Supreme Court October Term 2016: A Review of Select Major Rulings

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Summary

The Supreme Court term that began on October 3, 2016, was notably different from recent terms at the High Court. It was the first term (1) in thirty years to begin without Justice Antonin Scalia on the Court; (2) since 1987 to commence with a Court made up of fewer than nine active Justices; and (3) since 2010 in which a new member (Justice Neil Gorsuch) joined the High Court. Court observers have suggested that the lack of a fully staffed Supreme Court for the bulk of the last term likely had an impact on the Court's work both with regard to the volume of cases that the Court heard and the nature of those cases. The Court issued seventy written opinions during the October 2016 term and heard oral arguments in sixty-four cases, numbers that constitute the lightest docket for the Court since at least the Civil War era. Moreover, unlike in recent terms where the Court issued opinions on matters related to abortion and affirmative action, the Court's docket for the October 2016 term had comparatively very few high-profile issues.

Nonetheless, the October 2016 term featured a number of cases on matters of potential significance to Congress's work, especially with respect to discrete areas of law. In particular, the Court issued several notable opinions in the areas of intellectual property law, criminal law and procedure, and redistricting. While a full discussion of every ruling from the October 2016 term is beyond the scope of this report, **Table 1** provides brief summaries of the written opinions issued by the Court during the last term. Instead, this report focuses its discussion on four particularly notable cases the Court ruled on during the October 2016 term: (1) *Matal v. Tam*; (2) *Sessions v. Morales-Santana*; (3) *Trinity Lutheran Church of Columbia, Inc. v. Comer*; and (4) *Ziglar v. Abbasi*.

In *Matal v. Tam*, a dispute at the intersection of First Amendment and trademark law, the Court concluded that a federal law prohibiting the registration of trademarks that "may disparage" any "persons, living or dead" violates the Free Speech Clause of the First Amendment. In a case with potentially significant implications for immigration law, the Supreme Court, in *Sessions v. Morales-Santana*, ruled that a gender-based distinction in the derivative citizenship rules—under which persons born abroad to a U.S. parent may have U.S. citizenship automatically conferred at birth—violated equal protection requirements. In one of the most closely watched cases of the term, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court invalidated on free exercise grounds a state grant policy that strictly prohibited the distribution of public funds to religious entities on free exercise grounds. Finally, in *Ziglar v. Abbasi*, the Supreme Court ruled against extending the judicially created *Bivens* remedy to certain unlawfully present aliens challenging their detention during investigations following the September 11, 2001, terror attacks. The discussion of each of these cases (1) provides background information on the case being discussed; (2) summarizes the arguments that were presented to the Court; (3) explains the Court's ultimate ruling; and (4) examines the potential implications that the Court's ruling could have for Congress, including the ramifications for the jurisprudence in a given area of law.

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The Supreme Court term that began on October 3, 2016,[1] was notably different from recent terms at the High Court. Perhaps most conspicuously, the October 2016 term was the first term in three decades to begin without Justice Antonin Scalia on the Court.[2] Justice Scalia, who died midway through the previous term,[3] had a significant influence on the law in his nearly thirty-year career on the bench,[4] and his colleagues noted his absence in several tributes to the late Justice in the year that followed.[5] Moreover, because Justice Scalia's eventual successor was not seated until the end of the October 2016 term, the Court's most recent term was the first since 1987 to commence with a Court composed of fewer than nine active Justices.[6] And, with the appointment and confirmation of Justice Neil Gorsuch to the Supreme Court in April 2017, the October 2016 term was also notable in that it marked the first term since 2010 in which a new Justice joined the High Court.[7]

Court observers have suggested that the lack of a fully staffed Supreme Court for the bulk of the last term likely had an impact on the Court's work.[8] The Court issued seventy written opinions during the October 2016 term and heard oral arguments in sixty-four cases.[9] These numbers constitute the lightest docket for the Court since at least the Civil War era.[10] Beyond the volume of the Court's workload, the overall nature of cases on its docket appeared relatively less high profile than in prior terms. During the 2014 and 2015 terms, for example, the Supreme Court

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[1] *See* J. OF THE SUPREME COURT OF THE UNITED STATES 1 (Oct. 3, 2016), https://www.supremecourt.gov/orders/journal/Jnl16.pdf.

[2] Justice Scalia joined the Court on September 26, 1986. *See* J. OF THE SUPREME COURT OF THE UNITED STATES 891 (Sept. 26, 1985), https://www.supremecourt.gov/orders/scannedjournals/1985_Journal.pdf.

[3] *See* Hon. John G. Roberts, Jr., *Statement by Chief Justice John G. Roberts, Jr.* (Feb. 13, 2016), http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16 (announcing Justice Scalia's death).

[4] For more on Justice Scalia's jurisprudence and his legacy, see CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by (name redacted) and (name redacted) .

[5] *See, e.g.*, Hon. John G. Roberts, Jr., SUPREME COURT OF THE UNITED STATES, ASSOC. JUSTICE ANTONIN SCALIA MEM'L (Nov. 4, 2016), https://www.supremecourt.gov/pdf/ASSOCIATE%20JUSTICE%20ANTONIN%20SCALIA%20MEMORIAL.pdf ("Justice Scalia's voice is perhaps most deeply missed in this very chamber."); Hon. Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 2, 5 (2016) ("I miss the challenges and the laughter Justice Scalia provoked, his pungent, eminently quotable opinions, so clearly stated that his words rarely slipped from the reader's grasp, ... The Court is a paler place without him.").

[6] Justice Lewis Powell retired prior to the October 1987 term, and his eventual successor—Justice Anthony Kennedy—did not join the Court until February 18, 1988. *See* J. OF THE SUPREME COURT OF THE UNITED STATES 351 (Feb. 18, 1988), https://www.supremecourt.gov/orders/scannedjournals/1987_Journal.pdf.

[7] Justice Elena Kagan was appointed to the Court in August 2010. *See* J. OF THE SUPREME COURT OF THE UNITED STATES 1 (Oct. 1, 2010), https://www.supremecourt.gov/orders/journal/jnl09.pdf. Justice Gorsuch authored his first opinion for the Court in *Henson v. Santander Consumer USA, Inc.*, a unanimous ruling concluding a company that collects debts that it purchased for its own account is not a "debt collector" for purposes of the Fair Debt Collection Practices Act. 137 S. Ct. 1718, 1721 (2017). For more on the *Henson* litigation and Justice Gorsuch's opinion, see CRS Legal Sidebar WSLG1845, *Supreme Court Unanimously Holds Fair Debt Collection Practices Act Does Not Cover Debt Buyer*, by (name redacted) .

[8] *See, e.g.*, Mike Sacks, *The Supreme Court's Docket is Pretty Sleepy—and That's a Good Thing*, L.A. TIMES (Oct. 2, 2016), http://www.latimes.com/opinion/op-ed/la-oe-sacks-supreme-court-sleepy-docket-20161002-snap-story.html ("The drama went off the docket this year for two reasons. First: Not every term will be the term of the century.... Second: the deadlock.").

[9] *See* SCOTUSBLOG, STAT PACK: OCTOBER 2016 TERM 1 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf.

[10] Washington University in St. Louis School of Law's Supreme Court Database indicates that the last term in which the Supreme Court issued fewer than 70 opinions was 1864, when the Court issued 59 opinions. *See* THE SUPREME COURT DATABASE, WASHINGTON UNIVERSITY LAW, http://scdb.wustl.edu/data.php?s=6 (last accessed August 31, 2017).

issued major rulings on often-contentious issues like same-sex marriage,[11] affirmative action,[12] and abortion.[13] A number of legal commentators have noted that, in contrast, the October 2016 term simply did not include any cases that would tend to generate a comparable level of interest from the general public,[14] notwithstanding potential opportunities for the High Court to rule on such cases.[15] Perhaps because of the recent composition of the Court and the nature of its docket,[16] the latest term witnessed the issuance of a notable number of unanimous opinions.[17] In fact, all of the Justices agreed on the final judgment of the Court in 59% of the opinions issued

[11] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). For more on this decision, see CRS Report R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized*. The Court during the October 2016 term did issue an opinion holding that *Obergefell* required the invalidation of an Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent. *See* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (per curiam). *Pavan*, however, was a five-page, unsigned opinion issued without oral argument.

[12] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214-15 (2016). For more on this decision, see CRS Legal Sidebar WSLG1609, *Supreme Court Upholds University of Texas's Affirmative Action Plan*.

[13] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016). For more on this decision, see CRS Legal Sidebar WSLG1610, *Supreme Court Strikes Down Texas Abortion Requirements*, by (name redacted) .

[14] *See, e.g.*, Geoffrey Lou Guray, *The Supreme Court Just Had a Quiet Term. These High-Profile Cases are About to Change That.*, PBS (July 3, 2017), http://www.pbs.org/newshour/updates/supreme-court-just-quiet-term-high-profile-cases-change/ ("Nearly every single Supreme Court term in recent memory has had at least one-headline grabbing decision. That changed in the court's latest term, when it kept high-profile legal disputes off the docket."); Joseph P. Williams, *The Supreme Court Term: No Big Blockbusters, but Plenty of Work*, U.S. NEWS & WORLD REPORT (June 19, 2017), https://www.usnews.com/news/national-news/articles/2017-06-19/what-did-the-supreme-court-do-in-2016-2017 ("The justices didn't hand down any blockbuster rulings that reshaped the social or political landscape.").

[15] The Court opted not to grant review in several closely watched cases during the October 2016 term. *See, e.g.*, Arthur v. Dunn, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (arguing that the Court should have granted certiorari in challenge that the State of Alabama's method of execution was cruel and unusual under the Eighth Amendment); Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., statement respecting denial of certiorari) (noting that a case challenging Texas's voter identification law would be "better suited for certiorari review" at a later time); *see generally* Robert Barnes, *Supreme Court Declines to Hear Immigration and Redskins Cases*, WASH. POST (Oct. 3, 2016) https://www.washingtonpost.com/politics/courts_law/supreme-court-declines-to-hear-immigration-and-redskins-cases/2016/10/03/142eeb60-8973-11e6-b24f-a7f89eb68887_story.html?utm_term=.3f2ba52986f9 (noting that the Supreme Court declined to hear appeals respecting a number of issues, including on immigration and campaign finance law). While the Court was expected to issue a potentially major ruling on whether Title IX of the Education Amendments of 1972 requires schools to provide transgendered students access to restrooms congruent with their gender identity, the Supreme Court opted to vacate and remand the case following a change to the U.S. Department of Education's guidance on the issue. *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 2017 WL 855755, at *1 (Mar. 6, 2017); *see generally* CRS Legal Sidebar WSLG1750, *Supreme Court Remands Transgender Case After Agency Guidance Withdrawn*. And in two highly anticipated immigration cases, the eight-Member court was apparently deadlocked, as the cases were rescheduled for argument for the October 2017 term. In *Jennings v. Rodriguez*, No. 15-1204, *restored to calendar for re-argument*, June 26, 2017, the Court is asked to review immigration authorities' practice of detaining certain categories of aliens while seeking orders of removal against them. In *Sessions v. Dimaya*, No. 15-1498, *restored to calendar for re-argument*, June 26, 2017, the Court will consider whether 18 U.S.C. § 16(b), as incorporated into provisions of the Immigration and Nationality Act (INA) concerning alien eligibility for removal from the United States, is unconstitutionally vague.

[16] *See* Jess Bravin, *With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc*, WALL STREET J. (Apr. 21, 2017), https://blogs.wsj.com/washwire/2017/04/21/with-court-at-full-strength-alito-foresees-more-aggressive-conservative-majority/ (quoting Justice Samuel Alito that "[h]aving eight [Justices] ... probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases than we would have issued otherwise, but as of this Monday we were back to an odd number").

