands."[100]

Since, in the Trails Act, Congress failed to use "unequivocal and direct language . . . to transfer land from one agency to another, just as one would expect if a property owner conveyed land in fee simple to another private property owner[,]" the Court concluded there was no transfer of land, and the Department of the Interior retained authority to grant pipeline rights-of-way through the land.[101] This decision suggests that the Court is inclined to read statutes to protect private property interests, even when those interests run up against significant environmental concerns. Moreover, it illustrates that the Court is unwilling to read an intent to protect the environment, as opposed to private property, into a statute unless the statute provides for such protection with exacting specificity—especially against a government actor.

D. *Maine Community Health Options v. United States*

The final statutory interpretation case that we discuss resulted in a significant Affordable Care Act[102] (ACA) ruling and a victory for health insurers in *Maine Community Health Options v. United States*.[103] The decision contained an extended discussion of statutory interpretation rules and held that the plaintiffs could obtain relief through the Tucker Act, a federal law that allows plaintiffs to pursue money claims against the federal government in certain situations.[104]

99 *Id.* at 1849–50.
100 *Id.* at 1850 (quoting 16 U.S.C. § 521).
101 *Id.* at 1847.
102 Patient Protection and Affordable Care Act, 42 U.S.C. 18001 (2010).
103 *See* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020).
104 *Id.*; 28 U.S.C. § 1491(a)(1).

The ACA expanded health care coverage for millions who did not have it.[105] Among other things, the law established online exchanges where health insurers sell plans, provided tax credits to help people buy those plans, and prohibited insurers from discrimination based on health conditions.[106] At issue in this lawsuit was a provision of the ACA that provided protection to insurers that covered patients with higher needs that may incur significant losses.[107] Section 1342 of the ACA created a "Risk Corridors" program that limited insurer profits and losses during the first three years of the exchanges.[108] This provision required insurers to pay the U.S. Department of Health and Human Services (HHS) if plan profits exceeded a certain limit and provided for HHS to pay insurers that had losses over certain limits.[109] The ACA did not appropriate funds for the program, nor did it place a ceiling on the amount that HHS might have to pay.[110]

At the end of each year of the program, the federal government owed billions more to insurers with unprofitable plans than profitable insurers owed the government.[111] Each year, however, a hostile Congress attached a rider to the appropriations bill preventing the use of funds for risk corridor payments.[112] Four health insurers sued the federal government to recoup damages for their losses.[113] The United States Court of Appeals for the Federal Circuit ruled against them, holding that the appropriations riders had implicitly "repealed or suspended" § 1342's requirement that the government cover losses.[114]

The Supreme Court granted certiorari and reversed in a decision by Justice Sotomayor, joined in full by the Chief Justice and Justices Ginsburg,

105 *See* Rachel Garfield et al., Henry J. Kaiser Fam. Found., The Uninsured and the ACA: A Primer – Key Facts About Health Insurance and the Uninsured Amidst Changes to the Affordable Care Act (2019), http://files.kff.org/attachment/The-Uninsured-and-the-ACA-A-Primer-Key-Facts-about-Health-Insurance-and-the-Uninsured-amidst-Changes-to-the-Affordable-Care-Act (describing health insurance coverage gains resulting from the ACA).

106 *Me. Cmty. Health Options*, 140 S. Ct. at 1315. *See* 26 U.S.C. § 36B (providing for tax credits as premium assistance); 42 U.S.C. §§ 300gg-3, -11 (imposing consumer protections including prohibiting lifetime or annual limits and guaranteeing coverage for individuals with pre-existing conditions); 42 U.S.C. §§ 18031–18044, 18071 (establishing exchanges and imposing limits on cost sharing).

107 *Me. Cmty. Health Options*, 140 S. Ct. at 1315–16.

108 *Id.* at 1316 (citing § 1342, 124 Stat. 211 (codified at 42 U.S.C. § 18062)).

109 *Id.* at 1316.

110 *Id.*

111 *Id.* at 1317.

112 *Id.*

113 *Id.* at 1318.

114 *Id.*

Breyer, Kagan, and Kavanaugh, and in part by Justices Thomas and Gorsuch.[115] It held that § 1342 obligated the federal government to pay insurers in full, and neither Congress's failure to provide details about how the obligation must be satisfied nor the subsequent riders negated the obligation.[116] The statute created an obligation, the Court held, citing the plain language that stated that the federal government "shall pay" an amount determined by formula to plans that lose money.[117] The mandatory nature of the term "shall" was underscored by adjacent provisions, which differentiate between when HHS "shall" take certain actions and when it "may" exercise discretion.[118] "Thus, without 'any indication' that [the statute] allows the Government to lessen its obligation, we must 'give effect to [its] plain command.' That is, the statute meant what it said: The Government 'shall pay' the sum that § 1342 prescribes."[119]

Next, the Court held that Congress did not repeal by implication the obligation to pay the insurers when it refused to fund the risk corridors program in its appropriations riders.[120] It cited the long-standing principle that "repeals by implication" are rare and disfavored, particularly in the appropriations context.[121] The Court also pointed out that other sections of the ACA indicate that they are "subject to the availability of appropriations," while § 1342 does not.[122] "This Court generally presumes that 'when Congress includes particular language in one section of a statute but omits it in another,' Congress 'intended a difference of meaning.'"[123] The majority refused to find persuasive the legislative history offered by the United States, which consisted of a congressional floor statement and unpublished Government Accountability Office statement "doubt[ing] that either source could ever evince the kind of clear congressional intent required to repeal a statutory obligation through an appropriations rider."[124]

Finally, the Court found that the Tucker Act authorized the plaintiffs' suit for damages. The Tucker Act provides jurisdiction to the Court of Claims to hear non-tort claims for damages against the United States based on the

115 *Id.* at 1314.
116 *Id.* at 1319–20.
117 *Id.* at 1320–21 (citing 42 U.S.C. § 18062(a), (b)(1)).
118 *Id.* at 1321 (citing §§ 1341(b)(2), 1343(b)).
119 *Id.* at 1321 (quoting Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach et al., 523 U.S. 26, 35 (1998)).
120 *Id.* at 1323.
121 *Id.*
122 *Id.* at 1322.
123 *Id.* at 1323 (citations omitted).
124 *Id.* at 1326 (citations omitted).

