Supreme Court Roundup Part 2

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Overview of Presentation

- Cases of interest to states decided this term…continued
- Cases of interest to states to be decided next term

Georgia v. Public.Resource.Org

- Non-binding, explanatory legal materials created by state legislatures cannot be copyrighted
- 5-4 decision written by Chief Justice Roberts
- Outcome of the case was impossible to predict; oral argument was a mess!!
- Joan Biskupic of CNN said Roberts was initially in dissent in this case (she doesn't say who switched his or her vote)

Facts

- The Official Code of Georgia Annotated (OCGA) contains various non-binding supplementary materials including summaries of judicial decisions and attorney general opinions and a list of law review articles related to current statutory provisions
- The OCGA is assembled by the Code Revision Commission, which is a state entity; a majority of its member are **state legislators**
- Lexis prepares the annotations and the legislature approves them

Government Edicts Doctrine

- The author of an original work receives copyright protection
- "The animating principle behind [the **government edicts doctrine**] is that no one can own the law"
- Per this doctrine, **judges "may not be considered the 'authors' of the works** they produce in the course of their official duties as judges," regardless of whether the material carries the force of law
- The Court extended this **same rule to legislators**

Relevant Precedent

- "[T]he government edicts doctrine traces back to a trio of cases decided in the 19th century" and "reveals a straightforward rule based on the identity of the author
  - *Wheaton v. Peters* (**1834**), the Court held that judicial opinions can't be copyrighted
  - *Banks v. Manchester* (**1888**), the Court held a case syllabus or head note written by a judge can't be copyrighted
  - *Callaghan v. Myers* (**1888**), the Court held that an official reporter could copyright explanatory materials it had written about a case
- "These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the 'author' of the works they prepare 'in the discharge of their judicial duties'"

Why Extend the Doctrine from Judges to Legislators?

- Because "[c]ourts have thus long understood the government edicts doctrine to apply to **legislative materials**"

Code Revision Commission=Legislator

- Georgia's annotations are not copyrightable because the author is the Code Revision Commission and it "qualifies as a legislator"
- Even though Lexis did the drafting Georgia agreed the author of the annotations is the Commission
- "Commission is not identical to the Georgia Legislature," nevertheless it "**functions as an arm of it for the purpose of producing the annotations**"

Code Revision Commission=Legislator

- "Significantly, the **annotations the Commission creates are approved by the legislature** before being 'merged' with the statutory text and **published in the official code alongside that text at the legislature's direction**"
- The Commission creates the annotations in the "discharge" of its legislative "duties" because "**the Commission's preparation of the annotations is under Georgia law an act of 'legislative authority**' . . . and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws"

Dissents

- Justice Thomas, in a dissenting opinion, which Justice Alito joined in full and Justice Breyer joined in part, took the position that precedent stands for the proposition that **materials lacking legal force, like the annotations in this case, may be copyrighted**
- Justice Ginsburg dissented joined by Justice Breyer. She concluded the OCGA annotations aren't created in the legislative process because they aren't "**created contemporaneously with the statutes to which they pertain**," are "**descriptive rather than prescriptive**," and are only "**explanatory, referential, or commentarial material**"

Bottom Line

- If your legislature is involved in the creation of statutory annotations they can't be copyrighted
- **Twenty-two states, two territories, and the District of Columbia** "rely on arrangements similar to Georgia's to produce annotated codes"
- Million dollar question: will legal publishers like Lexis stop working with state legislatures to put together these statutory annotations as they can't be copyrighted if the legislature is involved?

Faithless Electors May be Punished

- In *Chiafalo v. Washington*, the Supreme Court upheld Washington state's law fining "faithless" electors that do not vote for the candidate that won the state's popular vote
- Likewise, the Court reversed the Tenth Circuit's decision in *Baca v. Colorado Dept. of State*, which held that removing a "faithless" elector was unconstitutional
- Justice Kagan wrote the opinion joined by all the Justices save for Justice Thomas who wrote his own concurrence

We Vote for Electors Not Candidates

- Yes!
- Article II of the U.S. Constitution requires states to appoint electors
- The Twelfth Amendment says that electors vote for president and vice president

32 states + DC Require Electors to Be Faithful

- And vote for the candidate **from their party** who received the most votes
- The Supreme Court ruled that pledge laws were constitutional in *Ray v. Blair* (1952)
- These cases extends the ruling in *Ray* to punishment of those who violate pledge laws