[17] *See* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html?mcubz=1 ("The last term was marked by a level of agreement unseen at the court in more than 70 years. That resulted from a lack of divisive disputes on social issues and hard work by the justices, who often favored exceedingly narrow decisions to avoid deadlocks.").

during the October 2016 term, a feat surpassed only one other time during the Roberts Court era—the October 2013 term (when the Court unanimously agreed on a final judgment in 66% of cases).[18]

Notwithstanding the volume and nature of the docket for its most recent term, the October 2016 term featured consideration of numerous cases on matters of potential significance to Congress's work, especially in several discrete areas of law. Of note, of the seventy opinions issued during the last term, more than 10% were on matters related to intellectual property law.[19] The Court also considered cases involving criminal law and procedure,[20] including several cases touching on racial bias issues in the criminal justice system.[21] And the Court rendered three potentially important rulings related to the legal standards for determining whether race impermissibly predominates a state legislature's redistricting decisions.[22]

While a full discussion of every ruling from the last Supreme Court term is beyond the scope of this report, **Table 1** provides brief summaries of the Court's written opinions issued during the October 2016 term. The bulk of this report highlights four particularly notable cases the Court heard and ruled on during the October 2016 term: (1) *Matal v. Tam*, which examines the interplay between the First Amendment and trademark law; (2) *Sessions v. Morales-Santana,* a case exploring the relationship between immigration law and the Court's Equal Protection jurisprudence; (3) *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the latest chapter in the Court's Free Exercise jurisprudence; and (4) *Ziglar v. Abbasi*, a case limiting the types of damages claims that can be asserted against federal officers for alleged constitutional violations under the *Bivens*[23] doctrine. Each case is addressed in a separate section below,[24] which

[18] *See* SCOTUSBLOG, STAT PACK: OCTOBER 2016 TERM 16 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf.

[19] *See* Matal v. Tam, 137 S. Ct. 1744 (2017); Sandoz Inc. v. Amgen Inc., 137 S. Ct. 1664 (2017); Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523 (2017); TC Heartland L.L.C. v. Kraft Foods Grp. Brands L.L.C., 137 S. Ct. 1514 (2017); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., L.L.C., 137 S. Ct. 954 (2017); Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734 (2017); Samsung Elecs. Co. v. Apple Inc., 137 S. Ct. 429 (2016). For a description of the holdings of these cases, see **Table 1**.

[20] According to **Table 1,** twenty-seven of the Court's seventy opinions touched in some way on questions of criminal law or procedure.

[21] *See, e.g.*, Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that when a juror makes a clear statement indicating that he relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the rule prohibiting challenges to a verdict based on comments the jurors made during deliberations must "give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee"); Buck v. Davis, 137 S. Ct. 759, 776 (2017) (holding that a death row inmate should be able to seek a new sentence because of "a particularly noxious strain of racial prejudice" in testimony introduced by the inmate's own defense attorney during the penalty phase of his trial). For a discussion of *Pena-Rodriguez*, see CRS Legal Sidebar WSLG1676, *UPDATE: Racially Biased Jurors & the No Impeachment Rule*, by (name redacted). For a discussion of *Buck*, see CRS Legal Sidebar WSLG1751, *Capital Punishment and Ineffective Assistance of Counsel: Latest from the Supreme Court*, by (name redacted)

[22] *See* North Carolina v. Covington, 137 S. Ct. 1624, 1625 (2017) (vacating a lower court's order to require special elections to remedy illicit racial gerrymandering); Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017) (affirming a district court ruling that North Carolina officials used race as the predominant factor in drawing district lines when they created two districts whose voting-age populations were majority black); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 794 (2017) (reversing a district court ruling concluding that race was not the predominant factor in the Virginia legislature's design for eleven of the twelve state legislative districts challenged). For background on the issues addressed in these cases, see CRS Report R44798, *Congressional Redistricting Law: Background and Recent Court Rulings*, by (name redacted) .

[23] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[24] These cases will be the subject of a seminar at CRS's Continuing Legal Education series, the Federal Law Update. For more information, see CRS, FEDERAL LAW UPDATE: FALL 2017, http://www.crs.gov/Events/Details/16684c3b-

(1) provides background information on the case; (2) summarizes the arguments that were presented to the Court; (3) explains the Court's ultimate ruling; and (4) examines the implications that the Court's ruling could have for Congress, including broader ramifications for jurisprudence in a given area of law.

Trademarks and Free Speech: *Matal v. Tam*

Matal v. Tam (formerly *Lee v. Tam*) involved a dispute at the intersection of First Amendment and trademark law. According to the Supreme Court's opinion in *Tam*, a federal law prohibiting the registration of trademarks that "may disparage" any "persons, living or dead"[25] violates the Free Speech Clause of the First Amendment.[26] While *Tam* involved the U.S. Patent and Trademark Office's (PTO's) refusal to register the mark "THE SLANTS" on the grounds that it may be disparaging to Asian Americans, the decision has broader implications for trademark law as well as the Court's free speech jurisprudence.

The Lanham Act[27] specifies the various requirements for registering a trademark.[28] Section 2(a) prohibits the registration of a mark that "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may *disparage* or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[29] To make this determination, the PTO considered the content of the trademark, "the likely meaning of the matter in question," and, if the meaning of the mark "is found to refer to identifiable persons, whether that meaning may be disparaging to a substantial composite of the referenced group."[30]

The circumstances underlying the *Tam* litigation began in 2006, when Simon Tam started an Asian American dance-rock band called "The Slants," a name he selected in an attempt to reclaim

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[25] 15 U.S.C. § 1052(a) (2012).

[26] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

[27] Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified at 15 U.S.C. § 1051 *et seq.*).

[28] A trademark is "any word, name, symbol, or device" used "to identify and distinguish [a markholder's] goods . . . from those manufactured or sold by others and to indicate the source of the goods." 15 U.S.C. § 1127. Trademark rights are not created by federal law, but, rather, arise through the use of a mark in commerce in connection with particular goods and services. *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1317 (2015) ("[T]he right to adopt and exclusively use a trademark appears to be a private property right that 'has been long recognized by the common law and the chancery courts of England and of this country.' ... [T]he exclusive right to use a trademark 'was not created by the act of Congress, and does not now depend upon it for its enforcement.'" (quoting *In re* Trade-Mark Cases, 100 U.S. 82, 92 (1879))). That is, there are certain common-law rights attendant to the use of marks in commerce without federal registration, including the right to prevent others from using the mark and the right to sue for infringement. *See id.* Federal trademark registration, however, provides certain benefits to markholders, including: serving as prima facie evidence of the markholder's exclusive right to use the mark, 15 U.S.C. §§ 1057(b), 1115; providing constructive notice of the markholder's claim of ownership of the mark, *id.* § 1072; and, after five years of registration, rendering a markholder's right to use a mark "incontestable," *id.* §§ 1065, 1115(b).

[29] 15 U.S.C. § 1052(a) (emphasis added).

[30] TRADEMARK MANUAL OF EXAM. PROC. (TMEP) § 1203.03(b)(i) (Jan. 2015 ed.); *see also In re* Tam, 808 F.3d 1321, 1330-31 (Fed. Cir. 2015) (en banc) ("A disparaging mark is a mark which 'dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison.'" (quoting *In re* Geller, 751 F.3d 1355, 1358 (Fed. Cir. 2014))).

or reappropriate Asian stereotypes.[31] In 2011, Tam sought to register the mark "THE SLANTS,"[32] but the PTO denied the application on disparagement grounds.[33] Tam appealed the PTO's rejection to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[34] While a three-judge panel affirmed the PTO's disparagement determination and rejected Tam's constitutional challenge on First Amendment grounds as "foreclosed by our precedent,"[35] the court sitting en banc subsequently held, "[t]he government regulation at issue amounts to viewpoint discrimination, and under the strict scrutiny review appropriate for government regulation of message or viewpoint, we conclude that the disparagement proscription of § 2(a) is unconstitutional."[36] In so holding, the court explicitly overruled long-standing circuit precedent.[37]

The Supreme Court granted certiorari and heard arguments on January 18, 2017.[38] The sole question before the Court was whether the disparagement provision is facially invalid under the First Amendment.[39] The PTO raised three arguments in defense of the disparagement clause: (1) trademarks are not private speech, but are instead the speech of the government (i.e., government speech) that the Court has recognized can favor a particular viewpoint;[40] (2) trademarks are government-subsidized speech for which the government can make content-based distinctions;[41] and (3) the disparagement clause "simply defines the criteria for participation in the government's voluntary trademark-registration program" for which it "has significant discretion" to determine the criteria for inclusion.[42] In the alternative, the PTO argued that, if trademarks are not government speech, they are merely commercial speech.[43]

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[31] *Tam*, 808 F.3d at 1331 ("With their lyrics, performances, and band name, Mr. Tam and his band weigh in on cultural and political discussions about race and society . . . .").

[32] U.S. Trademark Application No. 85/472,044 (filed Nov. 14, 2011).

[33] *In re* Tam, 108 U.S.P.Q.2d 1305 (T.T.A.B. 2013) ("The fact that applicant has good intentions underlying his use of the term does not obviate the fact that a substantial composite of the referenced group find the term objectionable.").

[34] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Federal Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[35] *In re* Tam, 785 F.3d 567, 571-72 (Fed. Cir. 2015).

[36] *Tam*, 808 F.3d at 1328.

[37] *Id.* at 1330 n.1 ("To be clear, we overrule *In re McGinley* . . . and other precedent insofar as they could be argued to prevent a future panel from considering the constitutionality of other portions of § 2 in light of the present decision."). The rule of *McGinley* as established by the Federal Circuit's predecessor provided: "With respect to appellant's First Amendment rights, it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark." *In re* McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981).

[38] Transcript of Oral Argument, Lee v. Tam, No. 15-1293 (U.S. Jan. 18, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1293_o7jp.pdf.

[39] *See* Brief for Petitioner at I, Matal v. Tam, 137 S. Ct. 1744 (2017) (No. 15-1293) [hereinafter Pet'r's Br.]; Brief for Respondent at i, Matal v. Tam, 137 S. Ct. 1744 (2017) (No. 15-1293) [hereinafter Resp't's Br.].

[40] Pet'r's Br. 12.

[41] *Id.* at 44 ("'[I]t is well established that the government can make content-based distinctions when it subsidizes speech.'" (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188-89 (2007))).

[42] *Id.* at 9; *see also* Reply Brief for Petitioner at 2, Matal v. Tam, 137 S. Ct. 1744 (2017) (No. 15-1293) [hereinafter Pet'r's Reply] ("Although the First Amendment gives respondent broad latitude to use racial slurs in his own communications, it does not require the government to assist him in that endeavor.").

[43] Pet'r's Br. 48 ("Because the essential function of trademarks is to identify goods and services as emanating from a particular commercial source, trademarks are 'commercial speech' and receive 'a limited form of First Amendment protection.'" (quoting S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 535 (1987))).

For his part, Tam argued that the disparagement clause violates the First Amendment "because it imposes a significant viewpoint-based burden on speech."[44] To Tam, the clause "permits the registration of marks that express a positive or neutral view of a person, but bars the registration of marks that express a negative view."[45] Furthermore, Tam asserted that "[t]he denial of registration is a serious burden" because those trademark applicants whose viewpoint is not approved by the PTO are denied the benefits of trademark registration.[46]

The Supreme Court's opinion in *Tam*, authored by Justice Alito, held that the disparagement provision violates the Free Speech Clause because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[47] Elaborating on this point in a later part of his opinion, Justice Alito (on behalf of four Justices) remarked that the disparagement clause "evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue."[48] However, Justice Alito concluded, "in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint."[49]

In concluding that the disparagement provision violated the First Amendment, the Court held that it was "far-fetched to suggest that the content of a registered mark is government speech," which is exempt from free speech scrutiny under the First Amendment.[50] The Court observed that "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration."[51] Comparing trademarks to monuments donated to a public park (the subject of *Pleasant Grove City v. Summum*)[52] and specialty license plates (the subject of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*),[53] both of which have been held to be government speech, the Court held that trademarks constitute *private* speech because (1) they do not have a history of use by the government to convey messages to the public; (2) the government does not maintain direct control over the messages conveyed; and (3) the public does not "associate[] the contents of trademarks with the Federal Government."[54] Finally, pointing to a variety of registered trademarks communicating a range of viewpoints and opinions, the Court noted that, if trademarks are considered government speech, "the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is

[44] Resp't's Br. 15.

[45] *Id.* at 10.

[46] *Id.* While there are common-law rights attendant to the use of marks in commerce, including the right to prevent others from using the mark and the right to sue for infringement, federal trademark registration provides certain additional benefits to markholders. *See supra* note 46. While the PTO acknowledged that trademark registration provides these benefits, it countered that denial of these "enhanced legal benefits" did not amount to a burden on speech because Tam remained free to use his mark as he likes. *See* Pet'r's Reply 6. That is, trademark registration is not necessary for him to exercise his common law rights of preventing others from using his mark and suing for infringement. *Id.*

[47] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

[48] *Id.* at 1763 (Alito, J.).

