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Supreme Court Report

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This *Report* summarizes opinions issued on July 8 and 9, 2020 (Part I).

I. Opinions

● *Trump v. Vance*, 19-635. By a 5-2-2 vote, the Court held that "the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need." In 2019, the New York County District Attorney's Office—acting on behalf of a grand jury it had convened—served a subpoena *duces tecum* on Mazars USA, President Trump's personal accounting firm. The subpoenas directed Mazars to produce financial records relating to the President and business organizations affiliated with him, including his tax returns from "2011 to the present." The President, in his personal capacity, sued the district attorney and Mazars in federal district court to enjoin enforcement of the subpoena, arguing that the President enjoys absolute immunity from state criminal process. The district court abstained and dismissed the case based on *Younger v. Harris*, 401 U.S. 37 (1971). In the alternative, the district court ruled against the President on the merits. The Second Circuit held that *Younger* abstention was inappropriate but agreed with the district court on the merits that the President was not entitled to a preliminary injunction. The court rejected the President's claim of absolute immunity and the argument asserted by the United States as amicus curiae that the state grand jury had to satisfy a heightened showing of need. Through an opinion by Chief Justice Roberts, the Court affirmed and remanded.

The Court first focused on the 1807 trial of Aaron Burr for treason. Prior to the trial, he moved for a subpoena *duces tecum* directed at President Thomas Jefferson that would require the President to produce a letter from Burr's co-conspirator that allegedly incriminated Burr. The President opposed the request, but Chief Justice Marshall—presiding over the case as Circuit Justice for Virginia—declared that the President does not "stand exempt from the general provisions of the constitution," including the Sixth Amendment's compulsory process guarantee. Marshall disagreed that demands on the President's time exempted him from testimonial obligations or that the possibility the requested papers might contain state secrets did so. According to the Court here, "[i]n the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena." The Court pointed to examples involving Presidents Monroe, Grant, Ford, Carter, and Clinton. The Court then pointed to *United States v. Nixon*, 418 U.S. 683 (1974), where the Court rejected President Richard Nixon's attempt to quash a subpoena *duces tecum* seeking the Watergate tapes. "[E]ndorsing Marshall's holding that Presidents are subject to subpoena," the *Nixon* Court invoked the maxim that "the public has a right to every man's evidence" and "observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting."

The Court noted that here it is dealing for the first time with a subpoena issued "by a local grand jury operating under the supervision of a *state* court"—a distinction the President said "makes all the difference." The Court disagreed. It first rejected the President's claim of absolute immunity. The President insisted that complying with subpoenas would divert him from his duties, citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which recognized the President's "absolute immunity from damages liability predicated on his official acts." "But," found the Court here, "*Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity." And *Clinton v. Jones*, 520 U.S. 681 (1997), "expressly rejected immunity based on distraction alone." The Court here stated that "[j]ust as a

'properly managed' civil suit is generally 'unlikely to occupy any substantial amount of' a President's time or attention, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties." (Citation omitted.) Plus, the President conceded that a state grand jury can "investigate a sitting President with an eye toward charging him after the completion of his term."

The Court next rejected the President's argument "that the stigma of being subpoenaed will undermine his leadership at home and abroad." Stated the Court, "there is nothing inherently stigmatizing about a President performing 'the citizen's normal duty of . . . furnishing information relevant' to a criminal investigation." Finally, the Court rejected the President's fear that he will be an "easily identifiable target" for harassment, stating that it "rejected a nearly identical argument in *Clinton*." And while the Court "cannot ignore the possibility that state prosecutors may have political motivations, here again the law already seeks to protect against the predicted abuse." The Court noted that grand juries may not engage in "arbitrary fishing expeditions" and that the President may seek protection in a federal court from a subpoena sought in bad faith. Second, "the Supremacy Clause prohibits state judges and prosecutors from interfering with the President's official duties," which the President, again, can enforce in federal court. The Court noted that its members are unanimous in rejecting absolute immunity.

The Court then rejected the Solicitor General's contention that "a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard." First, said the Court, "such a heightened standard would extend protection designed for official documents to the President's private papers." Second, the Court remained unconvinced that a heightened standard "is necessary for the Executive to fulfill his Article II functions." "Finally," said the Court, "in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence." Responding to the dissent's contention that the President is left with "no real protection," the Court observed that the President could challenge a subpoena based on bad faith and undue burden or breadth and noted that "'[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" Plus, the "President can raise subpoena-specific constitutional challenges, in either a state or federal forum"; and he can "argue that compliance with a particular subpoena would impede his constitutional duties."

The Court closed by saying: "Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need." The Court noted that the Second Circuit had directed that the case be returned to the district court, "where the President may raise further arguments as appropriate." And so the Court affirmed and remanded.

