

AT ISSUE

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In the first edition of our At Issue: Federal Edition, we provide information on the continued work at the federal level to provide CARES Act resources, the increase in firearm sales in our country over the last few months and a look at a few of the pending U.S. Supreme Court cases to keep an eye on during the October term.

As our state and nation continue to address the economic situation caused by the COVID-19 pandemic, CARES Act funds have proved vital for many small businesses and employees across the country. While economic uncertainty continues, CARES Act funds have offered relief in the form of Economic Injury Disaster Loans (EIDL), Paycheck Protection Program (PPP) loans and other programs that countless small businesses across the country have relied on in order to make ends meet. Our first article discusses the importance of these and other services established by the CARES Act, and how small businesses have benefitted.

In addition, we have noticed a nation-wide increase in the number of firearm sales across the country this year. It may be easy to point to one or two incidents responsible for this surge; however, as our second article explains, the true reasons are complex and myriad, and it is worth attempting to view this data and analyze it in the proper context.

Another casualty of the COVID-19 pandemic were timely decisions issued by the U.S. Supreme Court (SCOTUS). Due to the pandemic, SCOTUS pushed back many cases until the October 2020 term, which is quickly approaching. Our third article details three interesting cases SCOTUS is poised to consider in the coming weeks, along with relevant jurisprudence and case material.

I sincerely hope that you find the information presented in this newsletter helpful. We are certain to see a considerable amount of federal policy implemented in the lead up to the 2021 Session and I look forward to sharing more relevant stories with you relating to federal policy over the next few months. Please do not hesitate to call on me if I can be of any assistance.

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Finance

Federal Relief Shows the Government CARES About Small Businesses

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The emergence of the coronavirus in the United States quickly represented an economic crisis for many states. As the virus spread, states chose to shut down, limiting business operations and issuing stay at home orders, as consumers drastically altered their eating and shopping habits, and countless employees were laid off as the country felt the impact of the pandemic. In March alone, the United States lost 701,000 jobs with the unemployment rate jumping from 3.5 percent to 4.4 percent.¹ As the United States grappled with the spread of the virus, Congress attempted to provide relief. On March 27, 2020, President Donald Trump signed the third² and largest piece of legislation to address the coronavirus, the Coronavirus Aid, Relief, and Economic Security Act, better known as the **CARES Act**. Many of the provisions of the CARES Act were designed to specifically address the broad economic impact of the virus, with a particular focus on the small businesses suffering through the pandemic.

A central goal in the passage of the CARES Act was to specifically assist small businesses that were financially struggling to remain in business and maintain their payroll due the pandemic. The CARES Act includes the **Small Business Debt Relief Program** which covers small businesses' non-disaster Small Business Administration (SBA) loans for up to six months. Additionally, the CARES Act includes an expansion of the

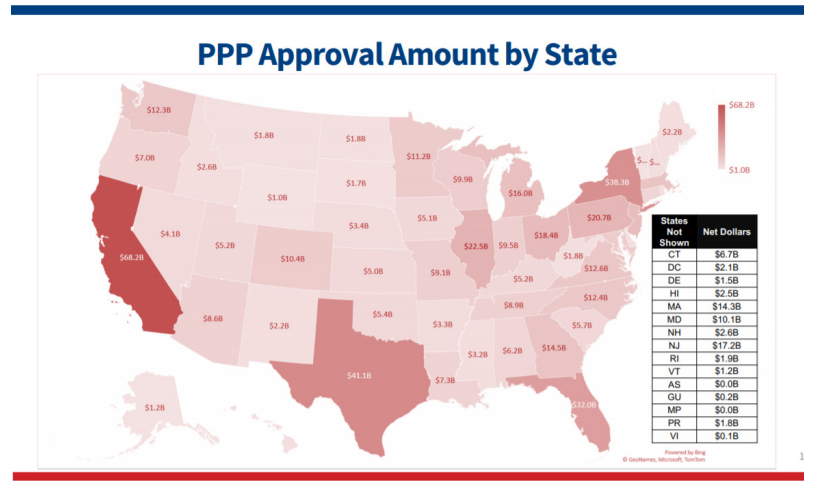
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existing Economic Injury Disaster Loans (EIDLs). EIDLs are a program administered by the SBA to provide loans to small businesses experiencing an economic injury as a result of a disaster. Under the CARES Act, EIDLs are expanded to include businesses nationwide that have suffered an economic injury as a result of the coronavirus. Additionally, the CARES Act also provides for EIDL advance grants of up to \$10,000 that may be available to businesses within three days to pay immediate expenses including payroll, rent, mortgage, and other specified costs. The EIDL advance grant does not need to be repaid even if the EIDL application is denied.

Included in the CARES Act is the creation of a landmark new program designed to aid small businesses in maintaining their workforce through the crisis. The CARES Act created the Paycheck Protection Program (PPP) which allows small businesses to receive 100 percent federally guaranteed loans to assist in the payment of payroll and other fixed expenses. PPP loans are administered by the SBA but businesses may apply to receive funds through existing third party lenders. PPP loans provide eligible businesses and organizations (those generally with 500 or less employees) with up to \$10 million in funds, based on 250 percent of the average monthly payroll costs³, to be used to pay for certain specified business costs. PPP loans may be used to pay generally considered set expenses including payroll costs, costs for the continuation of group health care benefits, employee salaries, interest payments on mortgages, rent and utility payments, and interest payments on other debts taken prior to the PPP loan. While PPP loans have a one percent interest rate, the loans can potentially be forgiven in whole or in part when used to maintain or restore staff and payroll and other approved expenses.⁴ Businesses can apply to have the amount they expended on eligible costs during a covered eight week window forgiven, provided that 75 percent of the funds expended are used to cover payroll costs.