[49] *Id.*

[50] *Id.* at 1758 (opinion of the Court).

[51] *Id.*

[52] 555 U.S. 460, 464 (2009).

[53] 135 S. Ct. 2239, 2243-44 (2015).

[54] *Matal*, 137 S. Ct. at 1759-60.

unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public."[55]

Three Justices joined other portions of Justice Alito's opinion examining whether the trademark registration program is akin to a government subsidy for speech for which it can make content-based distinctions (e.g., government funding for the arts),[56] or participation in a government program for which it has discretion to set the criteria for inclusion (e.g., programs that collect union dues for public employee unions[57]).[58] Justice Alito found that neither analog was appropriate because trademark registration is more comparable to a limited public forum for private speech, wherein the First Amendment prohibits viewpoint-based discrimination.[59] Justice Alito's opinion also considered whether trademarks might constitute commercial speech, subject to a lesser degree of scrutiny, but opined that the disparagement clause fails even under less stringent scrutiny because it was not "narrowly drawn" to serve "a substantial interest."[60] In so doing, Justice Alito noted, "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[61]

Three Justices joined Justice Kennedy's concurring opinion, which agreed with the opinion of the Court to the extent it suggested that the disparagement clause amounts to unconstitutional viewpoint discrimination.[62] For Justice Kennedy, however, this ultimate outcome "render[ed] unnecessary any extended treatment of other questions raised by the parties" (i.e., the government subsidy, government program, and commercial speech arguments).[63] Justice Thomas filed a separate concurring opinion arguing that the regulation of commercial speech to suppress truthful ideas should be subject to strict scrutiny.[64]

The Supreme Court's decision in *Tam* has consequences for other pending cases, such as *Pro-Football, Inc. v. Blackhorse*, a case challenging the PTO's cancellation of the "REDSKINS" trademarks as disparaging to Native Americans.[65] In *Pro-Football*, the district court upheld the cancellations against a First Amendment challenge almost identical to Tam's, concluding that "the federal trademark program is government speech under the Supreme Court's analysis in

[55] *Id.* at 1758 (comparing "Abolish Abortion," Registration No. 4,935,774, with "I Stand With Planned Parenthood," Registration No. 5,073,573; "Capitalism Is Not Moral, Not Fair, Not Freedom," Registration No. 4,696,419, with "Capitalism Ensuring Innovation," Registration No. 3,966,092; and "Global Warming Is Good," Registration No. 4,776,235, with "A Solution to Global Warming," Registration No. 3,875,271).

[56] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572-73 (1998) (rejecting facial First Amendment challenge to statute directing panel awarding federal grants for the arts to consider "decency and respect for the diverse beliefs and values of the American public").

[57] *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009) ("The First Amendment prohibits government from abridging the freedom of speech; it does not confer an affirmative right to use government resources to facilitate private speech." (internal quotation marks omitted)).

[58] *Matal*, 137 S. Ct. at 1760-62 (Alito, J.).

[59] *Id.* at 1762-63.

[60] *Id.* at 1674.

[61] *Id.* (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[62] *Id.* at 1675 (Kennedy, J., concurring in part and concurring in the judgment).

[63] *Id.*

[64] *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[65] Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 447 (E.D. Va. 2015).

Walker."[66] While on appeal to the Fourth Circuit,[67] Pro-Football filed a petition for a writ of certiorari before judgment to the Supreme Court, which would have allowed the case to be heard alongside *Tam*, but the petition was denied.[68] On June 21, 2017, Pro-Football submitted the *Tam* opinion to the Fourth Circuit and requested that judgment be entered in its favor, after which the court requested the parties' positions as to whether oral argument on this request was necessary.[69] In response, all parties conceded that *Tam* controls the *Pro-Football* case and consented to the court's entering of judgment in favor of Pro-Football.[70]

The *Tam* decision will also likely have consequences for the trademark regime as a whole. The Lanham Act contains other content-based restrictions, such as those prohibiting "immoral" and "scandalous" marks.[71] As the Federal Circuit recognized, "other portions of [the Act] may likewise constitute government regulation of expression based on message,"[72] and the Supreme Court's holding in *Tam* appears to solidify this conclusion. In this vein, the Court's opinion in *Tam* will affect other cases, such as *In re Brunetti*, a case pending before the Federal Circuit involving a challenge to the PTO's rejection of an application for the trademark "FUCT" as scandalous and immoral.[73] On June 20, 2017, the Federal Circuit requested briefing addressing (1) "the impact of the Supreme Court's *Tam* decision on Mr. Brunetti's case," and (2) "whether there is any basis for treating immoral and scandalous marks differently than disparaging marks in light of the Supreme Court's unanimous holding that 'offensive' trademarks cannot be banned."[74] Arguing that *Tam* is outcome determinative, Brunetti responded that "there is no difference between the Disparagement Clause and the Scandalous Clause."[75] The PTO, however, relying heavily on Justice Kennedy's concurring opinion in *Tam*, countered that *Tam* struck down the disparagement provision on the basis of viewpoint discrimination and, unlike the disparagement provision, the prohibition on scandalous marks is viewpoint neutral.[76] Oral argument occurred on August 29, 2017,[77] and the case is currently under consideration by the Federal Circuit.

The Court's opinion in *Tam* also has implications for free speech law more generally. While the Court in *Tam* made it clear that "[t]rademarks are private, not government, speech," it also cautioned against the "dangerous extension of the government-speech doctrine."[78] The Court pointed to copyright registration as "[p]erhaps the most worrisome implication" of extending the government speech doctrine.[79] The PTO attempted to distinguish the copyright system from the trademark regime, stating that while copyright is "the engine of free expression," "trademarks are

[66] *Id.* at 458.

[67] *Id.* at 439, *appeal docketed*, No. 15-1874 (4th Cir. Aug. 6, 2015).

[68] *Pro-Football*, No. 15-1874 (U.S. Oct. 3, 2016) (denying petition for certiorari before judgment).

[69] *Pro-Football*, 112 F. Supp. 3d 439 (mem. to parties requesting statement of positions on need for oral argument following Supreme Court's decision in *Tam*).

[70] As of August 24, 2017, the Fourth Circuit has yet to act on the request.

[71] 15 U.S.C. § 1052(a).

[72] *In re* Tam, 808 F.3d 1321, 1330 n.1 (Fed. Cir. 2015) (en banc).

[73] *In re* Brunetti, No. 85310960 (T.T.A.B. 2014), *appeal docketed*, No. 15-1109 (Fed. Cir. Oct. 28, 2014).

[74] *Brunetti*, No. 15-1109 (Fed. Cir. June 20, 2017) (order requesting letter briefs).

[75] Brief for Appellant at 1, *Brunetti*, No. 15-1109 (Fed. Cir. filed Aug. 9, 2017).

[76] Brief for Appellee at 2, *Brunetti*, No. 15-1109 (Fed. Cir. filed July 20, 2017).

[77] *Brunetti*, No. 15-1109 (Fed. Cir. July 24, 2017) (order scheduling oral argument).

[78] Matal v. Tam, 137 S. Ct. 1744, 1760 (2017) (opinion of the Court).

[79] *Id.*

source identifiers in commerce that are not inherently expressive."[80] That is, "[w]hile some trademarks have incidental expressive meaning, the essential function of a trademark is to identify and distinguish the source of goods or services in commerce."[81] The Court, unpersuaded by this argument, stated, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."[82]

As noted, the Court also distinguished trademarks from the specialty license plates at issue in *Walker v. Texas Division, Sons of Confederate Veterans*. In that case, the Court ruled that license plates constituted government speech and upheld Texas's refusal to permit a Confederate-flag design on a license plate because the design "might be offensive to ... the public."[83] In *Tam*, the Court stated that *Walker* "likely marks the outer bounds of the government-speech doctrine."[84] Thus, *Tam* may signal that the factors from *Walker* that inform whether expression is government speech (i.e., whether there is a history of the government using a specific form of speech to convey messages to the public; whether the government maintains direct control over the messages conveyed; and whether the public closely identifies a form of speech with the government), originally articulated in a case involving monuments in a public park,[85] will be analyzed narrowly in future cases. The Court's apparent reluctance to expand the government speech doctrine suggests limits to what the Court described as an "essential" doctrine that is "susceptible to dangerous misuse."[86]

Finally, *Tam* continues a recent trend of the Court to afford fairly broad First Amendment protection for speech in the commercial context. Three Justices joined the portion of Justice Alito's opinion that considered whether trademarks constitute commercial speech, but opined that the disparagement provision would fail even under less stringent scrutiny as has been applied to commercial speech in prior cases.[87] Notably, in his concurring opinion (also joined by three Justices), Justice Kennedy noted that "[c]ommercial speech is no exception" to the rule that viewpoint discrimination requires heightened scrutiny.[88] Justice Kennedy reasoned that, "[u]nlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality."[89] In his concurring opinion, Justice Thomas maintained his long-standing

[80] Pet'r's Br. 47.

[81] *Id.*

[82] *Matal*, 137 S. Ct. at 1758.

[83] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

[84] *Matal*, 137 S. Ct. at 1760.

[85] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 464 (2009).

[86] *Matal*, 137 S. Ct. at 1758.

[87] *Id.* at 1763-64 (Alito, J.).

[88] *Id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

[89] *Id.*

position[90] that any restriction on truthful commercial speech should be subject to strict scrutiny.[91] As a result, the Court in *Tam* seems to view the commercial speech doctrine as largely irrelevant to the result in this case, a view that aligns with other recent Court decisions involving commercial speech.[92]

Immigration and Gender Discrimination: *Sessions v. Morales-Santana*

Among the cases decided last term,[93] *Session v. Morales-Santana* potentially has the most consequential implications for future judicial review of immigration and citizenship matters.[94] The Supreme Court has repeatedly characterized Congress's authority over immigration as plenary, and the judiciary has employed a highly deferential standard of review to federal immigration laws.[95] In *Morales-Santana,* however, the Court ruled that a gender-based distinction in the derivative citizenship rules—under which persons born abroad to a U.S. parent may have U.S. citizenship automatically conferred at birth—violated equal protection requirements.[96] In

[90] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment) (stating, in a case involving a state law prohibiting the advertisement of liquor prices, that "the government's asserted interest [in] keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech").

[91] *Matal*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[92] *See, e.g.*, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1147 (2017) (holding that a state law prohibiting the display of credit card surcharges by merchants constitutes a regulation of merchants' speech); *IMS Health*, 564 U.S. at 563-54 (striking down a state law regulating the sale, disclosure, and use of prescriber-identifying information as unconstitutional under a strict scrutiny analysis).

[93] This past term, the High Court deferred resolution of a number of immigration cases until the October 2017 term, raising the possibility that the coming term will result in several major immigration rulings. Two immigration cases where oral arguments were heard by the Court this past term are scheduled for re-argument in October. *See supra* note 15 (discussing the Court's treatment of *Jennings v. Rodriguez* and *Sessions v. Dimaya*). And while two lower court injunctions blocking implementation of the March 6, 2017 executive order limiting certain foreign nationals and refugees from traveling to the United States were partially stayed by the Court in June, the actual merits of the lower-court decisions concerning the executive order's validity are scheduled for consideration in the coming term. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (granting certiorari and partially lifting two lower court injunctions pending further Supreme Court deliberations). *See also See also* Order in Pending Case, Trump v. Hawaii, No. 16-1540 (Sept. 12, 2017) (staying mandate of U.S. Court of Appeals of the Ninth Circuit that limited executive implementation of action related to certain refugees); Order in Pending Case, Trump v. Hawaii, No. 16-1540, Jul. 19, 2017 (denying motion for clarification of the stay on the injunctions at issue, and partially staying a modification to one of the injunctions made by a lower court in response to the Supreme Court's stay of its earlier injunction).

