FALL 2021 NEWSLETTER

U.S. SUPREME COURT CONSTITUTIONAL & CIVIL RIGHTS LAW UPDATE

By Frank Valenzuela & Angela Promberger

This update has three sections. The first section provides a survey of decided constitutional law and civil rights cases of importance to State and local governments that were heard by the U.S. Supreme Court during its October 2020 Term. The survey is organized by topic, not chronologically:

A. Qualified Immunity
B. Searches and Seizures Under the Fourth Amendment
C. First Amendment Student Speech Rights
D. First Amendment Religious Rights
E. First Amendment Speech & Association Rights
F. Nominal Damages for A Constitutional Violation and Standing
G. Takings
H. Voting
I. Sixth Amendment on Collateral Review
J. Eighth Amendment
K. Federal Religious Freedom Restoration Act

The second section is an explanation of a significant opinion concerning the Texas Heartbeat Act. The third section is a list of important constitutional law and civil rights cases that the Court will take up in its October 2021 Term.

I.
DECIDED CASES

A. QUALIFIED IMMUNITY

***Taylor v. Riojas*, No. 19-1261 (Decided on Nov. 2, 2020, without oral argument, in a per curiam opinion)**

The Supreme Court vacated the Fifth Circuit's grant of qualified immunity and remanded the case for further proceedings, holding that no reasonable correctional officer could have concluded that, under the extreme circumstances alleged in a verified complaint by Taylor, it was constitutionally permissible to house him in such conditions for six days. It should be noted that as the case was an appeal, through the Fifth Circuit, from an order on summary judgment, the Court viewed the disputed facts in the light most favorable to Taylor.

Taylor alleged that

> for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in "'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "'packed inside the water faucet.'" *Taylor v. Stevens*, 946 F. 3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

The Court found that the Fifth Circuit properly held that such conditions of confinement constitute cruel and unusual punishment in violation of the Eighth Amendment, but that the Fifth Circuit erred in its assessment that the law was not clearly established that "'prisoners couldn't be housed in cells teeming with human waste' 'for only six days,'" and, therefore, the officers did not have "'fair warning' that their specific acts were unconstitutional."

In concluding that qualified immunity should have been denied on this claim at the summary judgment stage, the Court noted that the Fifth Circuit "identified no evidence that the conditions…were compelled by necessity or exigency;" that the record did not reveal any reason to suspect that the conditions of confinement could not have been mitigated in degree or duration; and (though an officer-by-officer analysis would be necessary on remand) that there was some evidence that at least some of the officers involved in the confinement were deliberately indifferent to the conditions of Taylor's cells.

B. SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT

***Torres v. Madrid*, No. 19-292 (Decided on Mar. 25, 2021)**

The application of physical force to the body of a person with the intent to restrain is a seizure under the Fourth Amendment, even if the force does not succeed in subduing the person.

Roxanne Torres, the plaintiff, was standing with another person near a car in an apartment complex parking lot.[1] Officer Madrid and another officer, who were at the complex to execute a warrant, recognized that neither Torres nor the person with whom she was speaking were the subject of the warrant. As the officers approached Torres and the other person, the other person left and Torres, who was experiencing methamphetamine withdrawal, got into the car's driver's seat. The officers apparently tried to speak with her, but Torres did not notice their presence until one of them tried to open the door of the car.

[1] The Court considered the facts in the light most favorable to Torres.

Notwithstanding the officers' tactical vests marked with police identification, Torres claimed only to notice their guns. Torres thought that they were carjackers trying to steal her car and she began driving away to escape. The officers were not in the way; both fired their weapons, twice striking her in the back. Torres continued driving, exited the complex, drove a short distance, and stopped in another parking lot. Torres stole a car and drove 75 miles to a hospital. Torres' claims against the officers included a claim that the shooting was an unreasonable seizure under the Fourth Amendment.

