

Looking Ahead: Déjà Vu at the Supreme Court

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If there were ever a time that people wanted to look ahead, it's now. After wrapping up a hot-button Supreme Court term, the country is locked down in the middle of a global pandemic and anticipating a fierce and polarizing election. Many people simply want to look to the future and hope 2020 passes as quickly as possible along with the coronavirus, murder hornets, cancel culture, and civil-rights violations that came with it.

And yet, for Supreme Court watchers, looking forward will necessarily entail looking back. Next term the Court will hear a slew of cases that were scheduled for argument last term but were rescheduled after COVID-19 forced the marble palace to temporarily close. Cases concerning whether the Religious Freedom Restoration Act (RFRA) authorizes money damages, a law that limits the political affiliation of state supreme court judges, and due process limits on personal jurisdiction over out-of-state defendants were all originally slated for last term but will be heard in the upcoming term instead.

One case in particular should instill an acute sense of déjà vu: In *California v. Texas*, the Court will once again consider the constitutionality of the Affordable Care Act's requirement that every person obtain health insurance, also known as the "individual mandate." No, it's not Groundhog Day; it's the October 2020 Supreme Court term.

Even the Court's new docket forces us to look back. In *Edwards v. Vannoy*, the Court will consider whether its decision last term in *Ramos v. Louisiana* (incorporating against the states the Sixth Amendment's guarantee of a unanimous jury verdict) applies retroactively. In *Facebook Inc. v. Duguid*, which was put on hold last term while the Court decided

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the constitutionality of a federal robocall ban, the Court will consider the reach of that same act. In *Collins v. Mnuchin*, involving the president's ability to remove the director of the Federal Housing Finance Agency (FHFA), the Court will decide virtually the same question it answered last term in *Seila Law v. Consumer Financial Protection Bureau*, just in the context of a different agency.

Looking back is, of course, inherent to the institution. The Supreme Court is a court of final review, and it carefully considers precedent. But the fact that COVID-19 required cases to be rescheduled heightens the sensation of looking back.¹

One difference between the coming term and last term is that we can expect this one to be a bit quieter. Big terms, like October 2019–2020, are usually followed by more discreet ones. In addition to that rule of thumb, Chief Justice John Roberts has demonstrated a commitment to preserving the image of the Court as independent from politics, and those instincts may be heightened during an election year. And, if the leaks are accurate, Justice Brett Kavanaugh is eager to “avoid certain thorny dilemmas” in the wake of his contentious confirmation hearing.² It stands to reason that the justices will select a less eventful docket this term. That being said, 2020 has been thoroughly unpredictable. All bets are off.

I. The Affordable Care Act

Ever since the Affordable Care Act's (ACA) passage, in more Supreme Court terms than not, there's been a case challenging some aspect of its validity. From *NFIB v. Sebelius*³ in the October 2011 term

¹ Speaking of COVID-19, the Court so far has declined to weigh in on various pandemic-related measures, including shut-down orders, voting rules, and prisoner policies. Given the Court's refusal to grant emergency relief in *Calvary Chapel Dayton Valley v. Sisolak*, a case involving a Nevada order that prohibited churches from admitting more than 50 persons for services but that permitted casinos to operate at 50 percent capacity, it's clear the Court is reluctant to wade into the debate about the unprecedented restrictions on personal liberties that followed in the wake of the pandemic. As long as the outbreak continues, petitions will undoubtedly continue to be filed, including a petition from Calvary Chapel once the lower courts decide the case on the merits. Perhaps the longer the orders stay in force, the more likely the justices will see fit to resolve the constitutional disputes wrought by the government's response to the outbreak.

² Joan Biskupic, “How Brett Kavanaugh Tried to Sidestep Abortion and Trump Financial Docs Cases,” CNN, July 29, 2020, <https://cnn.it/3gzVepd>.

³ 567 U.S. 519 (2012).

(challenging the individual mandate and Medicaid expansion), to *Burwell v. Hobby Lobby*⁴ in 2012 (challenging the employer contraception mandate under RFRA), to *King v. Burwell*⁵ in 2014 (challenging the IRS's authority to extend tax credits to federal health insurance exchanges), to *Zubik v. Burwell*⁶ in 2015 (challenging the contraception mandate as applied to religious organizations), to *Health Options v. United States*⁷ and *Little Sisters of the Poor v. Pennsylvania*⁸ this past term (challenging the government's refusal to reimburse insurers for losses suffered due to the ACA and agency authority to exempt religious organizations from the contraception mandate, respectively), nary a term has gone by without an Obamacare challenge. The October 2020 term will be no different, as the Court reconsiders the constitutionality of the individual mandate in light of Congress's decision to reduce the "tax" for noncompliance to \$0.⁹

As most Court watchers will remember, in 2012 the Court upheld the ACA's requirement that individuals purchase health insurance (the so-called individual mandate) on the theory that it was a legitimate exercise of Congress's taxing power. Despite the fact that Congress itself described the fee for noncompliance as a penalty, the chief justice used a "saving construction" to rule that the mandate was a tax on the failure to maintain coverage. He reasoned that though the fee was not explicitly called a tax, it had familiar hallmarks of a tax: it generated revenue, was paid by taxpayers to the treasury, and was assessed by the IRS. Chief Justice Roberts wrote that while his view was not "the most natural interpretation," it was a "fairly possible" one.¹⁰

In an unsigned dissent, Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito argued that the "tax" was designed as a penalty for violating the law rather than a forced contribution to raise revenue. And because Congress itself called the fee a "penalty," the monetary assessment for failing to maintain health insurance was not a tax. According to the dissenters, the majority

⁴ 573 U.S. 682 (2013).

