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Speakers:

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Conference Reference Materials

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October Term 2021

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The Supreme Court heard its last argument of the Term on May 4. The Court has issued more than half of its expected decisions, with some high-profile opinions expected in cases challenging the Affordable Care Act, the constitutionality of the structure of federal agencies and the appointment of administrative judges, and anti-discrimination laws based on the Free Exercise Clause of the U.S. Constitution. The Court has also granted more than a dozen cases for next Term, and those cases do not disappoint Court watchers eager for a jam-packed OT2021. The Court's cert grants for next Term include cases about abortion, guns, and the Boston Marathon bomber, Dzhokhar Tsarnaev.

October Term 2020 has also seen a change in Administration, which impacts the Court in profound ways—perhaps most obviously, the identity of the Solicitor General, who is sometimes called the Tenth Justice. For the third time in the history of the United States, a woman is occupying the office of the Solicitor General: Elizabeth Prelogar, a former law clerk to Justice Ginsburg and Justice Kagan, Assistant in the Office of Solicitor General, and member of the Mueller team was named Acting Solicitor General in January. And thus far, the Biden Administration has not seemed to be in any rush to nominate someone to that role on a non-Acting basis.

The change in Administration has also seen significant changes to the Court's docket. The Office of Solicitor General switched its position in a number of cases being heard this Term, and it asked the Court to cancel arguments involving challenges to the Trump Administration's

policy priorities that the Biden Administration would no longer defend All of these factors, along with a lower-than-average grant rate during the pandemic, resulted in a rather light Term for the Justices, with just five or six arguments in each of the January, February, and March sittings—that's just one per day, when the Court typically hears two arguments each day of a sitting, and occasionally even three. So let's dig in to what the Court has been doing since October 2020.

COVID's Impact on Arguments

Last Term when the pandemic hit, the Supreme Court deferred a number of arguments to this Term and held remote arguments in a limited number of cases in May 2020. This Term has been entirely remote, and it has had a significant impact on the format—and, arguably, the effectiveness—of oral argument.

First, questioning by the Justices now proceeds in a predictable structure, with each Justice having the opportunity to ask questions in order of seniority (from the Chief Justice down to the most recently appointed Associate Justice, Justice Barrett). The Justices no longer jump in with questions whenever they like based on what the advocate is arguing at the time. This means that one Justice cannot "save" an advocate who has dug himself or herself into a hole by offering a friendly question or even a potential answer. But it has also meant that Justice Thomas has asked questions at every argument—after being well known for not asking a single question at argument for years on end. Time will tell whether Justice Thomas's new status as a vocal questioner will continue when in-person arguments resume.

Second, after the Chief Justice was criticized by court commentators for cutting off women Justices more than their male counterparts during remote arguments last May, each Justice's time has been strictly cabined by a uniformly applicable clock. This has led to some

obvious frustration by some members of the Court about the difficulty of asking follow-up questions (or meandering questions) and many more interruptions of advocates by the Justices. As a result, Supreme Court arguments have sometimes resembled congressional hearings, with the Justices reclaiming their time when an advocate does not immediately get to the point.

Third, this new argument structure has made for some *very long* arguments, particularly in cases in which more than two advocates present oral argument. During in-person arguments, the Court can limit total oral argument time to 30 minutes per side even in cases involving three or four lawyers by splitting the time amongst the various lawyers for the parties and any amici. But when oral argument consists of seriatim questioning by each Justice, it is effectively impossible to limit an amicus to just ten minutes. As a result, arguments have sometimes exceeded two hours for a single argument.

The 2020 Election's Impact on the Court

The 2020 election has already had a significant impact on the Court, even before any retirements of Justices appointed by Democratic Presidents. First and foremost, the political leadership of the Office of Solicitor General changed on the first day of the Biden Administration—from Jeff Wall, who became Acting Solicitor General when Noel Francisco resigned, to Elizabeth Prelogar, who was appointed Principal Deputy Solicitor General and Acting Solicitor General when President Biden took office. Ms. Prelogar is only the third woman in history to lead the Office of Solicitor General on either an acting or confirmed basis, following Barbara Underwood's tenure as Acting Solicitor General and Elena Kagan's time as a Senate-confirmed Solicitor General before she was nominated to the Supreme Court. The Biden Administration has not prioritized nominating a Solicitor General, leaving many to wonder whether Ms. Prelogar will be nominated for that position in the coming months.