The Fourth Amendment protects, in part, the right of the people to be protected against unreasonable seizures. A seizure can take the form of "physical force" or a "show of authority" that "in some way retrain[s] the liberty" of the person. In *Torres*, the Court considered whether "the application of physical force is a seizure if the force, despite hitting its target, fails to stop the person." The Court looked to the common law of arrest and its precedents interpreting it, and concluded that the common law of arrest treated "the mere grasping or application of physical force with lawful authority" as an arrest, regardless of whether it succeeded in subduing the arrestee. The Court also noted that common law arrests qualify as Fourth Amendment seizures. Looking to the Founding era, the Court understood that a seizure included "laying hold on suddenly," regardless of whether the force resulted in actual control or detention of the person, and that "seizure" did and does refer to an arrest.

Relying on the common law cases and commentary, and noting its own relevant precedents, the Court concluded that the application of physical force to a person with the intent to restrain is a seizure under the Fourth Amendment, regardless of whether the force succeeds in subduing the person. Importantly, the Court emphasized that not every contact between an officer and a person is a seizure, but only the use of force with the intent to restrain. "The appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain…." Though a touch can constitute a seizure, "the amount of force remains pertinent in assessing the objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent." The seizure does not depend on the subjective perceptions of the seized person.

The Court also noted that a seizure by force, "absent submission…lasts only as long as the application of force." There is no continuing seizure during the period of "fugitivity." The briefness of some seizures by force may inform the damages that a plaintiff may recover and what evidence a criminal defendant can seek to exclude from trial.

***Caniglia v. Strom*, No. 20-157 (Decided on May 17, 2021)**

The "community caretaking"[2] exception to the Fourth Amendment's warrant requirement that permits a warrantless search of an impounded vehicle does not extend to the home. The community caretaking doctrine does not justify warrantless searches and seizures in the home.

[2] This phrase comes from *Cady v. Dombrowski*, 413 U.S. 433 (1973), in which the Court noted that police officers are often called on to carry out noncriminal "community caretaking functions," like responding to disabled vehicles or investigating accidents. In *Cady*, the Court held that a warrantless search of an impounded vehicle did not violate the Fourth Amendment.

***Lange v. California*, No. 20-18 (Decided on June 23, 2021)**

The pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor does not categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant, but turns on the particular facts of the case.

Here, Lange drove past a police officer listening to loud music with his windows down and repeatedly honking his horn. The officer began following Lange and soon after turned on his overhead lights signaling Lange to pull over. Lange was about 100 feet from his house and did not stop, but instead drove into his attached garage. The officer followed Lange in, began questioning him, noticed signs of intoxication, and conducted field sobriety tests. Lange's blood-alcohol level was later found to be more than three times the legal limit. Lange was charged with the misdemeanor of driving under the influence of alcohol, plus a lower level noise infraction. Lange moved to suppress all of the evidence obtained after the officer entered the garage because the warrantless entry violated the Fourth Amendment.

The ultimate touchstone of the Fourth Amendment's prohibition on unreasonable searches and seizures in the home (and elsewhere) is reasonableness. Normally, a warrant is required, but there are exceptions to that requirement. One exception is for exigent circumstances, though the exception is carefully drawn in light of the special protection afforded to homes under the Fourth Amendment.

Equating misdemeanors with minor offenses, the Court noted that it has previously held that in dealing with minor offenses, officers do not usually face the kind of emergency that can justify a warrantless entry. Adding a suspect's flight to the equation does not change the analysis sufficiently to justify a categorical rule always permitting warrantless entries in the context of misdemeanor offenses.

Ultimately, the Court concluded that whether pursuing a suspect who the officer believes to have committed a misdemeanor qualifies as an exigent circumstance permitting a warrantless entry turns on the particular facts of the case. Significantly, the Court noted that this standard would likely result in many, if not in most, cases allowing a warrantless entry based on the totality of the circumstances – such as imminent harm to others, a threat to the officer, destruction of evidence by the feeling suspect, or the possibility of the suspect escaping from the home. The suspect's flight itself is one part of the totality of the circumstances.

C. FIRST AMENDMENT STUDENT SPEECH RIGHTS

***Mahanoy Area School District v. B.L.*, No. 20-255 (Decided on June 23, 2021)**

Under some circumstances, public schools can discipline students for their off-campus speech, but not under the facts at issue in this case.

