

Looking Ahead: October Term 2019

*Elizabeth H. Slattery**

The Supreme Court's recently concluded October Term (OT) 2018 will more likely be remembered for Justice Brett Kavanaugh's confirmation hearings than any particular case the Court decided. It seems the justices wanted a low-profile term following the bruising confirmation, and they put off or denied review in many cases raising hot-button issues. The decisions that produced the most media attention and scrutiny—the political gerrymandering cases on direct appeal and the census case that was on a tight deadline—were ones that the Court could not ignore (either by statutory command or as a practical matter).

It is still too early to make sweeping statements about the impact of President Donald Trump's nominees to the Court, though the rapid destruction of America their opponents foresaw has yet to occur. Justices Kavanaugh and Neil Gorsuch have, however, lived up to the chief justice's declaration last fall that we do not have "Obama judges or Trump judges, Bush judges or Clinton judges."¹ Like their predecessors, Justices Kavanaugh and Gorsuch are their own men, at times bucking expectations of how a "Trump" judge will vote. Indeed, the pair disagreed in about 30 percent of cases last term, showing they are not cookie-cutter "Republican" judges but thoughtful jurists with independent views of the law.

Now the focus turns to the new term, which starts October 7. The Court receives roughly 7,000 petitions every term and agrees to review between 60 and 70 cases. The justices have already granted review in 42 cases, including a number of consolidated cases.

*Elizabeth H. Slattery is a legal fellow at the Institute for Constitutional Government of The Heritage Foundation. The views expressed in this article are the author's own and should not be considered as representing any official position of The Heritage Foundation.

¹ Mark Sherman, Roberts, Trump Spar in Extraordinary Scrap over Judges, AP (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.

They will add another 20-odd cases to their schedule over the course of the fall and early winter. OT 2019 promises to be an exciting term with disputes implicating claims of sexual orientation- and gender identity-based discrimination in the employment context, funding of religious school-choice efforts, and the first significant gun rights case in nearly a decade. This is shaping up to be a term of sequels, with Obamacare and the Deferred Action for Childhood Arrivals (DACA) policy returning to the Court. The justices may also revisit whether states can require doctors who perform abortions to have admitting privileges at a nearby hospital. For a term leading into a presidential election year, the justices are not shying away from headline-making cases that will place the Supreme Court squarely in the minds of Americans on Election Day 2020.

I. The Insanity Defense

Kicking off the term, the justices will hear *Kahler v. Kansas* on the first day of oral argument.² It is a busy fall for the Kansas attorney general's office, as it has three cases at the high court. *Kahler* asks the Court to decide whether the Constitution forbids a state from abolishing the insanity defense. This defense has a long history in Anglo-American law, but likewise, states have long employed a variety of approaches to incorporate it into their criminal law. The Supreme Court previously declined to constitutionalize the common-law rule, known as the *M'Naghten* rule, which instructs that a defendant should not be held criminally responsible if, at the time of the crime, he was unable either to understand what he was doing or that his action was wrong.³ In *Clark v. Arizona* (2006), the Court held that due process does not require a state to employ both the cognitive and moral incapacity elements of the *M'Naghten* rule.⁴

A handful of states, including Kansas, have enacted laws allowing a criminal defendant to put on evidence of a mental disease or defect as it relates to his state of mind, or the *mens rea* element of the charged crime, rather than as an affirmative defense of insanity. The Court previously declined review in *Delling v. Idaho*, which asked the Court to hold that the Constitution mandates an insanity defense.

² *Kahler v. Kansas*, 139 S. Ct. 1318 (2019) (cert. granted).

³ 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

⁴ *Clark v. Arizona*, 548 U.S. 735, 749 (2006).

Joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, Justice Stephen Breyer dissented from the denial in *Delling*, writing that Idaho's law would allow disparate treatment of two equally unwell individuals. He posed the following hypothetical: A defendant who shot someone, believing the victim was a wolf, could assert an insanity defense to argue he lacked the *mens rea* to commit the crime. Another defendant who shot someone, recognizing his victim was a human but believing he was acting on the orders of a wolf, could not assert an insanity defense because he understood that he shot another person. In both situations, Breyer noted, "the defendant is unable, due to insanity, to appreciate the true quality of his act, and therefore unable to perceive that it is wrong."⁵

