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Supreme Court Report

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This *Report* summarizes opinions issued on June 8 and 15, 2020 (Part I); and cases granted review on those dates (Part II).

I. Opinions

● *Bostock v. Clayton County, GA*, 17-1618. By a 6-3 vote, the Court held that firing an employee for being homosexual or transgender constitutes prohibited employment discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964. The three cases before the Court all had the same basic fact pattern: "An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status." Each employee filed suit under Title VII alleging discrimination on the basis of sex. The Second and Sixth Circuits ruled for the employees; the Eleventh Circuit ruled for the employer. In an opinion by Justice Gorsuch, the Court ruled for the employees and held that Title VII bars employers from firing employees because of their homosexuality or transgender status.

The Court stated that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." Parsing the language of Title VII, the Court explained that "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." (Quotation marks omitted,) And "a but-for test directs us to change one thing at a time and see if the outcome changes." The Court noted that events can have multiple but-for causes: "When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." All told, "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII." And under the statute this assessment must be made on an individualized basis, not a group basis (does the employer treat one sex worse than the other sex overall). "So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it."

With that statutory background, the Court turned to discrimination against homosexuals and transgendered persons. The Court said: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." Or, as to a transgender person, the employer would be "intentionally penaliz[ing] a person identified as male

at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." The Court noted that this all remains so even if the employer's intent (motivation) is to discriminate against homosexual or transgender employees. "[T]o achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex." The Court found support for these various propositions in its Title VII precedents—*Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978); and *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998).

The Court then responded to the employers' arguments. To the employers' argument "that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation," the Court said that "these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause." Nor does it matter that sexual orientation is not on Title VII's list of protected characteristics; "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex," which is on the list. The Court noted that "sexual harassment" is not on the list, and is distinct from sex discrimination, "but it can fall within Title VII's sweep." The Court likewise dismissed as irrelevant congressional proposals to add sexual orientation to Title VII's list, finding that congressional failures to act are a particularly poor basis on which to interpret an existing statute.

The Court also rejected the employers' contention that their policies "have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?" The Court responded that it is commonplace for "two but-for factors to combine to yield a result that could have also occurred in some other way." Sex is a but-for cause in both cases. The Court then turned to the argument that "few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons." As an initial matter, noted the Court, "the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command." (Quotation marks omitted.) Beyond that, there is no evidence that the relevant statutory terms ("because of"; "sex"; "discriminate") meant something different in 1964 than they do today. In the end, the employers' position is that, "because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text." But textualism commands adherence to the text. Plus, the Court has interpreted Title VII to cover many actions that its framers would not have anticipated, such as male-on-male harassment and sexual harassment generally. Finally, the Court turned to supposed "undesirable policy consequences" that would follow from the Court's ruling. The Court found that those consequences are either not before the Court (*e.g.*, the validity of sex-segregated bathrooms) and may be overstated (*e.g.*, RFRA and the ministerial exception may mitigate the impact of the ruling on religious entities).

Justice Alito filed a 54-page dissent (plus 52-page appendix), which Justice Thomas joined. Noting that the House of Representatives recently passed a bill that would add sexual orientation and gender identity to Title VII (H.R. 5), Justice Alito wrote: "Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination

and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall." (Footnote omitted.) He stated that "[i]f every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time." Turning to the language of Title VII, Justice Alito maintained that "[i]f 'sex' in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender."

Responding to the majority's reasoning, Justice Alito said that "discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: 'We do not hire gays, lesbians, or transgender individuals.' And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants." He further faulted the Court's core hypothetical case of a gay worker fired for being gay who would not have been fired if (having a male boyfriend) he had been a woman: "what we have in the Court's hypothetical case are two employees who differ in two ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both." In short, concluded Justice Alito, "discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex."

Justice Alito then turned to arguments the employees made but which the Court did not reach. "One argument, which relies on our decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes." Justice Alito countered that Title VII doesn't bar discrimination based on sex stereotypes; sex stereotypes simply help prove discrimination because of sex. In the end, he said (quoting Judge Sykes), "[H]eterosexuality is not a female stereotype; it not a male stereotype; it is not a sex-specific stereotype at all." Second, Justice Alito found this case distinguishable from discrimination against a person whose significant other is a person of a different race. In that case, the "employer is discriminating on a ground that history tells us is a core form of race discrimination. . . . Discrimination because of sexual orientation is different. . . . An employer who discriminates on this ground might be called 'homophobic' or 'transphobic,' but not sexist."