⁵ 135 S. Ct. 2480 (2015).

⁶ 136 S. Ct. 1557 (2016).

⁷ 140 S. Ct. 1308 (2020).

⁸ 140 S. Ct. 2367 (2020).

⁹ *California v. Texas*, 140 S. Ct. 1262 (2020) (cert. granted).

¹⁰ NFIB, 567 U.S. at 563.

had effectively rewritten the statute in order to save it. “We have never held that any exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty,” the dissenters wrote.¹¹ When Congress “adopt[s] the criteria of wrongdoing” and then imposes a penalty as the “principal consequence on those who transgress its standard,” it has created a penalty, not a tax.¹²

The dissenters further reasoned (and on this point Chief Justice Roberts agreed) that the penalty could not be justified as a use of Congress’s commerce power. Congress may regulate economic activity that, in the aggregate, has a substantial effect on interstate commerce. But rather than regulating activity, the mandate regulated *inactivity*—that is, the failure to purchase health insurance.¹³ And “[i]f all inactivity affecting commerce is commerce, commerce is everything.”¹⁴ Using such reasoning, there would be no limit on the federal government’s ability to compel activity in order to regulate it.

Fast forward several years and Congress has reduced the ~~penalty~~ tax to zero. While both the mandate and the “shared responsibility payment” for failure to comply remain on the books, Congress in 2017 set the payment at the lesser of “zero percent” of a person’s household income and “\$0.”

Two individuals and 18 states¹⁵ filed a lawsuit arguing that the “tax” is now an unconstitutional mandate under the Court’s decision in *NFIB*. The tax is no longer a tax, they claim, because it generates no revenue, an essential prerequisite for any tax. They further argue that the mandate is not severable from the rest of the act and so the entire thing must fall.

¹¹ *Id.* at 662.

¹² *Id.* at 662–63.

¹³ Leaks and certain clues within the dissenting opinion, including the fact that it refers to the plurality’s concurring opinion as “the dissent,” drew speculation that Chief Justice Roberts changed his vote to uphold the mandate as a tax at the last minute, thus saving Obamacare. See, e.g., *id.* at 658.

¹⁴ *Id.*

¹⁵ Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia brought suit. Wisconsin was originally a plaintiff state, but later sought dismissal from the appeal.

For their part, the federal defendants agree that the mandate is unconstitutional, but they disagree that it's not severable from the rest of the law. Based on the defendants' unwillingness to defend the mandate on the merits, 20 states and the District of Columbia have intervened to argue that the mandate should be upheld.¹⁶

The district court held that the mandate was unconstitutional and not severable from the rest of the act and struck down the entire statute (though it stayed its judgment, pending appeal). On appeal in the Fifth Circuit, the U.S. House of Representatives intervened to defend the ACA.

In an opinion by Judge Jennifer Elrod, the Fifth Circuit affirmed, ruling that "[n]ow that the shared responsibility payment amount is set at zero" a "saving construction is no longer available."¹⁷ The tax no longer raises revenue, is no longer paid into the treasury, and is no longer determined by factors like taxable income. It is simply no longer a tax, and, as a mandate, it cannot be upheld under the commerce power given the opinion of a majority of justices in *NFIB v. Sibelius*. The Fifth Circuit remanded to the district court to determine severability.

The House and the state intervenors petitioned the Court for review and the justices agreed to hear the case. We'll finally find out whether the chief justice meant what he said when he ruled that the ACA does not mean what it says. If the "individual mandate" was not a mandate at all but a "tax," what happens when the "tax" goes away?

There's also an interesting standing question that asks whether the individual plaintiffs are injured by the mandate and have standing to challenge it, given that they suffer no penalty if they merely choose not to buy health insurance. The Fifth Circuit ruled that they did in fact have standing, based on their statements that they would follow the law because *it is the law* and will suffer an injury (lost money) by purchasing insurance. The defendants contend that such an injury is self-inflicted since the plaintiffs would have suffered no harm if they had just flouted the law and declined to buy insurance.

¹⁶ Those states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington.

¹⁷ *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019).

It's an interesting question that often comes up when the government issues guidance or imposes a regulation that affects a person's rights or responsibilities and then argues that, because the agency has not explicitly directed the would-be plaintiffs to do anything, or penalized them directly, they are therefore barred from challenging the requirement in court.¹⁸ Arguably, rule-of-law considerations weigh in favor of permitting plaintiffs to challenge laws that purport to regulate their behavior, even if the government claims they are free to ignore the law as written.

