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Supreme Court Report

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This *Report* summarizes opinions issued on June 29 and 30, 2020 (Part I).

I. Opinions

● *June Medical Services, LLC v. Russo*, 18-1323. By a 4-1-4 vote, the Court invalidated a Louisiana law requiring physicians who perform abortions to have admitting privileges at a local hospital. Louisiana enacted Act 620 in June 2014. The law requires any doctor who performs abortions to hold "active admitting privileges at a hospital" within 30 miles of where the doctor performs abortions. Five abortion clinics and four abortion providers filed lawsuits (later consolidated) alleging that Act 620 imposes an undue burden on their patients' right to obtain an abortion. (Those doctors are referred to as Does 1, 2, 5, and 6; two other abortion providers then practicing in Louisiana are Does 3 and 4.) The district court held a 6-day bench trial after which the court declared Act 620 unconstitutional on its face and preliminarily enjoined its enforcement. While the case was on appeal to the Fifth Circuit, the Supreme Court decided *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which held that a near identical Texas law unconstitutionally burdened women's right to seek abortions. (Indeed, the Louisiana law was modeled on the Texas law.) The case was remanded back to the district court, which issued a permanent injunction. The district court found that Act 620 provides no health benefits because "abortion in Louisiana has been extremely safe" and hospital transfers occur "far less than once per year." But, found the court, Act 620 would "result in a drastic reduction in the number and geographic distribution of abortion providers." That is because, despite "the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges . . ., they have had very limited success for reasons . . . not related to their competence." Plus, Doe 3 testified that he would stop performing abortions if he were the last physician performing them in the northern part of the state. The end result, found the court, is that the number of abortion doctors in the state would be reduced to one, or at most two. As a consequence, "many women seeking a safe, legal abortion in Louisiana will be unable to obtain one." A divided panel of the Fifth Circuit reversed, concluding that Act 620's impact was "dramatically less" than that of the Texas law at issue in *Whole Women's Health*. The Fifth Circuit concluded that the admitting-privileges requirement performs a beneficial credentialing function. And on the burden side, it concluded that all but one of the doctors failed to make a good-faith effort to get admitting privileges, and likely could have gotten them had they made such an effort. All told, found the court, "there is no evidence that Louisiana facilities will close from Act 620"; it therefore would not impose a substantial burden on Louisiana women seeking an abortion. Through a 4-Justice plurality opinion by Justice Breyer and a concurring opinion by Chief Justice Roberts, the Court reversed.

The plurality first rejected the state's contention that patients are the only proper parties to assert their right to an abortion, and that the abortion providers (and clinics) lack standing to do so. The plurality ruled that the state waived the argument by urging the district court to reach the merits and arguing that there was "no question that the physicians had standing to contest" Act 620. "And even if the State had merely forfeited its objection by failing to raise it at any point over the past five years, we would not now undo all that has come before on that basis." Finally, citing nine cases, the plurality stated that, "[i]n any event, . . . [w]e have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." The plurality

found this practice especially appropriate when the law at issue would be enforced against the litigant, which "eliminates any risk that their claims are abstract or hypothetical." The plurality did not find this case different from past third-party standing cases on the ground that "the plaintiffs have challenged a law ostensibly enacted to protect the women whose rights they are asserting." "That is a common feature of cases in which we have found third-party standing," including past abortion cases. (Chief Justice Roberts provided the fifth vote for this standing holding "[f]or the reasons the plurality explains[.]")

The plurality then turned to the merits. It repeated the statement from *Whole Women's Health* that, in assessing whether a law imposes an unconstitutional "undue burden," courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." And it noted that *Whole Women's Health* "'weighed the asserted benefits' of the law 'against the burdens' it imposed on abortion access." The plurality found that the district court here followed that guidance; its findings can be set aside only if they are "clearly erroneous." And "examin[ing], the extensive record carefully," the plurality "conclude[d] that it supports the District Court's findings" that Act 620's burdens "far outweigh" any benefit and therefore "imposes an unconstitutional undue burden." The plurality reiterated *Whole Women's Health*'s findings that abortion providers often cannot obtain admitting privileges because many hospitals restrict admitting privileges to doctors with a certain minimum number of admissions per year—a requirement abortion doctors typically cannot meet but that has nothing to do with competence. The district court here found the same: the Louisiana abortion doctors could not obtain admitting privileges "for reasons that had nothing to do with their ability to perform abortions safely" and which made it futile to apply to every qualifying hospital. Not only did many Louisiana hospitals require a minimum number of patients, but "[t]he evidence also shows that opposition to abortion played a significant role in some hospitals' decisions to deny admitting privileges." The plurality rejected the Fifth Circuit's conclusion that Does 2, 5, and 6 acted in bad faith in attempting to obtain admitting privileges. The Fifth Circuit provided specific reasons, which the plurality responded to on a doctor-by-doctor basis (and which won't summarized here due to space constraints).

