Association of Corporate Counsel
SOUTHERN CALIFORNIA

The U.S. Supreme Court: The 2020 Term and Beyond

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Southern California Chapter of the Association of Corporate Counsel

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Alison M. Tucher has served on the California Court of Appeal since 2018. Prior to that, she served on the Alameda County Superior Court since 2013. Before her appointment to the bench, she worked as a partner at Morrison & Foerster, where she handled intellectual property and commercial cases in trial courts, appellate courts, and private arbitrations. Before private practice, she spent three years trying criminal cases in Santa Clara County Superior Court as a Deputy District Attorney. She currently serves on the board of the Association of Business Trial Lawyers, speaks and writes on a variety of legal topics, and is a member of the American Law Institute. After graduating from Stanford Law School, she clerked for Ninth Circuit Judge William A. Norris and U.S. Supreme Court Associate Justice David Souter.

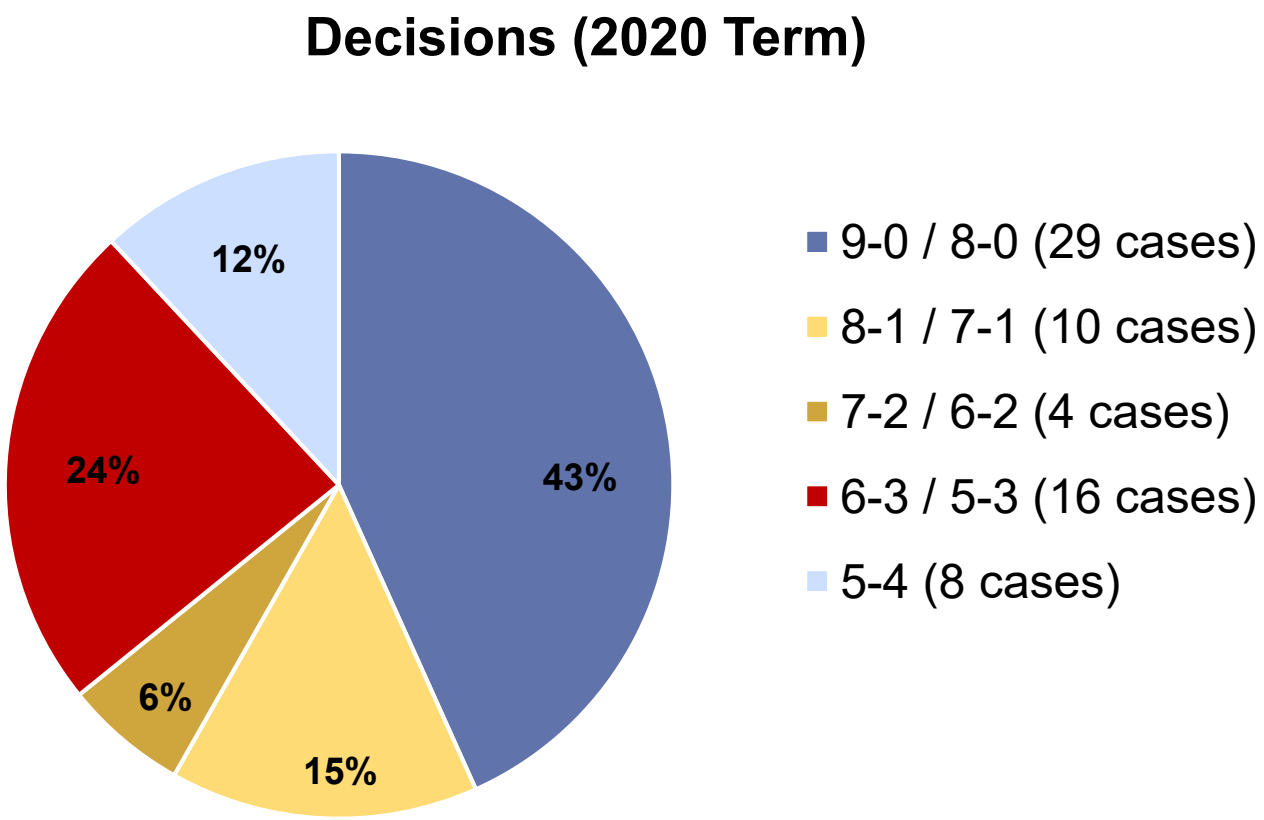
Aileen M. McGrath is a Senior Counsel at Akin Gump Strauss Hauer & Feld LLP. She focuses her practice on federal and state appellate litigation including the U.S. Supreme Court, the federal courts of appeals, and California appellate courts. Before joining Akin Gump, she served as co-chief of appellate litigation in the San Francisco City Attorney's Office. She began her tenure at the San Francisco City Attorney's Office in 2012 as Deputy City Attorney on the Complex and Affirmative Litigation Team. After graduating from Harvard Law School, she clerked for First Circuit then-Chief Judge Michael Boudin and U.S. Supreme Court Justice Stephen Breyer. She also worked as a chambers attorney on the California Supreme Court for Justice Mariano-Florentino Cuéllar.

