Supreme Court Update

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Overview of Presentation

- Supreme Court in the big picture in the big, controversial cases
- Significant decisions for local governments from last term (ending around July 1)
- Brief preview of interesting cases for cities for next term (beginning around October 1)

Two Different Supreme Court Cases

Big, Controversial Cases

- 3-5 on the docket each term
- For the 10 years before Kennedy left the Court (2018) almost all were decided 5-4 on ideological lines
- Mostly not local government cases

All the Other Cases

- 60-70 on the docket each term
- Mostly not decided 5-4 or on ideological lines
- Often decided 9-0, 8-1
- Almost all of the 10 or so local government cases are in this category

Summer of 2020: Supposed to be the Summer of a Conservative SCOTUS

- Justice Kennedy (unreliable conservative) was gone and had been replaced by Kavanaugh (expected-to-be reliable conservative)
- For the last 50 years we have had an **unreliable** conservative Supreme Court in big, controversial cases
  - Powell (’71-’87)
  - O’Connor (‘81-’06)
  - Kennedy (’87-’18)
- Votes should have been 5-4 in the big, controversial cases

All Eyes Were on the Chief

The Docket was Packed with Controversy

- Guns (decided on standing)
- Abortion
- DACA
- Employment protections for gay and transgender employees
- President's tax returns

What Did He Do?

- Chief Justice Roberts joined the liberals Justice in numerous rulings
  - Abortion
  - DACA
  - Title VII sexual orientation/gender identity
- At this point there **is no significant disagreement that Roberts sometimes takes positions in cases to** avoid 5-4 (now 6-3) conservative rulings on ideological lines

Everyone Thought this Status Quo Would Remain Indefinitely

And then Justice Ginsburg died

Amazing American

- Second female Justice
- True feminist hero
  - Endured overt sexism women of my generation couldn't dream of
  - Argued six gender discrimination cases before SCOTUS
  - Most famous SCOTUS majority opinion led to VMI accepting women
- Famous for her dissents
- Cultural icon when most people can't name one Supreme Court Justice
- **In the "other cases" she was a pragmatist who wanted fairness and common sense to prevail**

Justice Barrett Joins the Bench

- All the hallmarks of a reliable conservative:
  - Textualist
  - Originalist
  - Judicial restraint
  - Social conservative
  - Clerked for Justice Scalia
- Suddenly we have a 6-3 Court with Justice Kavanaugh in the middle

New Supreme Court

Summer of 2021: Supposed to be the Summer of a Conservative SCOTUS

Conservative

- Chief Justice Roberts
- Thomas
- Alito
- Gorsuch
- Kavanaugh
- Barrett

Liberal

- Breyer
- Sotomayor
- Kagan

Three Big, Controversial Cases

- ACA
  - Is the entire ACA unconstitutional because the individual mandate is now $0?
- Same-sex foster parent case
  - Could the City of Philadelphia refuse to work with Catholic Social Services because they wouldn't placer foster children with same-sex parents?
- Voting Rights
  - Did Arizona's restrictions on voting violate Section 2 of the Voting Rights Act because they had a disparate impact on minority voters?

Three Big Cases

Supposed to Happen

- Affordable Care Act
  - Individual mandate unconstitutional
  - Law severable
  - 5-4 (R+K+liberals)
- Gay foster parents
  - Catholic Social Services wins
  - 6-3
- Voting rights
  - Arizona laws upheld
  - 6-3

Actually Happened

- Affordable Care Act
  - No standing
  - 7-2
- Gay foster parents
  - Catholic Social Services wins very narrowly
  - 9-0
- Voting rights
  - Arizona law upheld
  - 6-3

What Really Happened

- One of the big decisions was 6-3
- Decisions in other big cases were very narrow
  - I agree with the theory votes were changes in the ACA and same-sex-foster parents' case
- Roberts is still at least somewhat in charge
  - Values permeate—institutionalism, incrementalism, turning the heat down not up
  - Getting what he wants on race and not taking as much heat
- More of the Court trying to find common ground?
- Conservatives were divided but dominant

Do We Really Have a 3-3-3 Court?