The plurality next turned to the impact Act 620 would therefore have on abortion access. Based on the district court's findings, only Doe 3 would be left to perform abortions in northern Louisiana—and he testified that he would stop performing abortions in that case. And only Doe 5 would be left to perform abortions in southern Louisiana. The plurality noted that "Doe 5 would be able to absorb no more than about 30% of the annual demand for abortions in Louisiana." Plus, there would inevitably be "'longer waiting times, and increase crowding.'" And even if Doe 3 continued to perform abortions (as the Fifth Circuit assumed, since it held that Act 620 wouldn't be responsible for his choice to stop practicing), "the annual demand for abortions in Louisiana would be more than double the capacity."

The plurality likewise accepted the district court's finding that Act 620 provides "no significant health benefits." First, the admitting-privileges requirement does not serve a "relevant credentialing function" because "hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions." Second, as in *Whole Women's Health*, the trial testimony

showed that surgical abortions only "very rarely require transfer to a hospital"; "the transfer agreement required by existing law" was sufficient for those rare cases; and the hospital the patient would likely need would be one 30 miles from her home, not the doctor's office. All told, found the plurality, the district court's factual findings on both burdens and benefits were amply supported and not clearly erroneous. The plurality therefore agreed with its conclusion that Act 620 poses a "substantial obstacle" to women seeking an abortion and that it poses an undue burden on a woman's constitutional right to choose to have an abortion.

Chief Justice Roberts provided the decisive fifth vote. He stated that he "joined the dissent in *Whole Woman's Health* and continue[s] to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case. . . . The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents." After discussing the benefits of *stare decisis*, Chief Justice Roberts turned to his understanding of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), which Louisiana and the providers agreed "provides the appropriate framework to analyze Louisiana's law."

Chief Justice Roberts noted that *Whole Women's Health* described *Casey*'s undue-burden standard as requiring courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access." That suggests "a grand 'balancing test in which unweighted factors mysteriously are weighed.'" Chief Justice Roberts rejected such a balancing test. He saw "no meaningful way" by which a court could "weigh the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other." Such balancing, he said, is a legislator's job, not a judge's. Chief Justice Roberts then carefully reviewed *Casey* and concluded that it did not suggest "a weighing of costs and benefits of an abortion regulation." Rather, *Casey* ruled that "[t]he several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional." While *Casey* did mention benefits, "these benefits were not placed on a scale opposite the law's burdens. Rather *Casey* discussed benefits in considering the threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" Once "that showing is made," said Chief Justice Roberts, "the only question for the court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" And *Whole Women's Health*, for all its talk of benefits, found that the Texas law presented a substantial obstacle, as required by *Casey*.

Chief Justice Roberts then turned to the Louisiana law and found that, "[b]ecause Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent." First, "the two laws are nearly identical." Next, "the District Court findings indicate that Louisiana's law would restrict access to abortion in just the same way as Texas's law, to the same degree or worse." Chief Justice Roberts noted that "the District

Court found that 'since the passage of [the Louisiana law], all five remaining doctors have attempted in good faith to comply' with the law by applying for admitting privileges, yet have had very little success." He said whether or not "we would reach the same conclusion," the finding was not clear error.

Justice Thomas wrote a dissenting opinion that focused on the issue of standing. In his view, "[u]nder a proper understanding of Article III, these plaintiffs lack standing to invoke our jurisdiction." He observed that, "[f]or most of its history, this Court maintained that private parties could not bring suit to vindicate the constitutional rights of individuals who are not before the Court." The Court "deviate[d] from this traditional rule" in the 20th century, from which "emerged our prudential third-party standing doctrine." But, first off, the "Court has never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential." Rather, "[a] brief historical examination of Article III's case-or-controversy requirement confirms what our recent decisions suggest: The rule against third-party standing is constitutional, not prudential." That's because the "traditional, fundamental limitations upon the powers of common-law courts . . . reveals that a plaintiff could not establish a case or controversy by asserting the constitutional rights of others." Justice Thomas acknowledged that the Court "has reflexively allowed abortionists and abortion clinics to vicariously assert a woman's putative right to abortion," but the Court did not address standing in most of those cases and provided flimsy reasoning the only time it squarely addressed the question, *Singleton v. Wulff*, 428 U.S. 106 (1976). Justice Thomas ended his separate dissent by asserting that the "Constitution does not constrain the States' ability to regulate or even prohibit abortion." Among other things, he stated that "*Roe* is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment." Disagreeing with Chief Justice Roberts' adherence to *stare decisis* here, he would not apply the doctrine to "*Roe* and its progeny" because they are "premised on a 'demonstrably erroneous interpretation of the Constitution.'"