Turning to textualism, Justice Alito said that the proper inquiry is "[h]ow would the terms of a statute been understood by ordinary people at the time of enactment?" The answer is that "[i]n 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The ordinary meaning of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds

might fit within some exotic understanding of sex discrimination would not have crossed their minds." Justice Alito's dissent closed by discussing potential consequences of the Court's decision that he found troubling: will transgender persons be entitled to use a bathroom or locker room reserved for persons of the sex with which they identify; under Title VII or Title IX will transgender individuals be entitled to participate on sports teams of the sex with which they identify; how must colleges assign students to housing; must a religious organization "employ individuals whose conduct flouts the tenets of the organization's faith"; must healthcare plans cover sex reassignment surgery; must employers and school officials use gender-neutral pronouns; and will constitutional claims of discrimination against homosexuals and transgender persons be subject to the same standard of review as sex discrimination?

Justice Kavanaugh filed a separate dissent. He stated that "[o]ur role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation." He faulted the Court for applying an unduly literalist approach that ignored the ordinary meaning of the phrase "because of sex." Justice Kavanaugh cited numerous textualists for the proposition that ordinary meaning controls, a proposition that advances "the rule of law and democratic accountability." And he cited numerous cases where the "Court has rejected literalism in favor of ordinary meaning." Justice Kavanaugh said the distinction is "especially important when—as in this case—judges consider *phrases* in statutes." "[T]his Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does."

And so the issue, to Justice Kavanaugh, "boils down to the ordinary meaning of the phrase 'discriminate because of sex.' Does the ordinary meaning of the phrase encompass discrimination because of sexual orientation? The answer is plainly no. . . . Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today." He pointed to federal and state laws, federal regulations, executive orders, and proposed bills that were premised on that distinction. Justice Kavanaugh closed by saying that "it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII."

● *Lomax v. Ortiz-Marquez*, 18-8369. The Court unanimously held that a dismissal without prejudice for failure to state a claim counts as a strike under the Prison Litigation Reform Act's three-strikes provision, 28 U.S.C. §1915(g). Petitioner Arthur Lomax is a Colorado inmate who sued respondent prison officials for expelling him from his facility's sex-offender treatment program. He moved for *in forma pauperis* status so that his suit could go forward before he pays the $400 filing fee. Under §1915(g), however, a prisoner may not file a federal civil action *in forma pauperis* if he

has filed three or more prior federal civil actions that were dismissed because they were "frivolous, malicious, or fail[ed] to state a claim upon which relief could be granted." The district court denied Lomax's motion for IFP status, finding that all three of his prior suits were dismissed for failure to state a claim. On appeal, Lomax argued that two of those dismissals should not count as strikes because they were without prejudice, meaning he could file a later suit on the same claim. The Tenth Circuit rejected that argument. In an opinion by Justice Kagan, the Court affirmed.

The Court stated that the "case begins, and pretty much ends, with the text of Section 1915(g)." Its "broad language" covers *all* dismissals that "fail[] to state a claim": "It applies to those issued both with and without prejudice to a plaintiff's ability to reassert his claim in a later action." Adopting Lomax's position would require "to read the simple word 'dismissed' in Section 1915(g) as 'dismissed with prejudice.'" The Court added that the PLRA contains three other provisions mentioning "dismiss[als]" for "fail[ure] to state a claim." Each empowers courts to dismiss *sua sponte* prisoner suits on that ground. Yet all agree that courts can dismiss those suits without prejudice. "So reading the PLRA's three-strikes rule to apply only to dismissals with prejudice would introduce inconsistencies into the statute."

