Supreme Court Update

Presented by Chuck Thompson

Hawaii Wildlife Fund v. County of Maui

Background

- The Clean Water Act distinguishes between the many ways that pollutants reach navigable waters. One way pollutants can reach navigable waters is via "point sources"—things like pipes and ditches.
- Runoff / groundwater are "nonpoint sources."
- The CWA regulates pollution added to navigable waters "from point sources" differently than pollution added "from nonpoint sources" and requires a permit for any discharges into point sources.

Issue

- Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Facts

- The County uses underground injection control (UIC) wells to dispose of wastewater.
- The wastewater eventually seeps out of the wells and mixes with groundwater which flows to the Pacific Ocean.
- The wells are regulated and permitted under federal and state safe drinking water programs.

Ninth Circuit Decision

- Held the County liable because: (1) "the County discharged pollutants from a point source" (i.e., the wells); (2) "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water"; and (3) pollutants reach navigable water at "more than de minimis" levels.

Maui's Arguments

- Statutory construction arguments: the text, structure, context, history, and purposes of the CWA all confirm that the CWA only requires a permit for pollutants discharged to navigable waters via a point source.

Hawaii Wildlife Fund's Arguments

- The CWA prohibits "any addition of any pollutant to navigable waters from any point source" without a permit. Argues that Maui seeks to avoid application of this prohibition by asserting that all additions of pollutants "to navigable waters from [a] point source" via groundwater are exempt.
- The wells in the case are point sources and Maui knows that the wastewater it injects into the wells flows into the Pacific Ocean (a navigable water).
- "A straightforward reading of the CWA's core prohibition, therefore, bars the County's unpermitted 'addition of [a] pollutant'—the Facility's effluent—'to navigable waters'—the Pacific—'from [a] point source'—the wells."

Supreme Court Holding

- Rejected both parties' arguments and came to a middle ground, concluding that the Act requires a permit when "the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters."

Factors to Consider to Determine if "Functional Equivalent" of a Direct Discharge

- Time and distance are the most important factors.
- Other factors are: "the nature of the material through which the pollutant travels"; "the extent to which the pollutant is diluted or chemically changed as it travels"; "the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source"; "the manner by or area in which the pollutant enters the navigable waters"; and "the degree to which the pollution (at that point) has maintained its specific identity

Behind the Scenes

- When the SCT granted certiorari, the environmental groups became concerned that their hard fought victory would tern Pyrrhic.
- Environmentalists lobbied the Maui council to settle and make the case moot.
- Council in 5-4 vote agree, but Mayor refuses.
- Who has the right to settle a case? Mayor or council or both?

Torres v. Madrid

Facts

- Two police officers were going to arrest a woman at her apartment. They noticed two people standing in front of her apartment and decided to talk to them as one of them may have been the person the officers were seeking to arrest.
- Torres, got into the car. She claims she was "tripping out" from meth.
- One of the officers told Torres several times to show her hands.

Facts

- When Torres heard the flicker of the car door, she started to drive thinking she was being carjacked. Torres drove at one of the officers who fired at Torres through the windshield.
- She was shot twice but drove away and ended up stealing another car and driving 75 miles to a hospital.
- She was arrested the next day.

Tenth Circuit Holding

- Torres wasn't seized under the Fourth Amendment because they "failed to 'control her ability to evade capture or control.'"
- Despite being shot, she did not stop or submit to officers' authority.
- There was therefore no excessive force in this case.

Issue

- Whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment or whether physical force must be successful in detaining a suspect.
- In other words, if someone doesn't stop, even if you use physical force (including shooting at them), are they "seized" within the meaning of the Fourth Amendment?

Why Does This Matter to Local Governments?

- Interest in limiting money damages paid by local governments. If there is no seizure under these circumstances, then no money damages are owed regardless of qualified immunity.
- Would also provide a bright line for litigants that would make it easier for local governments to get summary judgment in these cases (as opposed to arguing about reasonableness of use of force). Stops litigation earlier (saving money).

City of Chicago v. Fulton

Ordinance

- City may impound vehicles of individuals with 3+ unpaid violations for the purpose of enforcing its traffic regulations until the owner pays the outstanding fines and penalties.
- Impoundment can happen for unpaid parking tickets, moving violations, and driving with suspended licenses.
- "[a]ny vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle."

Facts

- The City of Chicago **impounded the debtors' vehicles** based on significant accumulated unpaid fines and penalties for parking tickets, moving violations, and driving with suspended licenses.
- Owners of the vehicles then filed for **bankruptcy** and sought to get their cars back through the bankruptcy proceedings without paying the fines.
- The City did not release the vehicles back.

