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- Justice Kennedy (unreliable conservative) was gone and had been replaced by Kavanaugh (expected-to-be reliable conservative)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

Fulton v. City of Philadelphia

- Big, controversial case
- Involving a local government!
- Of particular interest in Colorado because of the cake case
- Perhaps the best illustration of the trends in big, controversial cases 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
- Bigger than it seems?

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

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

Applying Strict (Fatal) Scrutiny

- Maximizing number of foster families an avoiding litigation are important but…
- Equal treatment of gay foster parents compelling but not narrowly tailored
  - 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,* 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: Big Case or No?

- 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
- In this case plus some COVID cases the Court has transitioned from religion has to comply with neutral rules to religion must be accommodated and treated as well if not better secular enterprises
- Maybe *Smith* doesn't matter—Court has given religion "most favored nation status"—see Linda Greenhouse, *What the Supreme Court Did for Religion*, NYT
- Lael Weinberger, *The Surprising Future of Free Exercise of Religion at the Supreme Court*, Newsweek

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"

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 and USCM are SLLC members (and so is the league 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

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

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 change of law in the 10th Circuit—see *United States v. Bute*, 43 F.3d 531 (10th Cir. 1994) (the "community caretaking" exception applies "only in cases involving automobile searches")

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?
- Police **know there is an emergency**—no warrant, no problem; exigent circumstances
- 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
- 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
- Change of law in the 10th 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 SLLC *amicus* brief in this case; not a Section 1983 case

Fair to Say SCOTUS Adopted the 10th Circuit Approach?

- Cited to *Mascorro* three times!!
- The Tenth Circuit has held that a hot pursuit justifies warrantless entry only if it combines "a serious offense" with "an immediate and pressing concern such as destruction of evidence, officer or public safety, or the possibility of imminent escape." *Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011)

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

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."
- How have things gone in the 10th Circuit?

City of Chicago v. Fulton

- Holding: City of Chicago didn't violate the Bankruptcy Code's automatic stay provision by holding onto a vehicle impounded after a bankruptcy petition was filed
- 8-0
- Written by Justice Alito
- No change in the law in the 10th Circuit
- *In re Cowen*, 849 F.3d 943, 950 (10th Cir. 2017) ("[O]nly affirmative acts to gain possession of, or to exercise control over, property of the [debtor's bankruptcy] estate violate § 362(a).")

Facts and Holding

- The City of Chicago impounds vehicles where debtors have three or more unpaid fines
- Robbin Fulton's vehicle was impounded for this reason
- She filed for bankruptcy and asked the City to return her vehicle; it refused
- The Seventh Circuit held the City violated the Bankruptcy Code's automatic stay provision
- The Supreme Court unanimously reversed

Bankruptcy 101

- When a bankruptcy petition is filed, an "estate" is created which includes most of the debtor's property
- An automatic consequence of the bankruptcy petition is a "stay" which prevents creditors from trying to collect outside of the bankruptcy forum
- The automatic stay prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"
- The Bankruptcy Code also has a "turnover" provision which requires those in possession of property of the bankruptcy estate to "deliver to the trustee, and account for" that property

Holding and Reasoning

- The Supreme Court held that "mere retention" of a debtor's property after a bankruptcy petition is filed doesn't violate the automatic stay. According to Justice Alito, "[t]aken together, the most natural reading of . . . 'stay,' 'act,' and 'exercise control'—is that [the automatic stay provision] prohibits *affirmative acts* that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed."
- However, the Court, conceded it did not "maintain that these terms definitively rule out" an alternative interpretation. According to the Court, "[a]ny ambiguity in the text of [the automatic stay provision] is resolved decidedly in the City's favor" by the turnover provision. First, reading "any act . . . to exercise control" in the automatic stay provision "to include merely retaining possession of a debtor's property would make that section a blanket turnover provision," rendering the turnover provision "largely superfluous." Second, the turnover provision includes exceptions that the automatic stay provision doesn't include. "Under respondents' reading, in cases where those exceptions to turnover . . . would apply, [the automatic stay provision] would command turnover all the same."

