19TH ANNUAL SUPREME COURT REVIEW

Written Materials

JULY 10, 2018

CIVIL RIGHTS DIVISION ▪ LEGAL AFFAIRS DEPARTMENT

 605 Third Avenue, New York, NY 10158 www.adl.org contactus@adl.org

Table of Contents

SUPREME COURT – 2018 TERM

Trump v. Hawaii **(SCOTUS: June 26, 2018) (ADL Brief)**

Issue**:** At issue in this case was President Trump's third attempt at prohibiting travel to the United States from six majority-Muslim nations. The Ninth Circuit affirmed an injunction put in place by the district court, which protected foreign nationals with a *bona fide* relationship with a person or entity in the United States.

ADL Brief**:** ADL's brief, which was joined by other Jewish organizations, urged the Supreme Court to leave the injunction in place. The brief pointed to three historical examples when the U.S. turned its back on immigrants and refugees and later apologized, including the tragedy of the USS St. Louis, in which Jews fleeing Nazi Germany were denied entry into the U.S. and sent back to Europe, where many perished in the Holocaust; the "Chinese Exclusion" Act that barred thousands of Chinese laborers from coming to America in the 1800s; and the internment of the Japanese during World War II. It warned against repeating the shameful times in our past when America has turned against those ideals.

Judgment/Holding**:** Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on June 26, 2018. The president has lawfully exercised the broad discretion granted to him under the Immigration and Nationality Act (INA) based on his claims of national security concerns. The Court rejects claims of anti-Muslim bias and holds that the order is directly based on a legitimate purpose: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."

Notable Dissent: The majority's decision "leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns." It does so "by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens." (Sotomayor, J.)

Jennings v. Rodriguez **(SCOTUS: February 27, 2018)**

Issue: This case involves a class-action challenge to the government's practice of detaining immigrants facing deportation for months or even years without due process. The 9th Circuit ruled that the government must provide individualized bond hearings to assess danger and flight risk when detention exceeds six months, and every six months thereafter.

Judgment/Holding**:** Reversed and remanded, 5-3, in an opinion by Justice Alito on February 27, 2018. Sections 1225(b), 1226(a) and 1226(c) of Title 8 of the U.S. Code do not give detained aliens the right to periodic bond hearings during the course of their detention; the U.S. Court of Appeals for the 9th Circuit misapplied the canon of constitutional avoidance in holding otherwise. "A court relying on that canon … must interpret the statute, not rewrite it." On remand, the 9th Circuit is instructed to address the constitutional challenges to the statute in the first instance.

***Notable Dissent*:** Doctrine of constitutional avoidance should have been applied because "the majority's interpretation of the statute would likely render the statute unconstitutional." (Breyer, J.)

Husted v. A. Philip Randolph Institute **(SCOTUS: June 11, 2018)**

Issue: This case involved a challenge by APRI to an Ohio law that provides that voters who miss a federal election will be subjected to a process that could ultimately result in their removal from the voter rolls. Under the process, a flagged voter must be sent a forwardable address-confirmation notice. If a voter does not respond and does not engage in voter activity for the subsequent four years, the voter's registration is automatically cancelled. Voters purged as a result of this process often did not see/understand the notice or realize they had been purged. The district court ruled in Ohio's favor, but the 6th Circuit reversed.

Judgment/Holding: Reversed, 5-4, in an opinion by Justice Alito on June 11, 2018. The process that Ohio uses to remove voters on change-of-residence grounds does not violate the National Voter Registration Act (NVRA). Subsection (d) of the NVRA specifically allows states to remove a voter who "has failed to respond to a notice" and "has not voted or appeared to vote." Not only "are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory." The Ohio practice at issue in this case "follows subsection (d) to the letter": "It is undisputed that Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years."

Notable Dissent: The Court's opinion "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." (Sotomayor, J.)