Legal Background

- The Bankruptcy Code's automatic stay provision provides that a petition for bankruptcy operates as a **stay** of "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." 11 U.S.C. § 362(a)(3).

Court Decisions / Arguments

- Bankruptcy courts held that the City violated the bankruptcy stay by "exercising control" over property of the bankruptcy estate and ordered the City to turn over the vehicles immediately.
- City argues that the stay does not apply because the City *already* has possession of the vehicles. **They were impounded before the petitioner filed for bankruptcy.**
- The Seventh Circuit rejected these arguments and held in favor of the debtors.

Issue Before the Supreme Court

- Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.

Practical Implications for Cities

- Widespread practice –Hundreds of thousands of cars impounded each year.
- 7th Circuit's rule **undermines public safety, enforcement of traffic codes, and incentivizes frivolous bankruptcy petitions** filed solely to obtain the release of an impounded vehicle.
- Impoundment where the driver is under the influence of alcohol or drugs. Studies have shown impoundment to be effective in preventing repeat driving while intoxicated offenses.

Hot topics to come

- Fulton vs. City of Philadelphia – will Employment Division vs. Smith be overturned?
- Qualified Immunity – is qualified immunity in peril? What if the court concludes that Section 1983 did not include immunity for public officials?
  - Pierson v. Ray - 386 U.S. 547 (1967)

Title VII Sexual Orientation / Transgender Cases

Bostock v. Clayton County /Altitude Express v. Zarda

- Issue: Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's **sexual orientation.**

R.G. & G.R. Harris Funeral Homes v. EEOC

- **Issues**: Whether Title VII prohibits discrimination against **transgender** people based on (1) their status as **transgender** or (2) **sex stereotyping** under *Price Waterhouse v. Hopkins*, which indicates that a company can't discriminate based on stereotypes of how a man or woman should appear or behave.

Price Waterhouse v. Hopkins

- Gender stereotype case. Concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination.
- The Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." 490 U.S. at 258.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)

- Title VII covers male-on-male sexual harassment in the workplace
- **"…statutory prohibitions often go beyond the principal evil** to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."

Plaintiffs' Arguments

- Plain language argument: Sexual orientation discrimination is sex discrimination because sexual orientation is a sex-based classification.
- Also constitutes sex stereotype discrimination under *Price Waterhouse*.
- Statutory history and Supreme Court precedent (*Oncale* / *Price Waterhouse*) confirms that Title VII forbids sexual orientation discrimination.
- Contrary ruling would be unworkable.

Employer & Federal Government Arguments

- Sex and sexual orientation are separate and distinct concepts, and employment decisions based on sexual orientation do not treat employees of one sex more favorably than similarly situated employees of the other sex.
- "In short, the Second Circuit simply changed the ultimate question from sex to sexual orientation. But because both men and women may have same sex attractions or partners, a stand-alone allegation of sexual orientation discrimination cannot, without more, show discriminatory treatment."

Oral Argument Highlights

- All eyes on Gorsuch. Kavanaugh only asked 1 question.
- Lots of concerns about the "next" case – bathrooms, locker rooms, sex segregated sports teams.
- Concern that if the Court rules in favor of employees, it can't carve out religious exemptions like Congress would/could if it were to craft legislation.
- Example of employer firing Catholic employee for marrying Jewish person. Not against Catholics, not against Jews, just against them marrying each other.

Predictions / Next Steps

- Likely a 5-4 decision and Justice Gorsuch seems to be the only Justice "in play" who could break other conservatives if he wants to provide a strict textualist approach.
- More likely, it will be 5-4 split on ideological lines.
- Congress will have to step up, as will state legislatures if the Court finds the term "because of sex" does not protect people based on sexual orientation / gender identity.

Department of Homeland Security v. Regents of the University of California (DACA)

Background

- In 2012, US adopted DACA to postpone deportation of undocumented immigrants brought to America as children and, if they met certain conditions, to assign them work permits allowing them to obtain social security numbers, pay taxes, and become part of the mainstream economy.

DACA Rescission

- In 2017 Trump administration rescinded DACA, arguing that it was illegal from its inception, and therefore could no longer continue in effect.
- Believed that it was illegal based on the same constitutional defects the Fifth Circuit recognized for DAPA (Deferred Action for Parents of Americans).
- Did not rescind based on policy preference, rather rescinded because argued it was illegal from the start.

State & Local Governments File Suit

- Challengers including state and local governments brought suit, arguing that rescinding DACA was arbitrary and capricious under the Administrative Procedure Act.
- Argue that defendants' rescission of DACA will injure state-run colleges and universities, upset the States' / local governments' workforces, disrupt the States' statutory and regulatory interests, cause harm to hundreds of thousands of their residents, damage their economies, and that it will hurt companies based in their States.

