Supreme Court Update

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IMLA

- Membership organization for local government attorneys. Provide education and advocacy services for local governments.
- File 30-40 amicus briefs in the lower courts and at the Supreme Court each year in support of local governments.
- Put on conferences and webinars for local government attorneys. Upcoming Conference in Minneapolis September 29 – October 3rd.

Fulton v. City of Philadelphia

- Issues:
- (1) whether *Employment Division v. Smith* should be revisited; and
- (2) whether the government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.

Employment Division v. Smith (1990)

- Court held that the Free Exercise Clause does not relieve an individual of the obligation to comply with a neutral law of general applicability that incidentally requires performance of an act that an individual's religious beliefs forbid.
- They are not subject to strict scrutiny when they decline religious requests to be exempt from neutral, generally applicable laws.

Déjà vu?

- *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*
- Whether applying Colorado's public accommodations law to **compel the petitioner to create expression** that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

Masterpiece Cakeshop Holding

- 7-2, found in favor of the baker, but dodged the actual question in the case.
- In adjudicating whether his religion "must yield to an otherwise valid exercise of state power," (here the anti-discrimination provision of the state's public accommodation law), the Colorado Civil Rights Commission failed to consider the case "with the religious neutrality that the Constitution requires." Instead, the Court found that the Commission evidenced "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."
- Inconsistent treatment of cases involving bakers who refused to make cakes with messages that were hostile to homosexuality.

Facts: *Fulton v. City of Philadelphia*

- Human Services refers foster child to one of the foster care agencies with which the City has a contractual relationship. Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child.
- Learned that 2 agencies would not work with same sex couples as foster parents, which violated the City's anti-discrimination laws, due to the agency's religious views on marriage.
- City stopped referring foster children to the agencies (but still works with them in other capacities).

Third Circuit

- CSS had failed to show that the City violated the Free Exercise or Free Speech Clauses by requiring that an agency that provides foster care services for the City comply with its anti-discrimination laws protecting same-sex couples.
- Court noted that there was no evidence of religious bias or hostility nor was there any evidence that the City had treated CSS differently because of its religion.
- Under *Employment Division v. Smith*, CSS must comply with the City's valid and neutral laws of general applicability.

Implications of the Case

- What are the implications of the case if the Court overrules *Employment Division v. Smith?*
  - Civil Rights Laws / Anti-discrimination laws
  - Employment (drug testing, holidays, work schedules, objections to job obligations – e.g., officer refusing to guard an abortion clinic?)
  - Contracts – demand to alter contractual terms?
  - Vaccination laws? Animal cruelty laws? Environmental protection laws? Noise ordinances? Public nuisance?
  - Real example: Case dismissed in case brought claiming Free Exercise right to practice Satanism when city prohibited him from bringing his Guinea Hog to public facilities.

Third Circuit on Employment Division v. Smith

- "CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs. **If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well."**

Oral Argument Foreshadowing

Holding 9-0

- The City's contract was not "generally applicable" under *Employment Div. v. Smith* because it allows for exemptions in the sole discretion of the Commission and the City therefore needed to meet heightened scrutiny for the requirement to survive, which it could not.
- No need to revisit / overrule *Smith* because the contract allows for exemption.
- Court also concluded that FPO did not apply to foster agencies because they are not public accommodations like hotels, restaurants, or pools.
- City is not entitled to extra deference because this is a contract.
- Under *Smith,* if a State or local government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons."

Cannot Survive Strict Scrutiny

- The City argued its non-discrimination policy should survive strict scrutiny as it serves three compelling interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children."
- Court rejected these interests though agreed equal treatment for gay / lesbian parents was a "weighty" interest, but on these facts where exemptions were allowed under the contract, no justification on refusing to provide one to CSS.

Concurrences

- Justices Alito, Thomas, and Gorsuch concur in the judgment only. They would overrule *Smith* given its "severe holding" and that its interpretation can result in "startling consequences." Justice Alito posits that the City could simply remove the exemption language from the contract and "sidestep" the decision.
- Justice Barrett wrote a concurrence joined by Justices Breyer and Kavanaugh questioning *Smith* but also highlighting the uncertainty of what would replace it and whether there would be a workable standard.

Takeaways

- Example of the pragmatists on the Court, led by Chief Justice Roberts, but which also includes Justices Breyer, Kagan, and Kavanaugh joining to form a coalition around a narrow issue.
- *Smith* is safe for now, but you have 3 Justices who want to overrule it (and wrote 77 pages about doing so) and 2 others (Barrett and Kavanaugh) who seem at least inclined to entertain the notion in another case.
- Some commentators believe this decision is much more sweeping because it says if the law allows for any discretion, regardless of whether exemptions were provided, then you must meet strict scrutiny if you refuse to provide an exemption to religion.