If the mandate is indeed struck down, and, depending on severability, this may be the Obamacare litigation to end all Obamacare litigation. Or, history might repeat itself, and we'll see the act at the Court in a future term in a Nietzschean cycle of eternal return.

II. Religious Liberty

A. Free Exercise

In *Fulton v. City of Philadelphia*,¹⁹ the justices will consider whether to overturn a case that tops many religious freedom lawyers' list of most reviled court opinions: *Employment Division v. Smith*.²⁰ *Fulton* concerns Philadelphia's decision to exclude religious agencies from participating in the city's foster system on the basis that they had refused to refer same-sex couples as potential parents. Catholic Social Services (CSS), an adoption agency, and longtime foster parent

¹⁸ See, e.g., *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 586 (7th Cir. 2011) (finding it "odd that the Agency is arguing that it must have a strict rule now to get [its objects] to be more compliant with [the agency's] rules, but at the same time it is asserting that these rules are not meant to change anyone's immediate behavior enough to confer standing to challenge that regulation"); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (finding that "it is more than a little ironic that [the government] would suggest [the plaintiff] lack[s] standing and then, later in the same brief, label [the plaintiff] as a prime example [of] . . . the very problem the Rule was intended to address"); *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015) (rejecting the government's argument that private participants in the horse industry lacked standing to challenge a regulation requiring organizations to enforce industry standards against them); *Duarte v. City of Lewisville*, 759 F.3d 514 (5th Cir. 2014) (holding that family members had standing to challenge ordinance regulating where their immediate relative could live).

¹⁹ 140 S. Ct. 1104 (2020) (cert. granted).

²⁰ 494 U.S. 872 (1990).

Sharonell Fulton, alleged that the city's policy violated their free-exercise rights, the Establishment Clause, Pennsylvania's Religious Freedom Protection Act, and their right to free speech.

When children enter foster care, the city of Philadelphia largely relies on private agencies to find them homes. In 2018, there were 30 such agencies operating in the city. One such agency, CSS, had placed thousands of children with parents and over 40 children with Fulton. But CSS's participation was halted in 2018 after a reporter from the *Philadelphia Inquirer* notified officials that two Catholic agencies would not recommend same-sex couples as foster parents. There was no evidence that a same-sex couple had ever been turned away or had even approached CSS. Nevertheless, the city ended its contract with the group.

After CSS and Fulton sued, the district court and the Third Circuit upheld the policy on the basis that it was a neutral act of general applicability under *Employment Division v. Smith*. Both courts further ruled that there was no free speech problem with conditioning a foster organization's use of government funds on implementing an anti-discrimination policy.

In *Smith*, the plaintiff had sought an exemption from a state drug law that prevented him from using peyote in a Native American religious ceremony. The Court rejected the plaintiff's First Amendment claims and ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."²¹ Writing for the majority, Justice Scalia wrote that the government could not regulate a religious ceremony qua religious ceremony, but to make people's obligation to obey a generally applicable law contingent on their religious beliefs would "permit every citizen to become a law unto himself."²²

Smith has been widely loathed by religious freedom advocates since the day it was issued, and it was the impetus for RFRA, which restores the "compelling interest" test for laws that burden free-exercise rights. CSS and Fulton argue that the Free Exercise Clause requires affirmative freedom from government interference, not

²¹ *Id.* at 879 (cleaned up).

²² *Id.*

freedom from nondiscriminatory laws. They therefore urge the Court to apply strict scrutiny to any government action that infringes exercises of faith. But there are other routes the Court could take, apart from overturning *Smith*. In addition to arguing that *Smith* should be abandoned, *CSS* and *Fulton* also argue that the Third Circuit incorrectly applied *Smith* and that the city's policy places an unconstitutional condition on their free speech rights.

Religious liberty is one area where the Court has been consistently active in vindicating constitutional rights. But here it's being asked to strike a balance between protecting that freedom and allowing the government to pursue its interest in anti-discrimination laws. It remains to be seen whether it will disturb the holding in *Smith*, as it's been asked many times before, or whether it will find some other middle ground.

B. RFRA Money Damages

In *FNU [First Name Unknown] Tanzin v. Tanvir*, the Court will consider whether RFRA permits money damages in cases against federal officials in their individual capacity.²³ The plaintiffs are a group of Muslim men, all of whom are U.S. citizens or lawful permanent residents, who allege that senior government officials placed them on the "no fly" list as retaliation for refusing to become FBI informants. At least one of the men had been banned from traveling by plane for years despite presenting no threat to aviation safety, causing him to lose his trucking job and depriving him of the ability to visit his family in Pakistan. Because the men refused the officials' overtures to act as informants at least in part because of their sincerely held religious beliefs, they sued the officials under RFRA.

