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Supreme Court Report

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This *Report* summarizes opinions issued on February 24, 25, and 26, 2020 (Part I); and cases granted review on February 24, 2020 (Part II).

I. Opinions

● *McKinney v. Arizona*, 18-1109. In a 5-4 decision, the Court held that a state appellate court sitting on collateral review may reweigh the aggravating and mitigating factors for a death sentence when an additional mitigating factor must be considered. In 1992, petitioner James McKinney was convicted of murdering Christine Mertens and Jim McClain. After finding the existence of aggravating circumstances and weighing the aggravating and mitigating circumstances, the judge sentenced McKinney to death for both murders. The Arizona Supreme Court affirmed. Nearly 20 years later, the en banc Ninth Circuit held that the Arizona courts violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), because they did not consider mitigating evidence of post-traumatic stress disorder on the ground it was not causally connected to the murders. When the case returned to the Arizona Supreme Court, McKinney argued that he was entitled to be resentenced by a jury. The state countered that the Arizona Supreme Court could itself reweigh the evidence under *Clemons v. Mississippi*, 494 U.S. 738 (1990). "The Arizona Supreme Court agreed with the State," reweighed the aggravating and mitigating evidence (including McKinney's PTSD), and upheld the death sentences. In an opinion by Justice Kavanaugh, the Court affirmed.

The Court relied on *Clemons*, where a state appellate court reweighed aggravating and mitigating evidence after invalidating an aggravating factor. *Clemons* held that a state appellate court may "uphold[] a death sentence based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review." The *Clemons* court rejected the argument that a jury was required to perform the reweighing, reasoning that "reweighing is not a resentencing but instead is akin to harmless-error review." And it "hinged" its analysis on an "appellate court['s] ability to weigh aggravating and mitigating evidence, not on any unique effect of aggravators as distinct from mitigators." The Court here explained that "[i]n deciding whether a particular defendant warrants a death sentence in light of the mix of aggravating and mitigating circumstances, there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side. . . . In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error."

The Court rejected McKinney's argument that *Clemons* was "no longer good law in the wake of th[e] Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, [136 S. Ct. 616] (2016)." Contrary to McKinney's argument, the Court explained, those cases do not require a jury to "weigh aggravating and mitigating circumstances in determining whether to uphold a death sentence." Nor do those cases require a jury to "make the ultimate sentencing decision within the relevant sentencing range." "'[S]tates that leave the ultimate life-or-death decision to the judge may continue to do so.'" Instead, *Ring* and *Hurst* require only that "a jury must find the aggravating circumstance that makes the defendant death eligible." And although the trial judge here found the aggravators, those cases are inapplicable because they were decided long after McKinney's conviction became final on direct review and do not apply retroactively on collateral review. In reaching that conclusion, the Court relied on the Arizona Supreme Court's ruling in this case that "it was conducting

an independent review in a collateral proceeding." So, "[a]s a matter of *state* law, the reweighing proceeding in McKinney's case occurred on collateral review." The Court declined to "second-guess the Arizona Supreme Court's characterization of state law."

Justice Ginsburg authored a dissent joined by Justices Breyer, Sotomayor, and Kagan. She disagreed with the majority's conclusion that the reweighing proceeding ranked as collateral review. In her view, it was a "replay of the initial direct review proceeding"—and "[r]enewal of direct review cannot sensibly be characterized as anything other than direct review." She would not have relied on the Arizona Supreme Court's contrary characterization of the proceeding, for "[w]hether the Constitution requires the application of law now in force is a question of federal constitutional law, not an issue subject to state governance." Justice Ginsburg would thus have applied *Ring* and found McKinney's sentence unconstitutional because a judge rather than a jury found the aggravators.