- Josh Blackman, *We don't have a 6-3 Conservative Court. We have a 3-3-3 Court*, Volokh Conspiracy
- Thomas, Alito, and Gorsuch are on the right
- Roberts, Kavanaugh, and Barrett are somewhere to the left of the right
- And Breyer, Sotomayor, and Kagan will do anything to form a majority
- Conservatives still in charge in 3-3-3

Gloves Will be Off Next Term

- Will summer 2022 be the term of the 6-3 conservative Supreme Court?
- Guns
- Abortion
- Affirmative action—cert petition pending
- **NONE of these deal with issues at the margins**

Local Government Cases from Last Term

- Ending around July 1, 2021

State and Local Legal Center

- Files *amicus curiae* briefs in the Supreme Court in cases affecting states and local governments on behalf of the Big Seven national organizations representing elected and appointed state and local government officials
- NLC is an SLLC member (and so is VML through NLC)
- *Amicus* briefs explain the practical impacts a ruling will have on a particular constituency and make policy arguments for why the Court should rule a particular way

SLLC Docket

- SLLC filed briefs in 11 cases
  - Three were holdovers for the term before
- One cert petition
  - Small cell, cert denied
- All cases had some local government connection
- Lot of losses
- A lot of police cases

Local Government Docket was WOW!

- Chicago—bankruptcy, impounding cars
- San Antonio—appellate costs
- Baltimore—climate change, federal court v. state court jurisdiction
- Philadelphia—foster care, non-discrimination ordinance v. First Amendment

How Did this Happen?

- A lot of litigation involves local governments
- One case was a hold over from last term
- The San Antonio case could have been brought by a non-government party
- Random

Fulton v. City of Philadelphia

- Big, controversial case
- Involving a local government!
- Perhaps the best illustration of the trends in big, controversial cases from last term
- The issue of gay rights v. religious liberty isn't going to go away no matter how many times the Supreme Court tries to duck it

Fulton v. Philadelphia

- Holding: Philadelphia's refusal to contract with Catholic Social Services (CSS) for foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise of Religion Clause of the First Amendment
- Unanimous
- Roberts wrote the opinion

Facts

- Philadelphia contracts with CSS, and over 20 other agencies, to certify foster care families
- When the city discovered that CSS wouldn't certify same-sex couples because of its religious beliefs the city refused to continue contracting with CSS
- The city noted CSS violated the non-discrimination clause in its foster care contract
- CSS sued the city claiming its refusal to work with CSS violated the Free Exercise and Free Speech Clauses of the First Amendment

Reasoning

- Chief Justice Roberts, writing for the Court, concluded that the city violated CSS's free exercise of religion rights
- He noted that in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable"
- In other words, neutral and generally applicable laws are generally constitutional even if they burden religion

Background on *Employment Division v. Smith*

- (Conservative) Justice Scalia wrote it
- Conservatives now dislike it because they see religion as being disadvantaged
- Easy rule for local governments to apply: if a rule is neutral and applies to everyone no exception for religion

Reasoning

- So, this non-discrimination clause should be constitutional, right?
- The Court held *Smith* didn't apply in this case because **the city's non-discrimination clause allowed for exceptions**, meaning it wasn't generally applicable

Concurring Opinions

- Barrett and Kavanaugh expressed skepticism about keeping *Smith,* didn't know what to replace it with, ultimately agreed with Roberts it didn't have to be reconsidered
- Alito, Thomas, and Gorsuch would have overruled *Smith*
- Alito concurrence: Philadelphia will now just take out the exception, CSS will sue again but it will lose under *Smith*, CSS will ask us to overrule *Smith* again
- Gorsuch concurrence: the Chief Justice used "a dizzying series of maneuvers" to "turn a big dispute of constitutional law into a small one"
  - "As §3.21's title indicates, the provision contemplates exceptions only when it comes to the **referral stage of the foster process**—where the government seeks to place a particular child with an available foster family"

Commentary—Roberts is a Genius

- Title says it all: Mark Joseph Stern, *John Roberts Just Pulled Off His Greatest Judicial Magic Trick*, Slate
- He united the three liberals together with Justice Amy Coney Barrett and Brett Kavanaugh in support of a taxpayer-funded agency's ability to discriminate against gay people
- Roberts affirmed that preventing anti-gay discrimination is a compelling state interest
- And, to top it all off, he upheld a landmark precedent that a *supermajority* of the court apparently wants to overturn

What's in it for the Liberals?