Importance of Issue for Cities

- Nationally, DACA recipients pay an estimated $1.7 billion in state and local taxes every year that go to fund critical programs administered by cities.
- Extensive evidence shows that undocumented immigrants—and their lawfully present family and neighbors—fear that turning to the police will bring adverse immigration consequences, and thus are less likely to report crimes.
- Many DACA recipients work for cities and counties and are valuable employees.
- If they lose their ability to work, they are more likely to need safety net services provided by local governments, which will in turn cost cities more money.

Lower Court Decisions

- Three lower courts have concluded ending the policy is both reviewable and likely unlawful.
- The Ninth Circuit concluded that the decision to rescind DACA is not committed to agency discretion and is therefore **reviewable** by courts.
- The Ninth Circuit also concluded that the plaintiffs were likely to show that the decision to rescind the policy was **arbitrary and capricious** under the APA because it was based on a **flawed legal premise**.

Ninth Circuit Holding

- "To be clear: **we do not hold that DACA could not be rescinded as an exercise of Executive Branch discretion**. We hold only that here, where the Executive did not make a discretionary choice to end DACA—but rather acted based on an erroneous view of what the law required—the rescission was arbitrary and capricious under settled law. **The government is, as always, free to reexamine its policy choices,** so long as doing so does not violate an injunction or any freestanding statutory or constitutional protection."

Nielson Memo: New Reasons for DACA Rescission?

- First reason is still that it is **unlawful**. Adds additional policy reasons, including that DHS wants to project "clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens."
- 1 paragraph on reliance: "In my judgment, neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress, a status that the DACA non-enforcement policy did not change."

Issue

- Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is (1) judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

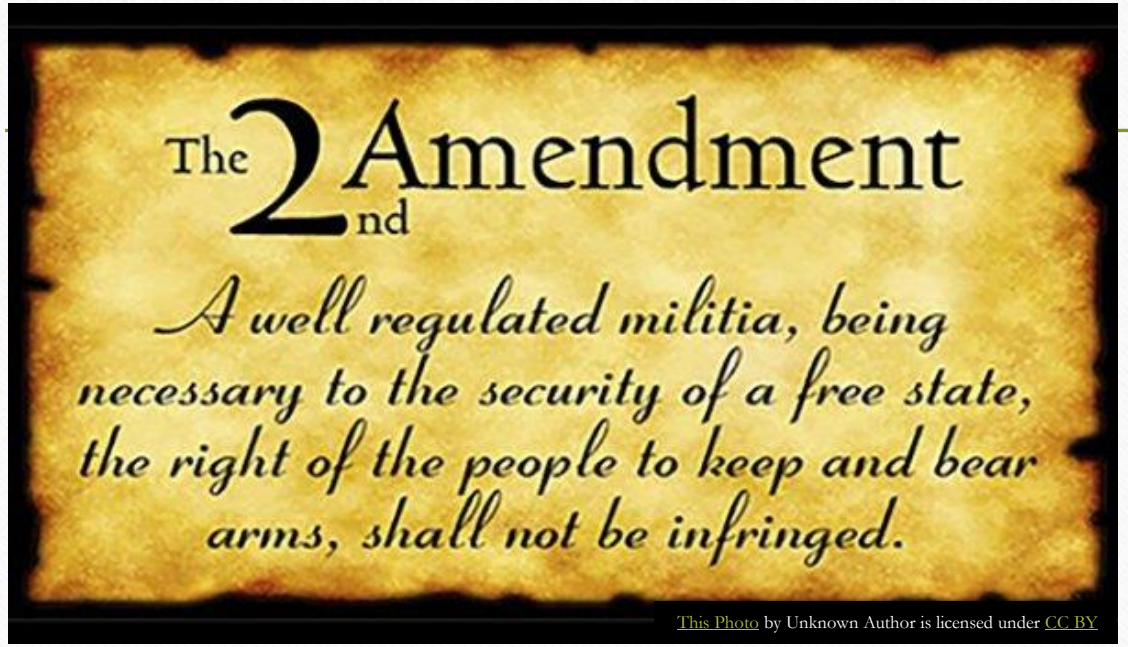
Oral Argument Highlights

- **Reliance interests**: Did the federal government adequately consider those interests when it chose to rescind DACA.
- If the issue of illegality was taken away, that would mean the Trump administration would have to "own" the decision to rescind based on its own choices / policy preferences.
  - Sotomayor on this point: "This is not about the law; this is about our choice to destroy lives."