The district court dismissed the case on the basis that RFRA does not permit money damages against government officials. The Second Circuit, however, reversed. As a separation-of-powers matter, the legislature is generally responsible for policy considerations, such as whether to confer indemnity or immunity, and courts are responsible for applying the law and fashioning the appropriate remedy. To preserve that balance, the Second Circuit declined to read Congress's intent into the statute. Instead, it applied a presumption that all remedies are available to a court unless Congress expressly

²³ 140 S. Ct. 550 (2019) (cert. granted).

says otherwise. Finding no indication that Congress sought to exclude money damages, the court ruled that they were available under RFRA.

Money damages are an important remedy for plaintiffs who seek to vindicate their constitutional rights in court. Where people have been injured and injunctive or declaratory relief is impractical or unavailable, damages often are the only way to make the person whole. And even when they are not the *only* remedy, they are important means of imposing accountability. The government argues, however, that there are good policy reasons for withholding damages as a remedy, because they may purportedly dissuade officials from vigorously performing their duties. The government further argues that it would threaten the separation of powers to allow damages when they are not clearly authorized. Interestingly, both parties argue that the case presents separation-of-powers concerns, but they each think those concerns weigh in their own favor.

III. The Administrative State

A. Separation of Powers

Following its decision in *Seila Law* last term, in which Chief Justice Roberts wrote an opinion deeming the Consumer Financial Protection Bureau's (CFPB) structure unconstitutional, the Court will consider in *Collins v. Mnuchin* whether the structure of the FHFA presents similar concerns.²⁴

The claim in both cases is that restrictions on the president's removal power violate the Constitution's promise of separation of powers. Administrative agencies often wield the power of all three branches, and, as Justice Kavanaugh observed as a judge on the D.C. Circuit, they exercise "huge policymaking and enforcement authority" that can "greatly affect the lives and liberties of the American people."²⁵ Yet these agencies are largely unaccountable to the executive, who is elected by the public and is charged by the Constitution with "tak[ing] care that the laws be faithfully executed." Both the CFPB and FHFA, for example, are led by a single director, removable

²⁴ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019), cert. granted, No. 19-422 (U.S. July 9, 2020).

²⁵ In re Aiken County, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

only for “inefficiency, neglect or malfeasance.”²⁶ In order for the president to discharge his duties and for these agencies to be truly accountable, the argument goes, the president must be able to remove these executive officers at will.

In *Seila Law*, the Court declined to overturn its decision in *Humphrey’s Executor v. United States* (1935), which allows Congress to restrict the president’s authority to remove executive officers in some instances.²⁷ Whether *Humphrey’s* is in jeopardy is hard to say, but the Court refused to extend it to the stark circumstances of the CFPB, “an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the president unless certain statutory criteria are met.”²⁸ Chief Justice Roberts concluded that the CFPB’s scheme is “incompatible with our constitutional structure,” which “scrupulously avoids concentrating power in the hands of any single individual.”²⁹

Given that the Court so recently declined to overturn *Humphrey’s* in *Seila Law*, it’s unclear if the case will go any further in *Collins*, but it is likely to at least restore *some* accountability to the FHFA and the so-called fourth branch of government.³⁰

B. The Anti-Injunction Act

In *CIC Services v. Internal Revenue Service*,³¹ the justices will decide whether the Anti-Injunction Act (AIA), which bars lawsuits brought to stop the collection of taxes, bans a lawsuit against an Internal Revenue Service reporting requirement merely because the violation of that requirement carries a tax penalty.³² If so, the Court would make

²⁶ Establishment of the Bureau of Consumer Financial Protection, 12 U.S.C. § 5491 (2010); 12 U.S.C. § 4512 (2008) (establishing the director of the FHFA).

²⁷ 295 U.S. 602 (1935).

²⁸ *Seila Law*, 140 S. Ct. at 2192.

²⁹ *Id.* at 2202.

³⁰ See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that administrative agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories”).

³¹ *CIC Servs., LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019), cert. granted, No. 19-930 (U.S. May 4, 2020).

³² The Anti-Injunction Act provides that, generally speaking, “no suit for the purpose of restraining the assessment or collection of any [federal] tax shall be maintained in any court by any person.” 26 U.S.C. § 7421 (2018).

it more difficult for plaintiffs to challenge allegedly illegal rules when they have some tax consequence.

In 2016, the IRS issued new record-keeping and reporting requirements, mandating that taxpayers report certain transactions that purport to be insurance but that the IRS concluded did not actually qualify. Noncompliance subjected taxpayers to penalties. CIC Services, a taxpayer adviser firm, challenged the requirements on the theory that the IRS had not undergone the necessary notice-and-comment rulemaking process under the Administrative Procedure Act. The IRS then moved to dismiss the case based on the AIA, which requires plaintiffs to wait until a tax has been collected to challenge its validity.

The Sixth Circuit ruled that, because violations of the IRS requirements carry a tax penalty, the AIA barred a pre-enforcement challenge to them. That conclusion conflicts with a previous Supreme Court decision interpreting the AIA's sister statute, the Tax Injunction Act.³³ It also stretches the underlying policy of the AIA, which is to facilitate the collection of taxes. The result is to bar lawsuits not just against tax impositions, but against rules that have any tax implication.