President Biden's electoral victory has also had an impact on the Court's docket itself. As often occurs when there is a change in Administration, the United States reversed its position in a number of high-profile cases shortly after Ms. Prelogar took office. These changes in position include *California v. Texas*, a case once again challenging Affordable Care Act. The Acting Solicitor General informed the Court by letter that the United States now takes the position that the ACA's individual mandate is constitutional and that, in any event, it is severable from the remainder of the Affordable Care Act. The United States also changed its position in *Americans for Prosperity v. Bonta*, supporting the constitutionality of California's donor-disclosure rules for charitable organizations, and *Cedar Point Nursery v. Hassid*, siding with union organizers against a Fifth Amendment Takings challenge to a California regulation that allows union organizers to enter the property of agriculture businesses to speak to employers about supporting a union. Finally, the United States slightly walked back its position in *Brnovich v. Democratic National Committee*, a case about Section 2 of the Voting Rights Act, quibbling with the test briefly advocated by the United States but not disagreeing with the outcome as applied to the Arizona regulations at issue, and reversed positions in *Terry v. United States*, a case about the application of the First Step Act to pre-August 3, 2010 crack offenders—a change that required the appointment of an *amicus* to defend the judgment below.

In addition to these changes in position with respect to cases being heard by the Court this Term, the Biden Administration also effectively mooted several cases that were before the Court. For example, the Acting Solicitor General asked the Court to cancel oral arguments in two immigration cases—one involving President Trump's use of a national-emergency declaration to spend $2.5 billion on a border wall (*Biden v. Sierra Club*), and another involving a Trump Administration policy requiring asylum seekers to remain in Mexico while their

applications were being considered (*Pekoski v. Innovation Law Lab*). The Biden Administration suspended both of those Trump-era policy priorities.

The Office of Solicitor General has received some criticism for these changes in position, but the Office's previous long-time deputy, Michael Dreeben, has defended those decisions, telling the press that when the Office was headed by Noel Francisco and Jeff Wall, it took "a number of ideologically driven, non-traditional positions that stretch the boundaries of traditional legal analysis by an SG," and that many of the changes in position simply reverted to the Office's historically institutional and precedent-oriented approach. Kimberly Strawbridge Robinson, *Biden on Pace to Flip Positions at Supreme Court More Than Trump*, Bloomberg (Mar. 18, 2021), https://news.bloomberglaw.com/us-law-week/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump. Commentators have also pointed out that a number of the Office's changes in position simply reflected the fact that the Biden Administration has unsurprisingly chosen not to defend the Trump Administration's policies that were being challenged by immigrant-rights and civil-rights groups. *Id.*

The Shadow Docket

The Supreme Court's "Shadow Docket"—its avenue of issuing emergency rulings often in enormously consequential cases without full briefing, oral argument, or reasoned opinions continued to receive attention this Term. The Court issued numerous emergency rulings in cases involving COVID restrictions (particularly those with an impact on religious worship), death-penalty executions, and voting rights. Many of these decisions were split decisions with vigorous dissents—most commonly from the liberal wing of the Court—though often without full indication of which Justices had joined which side. The public's increased scrutiny of the Shadow Docket resulted in a SCOTUSBlog symposium this year,

https://www.scotusblog.com/category/special-features/symposium-on-the-supreme-courts-shadow-docket/, and even a February 17, 2021 Congressional hearing held by the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet (https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4371).

Issued Opinions

This Term has already seen a number of important opinions in civil and criminal cases. In October, the Court heard a set of personal-jurisdiction cases consolidated as *Ford Motor Co. v. Montana Eighth Judicial District* that we covered in October's 2020 CLA Summit. The Court issued a decision in those cases in March, unanimously holding that Ford Motor Company could not avoid jurisdiction in Montana and Minnesota for accidents that occurred in those States and harmed residents of those States, even though the plaintiffs' specific vehicles were not designed, manufactured, or sold there. In Justice Kagan's opinion for the majority, the Court held that the substantial business activities Ford engaged in with respect to the types of vehicles at issue in the lawsuits created a relationship among Ford, the forums, and the litigation that was "close enough to support specific jurisdictions." Whether less-pervasive activities in other cases will likewise be "close enough" will no doubt occupy the dockets of many federal and state courts in the years to come.