If They Aren't Faithful they may be Punished

- In *Ray* the Court stated "'neither the language of Art[icle] II . . . nor that of the Twelfth Amendment' prohibits a State from appointing electors committed to vote for a party's candidate"
- Based on this determination, Justice Kagan concluded that **nothing in Article II forbids a state from taking away an elector's voting discretion**, and it grants the states the power to do so by allowing them to appoint electors "in whatever way it likes"
- "Electors have **only rarely exercised discretion** in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for preselected candidates, rather than to use their own judgment"

Big Picture Observations

- SCOTUS rarely "fixes" problems ahead of time
- 2016 there were 7 faithless electors (would have been more but Colorado replaced its faithless electors)
- A number of the Washington State faithless electors picked Colin Powell (a Republican) instead of Hilary Clinton (who won the state's popular vote)
- George "W." Bush beat Al Gore by 5 electoral votes

Kahler v. Kansas

- Constitution's Due Process Clause does not require states to acquit defendants who, because of mental illness, could not tell right from wrong when committing their crimes
- 6-3 decision written by Justice Kagan

Horrific Murder

- James Kahler shot his wife, her grandmother, and his two daughters after his wife filed for divorce and moved out with their children
- Defense: I was so severely depressed that while I knew what I was doing **I didn't know the difference between right and wrong**

Kahler's Argument

- Kansas "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong"

Relevant Precedent

- While the Supreme Court describes four "strains" of the insanity defense which states have adopted the two most relevant to this case come from the landmark English case, *M'Naghten* (1843)
- Two instances in which a mentally ill defendant was absolved of criminal culpability:
  - If a mental illness left the person **unable to understand what he or she was doing**
  - **To know that his or her actions were wrong**

Kansas Law

- Kansas has adopted the first prong of the *M'Naghten* rule requiring a defendant's acquittal if the defendant is able to prove he or she lacked the *mens rea* (intent) to commit the crime due to mental illness
- But in Kansas, unlike most states, a defendant may only argue that mental illness left him or her unable to know the difference between right and wrong ***after conviction*** **to justify a reduced sentence or commitment to a mental health facility**

More SCOTUS Precedent

- A state rule about criminal liability violates due process only if it "offends some principle of justice **so rooted in the traditions and conscience of our people as to be ranked as fundamental**"

Majority Reasoning

- The Due Process Clause does not require states to "adopt the moral-incapacity test from *M'Naghten*"
- The historical record on the insanity defense as "**complex—even messy**"
- "Early commentators on the common law proposed various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach"
- "**No insanity rule in this country's heritage or history was ever so settled** as to tie a State's hands centuries later"

Dissent—Breyer, Ginsburg, Sotomayor

- Read the history of the insanity defense differently
- "Seven hundred years of Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law itself, convince me that Kansas' law "'offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'"

Was Kansas Ever Really Abolishing the Insanity Defense?

- The majority rejected Kahler's characterization of Kansas **abolishing the insanity defense** entirely noting that Kansas "**channels to sentencing**, the mental health evidence that falls outside its intent-based insanity defense"
- The dissent pushed back stating "our tradition demands that an insane **defendant should not be found guilty in the first place**. Moreover, the relief that Kansas offers, in the form of sentencing discretion and the possibility of commitment in lieu of incarceration, is a matter of judicial discretion, not of right."

Only 4 Additional States

- Alaska, Idaho, Montana, and Utah refuse to exonerate mentally ill defendants who don't know the difference between right and wrong

County of Maui v. Hawaii Wildlife Fund

- When there is a "functional equivalent of a direct discharge" from a point source to navigable waters an appropriate permit is required under the Clean Water Act
- 6-3 decision (liberals+Roberts+Kavanaugh)
- Breyer wrote the opinion
- Widely reported as a loss for state and local governments--not a total win or total loss

Law

- The Clean Water Act forbids the "addition" of any pollutant "from a point source" to "navigable waters" without a National Pollutant Discharge Elimination System (NPDES) permit

Facts

- County of Maui wastewater reclamation facility pumps treated wastewater (pollutants) from wells (point sources) **which travels through groundwater** to the ocean (a navigable water)
- Hawaii Wildlife Fund claimed Maui should have obtained an NPDES permit
- Everyone agrees if the treated wastewater went directly from the well to the ocean an NPDES permit is required
- Question in the case is does it make any difference the treated waste water went through **groundwater** before going into the ocean

What's the Problem with Getting the Permit?