Justice Sotomayor Throws Shade on the SLLC's One Victory

- According to Justice Sotomayor, in a concurring opinion, "the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly comports with its spirit"
- Justice Sotomayor opined that the City may have violated a number of other provisions of the Bankruptcy Code, including the turnover provision

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
- Local government pays money damages if QI isn't available

Why is Qualified Immunity Controversial?

- One-time free pass to violate someone's constitutional rights without consequences where the law isn't clearly established
- Policy reason justifying it: 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 behavior was unconstitutional?
- Section 1983 **says nothing about qualified immunity**
- Qualified immunity is a Supreme Court created doctrine

Colorado and QI

- Colorado's Enhance Law Enforcement Integrity Act created a state law version of § 1983 applicable to local (notice not state) government "peace officers" who violate the state constitution
- Colorado's new law eliminates qualified immunity as a defense
- Note: the Colorado legislature can't do anything about **federal** qualified immunity

Qualified Immunity: A Winning Streak Like No Other

- Until this year, in only **two cases** since 1982 did the Supreme Court hold that police officers violated clearly established law
- Why?
  - Law is very favorable to state and local governments
  - Few cases (especially ones involving the police) have the same facts, so the law is rarely "clearly established"
  - Court is sympathetic to police officers who must make split-second decisions where their lives are on the line

SCOTUS was Asked to Act

- Starting a few years ago the Supreme Court started receiving petitions not saying the lower court had wrongly applied QI but instead saying the QI should be **overruled** or **modified**
- Beginning 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
- SLLC and IMLA worked put a brief together to defend qualified immunity

SCOTUS Refused to Hear QI Cases

- Nine cases total piled up in May 2020
- Most/all asking the Court to **eliminate** or **modify** the doctrine
- All petitions were denied on June 15, 2020
- Justice Thomas filed a dissenting opinion in one of the cases reiterating his "doubts about our qualified immunity jurisprudence," noting qualified immunity is not included in the text of the statute which allows state and local government officials to be sued for violating the constitution

Why Was this a Big Deal?

- SCOTUS denies petitions all the time
- Movement to eliminate or modify qualified immunity
  - Justices: Thomas and Sotomayor
  - Lower court judges
  - Academics: Notre Dame Law Review Symposium on the Future of Qualified Immunity
  - CATO took the lead
  - Advocacy groups on the right and left banded together
- Death of George Floyd

Why Did the Court Not Take Any of the Cases?

- We don't know because the Court doesn't say
- Going theories
  - Justice Sotomayor and Ginsburg (at least) probably wouldn't mind modifying doctrine but probably lack agreement with the conservatives about what to replace it with
  - Justices knew Justice Ginsburg's death was imminent and wanted to avoid saddling a new colleague with an issue this big?

SCOTUS Changed Course Last Term

- Made three "moves" or "corrections" against qualified immunity
  - And no moves in favor of it!
- None of the cases were heard on the merits with full briefing and oral argument—"shadow docket"
- All respond to the criticism that Court was constantly summarily reversing qualified immunity **grants**

Taylor v. Riojas

- Brief, unauthored opinion
- Justice Barrett doesn't participate
- Trent Taylor to a "pair of shockingly unsanitary cells" for six days
  - He claimed the first cell he was confined in was covered in feces "all over the floor, the ceiling, the window, the walls," and even inside the water faucet
  - The second, frigidly cold cell, "was equipped with only a clogged drain in the floor to dispose of bodily waste"

Fifth Circuit Decision

- The Fifth Circuit held that Taylor's confinement conditions violated the Eighth Amendment's prohibition on cruel and unusual punishment
- The Fifth Circuit granted the officers qualified immunity because "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days"

SCOTUS Holding and Reasoning

- The Supreme Court noted that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, **reasonably misapprehends the law** governing the circumstances she confronted"
- It reversed the Fifth Circuit's grant of qualified immunity because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time"

Justice Thomas…Wait for it…

- Dissented

McCoy v. Alamu

- Case was remanded for reconsideration in light of *Taylor v. Riojas*
- No opinion
- Technically, the Court didn't deny qualified immunity

