Looking Ahead: A Post-COVID Return—and a Shift to the Right?

Amy Howe[*]

It was truly a term like no other. Forced to shut down its in-person operations in March 2020 because of the COVID-19 pandemic, the Supreme Court operated virtually for the entire October 2020 term. From October until early May, it heard a (reasonably[1]) full slate of arguments by telephone, and it issued all its orders and opinions electronically, without ever once taking the bench.

Although the Court has released its calendar for the October argument session, the Court has not yet indicated whether it will resume in-person arguments then. Assuming that it does (or when it eventually does), the Court will have changed significantly from the last time we saw the justices in action in March 2020. The most obvious change comes in the Court's composition, with Justice Amy Coney Barrett filling the vacancy left by the September 2020 death of Justice Ruth Bader Ginsburg. And as a result, Republican-appointed justices now enjoy a 6-3 supermajority.

Not surprisingly, the newly reconstituted Roberts Court moved to the right in the 2020–2021 term, even if it wasn't as far to the right as some conservatives (including some justices) might have hoped. The justices issued decisions that (among other things) made it more difficult to challenge election regulations under the federal Voting Rights Act,[2] ruled that a state regulation that gave union organizers access to agricultural businesses to speak to employees is

[*]Amy Howe is a reporter and independent contractor for SCOTUSblog and the publisher of Howe on the Court.

[1]The Court issued only 54 signed opinions in argued cases, the second-smallest total since the 1860s. Adam Liptak, "A Supreme Court Term Marked by a Conservative Majority in Flux," N.Y. Times, July 2, 2021, https://nyti.ms/3rTggFO.

[2]Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

unconstitutional,[3] and held that Philadelphia violated the Constitution's Free Exercise Clause when it stopped doing business with a Catholic organization that refused to certify same-sex couples as potential foster parents.[4]

If the Court's October 2020 term was a historic one, the October 2021 term has the potential to be epic. By the time the justices left town for their summer recess,[5] their merits docket for the upcoming term already included three of the hottest of hot-button topics—abortion, guns, and religion—with the very real prospect that they could add another controversial topic, affirmative action, before the term is over. There seems to be little doubt that the Court will continue to move to the right. The real question, in the minds of many Court watchers, is by how much? Will it be a slow but steady shift, or will it be the even sharper turn to the right that conservatives have wanted for decades? Time, presumably, will tell.

I. Abortion

At a presidential debate in 2016, when asked whether he wanted *Roe v. Wade*[6] overturned, then-candidate Donald Trump said that it would "happen automatically" because he would appoint justices who were opposed to abortion.[7] During his four years in office, Trump nominated three justices to the Court: Neil Gorsuch in 2017, Brett Kavanaugh in 2018, and Amy Coney Barrett in 2020. In 2021, the Court will hear oral argument in *Dobbs v. Jackson Women's Health Organization*,[8] a case that is likely to test Trump's assurances about *Roe*.

Dobbs will be the Court's second abortion case in as many years. In 2020, in *June Medical Services L.L.C. v. Russo*,[9] a divided Court

[3]Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

[4]Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

[5]Or whatever the equivalent of "leaving town" is while we are still in a pandemic and the justices did not need to be in Washington, D.C., to issue the remaining opinions before their summer recess.

[6]410 U.S. 113 (1973).

[7]Dan Mangan, "Trump: I'll Appoint Supreme Court Justices to Overrule Roe v. Wade Abortion Case," CNBC, Oct. 19, 2016, https://cnb.cx/2WSsrHp.

[8]Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), cert. granted sub nom. Dobbs v. Jackson Women's Health, 209 L. Ed. 2d 748 (U.S. May 17, 2021) (No. 19-1392).