Cedar Point Nursery v. Hassid

Issue:

Is a temporary easement a taking?

Facts

- Agriculture employers argue California statutes "take" their property by allowing union organizers access to agricultural employees on the grower's property
- The access period may be during four 30-day periods each year for up to three hours each day during non-working hours. So a total of three hours per day for 120 days per year.
- The union organizers must provide notice to the employers.
- Workers on these farms don't live on them.

(Brief) Overview of Takings Law

- 5th Amendment: "nor shall private property be taken for public use, without just compensation."
- Supreme Court has previously said a **permanent** physical invasion is a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982).
- Regulatory takings are analyzed under factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978).
- Is this a per se physical taking?

Ninth Circuit: No Per Say Taking Here

- No permanent physical invasion.
- See *Nollan v. California Coastal Commission* (1987), where the California Coastal Commission offered to give a homeowner a permit to rebuild a house in exchange for an easement allowing the public to cross the property to access the beach.
- In *Nollan*, SCOTUS required just compensation for the easement.
- "Unlike in *Nollan*, it does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year"
- Dissent: duration doesn't matter; property owners should be able to exclude people.

Why Should Local Governments Care About this Case?

- Petitioner sought a ruling that property owners have a categorical right to exclude as one of the bundle of sticks of their property rights.
- Local governments go onto private property all the time: Police work, health inspections, foster care/adoption home visits, nuclear inspections, mine inspections, etc.
- If there is a categorical rule that all temporary easements are takings would all of these governmental inspections require just compensation?

Supreme Court Rules 6-3 in Favor of Employers / Property Owners

- The access regulation is a per se physical taking because it "appropriates a right to invade the growers' property" thereby **preventing the owner from exercising its right to exclude**, which is "one of the most treasured rights of property ownership."
- "[A] physical appropriation is a taking whether it is permanent or temporary" and the duration only points to the amount of just compensation under the Fifth Amendment.

What About Government Searches and Inspections?

- 1) Decision does not change the law of **trespass** – so isolated action entering property still a trespass?
- 2) "[M]any government-authorized physical invasions will not amount to a taking because **they are consistent with longstanding background restrictions on property rights.**" e.g., nuisance abatement, public / private necessity, search warrants.
- 3) Governments can require property owners to give up their right to exclude and allow access to government officials as **a condition for receiving a benefit**, for example, through the grant of a **permit, license, or registration** for health and safety inspections.

Breyer Dissent

- Raises questions about the majority's analysis, including how it would impact government regulations allowing access to property, noting he "suspect[s] that the majority has substituted a new, complex legal scheme for a comparatively simpler one."
- What is the difference between "isolated" trespass and "temporary" invasion?
- What background restrictions on property rights count? Only those that existed in 1789?

Qualified Immunity at the Supreme Court

- Two summary reversals in prison context **against** correctional officials this Term and one GVR.
- Long list before these three cases of summary reversals in favor of officers in the last few years. *See e.g., City of Escondido, Cal. v. Emmons,* 139 S. Ct. 500 (2019); *Kisela v. Hughes,* 138 S.Ct. 1148 (2018); *Mullinex v. Luna,* 577 U.S. 7 (2015); *White v. Pauly,* 137 S. Ct. 548 (2017).

Taylor v. Riojas

- Horrible facts involving, per the Court, "shockingly unsanitary" confinement conditions. Because the conditions were so bad, prisoner did not eat or drink for 4 days out of fear his food would be contaminated with feces which completely covered the cell.
- After that, he was then moved to a frigid cell which only had a drain on the floor; and he therefore did not relieve himself for over 24 hours. The cell had no bed, and he was confined without clothing. So, he had to sleep naked on the floor.

Fifth Circuit

- Circuit court ruled the confinement conditions violated the Eighth Amendment's prohibition against cruel and unusual punishment, but granted qualified immunity because the court indicated the law was not clearly established that “prisoners couldn’t be housed in cells teeming with human waste for only six days.”

Supreme Court Per Curium Reversed

- Citing to *Hope v. Pelzer,* the Supreme Court concluded that "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."
- Court concluded there was "no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency." And there was no reason to believe these conditions could not have been mitigated.
- Officer by officer analysis necessary on remand. But at least one officer demonstrated deliberate indifference with comment that Taylor was "going to have a long weekend."