Justice Kavanaugh issued an opinion concurring in the judgment, which Justice Gorsuch joined. Justice Kavanaugh maintained that the Court should adopt the test established in *United*

States v. Nixon, which "requires that the prosecutor establish a 'demonstrated, specific need' for the President's information." He called that "a tried-and-true test that accommodates both the interests of the criminal process and the Article II interests of the President." Justice Kavanaugh agreed that "the majority opinion appropriately takes account of some important concerns that also animate *Nixon* and the Constitution's balance of power." But he found that only time (and future cases) will tell us the practical difference between the two tests (and those proposed by Justices Thomas and Alito in dissent). Justice Kavanaugh "agree[d] that the case should be remanded to the District Court for further proceedings, where the President may raise constitutional and legal objections to the state grand jury subpoena as appropriate."

Justice Thomas issued a dissenting opinion. He agreed that the President is not entitled to absolute immunity, but asserted that the President "is entitled to relief from enforcement of the subpoena" if he "can show that 'his duties as chief magistrate demand his whole time for national objects.'" Justice Thomas would reject the President's claim of absolute immunity on the ground that the text of the Constitution—while affording some immunities—does not afford that one. And he found support for that conclusion in the drafting and ratification process and in Chief Justice Marshall's actions in the Burr trial. On when the President is entitled to relief from the subpoena's enforcement, Justice Thomas said that Marshall set out the correct standard: when "'his duties as chief magistrate demand his whole time for national objects.'" In applying that standard, Justice Thomas stated that "[t]he Constitution vests the President with extensive powers and responsibilities, and courts are poorly situated to conduct a searching review of the President's assertion that he is unable to comply." Thus, "[w]hen the President asserts that matters of foreign affairs or national defense preclude his compliance with a subpoena, the Judiciary will rarely have a basis for rejecting that assertion."

Justice Alito also issued a dissenting opinion. He stated that "two important structural features must be taken into account." The first is that "[t]he Constitution entrusts the President with responsibilities that are essential to the country's safety and well-being." The second is that, under the Supremacy Clause, "a State may not block or interfere with the lawful work of the National Government." Relying on *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Justice Alito asserted that "a State's sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President." He stated that a "subpoena can easily impair a President's 'energetic performance of [his] constitutional duties.'" Making matters worse, "[t]here are more than 2,300 local prosecutors and district attorneys in the country," many of whom have political ambitions. "If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure." Justice Alito therefore concluded that a heightened standard must be met before a subpoena like the one at issue may be allowed. Specifically, he would require a prosecutor: "(1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office." Justice Alito criticized the majority opinion for providing the President insufficient protection, and therefore "threatens to impair the functioning of the Presidency."

● *Trump v. Mazars USA, LLP*, 19-715. By a 7-2 vote, the Court held that, in assessing whether to enforce a subpoena issued by a congressional committee seeking the President's personal information (here, President Trump's private financial records), "courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." Three committees of the House of Representatives sought information about the finances of the President, his children, and affiliated businesses. The House Financial Services Committee sought the information as part of an effort "to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." The Permanent Select Committee on Intelligence sought the information "as part of an investigation into foreign efforts to undermine the U.S. political process," including Russian interference with the 2016 election. And the House Oversight and Reform Committee wished to investigate, among other things, whether the President "has undisclosed conflicts of interest," "is complying with the Emoluments Clauses," and "has accurately reported his finances to the Office of Government Ethics and other federal entities." Petitioners—the President in his personal capacity, his children, and his affiliated businesses—filed two suits challenging the subpoenas, alleging that they lacked a legitimate legislative purpose and violated the separation of powers. The banks and accounting firm holding the records took no position on the legal issues; the House committees intervened to defend the subpoenas. In both cases, the district court ruled for the House, and the court of appeals (the D.C. Circuit and Second Circuit) affirmed, finding the subpoenas served a valid legislative purpose. In an opinion by Chief Justice Roberts, the Court vacated and remanded.

The Court noted that it has "never addressed a congressional subpoena for the President's information," and that disputes over congressional subpoenas have instead "been hashed out in the 'hurly-burly, the give-and-take of the political processes between the legislative and the executive.'" That practice began with George Washington, continued to Thomas Jefferson, and continued ever since. With that background, the Court stated that although "Congress has no enumerated constitutional power to conduct investigations or issue subpoenas," the Court has "held that each House has power 'to secure needed information' in order to legislate." Congressional subpoenas must therefore be "'related to, and in furtherance of, a legislative task of the Congress.'" By contrast, "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" Plus, recipients of legislative subpoenas retain common law and constitutional privileges, including executive privilege.