- Time consuming
- Expensive
- May not be possible to get one
- SLLC argued the NPDES permitting program isn't designed for groundwater
- EPA hasn't taken a consistent position on whether and when an NPDES permit is required when polluted water travels through groundwater

Maui's Argument

- Maui argued that an NPDES permit is only required when a point source or series of point sources is "**the means of delivering pollutants to navigable waters**"
- In this case groundwater lies "between the point source [the wells] and the navigable water [the ocean]"
- The State and Local Legal Center (SLLC) filed an *amicus* brief supporting Maui's position

Hawaii Wildlife Fund's Argument

- Hawaii Wildlife Fund agreed with the Ninth Circuit "that the permitting requirement applies so long as the pollutant is '**fairly traceable**' to a point source even if it traveled long and far (through groundwater) before it reached navigable waters"

Holding

- SCOTUS rejected both positions holding that a permit is required when there is a **functional equivalent of a direct discharge from a point source to navigable waters**
- The functional equivalent of a direct discharge test "best captures, in broad terms, those circumstances in which Congress intended to require a federal permit"
- The Court concluded that the question in this case came down to the definition of "from" in the phrase "from a point source"
- The Ninth Circuit's interpretation of "from" was too broad, the Court opined, because it would lead to "surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers"

Holding

- The Court rejected as too narrow Maui's argument that if a pollutant travels from a point source through groundwater before reaching navigable water no NPDES permit is required
- What if a point source pipe spews pollution directly into coastal waters
- Under Maui's interpretation, "why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?"

The Seven Factor Test

- Transit time
- Distance traveled
- Nature of the material through which the pollutant travel
- Extent to which the pollutant is diluted or chemically changed as it travels
- Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point sourc
- Manner by or area in which the pollutant enters the navigable water
- Degree to which the pollution (at that point) has maintained its specific identity
- Generally **time** and **distance** will be the most important factors

Why is this Case Seen as a Loss?

- Court didn't rule whether the discharge in this case was a "functional equivalent of a direct discharge"
- Court could have held that pollutants traveling through groundwater **exempted** from the NPDES permitting process
- Lack of bright line rule will lead to litigation
- Case is bigger than groundwater—rule will apply anytime a pollutant goes from a point source to a navigable water via an intermediary (pits, fields, air)

Kansas v. Glover

- If the registered owner of a vehicle has a revoked license an officer may initiate a traffic stop on that basis alone unless the officer has information negating the inference the owner of the vehicle is the driver
- 8-1 (Justice Sotomayor dissented)

Facts

- Deputy Mehrer ran the license plate of a vehicle he saw being driven lawfully, matched it to the vehicle he observed, and learned it was registered to Charles Glover who had a revoked driver's license
- Deputy Mehrer initiated a traffic stop and discovered Charles Glover was in fact driving the vehicle

Where's the Reasonable Suspicion?

- The Supreme Court has held per the Fourth Amendment that police officers may initiate brief investigative stops if they have a "**particularized and objective basis for suspecting the particular person stopped of criminal activity**"
- Glover claims that in this case Deputy Mehrer lacked the necessary reasonable suspicion to stop him
- Kansas Supreme Court concluded there was "some suspicion" in this case but not "reasonable suspicion"

Court Found Lots of Reasonable Suspicion

- "Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop."

More Reasonable Suspicion

- That the registered owner of a vehicle isn't always the driver doesn't negate the reasonableness of the officer's inference
  - Reasonable suspicion "'falls considerably short' of 51% accuracy"
- Studies show that drivers with revoked licenses frequently continue to drive
- "Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive."

Additional Facts May Dispel Reasonable Suspicion

- "For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing'"

“Moved” Cases for Next Term

Rutledge v. Pharmaceutical Care Management Association

- Whether states' attempts to regulate pharmacy benefit managers' (PBMs) drug-reimbursement rates are preempted by the Employee Retirement Income Security Act (ERISA)

What are PBMs?

