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This *Report* summarizes opinions issued on March 4 and 8, 2021 (Part I); and cases granted review on March 8, 2021 (Part II).

I. Opinions

● *Uzuegbunam v. Preczewski*, 19-968. By an 8-1 vote, the Court held (to quote the syllabus) that "[a] request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right." Petitioner Chike Uzuegbunam is an evangelical Christian who was a student at Georgia Gwinnett College, a public college. One day, he "engaged in conversations with interested students and handed out religious literature." A campus police officer told Uzuegbunam that he had to stop because campus policy prohibited distributing religious material in that area. Uzuegbunam complied with the order, and later discovered that he could "speak about his religion or distribute materials only in two small designated 'free speech expression areas,'" and only after obtaining a permit. Uzuegbunam obtained such a permit and began speaking in one zone when he was stopped by another campus police officer for violating the policy prohibiting using the zone to "disturb[] the peace and/or comfort of person(s)." Uzuegbunam again complied with the order. "Another student who shares Uzuegbunam's faith, Joseph Bradford, decided not to speak about religion because of these events." Both students sued various college officials, arguing that those policies violated the First Amendment. They sought nominal damages and injunctive relief. The college officials responded by getting rid of the challenged policies. They then moved to dismiss the case as moot. The students agreed that they could no longer obtain injunctive relief, but "contended that their case was still live because they had also sought nominal damages." The district court dismissed the case as moot, and the Eleventh Circuit affirmed. In an opinion by Justice Thomas, the Court reversed and remanded.

The Court explained that "[t]o satisfy the 'irreducible constitutional minimum' of Article III standing," a plaintiff must establish, among other things, "a remedy that is likely to redress [his] injury." The issue here "is whether the remedy [Uzuegbunam] sought—nominal damages—can redress the constitutional violation that Uzuegbunam alleges occurred." The Court held that, to answer that question, it must "look to the forms of relief awarded at common law." Although both parties "agree[d] that nominal damages historically could provide prospective relief," they disagreed "about whether nominal damages alone could provide retrospective relief." The Court ultimately agreed with Uzuegbunam that they could.

The Court pointed to opinions awarding nominal damages even absent other types of damages, "and they did so where there was no apparent continuing or threatened injury for nominal damages to redress." The Court found this approach "followed both before and after ratification of the Constitution," pointing to a prominent (later validated) dissent by Lord Holt and opinions by Justice Story. In the end, the Court concluded that "the prevailing rule, 'well established' at common law, was 'that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.'"

That rule made sense, said the Court: "By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights." The Court rejected respondents' and the dissent's contention "that courts could award nominal damages only when a plaintiff pleaded compensatory damages but failed to prove a specific amount." The Court found that rule unsupported by the cases: "Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." Nor, said the Court, are nominal damages "purely symbolic." "Because nominal damages are in fact damages paid to the plaintiff, they 'affec[t] the behavior of the defendant towards the plaintiff' and thus independently provide redress." Finally, the Court rebutted the dissent's "worr[y] that after today the Judiciary will be required to weigh in on legal questions 'whenever a plaintiff asks for a dollar.'" The Court explained that "petitioners still would have satisfied redressability if instead of one dollar in nominal damages they sought one dollar in compensation for a wasted bus fare to travel to the free speech zone." The Court closed by applying its ruling here. "[I]t is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because 'every violation [of a right] imports damage,' nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms." (Citation omitted.) (In a footnote, the Court said it was not deciding whether Bradford—who failed to establish a past, completed injury—could pursue nominal damages.)