● *Hernandez v. Mesa*, 17-1678. By a 5-4 vote, the Court held that a *Bivens* damages action was not available to the family of a 15-year-old Mexican national who died from a cross-border shooting involving a U.S. Customs and Border Patrol Officer. Sergio Adrian Hernandez Guereca (Hernandez) was with a group of friends playing and running between the Mexican and United States border. When Hernandez ran back onto Mexican soil, Agent Jesus Mesa, Jr., fired two shots, one of which struck and killed Hernandez in Mexico. Petitioners, Hernandez's parents, brought suit seeking damages, alleging that Mesa violated Hernandez's Fourth and Fifth Amendment rights. The district court granted Mesa's motion to dismiss, and the Fifth Circuit affirmed. The Supreme Court granted certiorari, vacated the Fifth Circuit's decision, and remanded with instructions to consider its decision in *Ziglar v. Abbasi*, 582 U.S. ___ (2017), the Court's latest explication of *Bivens*. On remand, the Fifth Circuit considered *Ziglar* and declined to recognize a *Bivens* claim. In an opinion written by Justice Alito, the Court affirmed.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court recognized that a person claiming to be the victim of an unlawful arrest and search by a federal officer could bring a damages claim under the Fourth Amendment even though no federal statute authorized such a claim. The Court later extended *Bivens* to claims brought under the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). After *Carlson*, the Court changed course and recognized that "*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated." The Court explained that when an implied claim for damages is recognized on the ground that doing so furthers the "purpose" of the law, a court "risks arrogating legislative power." When asked to extend *Bivens*, the Court now engages in a two-step inquiry: first, it asks whether the request involves a claim in a "new context" or involves a "new category of defendants"; and second, it asks whether there are any special factors counseling hesitation in extending *Bivens*. If there are reasons to pause before applying *Bivens* in a new context or to a new class of defendants, a court should "reject the request." While there is no exhaustive list of factors to consider, a central consideration should be "separation-of-powers principles," whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."

Applying this two-step inquiry, the Court first concluded that even though the claims in this case arose under the Fourth and Fifth Amendments (as did the claims in *Bivens* and *Davis*), the *Bivens* claim in this case "assuredly arise[s] in a new context." The Court explained that its understanding of a "new context" is broad and applies when the context is "different in a meaningful way from previous *Bivens* cases decided by the Court," even if based on the same constitutional provision. Here, the Court observed there was a "world of difference between [*Davis*, involving a former congressional staffer's Fifth Amendment claim of gender discrimination, and *Carlson*, involving an Eighth Amendment claim for failure to provide adequate medical treatment to a federal prisoner,] and petitioners' cross-border shooting claims." Continuing to the second step, the Court recognized "multiple, related factors that raise warning flags" and counsel hesitation. For example, "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." And, since a "cross-border shooting is by definition an international incident," the Court said it must be "especially wary before allowing a *Bivens* remedy that impinges on this arena." The Court also found that national security interests counsel hesitation because Border Patrol agents such as Mesa are charged with protecting the United States' borders. Because regulating the conduct of agents at the border has national security implications, "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." Lastly, the Court observed that Congress has repeatedly declined to authorize damages for injury inflicted outside the borders. This pattern of congressional inaction, while providing alternative avenues for compensation in some situations, provides further hesitation in extending *Bivens*. When evaluating whether to extend *Bivens*, the "most important question 'is 'who should decide' whether to provide for a damages remedy, Congress or the courts?'" The Court concluded that the "correct 'answer most often will be Congress.'"

Justice Thomas filed a concurring opinion that Justice Gorsuch joined. He stated that for nearly 40 years the Court has refused to extend *Bivens* and has even suggested that *Bivens* and its progeny were wrongly decided. In his view, "[i]t is time to correct this Court's error and abandon the doctrine altogether."

Justice Ginsburg wrote a dissenting opinion that Justices Breyer, Sotomayor, and Kagan joined. She would have recognized a *Bivens* remedy for noncitizens when a U.S. officer acted wrongfully on United States soil. According to the dissent, "[r]ogue U.S. officer conduct falls within a familiar, not a 'new', *Bivens* setting." "Even if the setting could be characterized as 'new,' plaintiffs lack recourse to alternative remedies, and no 'special factors' counsel against a *Bivens* remedy." Justice Ginsburg explained that this case arose in a setting akin to *Bivens*: a U.S. officer acted in disregard of instructions governing his conduct and the victim's constitutional rights. The only difference, Justice Ginsburg observed, was that the bullet struck Hernandez on Mexican soil. But since the purpose of *Bivens* is to deter wrongful conduct occurring in the United States, this distinction should not matter "one whit." The dissent also discounted the special national security and foreign policy hesitation factors cited by the Court, noting that no policies or policymakers are challenged in this case, only the rogue actions of a rank-and-file law enforcement officer acting in violation of rules governing his office. Justice Ginsburg also observed that in accordance with *Ziglar*, the absence of an alternative remedy remains a significant factor in favor of applying *Bivens*.

