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ALERTS

SCOTUS Cert Recap: Immigration, Free Speech, And Veterans' Benefits

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Highlights

On Feb. 18 and 22, the Supreme Court agreed to hear three cases, which present the following questions:

Does federal law bar termination of the Migrant Protection Protocols, a policy requiring certain noncitizens to remain in Mexico during their immigration proceedings?

Does applying a public-accommodation law to compel an artist to speak or stay silent violate the Free Speech Clause of the First Amendment?

Does the doctrine of equitable tolling apply to the one-year statutory deadline for veterans to seek retroactive disability benefits?

The U.S. Supreme Court returned from its recent recess to hold a conference on February 18 from which it granted three cert. petitions: 1) a Biden administration petition asking the Court to allow it to terminate a Trump administration policy (called the Migrant Protection Protocols) that requires certain noncitizens to remain in Mexico during their immigration proceedings, 2) a web designer's petition raising a free speech challenge

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to a law prohibiting sexual-orientation discrimination in public accommodations, and 3) a veteran's petition urging the Court to apply equitable tolling to the deadline for seeking retroactive veterans' disability benefits.

The Court ordered expedited briefing in the Migrant Protection Protocols case to allow the case to be heard and decided this term, which will likely end in June. The other two cases, meanwhile, are slotted for next term, which begins October 2022.

While the free speech case likely will capture the most headlines – it drew more than a dozen cert-stage amicus briefs and could affect the validity of public-accommodation laws in a wide variety of contexts – the other two cases will be of widespread interest as well. The Migrant Protection Protocols case could determine the fate of a controversial immigration policy, and the veterans' benefits case will be significant for many current and future veterans seeking disability benefits. All of these cases, then, are very much worth watching.

Terminating the Migrant Protection Protocols

In *Biden v. Texas* the Court will once more confront the Migrant Protection Protocols, a Department of Homeland Security (DHS) policy that requires noncitizens who travel through Mexico from a third country to reach the United States to remain in Mexico while their U.S. immigration proceedings are adjudicated. The Court first encountered the policy in March 2020, when the Trump administration sought to stay a decision barring the policy's enforcement. The Court responded by issuing a short order staying the decision pending resolution of that administration's cert. petition and it later granted the petition itself. The Court, however, dismissed the case as moot following the Biden administration's announcement that it would terminate the policy.

That announcement in turn sparked a second flurry of litigation, with Texas and Missouri arguing that federal law requires DHS to continue to enforce the Migrant Protection Protocols. In August 2021, a Texas district court agreed with the states and ordered DHS to resume implementing the policy.

The U.S. Court of Appeals for the Fifth Circuit refused to stay that order, and the Biden administration then asked the Supreme Court to do so. On August 24, 2021, the Court denied that request, explaining that the administration had failed to show that its memorandum purporting to rescind the policy complied with the Administrative Procedure Act's prohibition on arbitrary and capricious agency decision-making.

A couple months later, the Biden administration issued a new memorandum that again purported to terminate the Migrant Protection Protocols. And after the Fifth Circuit held in December 2021 that the new memorandum could not justify terminating the policy, the administration returned to the Supreme Court, asking the Court to decide: 1) whether federal law requires ongoing enforcement of the Migrant Protection Protocols and 2) whether the Fifth Circuit improperly disregarded the new memorandum.

The Supreme Court has now agreed to answer both of these questions. In doing so, it will not only finally address the merits of the Migrant Protection Protocols, but will also address an important question of

general administrative law: When an agency memorandum reiterates a prior decision, how should courts determine whether the subsequent memorandum is merely a "fuller explanation" that cannot add reasons for the earlier decision, or is instead a "new agency action" that is free to provide additional reasons?
Immigration-law experts and administrative lawyers more broadly will surely pay close attention to the Court's answers.

Free Speech and Public Accommodations

In *303 Creative LLC v. Elenis*, the Court has announced, now for the second time, that it will consider how the First Amendment's Free Speech Clause applies to public-accommodation laws. The case was brought by a website designer who, due to her religious beliefs, would like to offer to design wedding websites that celebrate opposite-sex marriages while posting a notice that she will not design websites that celebrate same-sex marriages. Because this disparate treatment would run afoul of Colorado's public-accommodation law – which prohibits discrimination on the basis of sexual-orientation by any business offering services to the public – the website designer brought this suit arguing that the Free Speech Clause bars Colorado from applying its public-accommodation law to require her to create websites celebrating same-sex marriages and from applying its law to prohibit her from posting her proposed notice.

A divided panel of the U.S. Court of Appeals for the Tenth Circuit rejected this argument – with the panel majority applying strict scrutiny but upholding the law as narrowly tailored to Colorado's compelling interest in "ensuring equal access to publicly available goods and services" – and the Supreme Court has now agreed to review that decision.

Notably, nearly five years ago, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the Court had agreed to consider a cake-baker's similar free speech challenge to Colorado's public-accommodation law, but the Court ultimately resolved that case on free exercise grounds. In 303 Creative, however, the Court expressly declined to consider the website designer's free exercise claim, which suggests the Court is now ready to address the degree to which the Free Speech Clause limits the reach of public-accommodation laws.

The rationale the Court adopts to answer this question will in all likelihood apply to a variety of businesses with a variety of objections to public-accommodation requirements, and its decision is therefore likely to have widespread significance.

Equitable Tolling for the Deadline to Apply for Veterans' Benefits

Arellano v. McDonough confronts the Court with a narrow but important question concerning the veteran's benefits system: Can the deadline for seeking retroactive benefits for a military-service-connected disability be equitably tolled for good cause?

This question arises from a federal statute that imposes a one-year deadline for a veteran to file an application for disability benefits, starting from the date a veteran is discharged from military service. If this deadline is met, any benefits ultimately awarded are retroactive to the date of

discharge; if not, benefits can still be awarded, but are retroactive only to the date the government receives the benefits application. The upshot is that veterans who fail to meet the one-year deadline can lose a considerable amount of retroactive benefits.

In this case, the veteran contends that equitable tolling should apply when a service-caused disability – such as a psychiatric disorder caused by combat trauma – prevents a veteran from filing a benefits application prior to the one-year deadline. He invokes the Supreme Court's decision in *Irwin v. Department of Veterans Affairs,* which held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." He also points to the policy considerations he contends support the application of equitable tolling here: The illnesses that often cause veterans to miss the one-year deadline, he points out, are the very illnesses the veterans' benefits system is designed to address.

These arguments evenly split the U.S. Court of Appeals for the Federal Circuit: Six judges applied the *Irwin* presumption to conclude equitable tolling is available in this context, while another six concluded that Irwin is inapplicable, on the grounds that Irwin applies only to statutes of limitation and that this one-year deadline is not a true limitations statute (because it does not completely eliminate a veteran's ability to collect benefits).

The Supreme Court is now set to resolve this dispute, and its decision will affect tens of thousands of current and future military veterans. And in light of *Irwin's* possible application to numerous other federal benefits statutes, the Court's decision could have significance far beyond the veterans' benefits context as well.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Kian Hudson at 317-229-3111 or kian.hudson@btlaw.com.