[94] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

[95] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (discussing the "limited scope" of judicial review of immigration legislation, and observing that "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal citations and quotations omitted). For example, the power to regulate immigration and naturalization has permitted the federal government to discriminate on the basis of alienage in the treatment of persons located in the United States, at least so long as the discrimination satisfies the rational basis standard of review. *See* Mathews v. Diaz, 426 U.S. 67, 79-80, 83 (1976) (holding that federal conditions upon alien eligibility for public assistance were not "wholly irrational," and observing that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens ... The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'").

[96] A few years earlier in *Flores-Villar v. United States*, the Court was asked to review a decision by the Ninth Circuit that upheld as constitutionally valid the same gender-based distinction at issue in *Morales-Santana*. Divided 4-4 on the

doing so, the Court held that gender-based distinctions in laws governing the acquisition of U.S. citizenship trigger a more "exacting standard of review" than do gender-based distinctions in laws governing the entry or exclusion of non-U.S. nationals (aliens).[97]

The *Morales-Santana* case concerned provisions in the Immigration and Nationality Act (INA) specifying when a child born abroad to a U.S. citizen and an alien shall be granted U.S. citizenship at birth.[98] Although the specific eligibility requirements for derivative citizenship in such circumstances[99] have been amended over the years, the requirements have consistently differed based on the gender of the U.S.-citizen parent.[100] *Morales-Santana* focused on one key difference: the default rule is that a U.S.-citizen parent must have been physically present in the United States (or its outer possessions) for a multiyear period prior to the birth of his or her child abroad to transmit citizenship, but an unmarried U.S. citizen-mother need only have been continuously present for one year prior to the birth of her child.[101]

Morales-Santana involved a constitutional challenge to these differing physical presence requirements.[102] Luis Ramón Morales-Santana was born abroad and out of wedlock to a U.S.-citizen father and an alien mother.[103] He moved to the United States at thirteen, but decades later he was placed in alien removal proceedings based on his criminal conduct.[104] As a defense, Morales-Santana argued that he was a U.S. citizen. Although his U.S.-citizen *father* did not satisfy the physical presence requirements necessary to transmit citizenship under the existing INA rules, citizenship would have been conferred to a similarly situated individual born to an unwed U.S.-citizen *mother* under the applicable standard.[105] Morales-Santana claimed that the differing standards violated his (now-deceased) father's constitutional right to equal protection.[106] The U.S. Court of Appeals for the Second Circuit (Second Circuit) agreed and further ruled that,

question, the Court summarily affirmed the Ninth Circuit's decision. Flores-Villar v. United States, 564 U.S. 210 (2011) (per curiam), affirming United States v. Flores-Villar, 536 F. 3d 990 (9th Cir. 2008).

[97] *Morales-Santana*, 137 S. Ct. at 1693-94.

[98] *See id.* at 1686-87.

[99] The derivative citizenship provisions also provide different eligibility requirements depending upon whether one or both parents of a child born abroad are U.S. citizens. *See* 8 U.S.C. § 1401(c). Unless otherwise specified, this report's discussion of the derivative citizenship provisions' application to a married or unwed U.S.-citizen parent refers to situations where the other parent is an alien.

[100] *See* 8 U.S.C. §§ 1401(a)(7), 1409 (1958 ed.), now codified and amended at 8 U.S.C. §§ 1401(g), 1409 (a), (c) (2012 ed.).

[101] The length of the physical presence requirements has been modified over the years. The primary rule at the time relevant to the *Morales-Santana* case required an unwed U.S.-citizen father or a U.S.-citizen parent (regardless of gender) married to an alien to have had ten years' physical presence in the United States, at least five of which were after reaching the age of fourteen, in order to transmit citizenship. *See* 8 U.S.C. §§1401(a)(7), 1409 (1958 ed.). The current rule for such persons generally requires five years' physical presence, at least two of which were after the age of fourteen. 8 U.S.C. §§ 1401(g), 1409 (a) (2012 ed.).

[102] *Morales-Santana*, 137 S.Ct. at 1686.

[103] *Id.*

[104] *Id. a*t 1688.

[105] *See* 8 U.S.C. § 1401(a)(7) (1958 ed.).

[106] *Morales-Santana*, 137 S. Ct. at 1688 (explaining that Morales-Santana could not assert an equal protection violation on the basis of his own gender because the derivative citizenship provision did not distinguish between the sons and daughters of U.S. citizens); *see also id.* at 1689 (concluding that Morales-Santana had satisfied the requirements for third-party standing and could rest his claim for relief on the rights of his deceased father).

as a remedy, the one-year physical presence requirement applicable to unwed U.S.-citizen mothers should also apply to unwed U.S.-citizen fathers.[107]

The Supreme Court, in an opinion authored by Justice Ginsburg, agreed with the Second Circuit's conclusion that the gender-based distinction between the physical presence requirements applicable to unwed U.S.-citizen parents violated the equal protection component of the Fifth Amendment's Due Process Clause.[108] Applying the "exceedingly persuasive justification" test typically used to review gender-based distinctions by the government,[109] the Court rejected the government's argument that the "gender-based differential ensures that a child born abroad has a connection to the United States ... to warrant conferral of citizenship at birth."[110] The Court characterized this argument as an "anachronistic" assumption that "unwed fathers care little about, indeed are strangers, to their children," and thus need stronger ties to the United States to compete with the alien mother's ties to her own country.[111] The Court likewise found that the government provided insufficient evidence to base its claim that the differentiation between children of unwed U.S.-citizen mothers and U.S.-citizen fathers was premised on a special concern that children with a U.S.-citizen mother and alien father risked being rendered "stateless" (i.e., without citizenship to any country).[112]

While six Justices on the Court agreed that an equal protection violation had occurred, all eight Justices who considered the case (Justice Gorsuch did not participate) agreed that the remedy crafted by the Second Circuit was inappropriate.[113] The Court reasoned that extending the one-year physical presence rule to unwed U.S.-citizen fathers would run counter to Congress's intentions when it established this statutory scheme. Because of the interplay of different INA provisions, the Second Circuit's remedy would result in more rigorous physical presence requirements for a *married* U.S. citizen than a similarly situated *unmarried* U.S. citizen.[114] As a result, the Court held that the longer physical presence requirement for unwed U.S.-citizen fathers should also be applied prospectively to unwed U.S.-citizen mothers, as this remedy was what "Congress likely would have chosen had it been apprised of the constitutional infirmity."[115] Thus, while the Court found that a physical presence requirement for derivative citizenship violated equal protection, the Court did not alter the requirements applicable to Morales-Santana's

[107] Morales-Santana v. Lynch, 804 F.3d 520, 523-24 (2d Cir. 2015).

[108] *Morales-Santana*, 137 S.Ct. at 1686 and n.1.

[109] *Id.* at 1690.

[110] *Id.* at 1694-95.

[111] *Id*. at 1692-93. Elsewhere in the opinion, the majority contended that such gender-based distinctions not only "disserve men who exercise responsibility for raising their children," *id*. at 1693, but also perpetuate stereotypes that create "a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." *Id*. at 1692-93 (quoting Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (brackets in original)).

[112] *Id.* at 1695-96.

[113] Justice Thomas (joined by Justice Alito) concurred with the majority's judgment to the extent it reversed the Second Circuit. *Id*. at 1701-02 (Thomas, J., concurring). According to Justice Thomas, because the Court's remedial holding does not change the physical-presence requirement for Morales-Santana's father and thus cannot provide any judicial relief, the opinion should not have waded into the underlying constitutional waters. *Id*. at 1701.

[114] *See id*. at 1700 (majority op.) ("For if [the] one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S.-citizen parent is married?").

[115] *Id.* (internal citations and quotations omitted).

father.[116] Consequently, Morales-Santana's status as an alien subject to removal remained unchanged.

While the Court's ruling did not affect Morales-Santana's citizenship status, the decision appears to constrain Congress's ability to make gender-based distinctions when crafting derivative citizenship statutes. The Court had previously upheld the INA's paternal-acknowledgment requirements as a permissible gender-based distinction in the conferral of derivative citizenship;[117] the *Morales-Santana* majority viewed the statute's physical presence requirements as meaningfully different. Unlike paternal-acknowledgment requirements, the lengthier physical presence requirements for unwed U.S.-citizen fathers at issue in *Morales-Santana* did nothing to demonstrate the parent's ties to the child and also placed more than a "minimal" burden on the affected parent.[118] Moreover, whereas earlier Court opinions had reached no clear view on the appropriate standard of review for gender-based distinctions made by citizenship rules, *Morales-Santana* indicates that the same level of heightened scrutiny applicable to the review of other gender-based classifications will be employed to the review of derivative citizenship claims.[119]

More broadly, some observers have speculated that the decision may signal that judicial deference toward Congress's authority over immigration is waning.[120] Notwithstanding the Court's long-standing deference to Congress on immigration matters,[121] the *Morales-Santana* Court reviewed the derivative citizen statute's gender-based distinctions in the same manner as employed in nonimmigration contexts.[122] Indeed, the *Morales-Santana* Court did not believe that Congress's plenary authority over immigration was controlling in the case before it. Though such authority had led the Court earlier to uphold gender-based distinctions in the context of alien admission preferences, the *Morales-Santana* majority averred that heightened scrutiny is required when gender-based distinctions involve citizenship issues rather than the entry or exclusion of aliens.[123]

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[116] *Id.*

[117] *See* Nguyen v. INS, 533 U.S. 53, 57-59 (2001) (reviewing condition of derivative citizenship statute found in 8 U.S.C. § 1409(a), under which legitimation or parental acknowledgment is required by an unmarried U.S.-citizen father, a requirement not applicable to an unmarried U.S.-citizen mother).

[118] *Morales-Santana*, 137 S. Ct. at 1694.

[119] *Compare id*. at 1690 (employing heightened scrutiny), *with Nguyen*, 533 U.S. at 60-61 (concluding that because a gender-based distinction relating to paternity acknowledgement satisfied heightened scrutiny, there was no need to consider whether a lower level of scrutiny was permissible); and Miller v. Albright, 523 U.S. 420, 423 (1998) (plurality opinion where Justices were unable to agree on the appropriate standard of scrutiny for reviewing gender-based distinction in derivative citizenship eligibility requirements).

[120] *See, e.g.*, David Rubenstein, *Immigration Symposium: The Future of Immigration Exceptionalism*, SCOTUSBLOG (June 29, 2017), http://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/; Allissa Wickham, *Citizenship Ruling May Spell Trouble For Plenary Power*, LAW360 (June 13, 2017), https://www.law360.com/articles/933945/citizenship-ruling-may-spell-trouble-for-plenary-power.

[121] *See supra* note 95 and accompanying text.

[122] *Morales-Santana*, 137 S. Ct. at 1689-90.

[123] In *Fiallo v. Bell*, the Court applied a very deferential standard when reviewing gender-based distinctions in the context of alien admission preferences, based upon Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country." 430 U.S. 787, 794 (1977). The *Morales-Santana* majority opined that a more "exacting standard of review" was appropriate when assessing the gender-based distinctions in the application of derivative citizenship statutes. 137 S. Ct. at 14-17 (concluding that heightened scrutiny was appropriate to the review of gender-based distinctions in derivative citizenship requirements, as these distinctions do not touch upon the "entry preference for aliens" at issue in *Fiallo*).

Religious Freedom: *Trinity Lutheran Church of Columbia, Inc. v. Comer*

In its final decision of the term, the Supreme Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a case examining the constitutionality of a state policy that prohibited the distribution of public funds to religious entities.[124] The Court held that a church preschool and day care center cannot be disqualified from participating in a state program that offered funding for resurfacing of playgrounds because of the center's religious affiliation.[125] While the case had been of particular interest to legal scholars anticipating that newly confirmed Justice Neil Gorsuch might provide the deciding vote,[126] the Court ultimately voted 7-2 in the church's favor, with the majority of Justices viewing the state's action as government discrimination based on the religious status of the grant applicant in violation of the federal Free Exercise Clause.[127]

Trinity Lutheran centered on a challenge to a program administered by Missouri's Department of Natural Resources (DNR) that reimburses eligible nonprofit organizations that install playground surfaces made from recycled tires.[128] The program awards grants to applicants on a competitive basis, but, at the time the lawsuit commenced, the program barred participation by applicants that were owned or controlled by a religious entity.[129] The state justified its policy of precluding religious applicants by citing a Missouri constitutional provision that bars public funds from being used to aid religious institutions.[130] As a result, despite ranking the church among the top applicants, DNR denied Trinity Lutheran Church's grant application for resurfacing of a playground at its preschool and day care center.[131]

The church challenged the decision, alleging discrimination based on its religious identity in violation of the federal Free Exercise Clause, which bars laws and policies "prohibiting the free exercise [of religion]."[132] The church argued that categorical exclusion of religious organizations from participation in a public program was incompatible with the Free Exercise Clause's

[124] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

[125] *Id*. at 2025.

