SCOTUS OT23

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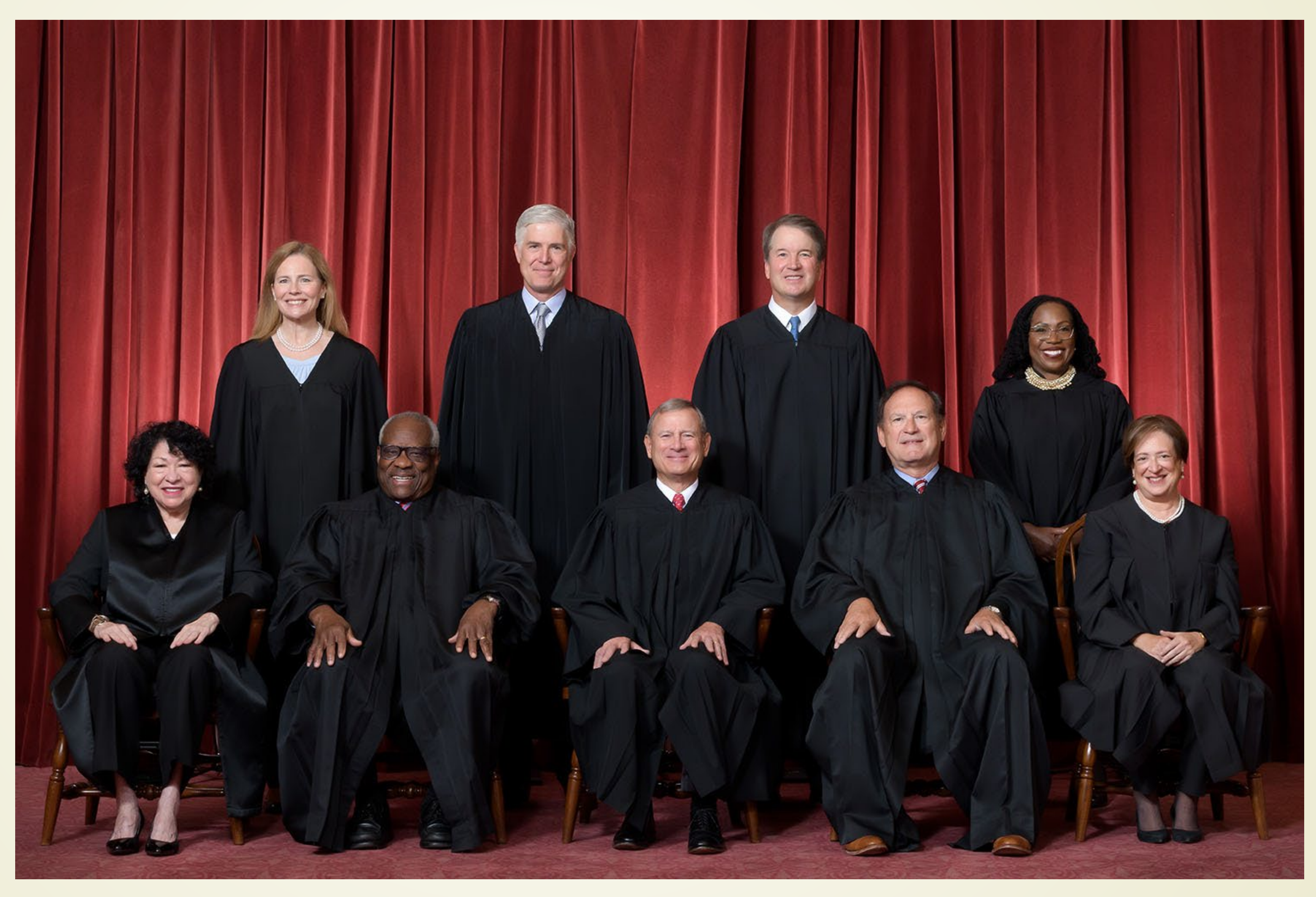
Tillman Breckenridge – Stris & Maher LLP – tbreckenridge@stris.com

The Justices



The Quiet Term That Will Change Everything

- In some ways, it was a quiet term
- Avoiding the hard questions in social media and the First Amendment
- Some decisions on direct governmental power as one-offs
- Only 60 decisions

But the Court Made Big Moves

- This was a sneaky big term
- Agency Schmagency – tough year for regulatory bodies
  - Great year for regulated businesses
  - Mixed bag for states
  - No such thing as judicial restraint

Newer Justices

- We're now getting a sense of Justice Jackson – inclined to fight the slow-play strategy
- Justice Barrett appears to be inclined toward protecting the image and legitimacy of the Court with the Chief and Kavanaugh
- Justice Gorsuch remains a consistent firebrand

Direct Governmental Authority

- The Court issued several opinions that directly address the power of state and local government.