Samuel Siegel is a Deputy Solicitor General in the California Department of Justice. Before joining the Solicitor General's office, he was a law clerk on the U.S. Court of Appeals for the Ninth Circuit and on the Central District of California. Sam represents the State of California and its agencies in a wide range of matters, primarily in the U.S. and California Supreme Courts and the Ninth Circuit. Among other representations, Sam was counsel of record for the State of California in *California v. Texas* in the U.S. Supreme Court, where he successfully worked with a coalition of 20 other States to defend the Patient Protection and Affordable Care Act.

The U.S. Supreme Court

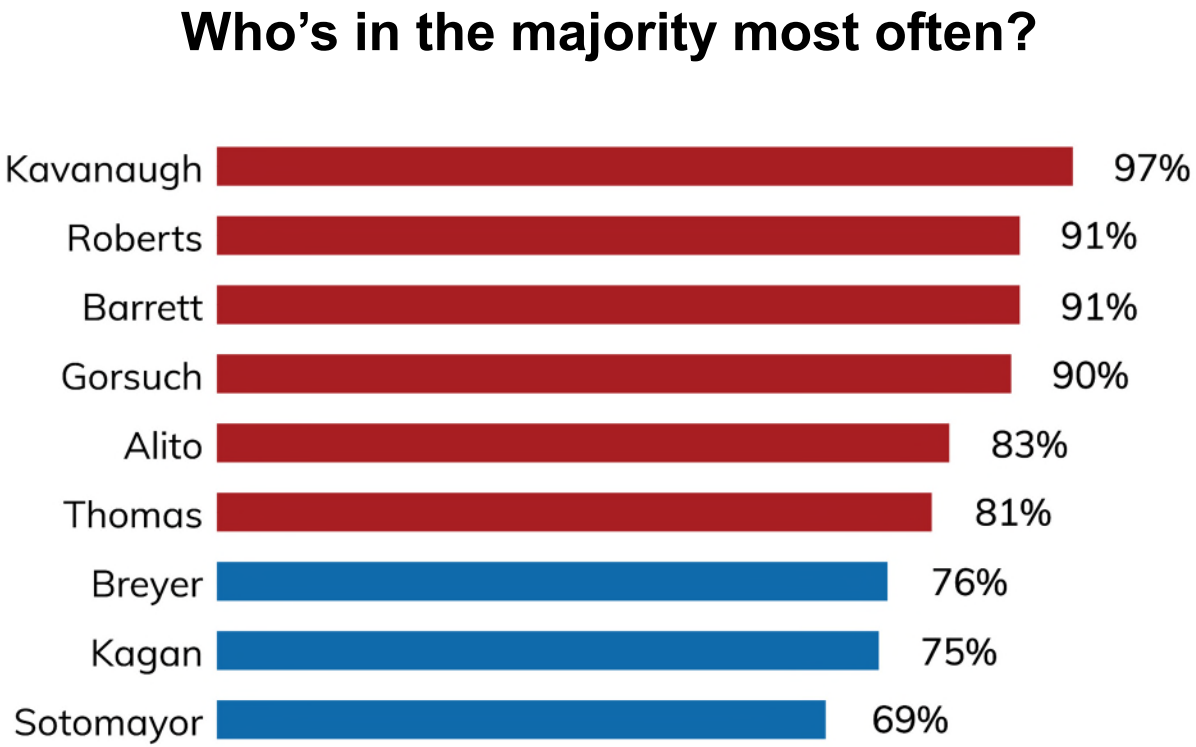
The 2020 Term: By the Numbers

Is the Court Divided Along Ideological Lines?