The President and Solicitor General contended that, because the President's papers are at issue, "the House must establish a 'demonstrated, specific need' for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes." And drawing on a D.C. Circuit decision regarding the Watergate tapes, the President asserted that the House must show that the requested information is "demonstrably critical" to its legislative purpose. The Court disagreed, noting that *United States v. Nixon* and the D.C. Circuit case involved claims of executive privilege. "We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations. . . . Such a categorical approach would represent a significant departure from the longstanding way

of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively."

The Court likewise rejected the House's position, which asked that its subpoenas be upheld "because they 'relate[] to a valid legislative purpose' or 'concern[] a subject on which legislation could be had.'" That approach, found the Court, "fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." To the contrary, the House's approach "leav[es] essentially no limits on the congressional power to subpoena the President's personal records. Any personal paper possessed by a President could potentially 'relate to' a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects." The Court found that "[w]ithout limits on its subpoena power, Congress could 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense." The Court found these separation of powers concerns fully applicable even though the subpoenas here involved personal papers and the subpoenas were issued to third parties.

In the end, said the Court, "[a] balanced approach is necessary," and "courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." The Court specified four "special considerations [that] inform this analysis." First, "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers." That means "Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a 'case study' for general legislation." Second, "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better." Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena." The Court vacated the lower court judgments and remanded to allow them to take those concerns into account.

Justice Thomas filed a dissenting opinion. He "would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power." That is because, Justice Thomas maintained, "[a]t the time of the Founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers." He found that legislative subpoenas to private parties could not be justified based on legislative supremacy because our Constitution rejected that concept or based on "the practices of 18th-century American legislatures." Justice Thomas stated that legislative subpoenas for "private, nonofficial documents" only began in the late 1830s and remained a controversial practice through the country's first century. Indeed, the Court refused to uphold the first such subpoena that came before it, in *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Justice Thomas acknowledged that the Court upheld such subpoenas in *McGrain*

v. Daugherty, 273 U.S. 135 (1927), but he concluded that *McGrain* "misunderstands both the original meaning of Article I and the historical practice underlying it." In Justice Thomas' view, the Constitution makes impeachment the only avenue through which Congress could obtain the President's papers, for "[t]he power to impeach includes a power to investigate and demand documents."

Justice Alito filed a separate dissenting opinion. He would assume for the sake of argument that legislative subpoenas are not categorically barred. Still, he finds such subpoenas "inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas." Justice Alito said, with respect to the specific subpoenas at issue, that "there is disturbing evidence of an improper law enforcement purpose"; and that "the sheer volume of documents sought calls out for explanation." He stated that he does "not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date." He would therefore require the House to make a variety of showings, including "a description of the type of legislation being considered," an explanation for the subpoenas' scope, and an explanation "why the subpoenaed information, as opposed to information available from other sources, is needed."

● *McGirt v. Oklahoma*, 18-9526. By a 5-4 vote, the Court held that Congress never disestablished the 1866 boundaries of the Creek Nation, meaning that all 3,079,095 acres within those boundaries—including most of the City of Tulsa—are "Indian country." As the dissent noted, "the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians." Years ago an Oklahoma state court convicted Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, of three serious sexual offenses years that took place on the Creek Reservation. He argued in postconviction proceedings that the state lacked jurisdiction to prosecute him because the federal Major Crimes Act (MCS) grants federal courts exclusive jurisdiction of crimes committed within "Indian country." And so the question whether the lands that constituted the Creek Reservation are still a reservation was joined. The Oklahoma state courts, in conflict with the Tenth Circuit, held that the federal government long ago disestablished the reservation. In an opinion by Justice Gorsuch, the Court reversed.

The Court began by describing how Congress created the Creek Reservation through a series of treaties connected to the United States' removal of the Creek from their ancestral lands in Georgia and Alabama. The 1833 Treaty granted the Creek Nation a patent, in fee simple, for the land. Although the early treaties did not refer to the Creek lands as a "reservation," the Court "found similar language in treaties from the same era sufficient to create a reservation." The Creek Nation sold part of the reservation through an 1866 Treaty which referred to "the reduced Creek reservation," but stating that the remaining land would "be forever set apart as a home for said Creek Nation." Did Congress break that promise? The Court said that "[t]o determine whether a tribe continues to hold a reservation, there is only on place we may look: the Acts of Congress." And the Court will not "lightly infer" that Congress breached its promises "once Congress has established a reservation." The Court

noted that "Congress knows how to withdraw a reservation when it can muster the will," pointing to explicit language Congress used in various statutes. No magic words are required, but Congress must "clearly express its intent to do so." The Court found no such clear expression here.

