

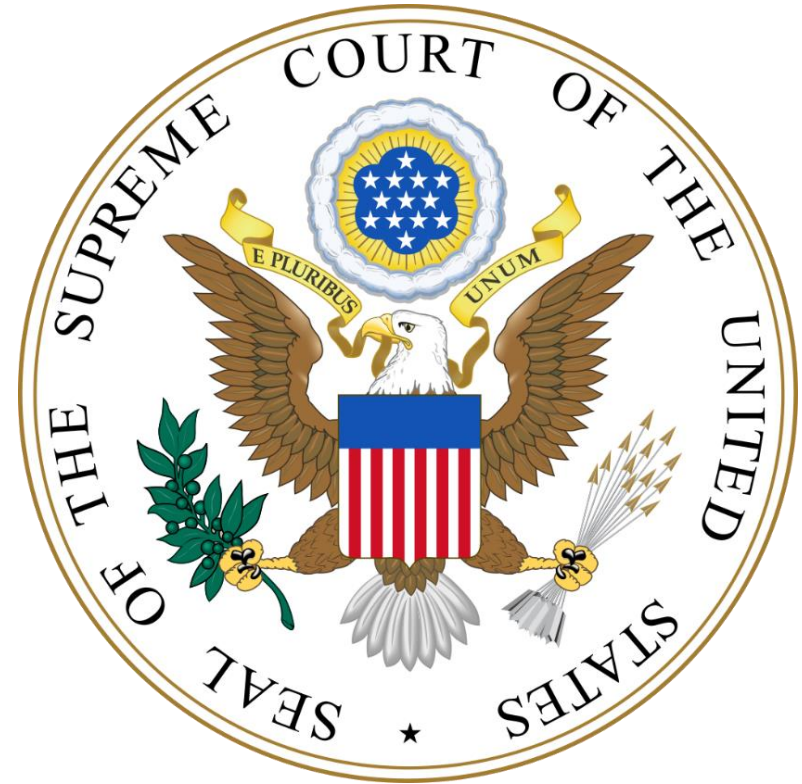
America's  Newspapers

The 2019 Recently Completed U.S. Supreme Court Term: Decisions and Commentary

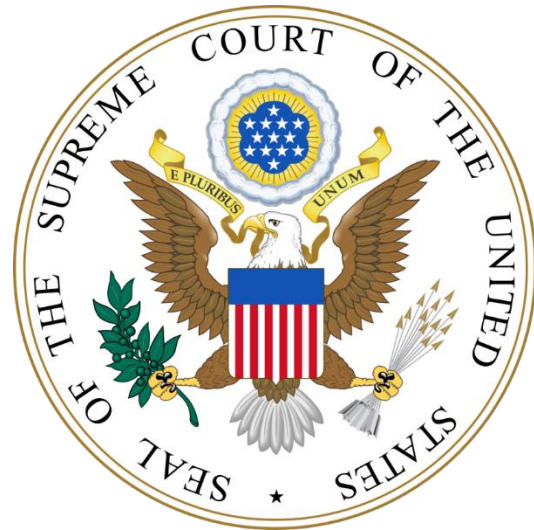
July 30, 2020

Richard B. Lapp, Partner
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Agenda