CIC moved for rehearing en banc, which the Sixth Circuit denied. But several judges dissented from denial, including Judges Amul Thapar, Raymond Kethledge, John Bush, Joan Larsen, John Nalbandian, Chad Readler, and Eric Murphy. Judge Jeffrey Sutton, who was the deciding vote, concurred in the denial of rehearing. He believed that the dissenting opinion by Judge Nalbandian “seems to be right as an original matter,” because it’s doubtful the AIA was intended to ban a suit “whenever the IRS enforces a regulation with a penalty that it chooses to call a tax.”³⁴ He concluded, however, that “reading between the lines of Supreme Court decisions is a tricky business,” and “poses fewer difficulties for the Supreme Court than it does for us.”³⁵ He thus suggested it was the Supreme Court’s mess to clean up, and the Court has taken up his invitation to do so.

The case has the potential to significantly broaden or narrow the ability of plaintiffs to seek pre-enforcement review of purportedly illegal

³³ *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1 (2015).

³⁴ *CIC Servs., LLC v. IRS*, 936 F.3d 501, 504 (6th Cir. 2019) (Sutton, J., concurring in denial of rehearing en banc).

³⁵ *Id.* at 505.

rules. On the one hand, as CIC noted in its petition, “[p]re-enforcement review is the lifeblood of administrative law.”³⁶ It’s what allows “a law-abiding citizen [to] challenge illegal regulations in court, without having to violate the regulation first and then raise its invalidity as a defense to an enforcement action.”³⁷ On the other hand, the Court has affirmed the government’s interest in securing its revenues.

Even in this case, the specter of *Obamacare* haunts the Court once again. In *NFIB v. Sebelius*, the Court ruled that the individual mandate was not a tax for purposes of the AIA, which meant that the suit could move forward, even though it was a tax for purposes of Congress’s taxing power. The Court is thus forced, once again, to determine if a “penalty” is a tax for purposes of the AIA.

IV. Nominal Damages and Mootness

Constitutional lawsuits sometimes have the effect of inducing the government to change its policy before the litigation is complete. That’s generally a happy outcome for the plaintiff, except that, in the absence of a court opinion, the government may choose to resume its policy at a later date. Nonetheless, when plaintiffs get what they asked for, like getting rid of an unconstitutional policy, courts will usually rule that the case is “moot” and that they no longer have jurisdiction to hear the case. Next term, in *Uzuegbunam v. Preczewski* (pronounced Oo-zah-BUN-um versus Preh-SHEV-skee), the Court will resolve the deep circuit split concerning whether such mootness can be defeated by bringing a claim for nominal damages.³⁸

In 2016, Chike Uzuegbunam was stopped by campus police from distributing religious literature in an outdoor plaza at Georgia Gwinnett College (GGC), where he was a student. The officer explained that no one could distribute writings of any kind at that location, in accordance with the school’s (ironically titled) “Freedom of Expression Policy.” Instead, students were permitted to engage in expression only if they reserved one of two designated “speech

³⁶ Petition for Writ of Certiorari at 2, *CIC Servs. v. IRS*, No. 19-930 (U.S. May 4, 2020).

³⁷ *Id.*

³⁸ *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824 (11th Cir. 2019), cert. granted, No. 19-968 (U.S. July 9, 2020). Plaintiffs typically seek nominal damages when their constitutional rights have been violated but money damages are nonexistent or difficult to calculate. They thus stand as a symbol in litigation for the violation of the plaintiff’s rights.

zones” which occupied a small part of campus and were open just 18 hours a week.

Uzuegbunam dutifully reserved a zone, only to be approached by a member of campus police yet again, who told him there had been complaints about his speech and subsequently asked him to stop speaking. The officer explained that Uzuegbunam’s reservation did not include permission to engage in “open-air speaking,” and that his speech qualified as “disorderly conduct” under GGC’s “Student Code of Conduct.”³⁹

After this second encounter, Uzuegbunam sued university officials under the First Amendment, asking for declaratory and injunctive relief and nominal damages. Thereafter, GGC revised its policy to permit speech everywhere without a permit except in limited circumstances and changed its code of conduct. It then moved to dismiss the lawsuit as moot. The district court granted the motion based on mootness, ruling that the college had changed its policies, there was “no reasonable basis to expect that it would return to them,” and the nominal damages could not save the suit from being moot.

The Eleventh Circuit affirmed, ruling that the plaintiffs’ “abstract” constitutional injury, represented by the nominal damages claim, was not sufficient to keep the case live.⁴⁰ A claim for nominal damages will defeat mootness, it said, only where the plaintiffs have also pleaded a claim for compensatory damages and there is an ongoing dispute as to that claim.⁴¹ Maintaining jurisdiction in Uzuegbunam’s case, however, where there was no claim for compensatory damages, “would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized.”⁴²

Represented by Alliance Defending Freedom, Uzuegbunam asked the Court to review the Eleventh Circuit’s decision and to resolve

³⁹ The code forbade “disturb[ing] the peace and/or comfort of person(s).” See Petition for Writ of Certiorari at 4, *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. July 9, 2020).