Oklahoma pointed to events during the "allotment era." In 1893 Congress established the Dawes Commission with the charge to persuade the Creek to cede territory to the United States or agree to allot its lands to tribal members. The Tribe refused the former, but acceded to the latter, culminating in a 1901 allotment agreement under which, with just a few exceptions, the reservation was allotted in 160-acre parcels to individual Tribe members who, by 1908, were permitted to sell their land to Indians and non-Indians alike. "Missing in all this," said the Court, "is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands. . . . [T]he Creek Reservation survived allotment"—a finding consistent with prior decisions holding that allotment, by itself, does not disestablish a reservation. "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination."

Oklahoma also pointed to the Curtis Act of 1898, through which "Congress abolished the Creeks' tribal courts[,] transferred all pending civil and criminal cases to the U.S. Courts of the Indian Territory," and subjected most major tribal ordinances to presidential approval. The Court found, however, that the Tribe still retained "significant sovereign functions over the lands in question," such as "the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process." True, the 1901 allotment agreement declared that the Creek tribal government "shall not continue" past 1906. But when 1906 arrived, Congress adopted the Five Civilized Tribes Act, which took a different course, merely "cutting away further at the Tribe's autonomy." Congress expressly recognized the Creek's "tribal existence and present tribal government[t]." And so, said the Court, "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation."

The Court next turned to Oklahoma's reliance on "historical practice and demographics, both around the time of and long after the enactment of all the relevant legislation." The state claimed these were the second and third steps of the test set out in *Solem v. Bartlett*, 465 U.S. 463 (1984). But that "is mistaken. When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." After reviewing its precedent, it "restate[d]": "There is no need to consult extratextual sources when the meaning of a statute's terms is clear." The Court added that the state's case does not persuade on its own terms. The state pointed to its longstanding practice of prosecuting Indians in state court for serious crimes committed on the contested lands. But, found the Court, the state also "erroneously entertained prosecutions for major crimes by Indians on Indian allotments for decades, until state courts finally disavowed the practice in 1989." Why should the former practice be taken "as a reliable guide to the meaning and application of" the MCA?" The state also pointed to statements by Creek leaders during the allotment era showing that they "understood their reservation was under threat." But the Court found these to be mere prophesies. Finally, the Court found the movement of white settlers into the lands equally unpersuasive, particularly because much white settlement was the product of fraud.

The Court rejected Oklahoma's contention that Congress never established a reservation in the first place, but rather established only a "dependent Indian community," which is more easily disestablished. The Court stated that "[h]olding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes. . . . What are we to make of the federal government's repeated treaty promises that the land would be 'solemnly guarantied to the Creek Indians,' that it would be a 'permanent home,' 'forever set apart,' in which the Creek would be 'secured in the unrestricted right of self-government'? What about Congress's repeated references to a 'Creek reservation' in its statutes?" Oklahoma argued that the land was not "reserved from sale," but rather was held by the Tribe in fee simple. But the Court found it "untenable" that, "when the federal government agreed to offer more protection for tribal lands, it really provided less." Oklahoma next argued that, even if the Creek land is a reservation, the MCA doesn't apply to the eastern half of Oklahoma, which "is and has always been exempt." Oklahoma made an intricate argument that the Court rejected as not coming close to satisfying the requirement of a clear congressional expression of intent "before the state or federal government may try Indians for conduct on their lands."

Finally, the Court downplayed the practical impact of its decision. The Court observed that it is not "unheard of for significant non-Indian populations to live successfully in or near reservations today." As to the decision's effect on criminal convictions, "the MCA applies only to certain crimes committed in Indian country by Indian defendants." Plus, many defendants may choose not to try their luck in federal court or are procedurally barred from doing so. And "[i]n any event," said the Court, "the magnitude of a legal wrong is no reason to perpetuate it." On the civil side, the Court noted that "Oklahoma and its Tribes have proven they can work successfully together as partners," having "negotiated hundreds of intergovernmental agreements." In the end, stated the Court, "If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."

Chief Justice Roberts filed a dissenting opinion, which Justices Alito and Kavanaugh joined in full and Justice Thomas joined except for a footnote. Chief Justice Roberts expressed concern that, across eastern Oklahoma, "the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law." The dissent explained that the Creek and other members of the "Five Tribes" allied with the Confederacy. The United States responded by imposing a new treaty that required each Tribe to give up western lands, which became Oklahoma Territory. Next came a flood of settlers into the Indian Territory (the Five Nations' reservations)—over 300,000 by 1900. Given the difficulties created by communal title to the land, Congress "set about transforming the Indian Territory into a State." "Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U.S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority.

Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma." "The tribal leadership acknowledged that its only remaining power was to parcel out the last of its land, and the State assumed jurisdiction over criminal cases that, if a reservation had continued to exist, would have belonged in federal court."