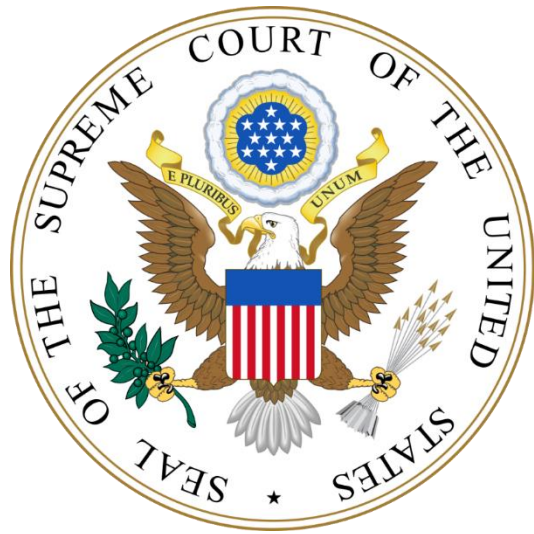


Part 1: The 2019-2020 Supreme Court and COVID-19

- A. The 2019 – 2020 Court
- B. Impact of COVID-19

Part 2: The 2019-2020 Term's Cases: Holdings, Analysis & Significance

- A. Employment Cases Decided
- B. Notable Non-Employment Cases Decided



Part 1

The 2019-2020 Supreme Court
and COVID-19

The 2019 – 2020 Court



- Chief Justice Roberts' Alliance
- Justice Gorsuch
- Justice Kavanaugh

LIBERAL BLOC

CONSERVATIVE BLOC



Sotomayor



Ginsburg



Kagan



Breyer



Roberts



Kavanaugh



Alito



Gorsuch



Thomas

Impact of COVID-19

Timetables Pushed, Processes Changed

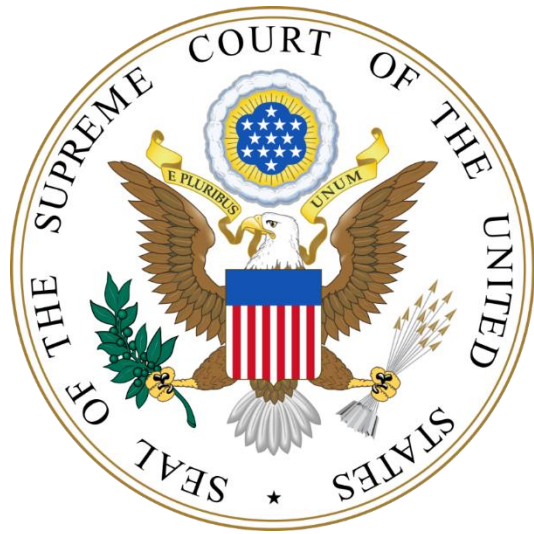
- For the first time since the 1918 Spanish Flu outbreak, SCOTUS postponed March oral arguments to April, then held them remotely in May.
- SCOTUS continued to release its list of orders online and has issued opinions, though they are not read from the bench as is typical but posted online.
- Decisions issued in July for the first time in 24 years.

Telephonic Oral Arguments

- Arguments occurred remotely (not in the same room with one another).
- Court used an ordering mechanism whereby the justices asked questions individually and in order of seniority.
- Justices were limited in the time they could question.

Live Access to Supreme Court Arguments

- In May, for the first time in its history, SCOTUS provided live audio of its oral arguments to the public, due to the COVID-19 pandemic.
- Polls indicate a significant majority of Americans across the ideological spectrum believe the public should have live access to judicial proceedings.



Part 2

**The 2019-2020 Term's Cases:
Holdings, Analysis, & Significance**

Employment Cases Decided

Comcast Corp. v. National Assn. of African American Owned Media



Citation: *Comcast Corp. v. National Assn. of African American-Owned Media*, 589 U.S. ____ (2020)

Decided: March 23, 2020

Holding: A plaintiff who sues for racial discrimination in contracting under 42 U.S.C. § 1981 bears the burden of showing that race was a but-for cause of the plaintiff’s injury, and that burden remains constant over the life of the lawsuit.

Practical Impact: The case’s strict test for bias suits -- the “but-for” test -- is also used to evaluate allegations of racial bias in employment under Section 1981. In *Comcast* the Supreme Court declined to decide whether Section 1981 only protects against discrimination in a final contracting decision, or whether it also protects against earlier stages of the contract-formation process.

Judgment: Vacated and remanded, 9-0, in an opinion by Justice Gorsuch on March 23, 2020. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment.