[126] The Court had granted Trinity Lutheran Church's petition for certiorari in January 2016, before Justice Scalia's death, but did not schedule oral arguments until after the confirmation of Justice Gorsuch in the spring of 2017. Trinity Lutheran Church v. Pauley, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 84 U.S.L.W. 3405 (U.S. Jan. 15, 2016) (No. 15-577). Speculation occurred that the Court's delay was the result of the eight sitting Justices being deadlocked, providing the new Justice with the deciding vote. *See* Amy Howe, *Argument Analysis: Justices Leaning Toward a Ruling For Trinity Lutheran On The Merits*, SCOTUSBLOG (Apr. 19, 2017, 2:14 PM), ("[T]he conventional wisdom went, the other eight justices were likely deadlocked on the case and were expecting him to cast the tiebreaking vote, which is why they waited nearly 15 months after granting review before hearing oral argument.").

[127] *Trinity Lutheran Church*, 137 S. Ct. at 2016-17.

[128] *Id*. at 2017.

[129] *Id*.

[130] *Id*. at 2017 (citing MO. CONST. art. I, § 7). Article I, Section 7 of Missouri Constitution states "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

[131] *Trinity Lutheran Church*, 137 S. Ct. at 2018 (noting that the church center "ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant.").

[132] U.S. CONST. amend. I.

guarantees.[133] In response, Missouri characterized the church's argument as requiring the state to go beyond the guarantees of the Free Exercise Clause, which "does not guarantee churches opportunities for public financing."[134] According to the state, its policy "places no meaningful restraint on Trinity Lutheran's ability to freely exercise its religion" and ensures that the state would not be required "to subsidize" the activities of a church.[135] While Missouri cited a state constitutional provision restricting the distribution of public funds to aid religious entities, a stronger antiestablishment standard than the federal Establishment Clause,[136] both parties agreed that the case did not present questions under the federal Establishment Clause.[137]

The Supreme Court ultimately was persuaded by the arguments of the church, holding that religious entities could not be barred from availing themselves of opportunities for the resurfacing grants simply because of their religious identity.[138] The Court based its opinion on the First Amendment's general prohibition on government interference with the "free exercise" of religion by its citizens.[139] Under the Free Exercise Clause, while neutral laws of general applicability that incidentally burden a person's free exercise rights are reviewed under a less demanding rubric, laws that "single out the religious for disfavored treatment" generally do not survive constitutional challenge.[140] In this vein, the Court has subjected "laws that target the religious for 'special disabilities' based on their 'religious status' [to the strictest scrutiny]."[141] In particular, the *Trinity Lutheran* Court explained that laws conditioning the opportunity to seek generally available benefits on one's religious status are subject to heightened scrutiny under the Free Exercise Clause.[142]

Because Missouri's program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," the Court held that the state had violated the Free Exercise Clause.[143] It rejected the state's characterization that its policy did not prohibit religious practice but rather "simply declined to allocate ... a subsidy the State had no obligation to provide in the first place."[144] Although the Court acknowledged that the policy did not criminalize behavior or otherwise proscribe beliefs, it concluded that the policy effectively forced the church to choose between its religious identity

[133] Brief for Petitioner at 11, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577).

[134] Brief for Respondent at 5, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577).

[135] *Id*.

[136] *See* MO. CONST. art. I, § 7.The federal Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion," *see* U.S. CONST. amend. I, has been interpreted to permit religious entities to receive public funding in some circumstances (e.g., secular aid to religious schools). *See* Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Bd. of Edu., 330 U.S. 1 (1947); Bradfield v. Roberts, 175 U.S. 291 (1899).

[137] *Trinity Lutheran Church*, 137 S. Ct. at 2019 ("The parties agree that the *Establishment* Clause of [the First] Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").

[138] *Id*. at 2023-24.

[139] *Id*.

[140] *Id*. at 2020.

[141] *Id*. at 2019.

[142] *Id*. at 2021-22 ("[T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church ... But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, ... the State has punished the free exercise of religion.").

[143] *Id*. at 2021.

[144] *Id*. at 2022.

and its eligibility to participate in a public benefits program.[145] Considering whether Missouri had a sufficient interest to justify what the Court deemed to be a "discriminatory policy," the Court explained that the state's interest in promoting the separation of church and state beyond what the federal Constitution requires through limitations on funding to religious entities was not compelling enough to justify "the clear infringement on free exercise before us."[146]

The outstanding question from *Trinity Lutheran* is the reach of the Court's decision. A large majority of states have adopted similar constitutional provisions (sometimes referred to as "Blaine Amendments") that broadly prohibit public funds from being directed to religious entities—a stricter limitation than the federal Establishment Clause.[147] The impact of *Trinity Lutheran* on these laws has been debated, largely because of "Footnote 3" in Chief Justice Roberts's opinion, which did not command a majority of the Court and two concurring Justices (Thomas and Gorsuch) expressly did not join. Footnote 3 states that the "case involves express discrimination based on religious identity with respect to playground resurfacing" and "[does] not address religious uses of funding or other forms of discrimination."[148] Justice Gorsuch, joined by Justice Thomas, asserted in a concurring opinion that Footnote 3 should not be read to limit the logic of the Court's opinion only to a limited set of cases, such as those involving playground resurfacing.[149] In dissent, Justice Sotomayor strongly criticized the Court's decision as "all but invalidat[ing]" state Blaine Amendments, asserting that the relationship between church and state is now "profoundly change[d]" because the Court has now viewed the Free Exercise Clause to, at least in some instances, require that public funding be provided to a religious institution.[150] Though the decision's full effect remains unclear, there have been immediate implications in other cases.[151] For example, the Court has remanded a number of other pending cases involving free exercise challenges of public aid that excluded religious schools because of state Blaine Amendments, ordering review in light of *Trinity Lutheran*.[152]

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[145] *Id*.

[146] *Id*. at 2024 ("[O]nly a state interest of the highest order can justify the Department's discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns ... As we said when considering Missouri's same policy preference on a prior occasion, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the *Establishment Clause of the Federal Constitution*—is limited by the *Free Exercise Clause*." (internal quotations and citations omitted)).

[147] Blaine Amendments generally refer to state constitutional provisions that prohibit the provision of public funding to religious organizations, which were similar to a proposed federal constitutional amendment proposed by Representative James G. Blaine in 1875. For a discussion of state Blaine Amendments, see Transcript, *The Blaine Game: Controversy Over the Blaine Amendments and Public Funding of Religion*, PEW RESEARCH CENTER: RELIGION AND PUBLIC LIFE (July 24, 2008), http://www.pewforum.org/2008/07/24/the-blaine-game-controversy-over-the-blaine-amendments-and-public-funding-of-religion/.

[148] *Trinity Lutheran Church*, 137 S. Ct. at 2024 n.3.

[149] *Id*. at 2026 (Gorsuch, J., concurring in part) ("Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion.").

[150] *Id*. at 2027, 2041 (Sotomayor, J., dissenting).

[151] *See, e.g.*, Complaint at 1, Harvest Family Church v. Fed. Emergency Mgmt. Agency, No. 4:17-cv-02662 (S.D. Tx. filed Sept. 4, 2017) (alleging that exclusion of houses of worship from eligibility for federal disaster relief aid violates the Free Exercise Clause).

[152] *See Supreme Court Remands School Aid Cases for Reconsideration in Light of Trinity Lutheran Decision*, RELIGION CLAUSE (June 28, 2017, 7:00 AM), http://religionclause.blogspot.com/2017/06/supreme-court-remands-school-aid-cases.html.

In addition to the federalism questions and effect of the decision on enforcement of state constitutional provisions, *Trinity Lutheran* may also have broader implications for government funding programs generally. The Court's decision indicates that a threshold question in analysis for public funding cases is whether eligibility for such funding is conditioned on the recipient's religious status or on how the funding will be used by the recipient.[153] The Court specifically noted that, in *Locke v. Davey*, it had previously upheld restrictions on the use of public funds for expressly religious purposes, emphasizing that the program at issue in that case "took account of [the state's] antiestablishment interest only after determining that the ... program did not 'require [beneficiaries] to choose between their religious beliefs and receiving a government benefit.'"[154] Thus, *Trinity Lutheran* appears to allow for the government to deny funding to religious beneficiaries if the funds will be used for religious purposes such as the example in *Locke*, but prohibits beneficiaries of a government grant from being disqualified as eligible simply because of their religious status.[155] In this vein, the case may offer some clarity to questions that arise in the context of federal programs that allow for the participation of religious organizations in providing secular social services.[156]

Federal Courts and Civil Rights: *Ziglar v. Abbasi*

In *Ziglar v. Abbasi*, a consolidated case in which only two-thirds of the bench participated, the Supreme Court, using language that may curb a wide range of damages lawsuits against government actors, ruled 4-2 against extending the judicially created *Bivens* remedy to certain claims brought by unlawfully present aliens challenging their detention following the September 11, 2001, terror attacks.[157] The central issue in *Abbasi* was the application of the Supreme Court's 1971 opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.* While 42 U.S.C. § 1983 provides a private damages remedy against individual *state* officers resulting from violations of the Constitution, Congress has never enacted a comparable statute with respect to *federal* officers' violations of the Constitution.[158] In *Bivens*, though, the Court functionally created such a remedy, recognizing a damages action against federal officers as an implied remedy for an illegal search conducted in violation of the Fourth Amendment.[159]

The *Bivens* remedy has had an inconsistent trajectory at the Supreme Court. In *Bivens* the Court suggested that a judicially created legal remedy might be inappropriate (1) in a case presenting "special factors counselling hesitation in the absence of affirmative action by Congress" or (2) if there exists "an explicit congressional declaration that [the plaintiffs should be] ... remitted to another remedy, equally effective in the view of Congress."[160] Following the general principle that "a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by

[153] *Trinity Lutheran Church*, 137 S. Ct. at 2021-24.

[154] *Id*. at 2016.

[155] *Id*. at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.").

[156] For more information on such programs, see CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*, by (name redacted)

[157] Ziglar v. Abbasi, 137 S. Ct. 1843, 1848 (2017). Justices Sotomayor, Kagan, and Gorsuch did not participate in the case.

[158] *See* 42 U.S.C. § 1983.

[159] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971).

[160] *Id.* at 396-97.

Congress,'"[161] in the decade that followed *Bivens* the Court twice extended the remedy to other contexts. First, in *Davis v. Passman*, the Court held that a *Bivens* remedy was available for gender discrimination against a public employee in violation of the equal protection component of the Fifth Amendment.[162] Second, in *Carlson v. Green*, the Court allowed a *Bivens* claim to proceed for constitutionally inadequate prisoner medical care in violation of the Eighth Amendment.[163]

Beginning in 1983, the Supreme Court began to curb the availability of the *Bivens* remedy in a series of cases.[164] For example, in *Chappell v. Wallace* the Court held for the first time that "special factors" counseled against extending the *Bivens* remedy.[165] *Chappell* involved a lawsuit filed by Navy enlistees against their superiors.[166] In denying a *Bivens* remedy, the Court concluded that the "unique disciplinary structure of the Military Establishment and Congress'[s] activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."[167] That same year, in *Bush v. Lucas* the Court held that the existence of "an elaborate, comprehensive scheme" to protect the federal workforce counseled against recognizing a *Bivens* claim in which a civil servant alleged that he had been retaliated against for exercising his First Amendment rights.[168] In the years following *Chappell* and *Bush*, the Court, while not overturning *Bivens*, has declined to extend the remedy first created in 1971 to a host of contexts arising in subsequent cases.[169]

With its 2007 opinion, *Wilkie v. Robbins*, the Court recognized a two-part framework for determining whether a *Bivens* remedy should be available.[170] First, the Court asks whether "any alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[171] Second, "even in the absence of an alternative," the Court considers whether "any

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[161] Davis v. Passman, 442 U.S. 228, 245 (1979) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

[162] *Id*.