B.L., a high school student, posted a Snapchat story with text containing profane

language directed at softball and cheerleading. The story was eventually shared with the school's cheerleading coach and the school's principal. The coaches then decided that B.L. would be suspended from the team for a year because the posts "used profanity in connection with a school extracurricular activity" and therefore "violated team and school rules." B.L. then sued the school on the basis that the suspension violated her First Amendment rights.

Though students do not shed their constitutional rights to freedom of speech at the schoolhouse gate, those rights are interpreted in light of the special characteristics of the school environment. One such characteristic is that schools, at times, stand *in loco parentis* (in the place of parents).

Based on the Court's precedents, schools can regulate: lewd, indecent, or vulgar speech during a school assembly on school grounds; speech during a class trip that promotes illegal drug use; and speech that may be understood to bear the school's imprimatur (like a newspaper). Precedent also establishes that schools can regulate speech that materially disrupts classwork or involves substantial disorder, a special characteristic that gives schools special leeway to regulate speech.

While the Court declined to issue a bright line rule with regard to the kind of off campus speech a school can regulate, it provided a non-exhaustive list of factors to be considered in future litigation. First, a school will rarely stand *in loco parentis* in relation to off campus speech because the speech will normally fall within the zone of parental responsibility. Second, allowing the school to regulate all on campus and off campus speech may mean that students cannot engage in any kind of speech. Finally, the school has an interest in protecting a student's expression in order to protect the marketplace of ideas.

Applying these considerations to B.L., the Court found that the school violated B.L.'s rights because the speech was off campus, the school did not stand *in loco parentis* in that instance, and there was not substantial disruption of a school activity due to the speech.

D. FIRST AMENDMENT RELIGIOUS RIGHTS

***Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123 (Decided on June 17, 2021)**

The government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.

Catholic Social Services (CSS) is a foster care agency in Philadelphia. Before 2018, CSS successfully contracted with the City of Philadelphia for the placement of foster children for over 50 years. The religious views of CSS inform its placement of foster children with families. CSS will not place children with same-sex couples or unmarried couples. No same-sex couple had ever sought certification as a foster couple from CSS.

The City of Philadelphia stopped referring foster children to CSS in 2018, claiming that CSS's refusal to certify same-sex couples as foster parents violated non-discrimination

provisions in the contract between the City and CSS. The City also stated that it would not enter into another contract with CSS unless CSS agreed to certify same-sex couples. CSS brought suit against the City, alleging that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment.

The Court held that the "City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its belief." The Court further held that the burden was not constitutionally permissible because the policy was not generally applicable and failed to meet strict scrutiny.

A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions. A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar manner. The Court held that the policy was not generally applicable, and it analyzed the policy under strict scrutiny.

In order to meet strict scrutiny, a government policy must advance "interests of the highest order" and be narrowly tailored to achieve those interests. Here, the Court narrowed the City's interest to whether it has an interest in denying an exception to CSS. The Court found this interest insufficient because the City failed to show that granting an exception to CSS would risk the City's goals of maximizing the number of foster families. Therefore, the policy could not survive strict scrutiny.

E. FIRST AMENDMENT SPEECH & ASSOCIATION RIGHTS

***Thomas More Law Center v. Becerra*, No. 19-255; *Americans for Prosperity Foundation v. Becerra*, No. 19-251 (Decided on July 1, 2021)**

A State's requirement that charities disclose to it the identity of their donors violates the donors' First Amendment rights.

In 2010, the Attorney General of California began enforcing a requirement that charities renewing their registrations file IRS Form 990 with the State. Form 990 Schedule B requires organizations to disclose the names and addresses of donors who have contributed over a certain amount of money, including the amount donated. The State claimed that these disclosures would help to prevent fraud by charitable organizations. Two tax-exempt charities, Americans for Prosperity Foundation and the Thomas More Law Center, filed suit against the Attorney General. They argued that the requirement violated their organizations' First Amendment rights as well as the rights of their donors, claiming that disclosing their contributors' identities and addresses would make them less likely to donate and could subject them to reprisal.

The First Amendment protects a right to free association, and compelled disclosure of affiliation with groups may constitute a restraint on the freedom of association, essentially having a chilling effect on advocacy and other groups.

The Court here applied the standard of exacting scrutiny to the compelled disclosures.