As part of the creation of the Paycheck Protection Program, the CARES Act allocated \$349 billion to the program to be distributed on a first come, first serve basis with applications opening from April 3rd until June 30th.⁵ On April 13th, the SBA announced that the initial \$349 billion allocated to the PPP had been depleted only 13 days after applications for loans opened to some entities.⁶ The SBA stated that 1.66 million applications had been approved with loans coming from 4,975 lending institutions.⁷ On April 24, 2020, President Trump signed the [Paycheck Protection Program and Health Care Enhancement Act](#), allocating an additional \$310 billion in funds to the PPP, with \$60 billion specifically set aside for small, midsize, and community lenders. While the PPP was revitalized with additional funding, businesses and industry professionals continued to grapple with the initial terms of the PPP loans and the numerous rules and guidance issued in its wake.⁸ In response to the concerns of businesses, a bipartisan effort focused on adding clarity and flexibility to the PPP.⁹ On June 5, 2020, President Trump signed the [Paycheck Protection Program Flexibility Act of 2020](#) (PPPFA) further amending the PPP to provide flexibility to small businesses in their access and use of PPP funds. Notable changes provided in the PPPFA to the original provisions of the PPP in the CARES Act include an increase in the covered period from eight weeks to 24 weeks, a reduction in the required amount of funds used on payroll costs for forgiveness from 75 percent to 60 percent, and an increase in the repayment period from two years to five years.¹⁰ These critical changes were designed to provide clarity to businesses as they utilize PPP funds, ultimately providing greater flexibility in the use of the funds, and making it easier for businesses to have these loans forgiven.¹¹

On August 8, 2020, the extended deadline to apply for a PPP loan expired with over \$525 billion funded to businesses but nearly \$134 billion unclaimed allocated funds remaining.¹² While the program as a whole undoubtedly has been [successful](#) in helping many small businesses stay afloat and their employees maintain their livelihood during the pandemic, a release of PPP loan data and recipients drew some [criticism](#). Following calls for greater transparency on PPP funds, the SBA released [data](#) on PPP loan recipients. An analysis of this data drew criticism over the recipients and conditions surrounding these loans. While the loans were designed to assist struggling small businesses, the list of recipients was highlighted by venture capital and private equity backed public companies, restaurant chains, large law firms, non-U.S. companies, religious organizations, and businesses connected to public figures. Additionally, despite the intent of the loans, many companies accepted funds with no intent to use funds to retain or rehire workers.



PPP Funds Approved by State, Reported by the SBA as of June 30, 2020

Even after the application period for loans expired, the story of the PPP and small business relief as a whole during the coronavirus is not complete. Businesses remain in the covered period to maintain or restore their workforce and many will be required to pay back unforgiven loan amounts over the next several years. As loan recipients continue under the latest legislation and guidance, speculation remains of further government action that may still impact the program results and the forgiveness of many loans.¹³ The provisions and programs contained in the CARES Act designed to assist small businesses were undoubtedly critical to the livelihood of many as the virus took America by storm. Even with government assistance, as the virus continues, small businesses across the country will need to continue to work to keep their doors open. -RB

2020: The Year of the Gun

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It's been joked on social media that if 2020 could be reviewed on Yelp it would receive one star and the reviewer would write something along the lines of: "Do not recommend! Stay away!" No one can argue that the nation hasn't seen a year as troubling, disturbing, and bizarre as 2020 in a very long time. For those with a short memory, the year kicked off with a potential war between the United States and Iran. The nation's focus quickly turned to COVID-19 in February followed by partial and total shutdowns by most states in March in an effort to slow down the spread of the virus and mitigate its effect on the nation's healthcare system. Just as the nation was struggling to slowly return to a degree of relative normalcy, the end of May saw the eruption of social unrest in the form of peaceful protests, rioting, and looting throughout the nation due to the death of George Floyd at the hands of Minneapolis police officers. Even now, many states continue to experience social unrest and partial shutdowns as the nation hurtles awkwardly towards the November presidential election. Throughout all of this uncertainty and upheaval, Americans have flocked to gun stores and other outlets to purchase firearms and ammunition at unprecedented levels.

It's not unusual for gun sales to spike during uncertain times such as the surge before the 1994 national assault weapons ban, the months leading up to the 2016 presidential election, and after the December 2012 Sandy Hook Elementary School mass shooting, which resulted in state legislatures across the nation introducing a variety gun control measures designed to curb the purchase of firearms. However, the astonishing increase and demand throughout the first eight months of 2020 has smashed all past gun sales records.

August became the eighth straight month gun sales increased drastically over the same period last year with a 57.8 percent increase over August 2019. Small Arms Analytics & Forecasting (SAAF), a research and consulting group focused on the business and economics of the global firearms and ammunition markets, estimates August 2020 U.S. firearms sales at 1.8 million units.¹ Although this number marks a decrease from the number of firearms sold in either June or July, and is the lowest year-over increase seen in the past six months, August's numbers pushes 2020 over the 15 million mark – surpassing the entire year of 2019 by over one million firearms. Commenting on this remarkable milestone, SAAF's Chief Economist Jurgen Brauer predicted that with the "hunting season about to begin in earnest and the presidential election season about to start in earnest as well, 2020 will without doubt exceed the previous high of 16.6 million units sold in 2016."²