● *Intel Corp. Investment Policy Comm. v. Sulyma*, 18-1116. ERISA's statute of limitations bars claims that a fiduciary breached a duty to plan holders if they are brought more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. §1113(2). The Court unanimously held that a plaintiff does not "necessarily ha[ve] 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading." Respondent Christopher Sulyma worked at Intel Corporation from 2010 to 2012, where he participated in two retirement plans. Payments into these plans were invested into two funds, mostly comprised of stocks and bonds, managed by the Intel Investment Policy Committee. After the stock market declined in 2008, the Committee increased the funds' investment in other assets, such as hedge funds, private equity, and commodities. These alternative assets carried relatively higher fees, and when the stock market rebounded, Sulyma's alternative asset portfolio lagged behind other investments. Sulyma filed this lawsuit on behalf of a putative class, alleging that the Committee and other plan administrators (petitioners) breached their fiduciary duties by overinvesting in the alternative assets. Petitioners challenged the suit as untimely because Sulyma filed it more than three years after petitioners disclosed to him the alternative investment decisions. Specifically, Sulyma received numerous disclosures, including documents explaining the extent to which his retirement plans were invested in alternative assets, a summary plan describing his investments, and emails directing him to annual disclosure statements and websites that hosted the disclosures and showed the underlying funds' return rates. Although Sulyma visited the websites, Sulyma testified that he did not "remember viewing" the above disclosures and that he was "unaware" that "the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity." The district court granted petitioners' motion for summary judgment, reasoning that "[i]t would be improper to allow Sulyma's claims to survive merely because he did not look further into the disclosures made to him." The Ninth Circuit reversed, construing "actual knowledge" to mean "knowledge that is actual, not merely a possible inference from ambiguous circumstances." In an opinion by Justice Alito, the Court affirmed.

As noted, ERISA requires suit alleging a fiduciary breach to be filed within three years of "the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. §1113(2). In construing the word "actual," the Court observed that the word means "existing in fact or reality." "[T]o have 'actual knowledge' of a piece of information," the Court explained, "one must in fact be aware of it." Critically, noted the Court, Congress conditioned the statute of limitations to begin upon "actual knowledge," rather than upon what a plaintiff reasonably should have known—a formulation Congress used in other ERISA limitations provisions. The Court therefore held that to satisfy §1113(2)'s "actual knowledge" requirement, a plaintiff must in fact have become aware of that information; disclosure alone is not sufficient. The Court cautioned that its opinion does not preclude any of the "usual ways" to prove "actual knowledge" and that such knowledge could be proved through circumstantial evidence. Evidence of disclosure, as well as electronic records showing that a plaintiff viewed the relevant disclosures, may be relevant. Nor, said the Court, does its opinion preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge."

● *Shular v. United States*, 18-6662. The Armed Career Criminal Act (ACCA) mandates a 15-year mandatory minimum sentence for certain defendants with prior convictions for a "serious drug offense." A state offense counts as a "serious drug offense" only if it "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. §924(e)(2)(A)(ii). The Court unanimously held that, to make that determination, a court should ask whether the state offense's elements involve the conduct specified in §924(e)(2)(A)(ii), that is, "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." The Court rejected petitioner's contention that courts should "first identify the elements of the 'generic' offense, then ask whether the elements of the state offense match those of the generic crime."

Petitioner Eddie Lee Shular pleaded guilty in federal court to being a felon in possession of a firearm and possessing cocaine with intent to distribute. He had previously pleaded guilty in Florida to five counts of selling cocaine and one count of possessing cocaine with intent to sell. The state law criminalizes "sell[ing], manufactur[ing], or deliver[ing] or possess[ing] with intent to sell, manufacture, or deliver, a controlled substance." While knowledge of the illicit nature of the substance is not an element, lack of such knowledge is an affirmative defense. The district court ruled that Shular's Florida convictions counted as "serious drug offenses" and imposed the 15-year minimum term. On appeal, Shular advocated for the generic-offense-matching approach. Under that approach, he claimed, his Florida convictions are not "serious drug offenses" because they do not require knowledge of the substance's illegality, whereas a "generic" version of ACCA's drug offense does. The Eleventh Circuit, diverging from the Ninth Circuit, rejected Shular's approach. Following its own precedent, the Eleventh Circuit ruled that ACCA "require[s] only that the predicate offense 'involv[e] . . . certain activities." In an opinion by Justice Ginsburg, the Court affirmed.