[9]140 S. Ct. 2103 (2020).

struck down a Louisiana law that would have required doctors who perform abortions to have the right to admit patients at nearby hospitals. Chief Justice John Roberts joined the Court's four liberals to provide the key vote to invalidate the law. In a separate concurring opinion, Roberts wrote that although he had disagreed with a 2016 ruling that struck down a similar law in Texas, and he continued to believe that the Texas case was "wrongly decided," he agreed with his liberal colleagues that the Louisiana law was so similar to the Texas law that, based on the doctrine of *stare decisis*, it could not stand.[10]

Dobbs comes to a Court with a very different make-up than the one that decided *June Medical* in June 2020. At issue in the case is a Mississippi law that would ban most abortions after the 15th week of pregnancy. When Jackson Women's Health, the state's only licensed abortion clinic, went to federal court to challenge the law, the district court blocked the state from implementing the law. The court reasoned that the Supreme Court's decisions in *Roe* and *Planned Parenthood v. Casey*[11] prohibit states from banning abortions before the fetus becomes viable. Because the Mississippi law bars abortions at 15 weeks, which is before viability, the district court concluded the law is unconstitutional.[12]

Mississippi went to the Supreme Court in June 2020, but the Court repeatedly rescheduled the case before finally considering the state's petition for the first time in January 2021. The justices then considered the case at 13 consecutive conferences before announcing in May 2021 that they would take up the case in the 2021–2022 term.

Although the state had told the justices in its petition for review that the questions it was asking them to resolve did "not require the Court to overturn *Roe* or *Casey*," the state's brief on the merits urged the Court to do just that.[13] *Roe* and *Casey*, the state contended, are "egregiously wrong" and "shackle States to a view of the facts that is decades out of date"—in particular, the assumption that if

[10] *Id.* at 2133 (Roberts, C.J., concurring).

[11] 505 U.S. 833 (1992).

[12] Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 544 (S.D. Miss. 2018), aff'd sub nom. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019).

[13] Petition for a Writ of Certiorari at 5, Dobbs v. Jackson Women's Health, No. 19-1392 (U.S. June 15, 2020).

abortion is not available, women would be resigned to a "distressful life and future." But in fact, the state countered, today "adoption is accessible," birth control is widely available, and women can "attain both professional success and a rich family life." Moreover, the state added, "scientific advances show that an unborn child has taken on the human form and features months before viability." But even if the Supreme Court does not overrule *Roe* and *Casey*, the state continued, it should at the very least hold that states can ban abortion before viability.

In exhorting the justices to deny review, the clinic stressed that the Mississippi law was clearly unconstitutional. "*Roe* and *Casey*, and the Court's subsequent cases, are clear that, before viability, it is for the pregnant person, and not the State," it reiterated, to "make the ultimate decision whether to continue a pregnancy."[14] And there is no need for the Court to disturb that precedent. The Supreme Court's decision in *Casey*, the clinic noted, acknowledged that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus," but the Court concluded that the State's interests are not strong enough before viability to support a ban on abortion. Drawing a line that prohibits states from banning abortion before viability not only leaves a clear line in place, the clinic added, but also a workable one, especially when the point at which a fetus becomes viable has remained the same—at approximately 23 or 24 weeks—since 1992.

Even before the Court tackles *Dobbs*, it will hear argument in another case involving a state's efforts to restrict abortions. The question before the Court in *Cameron v. EMW Women's Surgical Center, P.S.C.*[15] is a procedural one that does not implicate the constitutionality of the law itself, but—in this era of divided government—could have implications far beyond the issue of abortion.

The case arises from a challenge to a Kentucky law, passed in March 2018, that generally prohibits doctors from using the "dilation and evacuation" method, a procedure commonly used to end

[14]Brief in Opposition at 1, Dobbs v. Jackson Women's Health, No. 19-1392 (U.S. Aug. 19, 2020).

[15]EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 Fed. Appx. 748 (6th Cir. 2020), cert. granted sub nom. Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (Mar. 29, 2021) (No. 20-601).

a pregnancy during the second trimester.[16] When a Kentucky abortion clinic and two doctors who perform abortions went to court to challenge the law, the state's health secretary defended the law at trial.

