

Supreme Court Update

Lisa Soronen

State and Local Legal Center

lsoronen@sso.org

Overview of Presentation

- Chronology of what happened with SCOTUS in the last year
- Is our “new Court” what we thought it would be?
- Significant decisions for the states

Last Term was the First Full Term with Five *Real* Conservative Justices

Conservative

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

Liberal

- Ginsburg
- Breyer
- Sotomayor
- Kagan

Kennedy was Gone; Roberts was at the Center

- For the last 50 years we have had an **unreliable** conservative Supreme Court
- Why?
 - Powell ('71-'87)
 - O'Connor ('81-'06)
 - Kennedy ('87-'18)
- Now Kennedy (unreliable conservative) has been replaced by Kavanaugh (expected-to-be reliable conservative)

All Eyes Were on
the Chief



Topics on Last Term's the Docket

- 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

Has His Going Left Last Term Been Overstated?

- Yes probably (and I am part of the problem)
- He did it on his own terms in a (sometimes) sneaky way which he has done before
- Adam Liptak, New York Times writes Roberts “**steered the Supreme Court toward the middle, doling out victories to both left and right in the most consequential term in recent memory**”

Most Prevalent Theory on this Term: Going Left for the Institution

- At this point in time there **is no significant disagreement that Roberts sometimes takes positions in cases to avoid 5-4 (now 6-3) conservative rulings on ideological lines**
- Conservatives push back: doesn't trying to not look political make the Court look political?
- Might Roberts have gone left this term to help the right in the next election (by not causing Democrats to become enraged over SCOTUS)?

Reading Assignment #1

- Sarah Isgur, *John Roberts: The Man in the Middle*, Deseret News
- Is Roberts to be **admired** or **hated** for (sometimes in important cases) abandoning conservative principles for the sake of the institution?
- You may have a different view depending on whether you are a conservative or a liberal
- What personal characteristics does it take for a Supreme Court Justice to abandon their personal beliefs for what they perceive as the greater good?
- Could have been Michael Luttig!!

It Paid Off!!

- Gallup poll August 2020
 - 58% of people approve of the job SCOTUS is doing
 - Highest since 2009
 - 60% Republicans approve
 - 56% Democrats approve
 - 57% Independents approve

Death of Justice Ginsburg

We lost an amazing
American and a friend
to states



Amazing American

- Who has seen the documentary and/or the Hollywood movie of her life?
- 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

Friend to States

- All Justices are a mixed bag
- She was a pragmatist who wanted fairness and common sense to prevail
- Three cases I will remember her by:
 - *South Dakota v. Wayfair*
 - *Barr v. American Association of Political Consultants*
 - *Gobeille v. Liberty Mutual Insurance Company*

Justice Barrett Joins the Bench

- Just before the election
- Over the objection of Democrats (and Justice Ginsburg) who wanted they newly elected President to pick
- Senate Majority Leader McConnell's choice

Personally and Professionally

- Not an Ivy league East Coaster who worked for the federal government
- Doesn't have a really long appellate court record
- All the hallmarks of a conservative:
 - Textualist
 - Originalist
 - Judicial restraint
 - Social conservative
 - Clerked for Justice Scalia

Justice Barrett Immediately Made a Difference

- Basic argument in the COVID-19 stay-at-home cases is religious speech/exercise has been treated worse (more restricted) than other speech/activities in violation of the constitution
- Before Barrett the States won all the cases; after Barrett house of worship won all the cases (except one)
- Fairness to Barrett: some of the cases would have turned out the same way even if Justice Ginsburg was still on the Court (CA banning indoor church altogether); in one case she allowed CA to ban singing at church

Supreme Court and the Election

- Was involved by mostly not being involved
- Pre-election: could states count ballots received after election day? SCOTUS said yes if state judges interpreting state law said yes; none of these cases impacted the outcome of the election
- Post-election: Texas asked the Supreme Court to decide whether Georgia, Michigan, Pennsylvania and Wisconsin took “non-legislative actions to change the election rules that would govern the appointment of presidential electors” that violated the federal constitution; Court didn’t hear the case because of standing

Which **One Person** Was President Trump's
Biggest Foil?