The Court concluded that "Section §924(e)(2)(A)(ii)'s text and context leave no doubt that it refers to an offense involving the *conduct* of 'manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.' Because those terms describe conduct and do not name offenses, a court applying §924(e)(2)(A)(ii) need not delineate the elements of generic offenses." The Court first pointed to text: "the terms in §924(e)(2)(A)(ii)—'manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance'—are unlikely names for generic offenses. Those words undoubtedly can be used to describe conduct." The Court contrasted the provision with other provisions of ACCA that plainly speak in terms of generic offenses, such as §924(e)(2)(B)(ii), which refers to a crime that "is burglary, arson, or extortion." The Court next pointed to the statutory term "involv[es]" ("involv[es] manufacturing, distributing," etc.). "It is natural," said the Court, "to say that an offense 'involves' or 'requires' certain conduct." The Court declined Shular's invitation to apply the rule of lenity because it applies only when traditional canons of statutory construction leave a statute ambiguous, and here, the Court was "left with no ambiguity."

Justice Kavanaugh wrote a concurring opinion to expound why the rule of lenity does not apply. In his view, "the rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means." It does not apply merely because a statute is ambiguous.

● *Holguin-Hernandez v. United States*, 18-7739. In a unanimous decision, the Court held that for purposes of Federal Rule of Criminal Procedure 51(b), a criminal defendant who advocates for a lower sentence preserves an appellate argument that a longer sentence is unreasonably long. Gonzalo Holguin-Hernandez was on supervised release when he was convicted of drug trafficking in a new case. In addition to the sentence imposed for the new case, the United States asked the district court to find he had violated the conditions of his supervised release "and to impose an additional consecutive prison term" of 12 to 18 months for the violation, consistent with the Sentencing Guidelines range. Defense counsel argued that the sentence on the new case was sufficiently substantial and urged the court to impose "no additional time or certainly less than the [G]uidelines," *i.e.*, less than 12 to 18 months. The court imposed a consecutive term of 12 months. On appeal, Holguin-Hernandez argued "that the 12-month sentence was unreasonably long in that it was 'greater than necessar[y] to accomplish the goals of sentencing.'" See 18 U.S.C. §3553(a). The Fifth Circuit held that Holguin-Hernandez had forfeited the argument because he had not objected on "reasonableness" grounds, so it could review only for plain error. Finding no plain error, it affirmed. In an opinion written by Justice Breyer, the Court vacated and remanded.

The Court explained that under §3553(a), Congress requires federal sentencing courts to impose sentences that are "sufficient, but not greater than necessary, to comply with" various penological objectives. So how does a defendant preserve an objection based on §3553(a), *i.e.*, an objection that a sentence is unreasonably long? Rule 51(b) requires a party to preserve an error for review by "informing the court of" either (1) the action the party wishes the court to take or (2) the party's objection and the grounds for the objection. The Court found that Holguin-Hernandez satisfied subpart (b)(1) by "advocat[ing] for a sentence shorter than the one ultimately imposed." Specifically, "the defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved 'sufficient,' while a sentence of 12 months or longer would be 'greater than necessary' to 'comply with' the statutory purposes of punishment."

Justice Alito wrote a concurring opinion, joined by Justice Gorsuch, to point out several issues the Court did not decide. Specifically, the Court did not decide "what is sufficient to preserve a claim that a trial court used improper *procedures* in arriving at its chosen sentence"; "what is sufficient to preserve any 'particular' substantive-reasonableness argument"; and "whether this petitioner properly preserved his particular substantive-reasonableness arguments."

