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This *Report* summarizes cases granted review on July 9, 2020 (Part I).

I. Cases Granted Review

● *AMG Capital Mgmt., LLC v. FTC*, 19-508; *FTC v. Credit Bureau Center, LLC*, 19-825. At issue in both cases is whether the FTC has the statutory authority to obtain restitution. (The Court consolidated the two cases. For simplicity's sake, this summary will address only the latter case.) In 1973, Congress added Section 13(b) to the FTC Act, giving the Commission authority to enforce the Act's prohibitions directly in federal district courts. Section 13(b) authorizes district courts in such cases to issue "a permanent injunction." The FTC and most federal circuits have long interpreted Section 13(b) to authorize district courts to order defendants to return unlawfully obtained funds. The FTC sought such relief in *FTC v. Credit Bureau Center,* in which the FTC sued respondents for offering consumers a "free" credit report, but enrolled those who accepted into a credit-monitoring service for $30 per month. Duped customers suffered over $6 million in losses. "The Commission sued under Section 13(b), seeking to halt continuing violations and return the unlawful gains to consumers. The district court awarded summary judgment to the Commission. It entered a permanent injunction barring future violations of the FTC Act and requiring respondents to repay $5.2 million, the net amount they took from consumers after deducting amounts recovered from settling codefendants. The district court directed that those sums be used to compensate injured consumers as 'restitution.'. . . On appeal, the Seventh Circuit affirmed the finding of liability but reversed the monetary judgment." 937 F.3d 764.

The Seventh Circuit said it was "obvious" that "[r]estitution isn't an injunction." The court described an injunction as a "forward-facing" remedy, whereas restitution is "a remedy for past actions." And it contrasted the language of Section 13(b) with Sections 5(l) and 19 of the FTC Act, which it characterized as "backward-facing methods to obtain monetary relief for past injury." The Seventh Circuit also relied on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), where the Supreme Court "refused to find an implied restitutionary remedy" under the Resource Conservation and Recovery Act. The Seventh Circuit described *Meghrig* as establishing that, "[r]ather than presuming that Congress authorizes the judiciary to supplement express statutory remedies, the Court now recognizes that 'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'"

The FTC argues in its petition that, "[c]ontrary to the court of appeals' reading, it has long been understood that an injunction can provide for restitution or other forms of monetary relief to undo harm caused by the defendant's conduct." The FTC points to *Black's Law Dictionary*, Justice Story's *Commentaries on Equity Jurisprudence, as Administered in England and America*, and other respected commentators. The FTC also relies on *Porter v. Warner Holding Co*., 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288 (1960), which held "that a district court exercising authority to enjoin violations of a regulatory statute may order violators to return their unlawful gains absent a clear congressional directive to the contrary." The Commission asserts that *Porter* and *Mitchell* were controlling law when Congress enacted Section 13(b) in 1973 and that *Meghrig* is in any event distinguishable on various grounds. Further, says the FTC, Congress "accepted and ratified" the many court of appeals' holdings authorizing restitution under Section 13(b)

when Congress amended the provision in 1994 but left the phrase "injunction" untouched. Finally, the FTC maintains that the Seventh Circuit "erred in its conclusion that the remedies created by two other enforcement provisions of the FTC Act mean that injunctions under Section 13(b) cannot order defendants to return money they took from consumers. The FTC Act gives the Commission multiple ways to enforce the laws under its authority: by rulemaking, through the administrative cease-and-desist process, and through direct enforcement actions in federal court. The choice between those enforcement mechanisms lies 'in the informed discretion of the administrative agency.' The court of appeals misapplied that principle by effectively ruling that when Congress allows a type of relief under one statutory enforcement mechanism, it necessarily withholds such relief from other mechanisms." (Citations omitted.)

● *Uzuegbunam v. Preczewski*, 19-968. At issue is "[w]hether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right." In 2016, petitioner Chike Uzuegbunam—then a student at Georgia Gwinnett College—began distributing religious literature on campus. A campus police officer asked him to stop because he was not within one of the campus's two designated "speech zones" (a patio and a sidewalk). Expressive activities could occur by "reserving" one of those zones by submitting a form and any leaflets three business days in advance. Four officials reviewed the submissions. Uzuegbunam later reserved a speech zone to speak publicly about his faith, but campus police again stopped him because someone had complained that he was engaged in "disorderly conduct." Another student, Joseph Bradford, claims that he wished to speak publicly and distribute religious literature on campus, but was chilled from doing so. Uzuegbunam and Bradford sued school officials, claiming their First and Fourteenth Amendment rights were being violated. They sought declaratory and injunctive relief as well as nominal damages. While a motion to dismiss was pending, the college overhauled the challenged policies to generally allow students to speak publicly, distribute literature, and otherwise engage in expressive activities anywhere on campus without prior approval. And in the meantime, Uzuegbunam graduated. The defendant school officials moved to dismiss the case as moot. Three months later, the en banc Eleventh Circuit decided *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga*., 868 F.3d 1248 (2017), which held that the government's repeal of an ordinance it had never enforced mooted the plaintiffs' nominal-damages claims. Citing *Flanigan's*, the district court dismissed this case as moot. The Eleventh Circuit affirmed. 781 F. App'x 824.