The Court rejected Lomax's contention that §1915(g)'s phrase "dismissed [for] fail[ure] to state a claim" is a "legal term of art" referring only to dismissals with prejudice. Lomax relied on Federal Rule of Civil Procedure 41(b), which tells courts how to determine the preclusive effect of a prior court's order dismissing a case for failure to state a claim which did not specify whether the dismissal was with or without prejudice. Rule 41(b) instructs courts to treat such a dismissal as a dismissal with prejudice. According to Lomax, that same language when used in §1915(g) should have that same meaning. The Court disagreed, saying "that argument gets things backwards." Rule 41(b) is needed, the Court explained, precisely because the phrase "dismissed for failure to state a claim" can mean with or without prejudice. That's what creates the need for the default rule provided by the rule. Finally, the Court rejected Lomax's argument that because the two other grounds for dismissal listed in §1915(g)—dismissal of actions that are "frivolous" or "malicious"—"reflect a judicial determination that a claim is irremediably defective" (*i.e.*, "cannot succeed and should not return to court"), the same must be true of dismissals for failure to state a claim. The Court noted, however, that some frivolous actions are dismissed without prejudice. And "more fundamentally, Lomax is wrong to suggest that every dismissed action encompassed in Section 1915(g) must closely resemble frivolous or malicious ones. Congress expressly added dismissals for failure to state a claim in the PLRA to *expand* the statute." (In a footnote that Justice Thomas did not join, the Court noted that the three-strikes "provision does not apply when a court gives a plaintiff leave to amend his complaint," which courts often do if an "amendment can cure a deficient complaint." In that event, the action isn't dismissed and so no strike accrues.)

● *Andrus v. Texas*, 18-9674. By a 6-3 vote, the Court summarily reversed the Texas Court of Criminal Appeals and held that defense counsel performed deficiently in the sentencing phase of this capital case. The Court remanded for an assessment of prejudice. In 2008, during a bungled attempted carjacking, Terence Andrus shot and killed two people. At the guilt phase of his trial, defense counsel conceded Andrus's guilt and said the trial would "boil down to the punishment phase." But

counsel did little during the punishment phase, presenting no opening statement, only briefly cross-examining the government's witnesses, and calling few witnesses, from whom he elicited little helpful information. The jury sentenced Andrus to death. During an 8-day evidentiary hearing on his state post-conviction application, evidence showed "a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse." His mother sold drugs and engaged in prostitution, often at home in view of the children. "By the time Andrus was 12, his mother regularly spent entire weekends, at time weeks, away from her five children to binge on drugs. When she did spend time around her children, she was often high and brought with her a revolving door of drug-addicted, sometimes physically violent boyfriends." When Andrew was 10 or 11, and attempting to care for his siblings, he was diagnosed with affective psychosis. Later, when in the custody of the Texas Youth Commission, he committed multiple instances of self-harm and threatened suicide; he later tried to commit suicide while incarcerated awaiting trial for the murders. The Texas post-conviction court granted habeas relief, concluding that Andrus's counsel was ineffective for "failing to investigate and present mitigating evidence regarding [Andrus's] abusive and neglectful childhood." The Texas Court of Criminal Appeals reversed through a brief order stating that Andrus had "fail[ed] to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance." Through a *per curiam* opinion, the Court reversed and remanded. The Court stated that "[t]he evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*. But we remand so that the Court of Criminal Appeals may address the prejudice prong in the first instance."

The Court found, first, that "counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence." Nor, found the Court, could counsel's actions "be justified as a tactical decision," for "counsel never offered . . . any tactical rationale for the pervasive oversights and lapses here." Second, found the Court, "due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case." And third, "counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation." For example, the state pointed to Andrus's alleged commission of a knifepoint robbery at a dry-cleaning business, but counsel did not point out that Andrus professed innocence of that crime, the state did not charge him with it, and the evidence he committed it could have been rebutted.

Having found deficient performance, the Court turned to prejudice, which "here requires only a reasonable probability that at least one juror would have struck a different balance regarding Andrus' moral culpability." (Quotation marks omitted,) The Court found it "unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all," noting that its one-sentence denial of Andrus's claim "did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury." It is therefore possible, found the Court, that the Court of Criminal Appeals (mistakenly) found that Andrus failed to show deficient performance and therefore did not reach *Strickland*'s prejudice prong. The Court therefore remanded for that court to address *Strickland* prejudice.