Chief Justice Roberts criticized the majority for ignoring the sweep of these changes and instead "viewing each of the statutes enacted by Congress in a vacuum." And he criticized the Court for rewriting the *Solum* three-part test into a one-part test. "No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation." The Chief Justice explained why pure literalism was not the appropriate framework here: "Congress believed 'to a man' that 'within a short time' the 'Indian tribes would enter traditional American society and the reservation system would cease to exist.' As a result, Congress—while intending disestablishment—did not always 'detail' precise changes to reservation boundaries. Recognizing this distinctive backdrop, our precedents determine Congress's intent by considering a broader variety of evidence than we might for more run-of-the-mill questions of statutory interpretation." (Citations omitted.)

"Applied properly," Chief Justice Roberts insisted, "our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood." "What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place." Chief Justice Roberts disagreed with the majority's assertion that "Congress just couldn't 'muster the will' to finish the job." "This is fantasy. The congressional Acts detailed above do not evince any unease about extinguishing the Creek domain, or any shortage of 'will.' Quite the opposite. Through an open and concerted effort, Congress did what it set out to do: transform a reservation into a State."

Chief Justice Roberts next turned to "the contemporaneous understanding" of the situation and the "history surrounding the passage" of the relevant Acts. In his view, "[t]he available evidence overwhelmingly confirms that Congress eliminated any Creek reservation. That was the purpose identified by Congress, the Dawes Commission, and the Creek Nation itself. And that was the understanding demonstrated by the actions of Oklahoma, the United States, and the Creek." He noted that, consistent with disestablishment, "at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court." "Perhaps most telling," he wrote, "is that the

State's jurisdiction over crimes on Indian allotments was hotly contested from an early date, whereas nobody raised objections based on a surviving reservation."

Chief Justice Roberts then looked at the third *Solem* factor, "the subsequent treatment of the area in question and the pattern of settlement there." He pointed to numerous federal statutes referring to the "former reservation[s]" "in Oklahoma"; to the state's "'exercise[e] [of] unquestioned jurisdiction over the disputed area since the passage of" the Enabling Act"; and to the federal government and tribal leaders' operating on that same understanding. As to demographic history, "the population of the land has remained approximately 85%-90% non-Indian." Finally, Chief Justice Roberts turned to practical concerns. First, there are the "thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades," which are now called into question. Second, "the decision may destabilize the governance of vast swaths of Oklahoma." "Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test." See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). And under *Montana v. United States*, 450 U.S. 544 (1981), tribes can exercise authority over non-Indians if the conduct stems from a "consensual relationship[] with the tribe or its members" or directly affects "the political integrity, the economic security or the health or welfare of the tribe." Concluded the Chief Justice, "when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis."

● *Little Sisters of the Poor v. Pennsylvania*, 19-431. By a 5-2-2 vote, the Court upheld regulations that exempt employers who have religious and moral objections from complying with the Affordable Care Act's mandate that health plans provide coverage for women's contraceptives. The Affordable Care Act (ACA) requires covered employers to provide women with "preventive care and screenings" without "any cost sharing requirements." 42 U.S.C. §300gg-13(a)(4). Rather than specifying the covered forms of "preventive care," the ACA provides that coverage must include "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), an agency within the Department of Health and Human Services. In August 2011, HRSA issued guidelines requiring health plans to provide coverage for all contraceptive methods approved by the Food and Drug Administration. That same day, in an interim final rule (IFR), the Departments of Health and Human Services, Labor, and the Treasury (Departments) issued the "church exemption," which exempted churches from the contraceptive mandate. In 2013, the Departments issued a final rule intended to accommodate religious organizations that objected to the contraceptive mandate but were not entitled to the church exemption. Under the accommodation, a nonprofit religious organization that has a religious objection to providing insurance for contraceptives could self-certify to that effect; provide a copy of the self-certification form to its health insurance issuer; "which in turn would exclude contraceptive coverage from the group health plan and provide payments to beneficiaries for contraceptive services separate from the health plan." Shortly thereafter, two religious nonprofits run by the Little Sisters of the Poor challenged the accommodation, claiming it made them complicit in the provision of contraceptives, in

violation of their faith. They therefore claimed that the accommodation violated the Religious Freedom Restoration Act (RFRA). That issue reached the Supreme Court, but in *Zubik v. Burwell*, 578 U.S. ___ (2016), the Court remanded the cases without deciding the issue, directing the government to "accommodat[e] petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal coverage, including contraceptive coverage." Meanwhile, in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the Court held that the contraceptive "mandate, standing alone, violated RFRA as applied to religious entities with complicity-based objections." In 2016, the Departments attempted but failed to identify a "feasible" way of satisfying the *Zubik* remand direction.