A federal district court blocked Kentucky from enforcing the law, and the health secretary appealed to the U.S. Court of Appeals for the Sixth Circuit. After the briefing was completed in the court of appeals in 2019, the state's attorney general, Democrat Andy Beshear, was elected governor, defeating Republican incumbent Matt Bevin. The state's new health secretary, appointed by Beshear, continued to defend the law on appeal.

In June 2020, a divided Sixth Circuit upheld the district court's decision barring Kentucky from enforcing the law.[17] At that point, the health secretary told the state's new attorney general, Republican Daniel Cameron, that he would not seek rehearing in the Sixth Circuit or file a petition for certiorari in the Supreme Court. Two days later, Cameron filed a motion to intervene in the Sixth Circuit and, eventually, a petition for rehearing.

The Sixth Circuit rejected Cameron's request, prompting him to go to the Supreme Court to ask the justices to take up the question of whether he should have been allowed to intervene. The justices granted his petition for review in March 2021, although they declined to address the constitutionality of the law itself—specifically, whether they should send the case back to the lower courts for another look in light of the Supreme Court's 2020 decision in *June Medical Services v. Russo*.[18]

In the Supreme Court, Cameron argues that states should have the power to enforce their own laws—and to decide who represents them in defending those laws in federal court. In this case, he tells the justices, Kentucky law gives the attorney general the power "to defend state law when no other official will"; indeed, he notes, the

[16]EMW Women's Surgical Ctr., P.S.C. v. Meier, 373 F. Supp. 3d 807, 812 (W.D. Ky. 2019), aff'd sub nom. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785 (6th Cir. 2020).

[17]EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785 (6th Cir. 2020).

[18]EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 Fed. Appx. 748 (6th Cir. 2020), cert. granted sub nom. Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (Mar. 29, 2021) (No. 20-601).

health secretary did not oppose his motion to intervene.[19] "Federal courts," he stresses, "should have no interest in who a State designates to defend its laws."[20] It is also, he adds, "hard to imagine how the Attorney General could have moved more quickly" once he learned that the health secretary would no longer defend the law. He fully briefed his motion to intervene and filed his timely petition for rehearing within a week.[21]

Opposing Supreme Court review, the plaintiffs respond that the Sixth Circuit's denial of Cameron's motion to intervene does not have any impact on his general power to defend Kentucky's laws. Although the Sixth Circuit has allowed Cameron to intervene in other recent cases, they observe, the court of appeals "simply conclude[d] that the Attorney General's intervention in this particular case" came too late.[22]

The Sixth Circuit's decision denying Cameron's motion to intervene should only be reversed, the plaintiffs argue, if it was an abuse of discretion, but it was "plainly correct."[23] Among other things, they contend, motions like Cameron's, which come after the court of appeals has issued its decision, are "disfavored."[24] Otherwise, they posit, would-be intervenors can wait to see whether they approve of the court's decision before trying to enter the case. The Sixth Circuit also concluded that allowing the attorney general to intervene after its decision would be unfair to the plaintiffs because the main issue that Cameron sought to raise—whether the plaintiffs had a legal right to challenge the law on behalf of their patients—was an issue that Kentucky had previously waived.[25]

[19]Brief for Petitioner at 3, Cameron v. EMW Women's Surgical Ctr., P.S.C., No. 20-601 (U.S. June 14, 2021).

[20]*Id.* at 25.

[21]*Id.* at 31.

[22]Brief in Opposition at 10, Cameron v. EMW Women's Surgical Ctr., P.S.C., No. 20-601 (U.S. Feb. 5, 2021).

[23]*Id.* at 29.

[24]*Id.*

[25]EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 Fed. Appx. 748, 752 (6th Cir. 2020).

II. Second Amendment

In April 2021, the more conservative version of the Roberts Court opted to add another controversial issue to its docket for the 2021–2022 term: gun rights. In 2008, in *District of Columbia v. Heller*,[26] the Supreme Court ruled that the Second Amendment protects an individual right to have a handgun in the home for self-defense. Two years later, in *McDonald v. City of Chicago*,[27] the Court made clear that the right also applied to the states. But, in the years that followed, the Court—to the disappointment of gun-rights supporters and some justices—declined to say anything more about the scope of the Second Amendment.