Justice Alito filed a dissenting opinion which Justices Thomas and Gorsuch joined. Justice Alito wrote that the Court's remand "is squarely contradicted by the opinion of the Court of Criminal Appeals (CCA), which said explicitly that Andrus failed to show prejudice." On top of that, said Justice Alito, "there was strong support for that holding in the record." He faulted the Court for "never acknowledg[ing] the volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether within or without prison." The dissent pointed to the violence of the murders themselves; a 2004 armed robbery; his "assaultive behavior" while in a juvenile facility; another armed robbery; and "a reign of terror in jail" while awaiting trial for the murders. In the end, "[t]he CCA has already held once that Andrus failed to establish prejudice. I see no good reason why it should be required to revisit the issue."

● *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 18-1584. By a 7-2 vote, the Court held that "the United States Forest Service has authority under the Mineral Leasing Act, 30 U.S.C. §181 *et seq*., to grant rights-of-way through lands within national forests traversed by the Appalachian Trail." Lands acquired for the National Forest System are administered by the Forest Service. And under the Leasing Act (as amended in 1973) any "appropriate agency head" may grant "[r]ights of way through any Federal lands . . . for pipeline purposes." The 1973 amendments defined "Federal lands" to include "all lands owned by the United States, except" (as relevant here) "lands in the National Park System." The other relevant federal statute is the 1968 National Trails System Act, which establishes national scenic and historical trails, including the Appalachian Trail. The statute authorizes the Secretary of the Interior to enter into "rights-of-way" agreements with other federal agencies and other governmental and private landowners to establish the Appalachian Trail. The Department of the Interior has delegated authority of that Trail to the National Park Service.

In 2015, petitioner Atlantic Coast Pipeline applied to the Federal Energy Regulatory Commission to construct and operate a 604-mile natural gas pipeline from West Virginia to North Carolina. The pipeline's proposed route crosses 16 miles of land within the George Washington National Forest, which is crossed by the Appalachian Trail. Atlantic needed to obtain special use permits from the Forest Service for the portions of the pipeline that would pass through lands under the Service's jurisdiction. In 2018, the Forest Service issued the permits and granted a right-of-way that would allow Atlantic to place a 0.1-mile segment of pipe about 600 feet below the Appalachian Trail in the George Washington National Forest. Respondents, various environmental organizations, filed a petition for review in the Fourth Circuit contending (among other things) that the Forest Service's issuance of the special use permit for the right-of-way under the Trail violated the Leasing Act. The Fourth Circuit agreed and vacated the permit. It concluded that the Appalachian Trail became part of the National Park System when the Secretary of the Interior delegated its administration to the National Park Service. As such, found the court, the Trail falls under the Leasing Act's carve-out for "lands in the National Park System." In an opinion by Justice Thomas, the Court reversed and remanded.

The Court stated that the issue here was whether "*lands* within [a national forest] have been removed from the Forest Service's jurisdiction and placed under the Park Service's control because the Trail crosses them." If so, "then the lands fall under the Leasing Act's carve-out for 'lands in the

National Park System.'" The Court "conclude[d] that the lands that the Trail crosses remain under the Forest Service's jurisdiction and, thus, continue to be 'Federal lands' under the Leasing Act." The Court explained that "[p]ursuant to the Trails Act, the Forest Service entered into 'right-of-way' agreements with the National Park Service 'for [the] approximately 780 miles of Appalachian Trail route within national forests,' including the George Washington National Forest." But "[t]hese 'right-of-way' agreements did not convert 'Federal lands' into 'lands' within the 'National Park System.'" That is because a "right-of-way is a type of easement" that "grant[s] a nonowner a limited privilege to 'use the lands of another.'" Critically, "easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement"; "it was, and is, elementary that the grantor of the easement retains ownership over '*the land itself*.'" For example, "[i]f a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land." So too here. "[T]he plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands that the Trail crosses. It gave the Department of the Interior (and by delegation the National Park Service) an easement for the specified and limited purpose of establishing and administering a Trail, but the land itself remained under the jurisdiction of the Forest Service."