Total: 67 opinions released

Who is the New Swing Vote?



https://www.scotusblog.com/statistics/

Who is the New Swing Vote?

How often do the justices agree?

	Thomas	Breyer	Alito	Sotomayor	Kagan	Gorsuch	Kavanaugh	Barrett
Roberts	75%	73%	83%	66%	72%	81%	94%	84%
Thomas	-	63%	82%	55%	57%	88%	78%	85%
Breyer	-	-	59%	93%	93%	66%	73%	64%
Alito	-	-	-	53%	58%	88%	86%	87%
Sotomayor	-	-	-	-	88%	53%	66%	58%
Kagan	-	-	-	-	-	70%	72%	69%
Gorsuch	-	-	-	-	-	-	87%	91%
Kavanaugh	-	-	-	-	-	-	-	91%

Percentage of decided cases with full merits opinions in which any two justices agree with each other in the outcome (whether to affirm or reverse the decision below).

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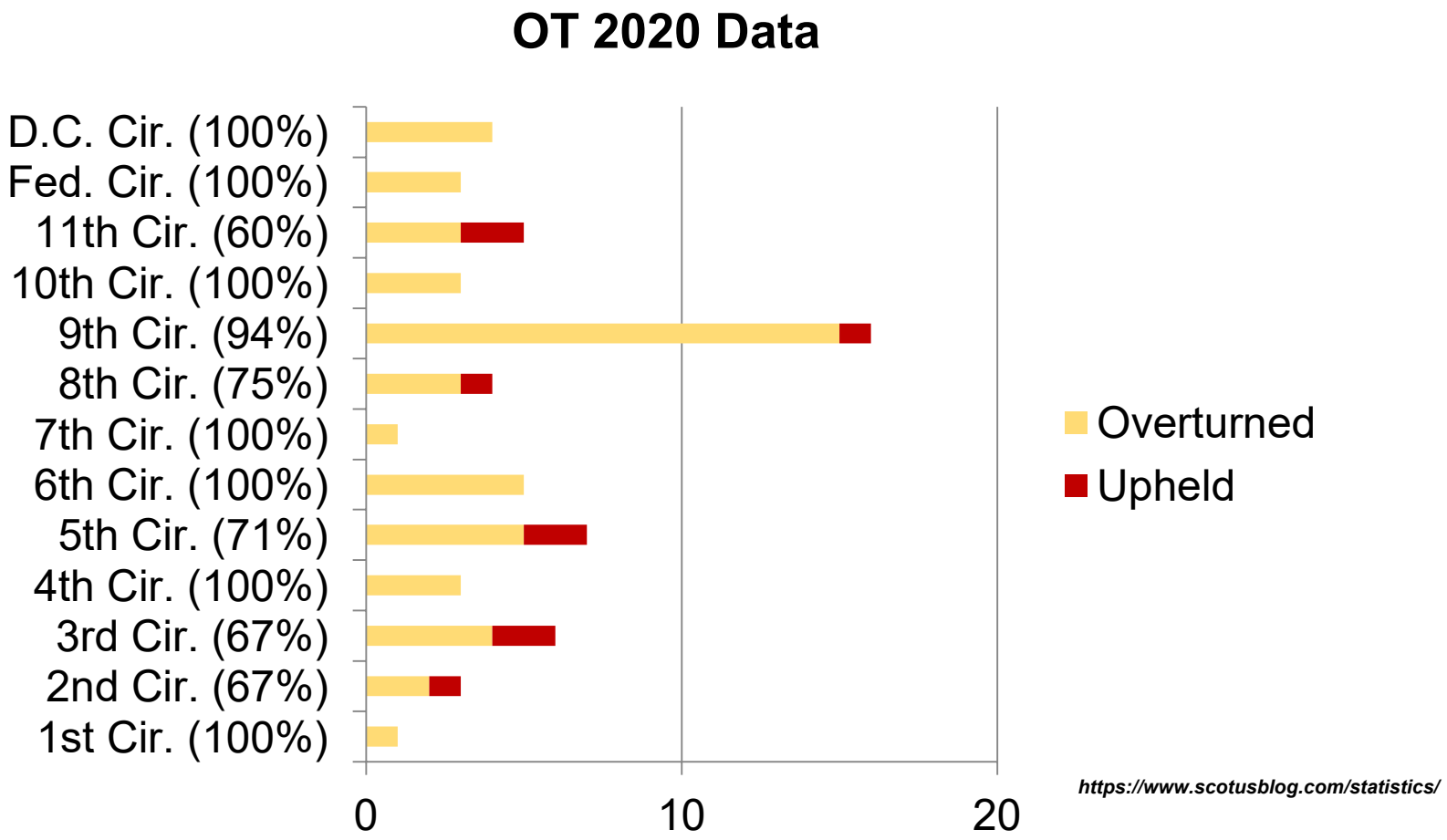
Which Circuits Are Overturned Most Often?