- Blackman: "Ruling against LGBT families must have been bitter pill to swallow, but there is no evidence that anyone was actually ever denied a service"
- Stern: "The alternative—overruling *Smith* and subjecting most burdens on religion to strict scrutiny—would be much worse"

Caniglia v. Strom

- Holding: police community caretaking duties don't justify warrantless searches and seizures in the home
- Unanimous, four-page decision
- Destined to be a loss for local governments
  - Good: very narrow
  - Bad: answers nothing
- No Fourth Circuit ruling on this issue

Facts

- During an argument with his wife, Edward Caniglia put a handgun on their dining room table and asked his wife to "shoot [him] now and get it over with"
- After spending the night at a hotel Caniglia's wife couldn't reach him by phone and asked police to do a welfare check
- Caniglia agreed to go to the hospital for a psychiatric evaluation after officers allegedly promised not to confiscate his firearms
- The officers went into his home and seized his guns regardless
- Caniglia sued the officers for money damages claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment

Cady v. Dombrowski (1973): Jaw-dropper

- Dombrowski told police officers after he crashed his car that he was a Chicago cop
- They had his car towed to an unguarded lot
- The next day they searched the car for his service weapon thinking he had to have it with him at all times
- Instead, they found bloody items from when he murdered his brother

Legal Background

- In *Cady* the Court held that a warrantless search of his impounded vehicle for an unsecured firearm didn't violate the Fourth Amendment
- According to the Court in that case "police officers who patrol the 'public highways' are often called to discharge noncriminal 'community caretaking functions,' such as responding to disabled vehicles or investigating accidents"
- The First Circuit ruled in favor of the police officers in *Caniglia* extending *Cady*'s "community caretaking exception" to the warrant requirement beyond the automobile

Holding

- Justice Thomas, writing for the Court, rejected the First Circuit's extension of *Cady*
- Justice Thomas noted the *Cady* opinion repeatedly stressed the "constitutional difference" between an impounded vehicle and a home
- "In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car 'parked adjacent to the dwelling place of the owner'"

Could have been Worse

- Caniglia argued that unless a "true emergency," is taking place, no entry into a home by police without a warrant can ever be reasonable
- The Court didn't go that far
- In Justice Alito's words, it simply held that "there is no special Fourth Amendment rule for a broad category of cases involving 'community caretaking'"

Could have been Better

- Where does this case leave us?
  - Dazed and confused?
- If police **know there is an ongoing emergency**—no warrant, no problem; **exigent circumstances** has long been an exception to the warrant requirement
- Police think **something bad has happened, be happening, or happen in the near future**; Court isn't clear when or whether a warrant is required

Might Kavanaugh Be Right?

- I think/hope Justice Kavanaugh is correct "the Court's exigency precedents, as I read them, permit warrantless entries when police officers have an **objectively reasonable basis** to believe that there is a **current, ongoing crisis** for which it is reasonable to act now"
- Justice Kavanaugh offered examples, similar to those in the SLLC brief, of police being able to enter a home without a warrant when a person is suicidal or elderly and uncharacteristically absent from church

Sanders v. United States

- 11-year-old calls grandmother and says mom and boyfriend are "fighting really bad" and "they need[ed] someone to come"; grandmother calls 911 tells police there are 2 other small children in the home; 11-year-old "acts excited" and gestures from an upstairs window as police arrive
- Mom comes outside; she has red marks on her face and neck and appears visibly upset
- Police ask mom to get boyfriend; when she opens the door, they hear a child crying inside
- What would you have done? police go in

Does this Entry Violate the Fourth Amendment?

- Police have no warrant
- 8th Circuit says said community caretaking justified the entry
- SCOTUS sends the case back to the 8th Circuit to redecide it after *Caniglia*

What Happens When Police Get Inside?