Predictions / Next Steps

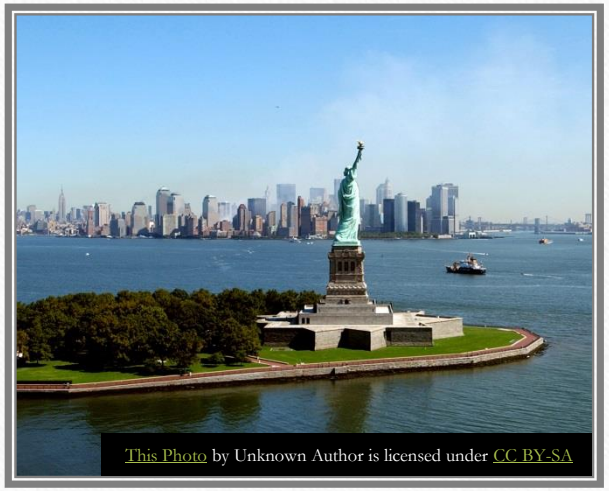
- If the Court says decision to rescind DACA was lawful and/or unreviewable, likely won't occur until late June 2020. This will put the issue squarely in the middle of the Presidential election.
- If a Democratic candidate for President is elected, fair to assume she/he could reinstate DACA via executive order fairly quickly.
- Congress can always act to provide protection for DREAMers. It would be better for *everyone* if Congress does this because a President is simply deferring deportation and these policies are generally considered temporary. Congressional legislation would mean we'd have a permanent solution and clear path for these individuals.

New York State Rifle & Pistol Ass'n v. City of New York



Facts

- A New York City administrative rule allows residents to obtain a "carry" or "premises" handgun license.
- The "premises" license allows a licensee to "have and possess in his **dwelling**" a pistol or revolver. A licensee may **only** take his or her gun to specific shooting ranges <u>located in the city</u>.
- Challengers want to bring their guns outside the city.



Legal Background

- In 2008 in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an **individual's right** to possess a firearm for purposes of self-defense **in the home.**
- The Court did not state whether an individual has a Second Amendment right to possess a gun ***outside the home***.

Challengers' Arguments

- Challengers want to bring their handgun to their second home outside the City and to target practice outside the City and claim the premises license violates their Second Amendment rights.
- They also bring challenges under the Commerce Clause and the constitutional right to travel.

Second Circuit Ruling

- The Second Circuit held the law is constitutional on all accounts.
- Intermediate scrutiny on the Second Amendment claim, the Second Circuit held the rule was "substantially related to the achievement of an important governmental interest." It seeks to "protect public safety and prevent crime."

Issue Before Supreme Court

- Whether New York City's ban on transporting a handgun to a home or shooting range outside city limits violates the Second Amendment, the Commerce Clause, or the constitutional right to travel.

Implications for Local Governments

- The first Second Amendment case the Court has taken in nearly 10 years.
- Potential for a sweeping ruling in the case that could provide for strict scrutiny for all gun law regulations, which could call into question a host of other gun law restrictions that local governments impose throughout the country.
- Scope of right to carry firearms outside the home. Is this a protected right?

The Plot Thickens – Moot?

- NYC argues that 2 subsequent changes in law render the litigation moot.
  - First, the City has amended the challenged regulation to enable holders of premises licenses to transport their handguns to additional locations, including second homes or shooting ranges outside of city limits.
  - Second, the State of New York has amended its handgun licensing statute to require localities to allow holders of premises licenses to engage in such transport.
- Argue they can now do exactly what they asked to do: transport their handguns within New York City to take them to shooting ranges and second homes outside the City.

Holding by 6 Justices = Moot

- Concluding the issue in the case is now moot given that both the State and the City amended their laws to provide "the precise relief that the petitioners requested…" The Court remanded the case to the Second Circuit to address any residual disputes, including whether the new rule would still infringe on any of the petitioners' rights given that they argue that they may not be allowed to stop for gas, coffee, or food when transporting their firearms from their homes in New York City to shooting ranges or homes outside the city

Dissent by Alito

- In the dissent, Justice Alito complains that "[b]y incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced." The dissent goes on to argue that New York City had failed to meet its heavy burden to demonstrate mootness. According to the dissent, the Court still had a live case before it because it was not "impossible for [the] court to grant any effectual relief whatever to the prevailing party."

More Second Amendment Cases in the Pipeline

- ***Ciolek v. New Jersey* - Issue**: Whether the legislative requirement of "justifiable need," which, as defined, does not include general self-defense, for a permit to carry a handgun in public violates the Second Amendment.
- Nine other pending cert. petitions involving Second Amendment issues that have been relisted with *Ciolek*.