During the 2019–2020 term, gun-rights advocates hoped that the Court was poised to issue a ruling that would address the right to have a gun outside the home. In December 2019, the justices heard argument in *New York State Rifle and Pistol Association v. City of New York*, a challenge to New York City's ban on transporting licensed handguns outside the city, including to shooting ranges and vacation homes. But in April 2020, the justices sent the case back to the lower court, holding that the challenge was moot because the city had changed its rule.[28]

Justice Samuel Alito dissented from the decision in an opinion joined by Justices Gorsuch and (for the most part) Clarence Thomas.[29] In a concurring opinion, Justice Kavanaugh agreed that the challengers' claims were moot, but he also sympathized with Alito's "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."[30] Kavanaugh suggested that the Court "should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."[31]

The Court further raised the hopes of gun-rights supporters when it quickly distributed 10 petitions for review that it had apparently been deferring while considering the New York City case. The justices considered the petitions at six consecutive conferences before

[26] 554 U.S. 570 (2008).

[27] 561 U.S. 742 (2010).

[28] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

[29] *Id.* at 1527 (Alito, J., dissenting).

[30] *Id.* (Kavanaugh, J., concurring).

[31] *Id.*

denying review in June 2020. There is no way to know why the Court declined to take up the issue when four justices—the number needed to grant certiorari—had seemingly expressed a willingness to weigh in on the scope of the Second Amendment again. One theory posited that those four justices were not certain that they would have a fifth vote—presumably the chief justice—in favor of a more expansive view of gun rights.

When *New York State Rifle and Pistol Association* returned to the Supreme Court in December 2020, it found a different, and likely more receptive, audience than the Court it had faced during the previous term. Justice Ginsburg had passed away in the interim and been replaced by Justice Barrett. As a judge on the U.S. Court of Appeals for the Seventh Circuit, Barrett dissented from a challenge to federal and state laws that barred a business owner convicted of mail fraud from owning a gun. While the majority rejected the man's appeal, Barrett agreed with him that, in the absence of any evidence that he would be "dangerous if armed," the ban was unconstitutional as it applied to him.[32]

The new case, *New York State Rifle and Pistol Association v. Bruen*, is a challenge to New York's regime for issuing licenses to carry a gun outside of the home. Under state law, anyone who wants to carry a gun outside the home must demonstrate "proper cause" to do so—which the state's courts have interpreted as requiring an applicant to show a "special need for self-protection."[33] That requirement, the New York State Rifle and Pistol Association (NYSRPA) contends, basically makes it impossible for the average person to obtain a license.

The NYSRPA went to federal court, arguing that the New York scheme violates the Second Amendment, but both the district court and the Second Circuit rejected that argument.[34] The group then came to the Supreme Court, which agreed in April 2020 to weigh in.[35]

[32]Kanter v. Barr, 919 F.3d 437, 468 (7th Cir. 2019) (Barrett, J., dissenting).

[33]See, e.g., Bando v. Sullivan, 735 N.Y.S.2d 660, 693 (N.Y. App. Div. 2002) (quoting Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257, aff'd, 421 N.E.2d 503 (N.Y. 1981)).

[34]N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach, 354 F. Supp. 3d 143 (N.D.N.Y. 2018), aff'd, 818 Fed. Appx. 99 (2d Cir. 2020).

[35]N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach, 818 Fed. Appx. 99 (2d Cir. 2020), cert. granted sub nom. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 2021 WL 1602643 (U.S. Apr. 26, 2021) (No. 20-843).