Hard to Overstate Importance of SCOTUS to Trump's Legacy

- Appointed three Justices
- He (and others) hold SCOTUS (at least partially) responsible for him not currently being President
- SCOTUS decided a lot of big cases related to his agenda (and would have decided a whole lot more had he been re-elected)

President Trump Main Accomplishment

- From a liberal perspective
 - Criminal justice legislation
 - Stock market
 - Tax cuts
 - Vaccine
 - Three Supreme Court Justices

Where Would you Put Three SCOTUS Justices?

- In term of importance?
- From a conservative perspective—all three Justices were good choices which John Kasich may have picked as well
- Presidential scholars: too soon to tell

SCOTUS Treated Trump Pretty Well

- Though he complained a ton about SCOTUS!
- Supreme Court mostly gave Trump what he wanted
 - Travel ban, federal executions, union dues, public charge, abortion pill
- Joan Biscupic, *Trump transformed the Supreme Court that mostly helped advance his agenda*, CNN, Jan. 19, 2021

SCOTUS Foil

- Perhaps ironically, the one **individual** who stood most in the way of Trump was Chief Justice Roberts
 - DACA
 - Citizenship census question
 - Tax returns

New Supreme Court



Beyond the Photo

Conservative

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

Liberal

- Breyer
- Sotomayor
- Kagan

A Tale of Two Thursdays

- Supposed to be 3 big cases this term
- June 17:
 - Unanimous (Gay foster parents)
 - 7-2 (ACA)
- July 1
 - 6-3 (Voting Rights Act)

Going Theory (before June 17, 2021) We Now Have 6-3 Conservative Court

- In big, conservative cases
 - Most SCOTUS case aren't big or controversial
 - Many involving the states are
- Adam Liptak of the NYT: adding Justice Barrett will move the Court “slightly but firmly to the right, making compromise less likely”
- Justice Kavanaugh is at now the Court's center

If this is True it is a Big Deal

- Last term 14 of the Court's 53 signed decisions were 5-4
- In 10 of those the majority was Roberts, Thomas, Alito, Gorsuch, and Kavanaugh
- Barrett v. Ginsburg would have made no difference
- Two of the Roberts, Ginsburg, Breyer, Sotomayor and Kagan cases concerned DACA and abortion

What I Thought was Going to Happen

- Generally, I agreed with the going theory but I thought...
- Roberts, Gorsuch, Kavanaugh, and Barrett will **never** be liberal Justices
- But what if the Chief can peel just one of them off occasionally in big, controversial cases?
 - Gorsuch—sexual orientation/transgender employment case
 - Kavanaugh—ACA
 - Barrett--??
- Maybe time will prove I am right but this term (mostly) didn't!

What Really Happened this Term

- One of the big decisions was 6-3
- Decisions other big cases were very narrow
 - I agree with the theory votes were changes in the ACA and gay-foster parents case to get to this result
- 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

What Really Happened this Term

- But don't be fooled conservatives were divided but dominant
 - Concerned with individual rights
- Tensions are high—Alito is the angriest?
- Beyond the big cases: three liberals were in the majority in 13 out of the 28 divided cases

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
- Best proof: ACA, gay foster parents
- Conservatives still in charge in 3-3-3
- More of the Court trying to find common ground?

Gloves Will be Off Next Term

- Is this term the calm before the storm?
- Guns
- Abortion
- Affirmative action—cert petition pending
- **NONE of these deal with issues at the margins**

Reading Assignment #2

- McKay Coppins, *Is Brett Kavanaugh Out for Revenge*, The Atlantic
- Justice Kavanaugh may be less important than we think but he is still at the Court's center
- Justice most in the majority this term
- At the end of the day getting to know what he has done is more important than knowing who he is
- We still don't know him that well
- Something about him I really like that may help the states—pragmatic