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Total: 69 decisions. Upheld: 14. Overturned: 55.

October Term 2020

- Affordable Care Act
- Antitrust
- Appellate Jurisdiction
- Copyright
- Free Exercise Clause
- Non-Profit Disclosures
- Personal Jurisdiction
- Securities Class Actions
- Standing in Class Actions
- Student Speech
- Takings
- Voting Rights

Affordable Care Act – *California v. Texas* (Decided 6/17/2021)

When it was enacted in 2010, the Patient Protection and Affordable Care Act (ACA) required most Americans to obtain minimum essential health insurance coverage—commonly known as the individual mandate—or to pay a monetary penalty. In 2017, Congress amended the ACA to set the penalty to $0. Shortly afterwards, a coalition led by the State of Texas sued, arguing that the mandate was unconstitutional and not severable from the rest of the ACA.

The district court struck down the ACA, and the 5th Circuit affirmed in significant part. The Court granted to decide whether the individual mandate was constitutional, and if not, if it could be severed from the rest of the ACA.

Holding: In a 7-2 opinion by Justice Breyer, the Court held that plaintiffs lacked standing to challenge the mandate's constitutionality. Because the minimum coverage provision is unenforceable, it does not injure anyone.

Dissent: Justice Alito criticized the decision as a "fundamental distortion" of standing jurisprudence.

Antitrust – *NCAA v. Alston* (Decided 6/21/2021)

The NCAA has long limited compensation to student athletes. Universities can provide athletes with scholarships and amounts covering basic expenses, but most other payments are prohibited. A group of student athletes sued, arguing that the NCAA's policies are antitrust violations, under Section 1 of the Sherman Act, because they prevent athletes from receiving fair compensation for their labor. The lower courts upheld the NCAA's rules limiting undergraduate compensation, but struck down the NCAA's rules limiting education-related benefits (e.g., payments for musical instruments, tutoring, computers, and the like).

Holding: In an 9-0 opinion by Justice Gorsuch, the Court affirmed and upheld the district court's injunction. The Court concluded that, because the NCAA has monopoly power in the intercollegiate sports market, its restraints are subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. The Court rejected the NCAA's argument that its restrictions are "pro-competitive" because they preserve college sports as we know it. Instead, the Court held that whatever interest the NCAA has in promoting amateurism, its restrictions on education-related benefits go too far in furthering that interest.

Concurrence: Justice Kavanaugh, in a concurrence, wrote that the NCAA's policies banning other types of athlete compensation "raise serious questions under the antitrust laws."

Appellate Jurisdiction – *BP P.L.C. v. Baltimore* (Decided 5/17/2021)

The city of Baltimore sued a group of oil and gas companies in Maryland state court seeking compensation for the effects of climate change. Chevron removed the case to federal court on eight different grounds. The district court remanded and the 4th Circuit affirmed, holding that it lacked jurisdiction to review most of the grounds for the district court's remand order.