City of Grant's Pass v. Johnson

- What constitutes criminalizing a status in violation of the Eighth Amendment?

Facts

- More homeless now than ever since the federal government started compiling the statistic in 2007
- 78% of homeless face mental health issues; 75% substance abuse
- Growth of homeless encampments; rejection of shelters

Facts

- Grant’s Pass ordinances prohibited:
  - Sleeping “on public sidewalks, streets, or alleyways;”
  - “camping” on public property; and
  - “camping” and “overnight parking” in city parks.
- The ordinances were enforced with a “light touch,” according to the opinion.

Opinion of the Court
Gorsuch

- Gorsuch wrote for the six-Justice majority.
  - He often takes on issues involving the Western U.S., and immediately, he points out that homelessness is a public health crisis in the West.
  - The Eighth Amendment does not limit what states can criminalize; it only limits the potential penalties.
  - And a regime that imposes fines, orders to desist, and then 30 days in jail for violating the order have no historical analog to “cruel and unusual” punishments.

Opinion of the Court

- *Robinson v. California*, 370 U.S. 660 (1962) – status (drug addiction) cannot be punished
  - But the Court emphasized in Robinson that the act of drug abuse can be criminalized. And here, Grant's Pass has criminalized acts, not the status of homelessness
  - The Court applied this principle in, *Powell v. Texas* 392 U.S. 514 (1968), where a public intoxication law was upheld even though litigants asserted it criminalized alcoholism

Dissent

- Sotomayor authored and Kagan and Jackson joined
  - Leads with a few heartbreaking stories of homeless people who were punished under similar laws
  - Notes that Grants Pass had 138 shelter beds, even counting ones that weren't available to all, compared with 600 homeless
  - Reflects a growing tendency of the Justices to fight over underlying facts—asserts no "light touch" to enforcement—a very troubling trend

Moyle v. United States

- The “EMTALA” Case – can a state’s prohibition on abortion override the federal duty to provide emergency medical care and preserve the life/health of the mother?
- The DIG heard round the country – No majority opinion
- A 2.5—3—0.5—2.5—0.5 decision. Lovely.

Facts

- Idaho prohibits abortion after six weeks, except to preserve the *life* of the pregnant woman – no "health" exception
- U.S. sued to enjoin law to extent a pregnant woman's health is in danger
- After the District Court ruled, the Idaho Supreme Court construed the law more narrowly than the District Court, and Idaho amended the law

Procedural Posture

- District court enjoined Idaho law to the extent it conflicted with EMTALA
- State appealed but also applied for immediate review in SCOTUS
- SCOTUS granted review and stayed the injunction pending review

Kagan concurrence
Sotomayor and Jackson (in part) joined

- Presents the case as a simple issue – direct conflict between Idaho law and EMTALA means state is unlikely to succeed and not entitled to an injunction
- Responds to dissent by Alito, which Kagan characterizes as stating that EMTALA does not create an entitlement to abortion, even in cases of imminent death (Jackson joined only this part)
- EMTALA requires treatment to stabilize any emergency medical condition

Barrett concurrence
The Chief Justice and Kavanaugh joined

- The law changed significantly
- Idaho raised issues not raised in the district court that should be decided by lower courts in the first instance
- Idaho's speculation about the federal government's interpretation of EMTALA to include stabilizing mental health was disclaimed by federal government, so Idaho's law is not "gutted" and emergency relief is unnecessary

Jackson concurrence/dissent

- Shames the Court for early intervention in the case, but asserts the DIG is inappropriate
- Answering the Supremacy Clause question is imperative because many states have passed similar laws and ER doctors are chilled in practicing stabilizing care—the U.S. has petitioned for cert. in a case enjoining EMTALA to the extent it conflicts with Texas's abortion law.

Alito dissent

- EMTALA actually forbids abortions
- It requires protection of the pregnant woman and her unborn child, as the definition of an emergency condition specifically states that it includes a condition threatening an unborn child

Criminal Liability for Government Officials – Snyder v. U.S.

- 18 USC s 666 renders it a crime to "corruptly" solicit, accept, or agree to accept "anything of value from any person, intending to be influenced or rewarded" for an official act.
- This prohibits bribes, but does it also prohibit gratuities?