A review of the other summer months shows us that July 2020 became the fifth straight month to set a gun sales record with a staggering 134 percent increase over July 2019. SAAF estimates July 2020 U.S. firearms sales at two million units.³ Over the course of those 31 days, the FBI conducted over 3.6 million background checks through its National Instant Criminal Background Check System (NICS). Estimated single handgun sales of 1.2 million represent a 152 percent increase over July 2019 sales, whereas the 600,000 single long-guns sold in July 2020 represent an increase of 108.2 percent over July 2019. All other likely background check-related sales increased by 125.3 percent over July 2019. This figure includes "multiple" sales in which the buyer purchases a mix of handguns and long-guns and the exact split between each cannot be determined.⁴

June experienced an even greater increase in firearms sales as the nation quickly descended into social unrest and upheaval following the death of George Floyd. That month, the NICS conducted 3,931,607 firearms background checks, breaking the previous record of 3,740,688 set only three months earlier in March.⁵ SAAF estimates that the 2,387,524 total firearms purchased in June represent a year-over-year increase of 145.3 percent from June 2019.⁶

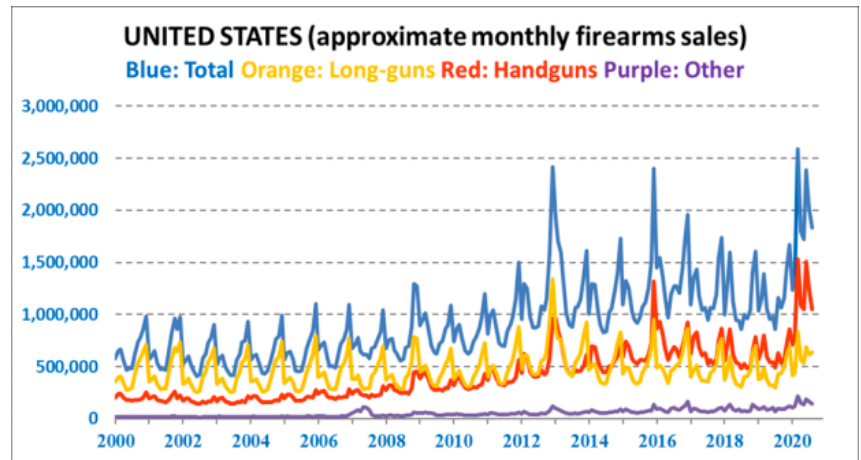
NICS Firearm Background Checks: Month/Year

November 30, 1998 - August 31, 2020

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Totals
1998											21,196	871,644	892,840
1999	591,355	696,323	753,083	646,712	576,272	569,493	589,476	703,394	808,627	945,701	1,004,333	1,253,354	9,138,123
2000	639,972	707,070	736,543	617,689	538,648	550,561	542,520	682,501	782,087	845,886	898,598	1,000,962	8,543,037
2001	640,528	675,156	729,532	594,723	543,501	540,491	539,498	707,288	864,038	1,029,691	983,186	1,062,559	8,910,191
2002	665,803	694,668	714,665	627,745	569,247	518,351	535,594	693,139	724,123	849,281	887,647	974,059	8,454,322
2003	653,751	708,281	736,864	622,832	567,436	529,334	533,289	683,517	738,371	856,863	842,932	1,008,118	8,481,588
2004	695,000	723,654	738,298	642,589	542,456	546,847	561,773	666,598	740,260	865,741	890,754	1,073,701	8,687,671
2005	685,811	743,070	768,290	658,954	557,058	555,560	561,358	687,012	791,353	852,478	927,419	1,164,582	8,952,945
2006	775,518	820,679	845,219	700,373	626,270	616,097	631,156	833,070	919,487	970,030	1,045,194	1,253,840	10,036,933
2007	894,608	914,954	975,806	840,271	803,051	792,943	757,884	917,358	944,889	1,025,123	1,079,923	1,230,525	11,177,335
2008	942,556	1,021,130	1,040,863	940,961	886,183	819,891	891,224	956,872	973,003	1,183,279	1,529,635	1,523,426	12,709,023
2009	1,213,885	1,259,078	1,345,096	1,225,980	1,023,102	968,145	966,162	1,074,757	1,093,230	1,233,982	1,223,252	1,407,155	14,033,824
2010	1,119,229	1,243,211	1,300,100	1,233,761	1,016,876	1,069,792	1,069,792	1,089,374	1,145,798	1,368,184	1,296,223	1,521,192	14,409,616
2011	1,323,336	1,473,513	1,449,724	1,351,255	1,230,953	1,168,322	1,157,041	1,310,041	1,253,752	1,340,273	1,534,414	1,862,327	16,454,951
2012	1,377,301	1,749,903	1,727,881	1,427,343	1,316,226	1,302,660	1,300,704	1,526,206	1,459,363	1,614,032	2,006,919	2,783,765	19,592,303
2013	2,495,440	2,309,393	2,209,407	1,714,433	1,435,917	1,281,351	1,283,912	1,419,088	1,401,562	1,687,599	1,813,643	2,041,528	21,093,273
2014	1,660,355	2,086,863	2,488,842	1,742,946	1,485,259	1,382,975	1,402,228	1,546,497	1,456,032	1,603,469	1,803,397	2,309,684	20,968,547
2015	1,772,794	1,859,584	2,012,488	1,711,340	1,580,980	1,529,057	1,600,832	1,745,410	1,795,102	1,976,759	2,243,030	3,314,594	23,141,970
2016	2,545,802	2,613,074	2,523,265	2,145,865	1,870,000	2,131,485	2,197,169	1,853,815	1,992,219	2,333,539	2,561,281	2,771,159	27,538,673
2017	2,043,184	2,234,817	2,433,092	2,045,564	1,942,677	1,901,768	1,742,546	1,925,146	1,967,104	2,030,391	2,382,788	2,586,138	25,235,215
2018	2,030,530	2,333,193	2,767,699	2,223,213	2,002,992	1,935,691	1,835,318	2,073,296	1,956,681	2,086,895	2,393,043	2,543,385	26,181,936
2019	2,165,094	2,053,886	2,644,851	2,334,249	2,349,309	2,312,309	2,030,661	2,366,824	2,207,312	2,393,609	2,574,752	2,936,894	28,369,750
2020	2,702,702	2,802,467	3,740,688	2,911,128	3,091,455	3,931,607	3,639,224	3,115,063					25,934,334