The Eleventh Circuit, quoting *Flanigan's*, reasoned that an award of nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." Because Uzuegbunam and Bradford never alleged "any concrete injuries" for which they sought compensation, the case presented "no live controversy" after the college's policy revisions and Uzuegbunam's graduation. Uzuegbunam and Bradford tried to distinguish *Flanagan's* on the ground that here the unconstitutional policies had been enforced. The court rejected the distinction, however, holding that Uzuegbunam's "right to receive nominal damages as the result of any unconstitutional conduct . . . would [still] have to flow from a well-pled request for compensatory damages."

Petitioners Uzuegbunam and Bradford argue that "[n]ominal damages are critical to ensure that federal courts remain open to litigants, especially in civil-rights cases. That is because constitutional violations often do not inflict financial injuries, and governments often moot equitable claims by changing unconstitutional policies. . . . Without nominal damages, bureaucrats can trample constitutional freedoms, then deprive citizens of a way to vindicate their rights. The Eleventh Circuit's rule slams the door on many civil-rights plaintiffs and makes future challenges less likely." Petitioners also contend that the Eleventh Circuit's decision conflicts with the Supreme Court's holding that nominal damages "materially alter[ ] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992), and its recognition of the important power to "vindicate[ ] deprivations of certain 'absolute' rights . . . through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). "The Eleventh Circuit's nominal-damages rule diminishes constitutional rights and cannot be squared with this Court's precedents." Petitioners add that the Eleventh Circuit decision conflicts with rulings of eight other circuits, which hold that the pursuit of nominal damages prevents mootness (at least where the disputed policy was enforced).

Respondent school officials counter that "[n]ominal damages would not provide petitioners any further forward-looking redress beyond what they received when the college permanently abandoned the policies they had challenged." And "they have not shown that mere 'vindication' of constitutional rights provides the kind of redress that Article III requires. A judicial award of nominal damages may well validate a challenge to a repealed law or policy as worthy, but mere 'vindication of the rule of law . . . is not an acceptable Article III remedy.' *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–07 (1998)." "Indeed," say respondents, "making a 'judicial pronouncement' to provide a plaintiff nothing more than the 'satisfaction of knowing that a federal court concluded that [a litigant's] rights had been violated' would be an 'advisory opinion,' not 'proper judicial resolution of a 'case or controversy.'" *Hewitt v. Helms*, 482 U.S. 755, 761–62 (1987)."

● *Collins v. Mnuchin*, 19-422; *Mnuchin v. Collins*, 19-563. These two petitions seek review of a 9-7 decision of the *en banc* Fifth Circuit in a lawsuit challenging an action by the Federal Housing Finance Agency (FHFA) and the Department of Treasury. The *Collins* petition argues that the structure of FHFA—which is headed by a single Director who can only be removed for cause by the President and is exempt from the congressional appropriations process—violates the separation of powers. The *Collins* petition also asks "[w]hether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent." The *Mnuchin* petition presents two questions that go to the underlying statutory issue.

Congress created FHFA as an independent agency in 2008 to regulate Fannie Mae and Freddie Mac, which are private, for-profit corporations that insure and securitize mortgages. FHFA is headed by a Director who is removable only "for cause by the President," and is funded through assessments, not congressional appropriations. In September 2008, FHFA appointed itself as conservator of Fannie Mae and Freddie Mac, which had suffered massive losses that year. At the same time, the Department of Treasury entered agreements with FHFA to purchase equity in the two companies. Treasury committed to buy up to $100 billion in stock in each company, an amount that

increased over time. "In return for its commitment, Treasury received various forms of compensation—including priority over other stockholders in getting its investment back if the enterprises were later liquidated, periodic fees, and dividends at a fixed rate. Critically, the size of the dividends each enterprise owed was tied to the amount of money Treasury had invested in the enterprise; it did not vary with the enterprise's profits. . . . Between 2009 and 2011, the dividends that the enterprises owed to Treasury repeatedly exceeded their quarterly earnings by billions of dollars. The enterprises therefore had to draw more money from Treasury just to pay Treasury's dividends." To cure that problem, Treasury and FHFA amended their agreement for a third time, to impose what is sometimes called "the Net Worth Sweep" (but the United States calls the "Third Amendment"). The Net Worth Sweep replaces the agreements' prior dividend structure with one that requires Fannie and Freddie to pay Treasury *their entire net worth* on a quarterly basis, minus a small capital buffer.

