THE THIRD BRANCH:
The Supreme Court of the United States (SCOTUS)
Week 3

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Fall 2023, Jefferson County Library

The Clean Water Act:
Sackett et.ux. v. EPA et al.*

- Michael and Chantell Sackett bought property near Priest Lake, Idaho and began backfilling the lot with dirt to build a home.
- The EPA:
  - Tells them that they have **wetlands** on their property,
  - That the backfill violates the Clean Water Act (CWA), and
  - Orders the Sacketts to restore the site or face penalties of over $40,000/day.
  - The wetlands are classified as such because they were near a ditch that fed into a creek which fed into Priest Lake.

*et ux. = et uxor, latin for and 'and wife.'

The Clean Water Act:
Sackett et. ux. v. EPA et al.

The Sackett's property is on the land side of the row of waterfront homes between the road and the driveway.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **The EPA's position**:
  - The CWA bars the discharge of pollutants, including rocks and sand, into 'navigable waters.'
  - Navigable waters are defined as 'waters of the United States.'
  - Both the Federal District Court and the 9th Circuit Court of Appeals agree with the EPA, relying on the application of a test set forth by former Justice Anthony Kennedy in a case called ***Rapanos v. United States*** (Rapanos):

    Is there a "significant nexus" between the wetlands at issue and waters that are covered by the CWA, and do the wetlands "significantly affect' the quality of those waters?

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **The Supreme Court**:
  - The Court **unanimously** sides with the Sacketts. All 9 justices agree that the EPA overstepped its authority and that the wetland on the Sackett's property is not under the authority of the EPA under the CWA.
  - However, the justices **split** on the reasoning, with Alito delivering the majority opinion that establishes a ***stricter*** test on how wetlands may fall under the CWA. Roberts, Thomas, Gorsuch and Barrett join this opinion.
  - Thomas also files a concurring opinion which Gorsuch also joins.
  - Kavanaugh files a concurring opinion that *disagrees* with the new test, which Sotomayor, Kagan and Jackson join.
  - Kagan writes a separate concurrence as well, further attacking Alito's analysis.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **Alito's Opinion**:
  - The CWA prohibits the discharge of pollutants into only "navigable waters" which it defines as "the waters of the United States…"
  - The EPA had interpreted "the waters of the United States" to include "all … waters that "could affect interstate or foreign commerce" and "wetlands ***adjacent*** to those waters." 'Adjacent' was interpreted by the EPA to mean not just 'bordering' or 'contiguous' but also 'neighboring.'
  - The EPA asserted jurisdiction over wetlands "adjacent" to non-navigable tributaries of navigable waters when they had "a ***significant nexus*** to a traditional navigable water." Such a nexus exists when the wetlands "either alone or in combination … significantly affect the chemical, physical, and biological integrity" of those waters.
  - This is how the EPA got the Sacketts: their wetland was lumped in with other wetlands in combination as having the above significant nexus.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **Alito's Opinion**:
  - One problem that Alito points out is that the Army Corps of Engineers controls permits for the discharge of dredge or fill into covered waters. The costs of such a permit are significant and both the EPA and the COE admit that the permitting process is arduous, expensive and long. I.e., if you've got a wetland, you are (were) probably screwed.
  - Under the *significant nexus* test, how do you know if your wetland is one that is covered by the CWA? The CWA's approach to 'waters of the United States' can be so broad as to 'criminalize mundane activities like moving dirt' in Alito's view.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **Alito's Opinion**:

  Alito goes back to the *Rapanos* decision and looks not at Kennedy's *significant nexus* test, but to the *plurality opinion* analyzing the CWA:

  - The covered waters of the United States under the CWA encompass only relatively permanent, standing or continuously flowing bodies of water, i.e. streams, oceans, rivers and lakes.
  - An amendment to the CWA in 1977 by Congress added wetlands adjacent to 'waters of the United States,' so some wetlands must be included as 'waters of the United States.'
  - The *Rapanos* plurality of four justices (not incl. Kennedy) spelled out when ***adjacent*** wetlands are covered: *only when those wetlands are, as a practical matter, indistinguishable from 'waters of the United States*.'
  - That is, to fall under the CWA the adjacent wetlands must have **a continuous surface connection** to bodies that are 'waters of the United States.'

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- **Thomas' Opinion**: Thomas agrees with Alito, but goes on to discuss traditional notions of navigable waterways, arguing for a more restrictive view of Congress' power to legislate under the Interstate Commerce Clause of the Constitution (this comes up periodically in Thomas' writing).
- **Kavanaugh's Opinion:** Kavanaugh argues that the 'continuous surface connection' test departs from the statutory text and from 45 years of practice and the Court's own precedents. He says **Alito interprets 'adjacent' to be limited to 'adjoining', where *adjacent* wetlands include both those that are *contiguous* to or border US waters but also those that are *separated by e.g. a manmade dike or barrier, a natural berm, beach dune, etc***. By changing the definition, long-covered waters will now not be covered with repercussions for water quality and flood control in his view.
- **Kagan's Opinion:** Kagan agrees with Kavanaugh and emphasizes that the Court is substituting its ideas about policy making for Congress's. Kagan particularly takes Alito to task on his interpretation of s.1344(g)(1) that any covered wetlands must be continuous with covered waters.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- The statutory provision being interpreted:
- 33 USC 1344 … **(g) State administration**
- (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, **including wetlands adjacent thereto**) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

The Clean Water Act
Sackett et. Ux. v. EPA et al.