Source: Federal Bureau of Investigation

As gun purchases for the first eight months of 2020 easily crossed over the 15 million mark with all months in 2020 seeing an increase in firearms purchases over 2019, the true surge started in March as people grew apprehensive over COVID-19, lockdown and shelter-in-place orders, and the growing scarcity of many consumer products. Gun purchases in March increased 91 percent over March 2019.⁷ In a July 2020 study, the Brookings Institute estimated that almost three million more firearms were sold from March to the end of June than would have ordinarily been sold during these months. Half of that increase occurred in June alone.⁸ Based on a survey of firearms dealers in August, the National Shooting Sports Foundation, Inc. (NSSF) determined that nearly **five million Americans** purchased a firearm for the very first time in 2020. NSSF concluded that individuals who have never previously owned a firearm accounted for 40 percent of all gun purchases from January to July 2020. Additionally, women comprised 40 percent of all first-time gun purchasers. NSSF data also **indicates** a 58.2 percent increase among Black buyers during the first six months of 2020 versus the same period last year – representing the most rapid growth of any race. White customers increased by 51.9 percent, Latino customers by 49.4 percent, and Asian customers by 42.9 percent.



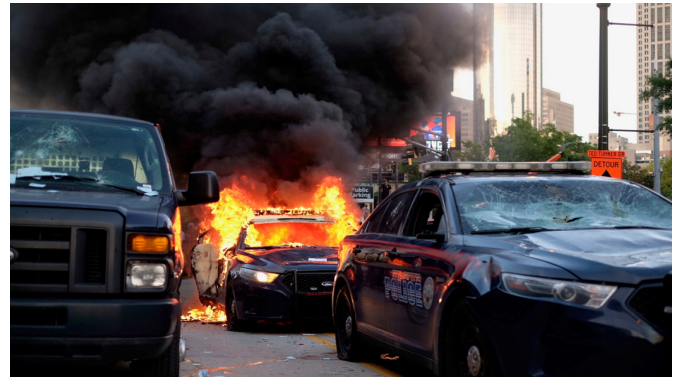
Source: Small Arms Analytics & Forecasting

American gun manufactures are likewise seeing increased revenue from these record sales. Connecticut-based Sturm, Ruger & Company indicated in its **2nd Quarter earnings report** that net sales had increased from \$210,367,000 in the first six months of 2019 to \$253,903,000 during the same period in 2020. That resulted in an earnings per share of \$1.06 in 2020 compared with \$.36 in 2019 - a 300 percent increase. Massachusetts-based Smith & Wesson reported a **similar profit jump in June**. Net sales for the company jumped nearly 33 percent from \$175.7 million for its fourth quarter ending June 2019 to \$233.6 million for the same period in 2020.

Ruger's CEO Chris Killoy acknowledged the historic demand and sees no sign of it slowing. "Having been in this industry for 30 years, I saw the surge in 1994 before the assault weapons ban took place," Killoy told investors during a July 29th **conference call**. "This is probably the strongest level of demand that I've seen. One of the most significant differences is how it has impacted all levels of the channel and the impact on inventory at all levels." Killoy continued that the "staggering increase in demand appears to be attributable to a few factors. Number one, concerns about personal protection and home defense stemming from continuing COVID-19 pandemic; protests, demonstrations, and civil unrest in many cities throughout the United States; and, lastly, the call by some for the reduction in funding and authority of various law enforcement organizations."⁹

COVID-19, Civil Unrest, and Calls to Defund the Police

It's clear that the initial surge in gun sales was sparked by concerns over the COVID-19 pandemic and the concurrent shut down in the majority of states. By mid-March, the pandemic was at the forefront of every news cycle, and firearm sales during this time were also becoming a lead story. The Brookings Institute discovered that the average daily level of firearm sales in January and February was 92,000. Within that period, daily sales varied within the range of 80,000 to 100,000 per day. On March 13, President Trump issued a proclamation declaring a national emergency concerning the COVID-19 outbreak. Over the next 12 days, firearm sales surged to over 120,000 per day and peaked at 176,000 on March 16. Throughout the next two months, as the country gradually settled into its new environment and then slowly transitioned into re-opening, firearm sales stabilized, although at a higher level than earlier in the year.¹⁰



Source: The Atlanta Journal-Constitution

The death of George Floyd on May 25 while in the custody of Minneapolis Police started a chain of events leading to protests and then rioting and looting throughout Minneapolis. This civil unrest then spread to other cities nationwide, including **Atlanta**, and triggered another surge in firearm sales, reaching 150,000 per day on June 2 and June 3. As protests, looting, and rioting continued throughout June, many Americans grew increasingly concerned over calls for **defunding the police**, leading to elevated firearm sales as spring transitioned to summer. As the police in many cities were continuously **forced to withdraw** in the face of **organized riots**, more and more people began to realize that not only is law enforcement sometimes unable to protect citizens, but the police **can't even protect themselves**.

