

An Amazing Term in the Supreme Court: October Term 2019*

D. Brook Bartlett Lecture
United States District Court for the Western District of Missouri
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I. Abortion rights

June Medical Services LLC v. Gee, 905 F.3d 787 (5th Cir. 2018). Whether the U.S. Court of Appeals for the 5th Circuit’s decision upholding Louisiana’s law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with the Supreme Court’s binding precedent in *Whole Woman’s Health v. Hellerstedt*.

Gee v. June Medical Services LLC, 905 F.3d 787 (5th Cir. 2018). (1) Whether abortion providers can be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a “close” relationship with their patients and a “hindrance” to their patients’ ability to sue on their own behalf; and (2) whether objections to prudential standing are waivable – per the U.S. Courts of Appeals for the 4th, 5th, 7th, 9th, 10th and Federal Circuits – or non-waivable per the U.S. Courts of Appeals for the D.C., 2nd, and 6th Circuits.

II. Civil Rights Litigation

A. Employment discrimination

Bostock v. Clayton County, Georgia, 140 S.Ct. ____ (June 15, 2020). The prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation or gender identity.

B. Section 1981

Comcast Corp. v. National Association of African American-Owned Media
National Association of African American-Owned Media v. Comcast Corp., 140 U.S. 1009 (2020). A claim of race discrimination under 42 U.S.C. § 1981 requires allegations and proof of but-for causation.

C. *Bivens* claims

Hernandez v. Mesa, 140 S.Ct. 735 (2020). No claim exists under *Bivens* for a shooting by a border agent in Texas that killed a boy in Mexico.

* This handout was prepared on June 22, 2020

III. Criminal cases

A. Fourth Amendment

Kansas v. Glover, 140 S.Ct. 1183 (2020). For purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

B. Insanity defense

Kahler v. Kansas, 140 S.Ct. 1021 (2020). A state, consistent with the Eighth and 14th Amendments, may abolish the insanity defense.

C. Capital punishment

McKinney v. Arizona, 140 S.Ct. 702 (2020). When a capital sentencing error under *Eddings v. Oklahoma* is found on collateral review, a state appellate court may conduct the reweighing of aggravating and mitigating evidence, as permitted by *Clemons v. Mississippi*.

IV. Deferred Action for Childhood Arrivals

Department of Homeland Security v. Regents of the University of California, 140 S.Ct. ____ (June 19, 2020). (1) The Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) The Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act.

V. First Amendment – freedom of speech

Chiafalo v. Washington, 193 Wash. 2d 380 (2019). Whether enforcement of a Washington state law that threatens a fine for presidential electors who vote contrary to how the law directs is unconstitutional because a state has no power to legally enforce how a presidential elector casts his or her ballot and a state penalizing an elector for exercising his or her constitutional discretion to vote violates the First Amendment. *Colorado Department of State v. Baca*, 935 F.3d 887 (10th Cir. 2019). (1) Whether a presidential elector who is prevented by their appointing state from casting an electoral-college ballot that violates state law lacks standing to sue their appointing state because they hold no constitutionally protected right to exercise discretion; and (2) whether Article II or the 12th Amendment forbids a state from requiring its presidential electors to follow the state's popular vote when casting their electoral-college ballots

VI. Free exercise of religion

Espinoza v. Mont. Dep't of Rev., 393 Mont. 446 (2018). Whether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.

Our Lady of Guadalupe School v. Morrissey Beru, 769 Fed.Appx. 460 (9th Cir. 2019); *St. James School v. Biel*, 911 F.3d 603 (9th Cir. 2018). Whether the First Amendment's religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.

Little Sisters of the Poor Saint Peters and Paul Home v. Pennsylvania, 930 F.3d 543 (3d Cir. 2019). (1) Whether a litigant who is directly protected by an administrative rule and has been allowed to intervene to defend it lacks standing to appeal a decision invalidating the rule if the litigant is also protected by an injunction from a different court; and (2) whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.

Trump v. Pennsylvania, 930 F.3d 543 (3d Cir. 2019). (1) Whether the Departments of Health and Human Services, Labor and the Treasury had statutory authority under the Patient Protection and Affordable Care Act and the Religious Freedom Restoration Act of 1993 to expand the conscience exemption to the contraceptive-coverage mandate; (2) whether the agencies' decision to forgo notice and opportunity for public comment before issuing the interim final rules rendered the final rules – which were issued after notice and comment – invalid under the Administrative Procedure Act; and (3) whether the U.S. Court of Appeals for the 3rd Circuit erred in affirming a nationwide preliminary injunction barring implementation of the final rules.

VII. Indian Law

McGirt v. Oklahoma, unpublished (Okla. Ct. Crim. App. 2019). Whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction.

VIII. Presidential immunity from subpoenas

Trump v. Vance, 941 F.3d 641 (2d Cir. 2019). Whether a grand-jury subpoena served on a custodian of the president's personal records, demanding production of nearly 10 years' worth of the president's financial papers and his tax returns, violates Article II and the Supremacy Clause of the Constitution.

Trump v. Deutsche Bank AG, 943 F.3d 627 (2d Cir. 2019). Whether the Committee on Financial Services and the Intelligence Committee of the U.S. House of Representatives have the constitutional and statutory authority to issue a subpoena to creditors for President Donald Trump and several of his business entities demanding private financial records belonging to the president.

Trump v. Mazars USA, LLP, 940 F.3d 710 (D.C. Cir. 2019). Whether the Committee on Oversight and Reform of the U.S. House of Representatives has the constitutional and statutory

authority to issue a subpoena to the accountant for President Trump and several of his business entities demanding private financial records belonging to the president.

IX. Second Amendment

New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 140 S.Ct. 1525 (2020).

Dismissed on mootness ground a challenge New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits as violating the Second Amendment.

X. Separation of powers

Sheila Law LLC v. Consumer Financial Protection Board, 923 F.3d 680 (9th Cir. 2019).

(1) Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers; and
(2) whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. §5491(c)(3) can be severed from the Dodd-Frank Act.