- This case has lots going on:
  - Federalism (degree of federal control of local waters)
  - Statutory interpretation/the meaning of words in context
  - Congressional power (Interstate Commerce Clause)
  - Alleged administrative overreach by the Feds
  - Land use
- Both the EPA and the COE have revised their regulatory definitions of WOTUS in light of the decision.
- This decision significantly reduces the scope of authority of the EPA over wetlands.

LENGTH OF SCOTUS OPINIONS OVER TIME

- 1801 – Marbury v. Madison – 44 pp.
- 1954 – Brown v. Board of Education – 14 pp.
- 1973 – Roe v. Wade – 66 pp.
- 2022 – Dobbs v. Jackson Women's Health – 213 pp.
- 2023 – SFFA v. Harvard & UNC – 237 pp.

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis

PETITIONER – Lorie Smith, owner and founder of a graphic design firm (301 Creative LLC), **wants to expand her business to include wedding websites**. However, she **opposes same-sex marriage on religious grounds**, so:

- **she does not want to design websites for same-sex weddings, and**
- **she wants to post on her website a message explaining her religious objections.**

RESPONDENT – Colorado's AntiDiscrimination Act (CADA) prohibits **businesses that are open to the public from discriminating** on the basis of numerous characteristics, including sexual orientation. Discrimination includes:

- **refusing to provide goods or services, and**
- **publishing any communication that says or implies that an individual's patronage is unwelcome because of a protected characteristic.**

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

LEGAL QUESTION – **Does application of the Colorado AntiDiscrimination Act violate an artist's 1st Amendment Free Speech Rights?**

SMITH'S SUIT IS PRE-EMPTIVE – Note that **Smith had not created any wedding websites** so had not turned down any gay customers nor been challenged by CO under CADA.

LOWER COURTS – Both the CO district court and the 10th Circuit **found for the state of Colorado**.

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

SMITH'S ARGUMENTS:

- CADA would require her to create messages that are inconsistent with her religious beliefs and bar her from announcing those beliefs on her website. Thus, **CADA would violate her 1st Amendment rights of free speech.**
- **She would happily design a website for an LGBTQ customer who runs an animal shelter,** but designing a marriage website would **express approval of the couple's marriage.**
- The service she provides is her **design services**, which are ***"pure speech,"*** and **CADA requires her to change that speech "in untenable ways."**

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

COLORADO'S ARGUMENTS:

- CADA's prohibition on publishing discriminatory services **does not violate the Free Speech Clause because it prohibits only speech that promotes unlawful conduct** and such speech is **not protected by the 1st Amendment.**
- **CADA does NOT require Smith to offer specific kinds of design services OR bar her from including biblical quotes** reflecting her view of marriage on any weddings websites that she might create.
- All that CADA requires is that Smith **sell whatever products or services she decides to offer to anyone who wants to buy them.**
- **For example, CADA does not require a Hundu calligrapher to create flyers with a Christian message, but if a Hindu calligrapher does create such a flyer, the calligrapher must sell it to all willing customers.**

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

PANEL'S PREDICTION LAST YEAR – **Side with Smith.** Court will have sympathy for persons who sincerely believe same-sex marriage violates their religious beliefs, and same-sex couples can readily find the services they need from other commercial actors.

SCOTUS RULING – **6:3 decision written by Gorsuch** (joined by Roberts Kavanaugh, Barrett, Gorsuch, Alito & Thomas):

- **The 1st Amendment *"protects an individual's right to speak his mind"*** even when others may regard that speech as "*deeply misguided*" or it may cause "*anguish.*"
- **Colorado may not *"force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance."***