Bottom Line: We Don't Really Know this Guy

- Why does she think he might be out for revenge?
 - Shaking hands after church so as to say “I won”
- She thinks what really motivates this guy is being liked
 - What we learned about his high school and college days is he has a strong desire to fit in
- She wonders if he is more of an opportunist than a conservative
 - Before he started cultivating relationship with conservative professors (perhaps to enhance he career) his fellow classmates didn't know what his politics were
 - But squint again at the story of Kavanaugh's rise, and a different picture might come into view: a credential-obsessed meritocrat who's spent his life sweatily striving for power without any grounding in conviction or principle

Conservatives Worry He Might Drift Left

- Even within the more staid precincts of the conservative legal establishment, **fears have begun to surface that Kavanaugh might be uniquely vulnerable to “judicial drift”**—a phenomenon in which Republican-appointed justices, such as Lewis Powell and Harry Blackmun, **grow steadily more liberal the longer they’re on the bench**. Even before he was nominated, **Kavanaugh had raised concerns at the Federalist Society**, which vets the conservative bona fides of judicial candidates. He was added to Trump’s shortlist only after an **intense lobbying campaign by Republican friends**, most notably Anthony Kennedy, the justice he had clerked for and eventually replaced. Now some Republicans are privately wondering if the scramble to push through his confirmation was worth it.

Why Does it Matter?

- There may be no greater indictment of America's democratic system than the fact that Brett Kavanaugh's feelings are so potentially consequential. But at a moment when the Court is routinely called upon to fill the void left by a dysfunctional political system, a single justice has enormous power to set policy and settle national debates. If Kavanaugh is "dangerous," as his critics contend, it's not because he is part of some brazen right-wing conspiracy. It's because he has managed to ascend to the height of American power while remaining, perhaps even to himself, a living Rorschach test.

Justice Barrett—3/4 a Term in

- Be careful freshman effect
- Solid, sensible conservative not right-wing zealot
 - Voting Rights, takings
- So far seems closer to Roberts and Kavanaugh than Alito, Thomas, and Gorsuch
- **Careful**, independent
 - Allowed CA to continue banning signing in church
- Big cases yet to come
 - Guns, abortion

To Summarize—Nina Totenberg, NPR, 5 Takeaways

- SCOTUS escaped 2020 election chaos
- Barrett=collegial colleague
- Conservatives held their fire...
- Until the last day (Voting Rights)
- Next term=more headlines

California v. Texas

- In a 7-2 opinion in *California v. Texas* the Supreme Court held that neither the individual nor the state plaintiffs had standing to challenge as unconstitutional the Affordable Care Act's (ACA) requirement to obtain health insurance following Congress setting the penalty at \$0 in 2017

Background

- As originally enacted in 2010, the ACA required most Americans to obtain “minimum essential health insurance coverage” or pay a penalty
- In *NFIB v. Sebelius* (2012) the Supreme Court held this requirement was a constitutional tax
- In this case the individual and state plaintiffs argued that the ACA’s requirement to obtain health insurance is no longer a tax now the penalty is eliminated and as a result the entire ACA is unconstitutional
- The Supreme Court didn’t rule on or even discuss either of these arguments

No Standing

- In an opinion written by Justice Breyer, the Court held the challengers in this case lacked standing to bring their case because they couldn't meet the “**fairly traceable**” element of the test for standing
- According to the Court a plaintiff has standing if he or she can “allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief”

Individual Plaintiffs

- The individual plaintiffs in this case claimed they had standing because they were harmed by having to buy health insurance
- This alleged injury wasn't traceable to the ACA, the Court reasoned, because while the ACA tells them to buy insurance it has no penalty
- How can you be harmed by being forced to buy health insurance when you aren't really forced to buy health insurance because there is no penalty

State Plaintiffs

- According to the Court, regarding **increased use of state health insurance**, the state plaintiffs failed to show that the minimum coverage provision, “without any prospect of penalty,” will in fact lead to more individuals using state insurance. So, this alleged injury wasn’t fairly traceable to the ACA’s health insurance coverage requirement. Specifically, the Court noted that the “**programs to which the state plaintiffs point offer their recipients many benefits that have nothing to do with the [ACA’s] minimum essential coverage provision.**”
- Likewise, states pointed to costs related to “providing beneficiaries of **state health plans with information about their health insurance coverage, as well as the cost of furnishing the IRS with that related information.**” According to the Court these costs weren’t fairly traceable to the ACA’s minimum coverage provision because they are **required by other provisions of the ACA.**