Constitution, statutes, regulations, or contract.[125] While acknowledging that it is rare to find a law that implicitly authorizes a damages suit under the Tucker Act, the Court concluded that § 1342 does.[126] Though it contains no substantive rights, the Tucker Act provides a means to enforce a statute that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," even if that statute does not explicitly provide for damages.[127] The statute's plain language says the government "shall pay," and that language "often reflects a congressional intent 'to create both a right and a remedy' under the Tucker Act."[128] Moreover, the statutory provision focuses on the compensation of insurers for past injuries, further indicating that it imposes an enforceable obligation.[129] Section 1342 contains no judicial remedies of its own nor any comprehensive remedial scheme supplanting a remedy through the Tucker Act. [130]

Justice Alito disagreed with the majority's decision to find an implied right of action to enforce the risk corridor provision. His dissent highlights recent Supreme Court precedent making it more difficult for individuals to obtain relief in federal court, specifically Court decisions limiting individual enforcement of statutory rights.[131] He notes that "[t]wice this Term, we have made the point that we have basically gotten out of the business of recognizing private rights of action not expressly created by Congress."[132] He refers disparagingly to the "period when the Court often 'assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose.'"[133] Now, he asserts, quoting recent concurrences by himself and Justices Thomas and Gorsuch, "we have come to appreciate that, '[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress[.]'"[134] Justice Alito overstates the

125 28 U.S.C. § 1491.

126 *Me. Cmty. Health Options*, 140 S. Ct. at 1329.

127 *Id.* at 1327–28 (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) and discussing Tucker Act, 20 U.S.C. § 1491).

128 *Id.* at 1329.

129 *Id.*

130 *Id.* at 1329–30.

131 *Id.* at 1331–32 (Alito, J., dissenting); *see* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis J. Health L. & Pol'y 207 (2016) (discussing history of cutbacks to individual enforcement of the Medicaid Act and other laws).

132 *Me. Cmty. Health Options*, 140 S. Ct. at 1331–32 (Alito, J., dissenting) (citing dicta in Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1015–16 (2020) and Hernandez v. Mesa, 140 S. Ct. 735 (2020)).

133 *Id.*

134 *Id.* at 1332 (quoting Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)) (alteration in original).

case, as federal courts continue to regularly allow individuals to enforce statutes through 42 U.S.C. § 1983, for example.[135] He is correct, however, that the Court has steadily moved away from the remedial imperative over the past twenty years as it has become more conservative.[136] Now that the Court tilts strongly to the right, it appears this trend is likely to continue.

This Term's statutory interpretation holdings broke little new ground, and there were no blockbusters among them. The Court largely followed the textualist path that it has taken in recent decades. These decisions are more notable for their substantive holdings on the meaning of the statutes rather than the means the Court employed to reach those conclusions.

135 *See* Perkins, *supra* note 131, at 208–09.

136 *See id.*; Diller et al., *supra* note 12 (reviewing the Supreme Court's 1999–2000 Term access-to-courts decisions).

IV. Suits Against Religious Employers

Another case this Term involved employer discrimination, in which the Court considered when the First Amendment might trump those obligations. *Our Lady of Guadalupe School v. Morrissey-Berru* focused on the conflict between statutory anti-discrimination obligations and the rights of religious employers. This case advanced the rights of religious employers to avoid the requirements of discrimination statutes.

The Court considered whether two former religious school teachers could pursue employment discrimination claims under the ADEA and the Americans with Disabilities Act.[137] One employee alleged she was fired because of her age; the other, because she had breast cancer.[138] The majority, led by Justice Alito, held that the First Amendment's Religion Clauses barred their claims.[139] The Court expanded upon a 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, which established that the Religion Clauses bar courts from hearing employment discrimination claims against a religious school based on a "ministerial exception," where claims could not be brought by a staff member who acted in a ministerial capacity.[140] While declining to "adopt a rigid formula for [who] qualifies as a minister," the *Hosanna-Tabor* Court identified four factors in deciding that the exception applied to that teacher: (1) her title of "minister," (2) her significant degree of religious training, (3) the fact that she "held herself out as a minister[,]" and (4) her role carrying out the Church's mission and message.[141]

In two separate cases, the Ninth Circuit held that the religious employers could not take advantage of the ministerial exception under the *Hosanna-Tabor* factors, noting that, among other things, the teachers were not given the title of minister and did not have extensive religious training.[142] The majority acknowledged these facts but held that the Ninth Circuit had not given appropriate deference to the school's determination that the teachers' duties were ministerial.[143] Here, the majority reasoned, the ministerial exception applied to bar their suit because the teachers participated in the religious education and formation of students, which is the essential mission

137 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

138 *Id.* at 2058–59.

139 *Id.* at 2055.