The Court also issued its first decision in decades regarding "fair use"—a doctrine codified in the Copyright Act that permits a "copying use" of a copyright-protected work where rigid application of copyright protections would stifle the creativity that copyright laws were designed to foster. For example, even if a song or a speech is copyright-protected, using that work to create a parody does not run afoul of the Copyright Act. And even if an advertising logo—say, a Campbell Soup can—an artist can make an exact replica of that advertising logo to

make a comment about consumerism without running afoul of copyright law. In *Google LLC v. Oracle America, Inc.*, the Court held that, assuming that Oracle's Java SE code is subject to copyright protection, Google's limited use of portions of the Java SE platform in its Android operating system to allow developers to write programs that could run on Android devices constituted a "fair use" of the Java code. Justice Breyer's majority opinion articulated a rather broad view of fair use—particularly in context where copyright protection is "thin," *i.e.* computer programs, as compared with books or firms—and was premised on the Copyright Act's broad purpose of encouraging, rather than stifling, innovation.

The Court returned to one of its favorite doctrines—the Fourth Amendment's limitation on warrantless searches and seizures—in *Torres v. Madrid*, a case about whether officers effected a "seizure" when they shot at and hit Roxanne Torres, who drove away when the officers were trying to speak to her. Although Torres was hit and injured, she nevertheless drove off and was not, in fact, detained by officers. Issuing a bright-line rule, the Court held that an effort to restrain someone's movement through the application of physical force constitutes a "seizure" even the person is not in fact restrained. As is true in many Fourth Amendment cases, though, Torres's victory in the Supreme Court may ultimately be short-lived—she faces high barriers to success on her civil-rights claim, including the doctrine of qualified immunity.

The Court also issued an important Eighth Amendment opinion in *Jones v. Mississippi*, a juvenile-sentencing case. The case served as a test of one of Justice Kennedy's most important legacies—providing increased substantive protections for juveniles in the sentencing context given their lesser culpability—and of the Court's commitment to stare decisis. To provide a bit of historical context, in 2012 the Court held in *Miller v. Alabama* (in an opinion written by Justice Kagan) that mandatory sentences of life without parole violated the Eighth Amendment

when imposed upon juvenile offenders. 567 U.S. 460. Four years later, the Court held in *Montgomery v. Louisiana* (in an opinion authored by Justice Kennedy) that *Miller*'s holding was substantive, not merely procedural, and thus must be applied retroactively. 577 U.S. 190 (2016). In particular, the Court stated that while *Miller* did not mandate the use of any particular procedure to consider a juvenile defendant's youth in sentencing, *id.* at 211, *Miller* clearly barred life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," *id.* at 209.

In *Jones*, the question before the Court was whether *Miller* and *Montgomery* require sentencing judges to find (implicitly or explicitly) that a juvenile is incapable of rehabilitation before imposing life without parole, or if it is sufficient that the judge's sentencing process includes some consideration of youth. In a 6-3 decision (with the majority opinion authored by Justice Kavanaugh and notably joined by the Chief Justice, who had concurred in *Miller* and joined Justice Kennedy's majority opinion in *Montgomery*), the Court held that *Miller* and *Montgomery* simply require sentencing judges to "consider" youth when sentencing juvenile offenders to life without parole. Justice Thomas's concurring opinion criticized the majority's holding as a disingenuous interpretation of *Miller* and *Montgomery*—in Justice Thomas's view, the majority was clearly overruling those decisions and should have done so expressly, by deeming them "demonstrably erroneous," rather than by interpreting them to have held something they plainly did not. Justice Sotomayor's dissent was one of the most sharply worded dissents thus far this Term: "How low this Court's respect for *stare decisis* has sunk," she remarked, accusing the majority of "distort[ing] *Miller* and *Montgomery* beyond recognition."

Opinions To Come

Although last Term was indisputably a blockbuster, this June will not disappoint Court watchers. There are a number of big opinions expected to come out in cases that have already been argued.