[163] Carlson v. Green, 446 U.S. 14, 24 (1980).

[164] *See* Chappell v. Wallace, 462 U.S. 296, 298 (1983).

[165] *Id.*

[166] *Id.* at 297.

[167] *Id.* at 304.

[168] 462 U.S. 367, 385-90 (1983). The Court further reasoned that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service," adding that, "[n]ot only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts." *Id.* at 389.

[169] *See* Minneci v. Pollard, 565 U.S. 118, 120 (2012) (rejecting an Eighth Amendment-based *Bivens* claim against employees of a privately operated federal prison); Hui v. Castaneda, 559 U.S. 799, 802 (2010) (concluding that the Federal Tort Claims Act precludes *Bivens* actions against U.S. Public Health Service personnel alleging constitutional violations arising out of their official duties); Wilkie v. Robbins, 551 U.S. 537, 547-48, 562 (2007) (refusing to recognize a *Bivens* claim against officials of the Bureau of Land Management accused of harassment and intimidation aimed at extracting an easement across private property in violation of the Fourth and Fifth Amendments); Correctional Services Corp. v. Malesko, 534 U.S. 61, 63 (2001) (refusing to extend *Bivens* to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (declining to imply a *Bivens* cause of action directly against an agency of the federal government); Schweiker v. Chilicky, 487 U.S. 412, 414, 418 (1988) (refusing to allow *Bivens* for violations of due process in handling of Social Security applications); United States v. Stanley, 483 U.S. 669, 671, 683-84 (1987) (holding that *Bivens* does not extend to any claim incident to military service).

[170] *Wilkie*, 551 U.S. at 550.

[171] *Id.*

special factors" exist that "counsel[] hesitation before authorizing a new kind of federal litigation."[172] Aside from applying this framework, the Court has increasingly focused its examination on whether to extend the *Bivens* remedy to "any new context or new category of defendants."[173] This focus has influenced lower courts' consideration of when it is appropriate to recognize a new *Bivens* remedy. In particular, courts have questioned what constitutes a "new context" for *Bivens*[174] and what "special factors" would counsel against recognizing a *Bivens* claim.[175]

The plaintiffs in *Abbasi*—six unlawfully present men of Arab or South Asian descent, most of whom are Muslim—were detained for months at a federal detention center in New York City shortly after the 9/11 terror attacks.[176] At the time, the Federal Bureau of Investigation (FBI) had been investigating tips of suspected terrorist activity (some more well-grounded than others) and detained aliens "of interest" pursuant to a "hold-until-cleared policy."[177] In other words, certain aliens were detained until the FBI affirmatively cleared them of terrorist ties.[178] According to the plaintiffs' complaint, some detainees, including the plaintiffs, purportedly were subjected to harsh conditions of confinement to pressure them into cooperating.[179] After plaintiffs' release from confinement and removal from the United States, they sued seeking money damages under *Bivens* for alleged constitutional harms suffered.[180] Specifically, the plaintiffs sought damages for the (1) government's detention policies and (2) resulting conditions of confinement. They brought claims against several high-level government officials and the detention facility's warden and assistant warden, alleging violations of the Fourth and Fifth Amendments.[181] The Second Circuit allowed the claims to proceed under *Bivens*, and an appeal to the Supreme Court followed.[182]

Before the Supreme Court, the *Abbasi* plaintiffs argued that their detention policy and conditions-of-confinement claims are cognizable under *Bivens*.[183] They principally contended that their claims against government actors alleging violations of the substantive and equal protection components of the Due Process Clause of the Fifth Amendment do not extend *Bivens* to a new context.[184] Because the Supreme Court has already recognized *Bivens* claims for unconstitutional prison abuse under the Eighth Amendment in *Carlson*, the plaintiffs argued that "[a] conditions of

[172] *Id.* (internal quotation marks and citations omitted).

[173] *See Malesko*, 534 U.S.at 68; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (stating that because "implied causes of action are disfavored," the Court is "reluctant to extend *Bivens* liability to any new context or new category of defendants") (internal quotation marks and citations omitted).

[174] *See, e.g.*, Meshal v. Higgenbotham, 804 F.3d 417, 423 (D.C. Cir. 2015) (commenting that "[t]he Supreme Court has never defined what constitutes a new 'context' for Bivens purposes."); Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009) (noting that the concept of a "new 'context'" for purposes of *Bivens* "is not defined in the case law.").

[175] *See, e.g.*, Hernandez v. United States, 757 F.3d 249, 275 (5th Cir. 2014) ("*Bivens* itself provided little guidance on what qualifies as a special factor. Since then the Supreme Court and our sister circuits have identified a handful of 'special factors.'"); *see generally* Anya Bernstein, *Congressional Will & the Role of the Executive in* Bivens *Actions: What is Special about Special Factors*, 45 IND. L. REV. 719 (2012).

[176] Ziglar v. Abbasi, 137 S. Ct. 1843, 1852-53 (2017).

[177] *Id.* at 1852.

[178] *See* Turkmen v. Hasty, 789 F.3d 218, 227 (2d Cir. 2015).

[179] *See* Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 325-26 (E.D.N.Y. 2013).

[180] *Abbasi*, 137 S. Ct. at 1852-54.

[181] *Id.* at 1853-54.

[182] *Id.* at 1854.

[183] Brief for Respondent at 20-30, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Nos. 15-1358, 15-1359, & 15-1363).

[184] *Id*.

confinement suit arising under the Due Process Clause is not at some exotic frontier for *Bivens* litigation."[185] The government countered that the plaintiffs' claims, indeed, sought to extend *Bivens* to new contexts, and further contended that challenges to high-level policy decisions involving national security and immigration are special factors counseling hesitation against affording a *Bivens* remedy in this case.[186]

In reversing the Second Circuit, Justice Kennedy, on behalf of the Supreme Court in *Abbasi*, began the opinion by providing general guidance for courts examining whether to allow a *Bivens* claim to proceed. Noting that *Bivens*, *Davis*, and *Carlson* "represent the *only* instances in which the Court has approved of an implied damages remedy under the Constitution itself," the majority explained the Court's hesitancy to expand the *Bivens* remedy further.[187] In particular, Justice Kennedy maintained that it is a "significant step under separation-of-powers principles for a court to determine that it has the authority ... to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."[188] The Court further noted that "there are a number of economic and governmental concerns" when determining whether to subject government employees to monetary and other liabilities, and Congress is in a "better position" than the Court to resolve those concerns.[189] Positing that "separation-of-powers principles" must be central to a *Bivens* analysis, the Court concluded that the "answer most often" to the question of "'who should decide' whether to provide for a damages remedy will be Congress."[190]

With this general principle in mind, the majority turned to the questions of (1) what constitutes a "new context" for *Bivens* and (2) what "special factors" counsel against extending the *Bivens* remedy to a new context. As to the first question, the Court answered the inquiry narrowly, holding that if a case is "different in a meaningful way" from *Bivens, Davis,* or *Carlson*, "then the context is new."[191] According to the Court, meaningful differences may include the constitutional right raised by the suit; the official action at issue; the amount of judicial guidance available for the problem; or the risk of judicial intrusion into the other branches of government, among others.[192] And with respect to what "special factors" might counsel hesitation against judicial intrusion, the *Abbasi* majority stated that "the inquiry must concentrate on 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."[193] Further, the availability of alternative remedies may also give the judiciary pause.[194] Ultimately, in fairly broad language, the Court concluded that:

> if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the

[185] *Id.* at 27.

[186] Brief for Petitioners at 17-18, *Ashcroft v. Abbasi*, 137 S. Ct. 1843 (2017) (No. 15-1359) (arguing that the lower court applied a "far too generalized definition of the context" of the *Bivens* claim and should have instead taken into account the context in which the claim arose—i.e., a national security emergency—and who the claim was being lodged against—high-level government officials).

[187] *Abbasi*, 137 S. Ct. at 1855 (emphasis added).

[188] *Id.* at 1856.

[189] *Id.* at 1856-57.

[190] *Id.* at 1857.

[191] *Id.*at 1859.

[192] *Id.* at 1859-60.

[193] *Abbasi*, 137 S. Ct. at 1857-58.

[194] *Id.* at 1858.

> courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.[195]

Turning to the *Abbasi* plaintiffs' challenges to the government's detention policies following 9/11, the Supreme Court concluded that *Bivens* cannot provide a remedy.[196] The Court first held that the claims lodged against a high-level executive policy in the wake of a major terrorist attack meaningfully differ from the issues in *Bivens*, *Davis*, and *Carlson*, which respectively involved FBI agents handcuffing someone in his home without a warrant, a Congressman firing his female employee, and a prison's failure to treat an inmate's medical condition.[197] Moving on to the special factors analysis, the Court concluded that *Bivens* is an inappropriate means for challenging a government agency's policy; rather, *Bivens* is better suited to challenging individual official action.[198] Furthermore, the Court added, other remedies, including injunctive relief, are more appropriate means to challenge "large-scale policy decisions."[199] Additionally, the majority maintained that allowing a suit for damages in *Abbasi*, which involved an investigation after a major terror attack on U.S. soil, would compel courts to interfere with "sensitive functions of the Executive Branch," including the responsibility to formulate and implement national security policies.[200] And, in the Court's view, a judicial inquiry into national security policy—a field that is the responsibility of Congress and the President—raises separation-of-powers concerns.[201] This concern is particularly pronounced, the Court continued, when the judicial inquiry involves a claim for money damages rather than injunctive relief, as "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis."[202]

As for the *Abbasi* plaintiffs' conditions-of-confinement claim against the warden and his assistant, the Supreme Court concluded that the plaintiffs indeed were asking for *Bivens* relief in a new context, but, nevertheless, declined to decide whether "special factors" precluded relief.[203] The Court first compared the conditions-of-confinement claim to the claim at issue in *Carlson*.[204] Although both cases related to prisoner mistreatment, the Court found small but meaningful differences between the claims.[205] For instance, the conditions-of-confinement claim in *Abbasi* alleged a violation of the Fifth Amendment, rather than the Eighth Amendment, and thus, in the majority's view, "the judicial guidance available to this warden, with respect to his supervisory duties, was less developed."[206] Next, the Court identified a number of special factors that may discourage extending the *Bivens* remedy, including potential alternative remedies and Congress's decision not to provide a damages remedy against federal prison officials in the Prison Litigation

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[195] *Id.*

[196] *Id.* at 1863.

[197] *Id.* at 1860 (noting that the "respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil," which "bear little resemblance to the three *Bivens* claims the Court has approved in the past.").

[198] *Id.*

[199] *Id.* at 1862. The Court also noted that a prisoner could seek a writ of habeas corpus to review individualized conditions-of-confinement challenges, as such a remedy "would have provided a faster and more direct route to relief than a suit for money damages." *Id.* at 1863.

[200] *Id.* at 1860-61.

[201] *Id.* at 1861.

[202] *Id.* at 1864.

[203] *Id.* at 1864-65.

[204] *Id.* at 1864.

[205] *Id.* ("[E]ven a modest extension is still an extension.").

[206] *Id.*

Reform Act.[207] But the Court stopped short of concluding that those factors were determinative, given that the Second Circuit did not conduct that analysis in the first instance, and the parties did not focus on that analysis in their arguments.[208]

In dissent, Justice Breyer, joined by Justice Ginsburg, contended that the majority improperly characterized the plaintiffs' claims as an extension of *Bivens*, and thus the Second Circuit's judgment should have been affirmed.[209] Justice Breyer agreed that the constitutional right at issue is germane to a *Bivens* analysis, but he argued that it is only the substance of the right at issue that matters, not merely the label of the right.[210] Under that view, the dissent reasoned that the *Abbasi* plaintiffs' claims did not meaningfully differ from other *Bivens* cases, most notably *Carlson*.[211] Although brought under different constitutional provisions—one applicable to persons serving a criminal sentence (*Carlson*) and one governing other forms of detention (*Abbasi*)—the harms, in Justice Breyer's view, were the same: unconstitutional treatment of the confined.[212]

Abbasi appears to signal an increasingly narrow role for *Bivens* actions to remedy constitutional violations by federal officers. The majority's reticence concerning the appropriateness of the *Bivens* remedy, in general, played a large role in the ultimate outcome in *Abbasi*. For instance, the majority described the era in which *Bivens* and its progeny were decided as an "ancien regime" in which the Court was more willing to create a judicial remedy when a federally protected right had been invaded, even when Congress had not statutorily provided one expressly.[213] In this vein, the majority opinion echoed a concurrence from Justice Scalia nearly twenty years ago, in which he described *Bivens* as a "relic of the heady days in which this Court assumed common-law powers to create causes of action" and argued for "limit[ing] *Bivens* and its two follow-on cases ... to the precise circumstances that they involved."[214] As a result, in *Abbasi*'s aftermath it may be harder for plaintiffs to argue that a particular case is not an extension of *Bivens* in closely related, but not identical, constitutional claims.[215] Additionally, the Court appears to be sending a strong message that it will not recognize a money-damages remedy for constitutional harms committed by federal officials if Congress has not created one, placing the primary responsibility for creating such

[207] *Id.* at 1865.

