Supreme Court Update

Amanda Kellar

Deputy General Counsel / Director of Legal Advocacy

International Municipal Lawyers Association

International Municipal Lawyers Association

Advancing Excellence in the practice of Local Government Law

Agenda

- Practice before the Supreme Court / Overview of the Supreme Court
- Major Cases from 2017 Term Discussed (Wayfair, Gill, Masterpiece Cakeshop, Trump v. Hawaii, Lozman, Janus)
- Impact of Kennedy Retirement/ Kavanaugh Appointment
- Cases to Watch on the 2018 Docket

Practice Before the Supreme Court: Petitioner

- 10,000 + petitions filed each year.
- Court grants 70-80 cases per year.
- Review Supreme Court Rule 10 to determine if you should seek certiorari. Not a court of error.
- Most common reason for granting certiorari is a deep circuit split.
- Did you get a good dissent at the circuit court level?

Practice Before the Supreme Court: Petitioner

- Framing the issue is important.
- No more than 2 -3 issues.
- Two general ways to frame the question: stated succinctly versus with a prelude to explain context.

Maryland National Capital Park & Planning Commission v. American Humanist Association

- **Issue**: Whether the establishment clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

DC v. Wesby: Question Presented

- Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing.

DC v. Wesby: Question Presented

- The questions presented are: 1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state. 2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

Practice Before the Supreme Court: Respondent

- Consider whether filing a response or waiving it.
- Just 1 Justice can ask for a response if you waive it.
- Go back to Rule 10 and explain why case does not meet the criteria.
- Try to get yourself into the long conference if possible.
- Do not get amicus support.

If the Court Grants Certiorari

- Immediately contact the Georgetown Supreme Court Institute and ask for a moot court.
- Consider hiring Supreme Court counsel – Court is very specialized.
- Coordinate *Amici* who will all want to file now that the case is pending before the Court.

South Dakota v. Wayfair

Background / Precedent

- *National Bellas Hess v. Department of Revenue of Illinois* (1967) the Supreme Court held that under the Commerce Clause, states and local governments cannot require businesses to collect sales tax unless the business has a **physical presence** in the state.
- *Quill v. North Dakota* (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that "contemporary Commerce Clause jurisprudence might not dictate the same result."

Hope: *DMA v. Brohl* (2015)

- Justice Kennedy wrote a concurring opinion stating that the "legal system should find an appropriate case for this Court to reexamine *Quill*"
- Justice Kennedy criticized *Quill* in *Direct Marketing Association v. Brohl* noting that, internet sales have risen astronomically since 1992 and states and local governments are unable to collect most taxes due on sales from out-of-state vendors.

States Respond

- Following the 2015 Kennedy opinion, 12 state legislatures passed laws between 2015 and 2017 requiring remote vendors to collect sales tax in order to challenge *Quill*.
- South Dakota's law was the first ready for Supreme Court review.
- It requires out-of-state retailers to collect sales tax if they annually conduct $100,000 worth of business or 200 separate transactions in South Dakota. No retroactive liability.

Oral Argument

- Before oral argument three likely votes for overturning *Quill:*
  - Justice Kennedy
  - Justice Gorsuch
  - Justice Thomas
- After oral argument is was safe to assume Kennedy, Gorsuch, and **Ginsburg**, (safe to assume Thomas)
- No clear 5th vote

Holding

- 5-4 in an opinion authored by Justice Kennedy
- *Quill* and *Bellas Hess* were not only wrong in their interpretations of the Commerce Clause at the time they were decided, but that "[e]ach year, the physical presence rule becomes further removed from economic reality", particularly given the boom of e-commerce, "and results in significant revenue losses to the States."

Holding

- Supreme Court held states and local governments can require vendors with no physical presence in the state to collect sales tax in some instances.
- In this case "economic and virtual contacts" between South Dakota and Wayfair were enough to create a "substantial nexus" with South Dakota under *Complete Auto,* allowing the state to require collection.
- Court noted that State and local governments were losing between $8-$33 billion big deal a year.