In 2017, with a new administration in the White House, the Departments gave the religious organizations what they wanted. The Departments issued two IFRs that expanded the church exemption so that any employer—including for-profit and publicly traded entities—that has a religious or moral objection to offering contraceptive services qualifies as an exempt religious employer. "Because they were exempt, these employers did not need to participate in the accommodation process[.]" The Departments invoked §300gg-13(a)(4) as authority for this religious exemption, as they had for the prior church exemption and accommodation. The Departments also stated "that RFRA compelled the creation of, or at least provided discretion to create, the religious exemption." Within a week of the IFRs' promulgation, Pennsylvania filed suit challenging the IFRs as procedurally and substantively invalid. The district court ruled for Pennsylvania and issued a nationwide preliminary injunction against the IFRs. While the Departments' appeal was pending, the Departments issued rules finalizing the 2017 IFRs. "Though the final rules left the exemptions largely intact, they also responded to post-promulgation comments." New Jersey then joined Pennsylvania's suit, and they jointly filed an amended complaint. They alleged that the final rules were substantively unlawful because the Departments lacked statutory authority to issue the exemptions. They further alleged that the IFRs were invalid because the Departments lacked good cause to bypass the Administrative Procedure Act's (APA) notice and comment procedures. And these procedural defects, they argued, infected the final rules. The district court agreed and issued another nationwide preliminary injunction. The Third Circuit affirmed. In an opinion by Justice Thomas, the Court reversed and remanded.

The Court first held that the 2018 final rules were substantively valid because they were authorized by ACA §300gg-13(a)(4). To remind, that provision states that "with respect to women," "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . such additional preventive care and screenings not described in paragraph (1) *as provided for* in comprehensive guidelines supported by [HRSA]." (Emphasis added.) The Court agreed with the Departments that the key phrase is "as provided for," which "grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover," "including the ability to identify and create exemptions from its own Guidelines."

Having found that the ACA authorized the rules, the Court found no need to reach the Departments' argument that RFRA independently compelled them. But the Court went on to "address respondents' argument that the Departments could not even consider RFRA as they formulated the religious exemption." The Court found it "appropriate" for the Departments to do so, given that "the

potential for conflict between the contraceptive mandate and RFRA is well settled." See *Hobby Lobby*, *supra*. Indeed, said the Court, given *Hobby Lobby*, had the Departments not considered RFRA they would have violated the APA by failing to consider an important aspect of the problem.

Finally, the Court ruled that the final rules were procedurally valid. Respondents claimed that the IFRs were insufficient to satisfy the APA's requirement that agencies publish a notice of proposed rulemaking before promulgating a rule with legal force. The Court disagreed. "Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA" —the IFRs identified the legal authority for the rules, described the rules, and requested comments. The Court added that, even assuming there was error, it was not "prejudicial." (The Court said it had "previously noted that the rule of prejudicial error is treated as an 'administrative law . . . harmless error rule[.]')" The Court found that respondents did not "experience[e] any harm from the title of the document." Finally, the Court rejected the Third Circuit's reasoning that "because the final rules were 'virtually identical' to the IFRs, the Departments lacked the requisite 'flexible and open-minded attitude' when they promulgated the final rules." The Court disdained an "open-mindedness test," stating that nothing in the APA requires it and courts cannot add judge-made procedures to the APA.

Justice Alito filed a concurring opinion, which Justice Gorsuch joined. Justice Alito noted that the Court "now send[s] these cases back to the lower courts, where the Commonwealth of Pennsylvania and the State of New Jersey are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA." He would end this seven-year litigation once and for all by holding that "RFRA compels an exemption for the Little Sisters and any other employer with a similar objection to what has been called the accommodation to the contraceptive mandate." RFRA bars the federal government from "substantially burdening a person's exercise of religion" unless the government action survives strict scrutiny. Justice Alito said that *Hobby Lobby* already held that "requiring the Little Sisters or any other employer with a similar religious objection to comply with the mandate would impose a substantial burden." And "[t]he inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections." Justice Alito next stated that the federal government lacked a compelling interest in imposing the contraceptive mandate on employers such as the Little Sisters. That's because the mandate contains "exceptions aplenty," including for women who work at home, for employers with fewer than 50 employees, and for large employers with "grandfathered" plans. In response to the dissent's assertion that the government had a compelling interest in providing "seamless" cost-free coverage, Justice Alito said: "It is undoubtedly convenient for employees to obtain all types of medical care and all pharmaceuticals under their general health insurance plans, and perhaps there are women whose personal situation is such that taking any additional steps to secure contraceptives would be a notable burden. But can it be said that all women or all working women have a compelling need for this convenience?" Finally, Justice Alito maintained that the accommodation was not the least restrictive means of meeting the government's interest. Quoting *Hobby Lobby*, he insisted that "[t]he most straightforward way would be for the Government to assume the cost of providing the . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies." Finally, Justice Alito responded to the respondent states' contention that

the new religious rule "grants an exemption to some employers who were satisfied with the prior accommodation." Said Justice Alito, "An employer who is satisfied with the accommodation may continue to operate under that regime." Plus, he remarked, "[n]othing in RFRA requires that a violation be remedied by the narrowest permissible corrective."