[208] *Id.*

[209] *Id.* at 1873-85 (Breyer, J., dissenting).

[210] *Id.* at 1877-78.

[211] *Id.*

[212] *Id.* In addition to the *Bivens* issue presented in *Abbasi*, the Supreme Court also considered whether the government actors were entitled to qualified immunity on the plaintiffs' allegations that they were liable for conspiring to interfere with the plaintiffs' civil rights under 42 U.S.C. § 1985(3). *Id.* at 1865-66. Qualified immunity shields government actors from suits for civil damages if a reasonable officer would not have known that his conduct was unconstitutional. *Id.* at 1867. In *Abbasi*, the Court concluded that "reasonable officials in petitioners' positions would not have known, and could not have predicted, that §1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged." *Id.* In a concurring opinion, Justice Thomas agreed with the majority's ruling on qualified immunity but wrote separately, in part, to express his "growing concern with [the Court's] qualified immunity jurisprudence." *Id.* at 1870 (Thomas, J., concurring). According to Justice Thomas, in determining qualified immunity, courts should ask "whether the common law in 1871"—the year in which the civil rights act was enacted from which § 1985 was derived—"would have accorded immunity to an officer for a tort analogous to the plaintiff's claim," rather than the current inquiry into whether the government actor's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 1871 (internal quotation marks and citation omitted).

[213] *Id.* at 1855 (majority).

[214] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

[215] *See Abbasi*, 137 S. Ct. at 1873 (Breyer, J., dissenting) ("I fear that the Court's holding would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals.").

remedies in the political branches.[216] Nonetheless, while *Bivens* has potentially become a "disfavored" remedy, the Court in *Abbasi* recognized that *Bivens*'s protection against unreasonable searches and seizures in violation of the Fourth Amendment is "settled law" that the majority did not intend to disturb.[217] Accordingly, the *Bivens* actions already recognized by the Court appear to remain viable in their specific contexts.

[216] *Id.*at 1857 (majority) ("The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? ... The answer most often will be Congress.").

[217] *Id.* at 1856-57.

Table 1. Supreme Court's October 2016 Term

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Trump. v. International Refugee Assistance Project	6/26/17	Per Curiam	The petitions for certiorari are granted, and the government's stay applications are granted in part. The injunctions remain in place only with respect to foreign nationals and refugees who have a credible claim of a bona fide relationship with a person or entity in the United States.	Civil Procedure Constitutional Law Immigration
Pavan v. Smith	6/26/17	Per Curiam	An Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent, violates the Fourteenth Amendment's substantive guarantee of the "constellation of benefits that the States have linked to marriage" to same-sex couples, as announced in *Obergefell v. Hodges*.	Civil Rights Law Constitutional Law Family Law
Hernández v. Mesa	6/26/17	Per Curiam	Where a U.S. Border Patrol agent on American soil shot and killed a Mexican national across the U.S.-Mexico border, the Sixth Circuit must on remand determine whether the victim's parents may assert damages claims against the agent under *Bivens v. Six Unknown Fed. Narcotics Agents* in light of the intervening guidance provided in *Ziglar v. Abbasi*.	Civil Rights Law Constitutional Law Criminal Law & Procedure
Davila v. Davis	6/26/17	Thomas	The ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of ineffective assistance of appellate counsel claims.	Constitutional Law Criminal Law & Procedure
California Public Employees' Retirement System v. ANZ Securities, Inc.	6/26/17	Kennedy	Petitioner's untimely filing of its individual complaint more than three years after the relevant securities offering is ground for dismissal.	Civil Procedure Securities Law
Trinity Lutheran Church of Columbia, Inc. v. Comer	6/26/17	Roberts	The Missouri Department of Natural Resources' policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the church an otherwise available public benefit on account of its religious status.	Civil Rights Law Constitutional Law
Perry v. Merit Systems Protection Bd.	6/23/17	Ginsburg	When the Merit Systems Protection Board dismisses on jurisdictional grounds a "mixed case"—where an employee attributes an adverse action to bias based on race, gender, age, or disability—the proper review forum is district court.	Civil Procedure Labor & Employment Law

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Murr v. Wisconsin	6/23/17	Kennedy	In a regulatory takings case, the Court of Appeals of Wisconsin was correct to analyze petitioners' two contiguous lots as a single unit in assessing the effect that governmental regulations had on petitioners' ability to use or sell their lots.	Constitutional Law Real Property Law
Lee v. United States	6/23/17	Roberts	Petitioner was prejudiced, for purposes of his ineffective-assistance-of-counsel claim, by his counsel's erroneous advice that he would not be deported as a result of pleading guilty to a federal drug crime, which turned out to be an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B).	Constitutional Law Criminal Law & Procedure Immigration
Maslenjak v. United States	6/22/17	Kagan	To secure a conviction for unlawfully procuring citizenship in violation of 18 U.S.C. § 1425(a), the government must establish that the defendant's illegal act played a role in acquiring citizenship, and where that alleged illegality is a false statement to government officials, the jury must decide whether the statement so altered the process as to have influenced the award of citizenship; here, the district court erred in instructing the jury that Maslenjak's false statements need not have influenced the naturalization decision.	Criminal Law & Procedure Immigration
Turner v. United States; Overton v. United States	6/22/17	Breyer	Evidence that the government failed to disclose to the defense in these cases was not "material" under *Brady v. Maryland*—i.e., there is no "reasonable probability" that it would have changed the outcome of petitioners' trial.	Constitutional Law Criminal Law & Procedure
Weaver v. Massachusetts	6/22/17	Kennedy	In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective assistance of counsel claim, the defendant must demonstrate prejudice to secure a new trial; petitioner has not satisfied that requirement here.	Constitutional Law Criminal Law & Procedure
Jenkins v. Hutton	6/19/17	Per Curiam	In a federal habeas case, the Sixth Circuit erred in holding that it could review Hutton's procedurally defaulted due process claim under the miscarriage of justice exception established in *Sawyer v. Whitley*.	Constitutional Law Criminal Law & Procedure
Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.	6/19/17	Alito	California courts lacked specific jurisdiction to entertain claims that New York-based pharmaceutical company Bristol-Myers Squibb's drug Plavix damaged the health of state nonresidents, who did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.	Constitutional Law Civil Procedure

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Matal v. Tam	6/19/17	Alito	The Federal Circuit's judgment—that 15 U.S.C. § 1052(a), which prohibits the registration of trademarks that may "disparage ... or bring ... into contemp[t] or disrepute" any "persons, living or dead," violates the First Amendment's Free Speech Clause—is affirmed.	Constitutional Law Trademark Law
McWilliams v. Dunn	6/19/17	Breyer	In a federal habeas case, the Eleventh Circuit erred in concluding that the Alabama courts' ruling—that McWilliams received all of the mental health assistance to which he was constitutionally entitled—was not unreasonable in light of *Ake v. Oklahoma*.	Constitutional Law Criminal Law & Procedure
Ziglar v. Abbasi	6/19/17	Kennedy	The Second Circuit's judgment—permitting illegal immigrants detained in the aftermath of September 11 to pursue claims against federal officials under *Bivens v. Six Unknown Fed. Narcotics Agents* and 42 U.S.C. § 1985(3) —is reversed in part and vacated and remanded in part.	Civil Rights Law Constitutional Law Immigration
Packingham v. North Carolina	6/19/17	Kennedy	A North Carolina statute that makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages" impermissibly restricts lawful speech in violation of the First Amendment.	Computer & Internet Law Constitutional Law Criminal Law & Procedure
Virginia v. LeBlanc	6/12/17	Per Curiam	In a federal habeas case, the Fourth Circuit erred in concluding that the Virginia trial court's ruling—that the Commonwealth's geriatric release program provides a meaningful opportunity for juvenile nonhomicide offenders to receive conditional release—was objectively unreasonable in light of *Graham v. Florida*.	Constitutional Law Criminal Law & Procedure
Henson v. Santander Consumer USA Inc.	6/12/17	Gorsuch	A company that collects debts that it purchased for its own account, like Santander did here, is not a "debt collector" for purposes of the Fair Debt Collection Practices Act.	Bankruptcy Law Business & Corporate Law
Sessions v. Morales-Santana	6/12/17	Ginsburg	The gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad, when only one parent is a U.S. citizen—a shorter duration-of-residency requirement for unwed U.S.-citizen mothers than for unwed U.S.-citizen fathers—is incompatible with the Fifth Amendment's requirement that the government accord to all persons "the equal protection of the laws"; it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender; in the interim, the current requirement for unwed U.S.-citizen fathers should apply, prospectively, to children born to unwed U.S.-citizen mothers.	Civil Rights Law Constitutional Law Immigration

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Microsoft Corp. v. Baker	6/12/17	Ginsburg	The federal courts of appeals lack jurisdiction under 28 U.S.C. § 1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice.	Civil Procedure
Sandoz Inc. v. Amgen Inc.	6/12/17	Thomas	In this suit involving the Biologics Price Competition and Innovation Act of 2009's patent-dispute regime, 42 U.S.C. § 262(l)(2)(A)'s disclosure requirement is not enforceable by federal injunction; the availability of a state-law injunction to enforce that provision should be determined on remand; and § 262(l)(8)(A)'s notice of commercial marketing may be provided prior to obtaining licensure.	Life Sciences/Pharmaceutical Patent Law Public Health & Welfare Law
North Carolina v. Covington	6/5/17	Per Curiam	In ordering North Carolina's General Assembly to redraw state legislative districts, the district court erred when it provided additional relief without undertaking an equitable weighing process.	Civil Procedure Constitutional Law
Advocate Health Care Network v. Stapleton	6/5/17	Kagan	The Employee Retirement Income Security Act of 1974's church-plan exemption applies to an employee benefit plan maintained by a qualifying church-affiliated organization, regardless of whether a church initially established the plan.	Health Care Law Pensions & Benefits Law
Kokesh v. SEC	6/5/17	Sotomayor	Because the Securities and Exchange Commission (SEC) disgorgement operates as a penalty under 28 U.S.C. § 2462, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued.	Civil Procedure Securities Law
Honeycutt v. United States	6/5/17	Sotomayor	21 U.S.C. § 853(a)(1)—which limits forfeiture to property the defendant himself actually acquired as the result of drug law violations—does not permit forfeiture with regard to petitioner, who had no ownership interest in his brother's store and did not personally benefit from the store's illegal sales.	Criminal Law & Procedure
Town of Chester v. Laroe Estates, Inc.	6/5/17	Alito	A litigant seeking to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff.	Civil Procedure Constitutional Law
County of Los Angeles v. Mendez	5/30/17	Alito	The Ninth Circuit's "provocation rule"—which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation"—is incompatible with the Fourth Amendment.	Constitutional Law Criminal Law & Procedure