Usually, a remand order is not appealable, but federal law carves out a narrow exception for certain removals, including those based on 28 U.S.C. § 1442 (known as the "federal-officer" removal statute), which the oil companies had invoked. The Court granted certiorari to decide whether, in such appeal, a court of appeals can review any reason for the remand, or only the ground identified in the statutory exception.

Holding: In a 7-1 opinion by Justice Gorsuch, the Court reversed the 4th Circuit's judgment. The Court held that a federal appeals court can review the district court's entire remand order when any one of the grounds for removal is appealable.

Dissent: Justice Sotomayor dissented, warning that this approach will allow defendants to "sidestep" the general bar on appellate review by "shoehorning" an argument under the federal officer or civil rights statutes into their removal notice.

Copyright – *Google LLC v. Oracle America, Inc.* (Decided 4/5/2021)

Oracle owns a copyright in Java SE, a computer platform that uses the popular Java computer programming language. Java is a building block for many apps and digital services. In 2005, Google acquired Android and sought to build a new software platform for mobile devices, and copied roughly 11,500 lines of Java code in its operating system to make it easier for software experts to make smartphone apps. The Federal Circuit held that Google's copying was not a fair use.

Holding: In a 6-2 opinion by Justice Breyer, the Court reversed and held that the copying was a fair use as a matter of law. The opinion embraced Google's argument that free access to software like this is crucial to the innovation economy. It found the nature of the code "inextricably bound together" with basic computing tasks that are far from "the core" of copyright. At the same time, Google used the code to create something new: "a highly creative and innovative tool for smartphones." Google used only a tiny amount (0.4 percent) of Oracle's code. For all of these reasons, the Court found that the copying was a fair use. In addition, the Court concluded that declining to apply fair use would create a risk of "creativity-related harms" to the public.

Dissent: Justice Thomas dissented, largely because he would apply the "effect on the market" inquiry in the opposite direction, *i.e.*, weighing against a finding of fair use.

Free Exercise Clause – *Fulton v. City of Philadelphia* (Decided 6/17/2021)

Catholic Social Services (CSS) contracts with the City of Philadelphia to provide foster care services. CSS refuses to certify same-sex married couples as foster parents. The City took the position that the refusal to certify same-sex married couples violated non-discrimination provisions that Philadelphia applies to its contractors. CSS sued, arguing that Philadelphia's position violated the Free Exercise Clause. The lower courts disagreed, holding that the contractual non-discrimination requirement was neutral and generally applicable under *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

Questions Presented: The case primarily concerned two questions: (1) Whether applying the contractual non-discrimination provisions to CSS violates the Free Exercise Clause, and (2) whether the Court should overrule *Smith*.

Holding: In a 9-0 opinion by the Chief Justice, the Court held that the City violated the Free Exercise Clause – but not for the broad reasons CSS argued. The Court focused on a contract provision allowing the City to exempt contractors in its "sole discretion." Even though the City had never exempted a contractor from its nondiscrimination requirement, the Court found that the "sole discretion" language meant the non-discrimination requirement was not "generally applicable," and thus *Smith* did not save it. The Court therefore applied strict scrutiny and found Philadelphia's denial of an exemption for CSS was a free exercise violation.

Concurrences: Several justices filed separate opinions. Justice Barrett indicated that she is not prepared to overrule *Smith* without a better test to replace it. Justices Thomas, Alito and Gorsuch—in separate opinions concurring in the judgment—indicated that they would overrule *Smith*.

Non-Profit Disclosures– *Americans for Prosperity Foundation v. Bonta* (Decided 7/1/2021)

Charitable organizations soliciting funds in California must disclose the identities of their major donors to the state Attorney General's Office. California uses this information to police misconduct by charitable organizations. Two tax-exempt organizations filed suit, arguing that the compelled disclosure requirement violated their and their donors' First Amendment rights. The district court agreed with the organizations, but the 9th Circuit reversed.

Holding: In a 6-3 opinion by the Chief Justice, the Court reversed and held that the disclosure requirement is facially invalid because it violates the First Amendment right of association by subjecting donors to possible harassment. The Court applied "exacting scrutiny," which requires a "substantial relation" between the law and a "sufficiently important governmental interest." The Court held that collecting donor information does not "form an integral part of California's fraud detection efforts."