Chief Justice Roberts dissented (his first solo dissent). He maintained that "an award of nominal damages does not alleviate the harms suffered by a plaintiff, and is not intended to. If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar. . . . I would place a higher value on Article III[.]" He criticized the Court as "see[ing] no problem with turning judges into advice columnists." Doctrinally, he disagreed "with the Court regarding both the framework it applies and the result it reaches." As to the former, he disagreed that the common law is dispositive: "Any lessons that we learn from the common law [ ] must be

tempered by differences in constitutional design." That is, "[a] focus on common law analogues cannot obscure the significance of the establishment of an independent Judiciary—a 'remarkable transformation' from a system with courts operating as 'appendages of crown power.'" Next, Chief Justice Roberts found it "entirely unclear whether common law courts would have awarded nominal damages in a case like the one before us." He found common law awards of nominal damages "generally limited to situations in which prevailing plaintiffs tried and failed to prove actual damages." He also faulted the Court for "spend[ing] little time trying to reconcile its analysis with modern justiciability principles." "To satisfy Article III, redress must alleviate the plaintiff 's alleged injury in some way, either by compensating the plaintiff for a past loss or by preventing an ongoing or future harm. Nominal damages do not serve these ends where a plaintiff alleges only a completed violation of his rights." And Chief Justice Roberts found the Court's ruling had no limiting principle: "'[it] is hard to conceive of a case in which a plaintiff would be unable to append a claim for nominal damages, and thus insulate the case from the possibility of mootness.'"

Chief Justice Roberts closed by raising a point the majority did not address. He said that "[t]he best that can be said for the Court's sweeping exception to the case-or-controversy requirement is that it may itself admit of a sweeping exception: Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff 's claims. Although we recently reserved the question whether a defendant can moot a case by depositing the full amount requested by the plaintiff, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016), our cases have long suggested that he can, see, *e.g.*, *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308, 313– 314 (1893)." Justice Kavanaugh filed a one-paragraph concurring opinion in which he joined the Court's opinion but noted that he agreed with Chief Justice Roberts on this point.

- *U.S. Fish & Wildlife Service v. Sierra Club, Inc.*, 19-547. By a 7-2 vote, the Court held that the deliberative process privilege—embodied in Exemption 5 of the Freedom of Information Act (FOIA)—"protects from disclosure . . . in-house drafts that proved to be the agencies' last word about a proposal's potential threat to endangered species." In 2011, the Environmental Protection Agency proposed a rule on the design and operation of "cooling water intake structures." Because fish can become trapped in these structures, EPA needed to consult with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (together, "Services"). Through such consultation, the Services prepare a "biological opinion" on whether EPA's proposed will jeopardize endangered species. Based on the consultation, EPA made changes to it proposed rule and sent the revised version to the Services in November 2013. Staff members at FWS and NMFS completed draft biological opinions by December 9. Both drafts concluded that the proposed rule was likely to jeopardize certain species. Rather than approving the drafts or sending them to EPA, the

Services decided to continue discussions with EPA. "So the Services shelved the draft opinions and agreed with the EPA to extend the period of consultation." In March 2014, EPA sent the Services a significantly revised version of the proposed rule. The Services went on to issue a joint final "no jeopardy" biological opinion, after which EPA issued its final rule. Sierra Club later submitted FOIA requests for records related to the Services' consultations with EPA. Although the Services turned over thousands of documents, they invoked the deliberative process privilege for the December 2013 draft biological opinions analyzing EPA's 2013 proposed rule. Sierra Club sued the Services, alleging that the drafts were subject to disclosure under FOIA. The district court ruled for Sierra Club, and the Ninth Circuit affirmed in relevant part, holding that the drafts were not privileged because "they represented the Services' final opinion that the EPA's 2013 proposed rule was likely to have an adverse effect on certain endangered species." Through an opinion by Justice Barrett—her first as a Justice—the Court reversed and remanded.

Exemption 5 of the Freedom of Information Act "incorporates the privileges available to Government agencies in civil litigation, such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege." "[T]he deliberative process privilege shields from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (Quotation marks omitted.) The privilege's goal is "[t]o encourage candor, which improves agency decisionmaking." That "rationale does not apply . . . to a final decision, because once a decision has been made, the deliberations are done. The privilege therefore distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not." The Court stated that "one thing is clear: A document in not final solely because nothing else follows it. Sometimes a proposal dies on the vine." And "documents discussing such dead-end ideas can hardly be described as reflecting the agency's chosen course. What matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." (Citation omitted.)