In November, the Supreme Court heard argument in *Fulton v. City of Philadelphia*, one of the many cases the Court has heard recently about the balance between religious liberties and laws providing protection from discrimination. *Fulton* involves several exceedingly important issues, including whether the government can condition a religious entity's participation in a government program (in *Fulton*, a foster-care program) on the entity's compliance with non-discrimination rules (again in *Fulton*, rules relating to the sexual orientation or marital status of potentially adoptive parents) that contradict the entity's religious beliefs. The petitioners in *Fulton* also expressly asked the Court to overturn its 1990 decision in *Employment Division v. Smith*, which held (in an opinion authored by Justice Scalia) that restrictions of neutral applicability—there, bans on peyote use—do not violate the Constitution's Free Exercise Clause as long as they are neutral and apply to everyone. There were a number of indications from the oral argument, which took place the day after the 2020 Presidential Election, that a majority of the Justices were sympathetic to the religiously based foster-care organization associated with the Archdiocese of Philadelphia. But even if those tea leaves were accurately read, the scope of the Court's decision will be critical to understanding how anti-discrimination laws and religious liberties will be balanced by this Court in the future.

Also in November, the Court heard yet another challenge to the Affordable Care Act in *California v. Texas*—this time, (i) whether the individual mandate was constitutional given Congress's decision in 2017 to reduce to zero the tax penalty for failing to purchase minimum

essential coverage, (ii) whether the entire Affordable Care Act must fall if the individual mandate is unconstitutional, or whether the mandate can be severed from the remainder of the Act; and (iii) whether the plaintiffs have standing to challenge a provision, which imposes zero penalty for lack of compliance, that does not appear to cause tangible harm. After a two-hour argument, the Court seemed inclined to leave the ACA in place without any consensus on the legal ground for doing so. Court watchers are likely readying themselves for an extremely divided decision that may not yield any majority position on any of the legal issues raised in the case.

In March, the Court heard argument in a pair of decisions challenging, under Section 2 of the Voting Rights Act, two Arizona voting provisions that make it restrict voting rights. *Brnovich v. Democratic National Committee*. The first restriction was a policy refusing to count provisional ballots cast in person on Election Day outside of the voter's designated precinct. The second restriction was a state law permitting only a narrow category of individuals (family and household members, caregivers, and mail and elections officials) to hand in early ballots. As noted previously, the Biden Administration ultimately supported upholding the two voting restrictions, and during argument a majority of the Court appeared poised to do so, though under varying justifications.

Finally, in *NCAA v. Alston*, heard just days before college basketball's "Final Four" tournament, the Court considered whether the NCAA's limitations on education-related benefits offered to student athletes (*e.g.*, caps on academic achievement payments and post-athletic-eligibility perks, such as graduate-school scholarships or study-abroad scholarships) violates federal antitrust laws. The Court seemed quite skeptical of the NCAA's "amateurism" rationale for what some Justices viewed as effectively a labor-price-fixing conspiracy among competitors.

The student-athlete plaintiffs were notably supported in their efforts by the U.S. government—and, in particular, Elizabeth Prelogar in her first argument as Acting Solicitor General defending the athletes' victory in the Ninth Circuit, which prohibited the NCAA from limiting or prohibiting universities from offering certain education-related benefits to student athletes.

Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law.

Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School.

He is the author of twelve books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are *The Religion Clauses: The Case for Separating Church and State* (with Howard Gillman) (Oxford University Press 2020), and *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador Macmillan 2018).

He also is the author of more than 250 law review articles. He is a contributing writer for the Opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court.

In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Education

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Jaime A. Santos is a partner in Goodwin Procter's Supreme Court and Appellate Litigation practice, where she focuses on appellate matters and complex civil litigation in federal courts. Jaime has filed dozens of briefs filed in the Supreme Court, and she has briefed and argued cases in federal and state appellate and trial courts across the country. She is a former cohost of the popular podcast *Strict Scrutiny* and regularly speaks at conferences and on panels about the work of the Supreme Court. In addition to her legal practice, Jaime has been a leader in addressing bias and harassment in the legal profession. Since January 2018, she has advised courts on improving the policies and processes governing inappropriate conduct in the workplace, and she has testified before the Senate Judiciary Committee and the Judicial Conference of the United States on these issues. She also serves on the MacArthur Justice Center Supreme Court & Appellate Advisory Board, and on the National Women's Law Center's Leadership Advisory Council.