Source: <https://www.scotusblog.com/case-files/cases/comcast-corp-v-national-association-of-african-american-owned-media/>

Babb v. Wilkie

Justice Roberts: Is “OK, Boomer [to an applicant]...actionable?”



Citation: *Babb v. Wilkie*, 589 U.S. ____ (2020)

Decided: April 6, 2020

Holding: The plain meaning of 29 U. S. C. § 633a(a), the federal-sector provision of the Age Discrimination in Employment Act of 1967, demands that personnel actions affecting federal employees must be free from any discrimination based on age. However, but-for causation is relevant to determining the available remedy.

Practical Impact: Plaintiffs suing for reinstatement, backpay, and compensatory damages must show a personnel action would have been different if age had not been taken into account.

If age discrimination played a lesser part in the decision, other forward-looking relief, such as an injunction, is available.

Does not impact the 2009 ruling in *Gross v. FBL Financial Services*, that private sector employees must show age was the “but-for” cause of the employment action under the ADEA.

Judgment: Reversed and remanded, 8-1, in an opinion by Justice Alito on April 6, 2020. Justice Sotomayor filed a concurring opinion, in which Justice Ginsburg joined. Justice Thomas filed a dissenting opinion.

Source: <https://www.scotusblog.com/case-files/cases/babb-v-wilkie/>

Bostock v. Clayton County, Georgia



Citation: *Bostock v. Clayton County*, 590 U.S. ____ (2020)

Decided: June 15, 2020

Holding: An employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

Judgment: Reversed and remanded, 6-3, in an opinion by Justice Gorsuch on June 15, 2020. Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Kavanaugh filed a dissenting opinion.

Source: <https://www.scotusblog.com/case-files/cases/bostock-v-clayton-county-georgia/>

Bostock v. Clayton County, Georgia



Practical Impact: Two consolidated cases -- *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County, Georgia* -- addressed workplace protections based on sexual orientation. *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* addressed workplace protections based on gender identity. The *Bostock* ruling is the first high court decision to deal directly with transgender rights -- and is expected to have an impact on housing, education, credit, health care and possibly beyond. The consolidated ruling will likely have far reaching impacts on over 100 federal statutes that prohibit discrimination because of sex. It may also impact state and local law prohibitions based on sex. However, just days prior to the decision, the Department of Health and Human Services issued a final rule that rolls back nondiscrimination protections embedded in the ACA by adopting an express narrow definition of sex.

Notably, the EEOC maintained that LGBT workers are covered under Title VII's protection from sex-based discrimination in the workplace, while the U.S. DOJ submitted arguments to the Supreme Court taking the opposite position arguing that Title VII does not protect workers based on gender identity or sexual orientation. Despite uncertainty at the federal level, a majority of states had already enacted laws prohibiting employment discrimination based on sexual orientation, and many also prohibit employment discrimination based on gender identity.

Our Lady of Guadalupe School v. Morrissey-Berru



Citation: *Our Lady of Guadalupe School v. Morrissey-Berru*, ____ U.S. ____ (2020)

Decided: July 8, 2020

Holding: The "ministerial exception" under the religion clauses of the First Amendment forecloses the adjudication of employment-discrimination claims of Catholic school teachers in these cases.

Practical Impact: Employment discrimination claims of age and disability discrimination filed by two teachers whose duties including teaching religious themes were barred, though the teachers were not ministers. The Ninth Circuit had rejected the Court's analysis holding an employee's performance of important religious functions could never be enough to prove a worker is a minister.

Judgment: Reversed and remanded, 7-2, in an opinion by Justice Alito on July 8, 2020. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

Source: <https://www.scotusblog.com/case-files/cases/our-lady-of-guadalupe-school-v-morrissey-berru/>

Retirement Plans Comm of IBM v. Jander



Citation: *Retirement Plans Comm. of IBM v. Jander*, 589 U.S. ____ (2020) (*per curiam*)

Decided: January 14, 2020

Holding: This case, about whether plaintiffs can state a claim against retirement-plan fiduciaries for breach of duty of prudence by alleging that the costs of undisclosed fraud grow over time, is vacated and remanded to the U.S. Court of Appeals for the 2nd Circuit for a determination on whether to consider two arguments raised in the briefs at the Supreme Court but not in the lower courts.