Dissent—Alito and Gorsuch

- States have standing
 - The ACA “imposes many burdensome obligations on States in their capacity as employers, and the 18 States in question collectively have more than a million employees. Even \$1 in harm is enough to support standing.”
 - Congress included findings in 2010 that the individual mandate was an essential part of the law
 - (But didn’t those findings relate to the law as it was *originally enacted*?)
- Would have held
 - The essential coverage requirement is unconstitutional
 - States should not have to comply with “the ACA provisions that burden them”

Commentary

- After oral argument *everyone* thought a majority of the Court would rule the ACA is severable from the minimum coverage requirement
 - Roberts and Kavanaugh basically said they thought so in the argument
 - Last term in separate opinions Roberts and Kavanaugh wrote love letters to severability

What Happened?

- We don't know and we may not know for a very long time
- Josh Blackman, South Texas College of Law has a plausible theory
- Justice Breyer's opinion on standing/redressability was a dissent
- Roberts liked it and brought Kavanaugh and Barrett with him
- What's in it for Roberts: narrow, 7-2 not 5-4

Commentary—Is the Standing Ruling Fair?

- Ilya Somin, George Mason Law School says YES though he disagrees with the direction SCOTUS is taking standing jurisprudence
 - I believe the states did have standing (even though they were largely wrong on the merits). That said, I have to admit today's ruling is consistent with the growing trend of Supreme Court decisions limiting state standing to challenge federal policies or those of other states.
 - Notable recent examples include *Trump v. New York*, the case where a group of state and local governments challenged the Trump administration's policy of excluding undocumented immigrants from congressional apportionment counts, and – of course – *Texas v. Pennsylvania*, [red state lawsuit](#) challenging the result of the 2020 election.

Might this Case Really not be over?

- The state plaintiffs advanced another argument for standing that was harder to dismiss. **If the mandate is unconstitutional and so interconnected with every other provision of the act that its invalidation renders the entire ACA invalid, they contended, then the state plaintiffs are injured by the application of other provisions of the ACA that undoubtedly impose costs.** The Court rejected this “**standing-by-nonseverability**” argument as not properly preserved in the lower courts or presented to the Justices, but Justice Alito, in a dissent joined by Justice Gorsuch, disagreed with that characterization.
- In his dissent, Justice Alito warned that dismissal on standing grounds leaves the plaintiff states free to “file a new action. . . . And in any event, many other parties will have standing to bring such a claim based on a variety of the ACA’s substantive provisions that are arguably inseverable from the mandate. Our Affordable Care Act epic may go on.”
- Michael Dorf, Verdict, *Challengers to the Affordable Care Act Lose their Third Supreme Court Case: Will They Bring a Fourth?*

Why Talk About *Fulton v. Philadelphia*

- Perhaps the best illustration of the trends from this 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
- There are probably 6 votes to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*

Fulton v. Philadelphia

- 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
- Case was 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
- But, 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

Applying Strict Scrutiny

- “Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents.”
- “As for liability, the City offers only speculation that it might be sued over CSS’s certification practices.”
- As for equal treatment of prospective foster parents and foster children: “We do not doubt that this interest is a weighty one, for ‘[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.’ On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City’s contention that its nondiscrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.”

Concurring Opinions

- Barrett and Kavanaugh expressed skepticism about keeping *Smith*, worried to replace it with, ultimately agreed with Roberts it didn't have to be reconsidered
- Alito, Thomas, and Gorsuch would have overruled *Smith*
 - It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause.
- 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

- This was *supposed* to be a blockbuster but it is barely a whimper—or is it bigger than it looks?
- Decision will be more/less impactful depending on how often non-discrimination laws and policies contain exceptions—commentators disagree
- Even if nondiscrimination laws don't have many exceptions many other laws might
- Maybe *Smith* doesn't matter—Court has given religion “most favored nation status”—see Linda Greenhouse, *What the Supreme Court Did for Religion*, NYT

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
- At the same time, 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 Happened?