The NYSRPA describes New York's regime as "upside down," arguing that the Second Amendment "makes the right to carry arms for self-defense the rule, not the exception."[36] This is reflected, the group argues, in the text of the Second Amendment, which guarantees not only the right to keep arms but also the right to bear arms—an addition that would be superfluous if you could only exercise it in the house. Moreover, the group adds, the history also "overwhelmingly confirms that the Second Amendment protects a right to carry firearms outside the home."[37] The constitutional problems with the regime are made worse, the group notes, by the "practically unreviewable" discretion that government officials enjoy in determining whether an applicant has shown proper cause.[38] Indeed, the challengers note, the law was originally passed to ensure that "newly arrived immigrants, particularly those with Italian surnames," could not obtain a carry license.[39]

In its brief opposing Supreme Court review, the state counters that its regime "descends from a long Anglo-American tradition of regulating the carrying of firearms in public."[40] New York defends its "proper cause" requirement as a "flexible standard." It notes that although state and local authorities have traditionally had "significant discretion to regulate the public carrying of" guns, "numerous" New Yorkers have received a public-carry license when they have had an "actual" need to do so for self-defense.[41] Finally, the state emphasizes, the regime promotes New York's compelling interest in public safety and preventing crime.

Amicus briefs filed on behalf of the NYSRPA came from many of its usual sources of support, including Second Amendment scholars, gun-rights advocacy groups, and members of Congress. But one brief, filed by public defenders and black legal aid lawyers, garnered more attention when it was filed in late July.[42] The lawyers

[36]Brief for Petitioners at 2, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 (U.S. July 13, 2021).

[37]*Id.* at 23.

[38]*Id.* at 42.

[39]*Id.* at 43.

[40]Brief in Opposition at 1, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 (U.S. Feb. 22, 2021).

[41]*Id.* at 1, 7, 20.

[42]Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 22, 2021).

told the justices that the consequences of New York's licensing scheme are "brutal" for racial and ethnic minorities.[43] They write that they "routinely see people charged with a violent felony for simply possessing a firearm outside of the home, a crime only because they had not gotten a license beforehand."[44] The lawyers' perspective may appeal to some justices as well. In his opinion for the Court in *Americans for Prosperity Foundation v. Bonta*,[45] striking down California's requirement that charities and nonprofits in the state provide the state attorney general's office with the names and addresses of their biggest donors, Chief Justice Roberts pointed to the "full range" of amicus briefs in the case as evidence of the "gravity of the privacy concerns" at issue. Although the oral argument has not yet been scheduled in *Bruen*, look for the public defenders' brief to make a similar cameo.

III. Religion

The Court will also revisit another topic that it tackled during the 2019–2020 term: public funding for religious schools. In June 2020, in *Espinoza v. Montana Department of Revenue*,[46] a divided Court ruled that the state's exclusion of religious schools from a program that provided scholarships to attend private schools, simply because of the school's religious character, violates the Constitution's Free Exercise Clause. Just over a year later, the justices granted review in *Carson v. Makin*,[47] a case that presents a question that they left unresolved in *Espinoza*: whether a state violates the Constitution when it excludes families and schools from a tuition-assistance program when the aid would be used to attend schools that provide religious instruction.

The case comes to the Court from Maine, whose Constitution and state laws require local governments to support and maintain public schools to ensure that all school-age children can "receive the benefits of a free public education."[48] Because over half of all school

[43] *Id.* at 5.

[44] *Id.* at 17.

[45] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388 (2021).

[46] 140 S. Ct. 2246 (2020).

[47] Carson v. Makin, 979 F.3d 21 (1st Cir. 2020), cert. granted sub nom. Carson v. Makin, 2021 WL 2742783 (U.S. July 2, 2021) (No. 20-1088).