Practical Impact: In concurring opinions, Justices Kagan and Gorsuch presented opposing views on what ERISA requires of “insider-fiduciaries” -- company executives who also manage employee stock plans. Justice Kagan stated the executives must act on insider information that could affect the plan if doing so wouldn’t violate securities laws, while Justice Gorsuch stated no such responsibility should exist and that the “hats” of corporate officer and fiduciary should be kept separate. Several justices expressed frustration during oral argument that the securities law debate arose for the first time in the Supreme Court. The Court gave the Court of Appeals the opportunity to decide whether to entertain IBM’s argument that ERISA imposes no duty on retirement plan fiduciaries to act on inside company information and the government’s argument that establishing the duty would likely conflict with securities laws.

Judgment: Vacated and remanded in a *per curiam* opinion on January 14, 2020. Justice Kagan filed a concurring opinion, in which Justice Ginsburg joined. Justice Gorsuch filed a concurring opinion.

Source: <https://www.scotusblog.com/case-files/cases/retirement-plans-committee-of-ibm-v-jander/>

Intel Corp. Investment Policy Committee v. Sulyma



Citation: *Intel Corp. Investment Policy Comm. v. Sulyma*, 589 U.S. ____ (2020)

Decided: February 26, 2020

Holding: Under the requirement in the Employee Retirement Income Security Act of 1974 that plaintiffs with “actual knowledge” of an alleged fiduciary breach must file suit within three years of gaining that knowledge, a plaintiff does not necessarily have “actual knowledge” of the information contained in disclosures that he receives but does not read or cannot recall reading.

Practical Impact: Workers have six years to sue under ERISA except under special circumstances. An employer can invoke a three-year statute of limitations if the employer can show that the worker gained actual knowledge of an ERISA fiduciary breach (the worker must have become aware of it by reading plan disclosures or through being told about it, or through other “usual ways” to prove knowledge, including evidence of “willful blindness.” Following the decision, employers are reviewing their practices to determine if they track that plan participants read the disclosure (perhaps by clicking a button before the screen forwards).

Judgment: Affirmed, 9-0, in an opinion by Justice Alito on February 26, 2020.

Source: <https://www.scotusblog.com/case-files/cases/intel-corp-investment-policy-committee-v-sulyma/>

Thole v. U.S. Bank, N.A.



Citation: *Thole v. U. S. Bank N. A.*, 590 U.S. ____ (2020)

Decided: June 1, 2020

Holding: Participants in a defined-benefit retirement plan who are guaranteed a fixed payment each month regardless of the plan’s value or its fiduciaries’ investment decisions lack Article III standing to bring a lawsuit against the fiduciaries under the Employee Retirement Income Security Act of 1974 under ERISA.

Practical Impact: The decision may eliminate most ERISA fiduciary-breach suits against fully-funded defined pension plans, if the retirees neither lost money nor faced a “substantial risk” of losing money due to “egregious” plan mismanagement. It may also limit suits against 401(k) plans. Footnote 2 suggests that retirees must show their losses wouldn’t be compensated by the Pension Benefit Guaranty Corp.

Judgment: Affirmed, 5-4, in an opinion by Justice Kavanaugh on June 1, 2020. Justice Sotomayor filed a dissenting opinion, in which Justices Ginsburg, Breyer and Kagan joined.

Source: <https://www.scotusblog.com/case-files/cases/thole-v-u-s-bank-n-a/>

Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania



Citation: *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, ___ U.S. ___ (2020)

Decided: July 8, 2020

Holding: The Departments of Health and Human Services, Labor and the Treasury had authority under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees.