- We don't know and we may not know for a very long time
- Josh Blackman, South Texas College of Law has a plausible theory
- Alito, Thomas, and Gorsuch voted to overrule *Smith*; Barrett and Kavanaugh joined the majority opinion in part
- Roberts majority opinion was a concurrence
- Breyer brokered a compromise: he joined the Chief and everyone except Alito, Thomas, and Gorsuch went along with him
- 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"

Brnovich v. DNC

- Arizona's requirement that ballots cast in the wrong precinct and ballots collected by anyone other than a limited group of people not be counted didn't violate §2 of the Voting Rights Act
- 6-3
- Alito write for the Court
- Roberts still in charge
 - Not a fan of the VRA
 - Gift to Alito
- Dissenters won't surprise you: Kagan, Breyer, Sotomayor

Facts

- The Democratic National Committee (DNC) sued the Arizona Attorney General claiming that Arizona's refusal to count ballots cast in the wrong precinct and ballots collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation §2 of the VRA
- The DNC also alleged the ballot-collection restriction was enacted with discriminatory intent in violation of §2

Section 2 of the VRA

- Section 2(a) disallows voting practices that “results in a denial or abridgement of the right” to vote based on race or color
- Section 2(b) states a violation occurs only where “the political processes leading to nomination or election” are not “*equally open* to participation” by members of the relevant protected group “in that its members have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice”
- Court: “it appears that the core of §2(b) is the requirement that voting be ‘equally open’”

This Isn't a Test it is 5 Factors

- Size of the burden imposed by the rule
- Whether the rule departs from standard voting practice in 1982 when §2 was amended
- Disparity of impact on different racial or ethnic groups
- Openness of the state's entire voting system
- Strength of the state interests served by the rule

Applying the Test to Precinct Only Voting

- “Having to identify one’s own polling place and then travel there to vote does not exceed the ‘usual burdens of voting’” particularly when considering Arizona’s “political processes” as a whole
- While in 2016 over 1% of voters of color versus .5% of white voters voted out of precinct, according to the Court, “[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open”
- Not counting out-of-precinct votes “induces compliance” with the requirement that voters vote at their assigned polling place. Precinct-based voting furthers important state interests including distributing voters more evenly at polling places and reducing wait times

Applying the Test to No Ballot Collection

- Arizonans who receive early ballots have numerous options to cast their ballots, can rely on multiple proxies, and have 27 days to vote
- The DNC was unable to provide statistical evidence that limits on ballot collection have had a disparate impact on minority voters
- “[T]hird-party ballot collection can lead to pressure and intimidation”

Intentional Discrimination Claim Fails

- The Supreme Court agreed the federal district court's finding of a lack of discriminatory intent in enacting the ballot-collection restriction "had ample support in the record"
- What happened after the airing of a former Arizona State Senator's "unfounded and often far-fetched allegations of ballot collection fraud" and a "racially-tinged" video created by a private party "was a serious legislative debate on the wisdom of early mail-in voting"

Kagan Takes Up Ginsburg's Mantle

- Ginsburg's dissent in *Shelby County* got her "really famous"
- "Unusual free-form exercise" resulting in a "non-test test"
- "Delusions of modesty"
- "A list of mostly made-up factors, at odds with Section 2 itself"
- "Stacks the deck against minority citizens' voting"
- "Tragic"
- "(Yet again) rewritten -- in order to weaken -- a statute that stands as a monument to America's greatness, and protects against its basest impulses"

Commentary—Liberals are (Very) Unhappy

- [JOSH GERSTEIN](#) and [ZACH MONTELLARO](#), *Advocates Decry Supreme Court's Surprisingly Sweeping Voting Rights Decision*, Politico
 - The Supreme Court's ruling in a Voting Rights Act case Thursday may appear modest in scope and subdued in rhetoric, but it will have a sweeping impact — undercutting efforts to challenge a slew of new laws Republican-led states have passed imposing new restrictions on the ballot, lawyers and civil rights activists said
- Conservatives respond:
 - “In a single blow, the Justices shot down efforts to politicize the Voting Rights Act and saved federal courts from becoming super election commissions” (Wall Street Journal Editorial Board)
 - States rights, election security