Turning to the case out of Kansas, James Kahler challenges his capital conviction for shooting his estranged wife and three other family members. Kahler and his wife had a contentious separation that led to Kahler's arrest for battery and subsequent severe depression and job loss. The Saturday after Thanksgiving in 2009, Kahler drove an hour to the home of his wife's grandmother, where she and their children were visiting. He shot and killed his wife, two daughters (but not his son), and the grandmother in a rampage that was recorded by the grandmother's Life Alert system. Kahler was charged with premeditated first-degree murder. At trial, his defense counsel argued that, due to Kahler's severe depression, he was unable to form the requisite intent and premeditation necessary for a capital murder conviction. The defense's forensic psychiatrist witness testified that Kahler "couldn't refrain from doing what he did," while the state's forensic psychiatrist concluded that Kahler had the capacity to form the necessary intent and premeditation, as shown by traveling to the grandmother's home, bringing a weapon with him, electing not to shoot his son, and initially evading capture. Kahler was convicted and sentenced to death. The Kansas Supreme Court affirmed his conviction.

Now at the U.S. Supreme Court, Kahler argues that Kansas has abolished the insanity defense in violation of the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause. Kahler traces a

⁵ *Delling v. Idaho*, 568 U.S. 1038, 1040 (2012) (Breyer, J., dissenting from denial of certiorari).

longstanding practice of providing an affirmative defense of insanity from the Founding era to the present day in 45 states. Kansas counters that it has not abolished the insanity defense but rather changed it from an affirmative defense to one way of showing the defendant lacked the necessary *mens rea*. Kansas maintains that states enjoy broad discretion in defining crimes, which includes making judgments about moral culpability and which affirmative defenses to allow. Last term, the justices laid bare their fierce disagreements over capital punishment, trading barbs in every capital case—from last-minute stay of execution requests to lethal injection drug protocols to mental competency.⁶ As a practical matter, this case may not have huge implications since an overwhelming majority of states have already chosen to allow defendants to raise an insanity defense. Given the justices' fiery disagreements last term, this case may serve to deepen the divide over capital punishment.

II. Sex-Based Discrimination

After refusing to take up similar cases in previous terms, the justices agreed to hear three cases involving whether the federal ban on employment discrimination extends to sexual orientation- and gender identity-based discrimination. Title VII of the Civil Rights Act of 1964 bans employers from failing to hire, firing, or otherwise discriminating in the terms of employment because of an individual's race, color, religion, sex, or national origin. During the Obama administration, the Equal Employment Opportunity Commission (EEOC) began interpreting Title VII's ban on sex discrimination to include sexual orientation and gender identity, though Congress never amended the statute to include them as protected classes. Until just a few years ago, all the federal appeals courts had ruled against extending Title VII by judicial fiat. In *Hively v. Ivy Tech Community College* (2017), the U.S. Court of Appeals for the Seventh Circuit concluded that Title VII does, in fact, encompass discrimination based on sexual orientation.⁷ Applying the Supreme

⁶ *Dunn v. Price*, 139 S. Ct. 1312, 1314 (2019); *Madison v. Alabama*, 139 S. Ct. 718, 731 (2019) (Alito, J., dissenting); *Murphy v. Collier*, 139 S. Ct. 1111, 1112 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019); *Reynolds v. Florida*, 139 S. Ct. 27, 30 (2018); *Zagorski v. Parker*, 139 S. Ct. 11, 11 (2018).

⁷ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

Court's 1989 *Price Waterhouse v. Hopkins* ruling that sex discrimination includes gender stereotyping, the en banc Seventh Circuit held that sexual orientation-based discrimination is indistinguishable from sex stereotyping.⁸ In *Price Waterhouse*, Ann Hopkins argued her employer discriminated against her when she was denied a promotion because she was considered too aggressive and abrasive for a woman. Notably, the Supreme Court did not create a new protected class in *Price Waterhouse*, it simply identified a way to prove sex discrimination.⁹

The Eleventh Circuit came to the opposite conclusion of the *Hively* court in *Evans v. Georgia Regional Hospital* (2017), but the Supreme Court declined to hear that case.¹⁰ Then the Second Circuit joined the Seventh Circuit in extending Title VII in *Zarda v. Altitude Express Inc.* (2018).¹¹ The Supreme Court granted review after the Second Circuit ruled for a skydiving instructor who alleged he was fired because he was gay. The employer says it fired Donald Zarda (whose estate continued litigating the case after he passed away in 2014) because he shared inappropriate information about his personal life and made clients uncomfortable. The employer also argues that, despite its nondiscriminatory reason for firing Zarda, Title VII does not recognize claims of sexual orientation-based discrimination. The EEOC and the justice department filed dueling briefs at the Second Circuit in *Zarda*, with the EEOC doubling down on the Obama-era interpretation of Title VII and the Trump administration's justice department disagreeing.

