A A L S

FEDERAL COURTS SECTION NEWSLETTER

July 9, 2020

2021 Annual Meeting Program

Over the last two years, there have been several high profile allegations of sexual harassment and other workplace misconduct by federal judges. In response to the first wave of allegations, the judiciary made some reforms, including clarifying that clerks have the option to anonymously report workplace misconduct to the court where they work. More recent allegations, however, have raised questions about whether these reforms and current mechanisms are sufficient to address and respond to workplace misconduct in the courts. As a result, there have been calls to extend Title VII and other statutes to the federal courts, among other reforms.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2019 Term, followed by descriptions of cases awaiting review that appear to present Federal-Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to Supreme Court opinions, lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2019 Term

***Allen v. Cooper*, 140 S. Ct. 994 (2020) (Argued: Nov. 5, 2019)**

Florida Prepaid Postsecondary (1999), which held that Congress could not abrogate states' Eleventh-Amendment immunity under the Patent Remedy Clarification Act, now compels the Court to make the same ruling with respect to the Copyright Remedy Clarification Act (CRCA). This should surprise no one, but doubtless will dismay some—and not just authors. Allen argued that *Central Virginia Community College v. Katz* (2006) allows the Court to make a clause-by-clause evaluation of which Article-I powers permit Congress to abrogate states' immunity. The Court has now slammed that door. If the Article-I power in a litigant's case is not spelled b-a-n-k-r-u-p-t-c-y, the case is going nowhere.

Allen also argued that CRCA was permissible under § 5 of the Fourteenth Amendment as remedy for a taking without due process. Here, too, the Court repeated its (perhaps unconvincing) thoughts from *Florida Prepaid*, finding abrogation of states' immunity disproportionate to states' violations of

intellectual-property rights. As in *Florida Prepaid*, Congress apparently cannot address isolated state violations of constitutional rights; only wholesale violations will do. The Court has not explained why this is so. If violations are few, then Congress's remedy applies infrequently. Why that is "out of all proportion" remains a mystery.

Justice Thomas concurred in part. First, he suggested that *stare decisis* is not as strong as the majority argued, so if a decision is "demonstrably erroneous," the "Court would be obligated (under Article III) to correct the error. Second, he did not concede that copyrights are property for Fourteenth-Amendment purposes, viewing it as an open question.

Justices Breyer and Ginsburg concurred in the judgment only. Justice Breyer's opinion for them argued that the Court's approach to state violations of copyright and patent law is badly flawed. He noted, "we went astray in *Seminole Tribe* . . . as I have consistently maintained." His opinion sounds remarkably like a dissent. It is possible that he styled it a concurrence because he wanted to stand closer to the Court's view of *stare decisis* than Justice Thomas was, but he did not say that, noting only that *Florida Prepaid* was controlling.

***Bannister v. Davis*, 140 S. Ct. 1698 (2020) (Argued: Dec. 4, 2019)**

The Court, 7-2, held that a Federal Rule of Civil Procedure 59(e) motion by a federal habeas petitioner is not a "second or successive application" under 28 U.S.C. § 2244(b). Such a motion seeks to correct a habeas court's judgment immediately after its issuance and raises no new claims. The majority distinguished a Rule 60(b) motion, which does constitute a second or successive petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), on the ground that such a "motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment . . . [and] threatens serial habeas litigation[.]" Justice Alito, joined by Justice Thomas, dissented, arguing that a Rule 59(e) motion, like one under 60(b), provides a second bite at the apple and therefore is nothing more than a successive habeas application under a different label.

***Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (Argued: March 2, 2020)**

The Court, 7-2, ruled that a federal statute precluding federal habeas review of admissibility determinations in expedited removal proceedings did not violate the Suspension Clause. Limiting the inquiry to the scope of the "writ as it existed in 1789," Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh, concluded that at the founding "[t]he writ simply provided a means of contesting the lawfulness of restraint and securing release." Respondent failed to challenge the legality of his detention during expedited removal proceedings or seek "simple release." Instead, he sought "a new . . . opportunity to apply for asylum," which exceeds the constitutional reach of the writ as understood in 1789.

Justice Thomas issued a concurring opinion discussing "the original meaning of the Suspension Clause."

Justice Breyer, joined by Justice Ginsburg, concurred in the judgment and emphasized the limited nature of the inquiry: "whether, under the Suspension Clause, the statute at issue 'is unconstitutional as applied to this party, in the circumstances of this case.' " Answering in the negative, Justice Breyer relied on (1) respondent's lack of connection to the United States (apprehension "just 25 yards inside the border" and no history of admission to or residence in the country) and (2) the nature of his claims (factual challenges and technical procedural defects). Justice

Breyer concluded that Congress may eliminate review under such circumstances.

