

## What's at Stake?

# Wrap Up: Supreme Court 2019-20 Term

No one could have predicted the extraordinary circumstances under which the Supreme Court concluded its 2019-20 term. The new year began with the Chief Justice presiding over a Senate trial of President Trump as part of the impeachment process. In early May, as a result of the coronavirus pandemic, the Court took the unprecedented step of meeting by phone to hear arguments and, also a “first,” allowing live audio of their deliberations for the balance of the term. Indeed, decisions were announced in the same manner in a term that stretched into early July. Chief Justice Roberts provided the swing vote in several landmark cases, although generally giving a narrow or procedural explanation of his vote.

***Below is the outcome of some of the major cases of concern to NCJW this term and more evidence that courts matter. Cases that the Court refused to hear included several appeals from states seeking to facilitate safe voting during the pandemic, continuing the Court's alarming record on voting rights.***

### Reproductive Health, Rights, & Justice

#### ***June Medical Services v. Russo***

In 2014, Louisiana passed a law that would require abortion providers to have admitting privileges at a hospital within thirty miles of the clinic. This law, like other Targeted Regulation of Abortion Providers (TRAP) laws, was designed to close abortion clinics by imposing onerous and medically unnecessary regulations on facilities and providers. In 2016's *Whole Woman's Health v. Hellerstedt*, the Supreme Court struck down as unconstitutional an identical Texas law imposing an “undue burden” on those seeking abortions. The Louisiana law, which would have closed two of the state's three clinics, was deemed unconstitutional by the district court but was upheld on appeal to the US Court of Appeals for the Fifth Circuit. The case was appealed to the Supreme Court, which heard oral arguments on March 4, 2020.

**Decided 5-4 June 29, 2020:** NCJW led an [amicus brief](#) in this case. We applaud the decision written by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan that found the Louisiana law unconstitutional, following the same arguments from *Whole Woman's Health*. Chief Justice John Roberts concurred with the judgement but wrote his own opinion, relying solely on precedent. The dissenters — Justices Kavanaugh, Gorsuch, Thomas, and Alito — also filed several separate opinions.

#### ***Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania and — Trump v. Pennsylvania***

In these consolidated cases, the Court considered the Trump administration's attempts to limit the Affordable Care Act's (ACA) birth control benefit. In 2017, the administration issued a rule dramatically expanding which employers qualify as exempt from the

benefit, meaning that far fewer employees would receive contraceptive insurance coverage. New Jersey and Pennsylvania successfully challenged the interim final rules in federal court, but the administration issued nearly identical final rules in November 2018. A district court issued a nationwide injunction preventing the rule from going into effect, and the US Court of Appeals for the Third Circuit upheld the decision. On May 6, the Supreme Court heard oral arguments on this issue.

**Decided 7-2 on July 8, 2020:** NCJW led an [amicus brief](#) in the case. We are disappointed the Court held that the ACA authorized the Department of Health and Human Services to issue an exemption from the birth control provision to employers with a moral or religious objection to contraception. Justice Thomas wrote an opinion joined by 4 other justices. Justice Kagan wrote a separate concurrence with Justice Breyer siding with the majority while outlining the potential for this case to survive. Justice Ginsburg wrote a dissent joined by Justice Sotomayor, noting that “between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services.”

## Employment Discrimination

### ***Altitude Express Inc. v. Zarda; Bostock v. Clayton County, Georgia; and R.G. & G.R. Harris Funeral Homes v. EEOC***

*Zarda* was consolidated with *Bostock v. Clayton County*, two cases dealing with workplace discrimination against gay individuals. The cases were heard along with *R.G. & G.R. Harris Funeral Homes*, a case involving a transgender employee, on October 8, 2019. The cases dealt with whether discrimination against an employee because of sexual orientation or gender identity constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act of 1964. In one case, Donald Zarda, who is now deceased, sued his former employer, claiming that he was fired because he was gay. The US Court of Appeals for the Second Circuit held that Title VII does indeed apply to discrimination based on sexual orientation because such discrimination “is a subset of sex discrimination.” Gerald Bostock, a former Clayton County employee, argued in his case that after the county learned that he is gay, it created trumped up charges as an excuse to fire him. The US Court of Appeals for the Eleventh Circuit held that Title VII does not apply to discrimination based on sexual orientation, thus barring Bostock’s discrimination claim. In the final case, Aimee Stephens, who is deceased, was fired after she informed her employer that she was beginning the process of transitioning prior to gender reassignment surgery. The US Court of Appeals for the Sixth Circuit ruled that Title VII protected transgender people.