Turning to the facts of this case, the Court held that "[t]he deliberative process privilege protects the draft biological opinions at issue here because they reflect a preliminary view—not a final decision—about the likely effect of the EPA's proposed rule on endangered species." The Court noted at the outset that the Services identified the opinions as "drafts." And the Court found that "the administrative context confirms that the drafts are what they sound like: opinions that were subject to change." The governing regulation "specifically contemplates further review by the agency after receipt of the draft, and with it, the possibility of changes to the biological opinion *after* the Services send the agency the draft." The Court rejected Sierra Club's contention that the draft opinions had an "operative effect" on EPA, and therefore must be treated as final, because the opinions

"were actually intended to give the EPA a sneak peak at a conclusion the Services had already reached and were unwilling to change." Unlike a draft opinion, found the Court, "a final biological opinion leads to 'direct and appreciable legal consequences' because it alters 'the legal regime to which the agency is subject.'" And "many documents short of a draft biological opinion could prompt an agency to alter its rule," including some (such as emails and memos) that clearly do not constitute a final administrative decision. In the end, said the Court, the question is whether the Services treated the draft as final. "They did not. The drafts were prepared by lower-level staff and sent to the Services' decisionmakers for approval." Those decisionmakers concluded that more work needed to be done. "These documents, then, are best described not as draft biological opinions but as drafts of draft biological opinions." In short, "[t]he recommendations were not last because they were final; they were last because they died on the vine."

Justice Breyer filed a dissenting opinion, which Justice Sotomayor joined. He found five "features" of the draft biological opinions that led him to conclude they "reflect 'final' decisions regarding the 'jeopardy' the EPA's then-proposed actions would have caused"—and hence fall outside Exception 5. Summarizing them, he pointed to "the likely finality of a Draft Biological Opinion, its similarity to a Final Biological Opinion, the similar purposes it serves, the agency's actual practice, the anomaly that would otherwise exist depending upon the presence or absence of a private party, and the presence of at least some regulation-based legal constraints." Justice Breyer thought, however, that some of the documents at issue might have been drafts of draft opinions (as opposed to draft opinions), and so would have remanded to allow the court of appeals to assess the documents with that in mind.

- *Pereida v. Wilkinson*, 19-438. A noncitizen is not eligible for discretionary relief from a lawful deportation order if he has been convicted of a disqualifying offense listed in the Immigration and Nationality Act. What if the noncitizen "has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction"? By a 5-3 vote, the Court held that the noncitizen bears the burden of showing he has not been convicted of a disqualifying offense, and has not carried his burden in that situation. The government brought removal proceedings against petitioner Clemente Pereida, alleging that he entered the country unlawfully and hadn't become a lawful resident. Pereida didn't dispute that he was subject to removal. Rather, he sought to establish only his eligibility for discretionary relief. But during his removal proceedings, Nebraska authorities were prosecuting (and ultimately convicted) Pereida for attempted criminal impersonation. Under Nebraska law, a person commits that crime if he commits any of the acts defined in four subsections, (a) to (d). An immigrant is not eligible for discretionary relief if he committed a crime "involving moral turpitude," which the parties agreed include a crime involving "fraud [as] an ingredient." The

immigration judge read subsections (a), (b), and (d) as stating a crime involving fraud, leaving only subsection (c)—prohibiting carrying on a business without a required license—as not. The government presented a copy of the criminal complaint against Pereida, which showed that Nebraska charged him with using a fraudulent social security card to obtain a job. Meanwhile, Pereida offered no competing evidence of his own. The immigration judge concluded that his conviction had nothing to do with subsection (c) and therefore involved fraudulent (and therefore disqualifying) conduct covered by subsections (a), (b), or (d). The Board of Immigration Appeals and Eighth Circuit affirmed. The Eighth Circuit reasoned that nothing in the record showed what Pereida had been convicted of. And because he "bore the burden of proving his eligibility for relief, [] it was up to him to show that his crime of conviction did not involve moral turpitude. Because [he] had not carried that burden, he was ineligible for discretionary relief[.]" In an opinion by Justice Gorsuch, the Court affirmed.