The ruling provoked a lengthy dissent from Justice Sotomayor. Joined by Justice Kagan, the dissent argued that history and precedent support habeas review of expedited removal orders even when petitioner seeks an order to remain in the country rather than simple release from detention. The dissent challenged Justice Breyer's analysis, including his characterization of respondent's claims. In the dissent's view, the claims raised legal questions and serious procedural defects subject to habeas review. The Court's decision, the dissent asserted, "handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers."

***Hernández v. Mesa*, 140 S. Ct. 735 (2020) (Argued: Nov. 12, 2019)**

A five-to-four Court held that it would not extend the *Bivens* remedy to the family of a fifteen-year-old Mexican boy whom a border patrol officer shot across the international border after the victim had run back across the border from the United States to Mexico. The majority viewed the shooting as a "markedly new" context with "foreign relations and national security implications." (It is apparently the majority's concern that our relations with foreign governments might fray if we allowed a civil action against a United States employee who murdered a foreign citizen on his nation's soil.)

Justice Thomas, whom Justice Gorsuch joined, concurred in an opinion that called for overturning *Bivens*. He noted that "the practice of creating implied causes of action in the statutory context . . . has already been abandoned."

Justice Ginsburg's dissent drew three supporters. Among other things, she pointed out that when Mesa fired his weapon, he "did not know whether the boy he shot was a U.S. national or a citizen of another land." The dissent argued that, just as in *Bivens*, this was a Fourth-Amendment case, that *Tennessee v. Garner* (1985) made it clear that the seizure was unreasonable, and that the "only salient different here [is] the fortuity that the bullet happened to strike Hernández on the Mexican side. . . ." Justice Ginsburg pointed out that in *Abbasi*, the Court said that *Bivens*'s purpose "is to deter the *officer*."[1]

***Little Sisters of the Poor v. Pennsylvania*, 2020 WL 3808424 (U.S. Jul. 8, 2020) (Argued: May 6, 2020)**

In a footnote, the majority noted that an intervenor of right must show independent Article-III standing "if it pursues relief that is broader than or different from the party invoking a court's jurisdiction." In this case, however, the majority ruled that the relief Little Sisters sought was identical to the government's request, so there was no need for independent standing.

1 Considering the extent to which the Court's creation and expansion of qualified immunities undermines that deterrence purpose is an exercise for the reader.

***McKinney v. Arizona*, 140 S.Ct. 702 (2020) (Argued: Dec. 11, 2019)**

In this 5-4 case, the Court held that a capital sentencing error found on federal habeas review may be remedied by a state appellate court's reweighing of aggravating and mitigating circumstances on collateral review, rather than by a jury, consistent with Clemons v. Mississippi (1990). Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, arguing that the state court conducted the reweighing not on collateral review, but on re-opened direct review, thereby triggering *Ring v. Arizona*'s rule requiring jury determination of aggravating factors.

***New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, 140 S.Ct. 1525 (2020) (Argued: Dec. 2, 2019)**

In a brief *per curiam* opinion that failed to address the voluntary-cessation rule and the heavy burden on defendants that goes along with it, the Court ruled that amendments to state and city handgun-licensing rules mooted petitioners' claims for declaratory and injunctive relief. The Court vacated the judgment and remanded, noting that the lower courts "may consider whether petitioners may still add a claim for damages in this lawsuit with respect to New York City's old rule." Justice Kavanaugh concurred with the mootness ruling, but also agreed with the dissent on the need for review of lower court treatment of the Court's Second-Amendment precedent and urged the Court to take up the matter "soon, perhaps in one of the several . . . petitions for certiorari now pending before the Court." Justice Alito, joined in full by Justice Gorsuch and in part by Justice Thomas, dissented. Emphasizing the need to remain alert to "attempts by parties to manufacture mootness in order to evade review," the dissent argued against mootness because the amendments did not clearly resolve one of petitioners' issues and because, if the Court ruled in petitioners' favor, the lower court "could (and probably should) award damages."

***Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) (Argued: Nov. 13, 2019)**

A unanimous Court holds that an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1). The Sixth Circuit, diverging from the Court's precedent and from the First and Third Circuits, was correct.

***Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020) (Argued: Jan. 13, 2020)**

A 5-4 Court again shut the federal courthouse door to plaintiffs seeking to enforce statutory rights. The majority ruled that Plaintiffs, participants in a defined-benefit plan, lacked standing to sue plan fiduciaries for violations of the Employment Retirement Security Act (ERISA) because Plaintiffs would receive the same monthly benefit regardless of the outcome of the suit. Unlike participants in defined-contribution plans, whose benefits fluctuate depending on the value of the plan or the management by plan fiduciaries, participants in defined-benefit plans receive fixed monthly benefits that are unaffected by the plan's value or the behavior of plan fiduciaries. The Court rejected an analogy to private trusts, explaining that "the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk." The Court acknowledged a "wrinkle"—possible standing by a plan beneficiary "if the mismanagement . . . was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." The Court expressed some doubt about the wrinkle, given that a federal entity "acts as a backstop and covers the vested pension benefits up to a certain amount and often in full[,]" but

ultimately failed to address it because Plaintiffs' complaint did not allege such a claim. (The Court also noted that the ruling does not apply to suits to enforce rights to plan information under ERISA.) Justice Thomas, joined by Justice Gorsuch, concurred, emphasizing (as in *Spokeo*) the distinction between public and private rights in standing doctrine. Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented, embracing the trust law analogy the majority rejected. The dissent emphasized that ERISA requires creation of a trust for plan assets and imposes fiduciary duties on trustees and plan managers. These duties, the dissent argues, flow "not only to the plan . . . but also to the beneficiaries and participants."

Granted Certiorari

Brownback v. King, No. 19-546 (Decision below: 917 F.3d 409 (10th Cir. 2019))

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq., waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA also imposes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

The question presented is whether a final judgment in favor of the United States in an action brought under § 1346(b)(1), on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.

California v. Texas, No. 19-840

(Decision below: 945 F.3d 355 (5th Cir. 2020)) (Consolidated with 19-1019 (immediately below) for one hour oral argument.)

As part of the Patient Protection and Affordable Care Act (ACA), Congress adopted 26 U.S.C. § 5000A. Section 5000A provided that "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage," 26 U.S.C. § 5000A(a); required any "taxpayer" who did not obtain such coverage to make a "[s]hared responsibility payment," § 5000A(b); and set the amount of that payment, § 5000A(c). In National Federation of Independent Business v. Sebelius, 567 U.S. 519, 574 (2012), this Court held that Congress lacked the power to impose a stand-alone command to purchase health insurance but upheld Section 5000A as a whole as an exercise of Congress's taxing power, concluding that it affords individuals a "lawful choice" between buying health insurance or paying a tax in the amount specified in Section 5000A(c). In 2017, Congress set that amount at zero but retained the remaining provisions of the ACA.

The questions presented are: 1. Whether the individual and state plaintiffs in this case have established Article-III standing to challenge the minimum coverage provision in § 5000A(a).

2. Whether reducing the amount specified in § 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

***Texas v. California*, No. 19-1019 (Decision below:** 945 F.3d 355 **(5th Cir. 2020))** (Consolidated with 19-840 (immediately above) for one hour oral argument.)

Congress passed the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), with the express goal of achieving near universal health-insurance coverage. To achieve that goal, Congress found it was "essential" to require healthy Americans to ensure that they have what Congress considered minimum essential coverage. In 2012, this Court held that "[t]he Federal Government does not have the power to order people to buy health insurance." 567 U.S. 519, 575. The Court upheld the minimum-essential-coverage requirement, however, because it was "fairly possible" to construe the mandate as a tax. In 2017, Congress eliminated that alternative construction by zeroing out any penalty. That legislative act rendered the individual mandate unconstitutional, as the court below correctly held.

1. Whether the unconstitutional individual mandate to purchase minimum essential coverage is severable from the remainder of the ACA.

2. Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

***CIC Services, LLC v. Internal Revenue Service*, No. 19-930 (Decision below: 925 F.3d 247 (6th Cir. 2019))**

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

***Tanzin v. Tanvir*, No. 16-1176 (Decision below: 894 F.3d 449 (2d Cir. 2018))**

"Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et. seg.*, permits suits seeking money damages against individual federal employees."

Comments, Questions, Submissions

Celestine McConville (Chapman) and Don Doernberg (McGeorge) prepared this newsletter. If you would like to contribute to a newsletter, contact Seth Davis, Chair of the Section for 2021, at Boalt Hall, (949) 824-3761, sethdavis@berkeley.edu, Leah Litman, Chair-Elect of the Section for 2021, Michigan Law School, (734) 647-0549, lmlitman@umich.edu, Celestine McConville, Chapman Law School, (714) 628-2592, mcconvil@chapman.edu, Don Doernberg, McGeorge Law School, (530) 274-1228, DLD@law.pace.edu, or so that your name can be placed in nomination at the 2021 meeting in San Francisco. Please make the contact as quickly as reasonably possible.

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