What Are People Purchasing

Why people are buying firearms may be easier to determine than what people are buying. As mentioned previously, June experienced the highest demand for firearms in 2020. The month resulted in 2,387,524 total firearms sold and nearly four million NICS background checks conducted. Single handgun sales made up the majority of the purchases with 1,511,714 sold in June, while long-guns accounted for about 690,212 in sales. All other likely background check-related sales totaled 185,599 which include purchases involving a combination of handguns and long-guns.¹¹

Neither the FBI nor the Bureau of Alcohol, Tobacco, and Firearms (ATF) maintain records on the specific types of firearms owned or purchased. Likewise, there is no nationwide database maintained by any private entity. What might shed some light on this may be an unscientific review of Gunbroker.com’s sales figures for June. Gunbroker is not a retailer and does not sell guns directly to the public; it’s an eBay-like website that connects buyers and sellers of guns. Unlike eBay, the purchased firearms are not exchanged directly between the buyer and seller. The firearms must first be shipped to a Federal Firearms Licensee (FFL) such as a gun store. The gun is only then transferred to the buyer after passing the required federal background check as well as any other requirements a state may impose.

Gunbroker releases a [monthly report](#) of the top-selling guns sold through its platform broken down by category of weapon type. For June, the site reported the following firearms as the top sellers:

- Semi-Auto Handgun: Glock 19
- Revolver: Colt Python
- Semi-Auto Rifle: Smith & Wesson M&P 15
- Bolt Action Rifle: Remington 700
- Pump Action Shotgun: Mossberg 590

None of these entries should be a surprise to anyone familiar with firearms. The Glock 19 is considered by many as the most popular handgun in the nation. The M&P 15 is Smith & Wesson’s version of the AR-15.¹² The AR-15 is the most popular rifle in the United States and AR-15s from various manufactures accounted for four of the top five semi-auto rifles sold in June.

Continued Uncertainty As Five More Months Remain

The year 2020 will be most remembered for the COVID-19 pandemic as well as the protests, riots, and looting as a result of George Floyd’s death. But the year will also be remembered for shattering all previous gun sales records. By the conclusion of August, over 15 million firearms have been purchased in the United States, exceeding the number of firearms sold in all of 2019. An estimated 5 million Americans became first time gun owners. With four more months remaining in the year, the continued uncertainty surrounding COVID-19, continued nationwide social unrest, a presidential election in November, and maybe even murder-hornets, the year will certainly go down as the “Year of the Gun” for gun manufacturers, retailers, buyers, and owners. -AA



President John F. Kennedy holds an AR-15 in the Oval Office. Kennedy pushed the Army to give up the M14 for the new AR-15, which became the M16 rifle and M4 carbine in U.S. military service.

Credit: The John F. Kennedy Presidential Library and Museum

Judiciary

Eyes on SCOTUS – Three Fascinating Cases to Watch

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The impact of COVID-19 rippled across all institutions this year, and the U.S. Supreme Court was not spared. SCOTUS generally releases the majority of its decisions in June; however, delays from the pandemic caused opinions to be released well into July for the first time [since 1996](#). SCOTUS agreed to hear 74 cases during its 2019-2020 term, but [12 cases were postponed](#) to the 2020-2021 term, again due to the pandemic.

As we head into another potentially unprecedented year under the shadow of COVID-19, here are highlights from three of the most interesting cases that are in the queue for the October 2020 term –

(1) Faith-Based Foster Care Agencies, Anti-Discrimination Policies, and the Free Exercise Clause

On February 24, 2020, SCOTUS granted the petition for a writ of certiorari in *Fulton v. City of Philadelphia*, a challenge by foster parents and Catholic Social Services (“CSS”) to Philadelphia’s refusal to continue to refer foster children to CSS for placement because CSS would not certify same-sex couples as foster parents. This case has been set for oral argument on November 4, 2020.

CSS is a non-profit, religious organization affiliated with the Archdiocese of Philadelphia that provides foster care services. In 2018, a reporter informed Philadelphia’s Department of Human Services that two of its foster care agencies would not work with same-sex couples as foster parents. When the agencies confirmed that, because of their religious views on marriage, they would not work with same-sex couples, the department ceased referring foster children to them, based on Philadelphia’s anti-discrimination laws. CSS, which was one of those agencies, brought this action claiming that Philadelphia violated its rights under the First Amendment, as well as under Pennsylvania’s Religious Freedom Protection Act. CSS sought an order requiring Philadelphia to renew their contractual relationship while permitting it to turn away same-sex couples who wish to be foster parents. When CSS was denied preliminary injunctive relief by the U.S. district court,¹ CSS appealed to the Third Circuit, which affirmed the decision. The Third Circuit cited the 1990 U.S. Supreme Court holding in *Employment Division v. Smith* and concluded that CSS was not entitled to a preliminary injunction, that Philadelphia’s nondiscrimination policy is a neutral and generally applicable law, and that the religious views of CSS do not entitle it to an exception from that policy. The Third Circuit also found that CSS failed to make a persuasive showing that Philadelphia targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation.²

SCOTUS is now being asked to address the following questions: (1) whether Free Exercise plaintiffs can only succeed by proving a particular type of discrimination claim — namely that the government would allow the same conduct by someone who held different religious views — as two circuits (the Third and Ninth Circuits) have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits (the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits) have held; (2) whether *Employment Division v. Smith* should be revisited; and (3) whether the government violates the First Amendment by conditioning a religious agency’s ability to participate in the foster care system on taking actions and making statements that directly contradict the agency’s religious beliefs.

Is There a Need to Revisit a Key Free Exercise Case in SCOTUS Jurisprudence?

Decided in 1990, *Employment Division v. Smith* is a landmark Supreme Court decision regarding the Free Exercise Clause.³ Two individuals were fired by a private drug rehabilitation organization because they ingested peyote (a hallucinogenic drug) for sacramental purposes at a Native American religious ceremony. Their applications for unemployment compensation were denied by the state of Oregon under a state law disqualifying employees discharged for work-related “misconduct.” In a majority opinion authored by the late Justice Scalia, SCOTUS held that the Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. Under *Smith*, the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.