The Court found that conclusion bolstered by the limited role the Secretary of the Interior (and by delegation the National Park Service) has in administering the Appalachian Trail "as a footpath"; and by Congress's use of "unequivocal and direct language in multiple statutes when it wished to transfer land from one agency to another." The Court then addressed respondents' contention that "if the National Park Service administers the Trail, then it also administers the lands that the Trail crosses, and no pipeline rights-of-way may be granted." Apart from ignoring "basic property principles," the Court said that "[r]espondents' entire theory depends on an administrative action about which the statutes at issue are completely silent: the Department of the Interior's voluntary decision to assign responsibility over a given trail to the National Park Service rather than to the Bureau of Land Management." "We will not presume," said the Court, "that the act of delegation, rather than clear congressional command, worked this vast expansion of the Park Service's jurisdiction and significant curtailment of the Forest Service's express authority to grant pipeline rights-of-way on 'lands owned by the United States.'" Finally, the Court noted that under respondents' position, state-owned and privately owned lands that cross the Trail "would also become lands in the National Park System," which would alter the federal-state balance without the required clear language.

Justice Sotomayor filed a dissenting opinion, which Justice Kagan joined. She said that the only question here is whether the Appalachian Trail is "lan[d] in the National Park System"? In her view, the key laws, "a half century of agency understanding, and common sense confirm that the Trail is land, land on which generations of people have walked." The dissent points to the Organic Act which defines the National Park System to "include any land and water administered by the Secretary" of the Interior, "acting through the Director" of the Park Service, for "park, monument, historic, parkway, recreational, or other purposes." The dissent had little difficultly concluding that the Appalachian Trail fits within that definition and is therefore "land in the National Park System." Justice Sotomayor added that "[f]or a half century the Park Service has acknowledged that the Appalachian Trail is a unit of (and land in) the Park System." Criticizing the majority's reasoning, the dissent stated

that "the Court does not disclose how the Park Service could administer the Trail without administering the land that forms it. Neither does the Court explain how the Trail could be a unit of the Park System if it is not land." Finally, on the Court's federalism argument, the dissent stated that the Leasing Act applies only to "lands owned by the United States" and so "does not address a State or private landowner's ability to grant rights-of-way for pipelines."

II. Cases Granted Review

● *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 19-963. At issue is "[w]hether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." Petitioner and respondent both distribute dental equipment. In 2012, respondent filed suit against petitioner and other defendants in federal district court alleging violations of federal and state antitrust law based on an alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. The complaint sought "tens of millions of dollars" in damages and included a two-sentence request for unspecified injunctive relief. Petitioner and other defendants moved to compel arbitration based on a clause in respondent's distribution agreements providing:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (*except for actions seeking injunctive relief* and disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be Charlotte, North Carolina. [Emphasis added.]

The arbitration rules of the American Arbitration Association assign issues of arbitrability—whether an arbitration agreement applies to the particular dispute—to the arbitrator. Respondent opposed the motions to compel arbitration, claiming that its request for injunctive relief rendered the entire dispute triable to a jury rather than an arbitrator. The Eighth Circuit ultimately agreed, holding that "[i]f an assertion of arbitrability [is] wholly groundless, the court need not submit the issue of arbitrability to the arbitrator." The Supreme Court reversed, holding that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." 139 S. Ct. 524. The Court noted that the court of appeals had not decided whether the parties had delegated the arbitrability question to the arbitrator, and therefore remanded for further proceedings. The current case comes in the wake of the remand.

On remand, the Eighth Circuit again affirmed the district court's denial of the motions to compel arbitration. 935 F.3d 274. The court of appeals acknowledged that the agreements "delegat[ed] the threshold arbitrability inquiry to the arbitrator for at least some category of cases." But, the court noted, the parties "dispute[d] the relationship of the carve-out clause—exempting actions seeking

injunctive relief—and the incorporation of the AAA rules." The court concluded that it (not an arbitrator) should resolve that dispute. The court reasoned that "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carveout" for actions seeking injunctive relief. "Given that carveout," the court concluded, it could not say that the agreements "evince[d] a 'clear and unmistakable' intent to delegate arbitrability" as to the carved-out claims. On the merits of the arbitrability question, the court determined that the action was one "seeking injunctive relief" and was thus exempt from arbitration.