[48] Me. Rev. Stat. Ann. tit. 20-A, § 2(1) (West 2021).

districts (known in Maine as "school administrative units") do not operate their own public high schools, those school districts have two options. They can make arrangements with another school (either public or private) to take their students, or they can pay tuition for a student to attend a public school or the "approved private school of the parent's choice at which the student is accepted."[49]

In 2018, a group of parents—represented by the Institute for Justice, which also represented the mothers in *Espinoza*—went to federal court. They argued that the requirement that a private school must be a "nonsectarian" school to qualify as an "approved" school and receive tuition-assistance payments violates their First Amendment right to freely exercise their religion. The district court rejected their challenge, and the First Circuit upheld that ruling.[50]

The First Circuit acknowledged the Supreme Court's recent decisions in *Espinoza* and *Trinity Lutheran Church v. Comer*,[51] holding that Missouri's exclusion of a church preschool from a grant program to resurface its playground violated the church's constitutional right. But Maine's restriction, the court of appeals concluded, "unlike the one at issue in *Espinoza*, does not bar schools from receiving funding simply based on their religious identity."[52] Rather, the First Circuit stressed, Maine's rule prohibits the private schools that the plaintiffs would like their children to attend from receiving the funding because they would use the money for religious purposes. This distinction is especially appropriate, the court of appeals suggested, because the Maine program was created to guarantee that students who cannot attend a school in their own hometown "can nonetheless get an education that is 'roughly equivalent to the education they receive in public schools.'"[53]

In urging the Court to take up the case, the parents argued that the current "state of affairs—in which a state cannot deny a benefit to a student because she wishes to attend a school that *is* religious, but can deny it because the school *does* religious things is unstable

[49] *Id.* § 5204(4).

[50] Carson v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019), aff'd sub nom. Carson v. Makin, 979 F.3d 21 (1st Cir. 2020).

[51] 137 S. Ct. 2012 (2017).

[52] Carson v. Makin, 979 F.3d 21, 40 (1st Cir. 2020).

[53] *Id.* at 42.

and untenable[.]"[54] Not only are facts malleable, so that an exclusion based on the school's religious use of funds could also be based on the school's religious status, the parents suggested, but "often-times, religious status and religious use are *inseparable*." Families believe that they are obligated to provide their children with a religious education, so excluding them from the tuition-assistance program "based on the religious use to which they would put their aid necessarily discriminates based on their religious status, as well."[55]

Opposing review, the state countered that Maine's tuition-assistance program is a "unique solution to an unusual situation."[56] Without the program, it stressed, a small group of Maine families would not have access to a public education. Therefore, the state explained, the program is intended to "engage private schools willing to deliver a specific service: an education that is substantially akin to that which a student would receive if their community operated a public school."[57] By contrast, the state contended, the schools that the plaintiffs want their children to attend admit that they discriminate against LGBTQ people and non-Christians in both hiring and admissions. Regardless of the schools' right to choose whom to admit or hire, the state stresses, the real question in the case is whether the state "must fund their educational program as the substantive equivalent of a public education"—and the answer, from the state's perspective, is clearly "no."[58]

IV. Death Penalty

In October, the justices will hear oral argument in a high-profile death-penalty case that the lower court called "one of the worst domestic terrorist attacks" since September 11, 2001.[59] Dzokhar Tsarnaev was sentenced to death for his role in the 2013 bombings near the finish line of the Boston Marathon, which killed three people and badly injured hundreds more. During the manhunt that followed, Dzokhar

[54] Petition for Writ of Certiorari at 29, Carson v. Makin, No. 20-1088 (U.S. Feb. 4, 2021).

[55] *Id.* at 32 (emphasis added).

[56] Brief in Opposition for Respondent at 17, Carson v. Makin, No. 20-1088 (U.S. May 21, 2021).

[57] *Id.* at 16.

[58] *Id.* at 20.

[59] United States v. Tsarnaev, 968 F.3d 24, 34 (1st Cir. 2020).

Tsarnaev and his older brother, Tamerlan, killed a fourth person, a local campus police officer. Tamerlan Tsarnaev was killed in a shoot-out with police, while Dzokhar Tsarneav was captured when he was found hiding in a boat in a backyard in suburban Boston.

In July 2020, the First Circuit affirmed Dzokhar Tsarnaev's convictions, but it vacated his death sentences and sent his case back to the lower court for resentencing.[60] The Trump administration came to the Supreme Court in October 2020, asking the justices to review that ruling.