- Boyfriend is just inside the door; a (crying) infant is in a nearby playpen
- Find the 11-year-old who tells them there was a gun downstairs and she heard mom yelling "Put the gun down! Put the gun down!" and she heard what she thought was boyfriend choking mom
- Mom told officers there was a gun on the first floor, which they found and took
- Million-dollar question: **What if boyfriend never came out and police had to wait to get a warrant to go inside?**

Justice Kavanaugh Has to be Right, Right?

- To be clear, however, the fact that the Eighth Circuit used a now-erroneous label does not mean that the Eighth Circuit reached the wrong result. Caniglia did not disturb this Court's longstanding precedents that allow warrantless entries into a home in certain circumstances. **Of particular relevance here, the Court has long said that police officers may enter a home without a warrant if they have an "objectively reasonable basis for believing that an occupant" is "seriously injured or threatened with such injury."**

Torres v. Madrid

- Holding: a person may be "seized" by a police officer per the Fourth Amendment even if the person gets away
- 5-3 decision written by Chief Justice Roberts
- No law on this in the Fourth Circuit

Facts of the Case are WOW

- Police officers intended to execute a warrant in an apartment complex Though they didn't think she was the target of the warrant, they approached Roxanne Torres in the parking lot. Torres got in a car. According to Torres, she was experiencing methamphetamine withdrawal and didn't notice the officers until one tried to open her car door.
- Though the officers wore tactical vests with police identification, Torres claims she only saw the officers had guns. She thought she was being car jacked and drove away.
- **She claims the officers weren't in the path of the vehicle, but they fired 13 shots, hitting her twice. Torres drove to a nearby parking lot, asked a bystander to report the attempted carjacking, stole another car, and drove 75 miles to a hospital.**

Arguments and Holding

- Torres sued the police officers claiming their use of force was excessive in violation of the Fourth Amendment's prohibition against "unreasonable searches and seizures"
- The officers argued, and the lower court agreed, that Torres couldn't bring an excessive force claim because she was never "seized" per the Fourth Amendment since she got away
- Holding: "application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person"

Reasoning—Precedent & Common Law

- In *California v. Hodari D.* (1991), the Supreme Court stated that the common law treated "the mere grasping or application of physical force with lawful authority" as an arrest, "whether or not it succeeded in subduing the arrestee."
- The Chief Justice acknowledged that despite this language, *Hodari D.* didn't answer the question in this case, which involves officer use of force. *Hodari D.* involved police officer "show of authority" which doesn't become an arrest until the suspect complies with the demand to stop.
- Citing to an English case from 1828, the Court "independently" concluded that "the common law rule identified in *Hodari D.*—that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that '[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant does not submit.'"

This Decision is…Unsatisfying

- Problems with relying on common law from England
  - Court doesn't always rely on it
  - Constitution in some instances was intended to reject the common law
  - It is rarely clear what the common law position was
- Citing to the SLLC *amicus* brief, Chief Justice Roberts explicitly rejected the brief's argument that the common law doctrine recognized in *Hodari D.* is just "a narrow legal rule intended to govern liability in civil cases involving debtors"
- Send wrong incentive to police officers?
  - Might as well shoot…even if they get away you can get sued

Lange v. California

- Holding: pursuit of a fleeing misdemeanor suspect does not always justify entry into a home without a warrant
- Rather, "[a]n officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency"
- All nine Justices agreed with the result
- No Fourth Circuit or Virginia Supreme Court decision on this issue

Facts

- Arthur Lange drove by a California highway patrol officer while playing loud music and honking his horn
- The officer followed Lange and put on his overhead lights, signaling Lange to pull over
- Lange kept driving to his home which was about 100 feet away
- The officer followed Lange into the garage and conducted field sobriety tests after observing signs of intoxication
- A later blood test showed Lange's blood-alcohol content was three times the legal limit

Issue

- Lange argued that the warrantless entry into his garage violated the Fourth Amendment
- California argued that pursuing someone suspected of a **misdemeanor**, in this case failing to comply with a police signal, always qualifies as an exigent circumstance authorizing a warrantless home entry
- Court had previously ruled that police could pursue a fleeing felon into a house without a warrant

Holding and Reasoning

- In instances of a misdemeanants' flight, "[w]hen the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting"
- "When it comes to the Fourth Amendment, the home is first among equals"
- Misdemeanors vary widely and may be minor
- Likewise, "[t]hose suspected of minor offenses may flee for innocuous reasons and in non-threatening ways"
- "The common law did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit"

Roberts and Alito Concurrence

- Considering numerous factors with a fleeing suspect will be difficult
- How are police officers supposed to know what a person will be charged with?
- According to these Justices, "hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. **It is itself an exigent circumstance**." "It is the flight, not the underlying offense, that has always been understood to justify the general rule: 'Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.'"