Justice Alito filed the principal dissenting opinion, which Justice Gorsuch joined in full and Justices Thomas and Kavanaugh joined in significant part. He criticized the plurality for "eschew[ing] the constitutional test set out in *Casey* and instead employ[ing] the balancing test adopted in *Whole Women's Health*." In his view, the only issue is "whether the challenged Louisiana law places a 'substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" Justice Alito nonetheless looked at whether the law provided benefits to women and disagreed with the plurality: "there is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice." He found that "[t]he record shows that the vetting conducted by hospitals goes far beyond what is done at Louisiana abortion clinics." Turning to burden, Justice Alito said that the plurality and Chief Justice Roberts "misuse the doctrine of *stare decisis*" because the effect of the Texas and Louisiana statutes are "empirical question[s]" that might have different answers. Justice Alito also criticized them for giving deference to the district court's factual findings when "it was necessary for the District Court to predict what [the law's] effects would be," such as predict that no new abortion doctors would enter the market.

Turning to the abortion doctors' efforts to obtain admitting privileges, Justice Alito maintained that the test should not be whether the doctors acted in "good faith." That is because "the doctors had everything to lose and nothing to gain by obtaining privileges" and so "had an incentive to do as little as they thought the District Court would demand." The proper test, he said, is "whether the doctors' efforts to acquire privileges were equal to the efforts they would have made if they knew their ability to continue to perform abortions was at stake." Justice Alito found further that "the evidence in the record fails to show that the doctors made anything more than perfunctory efforts to obtain privileges." He then walked through the various doctors' efforts to show this (and which also won't summarized here due to space constraints). Justice Alito concluded that the Court should remand the case for a new trial applying the correct "substantial obstacle" test and correct test regarding the doctors' efforts to obtain admitting privileges.

The final section of Justice Alito's dissent (not joined by Justice Kavanaugh) argued that the abortion clinic and providers should not have been allowed to assert the rights of women wishing to obtain an abortion. He found that the state did not waive the issue; it merely made "an accurate statement of circuit precedent on the standing of abortion providers." And although the state did not raise the issue until its cross-petition for certiorari, that does not deprive the Court of the power to take up the issue if the lower court passed on it (as the Fifth Circuit did). On the "merits" of third-party standing, Justice Alito emphasized the "blatant conflict of interest between an abortion provider and its patients. Like any other regulated entity, an abortion provider has a financial interest in avoiding burdensome regulations such as Act 620's admitting privileges requirement. . . . Women seeking abortions, on the other hand, have an interest in the preservation of regulations that protect their health. The conflict inherent in such a situation is glaring." Justice Alito found that conflict enough to reject third-party standing here. On top of that, he asserted that third-party standing fails here under the ordinary test, which requires a litigant to show "(1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit." He found neither prong met: women's relationships with abortion doctors are "generally brief and very limited"; and women seeking an abortion are capable of bringing suit, and often have. Justice Alito would overrule the Court's decisions allowing doctors to challenge abortion regulations.

Justice Gorsuch filed a separate dissenting opinion to express his view that the Court's decision "overlooks" various rules that constrain judicial power. He criticized the Court for failing to give deference to the legislature's factual findings—yet "the Louisiana Legislature passed Act 620 only after extensive hearings at which experts detailed how the Act would promote safer abortion treatment." He (like Justices Thomas and Alito) criticized the Court for allowing the abortion providers to maintain third-party standing. He asserted that the decision ran afoul of the rules regarding when facial challenges may succeed. (He said that the substantial obstacle test, by looking at a "large fraction" of "those women for whom the provision is an actual rather than an irrelevant restriction," "winds up asking only whether the law burdens a very large fraction of the people that it burdens.") He contended that the plaintiffs failed to show irreparable injury, as they must to obtain injunctive relief. Yet it's possible, he said, that a hospital would change its rules to permit an abortion provider to obtain admitting privileges or an out-of-state abortion provider would enter the state. And Justice

Gorsuch criticized the balancing test used by *Whole Women's Health* and the plurality here, describing it as "the sort of all-things-considered balancing of benefits and burdens this Court has long rejected" in all contexts.

Finally, Justice Kavanaugh issued a separate, short dissenting opinion. He agreed with Chief Justice Roberts' rejection of *Whole Women's Health's* cost-benefit balancing test. And, agreeing with Justice Alito's review of the factual record, he believed the case should be remanded for additional factfinding. On remand, the district court would have addressed the third-party standing issue, about which he expressed no opinion.

● *Seila Law LLC v. Consumer Financial Protection Bureau*, 19-7. By a 5-4 vote, the Court held that the structure of the Consumer Financial Protection Bureau—an independent agency "led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance"—violates the separation of powers. The Court went on to hold (by a 7-2 vote) "that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director . . . must be removable by the President at will." Congress created the CFPB in 2010 as an independent agency within the Federal Reserve system. Congress transferred the administration of 18 existing statutes to the new agency and enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by members of the consumer-finance sector. Congress authorized the CFPB to implement that standard and the 18 pre-existing statutes through binding regulations and through "potent enforcement powers" and "extensive adjudicatory authority." Congress placed the CFPB under the leadership of a single Director who is appointed by the President and confirmed by the Senate. The Director serves for a term of five years, during which the President may remove her from office only for "inefficiency, neglect of duty, or malfeasance in office." The CFPB does not obtain annual appropriations; it instead receives funding directly from the Federal Reserve, which itself is funded through bank assessments rather than the appropriations process. This case arose when the CFPB issued a civil investigative demand to Seila Law, a law firm that provides debt-related legal services to clients. The demand directed Seila law to produce information and documents to help determine whether the firm engaged in unlawful advertising, marketing, or sale of debt relief services. When Seila Law refused to comply, the CFPB filed a petition to enforce the demand in district court. Seila Law responded by arguing that the demand must be set aside because the CFPB's structure violated the separation of powers. The district court disagreed, and the Ninth Circuit affirmed. Through an opinion by Chief Justice Roberts, the Court vacated and remanded.