● *Rodriguez v. Federal Deposit Ins. Corp.*, 18-1269. The Court unanimously rejected the so-called *Bob Richards* federal common-law rule for determining ownership of a tax refund paid to an affiliated corporate group. The Internal Revenue Service allows an affiliated group of corporations to file a consolidated federal tax return. 26 U.S.C. §1501. Despite detailed regulations ensuring that the government receives all taxes due, federal regulations provide little direction concerning how refunds should be distributed, except that the IRS will pay the group's designated agent a single refund and such refund discharges the government's refund liability to all group members. To bridge this gap, many affiliated corporate groups have developed "tax allocation agreements," which typically specify what share of a group's tax liability each member will pay and the share of any tax refund

each member will receive. After United Western Bank fell into financial distress, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver. When the Bank's parent, United Western Bancorp, Inc., filed for bankruptcy, Simon Rodriguez was appointed its trustee. The IRS issued a $4 million tax refund, which both the FDIC and Rodriguez claimed. The question presented was how federal courts should resolve this dispute: by relying upon state law or by relying upon federal common law. The Tenth Circuit applied a federal common law doctrine known as the *Bob Richards* rule and concluded that the FDIC, as receiver for the bank, owned the tax refund. In an opinion by Justice Gorsuch, Court reversed and remanded.

The Court explained that, "normally," disputes about the meaning of a tax allocation agreement would be governed by state law. And absent a tax allocation agreement, state law would govern who receives the refund. But some federal courts crafted a common law rule known as the *Bob Richards* rule. *See In re Bob Richards Chrysler-Plymouth Corp.*, 473 F. 2d 262 (9th Cir. 1973). As originally conceived, the *Bob Richards* rule provided that in the absence of a tax allocation agreement, a tax refund belonged to the group member responsible for the losses that led to it. In later years, the *Bob Richards* rule was expanded to include not only situations where a tax allocation agreement did not exist, but became a general rule that applied unless the parties' tax allocation agreement unambiguously specified a different result. The Court decisively repudiated the *Bob Richards* rule.

As the Court has explained, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision, such as admiralty disputes and certain controversies between states. "Judicial lawmaking in the form of federal common law," the Court continued, "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." U.S Const. Art. I, §1; Amend. 10. In this respect, "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." Among the most basic of these conditions is that "[i]n the absence of congressional authorization, common lawmaking must be 'necessary to protect uniquely federal interests.'" Here, the Court concluded that while the federal government may have an interest in regulating how it receives taxes from corporate groups or how it delivers a tax refund due to a corporate group. But there is no federal interest "in determining how a consolidated corporate tax refund, once paid to a designated agent, is distributed among group members." Because neither *Bob Richards* nor any of the courts applying or extending the *Bob Richards* rule identified a unique federal interest, the Court held that the *Bob Richards* rule is not a proper exercise of federal common lawmaking. The Court remanded so that the lower courts could assess the dispute without *Bob Richards*.

● *Monasky v. Taglieri*, 18-935. The Court held that under the Hague Convention on the Civil Aspects of International Child Abduction (Convention), a child's habitual residence depends on the totality of circumstances and that this determination is subject to appellate review for clear error. Under the Convention, a child wrongfully removed from his or her country of "habitual residence" must ordinarily be returned to that country. Petitioner Michelle Monasky and respondent Domenico Taglieri married in the United States. Two years later, they relocated to Italy and neither had definite plans to return to the United States. After living together in Milan for the first year, the marriage deteriorated and Taglieri became physically abusive. Monasky later became pregnant and began

looking into returning to the United States, applying for jobs in the Unites States, inquiring about U.S. divorce lawyers, and obtaining cost information from moving companies. At the same time, however, she and Taglieri made preparations to care for their expected child in Italy. After her daughter's birth, Monasky and her daughter left Italy for Ohio. Taglieri petitioned a district court for the return of his daughter under the Convention on the ground that Italy was her "habitual residence." The district court granted the petition and concluded that "the shared intent of the [parents] is relevant in determining the habitual residence of an infant," although "particular facts and circumstances" might necessitate the consideration of other factors. The en banc Sixth Circuit affirmed. The en banc court reviewed the district court's ruling for clear error and found none. In the course of its opinion, it rejected Monasky's proposed requirement that parents must have a "meeting of the minds" (an "actual agreement") about their child's future home for that home to be the child's habitual residence. In an opinion by Justice Ginsburg, the Court affirmed.