Under exacting scrutiny, there must be a substantial relation between the disclosure requirement and a sufficiently important government interest. Though the Court found that California had an interest in preventing wrongdoing by charitable organizations, there was no evidence that the collection of Schedule B was used to prevent fraud. The Court also found that disclosure requirements, even if there is no disclosure to the public, can chill association. The Court held that in light of the overbroad regulation and the unnecessary threat of chilling association, the compelled disclosure of Schedule B failed exacting scrutiny.

F. Nominal Damages for A Constitutional Violation and Standing

***Uzuegbunam v. Preczewski*, No. 19-968 (Decided on Mar. 8, 2021)**

An award of nominal damages by itself can address a past injury, so a request for nominal damages is a request for a remedy that is likely to redress the injury caused by the challenge conduct (the third element of standing).

Uzuegbunam, an Evangelical Christian, was prohibited from engaging in religious speech by his public college in Georgia. He and another student whose speech was chilled sued for nominal and injunctive relief. During the lawsuit, the college eliminated the offending policies and argued that the entire case was moot. The students agreed that the injunctive relief claim was moot, but they argued that the nominal damages portion was not moot. The district court dismissed the case because it found that the claim for nominal damages was insufficient by itself to establish standing. The Eleventh Circuit affirmed.

To determine whether nominal damages can redress a past injury, the Court looked to the common law. Based on its review of the common law, the Court concluded that a request for nominal damages "satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." As a result, for the purposes of constitutional standing, "nominal damages provide the necessary redress for a completed violation of a legal right." Uzuegbunam's claim was not moot.

G. Takings

***Cedar Point Nursery v. Hassid*, No. 20-107 (Decided on June 23, 2021)**

A regulation that grants union organizers a "right to take access" to an agricultural employer's property for up to three hours a day, 120 days per year, in order to solicit support for unionization constitutes a *per se* taking under the Fifth and Fourteenth Amendments.

The Fifth Amendment's Taking Clause, applicable to the States through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. The Clause reflects the centrality of the protection of private property to the promotion of individual freedom. Courts analyze instances of physical appropriations using a *per se* rule: the "government must pay for what it takes." When the government does not appropriate property for itself or for a third party, but instead imposes laws or regulations restricting an owner's ability to use her own property, courts use balancing factors developed by prior Court precedent,

such as the regulation's economic impact, its interference with "reasonable investor-backed expectations," and the character of the government's action, in order to determine whether the regulation goes too far.

Physical takings can arise from a regulation, however. The essential question "is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." If a regulation results in a physical taking of property, a *per se* taking has occurred.

Here, the Court found that the regulation appropriates a right to invade the employer's property and constitutes a *per se* physical taking. The Court reasoned that the regulation appropriated for the use of third parties the owners' right to exclude, "'one of the most treasured rights of property ownership.'" As a result, just compensation is due to the owners.

H. Voting

***Brnovich v. Democratic National Committee*, No. 19-1257 (Decided on July 1, 2021)**

A State's ballot-collection law permitting only certain persons (i.e., family and household members, caregivers, mail carriers and elections officials) to handle another person's completed early ballot does not violate the 15th Amendment or Section 2 of the Voting Rights Act.

The 15th Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In 2016, the Democratic National Committee brought suit against several Arizona state officials claiming that the ballot-collection law was enacted with discriminatory intent in violation of the 15th Amendment and §2 of the Voting Rights Act.

The Court considered four factors: first, the size of the burden imposed by a challenged voting rule; second, the degree to which a voting rule departs from what was a standard practice when §2 was amended in 1982; third, the size of any disparities in a rule's impact on members of different racial or ethnic groups; and finally, the opportunities provided by a State's entire system of voting when assessing the burden imposed by the challenged provision. The Court analyzed Arizona's ballot-collection law and found that it did not impose any outsize burden on the voting process. The Court also held that there was no evidence that the bill was passed with discriminatory intent, or that it affected minority groups. Therefore, the Court held that the bill did not violate the 15th Amendment or §2 of the Voting Rights Act.