The Court held "that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." The Court began by stating that, under Article II, "[t]he entire 'executive Power' belongs to the President alone." And while "lesser executive officers" assist the President, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." And so the President has the power to appoint, oversee, and control "those who execute the laws," which "generally includes the ability to remove executive officials, for it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'" The Court stated that the President's removal power has been recognizing

beginning with the creation of the first executive departments in 1789. The Court confirmed this power "in the landmark decision" *Myers v. United States*, 272 U.S. 52 (1926), which—after conducing an extensive historical review—concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment and removal of executive officers." "To hold otherwise," *Myers* said, "would make it impossible for the President . . . to take care that the laws be faithfully executed." The Court viewed *Myers* as adopting the general rule that the President has "unrestricted removal power," subject only to two exceptions.

The Court recognized the first exception in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld a statute that allowed the President to remove the Commissioners of the FTC only for "inefficiency, neglect of duty, or malfeasance in office." But *Humphrey's Executor* viewed the FTC as exercising "no part of the executive power." Plus, the FTC's Board was composed of five members (no more than three from the same political party). "And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a 'complete change in leadership 'at any one time.'" The Court here viewed *Humphrey's Executor* as creating "an exception for multimember bodies with 'quasi-judicial' or 'quasi-legislative' functions," while "reaffirm[ing] the core holding of *Myers* that the President has 'unrestrictable power . . . to remove purely executive officers.'" The second exception, recognized in two cases, including *Morrison v. Olson*, 487 U.S. 654 (1988), was "for *inferior* officers." The Court explained that neither exception applies here. The CFPB is meaningfully different from the FTC: it is led by a single Director who cannot be considered a "non-partisan" "body of experts"; and "the CFPB Director is hardly a mere legislative or judicial aid," given his broad powers carrying out 19 federal statutes. And no one suggests that the CFPB Director is an inferior officer such that the *Morrison* exception would apply.

The Court thus viewed the question as whether to *extend* the exceptions to the "new situation" before it. The Court declined to do so. The Court first pointed to the "almost wholly unprecedented" structure of the CFPB. The few scattered examples are either "modern and contested" or were aberrational (*e.g.*, the Comptroller of the Currency enjoyed removal protection for one year during the Civil War). Second, the "CFPB's single Director configuration is incompatible with our constitutional structure," which "scrupulously avoids concentrating power in the hands of any single individual" apart from the President—whose authority is checked by the democratic process. The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one." Making matters worse, found the Court, is that the Director's five-year term "means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda." Nor can the President use the budget process to influence the agency.

The Court then rejected three arguments the Court-appointed amicus made in the agency's defense. First, it does not matter that "there is no 'removal clause' in the Constitution." "[N]either," said the Court, "is there a 'separation of powers clause' or a 'federalism clause.' These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies." Second, for the reasons already articulated, the Court rejected amicus' contention that *Humphrey's*

Executor and *Morrison* establish the general rule, with only limited exceptions to them. Finally, the Court declined amicus' invitation to broadly construe the statutory grounds for removing the CFPB Director to "reserve substantial discretion to the President." The Court found no support for that reading in the statutory text and found it inconsistent with Congress' plain intent to make the CFPB an "independent" agency.

Finally, Chief Justice Roberts' opinion (in a section joined only by Justices Alito and Kavanaugh) addressed remedy. It stated that "[t]he only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities." He concluded that "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. Quite the opposite." Plus, "the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if 'any provision of this Act' is 'held to be unconstitutional' because it has told us: 'the remainder of this Act' should 'not be affected.'" The four dissenting Justices agreed with this portion of Chief Justice Roberts' opinion.

Justice Thomas wrote an opinion concurring in part and dissenting in part, which Justice Gorsuch joined. Justice Thomas would overrule *Humphrey's Executor*, which "poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." He objected generally to independent agencies led by officers insulated from presidential oversight by removal restrictions, stating that they are "an unfortunate example of the Court's failure to apply the Constitution as written." *Humphrey's Executor* "has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design." Beyond that, he described *Humphrey's Executor* as "thinly reasoned" and "completely 'devoid of textual or historical precedent.'" Justice Thomas concluded that the Court nonetheless correctly resolved the merits of the constitutional issue—but he dissented on the remedial issue. He "would simply deny the [CFPB] petition to enforce the civil investigative demand." Justice Thomas set out his view that "'[e]arly American courts did not have a severability doctrine'"; that "[t]he Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute"; and that even viewing severability as an exercise in statutory construction, it "'bring[s] courts dangerously close to issuing advisory opinions.'"