- PBMs are an intermediary between health plans and pharmacies
- They set reimbursement rates to pharmacies dispensing generic drugs
- Contracts between PBMs and pharmacies create pharmacy networks
- Pharmacies make most of their money from PBMs
- According to the Eighth Circuit, "[b]ased upon these contracts **and in order to participate in a preferred network, some pharmacies choose to accept lower reimbursements for dispensed prescriptions**"
- So, in some instance pharmacies lose money by participating in PBMs

Here is How it Works

- Pharmacy buys your generic medication for $100
- Your co-pay is $20
- PMB reimburses your pharmacy at $60
- PBM charges your health plan $70
- Your pharmacy loses $20
- A study by the Ohio Department of Medicaid found that in 2017-18, PBMs reimbursed pharmacies $454.3 million for Ohio Medicaid beneficiaries' generic drugs and charged Ohio Medicaid $662.7 million— a 45.9% markup

Unsurprisingly, About 40 States have Tried to Regulate PBMs

- Arkansas passed a law requiring that pharmacies "be reimbursed for generic drugs at a price equal to or higher than the pharmacies' cost for the drug based on the invoice from the wholesaler"; allowing pharmacies to appeal reimbursement rates, and allowing pharmacies to refuse to fill prescriptions because of inadequate reimbursement

What is ERISA?

- Is Arkansas' law preempted by ERISA?
- ERISA protects pension participants by regulating certain **plan-administration procedures**
- According to the Eighth Circuit, ERISA preempts "any and all State laws insofar as they …. **relate to any employee benefit plans**"
- A state law "relates to" an ERISA plan by having "**a connection with or a reference to such a plan**"

Lower Court Holding

- The Eighth Circuit concluded that Arkansas's law "ma[de] implicit reference to ERISA" because it regulates "**PBMs** who **administer benefits for** . . . entities, which, by definition, *include* **health benefit plans and employers**, labor unions, or other groups . . . subject to ERISA regulation"

Arkansas Argument

- "[T]his Court has long held that ERISA does not shield plans or their administrators from state laws regulating the **rates charged for goods and services**
- "Under that rule, Act 900 is plainly not preempted. It **regulates drug reimbursement rates and provides mechanisms for enforcing that rate regulation**." Those mechanisms include requiring PBMs to provide pharmacies with internal appeals to challenge noncompliant rates (as they already did by contract) and the option to decline to sell drugs to PBMs that refuse to abide by Arkansas's rate regulation."

Pharmaceutical Care Management Association Argument

- **By directly affecting the administration of plan benefits**, Act 900 plainly "relates to" ERISA plans and is preempted, regardless of whether the plan manages the benefit itself or engages a third-party administrator to do so
- Arkansas' law "does not regulate rates for goods and services in the marketplace—it is silent as to pharmacy pricing"
- Determining reimbursements and paying for benefits are central to processing claims and to the very design of plan benefits

Carney v. Adams

- Delaware's Constitution requires that three state courts be balanced between the two major political parties
- Does this scheme violate the First Amendment?

Carney v. Adams

- Per Delaware's Constitution no more than half of the members of the Delaware Supreme Court, Superior Court, or Chancery Court may be of the same major political party
- Delaware attorney James Adams wants to be a judge in Delaware but he is an Independent
- Adams claims that the First Amendment prohibits the governor from making judicial appointments based on political party

Think About This

- You are the Republican Governor of Delaware
- On the Delaware Supreme Court there are 3 Republican judges and 2 Democratic judges
- A Democratic judge leaves the bench
- You must replace him or her with a Democrat

Law

- In the three previous "patronage" cases the Supreme Court has explained "the limits on a government employer's ability to consider a job candidate's political allegiance"
- Based on those cases the Third Circuit focused on whether judges are policymakers as **First Amendment protections do not apply to policymakers**
- Policymakers may be hired and fired based on their political views

Lower Court Holding

- The Third Circuit concluded **judges aren't policymakers**
- According to the lower court the "purpose of the policymaking exception is to ensure that elected officials may put in place **loyal employees** who will not undercut or obstruct the new administration"
- The Third Circuit reasoned "[j]udges simply do not fit this description. The American Bar Association's Model Code of Judicial Conduct instructs judges to promote **'independence' and 'impartiality,'** not loyalty." "The Delaware Supreme Court has stated that Delaware judges 'must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will.' **Independence, not political allegiance, is required of Delaware judges**."