Dissent: Justice Sotomayor dissented, joined by Justices Breyer and Kagan. Justice Sotomayor said, "Today's analysis marks reporting and disclosure requirements with a bulls-eye."

Personal Jurisdiction – *Ford Motor Co. v. Montana Eighth Judicial District Court* (Decided 3/25/2021)

In two cases, Minnesota and Montana state courts respectively exercised jurisdiction over Ford in a product liability suit involving cars built and initially sold outside the forum state. Before the Supreme Court, Ford argued that because it neither sold nor designed the particular cars at issue in the forum state, the state courts lacked personal jurisdiction over it.

Holding: In an 8-0 opinion by Justice Kagan, the Court held that the connection between the plaintiffs' claims and Ford's activities in the forum states supports specific jurisdiction. The Court concluded that where the plaintiffs are residents of the forum states, used the allegedly defective products in the forum states, and suffered injuries when those products malfunctioned there, the forum state courts may entertain the resulting suit. Thus, the Court rejected Ford's argument that Montana and Minnesota lacked specific jurisdiction because Ford had designed, manufactured, and sold the vehicles outside those states. And it emphasized that both companies do substantial business in Montana and Minnesota, advertise their cars there, provide maintenance and replacement parts, and otherwise "systematically serve[] a market" for Ford vehicles in the forum states.

Securities Class Actions – *Goldman Sachs v. Arkansas Teacher Retirement System* (Decided 6/21/2021)

Goldman Sachs investors sued the bank, arguing that they lost billions of dollars as a result of what they called false statements about the bank's high standards in avoiding conflicts. The statements were abstract and general. One example: "Our clients' interests always come first." Another: "Integrity and honesty are at the heart of our business." The 2nd Circuit had ruled in favor of the investors in certifying a class. The Court granted review to decide whether statements like these are too generic and nonspecific to distort the price of a security, and how defendants can rebut the presumption of reliance on alleged misstatements in a securities-fraud class action.

Holding: Justice Barrett wrote the opinion. For a unanimous Court, she wrote that courts must consider whether statements are too generic to have affected securities prices. For an 8-1 Court (with only Justice Sotomayor disagreeing), Justice Barrett wrote that the 2nd Circuit should reconsider the genericity question. As to the question of who has the burden of persuasion on the question of price impact, a 6-3 Court held that defendants have the burden of both production and persuasion on the issue.

Dissent: Justices Gorsuch, Thomas and Alito dissented from the Court's holding on burden of persuasion.

Standing in Class Actions – *TransUnion LLC v. Ramirez* (Decided 6/25/2021)

A class sued TransUnion, alleging that TransUnion placed inaccurate alerts on class members' credit reports. Some class members had their inaccurate reports distributed to third parties, but many did not. The 9th Circuit had held that all of these class members had Article III standing to sue TransUnion, and upheld a $40 million damages award. The 9th Circuit held that all class members had a "material risk of harm" that allowed them to sue TransUnion.

Holding: In a 5-4 decision authored by Justice Kavanaugh, the Court reversed, holding that only plaintiffs concretely harmed by a violation of the Fair Credit Reporting Act have standing to seek damages. The violation of a statutory prohibition is not enough. Plaintiffs must show a concrete injury, like monetary harm, physical harm, or intangible injuries like reputational injuries or the disclosure of private information. The plaintiffs whose information was not disseminated to third parties lacked this injury.

Dissent: Justice Thomas dissented, joined by the three liberal justices. He would allow lawsuits to go forward where plaintiffs allege violations of statutory prohibitions.

Student Speech – *Mahanoy Area School District v. B.L.* (Decided 6/23/2021)

B.L. was a student at a public high school who was disappointed that she was selected for the school's junior varsity cheerleading squad, rather than its varsity squad. B.L. posted a photo on the Snapchat app with vulgar language and gestures about the school and cheerleading. The school suspended B.L. from the junior varsity cheerleading squad. B.L. and her parents argued that the suspension violated the First Amendment because B.L.'s speech occurred off-campus. The Court granted review to decide whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), applies to student speech that occurs off campus.