Abbott v. Perez **(SCOTUS: June 25, 2018)**

Issue: The case involved a 2011 challenge brought by individual voters in Texas, along with organizations representing African-American and Latinos, to Texas's congressional and state house plans in violation of the U.S. Constitution and Section 2 of the Voting Rights Act (VRA). A federal court in D.C. blocked Texas's plan under the pre-clearance provisions and a separate federal court in Texas imposed interim maps in 2011 as cases proceeded in two courts. Texas adopted new maps in 2013 similar to the interim maps the Texas court imposed in 2011. A district court in Texas found that the 2013 maps showed Texas's discriminatory intent and that some of the district violated Section 2 of the VRA.

Judgment/Holding: Reversed and remanded, 5-4, in an opinion by Justice Alito on June 25, 2018. The district court disregarded the presumption of legislative good faith and improperly reversed the burden of proof when it required the state to show a lack of discriminatory intent in adopting new districting plans. One of the challenged state house districts is an impermissible racial gerrymander. The lower court mistakenly put the burden of proof on Texas to show a lack of discrimination. There was not enough evidence to hold that the Texas legislature intentionally discriminated when they re-approved the 2013 maps. Justice

Alito writes that courts must "presume" the "good faith" of the legislature in determining whether a state was engaged in racial discrimination.

Notable Dissent: The ruling "comes at serious costs to our democracy. It means that after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas…will continue to be underrepresented in the political process…. [T]he fundamental right to vote is too precious to be disregarded in this manner." (Sotomayor, J.)

Gill v. Whitford **(SCOTUS: June 18, 2018) (ADL Brief)**

Issue: At issue in this case is partisan gerrymandering. After the 2010 census, the Republican-controlled Wisconsin legislature engaged in redistricting. The district lines that would ultimately become law had a distinct partisan advantage for Republicans. A professor analyzing the plan concluded that Republicans would be able to maintain a 54-seat majority (of the 99 Assembly seats) while only garnering 48% of the statewide vote, while Democrats would have to get 54% of the vote to capture a majority of the seats. Plaintiffs, Democratic voters, alleged that the redistricting created an unconstitutional partisan advantage for Republicans.

ADL Brief: ADL joined a brief urging the Supreme Court to set limits on partisan gerrymandering. Citing the foundational principles of our democracy imagined by the Founders, the brief provides the Court with a historical perspective of the origins and progression of the fundamental values of representation and accountability, as well as the current views of Americans on political gerrymandering.

Judgment/Holding: Vacated and remanded, 9-0, in an opinion by Chief Justice Roberts on June 18, 2018. Plaintiffs failed to demonstrate Article III standing (no injury in fact). Case was remanded to the district court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes.

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n **(SCOTUS: June 4, 2018) (ADL Brief)**

Issue: Based on religious objections to the marriage of same-sex couples, the owner of a bakery refused to design and sell a wedding cake to a same-sex couple for their upcoming wedding. The Colorado Civil Rights Commission found that the bakery violated the state's anti-discrimination law, which prohibits sexual orientation discrimination in the sale of goods and services by public accommodations. In response to this violation, the petitioners, the bakery and its owner, raised multiple constitutional claims, including a claim that the Free Exercise Clause of the First Amendment permitted the denial of service to the couple.

ADL Brief: ADL joined an *amicus* brief filed by civil rights and religious groups. It asserted that particularly for generally applicable laws such as Colorado's anti-discrimination statute, the Free Exercise Clause does not authorize religious exemptions that harm others. Even if the Free Exercise Clause authorized such exemptions, the Establishment Clause of the First Amendment prohibits them.

Judgment/Holding: Reversed, 7-2, in an opinion by Justice Kennedy on June 4, 2018. The Colorado Civil Rights Commission's actions in evaluating the cakeshop owner's reasons for declining to make a cake for a same-sex couple's wedding celebration violated the First Amendment's Free Exercise Clause.

Notable Dissent: "The different outcomes the Court features [by the Colorado Civil Rights Commission] do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below." …. "When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. … Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse." (Ginsburg, J.)