Practical Impact: The decision could deprive tens of thousands of employees from access to affordable contraception. The Court upheld an employer’s right to reject regulatory requirements to provide no-cost birth control — that option could be removed from the health care plan — to protect an employer’s religious freedoms.

Judgment: Reversed and remanded, 7-2, in an opinion by Justice Thomas on July 8, 2020. Justice Alito filed a concurring opinion, in which Justice Gorsuch joined. Justice Kagan filed an opinion concurring in the judgment, in which Justice Breyer joined. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined.

Source: <https://www.scotusblog.com/case-files/cases/little-sisters-of-the-poor-saints-peter-and-paul-home-v-pennsylvania/>



Notable Non-Employment Cases Decided

Department of Homeland Security v. Regents of the University of California



Citation: *Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. ____ (2020)

Decided: June 18, 2020

Holding: 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.

Practical Impact: The temporary protection of nearly 700,000 undocumented youth from immigration enforcement remains in place.

Judgment: Vacated in part, reversed in part and remanded, 5-4, in an opinion by Chief Justice Roberts on June 18, 2020. Roberts delivered the opinion of the court except as to Part IV. Justices Ginsburg, Breyer and Kagan joined that opinion in full, and Justice Sotomayor joined as to all but Part IV. Justice Sotomayor filed an opinion concurring in part, concurring in the judgment in part and dissenting in part. Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Alito and Gorsuch joined. Justices Alito and Kavanaugh filed opinions concurring in the judgment in part and dissenting in part.

Source: <https://www.scotusblog.com/case-files/cases/department-of-homeland-security-v-regents-of-the-university-of-california/>

Espinoza v. Montana Department of Revenue



Citation: *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ____ (2020)

Decided: June 30, 2020

Holding: The application of the Montana Constitution’s “no-aid” provision to a state program providing tuition assistance to parents who send their children to private schools discriminated against religious schools and the families whose children attend or hope to attend them in violation of the free exercise clause.

Practical Impact: Here the Court adopted a status/use distinction — ok to use the state-funded scholarships for tuition at a religious school, but not ok to use the scholarships to obtain a degree in devotional theology. The impact of the case may be limited given that most states with no aid provisions already read those provisions consistent with the case’s holding. However, there may be a political impact. Advocates of religious schools may now seek enactment of various public subsidies for religious schools, including tuition vouchers and pandemic-related subsidies such as the Paycheck Protection Program loans. Government officials are discussing both calling on states to expand educational options to all schools as well as potential federal emergency scholarship aid for religious schools.

Judgment: Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on June 30, 2020. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. Justice Alito filed a concurring opinion. Justice Gorsuch filed a concurring opinion. Justice Ginsburg filed a dissenting opinion, in which Justice Kagan joined. Justice Breyer filed a dissenting opinion, in which Justice Kagan joined as to Part I. Justice Sotomayor filed a dissenting opinion.

Source: <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/>

Barr v. American Association of Political Consultants Inc.



Citation: *Barr v. American Assn. of Political Consultants, Inc.*, 591 U.S. ____ (2020)

Decided: July 6, 2020

Holding: The exception for calls to collect government debt from a federal ban on robocalls to cellphones violates the First Amendment, but the exception is severable from the rest of the Telephone Consumer Protection Act of 1991.

Significance: The Telephone Consumer Protect Act’s prohibition on automated calls to cellphones continues in effect and is expanded to include robocalls regarding government-debt-related calls. What is clear is that inherent in every calling and texting program is a meaningful nationwide class action risk under the TCPA and related federal and state robust consumer protection laws, such as Illinois’ BIPA. Both the Court and the FCC face additional cases to resolve the reach of various provisions this fall.

Judgment: Affirmed, 6-3, in an opinion by Justice Kavanaugh on July 6, 2020. Justice Thomas joined the court’s opinion as to parts I and II. Justice Sotomayor filed an opinion concurring in the judgment. Justice Breyer filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which Justices Ginsburg and Kagan joined. Justice Gorsuch filed an opinion concurring in the judgment in part and dissenting in part, in which Justice Thomas joined as to part II.