Will this Rule will be Difficult for Police?

- Court says: "Our approach will in many, if not most, cases allow a warrantless home entry"
- Justice Kavanaugh, in a solo concurrence, wonders if the difference between the Chief Justice's concurrence and the majority's approach "will be academic in most cases. That is because cases of **fleeing misdemeanants will almost always also involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others**—that will still justify warrantless entry into a home."

Cedar Point Nursery v. Hassid

- Holding: a California regulation allowing union organizers access to agriculture employers' property to solicit support for unionization up to three hours a day, 120 days a year is a per se physical taking under the Fifth and Fourteenth Amendments
- 6-3 conservative/liberal divide

Facts, Law, Argument

- California's law was very unique to CA's Central Valley
- The Fifth Amendment Taking Clause, applicable to the states through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation"
- In this case agriculture employers argued California's union access regulation "effected an unconstitutional **per se physical taking** . . . by appropriating without compensation an easement for union organizers to enter their property"

Physical Taking v. Regulatory Taking

- According to Chief Justice Roberts, writing for the majority, "[w]hen the government **physically** acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation"
- But when the government "instead imposes **regulations** that restrict an owner's ability to use his own property" the restrictions don't require "just compensation" unless they go "too far"

No Mere Regulation

- Access regulation "appropriates a right to invade the growers' property" and therefore constitutes a per se physical taking rather than a regulatory taking
- "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' **right to exclude**"
- The Court noted that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." "Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation."

Dissent: Breyer, Sotomayor & Kagan

- In the majority's view "virtually every government-authorized invasion is an 'appropriation'
- But this **regulation does not 'appropriate' anything; it regulates the employers' right to exclude others**
- At the same time, our prior cases make clear that the regulation before us allows only a temporary invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes 'too far'
- In my view, the majority's conclusion threatens to make many ordinary forms of regulation unusually complex or impractical.
- And though the majority attempts to create exceptions to narrow its rule the law's need for feasibility suggests that the majority's framework is wrong

Imagine if Stinky Stella was outside and wouldn't stop barking and my neighbors called the police who knocked on my door

How is that any different than union organizers being allowed to go temporarily on growers' land?

Good News

- State and local government officials routinely go onto private property temporarily to do police work and conduct inspections, etc.
- SLLC's *amicus* brief argued temporary entry onto private property by government officials isn't a per se physical taking
- The Court stated that "**government searches** that are consistent with the Fourth Amendment and state law **cannot be said to take any property right** from landowners" and "**government health and safety inspection** regimes will generally **not constitute takings**"

But Why?

- Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.
- **At SCOTUS *amicus* briefs rarely (if ever) win cases; very often they can't prevent loses; but they can prevent broad, devastating losses**

Polling Questions

- On May 1, 2020, had you heard of qualified immunity?
  - Yes
  - No
- Then, could you roughly define it?
  - Yes
  - No

Why Did I Never Talk about it?

- When it has always been important to the local governments?
- Hard to explain
- Flew under the radar (until George Floyd died)
- And…there wasn't much to say because until this year, in only **two cases** since 1982 did the Supreme Court deny police officers qualified immunity

What is Qualified Immunity

- Federal law (Section 1983) makes government employees and officials personally liable for money damages if they violate a person's federal constitutional rights
- Qualified immunity is a **defense** these cases
- Qualified immunity is generally available if the law a government official violated isn't "clearly established"
- Only the "plainly incompetent" and those who knowingly violate the law don't receive qualified immunity

Why is Qualified Immunity Controversial?