140 *Id.* at 2055 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)).

141 *Id.* at 2062.

142 *Id.* at 2058–60 (citing Our Lady of Guadalupe Sch. v. Morrissey-Berru, 769 Fed. App'x 460, 461 (9th Cir. 2019), and Biel v. St. James Sch., 911 F.3d 603, 608 (9th Cir. 2018)).

143 *Id.* at 2066–67.

of a private religious school.[144] The Court held that "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate."[145]

Justices Sotomayor and Ginsburg dissented, arguing that the majority opinion "collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role."[146] They criticized this as a "simplistic approach" that "has no basis in law and strips thousands of schoolteachers of their legal protections."[147] Justice Sotomayor cautioned that this decision could extend to a wide variety of laypeople who happen to work for religious institutions, with dire consequences. She argued that, in an attempt to combat "a perceived 'discrimination against religion' . . . [the Court] swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs."[148] While this decision applies to a relatively narrow group of employees, as Justice Sotomayor cautions, it has the potential to sweep in a wide variety of employees with only a tenuous connection to the essential religious function of the employer.

144 *Id.*
145 *Id.* at 2055.
146 *Id.* at 2072 (Sotomayor & Ginsburg, JJ., dissenting).
147 *Id.*
148 *Id.* at 2082 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020)).

V. The Administrative Procedure Act

The Administrative Procedure Act (APA) provides relief for individuals when federal agencies take action that is illegal.[149] This occurs when, for example, the action exceeded the agency's legal authority, was arbitrary and capricious, or did not allow for public notice and comment.[150] Two notable APA cases were decided during the 2019–2020 Term, one considering actions by the Department of Homeland Security (DHS) and the other by HHS. Both cases involved challenges against the Trump Administration's attempts to overturn Obama-era policies through the administrative process. APA claims were a main vehicle for challenging these efforts, resulting in several APA cases over the last four years.[151] The two APA cases decided during the 2019–2020 Term not only took on major political issues—immigration relief for certain undocumented immigrants and the availability of religious and moral exceptions to the obligation to provide contraceptive coverage in employer-based health insurance—but they also demonstrated the tension in the Court's APA jurisprudence. On the one hand, in the DHS case, on a substantive challenge to agency policy, the Court emphasized the importance of following formal APA procedure. On the other hand, in the HHS case, the Court found a rule valid despite the agency's failure to fully follow the procedural steps.

A. *Department of Homeland Security v. Regents of the University of California*

Chief Justice Roberts wrote the opinion for the five-member majority in *Department of Homeland Security v. Regents of the University of California*.[152] The case arose after the Trump Administration terminated the Deferred Action for Childhood Arrivals (DACA) program, which was created by the Obama Administration's DHS.[153]

In 2012, DHS issued a memorandum that established the DACA program to provide immigration relief for young immigrants and then expanded this program in 2014.[154] Soon after the Trump Administration

149 *See* 5 U.S.C. § 706.

150 *Id.* § 706(2)(A)–(D).

151 *See, e.g.*, Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (citizenship question on census); Weyerhaeuser Co. v. U.S. Fish & Wildlife, 139 S. Ct. 361 (2018) (endangered species).

152 *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Justice Sotomayor did not join Part IV of the opinion on Equal Protection, which is not discussed here.).

153 *Id.* at 1901.

154 *Id.* at 1901–02.

took office, the Attorney General recommended rescinding the program, claiming it was illegal, and, in September 2017, DHS did so through a memorandum (2017 Memorandum).[155] Several groups sued, and the Supreme Court took up the question of whether DHS's termination of the DACA program violated the APA.[156]

The United States District Court for the District of Columbia vacated the 2017 rescission and instructed DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."[157] In response, DHS issued a second memorandum in 2018 (2018 Memorandum) that provided additional reasons for the rescission.[158]

When the issue reached the Supreme Court, DHS first argued that its decision to terminate DACA was "unreviewable under the APA and outside th[e] Court's jurisdiction[,]" by analogy to the statute's ruling on the enforceability of individual decisions.[159] DHS emphasized that the DACA policy was a nonenforcement policy, rather than a new program, and under the APA, 5 U.S.C. § 701(a)(2), individual decisions about whether to enforce a particular law against a particular individual are within an agency's discretion and not subject to judicial review.[160] DHS contended that, similarly, a general policy of non-enforcement, and by corollary, the termination of such policy, was not subject to review because it is just like an individual non-enforcement decision.[161] The Court disagreed, finding that "the [2012] DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an 'action [subject to review under the APA].'"[162]

Next, the Court considered whether DHS "adequately explained" its 2017 policy change.[163] The APA instructs courts to hold unlawful and set aside agency actions that are arbitrary and capricious.[164] The Court has determined whether an agency's action is arbitrary and capricious by evaluating whether the agency provided an adequate explanation for its

155 *Id.* at 1903.
156 *Id.*
157 NAACP v. Trump, 298 F. Supp. 3d 209, 245 (D.D.C. 2018).
158 *Regents of the Univ. of Cal.*, 140 S. Ct. at 1904.
159 *Id.* at 1905.
160 *Id.* at 1905–06 (quoting Heckler v. Chaney, 470 U.S. 821, 831–832 (1985)).
161 *Id.* at 1906.
162 *Id.* (quoting *Heckler*).
163 *Id.* at 1907.
164 5 U.S.C. § 706(2)(A).

action, demonstrating that it engaged in reasoned decision-making.[165] The Court considered whether DHS could refer to the 2018 Memorandum as part of the agency's explanation for the change, but emphasized the familiar APA principle "that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'"[166] Thus, the Court reasoned, in the 2018 Memorandum, DHS "was limited to the agency's original reasons, and [its] explanation 'must be viewed critically' to ensure that the rescission is not upheld on the basis of impermissible '*post hoc* rationalization.'"[167] Because the reasons set forth in the 2018 Memorandum were "nowhere to be found" in the 2017 Memorandum, the Court could not consider them.[168] This portion of the decision reaffirms long-standing APA precedent, which makes clear that an arbitrary and capricious inquiry only considers the agency's rationale as stated when a policy is adopted, not later justifications.