Justice Kagan issued a lengthy dissenting opinion, which Justices Ginsburg, Breyer, and Sotomayor joined. In her view, "[t]he text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's 'general rule' of 'unrestricted removal power' with two grudgingly applied 'exceptions.' Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the

CFPB." (Citation omitted.) She explained that "the separation of powers is, by design, neither rigid nor complete," as can be seen by the Constitution's vesting in Congress "broad authority to establish and organize the Executive Branch." She noted also that in the Founding era, "Parliament often restricted the King's power to remove royal officers and many states imposed limits on gubernatorial removal power; and the text of the Constitution says nothing about the removal power.

Justice Kagan then turned to history. She found that "[t]he early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority." In short, "the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. . . . In addressing the new Nation's finances, Congress had begun to use its powers under the Necessary and Proper Clause to design effective administrative institutions. And that included taking steps to insulate certain officers from political influence." She found that Congress continued to do so through the 19th century, from the Second Bank of the United States through the Interstate Commerce Commission (created in 1887 and limiting the President's removal power). Congress created still more agencies with restricted removal power in the early 20th century. And, said Justice Kagan, the Court has "repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance," subject only to the limit "that Congress could not impede through removal restrictions the President's performance of his own constitutional duties." She insisted that *Myers* is the exception, and that *Humphrey's Executor* "unceremoniously—and unanimously—confined *Myers* to its facts." And she pointed to decisions by the Court in 1958, 1986, and 1988 reaffirming *Humphrey's Executor*.

Justice Kagan maintained that "[t]he deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. . . . Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. . . . But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way." Turning to the CFPB, she saw nothing to distinguish it from the FTC and similar agencies whose heads receive removal protection. "CFPB's powers are nothing unusual in the universe of independent agencies"; and its removal protection "is standard fare." The fact that there is only a single CFPB Director should not, she said, make all the difference. She saw nothing in *Humphrey's Executor* that relies on the number of agency heads; she found precedent for single-head agencies; and (in any event) "novelty is not the test of constitutionality when it comes to structuring agencies." Indeed, argued Justice Kagan, a President can exert more authority over an agency with a single head than a multi-member agency. "A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director." The dissent closed by stating that "[t]he Constitution does not distinguish between single-director and multimember agencies. It instructs Congress, not this Court, to decide on agency design."

● *Espinoza v. Montana Dep't of Revenue*, 18-1195. By a 5-4 vote, the Court held that a state scholarship program for private school students violates the Free Exercise Clause if it excludes religious schools. In 2015, Montana enacted a scholarship program for children attending private schools. The program grants a tax credit of up to $150 to a taxpayer who donates to a participating "student scholarship organization," which in turn uses the donations to award scholarships to children for tuition at private schools. Upon receiving a scholarship, the family designates its school of choice; the scholarship organization sends the scholarship money directly to the school. The Montana Legislature directed that the program be administered in accordance with the Montana Constitution's "no-aid" provision, which bars government aid to sectarian schools. Shortly after the program's enactment, the Montana Department of Revenue promulgated "Rule 1," which prohibited families from using scholarships at religious schools. It did this to reconcile the program with the no-aid provision. Three mothers who wanted their children to use scholarship funds at a private Christian school sued the Department of Revenue in Montana state court. The trial court enjoined Rule 1 on the ground that it was based on a misinterpretation of state law. The Montana Supreme Court reversed. It held that the program, unmodified by Rule 1, aided religious schools in violation of the no-aid provision of the state constitution. The court then held that this violation required invalidating the entire scholarship program. The court found no free exercise problem with its decision. In an opinion by Chief Justice Roberts, the Court reversed and remanded.

The Court noted that no party disputes that the scholarship program does not violate the Establishment Clause. That left, said the Court, the following question: "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program." The Court held that it did. The Court relied on the principle, recently reaffirmed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017), "that disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Trinity Lutheran* involved state grants to nonprofit organizations to pay for playground resurfacing, but state law barred religious entities from obtaining grants. "Here too," found the Court, "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school." The Department sought to distinguish *Trinity Lutheran* on the ground that the no-aid provision applies based on how the funds would be *used*, not based on the religious character of the recipients. And a plurality in *Trinity Lutheran* left open discrimination based on "religious uses of funding." The Court here again declined to address discrimination based on "religious uses of funding," finding that "[t]his case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status" and did not distinguish *Trinity Lutheran* on the ground that it involved a playground. The Court added that "[n]one of this is meant to suggest that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." (Citation omitted.) The Court simply left the issue open for another day.