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BNSF R. Co. v. Tyrrell	5/30/17	Ginsburg	45 U.S.C. § 56, a provision of the Federal Employers' Liability Act, does not address personal jurisdiction over railroads; and the Montana courts' exercise of personal jurisdiction over petitioner under Montana law does not comport with the Fourteenth Amendment's Due Process Clause.	Civil Procedure Constitutional Law Labor & Employment Law
Esquivel-Quintana v. Sessions	5/30/17	Thomas	For the purpose of determining whether a statutory rape offense criminalizing sexual intercourse based solely on the participants' ages qualifies as an aggravated felony under the Immigration and Nationality Act, the generic federal definition of "sexual abuse of a minor" requires the age of the victim to be less than 16.	Criminal Law & Procedure Immigration
Impression Products, Inc. v. Lexmark Int'l, Inc.	5/30/17	Roberts	Respondent Lexmark exhausted all of its patent rights in the toner cartridges it sold domestically as part of its Return Program as well as in the toner cartridges it sold abroad.	Patent Law
Cooper v. Harris	5/22/17	Kagan	The district court did not clearly err in concluding that race furnished the predominant rationale for North Carolina's redesign of Congressional Districts 1 and 12.	Civil Rights Law Constitutional Law
Water Splash, Inc. v. Menon	5/22/17	Alito	The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention) does not prohibit service of process by mail.	Civil Procedure International Law
TC Heartland L.L.C. v. Kraft Foods Group Brands L.L.C.	5/22/17	Thomas	For purposes of the patent venue statute, 28 U.S.C. § 1400(b)—which provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides ... " —a domestic corporation "resides" only in its state of incorporation.	Civil Procedure Patent Law
Kindred Nursing Centers, L.P. v. Clark	5/15/17	Kagan	The Kentucky Supreme Court's clear-statement rule—that a legal representative may enter into an arbitration agreement for his principal only where a power of attorney specifically authorizes him to waive the principal's rights of access to the courts and trial by jury—violates the Federal Arbitration Act.	Business & Corporate Law Contracts Law
Midland Funding, L.L.C. v. Johnson	5/15/17	Breyer	The filing of a proof of claim for an obviously time-barred debt in a bankruptcy proceeding is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.	Bankruptcy Law Business & Corporate Law

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Howell v. Howell	5/15/17	Breyer	The Uniformed Services Former Spouses' Protection Act does not permit state courts to order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.	Family Law Military & Veterans Law
Bank of America Corp. v. Miami	5/01/17	Breyer	The City of Miami is an "aggrieved person" authorized to bring suit under the Fair Housing Act (FHA), but the Eleventh Circuit erred in concluding that the City's complaints met the FHA's proximate-cause requirement based solely on the finding that the City's alleged financial injuries were foreseeable results of the Banks' misconduct.	Civil Rights Law
Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.	5/01/17	Breyer	The Foreign Sovereign Immunities Act's expropriation exception grants jurisdiction only where there is a legally valid claim that property rights are at issue and that the relevant property was taken in violation of international law; simply making a nonfrivolous argument to that effect is not sufficient.	Civil Procedure International Law
Lewis v. Clarke	4/25/17	Sotomayor	A tribal employee sued in his individual capacity, not the tribe, is the real party in interest, and the tribe's sovereign immunity is not implicated; an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.	Civil Procedure Indian Law
Nelson v. Colorado	4/19/17	Ginsburg	Colorado's statutory scheme—which permits the state to retain assessments tied to a conviction later overturned unless and until the defendant institutes a discrete civil refund proceeding and proves her innocence by clear and convincing evidence—does not comport with the Fourteenth Amendment's guarantee of due process.	Constitutional Law Criminal Law & Procedure
Manrique v. United States	4/19/17	Thomas	A defendant wishing to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order; if he fails to do so and the government objects, he may not challenge the restitution order in his appeal from an initial judgment imposing other aspects of his sentence, such as a term of imprisonment.	Criminal Law & Procedure
Goodyear Tire & Rubber Co. v. Haeger	4/18/17	Kagan	When a federal court relies on its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other side's legal fees, the award is limited to the fees the other side incurred solely because of the misconduct.	Civil Procedure Legal Ethics

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Coventry Health Care of Mo., Inc. v. Nevils	4/18/17	Ginsburg	Because subrogation and reimbursement prescriptions in federal employees' health insurance contracts that the Office of Personnel Management negotiates with private carriers plainly "relate to ... payments with respect to benefits" under 5 U.S.C. § 8902(m)(1)—the Federal Employees Health Benefits Act of 1959's express preemption provision—they override state laws barring subrogation and reimbursement; the regime Congress enacted is compatible with the Supremacy Clause.	Health Care Law
McLane Co. v. EEOC	4/03/17	Sotomayor	A district court's decision whether to enforce or quash an Equal Employment Opportunity Commission subpoena should be reviewed for abuse of discretion, not de novo.	Civil Rights Law Civil Procedure
Dean v. United States	4/03/17	Roberts	A sentencing court may consider the fact that a defendant will serve 18 U.S.C. § 924(c)'s mandatory minimum when calculating an appropriate sentence for the predicate offense.	Criminal Law & Procedure
Expressions Hair Design v. Schneiderman	3/29/17	Roberts	By prohibiting petitioner merchants from employing a single-sticker pricing regime to impose credit-card-use surcharges, New York General Business Law § 518 regulates speech, and thus it should be evaluated as a speech regulation by the Court of Appeals on remand.	Commercial Law Constitutional Law
Moore v. Texas	3/28/17	Ginsburg	The Texas Court of Criminal Appeals' (CCA's) decision that petitioner was not an intellectually disabled person exempt from the death penalty does not comport with the Eighth Amendment and this Court's precedents where the CCA rejected the habeas court's application of current medical guidance in favor of a standard set out in one of the CCA's prior opinions.	Constitutional Law Criminal Law & Procedure
Czyzewski v. Jevic Holding Corp.	3/22/17	Breyer	A bankruptcy court may not, without the consent of affected creditors, approve a structured dismissal of a Chapter 11 bankruptcy that deviates from the ordinary priority rules governing distributions of bankruptcy estate assets.	Bankruptcy Law
Star Athletica, L.L.C. v. Varsity Brands, Inc.	3/22/17	Thomas	The test for determining whether a feature incorporated into the design of a useful article is eligible for copyright protection—whether the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article, and (2) would qualify as a protectable pictorial, graphic, or sculptural work, either on its own or fixed in some other tangible medium of expression, if it were imagined separately from the useful article into which it is incorporated—is satisfied in this case.	Copyright Law

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Endrew F. v. Douglas Cty. School Dist. RE-1	3/22/17	Roberts	To meet its substantive obligation to provide a free appropriate public education under the Individuals with Disabilities Education Act, a school must offer an individualized education program that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.	Civil Rights Law Education Law
Manuel v. Joliet	3/21/17	Kagan	Petitioner may challenge the legality of his pretrial confinement on Fourth Amendment grounds; on remand, the Seventh Circuit should determine the claim's accrual date for statute-of-limitations purposes, unless it finds that the city has previously waived its timeliness argument.	Constitutional Law Criminal Law & Procedure
SCA Hygiene Products Aktiebolag v. First Quality Baby Products, L.L.C.	3/21/17	Alito	Laches (i.e., the doctrine that generally posits that an unreasonable delay in asserting one's rights can bar a claim for equitable relief) cannot be invoked as a defense against a claim for damages brought within the Patent Act's six-year limitations period, 35 U.S.C. § 286.	Civil Procedure Patent Law
NLRB v. SW General, In.c	3/21/17	Roberts	A Federal Vacancies Reform Act of 1998 (FVRA) provision that prevents a person who has been nominated to fill a vacancy in an office requiring presidential appointment and Senate confirmation from performing the duties of that office in an acting capacity, 5 U.S.C. § 3345(b)(1), applies to anyone performing acting service under the FVRA, not just first assistants performing acting service under § 3345(a)(1).	Constitutional Law Administrative Law
Rippo v. Baker	3/06/17	Per Curiam	Where petitioner requested recusal of his trial judge, the Nevada Supreme Court erred in not asking the proper question: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.	Criminal Law & Procedure Legal Ethics
Beckles v. United States	3/06/17	Thomas	The advisory Federal Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause.	Constitutional Law Criminal Law & Procedure
Pena-Rodriguez v. Colorado	3/06/17	Kennedy	The Sixth Amendment requires that the no-impeachment rule—which recognizes that a verdict, once entered, cannot be challenged based on comments the jurors made during deliberations—must give way in order for the trial court to assess the possible denial of the jury trial guarantee where compelling evidence indicates that a juror relied on racial stereotypes or animus to convict a criminal defendant.	Civil Rights Law Constitutional Law Criminal Law & Procedure

Case Name	Date of Opinion	Author of Court's Opinion	Holding (from Supreme Court Syllabus, if Available)	Area(s) of Law[a]
Bethune-Hill v. Virginia State Bd. of Elections	3/1/17	Kennedy	The district court employed an incorrect legal standard in concluding that race was not the predominant factor in the Virginia legislature's design for 11 of the 12 state legislative districts challenged in this case, but the court did not err in concluding that the lines for the remaining district were constitutional because the legislature's use of race, though predominant, was narrowly tailored to achieve a compelling state interest.	Civil Rights Law Constitutional Law
Fry v. Napoleon Community Schools	2/22/17	Kagan	A disabled child plaintiff seeking relief under a federal law other than the Individuals with Disabilities Education Act (IDEA) need not exhaust the IDEA's administrative procedures where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education"; the Court of Appeals should determine on remand the gravamen of Fry's complaint.	Civil Rights Law Education Law
Life Technologies Corp. v. Promega Corp.	2/22/17	Sotomayor	The supply from the United States of a single component of a multicomponent invention for manufacture abroad does not give rise to infringement liability under § 271(f)(1) of the Patent Act, because it does constitute the supply of "all or a substantial portion of the components of a patented invention" for combination abroad.	Patent Law
Buck v. Davis	2/22/17	Roberts	The Fifth Circuit erred in denying a certificate of appealability to petitioner, who demonstrated both ineffective assistance of counsel under *Strickland v. Washington* and an entitlement to relief under Federal Rule of Civil Procedure 60(b)(6).	Constitutional Law Criminal Law & Procedure
Lightfoot v. Cendant Mortgage Corp.	1/18/17	Sotomayor	The provision authorizing federally chartered corporation Federal National Mortgage Association (Fannie Mae) "to sue and to be sued ... in any court of competent jurisdiction, State or Federal," 12 U.S.C. § 1723a(a), does not extend federal jurisdiction to all cases involving Fannie Mae.	Civil Procedure Banking Law
White v. Pauly	1/09/17	Per Curiam	The Tenth Circuit erred in basing its conclusion that Officer White was not entitled to qualified immunity on the ground that White violated clearly established law when he arrived late to an ongoing police action and then failed to identify himself before shooting an armed individual.	Constitutional Law Criminal Law & Procedure
Shaw v. United States	12/12/16	Breyer	18 U.S.C. § 1344(1), which makes it a crime to "knowingly execut[e] a scheme ... to defraud a financial institution," covers schemes to deprive a bank of money in a customer's deposit account.	Banking Law Criminal Law & Procedure
Samsung Electronics Co. v. Apple Inc.	12/06/16	Sotomayor	In arriving at a damages award for design-patent infringement involving a multicomponent product, the relevant "article of manufacture," 35 U.S.C. § 289, need not be the end product sold to the consumer but may be only a component of that product.	Patent Law

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Salman v. United States	12/06/16	Alito	In affirming the securities fraud conviction of insider-trading tippee Salman, the Ninth Circuit properly applied *Dirks v. SEC*, which permitted the jury here to infer that the tipper personally benefited from making a gift of confidential information to a trading relative, from whom Salman, in turn, received the information.	Criminal Law & Procedure Securities Law
State Farm Fire & Casualty Co. v. United States *ex rel.* Rigsby	12/06/16	Kennedy	The False Claims Act (FCA) does not mandate dismissal of a qui tam relator's complaint for a violation of the FCA requirement that a complaint be sealed for a specified period of time; nor did the district court abuse its discretion in denying petitioner's motion to dismiss respondents' complaint for violating that requirement.	Civil Procedure Governments
Bravo-Fernandez v. United States	11/29/16	Ginsburg	The issue-preclusion component of the Double Jeopardy Clause does not bar the government from retrying defendants, like petitioners, after a jury has returned irreconcilably inconsistent verdicts of both conviction and acquittal when the convictions are later vacated for legal error unrelated to the inconsistency.	Constitutional Law Criminal Law & Procedure
Bosse v. Oklahoma	10/11/16	Per Curiam	The state court erred in concluding that *Payne v. Tennessee* implicitly overruled the portion of *Booth v. Maryland* that prohibits a capital sentencing jury from considering opinions of a victim's family members about the crime, the defendant, and the appropriate punishment.	Constitutional Law Criminal Law & Procedure

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

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