I. Sixth Amendment on Collateral Review

***Edwards v. Vannoy*, No. 19-5807 (Decided on May 17, 2021)**

Under the Supreme Court's retroactivity doctrine precedents, the Court's decision in *Ramos v. Louisiana*[3] does not apply retroactively to cases on federal collateral review.

[3] 140 S. Ct. 1390 (2020). In *Ramos*, the Court held that, as with criminal trials in federal court, the Sixth

Edwards was convicted of numerous serious crimes by non-unanimous jury votes. Edwards appealed his convictions through direct review and then through collateral review. While Edwards' petition for certiorari was pending before the Supreme Court, it decided *Ramos*. The Court granted certiorari in Edwards' case to decide whether *Ramos* applied retroactively to overturn final convictions on federal collateral review. The Court held that "[n]ew procedural rules do not apply retroactively on federal collateral review."

J. EIGHTH AMENDMENT

***Jones v. Mississippi*, No. 18-1259 (Decided on Apr. 22, 2021)**

The Eighth Amendment does not require the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that a person under the age of 18 who commits a homicide may be sentenced to life without parole, "but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." In *Jones*, the sentencing judge acknowledged his discretion and sentenced Jones to life without parole for the murder of Jones' grandfather that Jones committed at the age of 15.

Jones argued that the discretion to impose a lesser sentence than life without parole does not alone satisfy *Miller*. Instead, a sentencer must also make a separate factual finding "that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible." The Court disagreed.

The Court found that a requirement of a finding of incorrigibility is contrary to *Miller*'s stated requirements, and also to the Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which stated that "*Miller* did not impose a formal fact finding requirement" and that "a finding of fact regarding a child's incorrigibility…is not required."

As to Jones' alternative argument concerning the need for an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible, the Court rejected it because it: "(i) is not necessary to ensure that a sentencer considers a defendant's youth, (ii) is not required by or consistent with *Miller*, (iii) is not required by or consistent with this Court's analogous death penalty precedents, and (iv) is not dictated by any consistent historical or contemporary sentencing practice in the States."

K. FEDERAL RELIGIOUS FREEDOM RESTORATION ACT

***Tanzin v. Tanvir*, No. 19-71 (Decided on Dec. 10, 2020)**

Amendment requires unanimity in State criminal convictions for serious offenses. In *Ramos*, the Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality) and its companion case of *Johnson v. Louisiana*, 406 U.S. 356 (1972).

The federal Religious Freedom Restoration Act of 1993 ("RFRA") permits suits seeking money damages against federal employees in their individual capacities.

Congress passed RFRA in response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), in order to secure Congress' pre-*Smith* view of the right to free exercise under the First Amendment. RFRA provides a remedy to redress violations of that right. RFRA allows a person to "obtain appropriate relief against a government," and defines a "'government'" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." Respondents are practicing Muslims who claim that they were placed on the No Fly List because they refused to act as informants against their religious communities.

The Court first determined that the Act permits suits against federal government officials in their personal capacities. The Court determined that the legal backdrop against which Congress enacted RFRA supported its understanding of the text. The phrase "persons acting under color of law" draws on the well-known civil rights statute, 42 U. S. C. § 1983. The Court has long interpreted Section 1983 to permit suits against officials in their individual capacities. Because RFRA uses the same terminology in the same field of civil rights law, "it is reasonable to believe that the terminology bears a consistent meaning."

After concluding that RFRA permits suits against government employees in their personal capacities, the Court considered whether money damages could be considered "appropriate relief." Because there was no statutory definition of that term, the Court turned to the term's plain meaning at the time of enactment. Relying on dictionary definitions, the Court noted that the word "appropriate" means "[s]pecially fitted or suitable, proper" or "especially suitable or compatible." Relying on its own precedent interpreting the identical language, the Court explained that because this language is "open-ended", what relief is "'appropriate'" is "inherently context dependent." The Court noted that throughout American history, damages have long been awarded against government officials as appropriate relief, and that damages "are also commonly available against state and local government officials," including under Section 1983. Because RFRA originally applied against the States and local governments[4] and was intended to preserve statutorily the Court's pre-*Smith* understanding of the Free Exercise Clause, and because damages against employees in their individual capacities are available under Section 1983, the same types of damages are available under RFRA as under Section 1983.