Petitioner argues that, "[a]s the Court made clear when this case was last before it, courts may not decide gateway questions of arbitrability themselves when an arbitration agreement provides clear and unmistakable evidence that the parties intended to delegate such questions to an arbitrator." Petitioner maintains that the Eighth Circuit "conflates the question of who decides arbitrability with the question of whether the dispute is arbitrable—questions that this Court has made clear are analytically distinct. The whole point of a delegation provision is to have an arbitrator, and not a court, determine whether the plaintiff's claim is arbitrable—that is, whether the claim falls inside or outside the scope of the arbitration agreement. But by deciding whether a claim falls within the scope of a carve-out provision, a court necessarily decides arbitrability." (Citations and quotation marks omitted.)

● *Albence v. Guzman Chavez*, 19-897. The question presented is "[w]hether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. 1231, or instead by 8 U.S.C. 1226." The issue matters because "[t]hose detained pursuant to Section 1226 generally have a right to a bond hearing," whereas "[t]he government takes the position that Section 1231 detainees are not entitled to bond hearings." The statutory background is as follows. The Immigration and Nationality Act provides that, when the Department of Homeland Security finds that an alien has illegally reentered the United States after having been removed, "the prior order of removal is reinstated from its original date." 8 U.S.C. 1231(a)(5). Aliens subject to a reinstated removal order may seek withholding of removal if they can show that they would be removed to places where they face persecution or torture. If the alien establishes a reasonable fear in a screening process, the alien is placed in "withholding-only" proceedings before an immigration judge, with a right of appeal to the Board of Immigration Appeals, to determine the ultimate merits of the claim for relief. "This case involves a dispute over whether an alien placed in withholding-only proceedings is subject to the detention procedures set out in 8 U.S.C. 1231, or instead to the detention procedures set out in 8 U.S.C. 1226." Under §1226, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." That statute authorizes the Executive to release a detained noncitizen on bond; regulations provide that "a noncitizen detained under [Section] 1226 is entitled to an individualized hearing before an immigration judge to determine whether continued detention is necessary while immigration proceedings continue." Meanwhile, §1231 provides for detention for the duration of a 90-day "removal period" during which "the Attorney General shall remove the alien from the United States." If the noncitizen is not removed within the 90 days, he or she "normally is subject to supervised release," although the government is empowered to continue the detention of certain categories of

noncitizens beyond the 90-day period. No bond hearing is provided by the statute or regulations for noncitizens detained under §1231.

Respondents are noncitizens who were removed from the United States and then returned after they were allegedly persecuted, tortured, or threatened with such conduct in the countries to which they had been removed. The government reinstated each respondent's prior order of removal under §1231(a)(5), but each passed a reasonable fear interview before an asylum officer or an immigration judge on review. Each respondent was therefore placed in withholding-only proceedings. The government detained all of the respondents during those proceedings without providing bond hearings. Respondents filed habeas actions in district court seeking declarations that they were detained under §1226, as well as injunctive relief ordering individualized bond hearings. The district court ruled for respondents and a divided panel of the Fourth Circuit affirmed. 940 F.3d 867.

The Fourth Circuit read §1226 "to focus on" the "practical question whether the government has the authority to execute a removal," rather than on "'whether the alien is *theoretically* removable.'" (Citation omitted.) The court reasoned that, although an alien in withholding-only proceedings is "clearly removable," the "practical" decision whether that alien "'is to be removed'" remains pending. The court then found, by contrast, that §1231 was inapplicable. The court observed that §1231's detention provisions are triggered "only when the 'removal period' begins." The court stated that the removal period "does not begin until the government has the actual legal authority to remove a noncitizen from the country." And "until withholding-only proceedings conclude, the removal period has not begun and §1231's detention provisions do not apply."

The United States argues that the Fourth Circuit got it backwards. "Section 1226 governs the detention of aliens who are awaiting a decision on whether they will be ordered removed from the United States. By contrast, Section 1231, with limited exceptions inapplicable here, governs the detention of aliens who, like respondents here, have already been ordered removed from the United States. That conclusion follows from the plain terms of the statutory provisions." The United States continues: "Section 1226 authorizes the detention of an alien 'pending a decision on whether the alien is to be removed from the United States.' 8 U.S.C. 1226(a). The term 'pending' means 'remaining undecided; awaiting decision.' Section 1226 thus applies to an alien who is awaiting a decision on whether he will be ordered removed from the United States. Section 1231 takes over once an order of removal is in place. Section 1231(a)'s caption reads: 'Detention, release, and removal of aliens *ordered removed*.'" (Citation and quotation marks omitted.) And an alien who is subject to a reinstated order of removal has been ordered removed. As Judge Richardson wrote in his Fourth Circuit dissent, "[a] withholding proceeding permits an alien to seek protection from being removed to a particular country," but it does not permit the alien to "attack a reinstated order requiring removal from the United States."