More Commentary from Politico

- Democrats are mad at themselves from bringing a case that didn't have stronger facts
- The mushiness is not typical of an Alito opinion," said University of California-Irvine Professor Rick Hasen. "I think this was necessary to get the other justices on board — probably [Amy Coney] Barrett and [Brett] Kavanaugh —with a test that would be sufficiently mushy that it could be defended as potentially allowing some Section 2 cases to go forward."
- Decision doesn't impact litigation under the First, 14th or 15th Amendment
- Help get proposed federal elections law passed?

NCAA v. Alston

- Holding: the National Collegiate Athletics Association (NCAA) cannot restrict certain education-related benefits schools may offer student-athletes
- Unanimous
- Opinion written by Justice Gorsuch
- Narrow case (versus a narrow decision)
- Interesting concurrence by Kavanaugh

Background

- The NCAA regulates student-athlete compensation
 - This is weird right; what would you think if SLC regulated state legislator pay?
- Student-athletes sued the NCAA claiming that its rules limiting education-related benefits violate federal antitrust law
- At issue in this case were NCAA limits on scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships
- Not at issue in this case are NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education
 - Ninth Circuit upheld these limits
 - The student-athletes didn't ask the Supreme Court to review that holding

Law is Complicated

- Rule of reason
 - If a defendant (here the NCAA) acts in an anti-competitive manner (here the NCAA clearly does by disallowing educational-related compensation) then the student athletes must show the “procompetitive efficiencies” (here “amateurism”) can be “reasonably achieved through less anticompetitive means”

SCOTUS Reasoning

- The federal district court concluded educational-related benefits couldn't be “confused with a professional athlete's salary”
- So, disallowing caps on them “would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports”
- Supreme Court agreed

Kavanaugh Concurrence

- The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that **colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.**
- In my view, that argument is **circular and unpersuasive.** The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: **The NCAA's business model would be flatly illegal in almost any other industry in America.**
- Movie studios cannot collude to slash benefits to camera crews to kindle a “spirit of amateurism” in Hollywood.
- The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes.

Flood of State Legislation Banning Restrictions on NIL Compensation (Before and) After

- The number of states passing legislation allowing student athlete compensation (seems to) increase daily
- Most prevent the NCAA, conferences, and schools from barring student-athletes from receiving compensation for their names, images or likenesses
- Many states also allow athletes to hire agents and require advertising and endorsement deals to be reported to schools
- NCAA has temporarily lifted its strict ban on compensation for NIL instead of adopting more relaxed rules it worked on two year
- Federal legislation?

Rutledge v. Pharmaceutical Care Management Association

- **Who has heard of pharmacy benefit managers?**
- When you get a drug from a pharmacy your health insurance company probably doesn't pay the cost (less your copay) immediately
- A pharmacy benefit manager probably (PBM) probably does (and then your insurance pays the PBM)
- Arkansas concluded PBMs weren't always reimbursing Arkansas pharmacies for the cost the pharmacy paid for the drug and required them to
- Arkansas claimed "many pharmacies, particularly rural and independent ones, were at risk of losing money and closing"

Rutledge v. Pharmaceutical Care Management Association

- Holding: states may regulate the price at which pharmacy benefit managers (PBMs) reimburse pharmacies for the cost of prescription drugs without violating the Employee Retirement Income Security Act (ERISA)
- 8-0 decision written by Justice Sotomayor
- Decision in this case not inevitable

What is ERISA? What does ERISA Preempt?