DHS protested that it should not have to revisit the question again to provide a justification for the policy in advance of rescinding the program; it claimed that requiring it to go back to provide its reasons before the rescission before it could finally terminate the program would be "an idle and useless formality."[169] The Court majority rejected this argument and also disputed Justice Kavanaugh's dissenting opinion suggesting that the prohibition on post hoc rationalizations only barred courts from considering later policy justifications offered by attorneys in the course of litigation, not later explanations from the agency.

> While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.[170]

The majority thus emphasized that "[t]his is not the case for cutting corners

165 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mut. Ins. Co., 463 U.S. 29, 52 (1983).

166 *Regents of the Univ. of Cal.*, 140 S. Ct. at 1907 (quoting Michigan v. EPA, 576 U.S. 743, 758 (2015)).

167 *Id.* at 1908 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

168 *Id.* at 1908–09.

169 *Id.* at 1909 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).

170 *Id.* (citations omitted).

to allow DHS to rely upon reasons absent from its original decision."[171]

Finally, the Court considered whether the 2017 Memorandum could stand alone as having "adequately explained" agency policy and gave two reasons why it had not.[172] First, the 2017 Memorandum "failed to consider . . . important aspect[s] of the problem" by only considering whether the DACA program improperly made undocumented immigrants eligible for certain public benefits but not whether deferred immigration action was appropriate.[173] Second, the policy failed to consider whether DACA recipients and others legitimately relied on the 2012 and 2014 policies that established and expanded the DACA program.[174]

It is now well-settled that an agency has the discretion to change its policy, even to do a complete reversal, so long as it provides a reasonable justification for the change.[175] This decision makes clear, however, that in considering such a policy change, an agency must consider whether the prior policy created reliance interests, such as people's decisions about work, school, and family, and if so, consider whether and how to accommodate those interests.[176] Moreover, the case makes clear that these considerations must take place before the agency changes the policy, and the agency may not announce its reasons for the change later after the new policy is in effect.[177]

B. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*

In the other notable APA case, the Court declined to apply the procedural requirements of the APA rigidly. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the Court considered the validity of religious and moral exemptions to the preventive services requirements of the ACA.[178] Obama-era regulations implemented these requirements to require coverage of contraception.[179] The requirements were challenged,

171 *Id.* at 1909–10.

172 *Id.* at 1907.

173 *Id.* at 1910–12 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (alterations in original).

174 *Id.* at 1913–14.

175 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

176 140 S. Ct. at 1914–15 (noting that, when changing policy, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns").

177 *Id.* at 1909.

178 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

179 *See id.* at 2372–73.

resulting in six years of litigation, after which the Departments of HHS, Labor, and Treasury (Departments), which jointly administer the law, issued interim final rules that exempted certain employers with religious and moral objections from the coverage requirements.[180] Several lawsuits challenged those rules.[181] While litigation was pending, the Departments published final rules that were substantially the same as the interim final rules.[182] The Supreme Court took up a set of consolidated cases challenging the validity of the final rules' religious and moral exemptions.

The Court first considered whether the statute authorized the departments to enact final rules interpreting the statute.[183] Justice Thomas's majority opinion held that it did, noting that "a plain reading of the statute [shows] that the ACA gives [the Health Resources and Services Administration] broad discretion to [issue regulations defining] preventive care and screenings and to create the religious and moral exemptions" to the ACA's mandate to cover contraception.[184]

Next, the Court considered whether the APA allows agencies to issue interim final rules that request notice and comment at the same time the rule takes effect, rather than promulgating a "General Notice of Proposed Rulemaking" followed later by a final rule, as is more common.[185] Justice Thomas again determined that it does—as long as the agency provides adequate notice and an opportunity to comment before adopting the ultimate final rules.[186] While the Court agreed that the "APA requires agencies to publish a notice of proposed rulemaking in the Federal Register

180 *Id.* at 2373. The ACA's contraceptive coverage provision first came to the Court in *Burwell v. Hobby Lobby Stores*, where the Court held that the Obama Administration implementing regulation's failure to provide an exception to the provision's compliance for closely held corporations with sincere religious objections to providing employees with contraception substantially burdened their free exercise. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). The provision came before the Court again in *Zubik v. Burwell*, where the Court remanded consolidated cases challenging the Obama Administration's revised regulation implementing the contraceptive coverage provision that included a self-certification accommodation and instructed the agency to develop an approach that would accommodate employers' concerns while providing women full and equal coverage. Zubik v. Burwell, 136 S. Ct. 1557 (2016). The regulation at issue in this case resulted from the Court's direction in *Zubik*. *Little Sisters of the Poor*, 140 S. Ct. at 2377; *see also* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (interim final rule).

181 *Little Sisters of the Poor*, 140 S. Ct. at 2376.

182 *Id.* at 2378.

183 *Id.* at 2379.

184 *Id.* at 2381.

185 *Id.* at 2384.