SLLC *Amicus* Brief—Bipartisanship is a Good Thing

- State and local governments should be able to "insulate certain decision-making bodies from the rough-and-tumble of partisan politics"

SLLC *Amicus* Brief—This Case isn't Just About Judges

- "Hundreds of state and local governments have made a thoughtful choice to **use bipartisan decision-making processes**, based on their conclusion that these processes will produce the best outcomes for their communities. They have reached this conclusion in myriad settings: from **judicial selection, to elections administration, to ethics enforcement**, and more. A test which deems these reasonable choices per se unconstitutional would upend state and local governments and would **defy common sense**."

SLLC *Amicus* Brief—Actually Governor has No Say in Partisanship

- The brief argues that the patronage cases don't apply to this case because "the person making a hiring decision—here, the Governor—has no say in whether to take partisan affiliation into account; patronage plays no part in this picture. Instead, **the relevance of partisan affiliation is baked into the structure of government ahead of time**, when no one can predict who will be making a given appointment at a given point in the future."

Two Additional Issues

- Per the Delaware Constitution only a bare majority of family court and court of common pleas judges may be from the same political party but the "major political party" rule doesn't apply to them
- The Third Circuit concluded that the **"bare majority" rule isn't severable** from the unconstitutional "major political party" rule
- Standing—Adams has not applied for any judicial position since becoming an Independent in 2017

Torres v. Madrid

- Excessive force case with facts you can't make up
- As a practical matter states and local governments must **pay money damages when police officers are successfully sued for use of excessive force** unless qualified immunity applies (meaning only a plainly incompetent police officer would have thought at the time that the use of force was reasonable)

Facts

- Police officers approached Roxanne Torres thinking she may be the person they intended to arrest
- Torres was "tripping" from using meth for several days
- She got inside a car and started the engine
- One of the officers repeatedly asked her to show her hands but could not see her clearly because the car had tinted windows
- When Torres "heard the flicker of the car door" handle she started to drive thinking she was being carjacked

Facts

- Torres drove at one of the officers who fired at Torres through the wind shield
- The other officer shot at Torres as well to avoid being crushed between two cars and to stop Torres from driving toward the other officer
- Torres was shot twice
- After she hit another car, she got out of her car and laid on the ground attempting to “surrender” to the “carjackers”
- She asked a bystander to call the police but left the scene because she had an outstanding warrant
- She then stole a car, drove 75 miles, and checked into a hospital using an alias

Legal Issue

- Torres claims the police officers used **excessive force** against her in violation of the **Fourth Amendment**
- For the Fourth Amendment to be violated a "**seizure**" must have occurred
- The federal circuit courts of appeals are split regarding whether an attempt to detain a suspect by physical force must be ***successful*** for a "seizure" to occur

Holding and Reasoning

- Tenth Circuit held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." This is so, because "**a seizure requires restraint of one's freedom of movement**." Therefore, an officer's intentional shooting of a suspect **isn't a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him**."

Brain Teaser

- How can you be seized if you get away?
- How can you not be seized if you are shot (multiple times)?

New Next Term

California v. Texas

- Is the Affordable Care Act's (ACA) individual mandate is unconstitutional?
- More importantly, if the Court holds that it is, it will decide whether the individual mandate is severable from the ACA
- It is possible the Court will conclude it isn't severable and that the entire law is unconstitutional
- Or the Court may conclude it is severable and the rest of the ACA will remain the law of the land

Facts and Argument

- The ACA individual mandate required uninsured who didn't purchase health insurance to pay a "shared-responsibility" payment
- The Tax Cuts and Jobs Act of 2017 reduced the payment to $0 as of January 1, 2019
- Texas, and a number of other states argued, and the Fifth Circuit agreed, that the individual mandate is no longer constitutional as a result

Individual Mandate + Shared Responsibility Payment = Tax

- According to the Fifth Circuit, in *NFIB v. Sebelius* (2012) five Supreme Court Justices agreed that the "individual mandate could be read in conjunction with the shared responsibility payment" as "a **legitimate exercise of Congress' taxing power for four reasons**"
- The shared-responsibility payment generated revenue for the federal government by taxpayers when they filed their tax return
- The IRS enforced the requirement to pay, and the amount owed was "determined by such familiar factors as taxable income, number of dependents, and joint filing status"

Shared Responsibility Payment = $0 = No Tax

- The Fifth Circuit reasoned that now the shared responsibility payment amount is zero "[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist"
- "Most fundamentally, the provision no longer yields the 'essential feature of any tax' because it **does not produce "at least some revenue for the Government"**

Severability Test

- "Unless it is 'evident that the Legislature **would not have enacted those provisions which are within its power, independently** of that which is not, the invalid part may be dropped if what is left is fully operative as a law'"
- Think about this: **Congress** got rid of the individual mandate when it could have gotten rid of the entire law—isn't that good evidence of severability?