By the time the Court announced in March 2021 that it would hear the case, there was a new sheriff in town. During his presidential campaign, then-candidate Joe Biden had pledged to "work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government's example."[61] In July 2021, Attorney General Merrick Garland announced that he was imposing a moratorium on federal executions.[62] But that announcement was at odds with the brief on the merits that the Department of Justice had filed two weeks earlier, asking the justices to reinstate the death penalty for Tsarnaev and "put this case back on track toward a just conclusion."[63]

There are two issues before the Supreme Court. The first is whether the district court should have asked potential jurors what media coverage they had seen about the case. The federal government maintains that jurors can fairly decide the case even when it is "ubiquitously publicized" as long as they can "put that exposure aside" and issue a verdict based only on the evidence presented in court.[64] In this case, the government emphasizes, the district court developed a process designed to identify jurors who could provide a fair trial. By vacating Tsarnaev's death sentence because the trial judge had not asked potential jurors about their exposure to media coverage, the government contends, the First Circuit second-guessed

[60] *Id.* at 106.

[61] "The Biden Plan for Strengthening America's Commitment to Justice," JoeBiden.com, https://bit.ly/2TYmXK8.

[62] Michael Balsamo, Colleen Long, & Michael Tarm, "Federal Executions Halted; Garland Orders Protocols Reviewed," AP, July 1, 2021, https://bit.ly/3Cen7yc.

[63] Brief for the United States at 16, United States v. Tsarnaev, No. 20-443 (U.S. June 1, 2021).

[64] *Id.* at 17.

the trial judge and imposed a requirement inconsistent with the Supreme Court's cases.

Tsarnaev points out that the First Circuit's decision to vacate his death sentence based on the district court's failure to properly question potential jurors about their exposure to pretrial coverage of the case was consistent with a "long-established supervisory rule" designed to guarantee that "the assessment of impartiality is made by the judge, not the juror."[65] Indeed, Tsarnaev suggests, "although the government defends the district court's voir dire at great length, and touts the jurors' assurances that they could be impartial," in the case of at least two jurors, "there is every reason to doubt those assurances."[66]

The second question that the justices will consider is whether the district court properly excluded evidence that Tamerlan Tsarnaev was allegedly involved in an unrelated triple murder two years before the bombing. Here, too, the federal government describes the First Circuit's decision to vacate Tsarnaev's death sentence as an "unwarranted usurpation of the district judge's sound discretion."[67] Telling jurors about Tamerlan's alleged involvement in the crime would be more confusing and distracting than helpful, the government posits, particularly in light of all of the evidence supporting the jury's decision to sentence Dzokhar Tsarnaev to death.

Tsarnaev responds that his main strategy to defeat a death sentence was to portray him as being under the influence of (and therefore less responsible for the bombings than) his more aggressive and radicalized older brother. The district court allowed defense lawyers to introduce other evidence to make this point, Tsarnaev notes; evidence of Tamerlan's alleged involvement in the triple murder "was in the same vein—but it was far more convincing."[68] The court of appeals, Dzokhar Tsarnaev stresses, "correctly concluded that the evidence [of the triple murder] might have convinced at least one juror to vote against death"—all that would have been needed to spare Tsarnaev from the death penalty.[69]

[65]Brief in Opposition at 10, 28, United States v. Tsarnaev, No. 20-443 (U.S. June 1, 2021).

[66]*Id.* at 29.

[67]Brief for the United States, *supra* note 63, at 18.

[68]Brief in Opposition, *supra* note 65, at 18.

[69]*Id.* at 21.