NIFLA v. Becerra **(SCOTUS: June 26, 2018) (ADL Brief)**

Issue: At issue in this case was California's Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act (FACT) Act, which was enacted in 2015, to regulate the state's 300-plus Crisis Pregnancy Centers ("CPCs"). The law requires some licensed and unlicensed CPCs to post notices inside clinics indicating how women can access prenatal care, family planning, and abortion. In addition, it requires unlicensed centers to notify patients that they don't have a California medical license. A number of CPCs challenged this law arguing that it violated their right to free speech and free exercise of religion under the First Amendment. The District Court and 9th Circuit Court of Appeals disagreed.

ADL Brief: ADL joined a brief led by the National Women's Law Center and Center for Reproductive Rights along with 50 other reproductive justice, civil rights, and social justice organizations, focusing on the deceptive tactics of CPCs and their significant harm to women — especially women struggling to make ends meet. The tactics employed by CPCs are intentionally designed to misinform and dissuade women from accessing their constitutional right to an abortion. The brief included stories from women across the country who have been misled by CPCs. The brief argued that the required disclosures under the FACT Act were constitutional under the Court's context-based standard for evaluating compelled speech because the Act was a neutral, factual disclosure tailored to ensure women seeking reproductive healthcare in California have accurate information.

Judgment/Holding: Reversed and remanded, 5-4, in an opinion by Justice Thomas on June 26, 2018. Petitioners are likely to succeed on their claim that the FACT Act violates the First Amendment. The notice required for licensed centers "alters the content" of the licensed centers' speech and is therefore subject to strict scrutiny. The law does not pass muster because it is "wildly underinclusive" (it does not apply to most of the community clinics in the state or to federal clinics), and there are ways for the state to notify women about state-subsidized abortions without requiring the clinics to do so. In addition, the justification for the notice for unlicensed centers was "purely hypothetical" – the state pointed to no evidence

"suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals."

Notable Dissent: With respect to licensed centers, if a state can require a doctor to notify a woman seeking an abortion about adoption services, why can't it require a pregnancy center to inform a woman about abortion? With respect to unlicensed centers, it is "self-evident that patients might think they are receiving qualified medical care when they enter [these] facilities," and the Act's burden on speech in the vast majority of California's counties would be limited. (Breyer, J.)

Janus v. AFSCME Council 31 **(SCOTUS: June 27, 2018)**

Issue: *Janus* involves a challenge to agency (or "fair share") fees. The case was brought by Mark Janus, a child-support specialist with the State of Illinois Department of Healthcare and Family Services, challenging his requirement to pay union agency fees as a non-union member in violation of his First Amendment rights. Janus claimed the union advocated for political causes that he does not support.

Judgment/Holding: Reversed and remanded, 5-4, in an opinion by Justice Alito on June 27, 2018; overrules *Abood v. Detroit Bd. of Ed*. States and public-sector unions may no longer extract agency fees from nonconsenting employees, as doing so violates the First Amendment. Employees must choose to support the union before money is taken from them for fees. Alito writes that the First Amendment bars a state from requiring its resident to "sign a document expressing support for a particular set of positions on controversial public issues."

Notable Dissent: "There is no sugarcoating today's opinion…. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance." (Kagan, J.)

Carpenter v. United States **(SCOTUS: June 22, 2018)**

Issue: The case centers on the government's obtaining several months' worth of cell phone location records for suspects in a criminal investigation in Detroit in 2013 without getting a probable cause warrant. After one suspect, Timothy Carpenter, was convicted at trial, based in part on the cellphone location evidence, he appealed to the 6th Circuit Court of Appeals. The Court of Appeals held that no warrant is required under the 4th Amendment.

Judgment/Holding: Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on June 22, 2018. The government's acquisition of Carpenter's cell-site records from his wireless carriers was a 4th Amendment search and the government did not obtain the necessary warrant supported by probable cause before acquiring those records. The Court rejects the government's argument that people lose their privacy rights merely by using those technologies.