The Court noted, too, that a money damages remedy is the only form of relief that can remedy some RFRA violations. If Congress wanted to prohibit a damages remedy, it knew how to do so, and individual government employees could still assert the qualified immunity defense.

II.
DENIAL OF AN APPLICATION FOR INJUNCTIVE RELIEF

During its most recent regular session, the Texas Legislature passed the Texas Heartbeat

[4] The Court struck down RFRA's application to States and local governments in *City of Boerne v. Flores*, 521 U. S. 507, 511 (1997).

Act (the "Act") which: (1) prohibits abortions after the detection of a fetal heartbeat (at approximately 6 weeks of pregnancy); (2) prohibits Texas government officials from enforcing the Act; and (3) provides that "[a]ny person," other than a government official of any kind, may bring a civil action against (a) any person who performs or induces an abortion in violation of the Act, (b) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, or (c) who intends to engage in (a) or (b). The Act provides for injunctive relief, damages of at least $10,000, and costs and attorney's fees. Among the available affirmative defenses is the undue burden defense. The Act was signed into law on May 19, 2021, with an effective date of September 1, 2021.

On July 13, 2021, plaintiffs (doctors and clinics who perform abortions and spiritual counselors) filed suit, and on August 7 2021, sought a preliminary injunction. The suit was brought against various state officials, Judge Austin Jackson, a State judge from Smith County (in his official capacity), and Penny Clarkston, the Clerk of the Smith County courts. The plaintiffs seek to certify classes of all Texas judges who can hear suits under the Act and the district clerks of all 254 Texas counties. Finally, the plaintiffs sued Mark Lee Dickinson, an individual who allegedly threatened to sue under the Act.

The defendants filed motions to dismiss. Among other arguments, the government defendants asserted sovereign immunity and that the plaintiffs lacked Article III standing. The district court denied the motions prior to the scheduled August 30, 2021 preliminary injunction hearing. The defendants took an immediate interlocutory appeal of the denial of sovereign immunity to the Fifth Circuit, and all proceedings before the district court were stayed. On appeal, plaintiffs asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing the Act during the appeal. The Fifth Circuit denied the request.

On August 30, 2021, the plaintiffs filed an emergency application for an injunction and, in the alternative, to vacate the stays on the district court proceedings, with the Supreme Court. That same day, Justice Alito requested responses to the plaintiffs' emergency application, and those responses were filed on August 31, 2021. The plaintiffs filed a reply to the responses on the same day. The Act became effective on September 1, 2021 at midnight.

Very late on September 1, 2021, in a one paragraph order, a 5-4 majority of the Supreme Court denied the emergency application. The Court began by noting that, in order to prevail in an application for a stay or an injunction, an applicant has to make a "strong showing" that it is "likely to succeed on the merits," that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest.

The majority found that, though the plaintiffs have raised "serious questions regarding the constitutionality of the Texas law at issue," their application "also presents complex and novel antecedent procedural questions on which they have not carried their burden." The Court identified some of those procedurally important questions and facts:

- federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves, but it is unclear whether the defendants can or

will seek to enforce the Act against the plaintiffs in a manner that might permit the Court's intervention. The government defendants represented that neither they nor their employees possess the authority to enforce the Texas law either directly or indirectly.

- whether, under existing precedent, the Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law.
- Defendant Dickinson filed an affidavit stating "that he has no present intention to enforce the law."

In light of such issues, the Court reasoned that it could not say the plaintiffs met their burden to prevail in an injunction or stay application.

That said, that majority stressed that it did not purport "to resolve definitively any jurisdictional or substantive claim in the [plaintiffs'] lawsuit." The Court specifically noted that its order was "not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts."[5]

As of this time, the Act, the most stringent restriction on abortion in the United States since *Roe v. Wade*, 410 U.S. 113 (1973), remains in effect.

III.
<u>OCTOBER 2021 TERM</u>

When it begins its new Term on the first Monday in October 2021, the Court is slated to decide various cases involving constitutional and civil rights. As of today, here are some of the cases to watch:

***Hemphill v. New York*, No. 20-637 [Argument scheduled for Oct. 5, 2021]**

The question presented is whether, or under what circumstances, a criminal defendant, whose arguments or introduction of evidence at trial "opens the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence, also forfeits her right to exclude evidence otherwise barred by the Confrontation Clause.