● *Niz-Chavez v. Barr*, 19-863. The Court will resolve whether the government can trigger the "stop-time" rule—which ends noncitizens' period of continuous residence, which affects their eligibility for discretionary cancellation of removal—by sending the required information in multiple notices. Federal immigration law empowers the Attorney General to cancel removal of certain immigrants

under 8 U.S.C. §1229b(a) and (b). To be eligible for cancellation of removal, noncitizens must have lived in the United States continuously for a specified number of years: seven years for legal permanent residents; 10 years for others. *Id*. §1229b(a)(2), (b)(1)(A). The "stop-time rule" prevents noncitizens from taking advantage of lengthy delays in removal proceedings to continue to accrue years of continuous residence. Under that rule, the government can end those periods of continuous residence by serving "a notice to appear under section 1229(a)." "Section 1229(a) defines 'a "notice to appear'" as 'written notice . . . specifying' specific information related to the initiation of a removal proceeding. *Id*. §§1229b(d)(1), 1229(a)(1)." Among the required information is the "time and place at which the proceedings will be held." 8 U.S.C. §1229(a)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Court held that §1229(a) defines the notice, which must therefore include the "time and place at which the proceedings will be held." But what if that information is not contained in the initial "notice to appear" but is provided in a subsequent letter to the immigrant? Does that count as a valid notice to appear that triggers the stop-time rule (as of the date of the subsequent letter)?

Petitioner Agusto Niz-Chavez is a native and citizen of Guatemala who came to the United States illegally in 2005 after neighboring villagers threatened to kill him and his family over a land dispute. "He currently lives with and is the primary breadwinner for his longtime partner and their three young U.S.-citizen children, two of whom have significant health issues." On March 26, 2013, the Department of Homeland Security served Niz-Chavez with a document labeled "Notice to Appear." As was common practice, the document did not specify the time and place at which Niz-Chavez was required to appear, stating instead that the hearing would be held on "a date to be set at a time to be set." On May 29, 2013, the immigration court sent Niz-Chavez a hearing notice scheduling his case for June 25, 2013. The merits hearing was finally held on September 13, 2017—at which point Niz-Chavez has continuously resided in the country for 12 years if the stop-time rule did not apply. At his merits hearing, Niz-Chavez sought to apply for cancellation of removal, but the immigration judge concluded under then-governing pre-*Pereira* law that Niz-Chavez's continuous presence ended when he received the putative "Notice to Appear" in March 2013. The immigration judge ultimately denied Niz-Chavez's applications for relief, and Niz-Chavez appealed to the Board of Immigration Appeals. While his case was pending before the BIA, the Court decided *Pereira*. The Board affirmed, concluding that Niz-Chavez was not eligible for cancellation under *Pereira* because the combination of the putative notice to appear with the subsequent hearing notice triggered the stop-time rule in June 2013. The Sixth Circuit affirmed based on circuit precedent.

Niz-Chavez argues that the circuits are split 3-2 on the question presented. On the merits, he points to *Pereira*, which held that §1229(a) uses "quintessential definitional language" to define what "a 'notice to appear'" is. "[*A*] 'notice to appear,'" Niz-Chavez emphasizes, is "written notice . . . specifying" the seven pieces of information listed in the statute. "Notice that does not provide the required information does not meet section 1229(a)'s definition, is not 'in accordance with' section 1229(a), and does not trigger the stop-time rule. Nothing in the statute suggests that different notices, served at different times, and even by different government agencies, can combine to create 'a "notice to appear.'" Niz-Chavez also argues that the statutory history compels that result. Congress adopted the notice to appear requirement in 1996 to replace a prior notice provision that did not

require notice of the "time and place" of proceedings, which could be provided in a different document. Niz-Chavez maintains that "Congress's 1996 amendments to the statute in IIRIRA—which moved the time-and-place information from an optional part of the 'order to show cause' to a required part of the 'notice to appear'— plainly rejected the two-step process and required a one-step process."

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