Justice Kagan filed an opinion concurring the judgment, which Justice Breyer joined. Justice Kagan first explained that she agreed the Departments had authority to issue the new exemption, but for a different reason than the majority. In her view, whether the statute gave HRSA discretion to decide who needs to provide coverage is a close question. And "*Chevron* deference was built for cases like these." Such deference is especially appropriate, she found, because "the Departments have adopted the majority's reading of the statutory delegation ever since its enactment" and "[o]ver the course of two administrations[.]" Justice Kagan then added, though, that this "does not mean the Departments should prevail when these cases return to the lower courts." The respondent states argued that the challenged exemptions are "arbitrary [and] capricious," an issue the Court did not reach. And in Justice Kagan's view, "the exemptions HRSA and the Departments issued give every appearance of coming up short. Most striking is a mismatch between the scope of the religious exemption and the problem the agencies set out to address." (Footnote omitted.) That is, the "rule exempted all employers with objections to the mandate, even if the accommodation met their religious needs. In other words, the Departments exempted employers who had no religious objection to the status quo[.]" Justice Kagan also expressed concern that the new rule "allow[s] even publicly traded corporations to claim a religious exemption" and extends to employers with moral, as opposed to religious, objections. Both aspects of the rule "may also prove arbitrary and capricious."

Justice Ginsburg filed a dissenting opinion, which Justice Sotomayor joined. Justice Ginsburg maintained that ACA §300gg-13(a)(4) did *not* authorize the religious exemption. That provision, she said, empowered HRSA to decide the *type* of services that must be covered, but not *who* must provide the coverage. In addition to dissecting the statutory language, Justice Ginsburg noted that "HRSA's expertise does not include any proficiency in delineating religious and moral exemptions. One would not, therefore, expect Congress to delegate to HRSA the task of crafting such exemptions." Justice Ginsburg noted that, although this would mean that the original church exemption was not authorized by the ACA, that exemption "was justified on First Amendment grounds."

Justice Ginsburg next concluded that the religious exemption was not justified by RFRA. Pointing to *Zubik*'s direction that an accommodation between the two sides be reached, she insisted that RFRA does not demand that "religious adherents" receive benefits "at the expense of the rights of third parties." Yet that's just what would happen under the religious exemption, as between 70,500 and 126,400 women of childbearing age would lose their contraceptive coverage. Existing government programs are inadequate because they serve mainly low-income individuals and availing oneself of them imposes "additional barriers." Next, Justice Ginsburg embraced the respondent states' argument that the religious exemption "is not authorized by RFRA . . . because the self-certification accommodation it replaced was sufficient to alleviate any substantial burden on religious exercise." In Justice Ginsburg's view, "[a] religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to 'insist that . . . *others* must conform their conduct

to [her] own religious necessities.'" In the end, she said, the accommodation imposed the obligation to provide contraceptive coverage "directly on the insurers." Nor can it be said, claimed Justice Ginsburg, that the accommodation "hijacked" the religious employers' plans. Under the accommodation, "an insurance issuer 'must . . . [e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan.'"

Finally, Justice Ginsburg added in a footnote that the district court did not abuse its discretion in issuing a nationwide injunction, for such an injunction was necessary to provide complete relief to the plaintiffs. She stated that the harm inflicted by the exemption "is not bounded by state lines"—800,000 residents of Pennsylvania and New Jersey work and receive health insurance out of state; and many students attending college in those two states receive health insurance from their parents' out-of-state health plans.

● *Our Lady of Guadalupe School v. Morrissey-Berru*, 19-267; *St. James School v. Biel*, 19-348. By a 7-2 vote, the Court held that the "ministerial exception"—which prevents civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer—applies to two elementary school teachers at "religious schools who are entrusted with the responsibility of instructing their students in the faith." The case comes in wake of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). *Hosanna-Tabor* recognized the ministerial exception and set forth four circumstances it found relevant to concluding that Cheryl Perich, an elementary school teacher, was a minister subject to the exception. The Ninth Circuit, in two separate decisions, applied the four circumstances like factors in a balancing test and found two elementary school teachers not to be covered by the exception.

