

Supreme Court Update

Lisa Soronen

State and Local Legal Center

lsoronen@sso.org

Overview of Presentation

- Impact of Gorsuch and Trump on the Supreme Court
- Cases recently decided
- Cases of interest accepted for next term
- Possible future cases of interest

Who is Judge Gorsuch?

- Tenth Circuit Court of Appeals judge (10 years on the bench)
- 49 years old
- Harvard Law graduate
- Son of the first female head of the EPA
- Episcopalian/Catholic
- Justice Kennedy clerk

Justice Gorsuch is a Coup

- I am biased and think President Trump's biggest accomplishment to date was getting Justice Gorsuch on the Court
- Impeccable credentials, young, should be reliable conservative
- Not a reflection of any of Trump's idiosyncrasies
 - Any Republican president would have picked him
 - Trump wanted someone strong and independent

We Should Have Known More about Him Before April

- Authored over 800 hundred opinions; and participated in approximately 2,750 decisions
- No rulings on the some of the most prominent issues: gun control and abortion
- Most well known for his ruling regarding the birth control mandate, frozen trucker, and burping student

Amazing what we Know in Just Three Months

- Only participated in 13 cases, only one of which was controversial
- Weighed into guns, same-sex marriage, and the travel ban

What We Know about Him Now

- Aligned himself with the most conservative Justices—Thomas and Alito, rather than Roberts and Kennedy
- Described as a conservative activist
- No shrinking violet

Travel Ban, Guns, Same-sex Marriage

- Travel ban
 - Would have allowed the travel ban to go into effect completely before the Court could rule on the merits
- Same-sex marriage
 - Nothing in *Obergefell* indicates that a birth registration regime based on biology is unconstitutional
- Guns
 - Court should have reviewed CA conceal carry law

Other Things to Think about

- Might be more conservative than Scalia
 - Fourth Amendment, Confrontation Clause
- How much does he value pragmatism?
- How does he feel about precedent?
- Does he want to build consensus with colleagues?
 - Roberts and Kagan have never dissented alone
 - Written more non-mandatory opinions in two months than Kagan did in 2 years
 - Roberts speech on not liking too many opinion
- Views on *Chevron* deference will be very important in the future

Lot of Talk of Justice Kennedy Retiring

- Why does this matter so much?
- Court we have right now is, in the big cases, a 5-4 conservative Court with Justice Kennedy in the middle
- Recently Justice Kennedy has reliably voted with the liberals on social issues
- If Trump replaces Kennedy, Chief Justice Roberts will be the swing Justice **and** the Chief Justice

How Seriously Should We take These Rumors?

- Nina Totenberg reports he hasn't hired clerks for October 2018 and is telling applicants he is considering retirement
- Democrats need Justice Kennedy to hang on until 2020 because Democrats are unlikely to take control of the Senate in 2018
- Average retirement age for Supreme Court Justices is 79; Justice Kennedy is 80
- Oldest Justices are liberals and Justice Kennedy
 - Justice Ginsburg (84)
 - Justice Breyer (78)

Current Recently Decided

- Two “bigger” cases
- Two cases that might require a change in state law
- Three “one-offs”