The justices will also hear *Bostock v. Clayton County, Georgia*, in which a child welfare services coordinator argues he was fired after his employer discovered he is gay and played in a gay softball league. The county maintains it fired Gerald Bostock for mismanaging public funds, which was uncovered during an audit. Following its decision in *Evans*, the Eleventh Circuit ruled for the County in Bostock's case. The third case is *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*,

⁸ *Id.* at 347.

⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

¹⁰ *Evans v. Ga. Reg'l Hosp.*, 138 S. Ct. 557 (2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254–55 (11th Cir. 2017).

¹¹ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

which involves gender identity, rather than sexual orientation.¹² A male funeral director at a Christian funeral home informed the company he is transgender and would start dressing as a woman, going by the name Aimee Stephens. After weighing concerns about which bathroom Stephens would use, that Stephens's transition could be disruptive to grieving clients, and that Stephens would no longer comply with the company's sex-specific dress code, the funeral home fired Stephens and offered a severance package, which Stephens declined. Stephens filed a complaint with the EEOC, which brought suit against Harris Homes. The Sixth Circuit held that the funeral home violated Title VII's ban on sex discrimination because discrimination based on transgender status "necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be."¹³

The central issue in these three cases is whether the words enacted by Congress ("because of . . . sex") have an enduring meaning or whether they should change with the times. Title VII's use of "sex" had a pretty clear meaning in 1964—to combat discrimination women faced in the workforce. Since then, though Congress has included sexual orientation or gender identity in other federal laws—such as the Violence against Women Reauthorization Act, the Americans with Disabilities Act, and the Hate Crimes Prevention Act—it has considered and rejected many efforts to amend Title VII. In deciding these cases, the justices will likely fall into one of two camps: those who believe Congress should make the law and the courts should eschew invitations to "update" or "revise" language and those who think statutory text "can enlarge or contract their scope as other changes, in the law or in the world, require."¹⁴

III. Immigration and Executive Action

Making good on President Barack Obama's promise to use the power of the pen and phone to make changes that Congress was unwilling or unable to enact, in 2012 the Department of Homeland Security (DHS) created the Deferred Action for Childhood Arrivals

¹² EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

¹³ *Id.* at 578.

¹⁴ New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring).

(DACA) program. The program enabled 800,000 illegal aliens under 30 years old who were brought to the United States as children to apply for work authorization and deferred deportation. The administration expanded the program in 2014 to eliminate the age cap and increase the term of deferred action from two to three years, and later created a second program (known as Deferred Action for Parents of Americans, or DAPA) conferring deferred action on illegal aliens whose children are U.S. citizens or lawful permanent residents. Texas and 25 other states challenged the DACA expansion and DAPA program for violating the Administrative Procedure Act's (APA) requirement that substantive agency rules go through public notice and comment. The U.S. District Court for the Southern District of Texas granted the states a preliminary injunction, and the Fifth Circuit affirmed. While the case was pending at the Supreme Court, Justice Antonin Scalia suddenly passed away. The eight-member Court deadlocked, leaving the lower court ruling in place in June of 2016. These rulings did not affect the original DACA program, which remained in place.

In June 2017, after President Trump was elected, Texas and the other states announced plans to challenge the original DACA program. The Trump-led DHS then issued a memorandum concluding that the program was unlawful, explaining it would begin rolling it back. DHS announced that it would continue to process pending renewal requests from current DACA recipients for those set to expire within six months. The department's action immediately drew legal challenges alleging the rescission of DACA is arbitrary and capricious and violates equal protection, due process, and the APA's notice-and-comment requirement, among other claims. District courts in California and New York granted preliminary nationwide injunctions, finding the challengers were likely to succeed on the merits of their claims.¹⁵ The District Court for the District of Columbia vacated the rescission but stayed its order to preserve the status quo while the multiple suits continued.¹⁶ The Trump administration appealed to the Second, Ninth, and D.C. Circuits but also asked the Supreme Court to take up the cases on an expedited

¹⁵ *Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *Regents of the Univ. of Cal. v. United States, Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

