



## *Supreme Court Update and Preview*

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## Overview

- 10,000-foot view of last term and next term
- Major recent and upcoming SCOTUS developments:
  - Court decides not to revisit qualified immunity
  - Court broadens Title VII to include gay and transgender employees
  - SCOTUS and the First Amendment
  - SCOTUS and COVID-19

## The Big Picture

- Last term was of almost unbelievable significance
- Main story: Chief Justice Roberts went left
- Justice Ginsburg being treated again for pancreatic cancer
- One blockbuster on next term docket

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# QUALIFIED IMMUNITY

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## Move to Overrule and Modify Qualified Immunity

- Supreme Court:
  - Started to receive petitions saying qualified immunity should be **overruled** or **modified**
  - May be preparing to do something big
- SLLC worked with AGRiP to produce a brief to defend qualified immunity

## Supreme Court Refuses to Hear Cases

- Nine cases total piled up in May 2020
- Most/all ask the Court to **eliminate** or **modify** qualified immunity
- All petitions were denied on June 15, 2020

## Why didn't the court take any of the cases?

- We don't know because the Court doesn't say
- Justices all over the ideological spectrum have criticized qualified immunity for various reasons
- All recent SCOTUS qualified immunity decisions have been unanimous or close to it in favor of the government employee
- Justices Sotomayor and Ginsburg (at least) probably wouldn't mind modifying doctrine but probably lack agreement with the conservatives on what to replace it with

## Qualified Immunity Not Safe

- Congress could modify or eliminate the doctrine
  - Number of proposals in Congress right now
  - Probably need a Republican Senate to do so
- Could have a liberal Supreme Court in my lifetime
- Lower courts can choose to not really follow it
- Lower courts and SCOTUS can weaken *Monell*
  - No municipal liability without a policy or practice
- Don't be surprised if in the near future SCOTUS reverses a few lower court decisions granting qualified immunity



# TITLE VII

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## Title VII Overview

- Part of Civil Rights Act of 1964
  - Outlawed employment discrimination on the basis of race, color, religion, **sex** and national origin
- Court holds that sex includes sexual orientation and gender identity
  - 6-3 opinion written by **Justice Gorsuch**
- Most major expansion in employment law since the Americans with Disabilities Act Amendments Act of 2008

## Magnitude of This Change: Perspective Only

- Not a big deal
  - Many local governments/school districts already had policies and practices or were subject to ordinances/state laws protecting LGBT employees
- A big deal
  - A county was a party in one of the SCOTUS cases
  - Title VII may be a more attractive vehicle than state law to bring claims
  - Many more employees are now covered under Title VII
  - The problem for many local governments/school districts **won't be meritorious cases** (just like it isn't for other Title VII claims)



## Litigation Risks for Local Governments and Schools

- In short term, same issues that have been litigated for a while:
  - Transgender bathroom school cases
  - Religious exemption from non-discrimination ordinances/statutes and foster care cases (SCOTUS has taken a case on this)
- Getting all the attention: litigation over Idaho disallowing transgender women from playing sports on women's teams
  - Ban has been temporarily struck down

## General Observations: Court and Employment

- Court has taken that many employment cases in last decade
- Many cases were very narrow
- Most decided in favor of employers
- Petition to watch
  - *Reisman v. Associated Faculties of the University of Maine* (union as exclusive bargaining unit violates the First Amendment)



# FIRST AMENDMENT



## First Amendment and Protests

- Free Speech and Peaceful Assembly Clause provides a constitutional right to **protest peacefully**
- Time, place and manner restrictions are okay in a traditional public forum
- Pretty vague standards
- Hasn't been a SCOTUS protest case in 20 years
- Interesting litigation coming out of Portland related to the feds breaking up protests



## Social Media and First Amendment

- Elected officials blocking followers
  - If you go to a local government attorney or school attorney meeting, you will hear a presentation on legal issues related to elected officials using social media
- **Three federal courts of appeals cases** involving government officials/government **blocking** people on social media
  - Government officials/government have lost all three cases



## Easy Way of Understanding This Issue

- Citizens have free speech right to protest to government in online forums where government officials are online, communicating with public
  - Same idea as the First Amendment free speech right to protest in public streets
- Decision consistent with other Court cases
  - Court previously disallowed government officials from banning citizens from a particular channel of speech

## *Reed v. Town of Gilbert*

- Refresher
  - 2015 case
  - Worst Supreme Court case for local governments in nine years I have worked at SLLC
- Supreme Court held that strict (usually fatal) scrutiny applies to content-based restrictions on speech
- Court defined “content-based” broadly
- Problem for local governments: regularly regulate content-based speech



## SLLC Mission to Get *Reed* Overturned

- Sound far-fetched?
  - *Reed* was 9-0
  - It was only decided five years ago
- But three concurring SCOTUS justices expressed skepticism about *Reed*:
  - Breyer, Kagan, Ginsburg
- Last term, the Supreme Court accepted its first case interpreting *Reed*



## SLLC Amicus Brief Asking Court to Narrow *Reed*

- Amicus brief looks to narrow (read: overturn) *Reed*
  - Justice Kavanaugh accused Justice Breyer, joined by Justices Ginsburg and Kagan, of trying to do just that
  - Justice Sotomayor in a separate concurring opinion also wouldn't have applied strict scrutiny to the content-based restriction in this case
  - Justice Gorsuch wrote separately and said statute is content-based and fails strict scrutiny but doesn't cite to *Reed*
- **Could there be five votes to overrule *Reed*?**

## Religion

- This is the body of law where most SCOTUS watchers agree the Court has most successfully taken a turn to the right
- Local governments have mostly not been parties to or directly affected by recent religion SCOTUS cases
- That will change this term

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## *Fulton v. City of Philadelphia*

- Non-technical main issue
- One (of many) technical legal issues:
  - Whether the Supreme Court should overturn [\*Employment Division v. Smith\*](#) (1990) in which the Court held that individuals must comply with “valid and neutral law[s] of general applicability” regardless of their religious beliefs
- [\*Employment Division v. Smith\*](#) is a great decision for local governments because it is a bright-line rule!



## If It Goes = More Litigation

- From the SLLC amicus brief:
  - Government employees might raise a Free Exercise objection to performing aspects of their job that offend their religious beliefs
  - Private contractors may demand to alter the contractual terms themselves to accommodate religious beliefs
  - Additional areas local governments regulate could lead to religious exemptions: noise and other ordinances, building codes, zoning requirements, locations of roads, local holidays, etc.

# Thank you!



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