The Aftermath of *Smith* and the Birth of the Religious Freedom Restoration Act (“RFRA”)

In response to *Smith*, Congress in 1993 enacted RFRA to restore the strict scrutiny test, under which the government may substantially burden a person’s exercise of religion only if the government demonstrates that the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁴ However, in *City of Boerne v. Flores* in 1997, the U.S. Supreme Court held that the enactment of RFRA, as it applied to State and local governments, exceeded Congress’s remedial powers under § 5 of the Fourteenth Amendment.⁵ However, SCOTUS has since applied the standard from RFRA against the federal government in cases such as *Burwell v. Hobby Lobby Stores, Inc.*⁶

Congress responded to the *City of Boerne* decision by enacting the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses. Unlike RFRA, RLUIPA is limited to addressing substantial burdens on religious exercise in only two spheres: (1) land-use regulations⁷ and (2) religious exercise by incarcerated persons.⁸

In *Fulton* (the case now before SCOTUS), the petitioners argued in their merits brief that the *Smith* decision did not rely on the text, history, or tradition of the Free Exercise Clause, but rather, on a series of predictions about the outcome of its rule, including that granting religious exemptions would be “courting anarchy”; that most free exercise claims would involve “laws” rather than administrative rules and policies; and that legislatures would be sufficiently “solicitous” of religious exemption requests.

In [their brief filed on August 13, 2020](#), the Philadelphia respondents contend that this case would be “an exceptionally poor vehicle to consider the validity of *Smith*” and that the petitioners have not offered any historical evidence that the free exercise of religious “includes the right to wield government power as one’s religion dictates.” They argue that stare decisis also favors retaining *Smith* and that CSS would still lose even if *Smith* were overturned because the non-discrimination requirement “serves several state interests of the highest order” and is narrowly tailored to those interests.

(2) Juveniles Serving Life Without Parole

Jones v. Mississippi will be the latest in a series of cases over the last ten years in which SCOTUS has refined the Constitutional parameters for sentencing a juvenile offender to life imprisonment without the possibility of parole.

Juvenile Non-homicide Offenders Must Have a Meaningful Opportunity to Obtain Release

In *Graham v. Florida* in 2010, the U.S. Supreme Court held that juvenile offenders cannot be sentenced to life imprisonment without the possibility of parole for non-homicide offenses.⁹ The petitioner in *Graham* was 16-years old when he and other school-age youths attempted to rob a restaurant, during which the restaurant’s manager was struck on the back of the head by a metal bar; the victim required stitches for his head injury. *Graham* was arrested for the robbery attempt and was charged as an adult with armed burglary with assault or battery, a first degree felony with a maximum penalty of life imprisonment without the possibility of parole. He was also charged with attempted armed robbery, a second degree felony carrying a maximum penalty of 15 years of imprisonment. He pleaded guilty to both charges, was placed on probation, and was released after receiving credit for time served awaiting trial. However, within a few months, he was arrested again following a home invasion robbery, with two accomplices. He denied involvement in the crimes but admitted in court that he violated his probation conditions by fleeing. The trial court sentenced him to the maximum sentence authorized by law on each charge for which he was on probation: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, a life sentence gives a defendant no possibility of release unless he is granted executive clemency. Ultimately, SCOTUS held that the Eighth Amendment prohibits the imposition of a sentence of life without the possibility of parole on a juvenile offender who did not commit a homicide and that, although a State is not required to guarantee eventual freedom, the State must give juvenile non-homicide offenders sentenced to life without parole a meaningful opportunity to obtain release.

Mandatory Life Sentences without the Possibility of Parole are Unconstitutional for Juvenile Offenders

Two years later, in *Miller v. Alabama*, SCOTUS held that mandatory life imprisonment without the possibility of parole for those who were under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments.¹⁰ While the ability to impose a sentence of life imprisonment without the possibility of parole on a juvenile is not foreclosed, the sentence must take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. This ruling applies even to offenders who committed murder as a juvenile, extending the application of *Graham* beyond non-homicide offenses. The decision in *Miller* consolidated two cases; in each case, a 14-year-old was convicted of murder and was sentenced to a mandatory term of life imprisonment without the possibility of parole.

Retroactive Effect of the Decision in *Miller*

In 2016, the U.S. Supreme Court held in *Montgomery v. Louisiana* that its previous ruling in *Miller* should be applied retroactively.¹¹ The petitioner was 17 years old in 1963, when he killed a deputy sheriff. The jury returned a verdict of “guilty without capital punishment,” which carried an automatic sentence of life without parole. Nearly 50 years after the petitioner was taken into custody, SCOTUS decided in *Miller* in 2012 that mandatory life sentences without the possibility of parole for juvenile homicide offenders violates the Eighth Amendment’s prohibition on cruel and unusual punishments. As reported by The Atlantic on January 26, 2016, the decision in *Montgomery* that the ban on mandatory life-without-parole sentences for juvenile offenders applied retroactively impacted [more than 2,000 inmates nationwide](#) at the time who could be eligible for resentencing or the possibility of eventual freedom.

SCOTUS granted the cert petition in *Jones v. Mississippi* on March 9, 2020, to consider whether the Eighth Amendment¹² requires a finding that a juvenile is permanently incorrigible before a sentence of life without parole can be imposed. When the petitioner in this case was 15 years old, he killed his grandfather during an altercation. He was convicted of murder and sentenced to life imprisonment without the possibility of parole, the mandatory penalty for murder. Following the U.S. Supreme Court’s decision in *Miller*, the petitioner’s motion for post-conviction relief was granted, and he was given a new sentencing hearing to consider a set of juvenile characteristics and circumstances to help decide whether he should be sentenced to life with eligibility for parole or without the eligibility for parole. He was again sentenced to life without the possibility of parole.