¹⁶ *NAACP v. Trump*, 321 F. Supp. 3d 143 (D.D.C. 2018).

basis before the appeals courts ruled. The Ninth Circuit has since issued its panel opinion, ruling for the challengers.¹⁷

The Supreme Court granted the Trump administration's petitions in *McAleenan v. Vidal*, *Department of Homeland Security v. Regents of the University of California*, and *Trump v. NAACP*. The administration argues that the APA bars review of agency enforcement decisions, such as the DACA rescission, that are "committed to agency discretion by law."¹⁸ It also contends that, even if it is reviewable, DHS's decision to abandon an unlawful program is rational, and it does not violate equal protection or due process principles since it applies equally to all ethnicities and does not deprive recipients of a constitutionally protected interest. The challengers, including DACA recipients and several states, maintain that the DACA rescission is not the run-of-the-mill discretionary enforcement decision contemplated by the APA's bar on reviewability since DACA conferred numerous benefits on recipients. They further complain that the DACA rescission deprives recipients of due process and was motivated by racial animus against Latinos.

Tempers run high at the Supreme Court in cases involving the Trump administration and immigration (even those tangentially related to immigration), such as challenges to the travel ban and census citizenship question. Indeed, Justice Sotomayor compared the travel ban to one of the most shameful moments in American history, the Japanese internment during World War II, and Justice Breyer wrote that the addition of a citizenship question on the census would "undermin[e] public confidence in the integrity of our democratic system."¹⁹ The administration will likely face more of the same skepticism of its motives in the DACA rescission case. Another issue that may receive attention in this case is the practice of district courts issuing nationwide injunctions, which presidential administrations have uniformly decried. In the travel-ban case, Justice Gorsuch questioned the legitimacy of "cosmic injunctions" and Justice Clarence

¹⁷ *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

¹⁸ 5 U.S.C. § 701(a)(2).

¹⁹ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2584 (2019) (Breyer, J., concurring in part and dissenting in part).

Thomas strongly suggested in his concurrence that district courts lack the authority to enter “universal injunctions.”

IV. The Right to Keep and Bear Arms

The Supreme Court has not heard a significant case involving the Second Amendment since its landmark rulings in 2008 in *District of Columbia v. Heller* and 2010 in *McDonald v. City of Chicago*.²⁰ In those cases, the Court recognized that the Second Amendment protects an individual right to keep and bear arms (rather than a collective right enjoyed only by state militias) and that this right applies against the states as well as the federal government. The justices left for another day issues such as the standard of review courts should apply in reviewing regulations that infringe this newly protected right, the types of firearms, ammunition, and magazines government may ban, and to what extent this right extends beyond the home. In the past decade, the Supreme Court has turned away several cases raising these and other issues surrounding the Second Amendment, often over the protest of one or more of the justices. Last year, Justice Thomas chastised his colleagues for treating the Second Amendment like a “constitutional orphan” and “disfavored right,” pointing to the vast number of First and Fourth Amendment cases the Court has heard since it last reviewed a case dealing with the Second Amendment.²¹ Thus, the Supreme Court’s review of a Second Amendment case is a long time coming.

New York State Rifle & Pistol Association v. City of New York involves a challenge to New York City’s ban on transporting licensed handguns anywhere within city limits except to a gun range. Under the city’s regulations, residents must obtain a special “premises license,” which allows them to possess a handgun in their home and transport it to and from one of seven gun ranges in the city. The regulations forbid transporting handguns to any other location, such as a gun range beyond city limits or a second home (or even a new home if the resident moves). Members of a local shooting club challenged these restrictions, arguing that they flunk any level of constitutional

²⁰ *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²¹ *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the denial of certiorari).

scrutiny, burden the fundamental right to travel, and violate the Commerce Clause by controlling economic activity beyond the city's borders. The District Court for the Southern District of New York ruled for the city, finding the regulations are reasonably related to the city's legitimate interests in public safety and crime prevention. The Second Circuit affirmed, noting that the regulations "impose at most trivial limitations" on residents' ability to lawfully possess firearms for self-defense.²²