The Court began by quoting the Immigration and Nationality Act as providing that "[a]n alien applying for relief or protection from removal has the burden of proof to establish" that he "satisfies the applicable eligibility requirements" and that he "merits a favorable exercise of discretion." This means Pereida had the burden of proving he had not been convicted of a disqualifying crime. "Thus any lingering uncertainty about whether Mr. Pereida stands convicted of a crime of moral turpitude would appear enough to defeat his application for relief[.]" The Court found this understanding confirmed by context. The INA specifies types of evidence that "shall constitute proof of a criminal conviction," which shows that the statute "anticipates both the need for proof about prior convictions and the fact an alien sometimes bears the burden of supplying it." Plus, the INA sometimes expressly places the burden of proof on the government: "But the burden flips for '[a]pplications for relief from removal.'" Plus, "Pereida has offered no account why a rational Congress might wish to place this burden on an alien seeking admission to this country, yet lift it from an alien who has entered the country illegally and is petitioning for relief from a lawful removal order."

Pereida replied that he should be allowed to rely on the "categorical approach," under which a court "asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law." And here, says Pereida, "Nebraska's statute criminalizes at least some conduct—like carrying on a business without a license—that doesn't necessarily involve fraud." The Court ruled, however, that "[t]his argument [] overstates the categorical approach's preference for hypothetical facts over real ones." The Court noted that this case involved the "modified" categorical approach, which applies when a single criminal statute lists multiple, stand-alone offenses. Under the modified categorical approach, judges "'review[] the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction.'" This "left Mr. Pereida with the burden of proving as a factual matter that *his* conviction was for misusing

a business license under subsection (c)," a burden he failed to carry. It is true, said the Court, that (as Pereida contended) "when asking whether a state conviction triggers a federal consequence, courts applying the categorical approach often presume that a conviction rests on nothing more than the minimum conduct required to secure a conviction." But, explained the Court, "Pereida neglects to acknowledge that this presumption cannot answer the question *which* crime the defendant was convicted of committing. To answer that question, parties and judges must consult evidence. And where, as here, the alien bears the burden of proof and was convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn't among them." The Court concluded that this approach is supported by its precedents, which say "that to ask what crime the defendant has been convicted of committing is to ask a question of fact." Nor does it matter if "fairness and efficiency would be better served if the government bore the risk of loss associated with record-keeping difficulties." That is a matter for Congress, not the Court, to assess. Finally, the Court observed that, although the Court has limited the specific judicial records judges can review when applying the modified categorical test in the criminal context, "in the INA, Congress has expressly authorized parties to introduce a much broader array of proof when it comes to prior convictions."

Justice Breyer filed a dissenting opinion, which Justices Sotomayor and Kagan joined. He stated: "This case, in my view, has little or nothing to do with burdens of proof. It concerns the application of what we have called the 'categorical approach' to determine the nature of a crime that a noncitizen (or defendant) was previously convicted of committing. That approach sometimes allows a judge to look at, and to look only at, certain specified documents. Unless those documents show that the crime of conviction *necessarily* falls within a certain category (here a 'crime involving moral turpitude'), the judge must find that the conviction was not for such a crime. The relevant documents in this case do not show that the previous conviction at issue necessarily was for a crime involving moral turpitude. Hence, applying the categorical approach, it was not. That should be the end of the case." He noted that under the modified categorical approach, "the judge can look to [only] a limited set of court records to see if they say which subsection the defendant was convicted of violating." If those records don't tell us which kind of burglary was the basis for the conviction, "a judge is to determine what the defendant necessarily admitted (or what a jury necessarily found) in order for a court to have entered a conviction." Burdens of proof are irrelevant, Justice Breyer said, "because the categorical approach conclusively resolves the ambiguity as to which offense was the basis for the conviction." And he "see[s] no reason for the categorical approach to apply differently under the INA than under [the Armed Career Criminal Act] given their shared text and purpose." Finally, he asserted that the Court's "decision will result in precisely the practical difficulties and potential unfairness that Congress intended to avoid by adopting a categorical approach." For example, "[g]iven

the vast number of different state misdemeanors, plea agreements made long ago, cursory state records, and state prosecutors or other officials who have imperfect memories or who have long since departed for other places or taken up new occupations, there is a real risk of adding time and complexity to immigration proceedings."