- The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that **sets minimum standards** for most voluntarily established **retirement and health plans in private industry** to provide protection for individuals in these plans
- ERISA pre-empts “any and all **State laws** insofar as they . . . **relate to any employee benefit plan**” covered by ERISA
- “[A] state law **relates** to an ERISA plan if it has a **connection with or reference to** such a plan”

No Impermissible Connection

- In previous cases the Court has held that “ERISA **does not pre-empt** state rate regulations that merely **increase costs** or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage”
- Arkansas’s law is “merely a form of **cost regulation**”
- “It requires PBMs to reimburse pharmacies for prescription drugs at a rate equal to or higher than the pharmacy’s acquisition cost. PBMs may well pass those increased costs on to plans, meaning that ERISA plans may pay more for prescription-drug benefits in Arkansas than in, say, Arizona.”

No Impermissible Reference

- A law refers to ERISA if it “**acts immediately and exclusively upon ERISA plans** or where the existence of ERISA plans is essential to the law’s operation”
- According to the Court, Arkansas’s law “does not act immediately and exclusively upon ERISA plans because it **applies to PBMs whether or not they manage an ERISA plan**. Indeed, the Act does not directly regulate health benefit plans at all, ERISA or otherwise. It affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract.”
- If I buy health insurance on the exchange in Arkansas this law would apply to my PBM even though ERISA wouldn’t apply to my health insurance plan

Tons of States have Regulated PBMs

- Million-dollar questions:
 - Are all state laws regulating PBMs cost/price-related?
 - Is so, is this decision broad enough to cover all of them?

Here is *An* Answer

- Most immediately, *Rutledge* puts PBM regulations passed by more than [45 states](#) on much firmer footing. These laws do [different things](#), **but they are all aimed at reigning in prescription drug costs**. Some ban PBM gag clauses that prevent pharmacies from telling consumers about lower-cost options. Others limit patient cost-sharing, require PBMs to disclose their price lists and manufacturer rebates to improve transparency, or prohibit so-called “spread pricing” where PBMs charge plans more than they reimburse pharmacies. **Justice Sotomayor’s opinion sweeps broadly enough that its reasoning is not limited to the particulars of the Arkansas law.** Applying the logic of *Rutledge*, PBM laws are a form of health care cost regulation, and PBMs are not health plans but rather their administrative contractors, so ERISA should not preempt states’ PBM regulations.
- [Erin C. Fuse Brown](#) and [Elizabeth Y. McCuskey](#), The Implications Of *Rutledge v. PCMA* For State Health Care Cost Regulation, Health Affairs Blog, December 17, 2020

Jones v. Mississippi

- Holding: that sentencing a juvenile convicted of homicide to life without parole doesn't require a separate factual finding of permanently incorrigibility or an on-the-record explanation with an implicit finding of permanently incorrigibility
- 6-3; decided on ideological lines
- Justice Kavanaugh wrote the opinion; Justice Sotomayor wrote the dissent

Legal Background

- In *Miller v. Alabama* (2012) the Supreme Court held that the Eighth Amendment requires that life-without-parole sentences for juveniles convicted of homicide not be mandatory
 - Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties
- In *Montgomery v. Louisiana* (2016) the Supreme Court held that *Miller* applies retroactively to sentences issued before 2012

Facts and Legal Argument

- In 2004 Brett Jones, at age 15, killed his grandfather
- He was sentenced to life in prison without parole
- After *Miller* was decided a trial court resentenced him to life in prison without parole
- The Mississippi Court of Appeals rejected Jones's argument that the trial court **should have made a separate factual that he was permanently incorrigible**

No Finding of Permanent Incurrigibility Necessary

- A sentencer's discretion alone not to impose a life-without-parole sentence on a juvenile homicide offender rather than a finding of permanent incurrigibility satisfies the Eighth Amendment
- Justice Kavanaugh concluded the Court's following statements in *Montgomery* resolve this case: “***Miller* did not impose a formal factfinding requirement” and “a finding of fact regarding a child’s incurrigibility . . . is not required”**
- Quoting *Miller*, the Court further reasoned that it required “only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing” a life-without-parole sentence

Dissent

- According to the dissent, the sentencer **must actually “make th[e] judgment”** that the juvenile in question “is one of those rare children for whom [life in prison without parole] is a constitutionally permissible sentence”
- The dissent criticized the Court for relying on “*Montgomery*’s modest statement” as the “linchpin” of its decision
- The dissent pointed to other language in *Montgomery* clarifying the fact “[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment”

States May Require More

- Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States.