⁴⁰ *Uzuegbunam*, 781 Fed. Appx. at 829.

⁴¹ The court noted that a claim for nominal damages may present a live case or controversy where it is the only appropriate remedy. For example, in boundary disputes, landowners sometimes request nominal damages for trespass when seeking a court order regarding the boundary. Or, in libel lawsuits, plaintiffs sometimes ask for nominal damages to vindicate their reputation when seeking a judicial determination that the libel is false. It contrasted those situations with a case where the plaintiff seeks both nominal damages and declaratory or injunctive relief and the defendant subsequently changes its policy.

⁴² *Uzuegbunam*, 781 Fed. Appx. at 830.

the resulting split between the six circuits that hold that the government's policy change does not moot nominal damages claims, the two circuits that hold such claims moot only if the government changes a policy it has never enforced against the plaintiff, and the Eleventh Circuit, which held that such claims are always moot unless there is an accompanying compensatory damages claim. They argue that nominal damages claims represent a constitutional injury and entitle a plaintiff to an adjudication on the merits in the same way that claims for compensatory damages do.

A diverse array of groups filed amicus briefs in support of certiorari, demonstrating the broad interest among organizations that litigate in the public interest. Amici include atheist, Jewish, Catholic, and Muslim groups, the Foundation for Individual Rights in Education, and student groups like Young Americans for Liberty.⁴³ As the American Humanist Society observed, “[o]rderly society requires proper vindication of constitutional rights,” including claims for nominal damages.⁴⁴ Such awards “are necessary to ensure scrupulous observance of the Constitution.”⁴⁵

⁴³ Americans for Prosperity (AFP) wrote a particularly interesting amicus brief arguing that the Eleventh Circuit's decision would exacerbate the problems wrought by qualified immunity doctrine. It noted that, “[s]tudent plaintiffs can only overcome qualified immunity in a §1983 case and be heard against individual defendants if there is well-established precedent on point. But precedent cannot be developed” when claims are routinely dismissed, either for qualified immunity reasons itself, or because of mootness problems. Brief for Ams. for Prosperity as Amici Curiae Supporting Petitioners at 4, *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. July 9, 2020). AFP went on to quote Judge Don Willett, who described a qualified immunity conundrum:

Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Id. (quoting *Zadeh v. Robinson*, 928 F.3d 457, 474, 480 (5th Cir. 2019), petition for cert. filed, No. 19-676 (U.S. Nov. 22, 2019)). More permissive mootness doctrines, AFP concluded, present yet another obstacle to the development of the body of law necessary to overcome qualified immunity.

⁴⁴ Brief for Am. Humanist Ass'n as Amici Curiae Supporting Petitioners at 8, *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. July 9, 2020).

⁴⁵ *Id.* at 11.

The case presents an important question that is of interest to any individuals who might assert their constitutional rights in court, particularly in contexts—like schools—where the case may be mooted quickly (for instance, because the plaintiff graduates). Not only do litigants seek a full vindication of their constitutional rights in court but—so long as there is no adjudication on the merits—the government may resume their conduct at a later date, which leaves constitutional rights in peril.

V. The Criminal Docket

A short note on the criminal docket. The Court will hear at least three criminal cases relating to the Fourth, Sixth, and Eighth Amendments. In *Jones v. Mississippi*, the Court will consider whether the Eighth Amendment’s prohibition on cruel and unusual punishment requires a judge to make an affirmative finding that a minor is “permanently incorrigible” before imposing a sentence of life without parole.⁴⁶ The facts are enough to make a mother cry. The juvenile in the case stabbed his grandfather to death during an altercation when he was 15 years old. The boy, who suffered from depression and other mental health conditions for which he was medicated, had come to live with his grandparents to escape his “troubled” household. His father was a violent alcoholic, his stepfather was abusive, and his mother abused alcohol and suffered from various mental disorders. The boy testified that he stabbed his grandfather in self-defense, but the jury rejected that defense and sentenced him to life without parole, which was the mandatory penalty at the time.

Following the Supreme Court’s 2012 decision in *Miller v. Alabama*, which ruled mandatory life imprisonment without parole for minors unconstitutional, the Supreme Court of Mississippi instructed the state circuit court on remand to take into account various “characteristics and circumstances” when considering a new sentence.⁴⁷ At the hearing, the state offered no new evidence, while the defense offered testimony from several witnesses, including his grandmother (the widow of his grandfather). Nevertheless, the court imposed the same sentence. The question for the Supreme Court is whether *Miller* requires an affirmative finding that the minor is permanently incorrigible before imposing life without parole.

⁴⁶ 140 S. Ct. 1293 (2020) (cert. granted).

⁴⁷ 567 U.S. 460 (2012).