186 *Id.* at 2385.

before promulgating a rule that has legal force," the fact that the final rules were preceded by interim final rules (which had immediate full legal force) rather than a notice of proposed rulemaking did not violate the procedural requirements of the APA, since ultimately the agency adopted a final rule after an adequate notice and comment period.[187] Thus, *Little Sisters of the Poor* showed that, to the extent that the agency failed to perfectly follow the procedural requirements of the APA, that error was harmless and not prejudicial, concluding, "[f]ormal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA."[188]

The Court next addressed respondents' argument that the agency had not adequately considered the comments it received, given that it made almost no changes between the interim final rules and the final rules.[189] The Court rejected the respondents' argument and concluded that the agency met the requirements of the APA.[190] The United States Court of Appeals for the Third Circuit invalidated the rule because "[t]he notice and comment exercise surrounding the Final Rules [does] not reflect any real open-mindedness" toward the position set forth in the interim final rules, emphasizing the fact that the final rules were "virtually identical" to the interim final rules.[191] The Court rejected this "open-mindedness" test, holding that "the text of the APA provides the 'maximum procedural requirements' that an agency must follow in order to promulgate a rule" and that the agency comported with those requirements in this case.[192] The majority also noted that "the Third Circuit did not identify any specific public comments to which the agency did not appropriately respond[,]" [193] insinuating that such a finding might have led to a different result. Thus, where an agency generally follows the appropriate administrative procedures, a mere showing that an agency's final rule is identical to the version published to solicit comments will not by itself establish that the agency failed to adequately consider the comments.

In both of these APA cases, the Trump Administration reversed course on prior Obama-era policies. But the results were quite different. It is worth noting that the question presented to the Court in *Little Sisters of the Poor* was procedural, not whether the rule was arbitrary and capricious. The

187 *Id.* at 2384–85 (citing 5 U.S.C. § 553(b)).

188 *Id.* at 2384–85.

189 *Id.* at 2385.

190 *Id.* at 2385–86.

191 Pennsylvania v. President of the U.S., 930 F.3d 543, 568–69 (3d Cir. 2019), *as amended* (July 18, 2019), *cert. granted sub nom*. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 918 (2020) (first alteration in original).

192 *Little Sisters of the Poor*, 140 S. Ct. at 2385–86 (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015)).

193 *Id.* at 2379.

Court upheld the final rule because it found that the agency complied with the basic procedural requirements of the APA, even if it did so imperfectly.[194] In the DACA case, the fact that the agency changed its policy so completely, and with inadequate reasoning, informed the Court's decision that the policy change was arbitrary and capricious. The agency's failure to fully justify the change and to consider potential reliance interests on the prior policy meant that it failed to consider an important aspect of the problem and that the new policy was arbitrary and capricious.[195] As these cases suggest, future litigants considering whether to challenge a change to an administrative rule should look closely at the process by which administrative rules were adopted to determine whether they are susceptible to a legal challenge and also at the reasoning the agency put forth to justify that change.

194 *Id.* at 2385–86.

195 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912–13 (2020).

VI. SEVERABILITY

Two opinions from the Court's 2019–2020 Term discuss severability. Severability allows the remaining parts of a multi-purpose statute to remain in effect when only part of the statute has been found unlawful and thus unenforceable. Over the years, the Supreme Court has preferred courts to sever the unlawful provisions, thus allowing the remainder of the statute to live on. Both of the 2019–2020 severability opinions reflect this preference.

In *Barr v. American Association of Political Consultants*, the Court decided the constitutionality of a provision in the Telephone Consumer Protection Act of 1991 (TCPA), a statute that prohibits most robocalls to cell phones and home phones.[196] The challenged provision was an amendment to the TCPA added in 2015 to allow an exception for calls made to collect debts owed to the United States.[197] The American Association of Political Consultants (AAPC) wanted to make robocalls to solicit donations, conduct polls, and weigh in on candidates and issues, but these types of calls were not included in the 2015 amendment and thus were barred under the TCPA.[198] Citing the First Amendment, AAPC challenged the 2015 amendment as unconstitutionally favoring debt collection over political speech and asked the Court to invalidate the TCPA in its entirety.[199] Finding the amendment unconstitutional, the Court turned to the question of severability—whether to invalidate the TCPA in its entirety or to invalidate and sever only the government-debt exception.[200]

As Justice Kavanaugh's opinion for the Court points out, the TCPA is itself an amendment to the Communications Act, and the Communications Act contains an express severability clause.[201] That decided the matter. When Congress includes a severability clause in a statute, "absent extraordinary circumstances the Court should adhere to the text" of that clause for all provisions within the statute, including amendments.[202] Such extraordinary circumstances did not exist here, and Justice Kavanaugh discounted any thought of ignoring the text of the clause, noting "[t]hat kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will."[203] The opinion could have

196 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2344–45 (2020) (discussing 47 U.S.C. § 227(b)(1)(A)(iii)).
197 *Id.* at 2343.
198 *Id.* at 2345.
199 *Id.* at 2343.
200 *Id.* at 2348.
201 *Id.* at 2352 (citing 47 U.S.C. § 608).
202 *Id.* at 2349, 2352–53.
203 *Id.* at 2349.

stopped at upholding the express severability clause, but Justice Kavanaugh spends significant time discussing the general "presumption of severability" even in the absence of a severability clause.[204] He notes that "[t]he Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause[,]" and as a result, "it is fairly unusual for the remainder of a law not to be operative."[205]