Ignoring *Stare Decisis* is a Big Deal but Times have Changed

- In 1992, less than 2 percent of Americans had Internet access. Today that number is about 89 percent.
- In 1992, mail-order sales in the United States totaled $180 billion. Last year, e-commerce retail sales alone were estimated at $453.5 billion.
- In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Now estimates range from $8 to $33 billion.

Stare Decisis – Reliance?

- In terms of reliance principles, which sometimes countenance against overruling precedent, the Court noted that the **physical presence rule is not clear or easy to apply.** Many states working on other ways to get around physical presence at the margins:
  - notice / reporting;
  - "click through" nexus statutes;
  - Making apps available to be downloaded by in-state residents / placing cookies on in-state residents' web browsers.

Stare Decisis – Reliance?

- Further, reliance principles only apply for "legitimate reliance interests," and here, the tax problems States face is largely due to consumers failing to comply with lawful use taxes and so the companies should not be allowed to argue that they are relying on "opportunities for tax avoidance" as a legitimate constitutional concern.

Why Not Wait for Congress?

- "…Congress has the authority to change the physical presence rule, [however,] Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation…. It is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States."

What Did the Court Say about South Dakota's Law?

- To require a vendor to collect sales tax, the vendor must still have a "substantial nexus" (*Complete Auto*) with the state.
- The Court found a "substantial nexus" in this case based on the "**economic and virtual contacts**" Wayfair has with the state.
  - "A business could not do $100,000 worth of business or 200 separate transactions in South Dakota "unless the seller availed itself of the substantial privilege of carrying on business in South Dakota"
  - "And respondents are large, national companies that undoubtedly maintain an extensive virtual presence"

What Did the Court Say about South Dakota's Law?

- Three features of South Dakota's tax system that "appear designed to prevent discrimination against or undue burdens upon interstate commerce."
  - Provide a safe harbor to those who transact only limited business in South Dakota.
  - Don't collect retroactively.
  - Join the Streamlined Sales and Use Tax Agreement.

Dissent (Roberts)

- "I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the 'Internet's prevalence and power have changed the dynamics of the national economy.' But that is the very reason I oppose discarding the physical-presence rule. Ecommerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. **Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress."**

Dissent continued

- "Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers" with over 10,000 jurisdictions levying taxes. This is especially true for small businesses.
- Different definitions / standards apply. E.g., Illinois categories Twix and Snickers bars as food and candy respectively and taxes them differently.
- Really a crisis where we need to change the rules? Amazon is collecting.
- Better to leave to Congress, more flexibility to address these issues and investigate them.

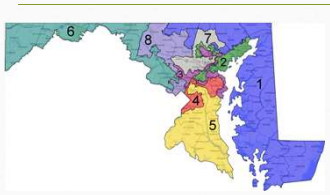
Open Questions after Wayfair

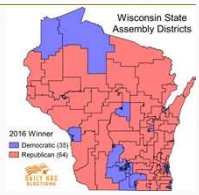
- Will South Dakota's law meet constitutional scrutiny?
- What about other laws that have harsher provisions like retroactivity?
- Is South Dakota's minimum threshold the floor? Should population be taken into account? (Easier to get to 200 transactions in California v. South Dakota).
- Will Congress Act?

How Much Money is Your State Going to Get?

- See Government Accountability Office November 2017 report: *States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs.* Table 6 offers a "high" and a "low" estimate for most states.
- Estimates for South Carolina range from 132 million to 193 million.

Partisan Gerrymandering Cases





Background*: Vieth v. Jubelirer,* 541 U.S. 267 (2004)

- Claim that PA's redistricting plan was the product of partisan gerrymandering.
- Deeply divided court. 4 Justices said Court should never review partisan gerrymandering cases. 4 Justices said Court can review them.

***Vieth v. Jubelirer,* 541 U.S. 267 (2004)**

- Justice Kennedy concurred in the judgment only.
- Also opined that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."