At the Supreme Court, the challengers contend that the city's regulations—which are among the most restrictive in the country—treat the possession of a handgun as "a privilege granted as a matter of municipal grace" rather than as a constitutionally protected right.²³ They argue that text, history, and tradition establish that the right to keep and bear arms is not confined to the home. The city, which defended its regulations as reasonable because residents could borrow or rent handguns if they wish to frequent gun ranges outside the city or purchase another handgun if they have a second home, has sought to prevent the Supreme Court from hearing this case. After the Court granted review, the city amended its regulations, effective July 21, 2019, to allow residents with a premises license to transport their handguns to another residence within or outside of the city and to gun ranges outside the city. This came after six years of litigation in which the city defended the old gun regime. The city now claims the case is moot and asked the Court to rule on its motion to dismiss the case. The challengers responded in a letter to the Court that they welcome the opportunity to address why they believe the case is not moot. As of this writing, the Court has denied the city's request for an extension to file its brief but has not ruled on the city's suggestion of mootness. While it is not clear what the Court will do, it is readily apparent that the city is trying to prevent the Court (with its current pro-Second Amendment majority) from resolving the case on its merits.

V. Tax Credits and the Religion Clauses

The Supreme Court will also hear a case asking whether, consistent with the religion clauses of the First Amendment, states can exclude religiously affiliated schools from a scholarship program.

²² N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45, 57 (2d Cir. 2018).

²³ Brief for Petitioners at 1, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, No. 18-280 (U.S. May 7, 2019).

The challengers seek to build on the foundation laid in a 2017 Supreme Court decision involving state discrimination against church-affiliated organizations. In *Trinity Lutheran Church v. Comer*, the Supreme Court held that Missouri violated the Free Exercise Clause of the First Amendment when it barred a church-run daycare center from receiving a public grant to resurface its playground.²⁴ The Court determined that the state improperly singled out the daycare center for disfavored treatment and denied it a public benefit solely because of its religious affiliation. Missouri relied on a “no aid” provision in its constitution (known as a Blaine Amendment²⁵) to bolster its decision to exclude a religiously affiliated organization from competing for a public grant. Chief Justice John Roberts wrote that the Court’s ruling was limited to “express discrimination based on religious identity with respect to playground resurfacing,” stressing that it did not “address religious uses of funding or other forms of discrimination.”²⁶ Justice Gorsuch, joined by Justice Thomas, explained in a concurrence that the principles laid down in the Court’s ruling “do not permit discrimination against religious exercise—whether on the playground or anywhere else.”²⁷ Shortly thereafter, the Supreme Court ordered courts in Colorado and New Mexico to revisit their rulings in cases dealing with a school voucher program and a textbook lending program in light of *Trinity Lutheran*. Now the Court may determine whether the logic of *Trinity Lutheran* extends to student aid programs.

Espinoza v. Montana Department of Revenue stems from a 2015 Montana law establishing a tax credit of up to \$150 per year for donations taxpayers make to a scholarship-granting organization. That organization then provides scholarships to income-eligible children to attend a private school of their choice. Scholarship recipients may

²⁴ *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

²⁵ Blaine Amendments prohibit public money from going to churches. Named for Sen. James G. Blaine of Maine, who in the late 1800s pushed to amend the federal Constitution to prohibit aid to “sectarian” schools, Blaine Amendments can be found in the constitutions of more than three dozen states. Justice Thomas detailed the ignoble roots of Blaine Amendments in *Mitchell v. Helms*, explaining how the original amendment “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’” 530 U.S. 793, 828 (2000).

²⁶ *Trinity Lutheran Church*, 137 S. Ct. at 2024 n.3.

²⁷ *Id.* at 2026 (Gorsuch, J., concurring in part).

use the funds at any qualified school, which initially included religiously affiliated private schools. In 2016, the Montana Department of Revenue enacted a rule excluding religious schools, citing the state's "no aid" constitutional provision. Families with children at religious schools challenged the rule, maintaining that it violates their federal constitutional right to free exercise of religion and that the tax credit incentivizes private donations so there is no public funding at issue. Indeed, the Supreme Court has long drawn a distinction between the government directly providing aid to religiously affiliated schools and the government providing aid to individuals who then choose to use the funds at religious schools.²⁸

The district court of the Eleventh Judicial District of Montana agreed with the families, entering a permanent injunction. On appeal, the Montana Supreme Court reversed and invalidated the scholarship program in its entirety, finding that indirect payments to religiously affiliated schools violate the "no aid" constitutional provision. The court also dismissed the families' free exercise claims, explaining that the "play in the joints" between what the Establishment and Free Exercise Clauses require of states allow them to erect higher barriers between religion and government than the federal Constitution requires. The U.S. Supreme Court granted review. The families ask the Supreme Court to extend the logic of *Trinity Lutheran* to rule that states may not exclude religiously affiliated schools from student-aid programs. Montana points to the Court's previous holding in *Locke v. Davey* (2004) that states could prohibit the use of public scholarship funds for college students studying to become ministers, consistent with Establishment Clause concerns about training clergy.²⁹ The *Locke* Court did not address, more broadly, whether states may entirely exclude religious schools from voucher or scholarship programs. The *Espinoza* case offers the Court the opportunity to harmonize the rulings in *Trinity Lutheran* and *Locke*.