**Decided 6-3 on June 15, 2020:** NCJW is gratified a majority of the Court agreed that Title VII of the Civil Right Act applies to LGBTQ people and joined an [amicus brief](#) in favor of the plaintiffs. To the surprise of many, Justice Gorsuch wrote the majority opinion joined by the Chief Justice and Breyer, Ginsburg, Sotomayor, and Kagan. Justice Alito wrote a dissent joined by Justice Thomas. Kavanaugh wrote a separate dissent.

## Immigration

### ***Department of Homeland Security v. Regents of the University of California, Trump v. NAACP, and McAleenan v. Vidal***

The Obama administration created the DACA (Deferred Action for Childhood Arrivals) program in 2012 to provide protection from deportation for undocumented immigrants brought to the US as minors who met certain eligibility requirements. DACA also granted recipients, known as Dreamers, the right to work legally. In 2017, the Trump Administration declared the program to be unconstitutional and ended it, leaving some 800,000 young adults who qualified for DACA eligible for deportation. The US Circuit Court for the Ninth Circuit dismissed the administration's action and granted a temporary injunction restoring DACA, leaving Dreamers with some relief but no certainty about their future status. The Supreme Court consolidated three DACA-related cases and heard arguments on November 12, 2019.

**Decided 5-4 on June 18, 2020: NCJW supports DACA recipients and lauded the Court's decision that the administration illegally ended the program.** Chief Justice Roberts wrote the majority opinion joined by Ginsburg, Breyer, and Kagan, calling the administration's actions "arbitrary and capacious" and suggested that adherence to procedures that required a more reasoned explanation might have changed the outcome of the case. Justice Sotomayor wrote her own concurrence. Justice Thomas wrote a dissent, which was joined by Alito and Gorsuch. Justice Kavanaugh wrote a separate dissent. **NCJW joined an [amicus brief](#) in support of Dreamers.**

## Access to Justice

### *Hernandez v. Mesa*

In 2010, Sergio Hernández, a 15-year-old Mexican national, was playing with friends in a culvert on the US/Mexico border when a Border Patrol agent detained one of Hernández's friends on US territory. Hernández ran into Mexican territory and the agent, standing on US territory, fired at least two shots across the border, killing Hernández. Hernández's family sued, claiming that their son's Fourth and Fifth Amendment rights were violated. Although there is no federal law specifically allowing for damages to non-citizens under these circumstances, a 1971 Supreme Court decision allowed individuals to seek damages for unconstitutional conduct by individual federal officers. The US Court of Appeals for the Fifth Circuit held that these circumstances do not warrant such a claim — known as a Bivens action — which would allow the Hernández's family to hold the Border Patrol agent liable. The Supreme Court heard oral arguments on November 12, 2019.

**Decided 5-4 on February 25, 2020: NCJW is disappointed by the Court's decision that a Bivens action does not extend to a cross-border shooting.** Justice Alito wrote the majority opinion, which cited, among other factors, separation of powers issues. Chief Justice Roberts, Kavanaugh joined while Thomas wrote a concurring opinion joined by Gorsuch. Justice Ginsburg wrote the dissent joined by Breyer, Sotomayor, and Kagan.

### *Comcast Corp. v. National Association of African American-Owned Media*

Comcast decided not to carry channels produced by Entertainment Studios Network (ESN), the only 100% African American-owned multi-channel media company in the country. ESN, which is owned by actor and comedian Byron Allen, and the National Association of African American-Owned Media, an entity created by Allen, then sued Comcast, alleging that it violated a federal statute barring racial discrimination in contracts. Five federal circuits have held that a claim under this statute requires "but-for causation," meaning racial animus must be the actual cause of the refusal to engage in a contract. In this case, the US Court of Appeals for the Ninth Circuit held that race need only be one

“motivating factor” in such a decision. The Supreme Court heard arguments on November 13, 2019 in this case.

**Decided unanimously on March 23, 2020: NCJW is disappointed in the decision.**

Justice Gorsuch wrote the opinion for the full Court except for Justice Ginsburg, who wrote a separate concurrence. The majority opinion held that racism must be a “but-for” cause of the injury, thereby weakening the protections of Section 1981 of the Civil Rights Act of 1866. **NCJW joined an [amicus brief](#) in support of the plaintiffs.**

## Religious Liberty

### *Espinoza v. Montana Department of Revenue*

In 2015, Montana legislators enacted a tax-credit scholarship program that provided funding for low-income families to send their children to private schools. Because Montana’s state constitution has an amendment, as do several state constitutions, that prohibits “direct or indirect” public funding of religiously affiliated educational programs, the state subsequently promulgated an administrative rule prohibiting scholarship recipients from using their funding at religious schools. Several parents, including Kendra Espinoza, who wanted to use the scholarship funding for private religious school, filed a lawsuit challenging the exclusion of religious schools as interference in their First Amendment right to free exercise of religion. The Montana Supreme Court found that the scholarship program was constitutional so long as students could not use the financial aid for religious schools, and the parents appealed. The case was argued before the Supreme Court on January 22, 2020.