Facts

- 2013: City of Portage, IN awards contracts to buy trucks from a company
- 2014: Company "cut a check" for $13K to mayor of Portage, who had been mayor at the time the contract was awarded as well
- Mayor said it was for consulting services, which was not prohibited for local officials
- Charged and convicted under Section 666

Opinion of the Court
Kavanaugh 6-3

- Gratuities are not prohibited under Section 666
- Section 666 initially prohibited gratuities but Congress amended it two years later to make it more closely resemble the bribery provision in Section 201(b)
- The structure (purportedly having bribery and gratuities prohibited in the same part) also suggests gratuities are not illegal

Opinion of the Court

- Separate punishments in other places, but not here, further indicating this is just about bribery
- Federalism: States and localities usually have their own provisions on gratuities, sometimes allowing them up to a certain amount
- Fair notice: Something akin to the rule of lenity, without invoking the rule of lenity's name

Dissent by Jackson
Joined by Kagan and Sotomayor

- The statute prohibits accepting anything with "intent … to be rewarded"
- Plain meaning of "rewarded" establishes criminality of gratuities
- "Rewarded" is the word Congress uses when it wants to criminalize gratuities in other places
- The house report relied on by the majority says amendments to Section 666 were meant to track Section 215, not Section 201

Voting Rights

- It was a quiet term for the Voting Rights Act, but the Court still got involved with redistricting and ballot rights.

Alexander v.
S.C. Conference of the N.A.A.C.P.

- What standards are applied under the Voting Rights Act for determining whether districts were drawn based on race?

Facts

- The case concerns two of South Carolina's seven congressional districts
- Due to population shifts, South Carolina had to add residents to District 6 while subtracting residents from District 1
- Legislature sought to make District 1 more strongly Republican, as two races in the previous decade had been won by slim margins—one for each party

Opinion of the Court
Alito

- Racial challenges to re-districting maps must meet a very high standard, and the Court has never overturned a map without direct evidence of racial gerrymander
- Here, the State pledges that it did not consider race at all, but it did engage in partisan gerrymander, which the Court previously approved
- Because Black voters tend to vote Democrat, there is no way to separate the two, and a gerrymander to consolidate Democratic Party support in one district necessarily will also consolidate Black votes as well

Dissent by Kagan
Sotomayor and Jackson joined

- The case hinges on whether South Carolina used race as a proxy for Democrat when engaging in partisan gerrymandering
- A three judge district court resolved it did after a 9-day trial, and the Court should defer to that factfinding
- Alito's presumption of legislative good faith cannot apply at Supreme Court review to change the clear error standard

Trump v. Anderson

- Can a state enforce Section 3 of the Fourteenth Amendment, which disqualifies people who participated in insurrection from state office?

Facts

- We all know what happened January 6, 2021
- Colorado voters sued to exclude Donald Trump from the primary ballot based on his role
- The Colorado Supreme Court ordered the CO Secretary of State to exclude Trump

Opinion of the Court
Per Curiam

- The Fourteenth Amendment does not allow states to enforce its prohibition on insurrectionists seeking federal office
- It can only be enforced by Congressional legislation when involving a federal officer
- But states can apply it to prohibit people from state office
- Four Justices dissent from the statement that it can only be enforced by Congressional legislation

Administrative Law

- Why talk about the Court's decisions on federal administrative law?
  - State power often is at issue
  - Some of it reflects on the legislative process in ways that can be relevant to state legislatures
  - The administrative decisions, taken together, show a sea change in the role of federal courts

Loper Bright v. Raimondo

- Paired with *Relentless, Inc. v. Dep't of Commerce*
- Whether to overrule *Chevron*, which held that after a court finds a statute silent or ambiguous on an issue, the court should defer to agency interpretation so long as it is a permissible construction
- The Court had abandoned *Chevron*, but without overturning it, lower courts still were bound

Facts

- Certain fishing vessels must have a federal observer on board to prevent overfishing, and they must pay for the observer
- The relevant statute is silent on who must pay for the federal observer, and the agency previously had paid for the observer

Opinion of the Court
The Chief Justice

- *Chevron* is overruled—As a separation of powers matter, it is up to the judiciary to interpret the law
- The Administrative Procedure Act expressly empowers the courts to rebuke agency decisions that are contrary to law
- *Skidmore* deference remains—courts can look to agencies for guidance as experts on issues of fact
- Agencies do not have special competence in statutory interpretation, but courts do.