***Thompson v. Clark*, No. 20-659 [Argument scheduled for Oct. 12, 2021]**

The question presented is whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against her has "formally ended in a manner not inconsistent with his innocence," as the Eleventh Circuit decided, or that the proceeding "ended in a manner that affirmatively indicates his innocence," as the Second Circuit decided.

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[5] Each of the dissenting Justices filed his or her own dissenting opinion, with some of the dissenting Justices joining some of their colleagues' dissenting opinions, as well.

***Ramirez v. Collier*, No. 21-5592 [Argument scheduled for Nov. 1, 2021]**

The questions presented are: (1) whether, under the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Texas's decision to allow Ramirez's pastor to enter the execution chamber, but forbidding the pastor from laying his hands on his parishioner as he dies, substantially burden the exercise of his religion, so as to require Texas to justify the deprivation as the least restrictive means of advancing a compelling governmental interest; and (2) whether, under the Free Exercise Clause and RLUIPA, Texas's decision to allow Ramirez's pastor to enter the execution chamber, but forbidding the pastor from singing prayers, saying prayers or scripture, or whispering prayers or scripture, substantially burden the exercise of his religion, so as to require Texas to justify the deprivation as the least restrictive means of advancing a compelling governmental interest.

***Houston Community College System v. Wilson*, No. 20-804 [Argument scheduled for Nov. 2, 2021]**

The question presented is whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.

***New York State Rifle & Pistol Association Inc. v. Bruen*, No. 20-843 [Argument scheduled for Nov. 3, 2021]**

The question presented is whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense.

***City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029 [Argument scheduled for Nov. 10, 2021]**

The question presented is whether the Austin city code's distinction between on-premises signs, which may be digitized, and off-premises signs, which may not be digitized, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.

***Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 [Argument scheduled for Nov. 30, 2021]**

The question presented is whether the compensatory damages available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination include compensation for emotional distress.

***Dobbs v. Jackson Women's Health Organization*, No. 19-1392 [Argument scheduled for Dec. 1, 2021]**

The question presented is whether all pre-viability prohibitions on elective abortions are unconstitutional.

***Carson v. Makin*, No. 20-1088 [Argument scheduled for Dec. 8, 2021]**

The question presented is whether a state violates the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction.

***FEC v. Ted Cruz for Senate*, No. 21-12 [Argument not yet scheduled]**

When a candidate for federal office lends money to his own election campaign, federal law imposes a $250,000 limit on the amount of post-election contributions that the campaign may use to repay the debt owed to the candidate. 52 U.S.C. § 30116(j). Assuming that standing exists, the Court will decide whether the loan-repayment limit violates the Free Speech Clause of the First Amendment.

***Shurtleff v. City of Boston*, No. 20-1800 [Argument not yet scheduled]**

There are three questions presented in this appeal concerning First Amendment rights and government speech:

1. Whether the First Circuit's failure to apply the Supreme Court's forum doctrine to the First Amendment challenge of a private religious organization that was denied access to briefly display its flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, conflicts with the Court's precedents holding that speech restrictions based on religious viewpoint or content violate the First Amendment or are otherwise subject to strict scrutiny and that the Establishment Clause is not a defense to censorship of private speech in a public forum open to all comers.

2. Whether the First Circuit's classifying as government speech the brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants, with hundreds of approvals and no denials, unconstitutionally expands the government speech doctrine, in direct conflict with the Supreme Court's decisions in *Matal v. Tam*, 137 S. Ct. 1744 (2017), *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

3. Whether the First Circuit's finding that the requirement for perfunctory city approval of a proposed brief display of a private religious organization's flag on a city flagpole, pursuant to a city policy expressly designating the flagpole a public forum open to all applicants with hundreds of approvals and no denials, transforms the religious organization's private speech into government speech,

conflicts with *Matal v. Tam*, 137 S. Ct. 1744 (2017), and circuit court precedents from the Second, Eighth, and Ninth Circuits.