VI. Obamacare Returns, Again

Congress's passage of the Affordable Care Act (ACA) is the gift that keeps on giving to the Supreme Court bar as the justices will hear a fifth challenge stemming from the 2010 health care law. Three

²⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²⁹ *Locke v. Davey*, 540 U.S. 712 (2004).

consolidated cases, *Moda Health Plan Inc. v. United States*, *Maine Community Health Options v. United States*, and *Land of Lincoln Mutual Health Insurance Co. v. United States*, invoke an ACA provision that committed the government to reimburse health insurers for a portion of their losses for providing insurance through the new exchanges to individuals with preexisting conditions for the first three years. Using appropriations riders in 2014, 2015, and 2016, Congress limited the funds available to the Department of Health and Human Services (HHS) to make these payments but failed to amend the ACA itself. What was meant to incentivize insurers to expand coverage to individuals with preexisting conditions (thereby assuming significant risks) led to “a \$12 billion bait-and-switch.”³⁰

Several health insurers that relied on the government’s promise to share the financial burden filed suit, asserting the ACA requires the government to reimburse them using the statutory formula and that the government breached an implied contract by failing to pay up. The U.S. Court of Federal Claims agreed and ordered the government to fulfill its financial obligation to the insurers. On appeal, the Federal Circuit acknowledged that the ACA obligated the government to pay these insurers using the statutory formula but found that the appropriation riders demonstrated Congress’s clear intent to abrogate that obligation. On the breach-of-contract claim, the appeals court reasoned that Congress makes laws to establish policies, not contracts, and without clear evidence to the contrary, legislation does not “establish[] the government’s intent to bind itself in a contract.”³¹ The appeals court declined to rehear the case sitting en banc over the protest of two judges. In dissent, Judge Pauline Newman opined, “This is a question of the integrity of our government. . . . Our system of public-private partnership depends on trust in the government as a fair partner. . . [and] assurance of fair dealing is a judicial responsibility.”³²

At the Supreme Court, the insurers explain that the government’s bait and switch did not just affect them—its failure to pay has led to

³⁰ Petition for Writ of Certiorari at 16, *Moda Health Plan, Inc. v. United States*, No. 18-1028 (U.S. Feb. 4, 2019).

³¹ *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1329 (Fed. Cir. 2018).

³² *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 740–41 (Fed. Cir. 2018) (Newman, J., dissenting from denial of rehearing en banc).

insurers going out of business, driving up costs and leaving individuals with fewer insurance options. They maintain that the appeals court erred in concluding that Congress evinced its clear intent to revoke the government's financial obligation in the appropriations riders because the text simply limited the source of the funds. The insurers further point out that the 2014 appropriations rider (passed in December 2014) could not retroactively eliminate the obligation incurred during that calendar year, which was the first year insurers offered plans through the new insurance exchanges. They complain the government "lured private parties into expensive undertakings with clear promises, only to renege after private parties have relied to their detriment and incurred actual losses."³³ The federal government argues that the ACA set up a temporary subsidy program for which Congress never appropriated funds and did not require HHS to make payments in the absence of an appropriation. While this case does not seek to overturn any part of the ACA, it highlights how the nearly 10-year-old law created as many problems as it sought to fix. But another case waiting in the wings may signal the death knell for the ACA, unless the chief justice saves it once again.

VII. On the Horizon

There's no shortage of important cases on the Court's docket in OT 2019, but there are a few others the justices may agree to review in the coming months. In *Texas v. Azar*, the justices may be asked to weigh in on the ACA for a sixth time.³⁴ In 2012, in *National Federation of Independent Business v. Sebelius*, the Supreme Court acknowledged that the ACA's individual mandate provision, which requires people to buy health insurance or pay a penalty, exceeded Congress's power to regulate interstate commerce.³⁵ The Court instead upheld the individual mandate as a lawful exercise of Congress's taxing power. Then Congress eliminated that tax penalty when it passed the

³³ Petition for Writ of Certiorari, *supra* note 30, at 17.