In *Edwards v. Vannoy*,⁴⁸ the Court will decide whether its decision last term in *Ramos v. Louisiana*,⁴⁹ which incorporated against the states the Sixth Amendment's right to a unanimous jury verdict applies retroactively to cases that have already made their way through the state courts and are now on federal collateral review. Thedrick Edwards was sentenced to life in prison after committing a series of robberies and a rape in 2006. One person on the jury voted to acquit Edwards on each count, but, because Louisiana did not then require a unanimous verdict, Edwards was found guilty. Before *Ramos*, only two states did not require unanimous juries, Oregon and Louisiana (Louisiana voters changed the law before the Court heard *Ramos* but did so too late to be of help to Mr. Ramos). Edwards would not have been convicted if he had been prosecuted in any one of the 48 other states (or by the federal government). The Supreme Court granted certiorari to decide whether *Ramos*, which now requires a unanimous verdict, applies to Edwards and others whose cases are on federal collateral review.

Last, in *Torres v. Madrid*, the Court will consider whether a seizure occurs any time the government uses physical force, even if that force is not successful at subduing the target.⁵⁰ The plaintiff, Roxanne Torres, sued police officers for excessive force after they shot her while she was sitting in her car in a parking lot. The officers, who were waiting to serve an arrest warrant on another person, approached Torres's car, which startled her. Torres claimed she did not identify the two officers as members of the police and she thus attempted to flee. In response, the police shot at her. Despite being shot, Torres was able to elude capture and drove to a hospital. In her excessive force suit, the district court ruled (and the Tenth Circuit affirmed) that no Fourth Amendment "seizure" occurred because an officer's application of physical force is not a seizure if the person is able to evade apprehension. The Court granted certiorari to resolve the resulting circuit split, and its decision will have far-reaching applications for plaintiffs who challenge uses of force that may injure, but not detain them.

⁴⁸ No. 19-5807 (U.S. May 4, 2020) (cert. granted).

⁴⁹ 140 S. Ct. 1390 (2020).

⁵⁰ 140 S. Ct. 680 (2020) (cert. granted).

VI. Impeachment

It is a truth universally acknowledged that a court in possession of a caseload must be asked to hear cases related to purported misconduct by President Trump. Next term, the Supreme Court will hear a case involving the attempts by members of Congress to secure materials from Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election for use in its impeachment investigations. Last year, Mueller submitted a report to Attorney General William Barr, and Barr later released a redacted version to the public. The House Judiciary Committee then sought a court order requiring the disclosure of the redacted portions of the report, in addition to grand jury transcripts and other materials, in connection with its impeachment investigations. The committee cited a federal rule of criminal procedure that allows a court to authorize disclosure of otherwise confidential grand jury materials "in connection with a judicial proceeding."

The district court ruled that impeachment is a "judicial proceeding" under the rule and granted the committee's request to access the materials. The D.C. Circuit affirmed,⁵¹ and the Supreme Court blocked the release of the grand jury materials pending its review of that decision. Notably, unless the justices expedite the oral argument, they will not hear the case until after Election Day.

VII. Severability

Last term revealed a deepening disagreement among the justices about how to handle the issue of severability, that is, whether or how to strike unconstitutional provisions from a larger act. In *Barr v. American Association of Political Consultants*,⁵² Justices Kavanaugh and Neil Gorsuch had a lively exchange about what the remedy should be in a lawsuit challenging a federal ban on robocalls, even though both agreed that a portion of the ban was unconstitutional. The plaintiffs in that case, a group that sought to make robocalls with political content, argued that the law's exemption for calls related to government debt rendered the law unconstitutional under the First Amendment. Both Justice Kavanaugh (writing for the majority) and

⁵¹ U.S. House of Representative v. U.S. Dep't of Justice, 951 F.3d 589 (D.C. Cir. 2020).

⁵² 140 S. Ct. 2335 (2020).

Justice Gorsuch (writing a concurrence) agreed that the exemption was a content-based restriction on speech that failed strict scrutiny. Justice Kavanaugh, however, ruled that the exemption was severable from the remainder of the act.⁵³ He therefore struck down the exemption and left a total ban in place. Justice Gorsuch, joined by Justice Thomas, would have entered an injunction preventing the government from enforcing the ban at all against the plaintiffs.⁵⁴

Both the majority opinion and the concurrence accused the other of overreach. Justice Kavanaugh wrote that he was adhering to the traditional severability analysis, which seeks to determine Congress's intent and which yields a far more modest result than Justice Gorsuch's approach. He noted that Justice Gorsuch would have invalidated an entire statute (at least, as applied to the plaintiffs) based on one sliver of it being unconstitutional. Justice Kavanaugh, by contrast, was merely getting rid of that one unconstitutional sliver—a result that he believed Congress would have preferred.