The petition for a [writ of certiorari](#) in *Jones* reflects that “[t]here is a deep and acknowledged split of authority on whether the Eighth Amendment permits a juvenile to be sentenced to life without parole absent a finding that he is one of the rare, permanently incorrigible juveniles for whom such a sentence is permissible.” However, the State of Mississippi [argued in its brief filed on August 14, 2020](#) that the Eighth Amendment requires only that mitigating circumstances of youth and its attendant characteristics be considered before imposing a sentence of life without parole and that Mississippi complied with those requirements. This case has been set for oral argument on November 3, 2020.

(3) What Constitutes a “Seizure” Under the Fourth Amendment?

Torres v. Madrid prompts the justices to consider whether an unsuccessful attempt to detain a suspect by use of physical force is a “seizure” within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court have held, or whether physical force must be successful in detaining a suspect to constitute a “seizure,” as the Tenth Circuit and the District of Columbia Court of Appeals have held. This case was held over from the 2019-2020 term due to the COVID-19 pandemic. The oral argument before SCOTUS for *Torres v. Madrid* was held on [October 14, 2020](#).

The underlying case involves the rejection of a § 1983 action¹⁴ against two police officers, brought by Roxanne Torres, who asserts that the officers used excessive force when they fired weapons into her vehicle, hitting her twice. In 2014, the New Mexico State Police officers went to an apartment complex to arrest a woman who was “involved with an organized crime ring”; Torres, the petitioner in this case, was not the subject of that arrest warrant.¹⁵ The officers, who were wearing tactical vests with police markings, decided to make contact with two individuals who were standing outside of the apartment of the woman who they were there to arrest. As the officers approached a Toyota FJ Cruiser parked next to the apartment, Torres got inside the Cruiser and started the engine, while the other individual went into the apartment. The officers were unsure at the time if Torres was the subject of the arrest warrant. Officer Richard Williamson approached the Cruiser’s closed window on the driver’s side and told Torres several times to show him her hands. According to Torres, she thought she was being carjacked. When Torres put the car in drive, Officer Williamson brandished his firearm. At some point, Officer Madrid, who was standing very close to the front wheel of the Cruiser, drew her firearm as well. Torres testified that she was trying to get away, and she said that the officers shot as soon as the Cruiser “creeped a little inch or two.” Officer Madrid testified that the Cruiser drove at her and that she fired at Torres through the windshield to stop her from running her over. Officer Williamson testified that he shot at Torres because he feared being crushed between the Cruiser and a nearby car and that he also wanted to stop the Cruiser from going toward Officer Madrid.

Two bullets struck Torres. She continued driving. After colliding with another vehicle, she stopped in a parking lot, got out of the Cruiser, laid down on the ground, and attempted to “surrender” to the people who she believed to be carjackers, thinking they were still in pursuit. She was “tripping out” after having used meth for a few days and did not want to wait for the police to arrive because she had an outstanding arrest warrant. She stole another vehicle that was left running nearby, drove 75 miles, and went to a hospital, where she identified herself with a false name. She was airlifted to a hospital in Albuquerque, properly identified, and arrested by police the next day. She later pled no contest to: (1) aggravated fleeing from a law-enforcement officer; (2) assault upon a police officer; and (3) unlawfully taking a motor vehicle. In 2016, Torres filed a civil rights complaint in federal district court against Officers Williamson and Madrid. The district court construed her complaint as asserting excessive force claims under the Fourth Amendment and concluded that the officers were entitled to qualified immunity, based on the reasoning that the officers had not seized Torres at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation. On appeal, the Tenth Circuit affirmed, finding that Torres failed to show she was seized by the officers’ use of force.

In her merits brief filed on [January 31, 2020](#), Torres argues that a seizure under the Fourth Amendment occurs when an officer applies physical force with the intent to restrain and that the original meaning of “seizure” in the Fourth Amendment included common law arrests, which did not require the suspect to submit in response to intentional, physical force. Torres contends that, at common law, arrests could be effected (1) by a show of authority that causes the person to submit or (2) by the application of physical force with the intent to restrain, no matter whether the person submits in response. The respondents [argued in their brief filed on March 2, 2020](#) that there can be no “seizure” without acquisition of control, and without a seizure, there is no Fourth Amendment violation.¹⁶ The respondents contend that Torres’ use of common law concepts for arrests are not controlling and urge SCOTUS to favor instead the “common sense” understanding of the term “seizure.” -BV