***Gill v. Whitford:* Facts**

- Wisconsin legislators redrew state assembly districts based on a model designed to predict the likelihood that various proposed districts would elect a Republican.
- In the 2015 election, Republican candidates received less than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts; and, in 2014, 52% of the vote yielded 63 seats for Republicans.

Challengers' Arguments

- Challengers argued new redistricting plan was an unconstitutional partisan gerrymander.
- Argued that the legislature created a plan that was intended to dilute Democratic votes, using two methods: "cracking" and "packing."

Three Judge Panel

- A divided panel of three federal judges ruled that the map enacted by the legislature was a result of partisan gerrymandering and prohibited by the First and Fourteenth Amendments.
- The three-judge panel ordered that new legislative districts be drawn by this November for the 2018 elections.
- Supreme Court **stayed** that order until it has a chance to rule on the case.

Gill v. Whitford

- **Issue:** Whether partisan gerrymandering cases are justiciable and if so, by what standard should the constitutionality of these claims be measured?

Challengers Proposed 3-Part Test

1. Is there discriminatory intent?
2. Is there a discriminatory effect? Measured by "efficiency gap." Proposed that an efficiency gap over 7% would demonstrate discriminatory effect.
3. Can the redistricting plan's "partisan effect can be explained by the legitimate state prerogatives and neutral factors that are implicated in the redistricting process."

Oral Argument Highlights

- **Standing** to challenge the whole map? Maybe under First Amendment.
- Chief Justice concerned about **integrity** of Supreme Court if they hold that these claims as justiciable
- Ginsburg noted that "precious right to vote" is at stake.
- Kennedy did not ask attorney for challengers any questions.

Benisek v. Lamone

- Involves Maryland's 6th Congressional District.
- Voters elected a Republican in the 2010 election, but since it was redrawn in 2011, the District has consistently elected Democrats.
- Redrawn map resulted in a more than 90,000-voter swing in favor of Democrats, and the share of registered Republicans fell from 47 percent to 33 percent.

Benisek v. Lamone

- Claim is **First Amendment retaliation** challenge to a partisan gerrymander (different theory than Gill).
- Republicans challenge the map, claiming it was drawn in retaliation for their voting Republican in prior elections in violation of the First Amendment.

Benisek Oral Argument

- Justices were struggling on what to do with these cases.
- Breyer suggested holding over Benisek and Gill for next term and combining it with a then-pending petition from North Carolina so they could reargue them all together.
  - Breyer: "Because I do see an advantage. You could have a blackboard and have everyone's theory on it, and then you'd have the pros and cons and then you'd be able to look at them all and then you'd be able see perhaps different ones for different variations and, you know, that's -- maybe there are different parts of gerrymandering that rises in different circumstances, dah-dah-dah. You see the point."

Gill Holding: 7-2 by Chief Justice Roberts

- **Court did not decide whether partisan gerrymandering cases are justiciable** because the plaintiffs lacked Article III standing.
- Instead of remanding the case with instructions to dismiss, which would be the usual course of action, the Court noted that this was "not the usual case," and remanded the case to allow the parties to "prove concrete and particularized injuries using evidence … that would tend to demonstrate a burden on their individual votes."

How do you Prove Standing?

- The Court noted that the plaintiffs' claims are based on the allegations that their votes have been diluted, which means that to have standing, an individual voter must show that **his or her district was "packed" or "cracked" as opposed to focusing on statewide harm to their interests**.
- The Court noted that the injury being alleged is "district specific" and the remedy sought must be "limited to the inadequacy that produced his injury in fact."

How do you Prove Standing?

- The Court noted that four of the plaintiffs in this case pleaded the type of particularization needed for standing purposes, but then failed to establish standing at trial (because they did not testify). Instead of presenting evidence at trial as to their individual harm, they rested their case on their theory of statewide injury to Wisconsin Democrats, which the Court today rejected for standing purposes.

Kagan Concurrence (4 Justices total)

- Agreed with Court majority opinion on standing, but wrote separately to endorse the challenger's arguments and provide a roadmap for how to proceed on the merits, once standing is established. "But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan."
- Also explained that First Amendment associational claim would be "statewide" in nature and thus not district specific (this type of claim was not brought below).