Fannie and Freddie shareholders sued under the Administrative Procedure Act, arguing that the Net Worth Sweep must be set aside both because it exceeded the statutory authority of FHFA and Treasury and because FHFA is unconstitutionally structured. The district court rejected all of the plaintiffs' claims. The case was eventually argued before the en banc Fifth Circuit. 938 F.3d 553. By a vote of 12-4, the court ruled that FHFA's structure is unconstitutional. But by a vote of 9-7, a different majority of the court held "that the appropriate remedy for the constitutional violation was to sever and declare unconstitutional the provision governing the removal of FHFA's Director, not to invalidate the Third Amendment." On top of that, these nine judges held that "the President had adequate oversight" of the adoption of the Amendment because the Secretary of the Treasury "was subject to at will removal by the President," meaning that the President "had plenary authority to stop the adoption of the [Third Amendment]" if he wanted to do so. And so the Net Worth Sweep (Third Amendment) survived the constitutional challenge. But by another 9-7 vote, the en banc court reversed the dismissal of the statutory claim against FHFA, remanding the case so that the district court could determine "if fact issues require trial or if summary judgment should be granted." In so holding, the court rejected arguments by FHFA for why the claims were barred by two provisions of the Housing and Economic Recovery Act of 2008 (Recovery Act), through which Congress created FHFA and authorized Treasury to "purchase any obligations and other securities issued by" Fannie and Freddie.

<u>*Collins v. Mnuchin*</u>. As noted, the shareholders' cert petition presents two questions. The first asks whether the structure of the FHFA violates the separation of powers. The Court seemingly answered that question in *Seila Law LLC v. Consumer Financial Protection Board*, 591 U.S. ___ (2020), holding that the CFPB's similar structure violates the separation of powers. The real focus of this case will therefore likely be the second question presented, which asks "[w]hether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent." The shareholders explain that there are two distinct remedial issues: "(1) whether past actions the agency took while it was unconstitutionally independent from the President should be set aside; and (2) what, if anything, the courts should do to sever the unconstitutional provisions or otherwise restructure the agency so that it operates constitutionally in the future." Their focus is the former question, as to which they agree with Judge Willet's statement in dissent that "[w]hen a plaintiff with Article III standing challenges the action of an unconstitutionally insulated officer, that action *must* be set aside." This is so, the shareholders argue,

because "the APA mandates that 'the reviewing Court *shall* . . . set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity.' 5 U.S.C. § 706; the "Court has consistently vacated agency action taken in violation of the Appointments Clause and other structural provisions of the Constitution"; the "Court decades ago repudiated as contrary to "basic norms of constitutional adjudication" the practice of prospective decision-making that fails to provide civil litigants with any remedy for a past constitutional violation"; and the "Court has acknowledged the need to 'create incentives' for litigants to vindicate the Constitution's structural provisions." In reply, the government respondents assert, among other things, that "[e]quitable relief 'does not follow from success on the merits as a matter of course.'" And "as the court of appeals correctly recognized, the Recovery Act's removal provision did not have a prejudicial effect on the President's ability to control the adoption of the Third Amendment. That is so because the Third Amendment was approved and signed by the Secretary of the Treasury—whom the President has the power to remove at will."