Federal Relief Shows the Government CARES About Small Businesses

- 1 Paul Davidson, As coronavirus spread, economy lost 701,000 jobs in March, breaking 10-year string of gains, USA Today (Apr. 3, 2020, 1:49 PM), <https://www.usatoday.com/story/money/2020/04/03/coronavirus-economy-loses-701-000-jobs-march-virus-spreads/5119265002/>.
- 2 Early legislative efforts to address the coronavirus were the Coronavirus Preparedness and Response Supplemental Appropriations Act, signed on March 6, and the Families First Coronavirus Response Act, signed on March 18.
- 3 Payroll costs include compensation (limited to employees making less than \$100,000 a year, payment for vacation, parental, family, medical, or sick leave, allowance for dismissal or separation, payment required for provisions of group health care benefits, payment of retirement benefits, and payment of State or local tax assessed on compensation of employees.
- 4 Christopher Austin et al., Borrower's Guide to PPP Loans, Paul Hastings (June 19, 2020), https://www.paulhastings.com/publications-items/details/?id=7b8f1b6f-2334-6428-811c-ff00004cbded#_ftn1.
- 5 Id.
- 6 Daniel Roberts, The #349 billion coronavirus loan program for small businesses is out of money after 13 days, Yahoo Finance (Apr. 16, 2020), <https://finance.yahoo.com/news/349-billion-ppp-coronavirus-loan-program-for-small-businesses-runs-out-of-money-in-13-days-143606277.html>.
- 7 Id.
- 8 Leon LaBrecque, What Difference Does It Make? The Paycheck Protection Program Flexibility Act of 2020, Forbes (June 19, 2020), <https://www.forbes.com/sites/leonlabrecque/2020/06/18/what-difference-does-it-make-the-paycheck-protection-program-flexibility-act-of-2020-pppfa/#8e564542998d>.
- 9 Id.
- 10 Jim Probasco, Paycheck Protection Program Flexibility Act of 2020, Investopedia (Aug. 7, 2020), <https://www.investopedia.com/paycheck-protection-program-flexibility-act-of-2020-an-overview-4846944#:~:text=The%20PPP%20Flexibility%20Act%20amends,from%2075%25%20to%2060%25>.
- 11 See supra, LaBrecque.
- 12 Jeff Drew, New PPP forgiveness guidance addresses owner-employee compensation, rent related costs, Journal of Accountancy (Aug. 25, 2020), <https://www.journalofaccountancy.com/news/2020/aug/ppp-forgiveness-guidance-addresses-owner-employee-compensation-rent-costs.html>.
- 13 James T. Madore, Borrowers delay applying for PPP loan forgiveness in hopes of better deal, Newsday (Aug. 25, 2020, 4:00 PM), <https://www.newsday.com/business/coronavirus/ppp-loans-forgiveness-small-business-sba-1.48565475>.

2020: The Year of the Gun

- 1 Small Arms Analytics & Forecasting, U.S. Firearms: Year-to-Date Sales Exceed all of 2019 (Sep. 2020), available at: <http://smallarmsanalytics.com/v1/pr/2020-09-01.pdf>
- 2 Id.
- 3 Small Arms Analytics & Forecasting, U.S. Firearms: July 2020 – Units Sales Continue to Boom (Aug. 2020), available at: <http://smallarmsanalytics.com/v1/pr/2020-08-03.pdf>
- 4 SAAF's firearms unit sales estimates are based on raw data taken from the NICS, adjusted for checks unlikely to be related to end-user firearms sales, such as background checks for weapons carry licenses. Therefore, the FBI's raw numbers (for July, 3,614,192 checks) cannot be taken at face value as large numbers of background checks are unrelated to end-user sales.
- 5 According to SAAF more firearms were actually sold in March 2020, but June saw the largest increase in sales percentage-wise over the same month in 2019 and also experienced the most background checks conducted.
- 6 Small Arms Analytics & Forecasting, U.S. Firearms Sales: June 2020 Units Sales Soar Once More (Jul. 2020), available at: <http://smallarmsanalytics.com/v1/pr/2020-07-01.pdf>
- 7 Small Arms Analytics & Forecasting, U.S. Firearms Sales: March 2020 Units Sales Show Anticipated COVID-19-Related Boom (Apr. 2020), available at: <http://smallarmsanalytics.com/v1/pr/2020-04-01.pdf>
- 8 Phillip B. Levine and Robin McKnight, Three Million More Guns: The Spring 2020 Spike in Firearm Sales, The Brookings Institute (Jul. 2020), available at: <https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/>
- 9 Nasdaq, Sturm, Ruger & Company, Inc. Reports Second Quarter Diluted Earnings of \$1.05 Per Share, Declares Special Dividend of \$5.00 Per Share and Declares Quarterly Dividend of 42¢ Per Share (Jul. 2020), available at: <https://www.nasdaq.com/press-release/sturm-ruger-company-inc.-reports-second-quarter-diluted-earnings-of-%241.05-per-share>
- 10 Id., Phillip B. Levine and Robin McKnight.
- 11 Id., Small Arms Analytics & Forecasting, (Jul. 2020).
- 12 A common misconception is that "AR" stands for "Assault Rifle" or "Automatic Rifle." "AR" is actually a reference to the gun's original manufacturer, ArmaLite, Inc., and stands for ArmaLite Rifle.

Endnotes Continued

Eyes on SCOTUS - Three Facinating Cases to Watch

1 *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661 (E.D. Pa. 2018).

2 *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019).

3 *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

4 42 U.S.C. § 2000bb-1.

5 *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997). However, SCOTUS has since applied the standard from RFRA against the federal government.

6 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (holding that, on a motion by a religious sect for a preliminary injunction against the federal government's ban on the sect's use of hoasca, a tea containing a hallucinogen, in religious ceremonies, the federal government had the burden to demonstrate a compelling interest under RFRA).

7 See 42 U.S.C. § 2000cc (a) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution: (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.").

8 See 42 U.S.C. § 2000cc-1 (a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

9 *Grabam v. Florida*, 560 U.S. 48 (2010).

10 *Miller v. Alabama*, 567 U.S. 460 (2012).

11 *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), as revised (Jan. 27, 2016).

12 The Eighth Amendment to the U.S. Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

13 The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14 42 U.S.C. § 1983 provides, in relevant part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subject ed, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or im munities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15 *Torres v. Madrid*, 769 F. App'x 654, 655-56 (10th Cir. 2019).

16 *Torres v. Madrid*, No. 1:16-CV-01163-LF-KK, 2018 WL 4148405, at *1 (D.N.M. Aug. 30, 2018).

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