The Washington Post

It’s a big deal when the Supreme Court decides not to decide

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June 16, 2020

The Supreme Court may refuse to take a case for a variety of reasons. Procedural intricacies may prevent a clean ruling on the merits, or the justices may want to let lower courts thrash out the law before intruding on the issue. In some cases, however, it seems the Supreme Court would just rather not step into the middle of a political minefield. On Monday, in addition to a historic ruling barring discrimination against LGBTQ employees, the Supreme Court made news for the cases it did not take.

The first concerned a California state law that prohibited state authorities from assisting federal immigration agents (e.g., alerting the federal government when someone in custody was to be released or handing off an undocumented person to federal authorities). The Trump administration, in its never-ending hunt to harass and deport undocumented immigrants (regardless of the danger they pose to society and their roots in the community), sued. The U.S. Court of Appeals for the 9th Circuit agreed with the district court that the California law was constitutional. “The justices first considered the case in January but put the government’s petition on hold for nearly two months,” writes Amy Howe of SCOTUSblog. “They listed the case for consideration at their conference in early March and then repeatedly relisted it at every conference since then before announcing [Monday] that they had denied review.” She added, “Justices Clarence Thomas and Samuel Alito noted publicly that they would have granted the government’s petition, but there is no way to know how the other justices voted, or why the court delayed action on the petition.”

The result is important insofar as it leaves in place California’s law, which reaffirms that states cannot be dragooned into performing services for the federal government. In that sense, it is a victory for federalism. It is also a boon to public safety. As California Attorney General Xavier Becerra put it: "We’re protecting Californians’ right to decide how we do public safety in our state. The Trump Administration does not have the authority to commandeer state resources. We’re heartened by today’s Supreme Court decision.” Should former vice president Joe Biden be elected, the issue would almost certainly disappear. For this reason, perhaps, the court decided it really didn’t need to weigh in.

More surprising among the denials was the court’s refusal to hear a batch of Second Amendment cases testing the extent to which states and localities can regulate guns. The New Jersey law at issue in one case permitted individuals to carry a handgun in public only if they can show a “justifiable need” — meaning “a special danger to life."

The court continues its streak of declining to weigh in on these gun regulation cases. Again, we do not know why, but we do know two of the most conservative justices, Clarence Thomas and

Brett M. Kavanaugh, are very upset that the court is not taking them. In high theatrical style, Thomas accused his colleagues of "looking the other way" when a constitutional violation is at issue. He declared: "This Court would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights. And it seems highly unlikely that the Court would allow a State to enforce a law requiring a woman to provide a justifiable need before seeking an abortion."

This is preposterous reasoning. The Heller decision affirming an individual Second Amendment right made clear that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Moreover, the issue is whether the court should entertain the case; no one imagines the court must take every abortion or First Amendment case.

A third decision not to take up a hot-button issue has immediate relevance. The court turned away eight cases challenging the doctrine of qualified immunity, which acts to shield police and others acting under color of law from lawsuits. Thomas again dissented, pointing out that the 1871 Reconstruction-era federal statute that allowed for suits against state officials for constitutional violations did not contain an immunity proviso limiting lawsuits to cases in which the plaintiff can show the defendant violated a "clearly established" right. The caveat has now swallowed the rule as courts have found that unless there is precedent involving the situation involving the precise fact pattern at issue, the defendant cannot be sued.

It is for this reason that qualified immunity has now become part of House Democrats' Justice in Policing Act of 2020. Reacting to the decision to decline to review qualified immunity, House Judiciary Committee Chairman Jerrold Nadler (D-N.Y.), Congressional Black Caucus Chair Karen Bass (D-Calif.), and Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties Chair Steve Cohen (D-Tenn.) released a statement largely echoing Thomas's objections:

Qualified immunity has repeatedly barred victims of police brutality from having their day in court, and it has been criticized by liberals and conservatives alike.

The Supreme Court's failure to reconsider this flawed legal rule makes it all the more important for Congress to act. The Justice in Policing Act of 2020 does just that: it makes clear that qualified immunity cannot be used as a defense in civil rights suits against federal, state, or local law enforcement officers. It is long past time to remove this arbitrary and unlawful barrier and to ensure police are held accountable when they violate the constitutional rights of the people whom they are meant to serve.

The reaction to the Supreme Court's decision to punt and a glance at the amicus briefs challenging qualified immunity from diverse ideological groups (ranging from the libertarian Cato Institute to the NAACP) suggest this may be an issue on which a cross-partisan alliance can be founded. Given public outrage over the seeming impunity with which officers use force — overwhelmingly against African Americans — there may finally be a political consensus to remedy the Supreme Court's damage to a statute specifically designed to address this issue: Give meaningful remedies to those who are abused by law enforcement.