The Court disagreed with the Department that the case is controlled by *Locke v. Davey*, 540 U.S. 712 (2004). In *Locke*, the Court upheld a Washington scholarship program that "prohibited students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy." The Court ruled that "*Locke* differs from this case in two critical ways." First, Washington allowed scholarships to be used at "pervasively religious schools"; the state simply denied scholarships for one intended use. Montana, by contrast, broadly bars religious entities from benefiting from the program. Second, "*Locke* invoked a 'historic and substantial' state interest in not funding the training of clergy." The Court found that "no comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid." To the contrary, observed the Court, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." The Court noted that many states denied support for religious schools in the second half of the 19th century, but that many of those no-aid provisions "belong to a more checkered tradition shared with the Blaine Amendment of the 1870s," which was based on hostility to the Catholic Church. "The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."

The Court next ruled that the Montana "no aid" provision did not survive strict scrutiny. First, "Montana's interest in separating church and State 'more fiercely' than the Federal Constitution" is not a compelling interest "in the face of the infringement of free exercise here." Second, the no-aid provision can't be justified as promoting religious freedom by preventing excessive entanglement between religious institutions and the state. Said the Court, "[a]n infringement of First Amendment rights [ ] cannot be justified by a State's alternative view that the infringement advances religious liberty." Plus, noted the Court, a religious school can always choose not to participate. Finally, the Court turned to the Department's contention that "there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether," meaning "religious schools and adherents cannot complain that they are excluded from any generally available benefit." That logic fails, found the Court. The Montana Supreme Court eliminated the program based on its initial error of federal law in applying the no-aid provision to exclude religious schools from the program. Had the court realized that this violated the Free Exercise Clause, it "would have had no basis for terminating the program." In short, "[b]ecause the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds."

Justice Thomas filed a concurring opinion, which Justice Gorsuch joined. He criticized the Court's Establishment Clause jurisprudence, which "continues to hamper free exercise rights." Reiterating previously expressed views, he said that the Establishment Clause "resists incorporation against the States." And even if incorporated, it would only protect against an "establishment" of religion as understood at the founding, *i.e.*, "'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'" "Properly understood," he said, "the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions." Justice Thomas went on to assert that an "overly expansive understanding of the [Establishment] Clause has led to a correspondingly cramped interpretation of the [Free Exercise Clause]." Finally, he insisted that "[u]nder a proper understanding of

the Establishment Clause, robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level. The Court's distorted view of the Establishment Clause, however, removes the entire subject of religion from the realm of permissible governmental activity, instead mandating strict separation."

Justice Alito issued a concurring opinion to provide "a brief retelling" of the anti-Catholic underpinnings of the Blaine Amendment and the no-aid provisions it inspired. Justice Gorsuch also issued a concurring opinion to address the status-use distinction that the majority opinion discussed. He stated that he "was not sure about characterizing the State's discrimination in *Trinity Lutheran* as focused only on religious status, and [is] even less sure about characterizing the State's discrimination here that way." Further, he's not sure the distinction matters. "The Constitution forbids laws that prohibit the free exercise of religion. That guarantee protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly." Justice Gorsuch stated that the Court's "cases have long recognized the importance of protecting religious actions, not just religious status." And for good reason, he said. "What point is it to tell a person that he is free to *be* Muslim but may be subject to discrimination for *doing* what his religion commands[?]"

Justice Ginsburg filed a dissenting opinion, which Justice Kagan joined. She found no discrimination here because there was no differential treatment. "Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion." "Accordingly," she opined, "the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise." Justice Ginsburg faulted the Court's reading of the Montana Supreme Court's decision: the court "[d]eclined to rewrite the statute to exclude [religious] schools"; it "never made religious schools ineligible for an otherwise available benefit, and it never decided that the Free Exercise Clause would allow that outcome."

Justice Breyer filed a separate dissent, which Justice Kagan also joined in part. He stated that there is "'play in the joints' between 'what the Establishment Clause permits and the Free Exercise Clause compels.'" And "[w]hether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clause's objectives." He found the "program at issue here strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*." He continued: "Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) 'an essentially religious endeavor'—an education designed to 'induce religious faith.' That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground." (Citation omitted.) In Justice Breyer's view, "the question in this case—unlike in *Trinity Lutheran*—boils down to what the schools would do with state support. And the upshot is that here, as in *Locke*, we confront a State's decision not to fund the inculcation of religious truths." He found that Madison's Memorial and Remonstrance and Jefferson's Bill for Religious Liberty began an historic tradition for that decision. Justice Breyer emphasized that, "[a]s applied, the provision affects only a scholarship program that, in effect, uses taxpayer funds to help pay for student tuition at religious schools. We

have long recognized that unrestricted cash payments of this kind raise special establishment concerns." Justice Breyer criticized the majority for adopting "a test of 'strict' or 'rigorous' scrutiny"; and for viewing Montana as having punished religious exercise when it was merely choosing not to fund it. All told, Justice Breyer would not adopt a mechanical test (or formula) but would instead exercise "judgment-by-judgment analysis."