- One-time free pass to violate someone's constitutional rights without consequences where the law isn't clearly established
- Even though the individual government employee technically owes the money damages the local government basically always pays
- Section 1983 **says nothing about qualified immunity**
- Qualified immunity is a Supreme Court created doctrine

Policy Justification for QI

- Why should government officials be liable for money damage where they didn't know and had no way of knowing (because no court had ruled on what they did) their actions were unconstitutional?

SCOTUS Refused to Take Qualified Immunity Petitions

- Starting a few years ago the Supreme Court started receiving petitions saying not that the lower court had wrongly applied QI, but instead that QI should be **overruled** or **modified**
- In **October 2019,** the Court started holding a number of these petitions indicating it might take a bunch of the cases together and do something big on qualified immunity
- On **June 15, 2020**, the Court denied all the petitions; we don't know why
  - Justice Sotomayor and Ginsburg probably wouldn't have minded modifying doctrine but likely **lacked agreement with the conservatives about what to replace it with**

Last Term: Three Corrections

- *Taylor v. Riojas*
  - Court reversed QI granted to correctional officers who confined Trent Taylor to a "pair of shockingly unsanitary cells" for six days
- *McCoy v. Alamu*
  - Court reversed QI granted to correctional officer who pepper sprayed an inmate in response to a different inmate throwing water at him
- *Lombardo v. City of St. Louis, Missouri*
  - Court instructed the lower court to re-determine whether prone restraint on the stomach was unreasonable in this case depending on the "kind, intensity, duration, or surrounding circumstances"

What Does this Mean? What's Next for QI in SCOTUS?

- Corrections were minor
- Expect more summary reversals of qualified immunity grants
- Amanda Karras, International Municipal Lawyers Association
  - The Court is trying to signal to lower courts that they need to deny QI in **more egregious cases** and that maybe the **clearly established prong** is being applied in **too mechanically** and needs to be more lenient toward plaintiffs.
- Still don't know a lot about the views of Gorsuch, Kavanaugh, and Barrett

(Very Brief) Preview

- Court's docket is only about ½ full
- Court will agree to hear about 30 more cases
- Two cases discussed aren't the only local government cases on the docket, but they are the most interesting

New York State Rifle and Pistol Association v. Corlett

- Issue: may states (or local governments) prevent persons from obtaining a concealed-carry license for self-defense if they lack "proper cause"
- New York case law requires an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" to satisfy the proper cause standard
- Wanting a gun, liking guns isn't "proper cause"
- Easy to find 5 votes (probably 6 counting Roberts) to strike down New York's law
- VA—for concealed carry must be 21 and demonstrate competence with a firearm

Houston Community College System v. Wilson

- Issue: whether a board member can sue a board claiming his or her First Amendment rights were violated by a censure
- 5th Circuit said a censure may violate the First Amendment
- Fourth Circuit: board may censure a member without violating the First Amendment
- In *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997), an elected county board of supervisors censured a member for using "abusive language" toward other members of the board in private conversations. The Fourth Circuit held that the board's decision did not violate the First Amendment

Facts

- David Wilson was an elected trustee of the Houston Community College System (HCC)
- In response to the board's decision to fund a campus in Qatar, which he disagreed with he arranged robocalls and was interviewed by a local radio station
- He filed a lawsuit against the HCC after it allowed a trustee vote via videoconference, which he contended violated the bylaws
- He sued the board again when it allegedly excluded him from an executive session
- He hired a private investigator to investigate HCC and to determine if one of the trustees lived in the district in which she was elected
- He maintained a website where he discussed his concerns, referring to other trustees and HCC by name

Would you Also Want to Censure Wilson?

- The board publicly censured him for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct"

Arguments

Houston

- Censure doesn't chill speech Wilson can (and probably has) continued speaking
- Why can't the board speak through a censure?