Thomas Concurrence (Joined by Gorsuch)

- Agreed no standing, but would not have remanded and followed the "unusual course" of the majority.

Benisek v. Lamone Holding (Per Curiam)

- This case came to the Court on a preliminary injunction motion.
- Even if Court assumed a likelihood of success on the merits, the balance of equities and the public interest weighed in favor of upholding the district court's denial of the PI because the plaintiffs failed to show "reasonable diligence" in pursuing their complaint, **waiting six years after the map was drawn before seeking a preliminary injunction.**
- Public interest weighed in favor of denying injunction given interest in orderly elections.

Gill v. Whitford

- There were likely four votes to find unconstitutional gerrymandering in this case (Kagan's concurrence).
- Why did Justice Kennedy not provide the fifth vote?
  - If he had this case could have been the biggest decision of this century so far.
  - Leaving the Court.

Is Partisan Gerrymandering Dead?

- As long as the Court has five solid conservatives—probably for now. But…
  - Lower courts want a standard and will continue to push the Court to give them one.
  - Cases exist which have much worse efficiency gaps than Wisconsin's
    - NC: The 2016 efficiency gap, was 19.4% favoring Republican candidates; the thirteenth highest in all of the United States from 1972 to 2016
  - State constitutions offer a possible remedy (Pennsylvania).

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission

Facts

- Masterpiece is a bakery open to the public in Colorado.
- A same-sex couple requested a cake for their wedding.
- The owner said no, claiming creating wedding cakes for same-sex weddings conflicts with his religious beliefs.
- He offered to sell them other baked goods. They left without buying anything.

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission: Background

- Colorado Public Accommodation Law: "It is a discriminatory practice … for a person…to refuse, withhold from, or deny to an individual or a group, because of …**sexual orientation**…the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of **public accommodation** ..." CO Rev Stat § 24-34-601 (2016).

Definition of Public Accommodation

- "'Place of public accommodation' means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public…"
- "'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes."
- CO Rev Stat § 24-34-601 (2016).

The Colorado Court of Appeals

- Held in favor of same-sex couple / Rejected speech and expression claims.
- Rejected argument that the refusal was based on opposition to same sex marriage and not discrimination, noting it was a distinction without a difference.
- Applied **rational basis /lowest level of scrutiny** to Colorado's law.

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission: Issue

- Issue: 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.

Petitioner's (Masterpiece Cake) Arguments

- **Compelled-speech** doctrine forbids the Commission from demanding that artists design custom expression (a cake) that conveys ideas they deem objectionable.
- Compelling the cakemaker to create a wedding cake for a same sex couple violates the **Free Speech** and **Free Exercise** Clauses of the **First Amendment**.
- Cannot satisfy **strict scrutiny (highest level / nearly always fatal to claims)**.

Respondent's (Commission) Arguments

- First Amendment does not prohibit Colorado from banning discrimination by commercial entities when they sell goods and services to the public.
- The Act was applied to regulate commercial conduct, not speech. Simply requires a business to serve customers on equal terms.
- Court should apply intermediate scrutiny (more likely to survive).

Individual Respondents

- No basis for applying strict scrutiny.
- The bakery's and the United States' requested exceptions are unsupported and unworkable. i.e., Slipper slope. (What about other protected classes, not just about LGBT if we create an exception)

SLLC / IMLA

- Historical role of state / local governments in anti-discrimination laws (race and gender).
- Prevalence of sexual orientation anti-discrimination laws (21 states and over 100 local governments have them).
- If Court wishes to carve out a religious exemption for public accommodation laws, this is not the case to do it.

Oral Argument: Justice Kennedy

- "If you prevail, could the baker put a sign in his window, we do not bake cakes for gay weddings? … And you would not think that an affront to the gay community?"

Holding Justice Kennedy (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."

Implications / What's Next?

