


"Remain in Mexico" and Texas' anti-abortion law

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Petitions of the week



This week we highlight petitions that ask the Supreme Court to consider, among other things, whether the Biden administration properly terminated the Trump administration's "remain in Mexico" policy or must continue to enforce it, and whether abortion providers' challenge to Texas' restrictive anti-abortion law can return to the district court in place of the 5th Circuit.

"Remain in Mexico" policy

Biden v. Texas presents the latest stage in the Biden administration's attempt to unwind the Trump administration's "remain in Mexico" policy. This policy required people seeking asylum at the southern border to stay in Mexico while they waited for a hearing in U.S. immigration court. In June 2021, Secretary Alejandro Mayorkas of the Department of Homeland Security issued a decision terminating the policy. After Texas and Missouri challenged that decision, a federal district court vacated the secretary's termination, in part on the administrative-law ground that the decision was insufficiently explained. The Biden administration sought a stay of that order in the Supreme Court, but the justices rejected that request over the dissent of Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

As the case proceeded to an appeal in the U.S. Court of Appeals for the 5th Circuit, the secretary attempted to address the earlier deficient explanation by issuing a new decision terminating the policy. However, the 5th Circuit did not consider the secretary's new decision and affirmed the district court's ruling compelling the Biden administration to continue enforcing the policy. The Biden administration has now returned to the Supreme Court asking the justices to take up the case on the merits. In her cert petition, the U.S. solicitor general argues that the statutory basis for the Trump administration's policy, **8 U.S.C. § 1225**, states that the DHS secretary "may" return noncitizens to Mexico during their immigration proceedings, but does not require the secretary to do so, such that the Biden administration can change policies.

Texas abortion law

As Amy Howe reported for SCOTUSblog, abortion providers this week again asked the justices to order the U.S. Court of Appeals for the 5th Circuit to send their challenge to Texas' restrictive anti-abortion law back to U.S. District Judge Robert Pitman. The law, **S.B. 8**, prohibits almost all abortions after about six weeks of pregnancy. On Dec. 10, the Supreme Court **ruled** that the providers' lawsuit can go forward against a group of state medical licensing officials. However, on Dec. 13, the court rejected the providers' request to have their case sent directly to Pitman, and instead it sent the case back to the 5th Circuit. A three-judge panel of the 5th Circuit heard oral argument Friday on whether to refer a key legal issue in the case to the Texas Supreme Court — a step that supporters of abortion rights have characterized as a delay tactic. At the Supreme Court, the latest iteration in the ongoing dispute comes in the form of a mandamus petition — essentially a request for the justices to command the 5th Circuit to take a non-discretionary action — and is known as *In re Whole Woman's Health*.

These and other petitions of the week are below:

Markham Concepts, Inc. v. Hasbro, Inc.

21-711

Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to SCOTUSblog in various capacities, is among the counsel to the petitioners in this case.

Issue: Whether a party that commissions a work from an independent contractor qualifies as the creator's "employer" within the meaning of the Copyright Act of 1909's work-for-hire provision.

Cope v. Cogdill

21-783

Issues: (1) Whether jail officials who are subjectively aware of a substantial risk that a pretrial detainee will attempt suicide and respond to the harm unreasonably may be held liable when their violation was obvious — as the U.S. Courts of Appeals for the 1st, 4th, 7th, 8th, 9th, and 11th Circuits have held — or whether jail officials who respond unreasonably to the obvious risk should be granted qualified immunity in the absence of a case involving the same facts — as the U.S. Court of Appeals for the 5th Circuit held below; (2) whether the objective standard the Supreme Court announced in *Kingsley v. Hendrickson* applies to inadequate-care claims brought by pretrial detainees — as the U.S. Court of Appeals for the 2nd, 6th, 7th, and 9th Circuits have held — or whether the subjective standard that applies to convicted prisoners also applies to pretrial detainees — as the U.S. Courts of Appeals for the 8th, 10th, and 11th Circuits have held and as the 5th Circuit held below; and (3) whether the judge-made qualified immunity doctrine requires reform.

Cruz v. Arizona

21-846

Issue: Whether the Supreme Court's decision in *Lynch v. Arizona* — confirming that the

rule announced in ***Simmons v. South Carolina*** (that due process entitles a capital defendant whose future dangerousness is at issue to inform the jury that he will be ineligible for parole if not sentenced to death) applies in Arizona — applied a settled rule of federal law that must be applied to cases pending on collateral review in Arizona.

Jones v. Hendrix

21-857

Issue: Whether federal inmates who did not — because established circuit precedent stood firmly against them — challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under **28 U.S.C. § 2241** after the Supreme Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

Biden v. Texas

21-954

Issues: (1) Whether **8 U.S.C. § 1225** requires the Department of Homeland Security to continue implementing the Migrant Protection Protocols, a former policy under which certain noncitizens arriving at the southwest border were returned to Mexico during their immigration proceedings; and (2) whether the U.S. Court of Appeals for the 5th Circuit erred by concluding that the secretary of homeland security's new decision terminating MPP had no legal effect.

In re Whole Woman's Health

21-962

Issue: Whether a writ of mandamus should issue directing the U.S. Court of Appeals for the 5th Circuit to remand the case to the district court without delay.

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Cases: *In re Whole Woman's Health*, *Markham Concepts, Inc. v. Hasbro, Inc.*, *Cope v. Cogdill*, *Cruz v. Arizona*, *Jones v. Hendrix*, *Biden v. Texas*

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