II. Cases Granted Review

[Editor's note: Some of the language in the background section of the summary below was taken from the petition for writ of certiorari and brief in opposition.]

● *Thompson v. Clark*, 20-659. The Court will address "[w]hether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has 'formally ended in a manner not inconsistent with his innocence,' or that the proceeding 'ended in a manner that affirmatively indicates his innocence[.]'" (Citations omitted.) On January 14, 2015, at 10:00 pm, petitioner Larry Thompson and his then-fiancée Talleta Watson were at home with their one-week old child Nala. Unbeknownst to the couple, Talleta's sister Camille—who was living with them and suffered from cognitive delays—dialed 911. Mistaking a red rash for signs of abuse, Camille provided a description of petitioner and his address. Two Emergency Medical Technicians (EMTs) arrived at petitioner's apartment building to investigate. Respondents, four NYPD officers, arrived thereafter in response to the 911 call and met with the EMTs, who had just been inside petitioner's apartment. The officers went upstairs to petitioner's apartment unit and petitioner answered the door. The officers physically attempted to enter petitioner's home. When one officer attempted to enter, petitioner shoved him, and a struggle ensued until petitioner was placed under arrest. The officers then entered and searched petitioner's apartment over his objection. The EMTs then went back into petitioner's apartment, examined his baby, and saw what they understood to be diaper rash, with no signs of abuse. Petitioner was charged with resisting arrest and obstructing governmental administration, and spent two days in jail before being released on his own recognizance. A few months later, an assistant district attorney confirmed that the "People are dismissing the case in the interest of justice." Petitioner then turned around and sued the officers under §1983, asserting claims for false arrest, malicious prosecution, fabricated evidence, and unlawful entry. The district court granted judgment as a matter of law to the officers on petitioner's malicious prosecution claim. Based on Second Circuit precedent, the court held that petitioner could not establish favorable termination, as required in a malicious prosecution §1983 action, because his criminal case did not end with an indication of innocence. As relevant here, petitioner appealed the favorable termination ruling. The Second Circuit affirmed. 794 F. App'x 140.

The Second Circuit relied on its ruling in *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), which "held that section 1983 malicious prosecution claims require 'affirmative indications of innocence to establish favorable termination.'" Here, found the court, because "neither the prosecution nor the court provided any specific reasons about the dismissal on the record" and petitioner had failed to "point to any affirmative indication of innocence" in the record, he could not satisfy this standard. The officers defend that holding as having "a firm foundation in the common law leading up to § 1983" and in "the fact that malicious prosecution claims were (and are) 'heavily disfavored' because they deter resort to the criminal justice system and promote 'harassment, waste, and endless litigation.'" The officers say that, "[b]y serving an evidentiary and filtering function, the indication-of-innocence standard helps strike the right balance."

Petitioner argues that there is a 7-1 circuit split on the favorable termination issue—and he agrees with the one court in the minority, *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020). Judge William Pryor wrote for that court that "[a]fter considering both the common law and Fourth Amendment, we hold that the favorable-termination element of malicious prosecution is not limited to terminations that affirmatively support the plaintiff's innocence." "Instead," he wrote, "the favorable-termination element requires only that the criminal proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement." Petitioner maintains that the Supreme "Court's prior cases have recognized a host of ways to satisfy the favorable-termination requirement that do not affirmatively indicate innocence"—such as proving "'that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus'" (quoting *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)). "None of these showings," says petitioner, "affirmatively indicate a plaintiff's innocence. Furthermore, it is hard to see why being convicted and then having that conviction overturned or 'called into question' on appeal or habeas would be favorable, but succeeding outright by dismissal before trial or conviction would not."

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