This Case Caused Quite a Stir

- Dissent has strong language; accuses the majority of abandoning precedent
 - “This conclusion would come as a shock to the Courts in *Miller* and *Montgomery*”
 - “Today, however, the Court reduces *Miller* to a decision requiring ‘just a discretionary sentencing procedure where youth [is] considered.’ Such an abrupt break from precedent demands ‘special justification.’ The Court offers none. Instead, the Court attempts to circumvent *stare decisis* principles by claiming that ‘[t]he Court’s decision today carefully follows both *Miller* and *Montgomery*.’ **The Court is fooling no one.**
- IMHO both the majority and dissent are correct
 - *Miller* says no fact finding is required
 - How do we know a court really determined a minor was permanently incorrigible if the court finds no facts?

Juveniles Should be Deemed Incurrigible Before Sentence to Life in Prison without Parole

- All: 71%
- Dem.: 77%
- Ind.: 69%
- Repub.: 64%
- Source: NYT

Mahoney Area School District v. B. L.

- Holding: a public school could not discipline a student who transmitted to her Snapchat friends, **outside of school hours and away from the school's campus**, vulgar language and gestures criticizing the school and the school's cheerleading team
- 8-1
- Opinion written by Justice Breyer
- Who is the lone dissenter?

Facts

- After not making the varsity cheerleading team or get her preferred softball position, on a weekend at a convenience store, B. L. posted on Snapchat an image of her and a friend with their middle fingers raised and the caption “Fuck school fuck softball fuck cheer fuck everything”
- School kicked B. L. off the JV cheerleading team for the year

Background

- In *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court held that schools have a special interest in regulating student speech that “materially disrupts class work or involves substantial disorder or invasion of the rights of others
- The Third Circuit held that *Tinker* doesn’t extend to off-campus speech

Ruling

- Court basically rules school discipline for off-campus speech should be rare
- “[T]hree features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished”
- While a school may stand in place of a parent or guardian when the student is on school grounds during school hours, such is rarely the case when the student speaks off campus
- If the school can regulate both on- and off-campus speech, a student’s speech is subject to school regulation 24 hours a day
- Schools have an interest in protecting student’s unpopular expressions particularly off-campus because “America’s public schools are nurseries of democracy”

Why Does B. L. Win?

- B. L.'s speech, which involved criticizing school rules “did not involve features that would place it outside the First Amendment’s ordinary protection”
- B. L.'s posts occurred outside school hours, away from school, to only a private circle of Snapchat friends; and she did not “identify the school in her posts or target any member of the school community with vulgar or abusive language”
- The school’s interests in teaching good manners and punishing vulgar speech were “weakened considerably by the fact that B. L. spoke outside the school on her own time”
- Additionally, little evidence suggested the posts caused substantial disruption in the classroom or on the cheerleading team

Why Does this Case Matter to State Legislatures?

- 25 or so states that allow schools to discipline students for off-campus bullying
- Had the Supreme Court said (like the Third Circuit) that disciplining for any and all off-campus speech violates the First Amendment all those statutes would be unconstitutional
- Is bullying one of these rare instances disciplining for off-campus speech is okay? Only time will tell
- “The parties’ briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include **serious or severe bullying or harassment targeting particular individuals**; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”

Southern States Allowing Discipline for Off-Campus Cyberbullying

- Alabama
- Arkansas
- Florida
- Georgia
- Louisiana
- Tennessee
- Texas

Justice Thomas Dissents

- Is anyone surprised Justice Thomas (alone) is very pro-school discipline?
- “A more searching review reveals that schools historically could discipline students in circumstances like those presented here”

Public Favors Schools **Not Being Able** to Discipline for Off-Campus Speech

- All: 71%
- Dem.: 64%
- Ind.: 72%
- Repub.: 78%
- Source: NYT

Questions?

Thanks for attending!