Facts

- “McCoy was incarcerated in the prison’s administrative segregation block. The parties agree that Alamu sprayed McCoy with a chemical agent after a different prisoner had twice thrown liquids on Alamu. They disagree about almost everything else.”
- McCoy’s version: Inmate Jackson twice threw water on Officer Alamu; Officer Alamu grabbed his chemical spray but Jackson held up a sheet; Officer Alamu asked for Jackson name and number; McCoy approached the front of his cell to tell him; he sprayed McCoy for no reason
- Officer’s version: he went for cover after being "chunked with an unknown liquid" by Jackson; he sprayed McCoy after he threw "an unknown weapon" at him, which may have been a "piece of rolled toilet paper"

Fifth Circuit Decision—Constitutional Violation

- Officials may use chemical spray where “reasonably necessary to prevent riots or escapes or to subdue recalcitrant prisoners”
- On McCoy’s adequately supported view of the facts, there was no need to "subdue" McCoy—it was Jackson, not McCoy, who was "recalcitrant"

Fifth Circuit Decision—Qualified Immunity

- But it was not *beyond debate* that it did, so the law wasn't clearly established. This was an isolated, single use of pepper spray. McCoy doesn't challenge the evidence that Alamu initiated the Incident Command System immediately after the spray, nor that medical personnel promptly attended to him and provided copious amounts of water. Nor does he provide evidence to contest the Use of Force Report's finding that Alamu used less than the full can of spray.
- In somewhat related circumstances, we held that spraying a prisoner with a fire extinguisher "was a *de minimis* use of physical force and was not repugnant to the conscience of mankind." *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993)
- Similarly here, on these facts, it wasn't beyond debate that Alamu's single use of spray stepped over the *de minimis* line

Let's Vote: Would you have Granted Qualified Immunity

- On inmate McCoy's version of the facts?

Harder than You Think?-- *Jackson v. Culbertson*

- While in prison, Jackson started a fire with a match and the core of a role of toilet paper. The fire alarm went off, prompting prison officials to take action. One official arrived with a fire extinguisher. The fire had already gone out by the time he arrived; nonetheless, the official sprayed the remaining ashes, as well as Jackson and two other inmates.
- Because he suffered no injury, we find that the spraying of Jackson with the fire extinguisher was a *de minimis* use of physical force and was not repugnant to the conscience of mankind. *Cf. Olson v. Coleman,* 804 F. Supp. 148, 150 (D.Kan. 1992) (finding a single blow to the head causing a contusion to be *de minimis* and not repugnant); *Candelaria v. Coughlin,* 787 F. Supp. 368, 374 (S.D.N.Y. 1992) (allegation of single incident of guard using force to choke inmate was *de minimis*), *aff'd,* 979 F.2d 845 (2d Cir. 1992)

Compare the Cases

Similarities

- **Single incident**
- No merits to subduing either person

Differences

- **McCoy claimed an injury**
- McCoy didn't do anything wrong

Lombardo v. City of St. Louis, Missouri

- Unauthored
- No briefing or oral argument
- Sent back to the lower court to redecide the case to decide whether police officers used excessive force when restraining Nicholas Gilbert on his stomach for 15-minutes and/or should receive qualified immunity

Facts

- Gilbert was arrested for trespassing in a condemned building and failing to appear in court for a traffic ticket
- Officers tried to handcuff Gilbert after it appeared he was trying to hang himself in his cell. Gilbert was only 5'3" and 160 pounds but he struggled with multiple officers. Ultimately, they were able to handcuff Gilbert and put him in leg irons. They moved him face down on the floor and held his limbs down at the shoulders, biceps, and legs. At least one officer placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, "It hurts. Stop."
- After 15 minutes of struggling in this position, Gilbert's breathing became abnormal and he stopped moving. The officers rolled Gilbert over and checked for a pulse. Finding none, they performed chest compressions and rescue breathing. Gilbert was pronounced dead at the hospital.