Opinion of the Court

- The opinion does not invite challenges to prior decisions that relied on *Chevron*
- They are still subject to statutory stare decisis, though the Court has changed the methodology for resolving these issues going forward

Concurrences

- Thomas would decide the case on Constitutional separation of powers grounds but agrees the APA also forbids *Chevron* deference
- Gorsuch provided historical context for his opinion, arguing that *Chevron* violated stare decisis principles itself

Dissent by Kagan
Joined by Sotomayor and Jackson

- *Chevron* reflects Congress's intent that agencies fill in the gaps because it is impossible to write a comprehensive regulatory statute
- *Chevron* is entitled to "supercharged" stare decisis because it is statutory (Congress could have changed it) and there are monumental reliance interests
- Kagan gives her own historical discussion, noting the deference given to agencies in the New Deal and how the APA was meant to "restate" the law, not change it

Ohio v. EPA

- States must provide implementation plans for new air quality standards that come from the EPA
- EPA changed Ozone standard from 75 ppb to 70 and rejected some state implementation plans under this standard for failure to address downwind effects required under the "Good Neighbor Provision" of the EPA
- EPA issued a federal implementation plan that met legal challenges

Opinion of the Court
Gorsuch

- Gorsuch quickly dispatched the second through fourth factors for a stay—irreparable injury, balance of harms, and public interest—as somewhat even.
- The case would turn on the likelihood of success on the merits
- The states are likely to succeed because the EPA did not offer an reasonable explanation for its final rule. The federal plan required application to 23 states, but no explanation of what happens if a few states get relief

Dissent by Barrett
Joined by Kagan, Sotomayor, and Jackson

- The dissent accuses the majority of “downplaying” law and misrepresenting the facts
- The EPA has express duties with respect to the Good Neighbor Rule, and EPA followed the implementation plan procedures laid out in the Act
- The federal implementation plan was not state specific and was effective regardless of how many states were bound

Administrative Law Takeaways

- Taking *Loper Bright*, *Ohio v. EPA*, and *Corner Post* individually, none of them seem like that big a deal
- *Loper Bright* is acknowledged as a big case, but it only applies when there's an ambiguity or a gap
- The other two caused barely a blip publicly
- But taken together, the Court greatly expanded access to courts for challenges to agency action *and* lowered the bar for winning. The message is clear.

The Thorny Problem of Social Media and the First Amendment

- The Court's approach to social media is characterized by some version of a judicial Hippocratic Oath – First, do no harm
- This leads to decisions that are very hands-off, unlike other areas of law
- Three cases directly affect what individual state government personnel can and can't do with respect to social media

NetChoice Cases

- Do Florida and Texas laws regulating content moderation on social media sites violate the First Amendment?
- Florida and Texas statutes regulated social media companies, limiting their ability to moderate content
- Florida also required companies to give reasons for removing posts and to allow appeals of removal decisions

Procedural History

- Giant social media companies challenged the Florida and Texas laws on the ground they violated the companies' free speech rights
- Both cases were facial challenges, seeking to invalidate the whole law
- District courts enjoined the laws
- The Eleventh Circuit affirmed the Florida injunction and the Fifth Circuit vacated the Texas injunction

Opinion of the Court
Kagan

- Kagan starts by noting the growth of the internet in 30 years since *Reno v. ACLU*, and then she notes the "dizzying transformation" of the platform
- Despite making facial challenges, which require proving the law does not have significant allowable applications, the companies only addressed how the law affects certain parts of their giant platforms
- The opinions below focused on how the laws applied to Facebook's news feed and YouTube's home page

Opinion of the Court

- Courts below failed to consider how the law affects Gmail filtering, Etsy Customer reviews, etc.
- So, the case is sent back to the circuit courts
- But wait, there's more – Kagan explored the contours of facial challenges and other First Amendment principles to offer guidance, taking direct aim at the Fifth Circuit
  - "The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds."

Opinion of the Court

- “So on remand, each court must evaluate the full scope of the law’s coverage. It must then decide which of the law’s applications are constitutionally permissible and which are not, and finally weigh the one against the other. The need for NetChoice to carry its burden on those issues is the price of its decision to challenge the laws as a whole.”

Concurrences

- Barrett - Also piling on the Fifth Circuit's analysis and noting that an as-applied challenge would be better
- Jackson – Agrees with outcome and that NetChoice did not meet the high bar of a facial challenge but goes on to say the Court should not have given further guidance

Concurrences

- Thomas – The Court should not have opined on the challenge, but also, the Court should revisit *Zauderer*, which gave commercial speech lesser protection when disclosures are required; also the Court should apply the common carrier doctrine to the social media companies; also, facial challenges conflict with Article III
- Alito – The holding is only that NetChoice failed to meet its burden in both cases, and the rest of the Opinion of the Court is dicta; endorses common carrier approach

Lindke v. Freed

- To what extent can government officials censor comments on their social media feeds consistent with the First Amendment right to free speech?