Wilson

- Censure is punishment; I can't be punished for my speech
- Censure okay for speech outside the legislative process; I only spoke as part of the legislative process

IMHO

- Of course, censuring this guy doesn't violate the First Amendment
- SLLC didn't file a brief in this case
  - Who are the members of NLC?
  - City council members
  - County councils
  - Both

Polling Questions

- Does your city have a sign code?
  - Yes
  - No
- If so, can you name 3-5 provisions of the side code?
- Do you know if your sign code treats off-premises and on-premises signs differently?
  - Yes
  - No

City of Austin v. Reagan National Advertising

- Issue: whether allowing on-premises billboards to be digitized but not off-premises billboards is "content-based" under the First Amendment
- On premises: McDonalds sign at a McDonalds location
- Off premises: McDonalds billboard on a highway
- Why might a local government adopt a policy like this one?
- No ruling in the 4th Circuit on this issue

It is all about *Reed*

- In *Reed v. Town of Gilbert* (2015), the Supreme Court held that content-based restrictions on speech are subject to strict scrutiny, meaning they are "presumptively unconstitutional" under the First Amendment
- In *Reed* the Court defined content-based broadly to include distinctions based on the "function or purpose"

Arguments

- The City argued that the definition of off-premises is a time, place, or manner restriction based on the location of signs
- The Fifth Circuit disagreed stating: "*Reed* reasoned that a distinction can be facially content based if it defines regulated speech 'off-premises' signs by their purpose: advertising or directing by its function or purpose. Here, the Sign Code defines attention to a business, product, activity, institution, etc., not located at the same location as the sign"

If you have to Read the Sign

- To know whether or how it is regulated the regulation is content-based
- You have to read an on-premises sign to determine if it is an on-premises sign
- In a similar Sixth Circuit case the Sixth Circuit reasoned: "The fact that a government official had to read a sign's message to determine the sign's purpose was enough to subject the law to strict scrutiny even though the sign's location was also involved." According to the Fifth Circuit, "So here too. To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an 'obvious content-based inquiry,' and it 'does not evade strict scrutiny' simply because a location is involved."

Local Governments will Miss Justice Ginsburg in this Case

- In 2020 she voted with Justices Breyer and Kagan to basically overrule *Reed;* Sotomayor would probably agree as well
- Barrett's views on *Reed*?
- Court can narrow *Reed* in this case or double down

Justice Breyer Retirement

- Chatter started appearing as soon as Biden was elected
- 83
- Liberal
- No one can say he is mentally unfit for the job; he doesn't seem physically unfit either

Many People Thought He Would Announce His Retirement in June 2021

- As there are 51 Democrat votes in the Senate
- I did not
- Retiring in June 2021 is the same as retiring in 2022 UNLESS a Democrat Senator dies and a Republican governor picks (a Republican) replacement

In July He Seemed to Be Saying He was Going to Stay…

- Retirement depends on health and the Court
- Likes new leadership role
  - Breyer said his new seniority in the justices' private discussion over cases "has made a difference to me. ... It is not a fight. It is not sarcasm. It is deliberation"
- Joan Biskupic, *Exclusive: Stephen Breyer says he hasn't decided his retirement plans and is happy as the Supreme Court's top liberal*, CNN
- Josh Blackmun, *Was There a Double Flip in the November Sitting?*, Volokh Conspiracy (if Justices changed their votes Breyer was a leader/instigator)
- (Tactful) liberal reaction: "Didn't we just see this movie?"

Has He Changed His Tune?

- More recently has said he doesn't intend to die on the bench
- Some think he is too much of an institutionalist to purposely leave next June 2022
- I disagree (and seemingly so does Justice Breyer as this is what he told the NYT)
  - He cited the late Justice Antonin Scalia, whom he served on the court with, as saying he didn't want his legacy on the court washed away by an ideologically opposed successor.
  - "He said, 'I don't want somebody appointed who will just reverse everything I've done for the last 25 years,'" Breyer said in the interview.

Judge Brown Jackson

- Biden said he would appoint the first Black woman to SCOTUS
- Other black women are on the lists-why all the focus on her?
  - D.C. Circuit judge
  - 50—perfect age
  - Harvard undergrad, Harvard Law, Breyer clerk
- Most high-profile case decided: House of Reps could subpoena President's White House counsel over President's objections: "presidents are not kings"

Suddenly the Age Game Changes

- Justice Thomas, 73, conservative (likely to die on the bench?)
- Justice Alito, 71, conservative
- Note: 70 is NOT OLD for a SCOTUS Justice
- Oldest liberal Justice: Sotomayor, 67

Questions?

Thanks for attending!!