V. Affirmative Action

Before the term is over, the Court may weigh in (or at the very least have agreed to weigh in) on yet another third-rail topic: affirmative action. Eighteen years ago, in *Grutter v. Bollinger*,[70] the Supreme Court upheld the University of Michigan Law School's consideration of race in its admissions process as part of its effort to assemble a diverse student body. But, as Justice Sandra Day O'Connor emphasized in her opinion for the majority, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[71]

In 2016, the Court upheld the University of Texas at Austin's race-conscious admissions program against a challenge by a white student, Abigail Fisher, who was not admitted to the university.[72] The justices divided 4-3, with Justice Elena Kagan recused and the vacancy created by the death of Justice Antonin Scalia not yet filled. Justice Anthony Kennedy, who wrote for the majority, cautioned that the Texas program was unique, and he warned that even the University of Texas had an "ongoing obligation" to reevaluate whether the program was still necessary.[73]

Five years later, a nonprofit formed by Edward Blum, who had backed Fisher's lawsuit, came to the Court, asking the justices to weigh in on Harvard's race-conscious admissions policy for undergraduates. After the lower courts rejected the group's challenge to the policy, the group was asking the justices to rule on two issues: whether Harvard's policy violates the federal Civil Rights Act and whether the Court should overrule its 2003 decision in *Grutter*.[74]

The Court that considered the group's petition at its June 10, 2021, conference was a very different—and potentially much more sympathetic—Court than the one that decided *Fisher* just five years earlier. All three of the *Fisher* dissenters—Roberts, Thomas, and Alito—are still on the Court, but they have been joined by three more conservative justices: Gorsuch, who succeeded Scalia;

[70]539 U.S. 306 (2003).

[71]*Id.* at 343.

[72]Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

[73]*Id.* at 2215.

[74]Petition for Writ of Certiorari at i, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (U.S. Feb. 25, 2021).

Kavanaugh, who replaced Kennedy; and Barrett, who succeeded Ginsburg.

After considering the case at their conference for the first time, the justices acted quickly, calling for the views of the U.S. solicitor general on June 14. The order means that if the justices do grant review, the Court might not hear oral argument in the case until 2022. But with the 2022 midterm elections just a little over a year away, the delay may be a feature, rather than a bug, as far as some justices are concerned—particularly when, as a practical matter, a majority of the Court may not be especially interested in the Biden administration's views on affirmative action.

VI. The Breyer Retirement Watch Continues

As the Roberts Court settles into its first full term in its latest incarnation, the prospect of more change looms over One First Street, N.E. Even before President Joe Biden took the oath of office on January 20, 2021, some liberals were clamoring for the Court's oldest justice, Stephen Breyer, to step down to allow the new president to name his replacement. Justice Ginsburg had rebuffed suggestions that she should retire during the Obama administration but died before the 2020 election, allowing President Donald Trump to name her replacement. Liberals (including some Democratic lawmakers) want to avoid repeating this scenario with Breyer, who turns 83 this summer.

The end of the 2020–2021 term, often the traditional time for justices to reveal a retirement, came and went without any announcement from Breyer. In an interview in mid-July, Breyer told CNN's Joan Biskupic that he hadn't made a decision yet about when to retire. He indicated that he was enjoying his new role as the most senior member of the Court's liberal bloc, which allows him to speak third at the Court's conferences and assign dissents when the Court divides along ideological lines. His "health" and "the Court" would be, Breyer said, the primary factors in his decision about when to retire.[75]

[75]Joan Biskupic, "Exclusive: Stephen Breyer Says He Hasn't Decided His Retirement Plans and Is Happy as the Supreme Court's Top Liberal," CNN, July 15, 2021, https://cnn.it/37k9QWw.

If Breyer does in fact step down and Biden is able to name a replacement for him, the new justice probably would not have any real effect on the ideological balance on the Court. But with the 2022 midterm elections on the horizon, liberals fret about the prospect that Democrats could lose the Senate before a Breyer successor is confirmed, creating an opening for a Republican majority to block a Democratic nominee—perhaps indefinitely.

Conclusion

Even if the justices don't add any more blockbusters to their plate for the 2021–2022 term, Court watchers are likely to be waiting with bated breath in late spring and early summer for the Court's rulings on abortion, guns, and religion. Throw in the prospect of a Breyer retirement, and you have the recipe for an extraordinary amount of public attention on the Court and its work, in an election year. What the public will think of that work remains to be seen.