- "[t]he outcome of cases like this in other circumstances must await **further elaboration in the courts**…" and "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."
- Note: same baker is now suing the state officials, alleging religious discrimination over his refusal to make a cake celebrating a gender transition.

Trump v. Hawaii

Trump v. Hawaii

- Third "travel ban", which placed entry restrictions on nationals of eight countries (Chad, Iran, Somalia, Libya, North Korea, Syria, Venezuela, and Yemen).
- In executive branch's view, these countries presented deficient information-sharing practices and therefore presented national security concerns.
- The Ninth Circuit upheld grant of a nationwide injunction barring the enforcement of the entry restrictions.

Challenger's Arguments

1. Violates the Establishment Clause / motivated by anti-Muslim animus. "[a]t the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation."
2. Lacked authority under the Immigration and Nationality Act to impose the restrictions

Trump's Statements

- Numerous campaign statements including a formal statement in December 2015 on his website "calling for a total and complete shutdown of Muslims entering the United States." Remained on his campaign website until May 2017. (Before and after election)
- Statements after he became President about the "travel ban" and lawyers watering it down and making it "politically correct." Retweeting anti-Muslim videos, etc.

Court's Ruling: Authority under the INA

- The plain language of the INA "grants the President broad discretion to suspend entry of aliens into the United States" and that "[t]he President lawfully exercised that discretion based on his findings …that entry of the covered aliens would be detrimental to the national interest."

Court's Ruling: No Establishment Clause Violation

- "Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, **neutral on its face**, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself."

Can the Court Even Look "Behind" the Neutral Policy and Use President's Words?

- Maybe. Assuming it could, rational basis (most deferential) review standard applies. Under this standard, the Court concluded that there was "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from religious hostility…"
- It was a neutral policy on its face and there were legitimate reasons for the policy despite Trump's statements. First E-O that singled out Christians for favored treatment might not have fared as well.

Justice Sotomayor Dissent

- Focused exhaustively on President Trump's anti-Muslim statements both as a candidate and President., chiding the majority for "briefly recount[ing] a few of the statements and background events that form the basis of [their] constitutional challenge" and notes "[t]he full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith."
- Notably, Justices Sotomayor and Ginsburg would not disregard the President's campaign statements in determining whether an official policy in question violates the Constitution.

Relevance to Local Governments

- **Statements by elected officials**. Can plaintiffs use this case to challenge laws and policies based on both candidates' and governmental officials' extraneous statements. Both *Masterpiece Cakeshop* and this case seem to open the door.
- Courts may also use a higher / less deferential standard outside the context of this case (Presidential directive related to national security).
- Nationwide injunctions – Justice Thomas' concurrence.

Lozman v. City of Riviera Beach

Lozman v. City of Riviera Beach

- Lozman, an outspoken critic of the City Council, was speaking during public comments portion of the City Council meeting.
- Directed to stop his comments by a Councilperson or he would be arrested. He was given the option to leave the meeting in lieu of being arrested, but refused.
- Arrested for disorderly conduct / resisting arrest.

Lozman v. City of Riviera Beach

- Charges against him were dismissed and Lozman brought suit under Section 1983, claiming retaliatory arrest.
- Jury returned verdict in favor of City and Eleventh Circuit upheld the verdict, holding that probable cause to arrest Lozman defeated his First Amendment retaliatory arrest claim as a matter of law.

Lozman v. City of Riviera Beach

Issue: Whether the existence of probable cause defeats a First Amendment **retaliatory arrest claim** as a matter of law.

SLLC / IMLA Brief

- Lozman's rule will make it more difficult to maintain **safety and order** at local-government meetings, public protests, and political rallies.
- Lozman's rule will make it **easier to state frivolous claims** not only against officers but against municipalities as well.
- **Other protections in place** for people like Lozman (state constitutions, internal police discipline).

Oral Argument Highlights

- Chief Justice Roberts found the video "chilling."
- Justices Breyer and Kennedy were concerned about police officer's ability to make arrests when confronting violence at riots / bar fights.
- All Justices seemed very sympathetic to Lozman, but most recognized challenges for police officers too.