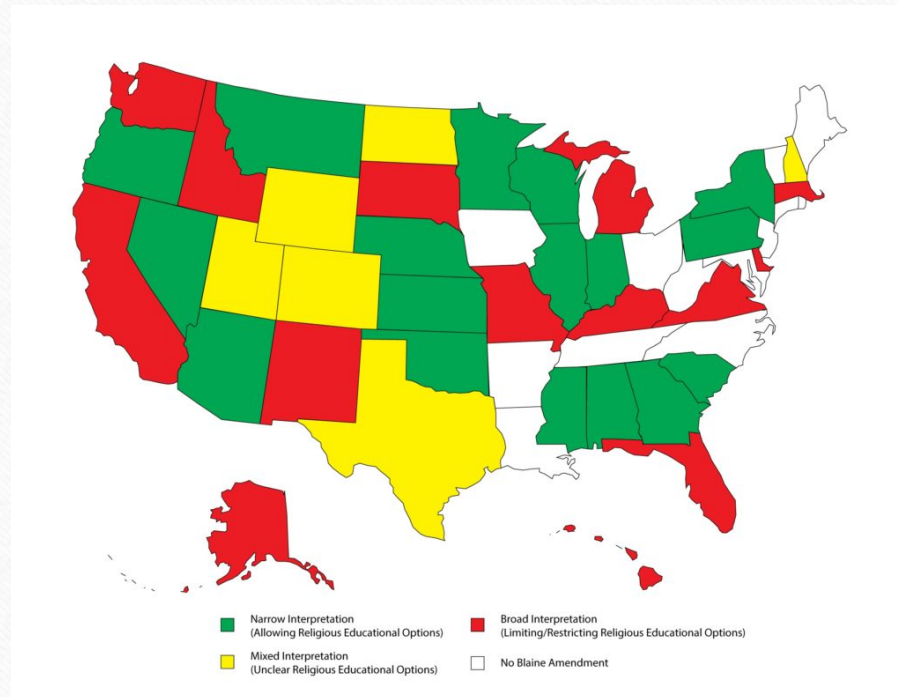
Overall Observations about the Term

- Court was very conscious about having only eight Justices
 - No real high interest cases—transgender bathroom case sent back to 4th Circuit
 - Lots of early, unanimous or 7-1 opinions (Thomas, dissenting) about 10 pages long
 - Court has accepted lots of cases where they generally have significant agreement
 - Qualified immunity/police
 - First Amendment free speech

Trinity Lutheran v. Comer

- The Court held 7-2 that Missouri violated Trinity Lutheran Church's free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires
- Missouri relied on its "Blaine Amendment"/super-Establishment Clause which aren't common in the South
- Chief Justice Roberts joined by Justices Kennedy, Alito, and Kagan agreed that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."
- Gorsuch and Thomas refused to join this footnote

Institute for Justice—Blaine Amendments



Endrew F. v. Douglas County School District

- Per Individuals with Disabilities Education Act (IDEA), a student with a disability receives an individual education plan (IEP), intended to provide that student with a “free and appropriate public education” (FAPE)
- *Board of Education v. Rowley* (1982): IEP must be “reasonably calculated to enable a child to receive educational benefits”
- What is the standard? Is **some benefit** enough?
- Regular classroom: an IEP must be “reasonably calculated to enable the child” to advance from grade to grade
- Not regular classroom: appropriately ambitious in light of his circumstances
- This unanimous decision will be expensive; only Southern states with a “substantial benefit” standard were **Kentucky** and **Tennessee**

Pena-Rodriguez v. Colorado

- “No-impeachment” rules prevent jurors from testifying after a verdict about what happened during deliberations with limited exceptions
- Holding: the “Constitution requires an exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt”
- Southern states including an exception for racial bias: **Tennessee, Texas, Georgia, South Carolina**
- 5-3 decision with Kennedy writing the majority opinion

Expressions Hair Design v. Schneiderman

- Credit-card surcharge bans regulate speech under the First Amendment
- State statute prohibiting vendors from advertising a single price and a statement that credit card customers must pay more regulates speech
 - What the law regulates is how sellers may communicate their prices. A merchant who wants to charge \$10 for cash and \$10.30 for credit may not convey that price any way he pleases. He is not free to say “\$10, with a 3% credit card surcharge” or “\$10, plus \$0.30 for credit” because both of those displays identify a single sticker price—\$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display \$10.30 as his sticker price.
- Southern states with similar laws: **Florida, Oklahoma, Texas**
- Southern states with legislation recently proposed: Arkansas, Kentucky, Mississippi, Missouri, South Carolina, Tennessee, West Virginia

One Offs

- *Packingham v. North Carolina*: North Carolina law making it a felony for a registered sex offender to access social networking sites where minors can create profiles violates the First Amendment Free Speech Clause (narrower law might be okay)
- *Moore v. Texas*: SCOTUS rejects a Texas court's reliance on a 1992 definition of intellectual disability and the use of a number of factors as indicators of intellectual disability which the Court described an "invention...untied to any acknowledged source" (Tennessee and Pennsylvania court cited TX decision)
- *Nelson v. Colorado*: SCOTUS struck down a Colorado law requiring defendants whose criminal convictions have been invalidated to prove their innocence by clear and convincing evidence in order to receive a refund of fees, court costs, and restitution (no circuit split)