Chief Justice Roberts authored the other severability case, *Seila Law LLC v. Consumer Financial Protection Bureau*.[206] After the recession of 2008, Congress amended the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to establish the Consumer Financial Protection Bureau (CFPB), "an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent."[207] In an effort to ensure the independence of the CFPB, Congress determined that a single director would lead the Bureau, serve a term longer than that of the President, and be removable by the President only for "inefficiency, neglect, or malfeasance."[208]

Seila Law offers legal services to clients who are experiencing problems with debt. In 2017, the CFPB issued an investigative demand letter to Seila Law.[209] Seila Law objected to the demand, arguing that the CFPB's single-director set-up violated the separation of powers.[210] This case resulted, and the Supreme Court ultimately held that with "no boss, peers, or voters to report to . . . [y]et . . . wield[ing] vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy[,]" the structure of the CFPB violated the requisite separation of powers.[211]

The Court then decided whether the provision establishing the director's authority was severable from the other provisions of Dodd-Frank establishing the CFPB.[212] Citing precedent, Chief Justice Roberts's plurality opinion severed the unconstitutional provision from the remainder of the law.[213] He determined that the provision was severable because the surviving provisions were capable of "functioning independently" and "nothing

204 *Id.* at 2350–51.

205 *Id.* at 2350–52. *Cf. id.* at 2352 n.9 ("On occasion, of course, it may be [necessary to sever] a particular surrounding or connected provision . . . even though the rest of the law would be operative . . . . [C]ourts address that scenario as it arises.").

206 *See* Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

207 *Seila Law*, 140 S. Ct. at 2191.

208 *Id.*

209 *Id.* at 2194.

210 *Id.*

211 *Id.* at 2191–92.

212 *Id.* at 2207–11.

213 *Id.* at 2209–11.

in the statute's text or historical context [made] it evident that Congress . . . would have preferred a dependent CFPB to *no agency at all*."[214] The Chief Justice concluded by rejecting Justice Thomas's suggestion in his partial dissent to "junk our settled severability doctrine and start afresh," finding it clear that "Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today."[215]

To sum up, the 2019–2020 severability cases maintained the Court's settled severability doctrine. When there is "a constitutional flaw in a statute, [the Court will] try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[216] This "presumption of severability . . . allows courts to avoid [the] judicial policymaking" that will arise as a court decides how much of the statute to invalidate.[217] It "recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other* provisions of that law."[218] The approach also avoids, whenever possible, the major disruption that wholesale destruction of the law would cause for individuals and entities whose actions are affected by it.[219]

214 *Id.* at 2209–10 (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010)) (first alteration in original).

215 *Id.* at 2210, 2222–24 (Thomas & Gorsuch, JJ., concurring in part and dissenting in part).

216 *Id.* at 2209 (quoting *Free Enter. Fund*, 561 U.S. at 508).

217 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 (2020).

218 *Id.*

219 *See Seila Law*, 140 S. Ct. at 2210.

VII. Statutes of Limitation

In civil law, statutes of limitation set time frames in which a party may bring suit to take action to enforce rights or seek redress from an injury.[220] They may run from a date an action or injury occurs or the date it is discovered or should reasonably have been discovered.[221] It is perhaps the most common barrier to individuals bringing their claims before a court.

In an opinion with lessons for all plaintiffs' attorneys, the Court dealt consumers and their advocates a defeat in *Rotkiske v. Klemm*.[222] The Court considered when a statute of limitations begins to run in Fair Debt Collection Practices Act (FDCPA) cases.[223] The FDCPA imposes requirements on debt collectors and prohibits certain activities in an attempt to eliminate abusive debt collection practices.[224] Klemm, a collection agency, sued Rotkiske to collect an unpaid credit card debt.[225] Klemm attempted to serve Rotkiske at an address where he no longer lived, leading to Rotkiske failing to receive notice or respond and, thus, allowing Klemm to obtain a default judgment.[226] Rotkiske later brought suit under the FDCPA, alleging that the attempt to collect was unlawful.[227] Moreover, he argued, the statute of limitations under the FDCPA should be equitably tolled because Klemm purposely served the complaint at the wrong address.[228]

Rotkiske argued that the statute of limitations should run from the date that the FDCPA violation is discovered, not the day it occurs.[229] He cited Ninth Circuit law, which held that "under the 'discovery rule,' limitations periods in federal litigation generally begin to run when plaintiffs know or have reason to know of their injury."[230] The Third Circuit disagreed, however, ruling against Rotkiske and holding that the one-year limitations period runs from the date on which the violation occurred.[231] The Court granted certiorari to resolve this split among the circuits and, in a majority opinion from Justice Thomas joined by all but Justice Ginsberg, held for the

220 *Statute of Limitations*, Black's Law Dictionary (11th ed. 2019).
221 *Id.*; *see also, e.g.*, Rotkiske v. Klemm, 140 S. Ct. 355, 359 (2019).
222 *Rotkiske*, 140 S. Ct. 355.
223 *Id.* at 358.
224 *Id.*
225 *Id.* at 358–59.
226 *Id.* at 359.
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.* (citing Mangum v. Action Collection Serv., Inc., 575 F.3d 935, 940–41 (9th Cir. 2009)).
231 *Id.*

defendant.[232]

The majority held that the statute, which provides that an FDCPA action "'may be brought . . . within one year from the date on which a violation occurs' . . . unambiguously sets the date of the violation as the event that starts the one-year limitations period."[233] The Court rejected Rotkiske's argument that the statute should be read to include a general "discovery rule," because "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'"[234] It acknowledged Rotkiske's allegation that he did not discover the violation because the creditor served notice of its debt collection suit in a way that intentionally ensured he did not actually receive notice but refused to consider whether an "equitable tolling" exception for fraud should apply, upholding the Third Circuit's finding that this issue was not preserved for appeal.[235]