Holding: In a 8-1 opinion by Justice Breyer, the Court held that the school district's decision to suspend B.L. from the cheerleading squad violated the First Amendment. But the decision did not impose a categorical rule based on the location of speech, and it leaves open the possibility that schools may regulate speech that occurs off campus if it involves severe bullying, threats or similar conduct.

Takings – *Cedar Point Nursery v. Hassid* (Decided 6/23/2021)

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization. The regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Two California growers filed suit in federal court, arguing that the regulation effectively gave union organizers an easement to enter the growers' property without compensation, and thus was an unconstitutional per se physical taking. The 9th Circuit had disagreed and upheld the regulation.

Holding: In a 6-3 opinion by the Chief Justice, the Court held that California's access regulation constitutes an unconstitutional per se taking under the Fifth and 14th Amendments.

Dissent: Justice Breyer dissented, joined by Justices Kagan and Sotomayor, arguing that the majority's decision will "make many ordinary forms of regulation unusually complex or impractical" by injecting a property-rights element.

Voting Rights – *Brnovich v. Democratic National Committee* (Decided 7/1/2021)

This case involved two Arizona election regulations: (1) an "out of precinct" policy requiring election officials to throw out a ballot cast at the wrong precinct, and (2) a regulation prohibiting so-called "ballot harvesting," *i.e.*, the delivery of someone else's ballot. The 9th Circuit had held that both provisions violated Section 2 of the Voting Rights Act.

Holding: In a 6-3 opinion by Justice Alito, the Court reversed and upheld both provisions. The Court's opinion outlined several factors that bear on whether a law violates Section 2: the size of the burden; the extent to which the voting rule being challenged differs from voting practices employed in 1982 (when Section 2 was amended); the availability of alternatives; the interest the state has in a particular rule; and the size of any disparate impact on racial or ethnic groups. Applying these factors, the Court held that neither Arizona law violates Section 2.

Dissent: Justice Kagan dissented, joined by Justices Breyer and Sotomayor. She criticized the majority as adopting a "cramped reading" of Section 2 to uphold two provisions that discriminate against minority voters.

The Shadow Docket

- The shadow docket is the set of orders and summary decisions that the Supreme Court decides outside of its usual merits process.
- Mechanics: litigants apply to a single justice (Circuit Justice) who decides whether to refer the dispute to the full Court. Five Justices must vote to grant.
- Why is it controversial? Orders issued on the shadow docket are not technically rulings on the legal merits of the underlying disputes, but often they have the effect of influencing the lower courts.

COVID-19 Emergency Orders: The Impact of a New Justice?

- *South Bay United Pentecostal Church* (May 2020): Court denied emergency application challenging Gov. Newsom's order limiting religious institutions to 25 percent capacity (or 100 people). The Chief Justice concurred because the order treated churches the same as comparable secular gatherings.
- *Calvary Chapel v. Nevada* (July 2020): Court denied emergency application challenging Nevada governor's order limiting church services to 50 people. Justices Alito, Gorsuch, Thomas and Kavanaugh dissented.
- *Roman Catholic Diocese v. Cuomo* (November 2020): The State of New York had limited attendance at religious services to 10 people in areas with severe outbreaks, and 25 people in other nearby areas. In a 5-4 vote, the court prohibited New York from enforcing these restrictions. Justice Barrett voted with Justices Alito, Gorsuch, Thomas and Kavanaugh. The majority emphasized that essential businesses like "acupuncture facilities, camp grounds, and garages" could operate at higher capacity than religious institutions.
- *South Bay United Pentecostal Church/Harvest Rock* (February 2021): Court allowed churches to hold indoor worship services, but allowed California to continue to enforce attendance caps and restrictions on singing.
- *Gateway City Church* (February 2021): Court granted application for emergency relief from Santa Clara County's prohibition on indoor worship services, allowing indoor services to resume with capacity limits.
- *Tandon* (April 2021): Court struck down restrictions on group religious activities in private settings. Unsigned 5-4 opinion said that laws require strict scrutiny "whenever they treat any comparable secular activity more favorably than religious exercise."

Preview of 2021 Term

- Second Amendment
- Abortion
- Death Penalty
- Affirmative Action?
- Commission on Supreme Court Reform

Thank You for Joining Us!

Questions?