Holding (Kennedy)

- The Court held 8-1 that Lozman could pursue his claim against the City for an **"official municipal policy"** of intimidation / retaliation in violation of the First Amendment under *Monell.*
- Transcript of a closed-door city council session wherein Wade suggested the City should "intimidate" Lozman.
- Court assures us that there is "little risk of a flood of retaliatory arrest suits against highlevel policymakers."

How do you Prove a Claim?

- To prove this "unique class of retaliatory arrest claims," ***Mt. Healthy*** provides the correct framework.
- Under the *Mt. Healthy* rule, a plaintiff establishes speech-based retaliation by demonstrating that the defendants would not have taken the challenged action **"but for"** their **retaliatory motive.**
- The Court specifically held that it was not addressing the elements required to prove retaliatory arrests in other contexts, such as where a police officer makes an on-the-spot.

Thomas Dissent

- Justice Thomas was the lone dissenter.
- In his view, he would have answered the actual question presented and concluded that the lack of probable cause is a required element to pursue a First Amendment retaliation claim.

Janus v. American Federation of State, County, and Municipal Employees, Council 31

Background

- This case involves the constitutionality of "agency fees."
- Public-sector employees who decline to join a union are still required under many laws to pay an "agency fee," or their "fair share," which amounts to a percentage of the union dues meant to represent the portion attributable to activities that are "germane to [the union's] duties as collective bargaining representative."

Facts

- In this case, Janus refused to join the union and the total chargeable amount he was required to pay to the union was 78% of full union dues. He sued, claiming charging him for union dues when he disagrees with the union's policies and does not wish to join the union violates his First Amendment rights.

Holding

- In a 5-4 opinion authored by Justice Alito, the Supreme Court overruled *Abood v. Detroit Board of Education.*
- The Court held that the Illinois law at issue, which according to the Court, requires public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities…**violates the free speech rights** of nonmembers by **compelling them to subsidize private speech on matters of substantial public concern."**

What about Stare Decisis?

- The Court noted that the doctrine is "weakest when [the Court] interpret[s] the Constitution…" and five factors weighed in favor of overruling *Abood:* (1) the quality of its reasoning; (2) "the workability of the rule it established"; (3) "its consistency with other decisions," (4) "developments since the decision was handed down," and (5) "reliance on the decision."

Implications

- States and local governments that have any laws or policies relating to agency fees for unions should immediately review those to determine whether they can continue to be applied post-*Janus* and take immediate actions to make sure you are in compliance with the decision.
- Second big case this term that overruled precedent.

Janus Implications

- "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, **unless the employee affirmatively consents to pay**. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed."

Supreme Court through the end of July

Conservative
- Chief Justice Roberts
- Kennedy*
- Thomas
- Alito
- Gorsuch

Liberal
- Ginsburg
- Breyer
- Sotomayor
- Kagan

Kennedy Observations

- Justice Kennedy ruled the world
  - In the majority in all the big cases
  - *South Dakota v. Wayfair*—his idea, his opinion
  - Cake case / Lozman—he writes the opinion, his theory of the case triumphs
  - Partisan gerrymandering—Roberts and Kagan were fighting for his vote

Kennedy Observations

- Why was he so indecisive/narrow this term?
  - Cake case—really torn?
  - Partisan gerrymandering—waiting for something worse?
- Because he knew he was leaving?
- Why was has so conservative this term?
  - He is a conservative

Kennedy Observations

- He was angry about something you all should care about—misbehavior by the government
  - Cake case—discriminatory statements by Colorado Civils Rights Commission members
  - NIFLA—state legislatures congratulating themselves for forcing people to say things they don't want to say
  - Lozman—City Council "official municipal policy" of retaliation
  - Travel ban—government officials speaking and acting with discriminatory animus

His Parting Words are to Elected Officials

- There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does **not mean those officials are free to disregard the Constitution and the rights** it proclaims and protects. The **oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do**. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

His Parting Words are to Elected Officials

- The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. **An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts**.