Justice Ginsburg dissented. While agreeing that the "discovery rule" does not apply to the statute of limitations in the FDCPA, she would have held that the conventional "time trigger" would not apply when creditor fraud accounts for the debtor's failure to file a timely suit.[236] Here, the debtor alleged that the creditor purposely arranged for service at an address where the debtor no longer lived, then filed a false affidavit of service.[237] Thus, fraud prevented Rotkiske from complying with the one-year statute of limitation and, under these narrow circumstances, she argued, the typical rule that a claim accrues when an injury occurs should not apply.[238]

This is a frustrating outcome for Rotkiske, as the machinations of the creditor prevented him from filing within the statutory period, and a disappointment for consumer advocates. However, it is likely that the impact of this opinion will be limited if future litigants more carefully plead equitable tolling.

232 *Id.* at 358.
233 *Id.* at 360.
234 *Id.* at 360–61 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 94 (2012) (second alteration in original).
235 *Id.* at 361.
236 *Id.* at 363.
237 *Id.* at 362.
238 *Id.* at 362–63.

VIII. Finality

Under general rules of procedure, individuals can only appeal a final decision of the district court. Moreover, the rules allow only a limited period of time for the individual to appeal a final decision, and the appellate courthouse doors are generally closed to those who miss the deadline.[239] Thus, rules governing final decisions are important considerations for plaintiffs seeking to maintain their access to court—as illustrated this past Term in the bankruptcy context in *Ritzen Group, Inc. v. Jackson Masonry, LLC*.[240]

The case arose when Mr. Ritzen sued Jackson Masonry in state court for breach of a contract to sell land.[241] Just before the trial was to begin, Jackson filed for Chapter 11 bankruptcy in federal bankruptcy court.[242] The Bankruptcy Code's automatic stay provision put the state court case on hold during the pendency of the federal bankruptcy case.[243] Mr. Ritzen filed a motion seeking relief from the stay so that he could pursue his state court case, arguing that the relief "would promote judicial economy and that Jackson had filed [the] bankruptcy [action] in bad faith."[244] The bankruptcy court denied the stay-relief motion.[245] Ritzen did not appeal within the prescribed period; rather, he pursued his breach of contract claim against the bankruptcy estate.[246] Unfortunately, he, not Jackson, was held in breach of contract, and his claims against the bankruptcy estate were rejected.[247] Ritzen then appealed the denial of his stay-relief motion and the decision rejecting his breach of contract claim.[248] The Supreme Court granted certiorari and focused on the appeal of the stay-relief motion.[249]

As noted above, under general rules of civil litigation, a party can only appeal "final decisions" of district courts.[250] A decision is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[251] The rules of finality differ for bankruptcy

239 *See, e.g.*, 28 U.S.C. § 1291 (authorizing appeals from "final decisions" in general district court litigation); 28 U.S.C. § 158 (authorizing appeals from "final judgments, orders, and decrees" in bankruptcy litigation).

240 Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020).

241 *Ritzen Grp.*, 140 S. Ct. at 587.

242 *Id.*

243 *Id.* (citing 11 U.S.C. § 362(a)).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.* at 588.

249 *Id.* (citing Ritzen Grp., Inc. v. Jackson Masonry, LLC, 139 S. Ct. 2614 (2019) (mem.)).

250 28 U.S.C. § 1291.

251 140 S. Ct. at 586 (quoting Gelboim v. Bank of Am. Corp., 574 U.S. 405, 409 (2015)).

cases because these cases typically bring numerous, distinct individual claims against a debtor together under one umbrella.[252] As a result, orders in bankruptcy cases become "final" when they definitively resolve "discrete disputes" within the case.[253] The issue in *Ritzen Group* was whether the stay-relief motion was a discrete proceeding that resulted in a final, appealable order when the bankruptcy court conclusively decided it.[254] Writing for a unanimous Court, Justice Ginsburg held that it was and that Mr. Ritzen's appeal was correctly dismissed as untimely.[255]

The Court found the text of the governing statute clear on the matter of finality.[256] Unlike 28 U.S.C. § 1291, which governs civil litigation generally and allows appeals from "final decisions," the bankruptcy code authorizes appeals from "final judgments, orders, and decrees" "in cases and proceedings."[257] A neighboring provision lists motions to terminate or modify the automatic stay as "core proceedings."[258] The Court found this drafting provided a strong "textual clue" that Congress viewed stay-relief motions as "proceedings" that were immediately appealable.[259] Second, the Court built upon its previous cases, which recognized that "Congress made 'orders in bankruptcy cases . . . immediately appeal[able] if they finally dispose of discrete disputes within the larger [bankruptcy] case."[260] The Court found that Ritzen's stay-relief motion was a "discrete proceeding" because it was "a procedural unit anterior to, and separate from, claims-resolution proceedings[,]" deciding for example whether a creditor would be able to isolate its claim from others and "go it alone outside bankruptcy."[261]

Finally, the Court rejected Ritzen's argument that holding for Jackson Masonry would encourage piecemeal litigation, finding instead that Mr. Ritzen was attempting a second bite at the apple. The Court found his appeal of the stay-relief motion to be an effort to "return to square one" and relitigate the contract claim in state court *after* he lost the stay-relief motion and subsequently litigated and lost his breach of contract claim during the bankruptcy proceeding.[262] According to Justice Ginsburg, "[t]he second