McCoy v. Alamu

- Supreme Court granted, vacated, and remanded the case back to the Fifth Circuit in consideration of *Taylor v. Riojas*.
- **Issues**: (1) Whether a prison official is entitled to qualified immunity if he gratuitously assaults a prisoner but not every factor from *Hudson v. McMillian* for when the use of excessive physical force may constitute cruel and unusual punishment favors the plaintiff or whether the plaintiff can nonetheless defeat qualified immunity; and (2) whether a prison official who assaults a prisoner without justification is entitled to qualified immunity if past precedent involved different mechanisms of force, as the 5th Circuit implicitly held here, or whether precedent concerning unprovoked assaults by one weapon can clearly establish the unconstitutionality of unprovoked assaults by other weapons, as the 4th and 9th Circuits have held.

Lombardo v. City of St. Louis (6-3, Per Curiam)

- In custody death of prisoner after struggle and officers pinned him to the ground, face down with his legs shackled and arms handcuffed behind his back for 15 minutes.
- Eighth Circuit concluded force was not unconstitutional under *Kingsley v. Hendrickson,* 576 U.S. 389 (2015).
- Supreme Court reversed and remanded because the majority claimed the lower court ruling was "unclear" as to whether that court had applied a categorical rule saying prone restraint is *per se* constitutional if the detainee is resisting.
- SCOTUS indicated per se rule would contravene existing precedent and courts need to consider other *Kingsley* factors.

Takeaways

- Starting a few years ago the Supreme Court started receiving petitions saying the QI should be **overruled** or **modified** and there has been a concerted effort by CATO, academics, and others to get these cases to the Court to have the doctrine overturned.
- Nine cases total piled up in May 2020, which had been relisted repeatedly and many thought the Court might take one up to reconsider QI. But they were all denied June 15, 2020.
- Court could still overrule QI. Another (perhaps more likely outcome) is we will see the Court take cases at the margins / that are particularly egregious and issue summary reversals. But the summary reversals may become less one-sided.

Public Safety Cases – Lighting Round

- *Caniglia v. Strom*
- *Torres v. Madrid*
- *Lange v. California*

Caniglia v. Strom

- **Issue**: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

Community Caretaking Doctrine - *Cady v. Dombrowski* (1973)

- Supreme Court upheld the warrantless search of a disabled **vehicle** when the police reasonably believed that the vehicle's trunk contained a gun, and the vehicle was vulnerable to vandals.
- The *Cady* Court explained that police officers frequently engage in such "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."
- Police activity in furtherance of such functions (at least in the motor vehicle context) does not, the Court held, offend the Fourth Amendment so long as it is executed in a reasonable manner pursuant to either "state law or sound police procedure."

Supreme Court 9-0

- Concluded the community caretaking exception to the warrant requirement does not extend into the home, reasoning that under the Fourth Amendment, "[w]hat is reasonable for vehicles is different from what is reasonable for homes."
- Noted that Court's previous decisions have allowed for intrusions into the home when police have a warrant, when consent is provided, or when exigent circumstances exist, "including the need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."
  - But exigent circumstances were not argued here.

Justice Alito's Concurrence

- Hypothetical neighbors call the police because their elderly neighbor did not come to dinner, and she is never late. The question posed at oral argument was whether it would violate the Fourth Amendment for police officers to enter the home to check on her without a warrant; and the petitioner in this case indicated it would, even if 24 hours had gone by. Per Justice Alito, "[t]his imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony."
- Justice Alito noted the Court's current precedents would not cover this situation and suggested that States could seek to institute procedures for warrants in these non-criminal cases

Justice Kavanaugh

- Disagreed with Justice Alito that current precedent would cover the hypothetical neighbor.
- According to Justice Kavanaugh, there should not be a community care-taking exception to the warrant requirement, but he believed the Court's current exigent circumstances doctrine would "of course" allow police to enter the home of the elderly person who falls and needs assistance.
- He also called the issue, "more labeling than substance" because he believed these scenarios would be covered by exigent circumstances.

Torres v. Madrid

- **Issue:** Can someone be seized for the purposes of the Fourth Amendment if the use of force dose not terminate the suspect's movement?

Supreme Court (5-3)

- New rule for the scenario where force is used by a suspect gets away.
- The Court concluded that "[t]he 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." Relied on *California v. Hodari D,* 499 U.S. 621 (1991) (which has the same rule for arrests).
- She was seized the moment the bullets struck her.
- Though the test asks if there was an intent to restrain, Court notes it is objective -- the test is "whether the challenged conduct objectively manifests an intent to restrain."

Lange v. California (9-0)

- **Holding**: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home.

Questions?

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