³⁴ The Supreme Court has decided four cases stemming from the Affordable Care Act, or what should be called the Supreme Court Bar Full Employment Act: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *King v. Burwell*, 135 S. Ct. 2480 (2015); and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). As discussed above, the Court will hear a fifth case, *Moda Health Plan, Inc. v. United States*, in OT 2019.

³⁵ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012).

Tax Cuts and Jobs Act of 2017. Private individuals along with Texas and 19 other states filed suit, seeking a declaration that the individual mandate is unconstitutional and cannot be severed from the remainder of the law. The Trump administration in large part agrees with the plaintiffs, and California, 15 other states, and the District of Columbia intervened in the suit to defend the law. The District Court for the Northern District of Texas ruled for the challengers, explaining that the individual mandate is the “linchpin” of the ACA. The appeal is currently pending before the Fifth Circuit.

Another case the justices may soon agree to hear is *June Medical Services v. Gee*, which challenges a Louisiana law requiring doctors who perform abortions to have admitting privileges at a nearby hospital. If this sounds familiar, that’s because the Supreme Court decided a case involving a similar Texas law in *Whole Woman’s Health v. Hellerstedt* (2016), finding the law was an undue burden on women’s access to abortion.³⁶ One of Louisiana’s four abortion clinics challenged the law, and, citing *Hellerstedt*, the District Court for the Middle District of Louisiana held that it advanced minimal health benefits while placing substantial burdens on women seeking an abortion. The Fifth Circuit reversed, citing the fact that only one doctor in Louisiana had been unable to gain admitting privileges and no clinics had closed due to the new law.³⁷ The clinic asked the Supreme Court to temporarily enjoin the law while it appeals the Fifth Circuit’s ruling. The Court granted the stay over the protest of Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh. June Medical Services already filed its petition for a writ of certiorari, so the justices could grant review when they return in late September to consider petitions filed over the summer.

A final issue the justices may hear is the legality of the Trump administration’s attempt to withhold certain federal funds from jurisdictions (known as sanctuary cities) that refuse to cooperate with the administration’s immigration enforcement. Soon after President Trump took office, he issued an executive order and then-Attorney General Jeff Sessions issued a backgrounder explaining that receipt of federal dollars, such as Community Oriented Policing Services

³⁶ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

³⁷ *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).

(COPS) grants and Byrne Memorial Justice Assistance grants, are contingent on local law enforcement's cooperation with the federal government's immigration enforcement efforts. More than 300 jurisdictions (cities, counties, and even entire states) have refused to comply with federal immigration enforcement efforts, such as notifying Immigration and Customs Enforcement when illegal aliens are released from prison. Chicago, Los Angeles, New York City, Philadelphia, and San Francisco challenged the administration's conditioning of federal funds on their compliance, arguing that this exceeds the federal government's authority and violates the separation of powers and the Spending Clause, among other claims. The district courts uniformly ruled for the cities, with a few issuing nationwide injunctions. All but one of the appellate courts affirmed, although some limited the scope of overzealous district courts that entered nationwide injunctions. The Ninth Circuit recently ruled for the Trump administration in Los Angeles's case challenging the denial of its application for a \$3 million COPS grant.³⁸ Given the split among the federal appeals courts, this dispute may end up before the Supreme Court before long.

VIII. Conclusion

The Supreme Court's OT 2019 begins October 7, with the justices hearing cases involving an Obamacare bait and switch, the Trump administration's decision to roll back the DACA program, onerous restrictions on gun rights, claims of sexual orientation- and gender identity-based employment discrimination, school-choice efforts for religiously affiliated schools, and a capital defendant's attempt to employ the insanity defense, among many other cases. Cases on the horizon that the Court may take up later in the term include challenges to an admitting privileges requirement for doctors who perform abortions, the Trump administration's attempt to withhold federal dollars from sanctuary cities, and whether Obamacare must fall now that Congress has eliminated the tax penalty associated with the individual mandate. While the justices shied away from the spotlight in OT 2018, the next term will feature many high-profile issues in headline-making cases and place the justices front and center leading up to Election Day 2020.

³⁸ *City of L.A. v. Barr*, No. 18-55599, 2019 U.S. App. LEXIS 20706 (9th Cir. July 12, 2019).