**Decided 5-4 on June 30, 2020: NCJW is disappointed in the decision, which allows taxpayer dollars to go to religious schools and joined an [amicus brief](#) opposing this shift.** Chief Justice Roberts wrote the majority opinion joined by Justice Kavanaugh, stating that the Montana rule violated the Free Exercise clause by barring parents who want to send their children to religious schools from public benefits “solely because of the religious character of the school.” Separate concurrences were written by Justices Alito, Thomas, and Gorsuch. Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented.

### *Our Lady of Guadalupe School v. Morrissey-Berru and St. James School v. Biel*

In these consolidated cases, argued on May 11, 2020, the Supreme Court considered the “ministerial exception” to federal employment discrimination laws, which protects religious institutions from certain discrimination claims brought by their “ministers” based on the First Amendment’s guarantee of religion/state separation. In a case in 2012, the Court first developed the “ministerial exception” but did not define who would be considered a “minister.” These recent cases involved teachers at Catholic schools: Agnes Morrissey-Berru, who sued for age discrimination when her contract wasn’t renewed, and Kristen Biel, now deceased, who sued under the Americans with Disabilities Act when she lost her job after informing her school that she was starting treatment for breast cancer. The US Court of Appeals for the Ninth Circuit reversed a lower court decision in the Morrissey-Berru case, finding that she had no religious training or credentials and therefore did not fit the description of a minister. In Biel’s case, the Ninth Circuit similarly decided that her background did not qualify her as a minister for purposes of the ministerial exception.

**Decided 7-2 on July 8, 2020: NCJW is unhappy with the decision and, given our**

**strong opposition to all laws and policies that permit discrimination under the guise of religious freedom, joined an [amicus brief](#) in support of the respondents.** Justice Alito authored the majority opinion with Justices Thomas and Gorsuch issuing a separate concurring opinion. Justice Sotomayor, joined by Justice Ginsburg, wrote the dissent, contending that the majority’s opinion “has no basis in law and strips thousands of schoolteachers of their legal protections.”

## Gun Violence Prevention

### ***New York State Rifle & Pistol Association Inc. v. City of New York***

New York State has strict gun-licensing procedures required for possession of a firearm. The state separates “carry” licenses from “premises” licenses for handguns. Premises licenses require handguns to be kept at a specific address and not removed except under very specific circumstances, one of which is to transport the gun unloaded to an authorized small arms range/shooting club (all of which are located in New York City). Three individuals with premises licenses, joined by the NY State Rifle & Pistol Association, sued to be allowed to transport their handguns to shooting clubs and competitions outside of New York City. A district court held that the regulation did not restrict the right to possess a gun nor did it violate any other constitutional right. The US Court of Appeals for the Second Circuit agreed. The Supreme Court heard arguments in this case on December 2, 2019.

**Decided 6-3 on April 27, 2020:** In an unsigned opinion, the Court decided the case was moot because New York City amended its law to allow petitioners to transport their firearms to a second home or shooting range outside of the city. Justice Kavanaugh wrote a separate concurrence and Justices Thomas and Alito (joined by Justice Gorsuch) wrote separate dissents. Justice Kavanaugh and the dissenters wanted the court to weigh in on the way that lower courts are misinterpreting two past gun cases. **NCJW is pleased with the Court’s decision.**

## Government Ethics & Accountability

### ***Kelly v. United States***

Bridget Kelly served as deputy chief of staff to former New Jersey governor Chris Christie. Kelly was convicted and sentenced to 18 months in prison for her role in “Bridgegate” — the scandal that erupted over the decision to change the traffic patterns on the George Washington Bridge, creating gridlock in nearby Fort Lee, New Jersey. Officials cited a traffic study to justify the change, but prosecutors say that the real reason was a desire to punish the city’s mayor for not endorsing Christie’s re-election bid. The case involved whether a public official defrauds the government of its property when she provides a “public policy reason” for an official decision that is not her actual reason for making the decision. A grand jury indicted Kelly and William Baroni, Jr. for their roles in the scheme and a jury convicted them on seven counts. The US Court of Appeals for the Third Circuit affirmed four of the seven counts. Oral arguments were heard by the Supreme Court on January 14, 2020.

**Decided unanimously on May 7, 2020:** The Court, in an opinion authored by Justice Kagan, said that Kelly and Baroni could not have violated federal law because they were not seeking money or property. **NCJW is troubled by this decision.**