The Court first held that "the determination of habitual residence does not turn on the existence of an actual agreement." Because the Convention does not define "habitual residence," the Court relied upon the plain meaning that a child "resides" where she lives and that residence in a particular country can be deemed "habitual" only "when her residence there is more than transitory." The Court continued that the term "habitual" "suggest[s] a fact-sensitive inquiry, not a categorical one." This construction is supported by the Convention's explanatory report, the Treaty's "negotiation and drafting history," and the views of other Treaty participants. In sum, there are no categorical requirements for establishing a child's habitual residence; this determination should be made based on the totality of the circumstances.

The Court next considered the appropriate standard of appellate review for a habitual residence determination. In the absence of a treaty or statutory mandate, the appropriate level of deference depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Here, a "child's habitual residence presents what U.S. law types a 'mixed question' of law and fact—albeit barely so." As the Court explained, after identifying the totality of the circumstances standard, "what remains for the court to do in applying that standard . . . is to answer a factual question." Thus, the Court concluded, the "habitual-residence determination . . . presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court." Although typically the Court might remand to a lower court to apply the totality of the circumstances standard in the first instance, the Court found that unnecessary and unwise here given the district court's factual findings, the protracted proceedings, and that the child was now five-years old. The Court therefore entered final judgment on the child's return to Italy.

Justice Thomas filed a concurring opinion stating that he would have decided this case principally on the plain meaning of the Treaty's text without resorting to the decisions by other Treaty signatories. Justice Alito also filed a concurring opinion expressing his view that the determination of one's "habitual residence" is not a pure question of fact, and therefore he would apply an abuse of discretion standard on review, not a clear error standard.

● *Roman Catholic Archdiocese of San Juan, P.R. v. Feliciano*, 18-921. The Court summarily vacated for lack of jurisdiction a Puerto Rico Supreme Court decision holding that the Catholic Church in Puerto Rico is a single entity for purposes of civil liability, and that its dioceses, parishes, schools, and trusts are not "entities with different and separate legal personalities." Current and former employees of several school academies associated with the Catholic Church sued the Archdiocese of San Juan, the Superintendent of Catholic Schools in San Juan, the academies, and a pension trust for their pension payments and benefits. At some point, the trust filed for bankruptcy, prompting the Archdiocese to file a notice of removal to federal court. The next month, a Puerto Rico trial court issued orders requiring the Church to make the pension payments and place $4.7 million in a court account; it also ordered the seizure of Church assets in Puerto Rico. An appellate court reversed, finding that the only defendant with separate personhood who could be ordered to make the pension payments was the Archdiocese. The Puerto Rico Supreme Court reversed. Agreeing with the trial court, the Puerto Rico Supreme Court held that "the only defendant with separate legal personality, and the only entity that could be ordered to pay the employees' pensions, was the [Catholic Church]." Through a *per curiam* opinion, the U.S. Supreme Court vacated that opinion.

The Court did not reach the merits. It held that the payment and seizure orders were void because they were issued by the state court *after* the notice of removal to federal court was filed—at which point the state court had lost jurisdiction—and *before* the case was returned to state court. The Court remanded "the case to the Puerto Rico state courts to consider how to proceed in light of the jurisdictional defect [it] identified." Justice Alito wrote a concurring opinion, which Justice Thomas joined. He set out his view that the Puerto Rico Supreme Court erred in holding that the Catholic Church in Puerto Rico "is a single entity for purposes of civil liability." The state supreme court relied on *Municipality of Ponce v. Roman Catholic Apostolic Church in Puerto Rico*, 210 U.S. 296 (1908), but that case "simply held that the Church was a juridical person and thus could bring suit." The "Court did not hold that the Church is a single entity for purposes of civil liability."

II. Cases Granted Review

● *Fulton v. City of Philadelphia*, 19-123. Philadelphia excluded Catholic Social Services (CSS) from its foster care program because CSS won't provide service to same-sex couples, in violation of the foster-care contracts' anti-discrimination provision. CSS maintains that it is being coerced to change its religious practices. The Court will review three questions: (1) "Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—. . . or whether courts must consider other evidence that a law is not neutral and generally applicable . . . ."; (2) "Whether *Employment Division v. Smith*[, 494 U.S. 872 (1990),] should be revisited"; and (3) "Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs."