Where did He Provide the Critical 5th Vote?

- Anything, everything
  - Gun rights
  - Death penalty
  - Affirmative action
  - Abortion
  - Same sex marriage
  - Land use
  - *Citizens United*

Where Was Justice Kennedy "Liberal"?

- LGBTQI issues
- Death penalty
- Race (sometimes)
- Abortion (sometimes)

Who is Justice Kavanaugh?

- We know three things about him for sure
  - Very conservative (could be an even more reliable conservative)
    - In between Thomas and Gorsuch/Alito
  - Over 1/3 of his opinions involve administrative law
  - He hasn't ruled on a lot of cases involving bread and butter issues for local government because he has been on the D.C. Circuit

What We Have Seen So Far

- Pro-employer
- Pro-law enforcement (qualified immunity, Fourth Amendment)
- Pro-gun
- Pro-free speech
- Anti-agency deference
- Anti-environmental regulation

What We Can Guess

- Pro-property rights
- Pro-religion in public spaces
- Pro-closing the courthouse door
- Anti-race-based decision making

Not Just How He Votes

- Kavanaugh will be able to affect what cases the Court takes .
- Four votes are needed to accept a case.
- Kennedy and Roberts were likely votes to strike down state and local restrictions on guns.
- Neither would provide the fourth vote to take a gun case.
- Liberal Justices may also not want to take up partisan gerrymandering again.

Looking to the Future

- Most popular this past term: Chief Justice Roberts (in the majority 93% of the time)
- Roberts will most likely now be the swing Justice.
  - And the Chief Justice
  - How much swinging will be happening?

2018 Supreme Court Docket

- Mount Lemmon Fire District v. Guido
- Weyerhaeuser Company v. U.S. Fish and Wildlife Service
- Knick v. Township of Scott
- Gamble v. United States
- Timbs v. United States
- Tennessee Wine & Spirits Retailers Association v. Byrd
- Royal v. Murphy
- Franchise Tax Board of California v. Hyatt
- Maryland-National Parks Comm'n v. American Humanist Association
- Nieves v. Bartlett

Nieves v. Bartlett (Lozman Part Deux)

Nieves v. Bartlett

- **Issue**: Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.
- Third time this issue is before the Court
  - *Lozman* – municipal policy custom
  - *Reichele* – decided on qualified immunity grounds

Facts

- "Arctic Man" festival = lots of drinking, extreme sports in remote portion of Alaska
- Troopers encounter Bartlett who refuses to speak to them. They then see a minor who appears to be drinking alcohol and go to talk to him.
- Bartlett, who is intoxicated and weighs 240 lbs, rushes over and stands very closely to Trooper Weight, who took his actions as " hostile and aggressive" so he pushes Bartlett to create space. They then arrest him for disorderly conduct / resisting arrest.

Facts

- Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now" – First Amendment hook.
- Charges are dropped against Bartlett due to budgetary constraints.

Ninth Circuit Ruling

- Plaintiff can proceed on a retaliatory arrest claim even if the officers had probable cause to arrest.
- In this case, because Bartlett alleged that Nieves said: "bet you wish you would have talked to me now," a reasonable jury could have found that the arrest was in retaliation for his refusal to answer questions earlier in the evening and summary judgment was therefore inappropriate.

Counting Votes

- Thomas dissented in Lozman and would have advocated for a brightline rule.
- From there it is a guessing game, but seems likely that Chief Justice Roberts and Justice Alito will join Thomas based on comments they made in oral argument in Reichle and Lozman. Gorsuch and Kavanaugh tend to be pro-law enforcement.
- Breyer was concerned about the "bar fight" scenario during Lozman's oral argument but likely would not favor a brightline rule barring all cases.
- Compromise decision v. brightline rule?

Contact Information:
Amanda Kellar, Director of Legal Advocacy for IMLA
akellar@imla.org
202-466-5424

International Municipal Lawyers Association
Advancing Excellence in the practice of Local Government Law