Justice Sotomayor filed a separate dissent. She first found that the Montana Supreme Court expressly declined to resolve the Free Exercise Clause issue in this case. Next, like Justice Ginsburg, she would hold that the plaintiffs' claim isn't cognizable because they were not subject to differential treatment; the program was invalidated in its entirety. Justice Sotomayor also found that the Court's answer to the question it posed was incorrect. She maintained that "[t]he Court's analysis of Montana's defunct tax program reprises the error in *Trinity Lutheran*. Contra the Court's current approach, our free exercise precedents had long granted the government 'some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.' Until *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice." She found this case similar to *Locke*, in that the state was seeking to "avoid[] 'historic and substantial' antiestablishment concerns." All told, she wrote, "a State's decision not to fund religious activity does not 'disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns.'"

● *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 19-177. By a 5-3 vote, the Court held that, consistent with the First Amendment, the federal government may require foreign nongovernmental organizations to maintain a policy opposing prostitution as a condition for receiving federal funds to combat HIV/AIDS abroad. Through the Leadership Act, Congress has allocated billions of dollars to American and foreign nongovernmental organizations that combat HIV/AIDS abroad. But Congress sought to fund only those organizations that have, or agree to have, a "policy explicitly opposing prostitution and sex trafficking." (The Court referred to this as the Policy Requirement). In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) (*AOSI I*), the Court held that the First Amendment bars enforcement of the Policy Requirement against plaintiffs, which are American nongovernmental organizations that receive funds to fight HIV/AIDS abroad that do not want to express their agreement with the policy opposing prostitution. Following the decision in *AOSI I*, plaintiffs returned to court seeking to bar enforcement of the directive against their foreign affiliates. The district court agreed with the plaintiffs and barred such enforcement. The Second Circuit affirmed. In an opinion by Justice Kavanaugh, the Court reversed.

The Court held that "Plaintiffs' position runs headlong into two bedrock principles of American law." First, the Court pointed to the "long settled" rule "of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." Although "foreign citizens *in the United States* may enjoy certain constitutional rights[,] . . . the Court has not allowed foreign citizens outside the United States or [] U.S. territory to assert rights under the U.S. Constitution." Second, the Court relied on the "long settled" rule "of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." The Court observed that "[p]laintiffs' foreign affiliates were incorporated in other countries and are legally

separate from plaintiffs' American organizations." Said the Court: "Those two bedrock principles of American constitutional law and American corporate law together lead to a simple conclusion: As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment."

The Court rejected plaintiffs' two principal arguments. First, relying on cases such as *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995), plaintiffs argued that "the foreign affiliates' required statement of policy against prostitution and sex trafficking may be incorrectly attributed to the American organizations." But, noted the Court, *Hurley* and related cases "arose because the State forced one speaker to host another speaker's speech." That is not the case here. "And plaintiffs cannot export their own First Amendment rights to shield foreign organizations from Congress's funding conditions." Second, plaintiffs argued that *AOSI I* already resolved the issue in their favor. The Court disagreed, finding that it "did not facially invalidate the Act's condition on funding" and did not purport to resolve the issue presented here. Justice Thomas wrote a brief concurring opinion to express his continuing disagreement with *AOSI I*.

Justice Breyer issued a dissenting opinion more than twice the length of the majority opinion, which Justices Ginsburg and Sotomayor joined. (Justice Kagan did not participate in the case.) Justice Breyer wrote that the Court "asks the wrong question and gives the wrong answer. This case is not about the First Amendment rights of foreign organizations. It is about—and has always been about—the First Amendment rights of American organizations." He explained that *AOSI I* distinguished *Regan v. Taxation With Representation of Wash*., 461 U.S. 540 (1983), which upheld a bar on lobbying by a §501(c)(3) nonprofit organization because the nonprofit was permitted to establish an affiliate to conduct its lobbying activities. *AOSI I* rejected the government's argument that, as in *Regan*, plaintiffs could act (and speak) through two corporate entities, one that receives the funds, the other that communicates the Policy Requirement. *AOSI I* reasoned that "[i]f the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs." And if "the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." In Justice Breyer's view, *AOSI I*'s reasoning, along with the body of precedent on which it relied, should decide this case. "Just as compelling a clearly identified domestic affiliate to espouse a government message distorts [plaintiffs'] own protected speech, so too does compelling a clearly identified foreign affiliate to espouse the same government message. Either way, federal funding conditioned on that affirmative avowal of belief comes at an unconstitutionally high 'price of evident hypocrisy.'" (Citation omitted.)