252 *Id.* at 586.
253 *Id.* (citation omitted).
254 *Id.* at 586.
255 *Id.* at 592.
256 *Id.* at 587, 590.
257 *Id.* at 586–87 (quoting 28 U.S.C. § 158(a)).
258 *Id.* at 590 (quoting 28 U.S.C. § 157(b)(2)).
259 *Id.*
260 *Id.* at 587 (quoting Bullard v. Blue Hills Bank, 575 U.S. 496, 501 (2015) (alterations in original) (some citations omitted).
261 *Id.* at 589–90.
262 *Id.* at 591.

bite Ritzen seeks scarcely advances the finality principle."[263] As this case illustrates, as plaintiffs formulate and litigate their claims, they must consider how and when core access-to-court principles may come into play, including those defining when the court has issued a final, immediately appealable order.

263 *Id.*

Conclusion

In its 2019–2020 Term, the Supreme Court decided a number of cases that will affect individuals' ability to obtain redress from a court of law. On balance, these cases maintained the Court's tilt toward curbing individual court access. The Court continued to limit rights against state actors, carried on a trend of narrow and textualist statutory interpretations, and provided leniency to agencies in procedural requirements. However, there were some bright spots for individual protections. The textualist definition of "sex" was found to include sexuality and gender identity, post hoc rationalizations were found an inadequate justification for attacking DACA, and important protections imposed by § 1981 of Title VI remained intact.

Looking forward, the 2020–2021 Term opened with the COVID-19 pandemic continuing to control operations. Once again, the Court heard oral arguments through telephone conference calls, with the public listening to live audio broadcasts of the arguments. As in previous years, the Court will decide a number of potentially significant access-to-court cases. Plaintiffs' standing, and thus their ability to be in court at all, is under attack.[264] As it did during the 2019–2020 Term, the Court will be assessing what it takes to prove a discrimination claim.[265] The Court also agreed to consider whether the Secretary of HHS has the authority to condition Medicaid coverage on a requirement that the individual work a certain amount. Citing the APA and rules of statutory construction, the lower courts concluded that the Secretary did not have this authority.[266] The Court will also decide when the federal government can keep pre-decisional information secret and when the Freedom of Information Act compels disclosure.[267] Another case addresses when Social Security claimants can question whether their hearing officer was properly appointed.[268]

264 *See, e.g.*, Sierra Club v. Trump, 963 F.3d 974 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 618 (2020) (questioning organization's standing to challenge Trump administration's redirection of appropriated funds to build border wall); Carney v. Adams, 922 F.3d 166 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 602 (2020) (questioning whether judicial candidate has standing to challenge state constitutional provision limiting state court judges to members of two major political parties).

265 Fulton v. City of Phil., Penn., 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (questioning standard of proof in case alleging religious discrimination after city did not contract with foster care agency that refused to comply with all-comers provisions, including those for married same-sex couples).

266 *See* Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020), *cert. granted sub nom.*, Azar v. Gresham, 141 S. Ct. 890 (2020) (mem.).

267 Sierra Club v. U.S. Fish & Wildlife Serv., 925 F.3d 1000 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020).

268 Carr v. Saul, 961 F.3d 1267 (10th Cir. 2020) (refusing to allow claimant to raise

On November 10, 2020, the Court heard two hours of argument in *California v. Texas*, a case with the potential for significant substantive and access-to-court rulings.[269] A group of Republican state attorneys general and individual taxpayers, supported by the Trump Administration, argued that the ACA's provision requiring individuals to have minimum insurance coverage or pay a tax penalty is harming them and is unconstitutional.[270] They asked the Court to find that the provision cannot be severed and that the entire ACA should fall. If the plaintiffs are found to have the standing to bring the case, and their claims are successful, the challenge would affect the health and public health of hundreds of millions of Americans because the ACA addresses everything from pre-existing health conditions to nutritional labeling and expanding Medicaid to adults and former foster youth.[271]

Those seeking to protect and preserve individuals' access to court will need to monitor the Court's decisions. Significantly, the composition of the 2020–2021 Supreme Court has changed. Added to the mix, newly installed Justice Coney Barrett provides conservatives with a clear 6-3 advantage.[272] Justice Ginsburg's absence is sure to be felt as the Court continues to limit entry to individual litigants.

constitutional appointment clause claim on appeal), *cert. granted*, 141 S. Ct. 813 (2020) (mem.), and Davis v. Saul, 963 F.3d 790 (8th Cir. 2020) (refusing same), *cert. granted*, 141 S. Ct. 811 (2020) (mem.).

269 *See* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (invalidating the ACA in its entirety), *aff'd in part, vacated in part and remanded*, 945 F.3d 355 (5th Cir. 2020) (remanding for reassessing severability), *cert. granted sub nom.*, California v. Texas, 140 S. Ct. 1262 (2020) (mem.); Oral Argument, California v. Texas, 140 S. Ct. 1262 (argued Nov. 10, 2020) (Nos. 19-840 & 19-1019), https://www.oyez.org/cases/2020/19-840 (transcript and audio recording).

270 Brief for Respondent/Cross-Petitioner States at 30, *California*, 140 S. Ct. 1262 (Nos. 19-840 & 19-1019), 2020 WL 3579860 at *30.

271 Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, *amended by* Tax Cuts and Jobs Act of 2017, 26 U.S.C. § 5000A.

272 *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. Times (Nov. 2, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html.