Source: <https://www.scotusblog.com/case-files/cases/barr-v-american-association-of-political-consultants-inc/>

Chiafalo v. Washington



Citation: *Chiafalo v. Washington*, 591 U.S. ____ (2020)

Decided: July 6, 2020

Holding: A state may enforce an elector’s pledge to support their party’s nominee – and the state voters’ choice – for president in the Electoral College.

Significance: Challenges from the states of Colorado and Washington to the faithless elector laws will be impactful for the upcoming election. In short, the current electoral system remains in place. States like Washington and Colorado that have faithless elector laws will be able to continue to enforce them, and there may be significantly less suspense when the Electoral College meets in December to formally elect the President. State electors must vote for the candidate who won the popular vote.

Judgment: Affirmed, 9-0, in an opinion by Justice Kagan on July 6, 2020. Justice Thomas filed an opinion concurring in the judgment, in which Justice Gorsuch joined as to part II.

Source: <https://www.scotusblog.com/case-files/cases/chiafalo-v-washington/>

Trump v. Vance



Citation: *Trump v. Vance*, 591 U.S. ____ (2020)

Decided: July 9, 2020

Holding: Article II and the Supremacy Clause of the U.S. Constitution do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

Significance: Disputes over President Trump's financial records will continue. While a sitting President is not always immune from state grand jury proceedings while he is in office, the trial court must decide whether complying with the subpoena would interfere with the President's ability to do his job. Even if the New York Prosecutor ultimately prevails, he will not have access to the documents anytime soon.

Judgment: Affirmed and remanded, 7-2, in an opinion by Chief Justice Roberts on July 9, 2020. Justice Kavanaugh filed an opinion concurring in the judgment, in which Justice Gorsuch joined. Justice Thomas filed a dissenting opinion. Justice Alito filed a dissenting opinion.

Source: <https://www.scotusblog.com/case-files/cases/trump-v-vance/>

Trump v. Mazars USA, LLP



Citation: *Trump v. Mazars USA, LLP*, 591 U.S. ____ (2020)

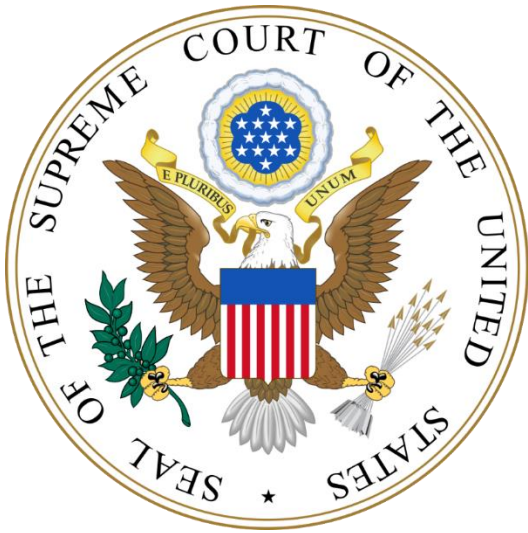
Decided: July 9, 2020

Holding: Although Congressional subpoenas for the President's financial information may be enforceable, the Court below did not adequately consider the significant separation of powers concerns implicated by subpoenas from three Committee of the House of Representatives seeking President Donald Trump's financial records. The Court acknowledged that Congress has the power to obtain information so that it can craft legislation effectively. However, the Court noted the power is limited; Congressional subpoenas are valid only if they serve a valid legislative purpose and are not intended for law enforcement efforts.

Significance: Here, again, any decision will be some time away; likely after the November elections.

Judgment: Vacated and remanded, 7-2, in an opinion by Chief Justice Roberts on July 9, 2020. Justice Thomas filed a dissenting opinion. Justice Alito filed a dissenting opinion.

Source: <https://www.scotusblog.com/case-files/cases/trump-v-mazars/>



Closing Remarks