Three Cases Accepted for Next Term

- Travel ban
- Partisan gerrymandering
- Cake case

Travel Ban

- The president's second executive order prevents people from six predominately Muslim countries from entering the United States for 90 days, but only applies to new visa applicants and allows for case-by-case waivers
- Froze decisions on refugee applications for 120 days
- Capped total refugee admissions at 50,000 for fiscal year 2017

Travel Ban

- Two courts issued injunctions preventing parts of the travel ban from going into effect
 - Fourth Circuit: revised travel ban likely violates the Establishment Clause, noting that its “text speaks with vague words of national security but in context drips with religious intolerance, animus and discrimination”
 - Ninth Circuit: revised travel ban likely exceeds the power granted to the President by Congress in the Immigration and Nationality Act

Travel Ban

- The Supreme Court concluded that until it rules on the merits of this case the executive order cannot be enforced against persons, including refugees (even if they exceed the 50,000 cap), who have a “bona fide relationship with a person or entity in the United States” “close family,” students, and workers offered employment

Who Won?

- President Trump tweeted SCOTUS ruling was a “clear victory”
- Is that true?
- The ruling *was* a clear victory for the plaintiffs in this case and those similarly situated to them
- The Supreme Court ordered that they may not be barred from the United States under the revised travel ban now, and this will not change unless the Court both reaches a decision on the merits and issues a broad holding in favor of the government

Subsequent Litigation

- SCOTUS let stand a part of a decision by a district court judge in Hawaii that broadened the definition of close family to include grandparents and cousins of a person in the U.S.
- SCOTUS blocked part of a decision by a district court judge in Hawaii that said citizens with formal assurances from a U.S. refugee resettlement agency are eligible for entry (pending a decision by the 9th Circuit)

Lots of interesting legal issues

- Is the travel ban moot?
- Establishment Clause
- President's authority under the INA
- Legal right of a variety of non-citizens not currently living in the US
- Relevance of statements of candidate and President Trump
- Nationwide injunctions

Partisan gerrymandering

- While the Court has repeatedly struck down district maps that rely on racial gerrymandering, it has never ruled that maps drawn to secure partisan advantage are unconstitutional
- In 2004, Justice Anthony M. Kennedy wrote a concurring opinion indicating that partisan gerrymandering could be unconstitutional under a First Amendment theory
- *Gill v. Whitford* will be the first case before the Court since *Vieth* explicitly arguing that partisan gerrymandering can violate the First Amendment

Partisan gerrymandering

- In the 2015 election, Wisconsin Republican candidates received fewer than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts
- The challengers propose a standard for determining the influence of partisan gerrymandering in the district-drawing process
- It is based on “wasted votes”—votes in each district cast for a non-winning party's candidate
- By dividing the difference between the sums of each party's wasted votes by the total number of votes cast, the proposed standard yields an efficiency gap
- The challengers argue that efficiency gaps over 7% violate the Constitution
- The efficiency gap in Wisconsin was 13.3% in 2012 and 9.6% in 2014, according to the proposed standard

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Colorado's public accommodations law prohibits discrimination against people based on sexual orientation
- Issue: Whether applying Colorado's public accommodations law to compel a cake artist to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment
- Bunch of these cases: wedding photographer, venue and stationary vendors
- Challengers have lost all of the cases

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Lower court decision
 - Free speech claim: “Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally”
 - Free exercise claim: The Colorado Court of Appeals applied rational basis to Colorado’s law and “we easily conclude that it is rationally related to Colorado’s interest in eliminating discrimination in places of public accommodation”
- Southern states with public accommodation laws covering sexual orientation: none

Something More at Work in this Case

- Religious liberty to be free from taking a position that conflicts with your religious beliefs
 - Birth control mandate cases
- Denied cert in a pharmacy case—no Justice Scalia
- Cake case relisted 14 times; Court denied cert in an identical case involving a wedding photographer—nibble rather than a bite into religious liberty

Will *Quill* be Overturned?

- South Dakota (and other states) passed a law defying *Quill* with the hopes the Supreme Court will hold their law constitutional and overturn *Quill*
- A state trial court ruled against South Dakota in March; the South Dakota Supreme Court should do the same—then on to SCOTUS
- In the last year Judge Gorsuch wrote an opinion strongly suggesting SCOTUS should overturn *Quill*
- \$23 billion in lost tax revenue a year