Facts

- James Freed was the City Manager of Port Huron, Michigan
- Freed sometimes posted about city issues on his personal Facebook feed. It was a "page" in the "public figure" category because he reached the limit of 5,000 friends. This meant he could not keep the page private
- He put his job on the page and his profile picture was him in a suit and tie with a city pin. There also was a link to the city's website, and the e-mail address he provided was the city's general address

Facts

- Freed posted “prolifically” and many of his posts were about personal matters, but he also posted information about his job, like starting reconstruction of the city boat launch and visiting local high schools
- He sometimes sought feedback on city services, including posting a survey, and he sometimes gave feedback, answering city questions
- He deleted comments he found “derogatory” or “stupid”

Facts

- During the COVID emergency, Freed put up several posts about the city's response
- Kevin Lindke was unhappy with the city's response and commented that the city's efforts were "abysmal" and claimed the "city deserves better"; he also commented on a picture of Freed getting takeout about how city officials should not be eating at expensive restaurants
- Freed deleted Lindke's comments and blocked him from further commenting

Opinion of the Court
Barrett

- Freed sued under 42 USC 1983 and the issue made it to the Supreme Court
- The issue is whether Freed's conduct on his Facebook page was "state action"
- When a government official posts on social media "it can be difficult to tell whether the speech is official or private"

Opinion of the Court

- Freed has his own First Amendment rights, including the right to speak on public issues as a private person
- So, the label of "state official" is not enough, and the rights turn on the substance of the posts
- The Court held that "such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."

Opinion of the Court

- Prong 1 – the speech must derive from the official's actual authority "rooted in written law or longstanding custom." If the official has no authority over public health, posting regarding restaurants' health ratings does not invoke the power of the state
- Prong 2 – Context matters – If he had labeled his page as personal, there would be a strong presumption of no state action.

National Rifle Association v. Vullo

- Not a social media case, but helpful for understanding *Murthy*.
- NRA had affinity insurance programs for its members where it received a percentage of members' premiums
- After the Parkland shooting, many companies disassociated with the NRA
- NRA alleges that NY head of the Department of Financial Services offered leniency on certain violations if the companies ceased providing insurance to gun groups, issued public statements with pressure, and held meetings intending to influence insurance companies

Opinion of the Court
Sotomayor

- "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."
- The Second Circuit, which found the actions allowable, stated that each action was permissible, and the Court determined that the Second Circuit viewed these actions in isolation instead of taking the reasonable inferences from them

Murthy v. Missouri

- Can government officials nudge or otherwise influence a non-government actor to suppress protected speech?
- Can more subtle maneuvers than Vullo’s also be prohibited?

Facts

- During the COVID emergency, social media platforms demoted or pulled information they deemed inappropriate, mostly insofar as they: (1) expressed conspiracy theories on COVID's origin, or (2) provided COVID remedies that were ineffective or dangerous
- Two states and five individuals sued "dozens of Executive Branch officials and agencies"

Facts

- The district court entered an injunction that forbade some agencies and “scores of named and unnamed officials and employees” from acting “for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms.”
- The Fifth Circuit changed the operative action language to “coerce or significantly encourage,” narrowing the injunction a bit

Opinion of the Court
Barrett

- Social media platforms have generally fought misinformation over the years since their inception, interestingly—Facebook demoted posts containing misleading claims about elections in 2016
- In 2020, the platforms chose to delete false or misleading content regarding COVID-19
- At the same times, “various federal officials regularly spoke with the platforms about covid-19 and election related information.”

Opinion of the Court

- The plaintiffs did not seek to enjoin the platforms, and there were no findings that the government interference caused the platforms to take the plaintiffs' posts down.
- The Court pointed to the scant evidence linking the platforms' conduct and the government's persuasion. And in some cases, the evidence pointed the other way. For instance, three plaintiff doctors had their viewpoints restricted before discussions with the government allegedly occurred.

Dissent by Alito
Joined by Thomas and Gorsuch

- Alito penned a fiery dissent: “If the lower courts’ assessment of the voluminous record is correct, this is one of the most important free speech cases to reach this Court in years.”
- “What the officials did in this case was more subtle than the ham-handed censorship found to be unconstitutional in *Vullo*, but it was no less coercive.”
- “Officials who read today’s decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by. That is not a message this Court should send.”

The Pendulum Swings

- Power has swung decidedly to the Conservatives
- But beware the use of raw power, as the pendulum often swings back
- One need only to look at standing doctrine to see that "a sentence is but a cheveril glove to a good wit. how quickly the wrong side may be turned outward." Twelfth Night Act 3, Scene 1.
- Will judicial activism slow now that certain pre-existing concerns have been resolved?

Questions?

Tillman J. Breckenridge

Stris & Maher LLP

tbreckenridge@stris.com