Mnuchin v. Collins. The government's petition challenges the en banc Fifth Circuit's ruling allowing the shareholders' statutory claims to proceed to trial. Their two questions presented are: (1)"Whether the [Recovery Act's] anti-injunction clause, which precludes courts from taking any action that would 'restrain or affect the exercise of powers or functions of the Agency as a conservator,' 12 U.S.C. 4617(f), precludes a federal court from setting aside the Third Amendment"; and (2) "Whether the [Recovery Act's] succession clause—under which FHFA, as conservator, inherits the shareholders' rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment." On the anti-injunction clause, the en banc Fifth Circuit reasoned that whether it "bars relief . . . depends entirely on whether the Third Amendment exceeded FHFA's statutory conservatorship powers." On that question, the court held that the shareholders "stated a plausible claim that the Third Amendment exceeded statutory authority." That's because FHFA is a conservator, not a receiver, but only a receiver has authority to "liquidate" Freddie and Fannie's assets. Yet (accepting the shareholders' allegations) the Net Worth Sweep "abandoned rehabilitation in favor of 'winding down'" the enterprises and is designed "to deprive Fannie and Freddie of all their capital." The government petitioners respond that "the court had no power to make that determination" because "the clause prohibits the courts from 'second-guess[ing] either the dividend-allocating terms that FHFA negotiated on behalf of the [enterprises], or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved.'" The government also maintains that, "[i]n any event, the court of appeals' statutory objections to the Third Amendment fail on their own terms" because the Third Amendment is *not* "tantamount to a liquidation of the enterprises." The government notes that "[s]even years after the adoption of the Third Amendment, the enterprises remain going concerns with trillions of dollars in assets."

As to the succession clause, the en banc Fifth Circuit acknowledged that it bars shareholders from bringing derivative claims on behalf of the enterprises while the enterprises remain in conservatorship. But the court concluded that the shareholders suffered personal injuries from the Third Amendment as "residual claimants of [the enterprises'] value" and that the shareholders had brought their claims under the APA. The government responds that "[t]hat line of reasoning proves too much, and, if taken to its logical conclusion, would obliterate the distinction between direct and derivative actions. *Every* wrong to a corporation could be said to injure a shareholder by reducing the corporate

value to which the shareholder has a residual claim." And it doesn't matter that the shareholders brought their claim under the APA: "The direct or derivative character of a lawsuit depends on who suffered the alleged harm and who benefits from the recovery—not on the statute under which the lawsuit is brought. The shareholders assert that FHFA has violated the APA, but that violation is alleged to have harmed the corporation, and any remedy for that violation would flow to the corporation. The shareholders' claim is therefore derivative."

● *Facebook, Inc. v. Duguid*, 19-511. The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits robocalls, *i.e.*, calls made by an "automatic telephone dialing system" (ATDS). The Court agreed to resolve "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" Facebook allows its users to opt in to certain "extra security feature[s]" to protect their personal information. "One of these opt-in security features allows a user to provide a mobile telephone number for Facebook to contact the user with a text-message 'login notification' that alerts the user when the user's Facebook account is accessed from a potentially suspicious location. . . . If the user does not recognize the log-in attempt, the notification enables the user to take immediate action and secure the account, thereby preventing improper access by an unknown actor." (Citations omitted.) Respondent Noah Duguid filed a putative class action alleging that Facebook violated the TCPA's prohibition on making calls using an ATDS. He asserted that he and the putative class members were therefore entitled to $1,500 in treble damages for each message. Facebook moved to dismiss on both constitutional and statutory grounds. The district court granted the motion on statutory grounds, holding that "plaintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS." The Ninth Circuit reversed. 926 F.3d 1146.

While the appeal was pending the Ninth Circuit issued *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (2018), which rejected the district court's interpretation of the statute. *Marks* concluded "that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). *Marks* found the statutory language ambiguous as to whether the phrase "using a random or sequential number generator" in subsection (A) modifies both "store" and "produce" or only "produce." The court concluded that the statute's "structure and context" dictate that the phrase modifies only "produce"—meaning that a device that can "store . . . numbers to be called" qualifies as an ATDS, even if it does not "us[e] a random or sequential number generator." The court reasoned that "[t]he structure and context of the TCPA as originally enacted indicate that Congress intended to regulate devices that make automatic calls. Although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA." The Ninth Circuit here reaffirmed *Marks*.

Facebook argues that "[t]he Ninth Circuit's statutory interpretation renders the statute wildly overbroad, extending the TCPA's up-to-$1,500-per-call penalty to calls and texts millions of Americans make with their smartphones every day." Turning to statutory text, Facebook relies on the "punctuation canon," which says that "a qualifying phrase separated from its antecedents by a comma means that the qualifying phrase applies to all antecedents, and not only to the immediately preceding one." Here, that means the phrase "using a random or sequential number generator" in subsection (A) modifies both verbs in the preceding clause, "store" and "produce." And that means, Facebook argues, that "the critical mechanism Congress identified (and what distinguishes an ATDS from an ordinary smartphone) is the device's use of 'a random or sequential number generator.'" According to Facebook, "[t]he impact of the Ninth Circuit's interpretive maneuver is staggering. While the typical telephone is incapable of storing or producing numbers 'using a random or sequential number generator' without further configurations, virtually any modern telephone has the capacity to store numbers and then dial those numbers automatically."

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