Justice Gorsuch argued that it was the majority that was acting contrary to Congress's intent by effectively rewriting the statute. "Just five years ago," he said, "Congress expressly allowed robocalls" for some purposes.⁵⁵ By reinstating a total ban on all robocalls, the majority contradicted Congress's deliberate steps to restrict less speech. Moreover, such a remedy left the plaintiffs with no practical relief because the ban remained in effect, just without an exemption for other groups. "What is the point of fighting this long battle," he asked, "if the prize for winning is nothing at all?"⁵⁶ He also indicated that severability doctrine should be revisited.

To this, Justice Kavanaugh quipped: "Justice Gorsuch suggests . . . that severability doctrine may need to be reconsidered. But when and how? As the saying goes, John Marshall is not walking through that door."⁵⁷ This constitutional lawyer, for one, has never heard of such a saying. But after an extended trip down a Google rabbit hole, it appears the justice was referring to a press conference some years ago when Rick Pitino, then-coach of the Boston Celtics said, "Larry Bird is not

⁵³ *Id.* at 2352–55.

⁵⁴ *Id.* at 2365–67 (Gorsuch, J., concurring in part and dissenting in part).

⁵⁵ *Id.* at 2366.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2356.

walking through that door.”⁵⁸ Coach Pitino’s message was that Boston fans should focus on the present rather than yearning for the past. In other words, the quip appears to be Justice Kavanaugh’s way of saying “stare decisis” with regards to severability doctrine.⁵⁹

This same debate made an appearance in *Seila Law*, except with Chief Justice Roberts writing the majority opinion and adhering to the traditional severability analysis and Justice Thomas advocating for enjoining the law as to the plaintiffs. There, Chief Justice Roberts described severability as “a scalpel rather than a bulldozer.”⁶⁰ Justice Kavanaugh later used almost identical language in *Barr*, when he said: “The Court’s precedents reflect a decisive preference for surgical severance rather than wholesale destruction.”⁶¹

We can expect the debate to resurface next term in the Affordable Care Act litigation if the Court rules that the mandate is

⁵⁸ JazzBasketball1, Rick Pitino – “Walking Through That Door” Press Conference, YouTube (July 2, 2011), <https://bit.ly/3fEzKGe>. Thanks to Josh Blackman for the pointer. See Josh Blackman, “Part III: *Barr v. AAPC and Stare Decisis*,” Reason: The Volokh Conspiracy, July 7, 2020, <https://bit.ly/2Pw8krw>.

⁵⁹ One could argue that Coach Pitino’s quote favors abandoning precedent in favor of current conditions. His full quote was:

Larry Bird is not walking through that door, fans. Kevin McHale is not walking through that door, and Robert Parish is not walking through that door. And if you expect them to walk through that door, they’re going to be gray and old. What we are is young, exciting, hard-working, and we’re going to improve. People don’t realize that, and as soon as they realize those three guys are not coming through that door, the better this town will be for all of us because there are young guys in that (locker) room playing their asses off. I wish we had \$90 million under the salary cap. I wish we could buy the world. We can’t; the only thing we can do is work hard, and all the negativity that’s in this town sucks. I’ve been around when [baseball player] Jim Rice was booed. I’ve been around when [baseball player] Yastrzemski was booed. And it stinks. It makes the greatest town, greatest city in the world, lousy. The only thing that will turn this around is being upbeat and positive like we are in that locker room . . . and if you think I’m going to succumb to negativity, you’re wrong. You’ve got the wrong guy leading this team.

Pitino, *supra* note 58. Arguably, Coach Pitino might take Justice Gorsuch’s side in the severability debate, and not rely on doctrines of the past where they do not meet the conditions of today.

⁶⁰ *Seila Law*, 140 S. Ct. at 2210.

⁶¹ *Barr*, 140 S. Ct. at 2350–51.

unconstitutional. Or, the Court may address it in *Carney v. Adams*, which challenges a Delaware law that limits the political makeup of state courts.⁶² In that case, the Third Circuit invalidated a state constitutional provision that requires judges who are not members of the majority political party on the court to be members of the other “major political party.” The court not only struck down that provision but deemed it inseparable from a separate requirement mandating that no more than a “bare majority” of judges on any one court be composed of the same political party. Severability is one of the key questions before the Supreme Court.

For now, it seems that Chief Justice Roberts and Justice Kavanaugh are firmly in the majority when it comes to severability. But even if the doctrine does not change, we may get more quips and colorful language out of the dispute.

Conclusion

The Court’s term begins on October 5, and, at least to start, the cases will be familiar because we expected to hear them argued months ago. While likely a quieter term than the last, we will still see some fireworks. From the (never-ending) ACA litigation, to friction between religious liberty and anti-discrimination law, to a case related to impeachment, the Court will be unable to wholly escape controversy despite Chief Justice Roberts’s efforts to keep the Court free of politics. But who knows what goes on in that oak-paneled room where it happens? Supreme Court terms are always quiet following bigger years, until . . . they *aren’t*. It’s 2020. Nothing is certain, except maybe death, taxes, and the likelihood of seeing Obamacare before the Court in a future term.

⁶² 140 S. Ct. 602 (2019) (cert. granted).