Fifth Circuit: Maybe It is Maybe it Isn't

- While the district court held that none of the ACA was severable from the individual mandate (meaning the entire Act is unconstitutional), the Fifth Circuit concluded **the district court failed to take a "careful, granular approach" in its severability analysis**
- "The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. Instead, the opinion focuses on the 2010 Congress' labeling of the individual mandate as 'essential' to its goal of 'creating effective health insurance markets,' and then proceeds to designate the entire ACA inseverable."

Standing Question

- California and a number of other states defending the ACA argue that the individual and state plaintiffs lack standing to bring this case
- California argues the individual plaintiffs haven't been harmed by the tax being reduced to zero because "[a] statutory provision that offers individuals a **choice between purchasing insurance and doing nothing** does not impose any legally cognizable harm"
- California claims that the states have failed to alleged harm because they have no proof that the shared-responsibility payment being zero will **force individuals into the states' Medicaid and CHIP programs or increase state costs for "printing and processing [certain] forms**"

This Case is being Framed as

- Will Chief Justice Roberts save the ACA by finding the individual mandate is severable?
- No oral argument in this case but conventional wisdom is yes
- Roberts and Kavanaugh wrote pro-severability opinions in cases last term

Fulton v. City of Philadelphia

- May local governments refuse to contract with foster care agencies who will not work with gay couples?
- Simple question, simple case right? Nope!
- Why do states care about this case?
- It has to do with the effect of a non-discrimination ordinance—many states have similar non-discrimination statutes
- Court might overturn *Employment Division v. Smith*

Facts

- The City of Philadelphia long contracted with Catholic Social Services (CSS) to place foster care children
- The City stopped doing so when it discovered CSS wouldn't work with same-sex couples
- Philadelphia requires all foster care agencies to follow its "fair practices" ordinance, which prohibits sexual orientation discrimination in public accommodations

Legal Issue and Holding

- CSS claims the City violated the First Amendment by refusing to continue contracting with it because of its religious beliefs
- The Third Circuit ruled in favor of the City

Not Neutral

- CSS argued that Philadelphia's "fair practices" ordinance isn't applied to it neutrally
- According to the Third Circuit, the test for neutrality is whether the City treated CSS "worse than it would have treated another organization that **did not work with same-sex couples as foster parents but had different religious beliefs**," which the City didn't do
- CSS points out that other federal courts of appeals have allowed free exercise plaintiffs to rely on other evidence a law isn't neutral including that the "government issues individualized exemptions, that the law exempts secular conduct that undermines the government's interest, or that law's history indicates non-neutrality"

Employment Division v. Smith

- SCOTUS has agreed to reconsider the Court's holding in *Employment Division v. Smith* (1990), holding individuals must comply with "**valid and neutral law[s] of general applicability**" regardless of their religious beliefs
- *Employment Division v. Smith* is good for states because it is a **bright-line** rule
- Quoting Justice Alito, CSS notes that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause"
- CSS asks the Court to "revisit *Smith* and return to a standard that can better balance governmental interests and fundamental rights"

Free Speech Claim

- CSS also claims Philadelphia is requiring it to "**adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents**," in violation of the First Amendment Free Speech Clause
- The Third Circuit agreed that the City couldn't condition contracting with CSS on it officially proclaiming support for same-sex marriage but it could condition contracting with CSS on refusing to work with same-sex couples

Deja Vu *Masterpiece Cakeshop*

- In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) the owner of a cake shop, Jack Phillips, refused to create a wedding cake for a same-sex couple because of his religious beliefs
- Colorado's public accommodations law, like Philadelphia's "fair practices" ordinance, prohibits sexual orientation discrimination in public accommodations
- Phillips argued he had a First Amendment free speech and free exercise right not to make the cake
- The Supreme Court ruled in a favor of Phillips finding that the Colorado Civil Rights Commission acted with **hostility toward religion** because a number of commissioners made anti-religion remarks at Phillips' hearing
- But the **Court failed to decide the free exercise and free speech issues** that arose in *Masterpiece Cakeshop*, which also arise in *Fulton v. City of Philadelphia*

Questions?

Thanks for attending!