Lower Court Rulings

- Gilbert's parents sued the officers claiming they violated the Fourth Amendment by using excessive force
- A federal district court ruled the officers were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time
- The Eighth Circuit ruled for the officers holding they did not apply unconstitutionally excessive force

SCOTUS Ruling

- The Eighth Circuit cited the correct factors in determining whether the use of force was reasonable
- But it was "unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is per se constitutional so long as an individual appears to resist officers' efforts to subdue him"
- The Eighth Circuit described as "insignificant" the fact that Gilbert was handcuffed and leg shackled when officers kept him in the prone position for 15 minutes

SCOTUS Ruling

- These details matter because "St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation," "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk," and that "guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands"
- "Having either failed to analyze such evidence or characterized it as insignificant, the court's opinion could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law. Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent"

Dissent: Alito, Thomas, Gorsuch

- We should just hear this case on the merits
- Court "unfairly interprets" the 8th Circuit decision
- Can the Court seriously think that the Eighth Circuit adopted such a strange and extreme position—that the use of prone restraint on a resisting detainee is always reasonable no matter how much force is used, no matter how long that force is employed, no matter the physical condition of the detainee, and no matter whether the detainee is obviously suffering serious or even life-threatening harm?

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
- Might the Court overturn *Pearson v. Callahan* (2009) and require lower court to always decide whether the constitution was violated?

Juiciest QI Petition

- Always a lot of juicy QI petitions
- *Frasier v. Evans* questions presented
  - Whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity
  - Whether it has been "clearly established" since at least 2014 that the First Amendment protects the right of individuals to record police officers carrying out their duties in public
- Usual suspects decry QI in *amicus* briefs

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**

Uzuegbunam v. Preczwski (*U v. P*)

- Holding: to have a "redressable injury" required to bring a lawsuit a plaintiff need only ask for nominal damages ($1)
- 8-1 decision
- Robert's only solo dissent ever
- No change in the law in the Tenth Circuit; Tenth Circuit has repeatedly held that "a complaint for nominal damages survives mootness even where prospective relief is no longer available"
- But there is a twist!

Facts

- Chike Uzuegbunam was threatened with disciplinary action for speaking about his religion in the "free speech expression areas" at Georgia Gwinnett College, a public college where he was enrolled
- He and another student, Joseph Bradford, who decided not to speak about his religion because of what happened to Uzuegbunam, sued the college claiming its campus speech policies violated the First Amendment
- They asked for nominal damages and an injunction requiring the college to change its speech policies
- The college got rid of the challenged policies and argued the case was now moot
- **Had Uzuegbunam also brought a claim for actual damages (for example, bus fare getting to and from campus) both parties agree his case would not be moot**

Holding and Reasoning

- To establish standing, among other requirements, a plaintiff must ask for a remedy that is **redressable**--likely to address his or her **past injuries**
- In an opinion written by Justice Thomas the Court held that Uzuegbunam's claim for nominal damages is intended to redress a past injury
- According to the Court the prevailing rule, "well established" at common law, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage"

Lots of Caveats

- The Court stated that that a request for nominal damages doesn't "guarantee[] entry to court" as it only addressed whether nominal damages satisfy the redressability element of standing
- The Court also didn't decide whether Bradford could pursue a nominal damages claim noting nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury"

Roberts and Kavanaugh "Sweeping Exception"

- Roberts, and Kavanaugh, in a one-paragraph concurring opinion, see a "sweeping exception" to the Court's "sweeping exception to the case-or-controversy requirement"
- "Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff's claims"
- According to Roberts: "This is a welcome caveat, and it may ultimately save federal courts from issuing reams of advisory opinions"
- Try this in Colorado: if a plaintiff only has nominal damages give the plaintiff $1 and ask the judge not to issue a written opinion

(Very Brief) Preview

- Court's docket is only about ½ full
- Court will agree to hear about 30 more cases
- Three cases discussed briefly aren't the only local government cases on the docket

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

City of Austin v. Reagan National Advertising of Texas

- Issue: whether different rules for on-premises signs and off-premises signs are content-based (and subject therefore to strict scrutiny)
- First sign case since *Reed v. Town of Gilbert* (2015)
- Will the Court create an exception to *Reed* or double down on it?
- Local governments will miss Ginsburg
- Barrett's views on *Reed*???

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
- IHMO: NO
- SLLC didn't file in this case
  - Who are the members of NLC? City council or city council members?

Questions?

Thanks for attending!!