The first of those cases involved Agnes Morrissey-Berru, who was employed as a lay fifth or sixth grade teacher at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school. She taught all subjects, including religion, which she taught every day; took religion education courses at the school's request; signed an employment agreement stating that the school's mission was "to develop and promote a Catholic School Faith Community"; was considered a "catechist," *i.e.*, a teacher of religion; produced an annual passion play; took her students to Mass once a week; and began and ended every day with a Hail Mary. After the school declined to renew her contract, she sued it under the Age Discrimination in Employment Act. The school maintained that it let her go because she had difficult administering a new reading and writing program. OLG successfully moved for summary judgment in the district court based on the ministerial exception, but the Ninth Circuit reversed. It agreed that Morrissey-Berru had "significant religious responsibilities" but found that factor "outweighed" by the facts that she did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister." The second case involved the late Kristen Biel, who served as a substitute first-grade teacher and full-time fifth grade teacher at St. James School, another Catholic primary school. Biel's employment agreement was similar to Morrissey-Berru's. Biel taught religion for 200 minutes each week; administered a weekly religion test; worshipped with her students; taught her students Catholic practices; prayed with her students at monthly Masses; and opened and closed each school day with a prayer.

After St. James did not renew Biel's contract, Biel sued the school, alleging she was discharged because he sought a leave of absence to obtain treatment for breast cancer. The school insisted that the decision was based on poor performance. St. James obtained summary judgment based on the ministerial exception, but another Ninth Circuit panel reversed, reasoning that Biel lacked Perich's "credentials, training, [and] ministerial background." In an opinion by Justice Alito, the Court reversed and remanded.

The Court reaffirmed that "the Religion Clauses protect the right of churches and other religious institutions to decide matters '"of faith and doctrine"' without government intrusion. . . . This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles. The 'ministerial exception' was based on this insight." The Court described the exception as requiring courts "to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." The Court then described *Hosanna-Tabor* and noted the "four relevant circumstances" it identified as forming the basis for concluding that Perich qualified as a minister: she had the title "minister"; her position "reflected a significant degree of religious training"; she "held herself out as a minister of the Church"; and her "job duties reflected a role in conveying the Church's message and carrying out its mission."

The Court explained here that "our recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases." For example, "since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement." And "insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach." Thus, said the Court, "[w]hat matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."

The Court ruled that when it applies that understanding to the cases now before it, it is clear that Morrissey-Berru and Biel are ministers subject to the exception. "There is abundant record evidence that they both performed vital religious duties." Also, "both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important." The Court criticized the Ninth Circuit for "treating the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same." Rather *Hosanna-Tabor* "called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception." The Ninth Circuit therefore placed too much weight on

Morrissey-Berru and Biel not having the title of "minister"; and on their having less formal religious schooling than Perich.

Justice Thomas filed a concurring opinion, which Justice Gorsuch joined. Justice Thomas wrote to reiterate the claim he made in his *Hosanna-Tabor* concurring opinion: "that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'" "This deference is necessary," he said, "because, as the Court rightly observes, judges lack the requisite 'understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.' What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis." (Citation omitted.)

Justice Sotomayor filed a dissenting opinion, which Justice Ginsburg joined. Justice Sotomayor noted that prior to *Hosanna-Tabor*, courts typically focused on whether the employee "was a 'spiritual leade[r]' within a congregation such that 'he or she should be considered clergy.'" "That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees," including lay faculty. Justice Sotomayor asserted that *Hosanna-Tabor* did not change that. It found Perich to be a minister based on four "factors" which showed that she "had a unique leadership role within her church." Justice Sotomayor contended that the majority here rewrote *Hosanna-Tabor*, essentially adopting the view of a concurring opinion which said that all that matters is the religious function the teacher performs. And "because the Court's new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp."

In Justice Sotomayor's view, applying *Hosanna-Tabor* faithfully shows that Morrissey-Berru and Biel are not ministers. Both were "lay" teachers, without any leadership position. Second, "neither teacher had a 'significant degree of religious training' or underwent a 'formal process of commissioning.' Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment." (Citation omitted.) "Third, neither Biel nor Morrissey-Berru held herself out as having a leadership role in the faith community." As to the fourth consideration, the teachers' function, "the time Biel and Morrissey-Berru spent on secular instruction far surpassed their time teaching religion. For the vast majority of class, they taught subjects like reading, writing, spelling, grammar, vocabulary, math, science, social studies, and geography." Further, said Justice Sotomayor, "Biel did not lead devotionals in her classroom, did not teach prayers, and had a minor role in monitoring student behavior during a once-a-month mass." And "Morrissey-Berru did not lead mass, deliver sermons, or select hymns." On top of that, Justice Sotomayor insisted, "neither school has shown that it required its religion teachers to be Catholic. The Court does not explain how the schools here can show, or have shown, that a non-Catholic 'personif[ies]' Catholicism or leads the faith."

Justice Sotomayor closed by discussing the consequences of the decision. Some "sources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets." (Citation omitted.) Thus, "[s]o long as the employer determines that an employee's 'duties' are 'vital' to 'carrying out the mission of the church,' then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion. This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities." (Citation omitted.)

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