The City of Philadelphia enters into contracts with various agencies to provide foster services. When a family seeks to foster a child, the family begins the process by reaching out to a licensed agency, which then conducts an assessment of the applicant called a "home study." The requirements for home studies are set by state law and include a review of the "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationship, especially as they might affect a foster child." At the conclusion of the home study, the foster agency determines whether it can certify the family to work with that agency and care for the foster child. CSS is a licensed religious foster care agency and ministry of the Archdiocese of Philadelphia that places children with foster parents. CSS exercises its religion by caring for foster children in accordance with its Catholic beliefs, but will not provide written certifications for same-sex couples because it believes such a certification is inconsistent with its sincerely held religious beliefs. The City advised CSS that its foster agency contract forbids discrimination and that when CSS's current contract expires, the City is "under no legal obligation to enter into a new contract for any period thereafter." The City further advised CSS that it intended "to assist with the transition of foster families to other agencies, absent assurances that CSS is prepared to adhere to its contractual obligations and, in implementing its City contract, to comply with all applicable laws, including those related to non-discrimination." CSS and its co-petitioners filed suit and sought a preliminary injunction. The district court denied the injunction, and the Third Circuit affirmed. 922 F.3d 140.

With respect to the Free Exercise Clause, the Third Circuit concluded that "[t]he City's non-discrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy. See *Emp't Div. v. Smith*, 494 U.S. 872, 877-78 (1990)." The court rejected CSS's reliance on "cases where courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct." The court framed the inquiry as follows: "was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs?" It found the answer to be no. The Third Circuit observed that the City has been working with CSS for many decades fully aware of its religious character and it continues to work with CSS in providing other forms of non-foster care despite CSS's religious views regarding same-sex marriage. On similar grounds, the Third Circuit rejected CSS's Establishment Clause argument, noting that "the two Religion Clauses largely run together." Because the evidence demonstrated that the City still works with CSS and another organization opposed to same-sex marriage to provide other forms of non-foster care, the court concluded that "CSS is not being excluded due to its religious beliefs." Rather, the City insists that if "CSS wants to continue providing foster care, it must abide by the City's non-discrimination policy in doing so." Lastly, the Third Circuit rejected CSS's arguments that the City was compelling its speech in a manner CSS found disagreeable and that the City was retaliating against CSS for engaging in protected speech. The court explained that the speech, *i.e.*, CSS's home study certification, "occurs because CSS has chosen to partner with the government to help provide what is essentially a public service" and that the City simply insists that all agencies abide by "public rules of non-discrimination in the performance of its public function under any foster-care contract." Because the City's actions are regulatory in nature, and not retaliatory in nature, the court also concluded that CSS's retaliation claim fails.

Petitioners argue that the Third Circuit erroneously applied a test that a free exercise plaintiff "must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." Petitioners maintain that the proper test, adopted by the majority of circuits, allows a free exercise plaintiff to rely upon different forms of evidence to prove that a law is not neutral or generally applicable. Specifically, those circuits allow a plaintiff to "prove a claim by showing that the government issues individualized exemptions, that the law exempts secular conduct that undermines the government's interest, or that law's history indicates non-neutrality." Petitioners maintain that they would prevail under that approach. They note that the City permits various exemptions from its policies, but will not permit an exemption for CSS; they point to statements by the City Council accusing it of discrimination; and they maintain that they were "targeted" even though the City "has never investigated secular agencies or informed them of its claimed policies." Petitioners separately argue that the Court should reconsider *Employment Division v. Smith* and abandon the rule that a generally applicable law prohibiting a specific religious practice does not violate the Free Exercise Clause. Instead, argue Petitioners, the Court should "return to a standard that can better balance governmental interests and fundamental rights." Lastly, Petitioners argue that conditioning its agency license and the receipt of funds on its willingness to certify same-sex couples violates its free speech and religious rights because without its acquiescence CSS will be completely excluded from the foster care system. They insist that "'when the State conditions a benefit in this way, . . . the State has punished the free exercise of religion.' *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017)."

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