Justice Breyer went on to say that "[l]everaging Congress' Article I spending power to distort respondents' protected speech in this way therefore violates respondents' First Amendment rights—whatever else might be said about the affiliate's own First Amendment rights (or asserted lack thereof)." The foreign affiliates' speech will be attributed to the plaintiffs' organizations; audiences will not notice or care "that the affiliates were incorporated as *foreign* legal entities." Justice Breyer read cases such as *Hurley* as standing for the proposition, directly relevant here, that "[t]he First Amendment protects speakers from government compulsion that is likely to cause an audience to mistake someone else's message for the speaker's own views." He found the majority's two "bedrock

principles" irrelevant. That foreign citizens outside U.S. territory may not possess constitutional rights is beside the point: "This case concerns the constitutional rights of American organizations." Justice Breyer added that "the majority's blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law. The idea that foreign citizens abroad never have constitutional rights is not a 'bedrock' legal principle. At most, one might say that they are unlikely to enjoy very often extraterritorial protection under the Constitution. Or one might say that the matter is undecided. But this Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances." He said that *Boumediene v. Bush*, 553 U.S. 723 (2008), rejected the absolutist position the majority here adopted, holding that constitutional "questions of extraterritoriality turn on objective factors and practical concerns" present in a given case, "not formalism." Nor, maintained Justice Breyer, is the second "bedrock principle" relevant. "We have made clear again and again (and again) that speech may be attributed across corporate lines in the First Amendment context—including in our previous opinion in this very case."

● *Patent and Trademark Office v. Booking.com B.V.*, 19-46. By an 8-1 vote, the Court held that, although a generic term may not be registered as a trademark, a generic term followed by ".com" may be eligible for trademark protection. Booking.com provides hotel reservations and other services under the brand "Booking.com," which is also the domain name of its website. It filed applications with the Patent and Trademark Office (PTO) to register four marks, all containing the term "Booking.com." Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board ruled that the term "Booking.com" is generic and therefore unregistrable. Booking.com sought review in federal district court, which concluded—relying on new evidence on consumer perception—that "Booking.com" is not generic. The Fourth Circuit affirmed, rejecting the PTO's contention that the combination of ".com" and a generic term is necessarily generic. In an opinion by Justice Ginsburg, the Court affirmed.

The Court began by setting out three "guiding principles" that "are common ground": (1) "a 'generic' term names a 'class' of goods and services, rather than any particular feature or exemplification of the class"; (2) "for a compound term, the distinctiveness inquiry trains on the term's meaning as a whole, not its parts in isolation"; and (3) "the relevant meaning of a term is its meaning to consumers." Based on those principles, "whether 'Booking.com' is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services." For example, "if 'Booking.com' were generic, we might expect consumers to understand Travelocity—another such service—to be a 'Booking.com.' We might similarly expect that a consumer, searching for a trusted source of online hotel-reservation services, could ask a frequent traveler to name her favorite 'Booking.com' provider." But consumers don't perceive the term "Booking.com" that way, as the lower courts found and PTO no longer disputes. "That should resolve this case: Because 'Booking.com' is not a generic name to consumers, it is not generic."

The Court rejected the PTO's "nearly *per se*" view that "when a generic term is combined with a generic top-level domain like '.com,' the resulting combination is generic." The Court observed that the PTO did not follow that rule in the past. And it distinguished *Goodyear's India Rubber Glove Mfg.*

Co. v. Goodyear Rubber Co., 128 U.S. 598 (1888), which held that adding a generic corporate designation (like "Company") to a generic term produces a generic term not eligible for registration. The Court found that a "generic.com" term is different because it "might also convey to consumers a source-identifying characteristic: an association with a particular website." Plus, said the Court, what matters is a term's meaning to consumers. The Court cautioned that it is not "embrac[ing] a rule automatically classifying such terms as nongeneric. Whether any given 'generic.com' term is generic, we hold, depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class." The Court noted that "[e]vidence informing that inquiry can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning. Surveys can be helpful evidence of consumer perception but require care in their design and interpretation." Finally, the Court found that allowing the trademark here would "not disserve trademark law's animating policies." Justice Sotomayor filed a concurring opinion in which she noted her agreement with the dissent that consumer-survey evidence "may be an unreliable indicator of genericness."

Justice Breyer dissented. He asserted that the 1946 Lanham Act did not overturn *Goodyear*; that "the *Goodyear* principle is sound as a matter of law and logic"; and that adding an internet domain name to a generic term is no different from adding a company designation as in *Goodyear*. "In my view, appending '.com' to a generic term ordinarily yields no meaning beyond that of its constituent parts." "Like the corporate designations at issue in *Goodyear*, a top-level domain such as '.com' has no capacity to identify and distinguish the source of goods or services. It is merely a necessary component of any web address. . . . Just as 'Wine Company' expresses the generic concept of a company that deals in wine, 'wine.com' connotes only a website that does the same. The same is true of 'Booking.com.'" Criticizing the majority's reasoning, Justice Breyer stated that "[t]here will never be evidence that consumers literally refer to the relevant class of online merchants as 'generic.coms.' Nor are 'generic.com' terms likely to appear in dictionaries." He went on to criticize consumer survey evidence as having "limited probative value in this context." Finally, Justice Breyer asserted that the majority's rule "threatens serious anticompetitive consequences in the online marketplace." On top of all the other competitive advantages the holder of a generic domain name possesses, granting its mark trademark protection "confers additional competitive benefits on their owners by allowing them to exclude others from using *similar* domain names."

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