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

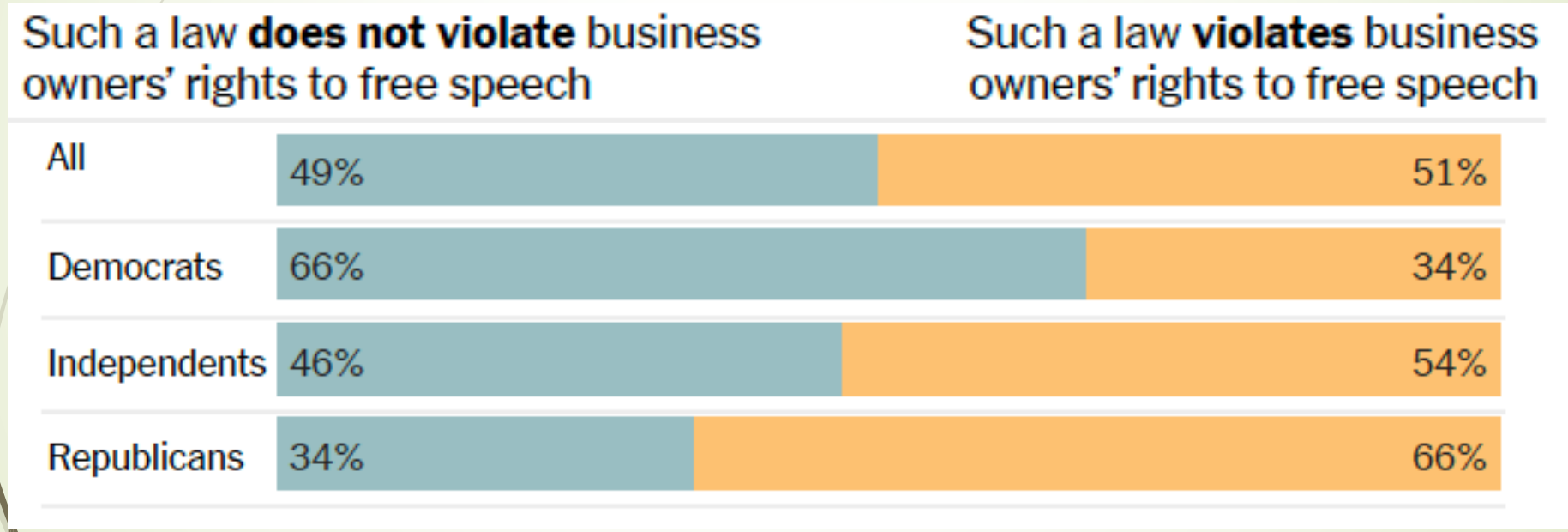
DISSENT – **written by Sotomayor** (joined by Kagan & Jackson):

- **The Constitution** ***"contains no right to refuse service to a disfavored group."***
- **CODA does not regulate or compel speech.** A business owner offering goods and services to the public ***"remains free to decide what messages to include or not to include."***
- ***"The immediate symbolic effect of the decision is to mark gays and lesbians for second-class status."***

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

Where the public stands



The New York Times | https://nyti.ms/43xL9Bt

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

REACTION FROM THE LIBERAL LEGAL COMMUNITY:

- Case comes as both a religion and speech case, but **religion gets stripped out, yet it is almost impossible to unbraid the two.**
- This case represents ***"a remarkable carve-out of public accommodation law."***
- After today, commercial businesses can now hang out a shingle or put on their website a sign that says, ***"we will serve all comers except gay couples."***
- *"The absence of anyone on the other side of this case* [a declined customer] *means* ***there was really only one compelling story told."***

Dahlia Lithwick, Contributing editor at *Newsweek*
American Constitution Society – SCOTUS Review OT 2022
https://www.youtube.com/watch?v=JRaGkkWNAkU
28:45→34:15

Free Speech Exceptions to Nondiscrimination Law

303 Creative LLC v. Elenis (cont)

INVESTIGATIVE REPORTING BY WASHINGTON POST:

- "…*the **legal advocacy group** behind this case **[Alliance Defending Freedom or ADF] has spent a decade laying groundwork** through similar lawsuits filed around the country.*"
- One founder, talk-radio pioneer **Marlin Maddoux** published a book calling for ***"an all-out culture war"* against *"godless sodomites"* in order to prevent a *"homosexual agenda"* from remaking society.**
- Headquartered in Scotsdale, AZ, **ADF collected nearly $97 million** in the year ending June 2022, **financing 90 staff lawyers** and a network of **>4,000 "allied attorneys."**
- In three case precedents cited in the SCOTUS petition, **petitioners were shown to have been created by ADF**, which did legal work to **set up commercial entities** and **creating staged wedding websites using their own employees.**

https://www.washingtonpost.com/investigations/2023/09/24/alliance-defending-freedom-wedding-lawsuit/

Haarland v. Brackeen and related cases involving the **Indian Child Welfare Act (ICWA)**

- The case was brought by the states of Texas, Louisiana, and Indiana, and individual plaintiffs, and seeks to declare the **Indian Child Welfare Act** (**ICWA**) unconstitutional.
- The matter originally came up in Texas District Court on an adoption petition filed by Chad and Jennifer Brackeen. After their effort was challenged by the Navajo Tribe, the Brackeens sued in the U.S. District Court in Fort Worth. The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians intervened in the case. ***The U.S. District Court declared that the ICWA was unconstitutional and the case was appealed***.
- The **Fifth Circuit Court of Appeals** held that parts of the law, that set federal standards for lower and state courts, were constitutional; but that the **parts of the law that required state agencies to perform certain acts were unconstitutional** as a violation of the Tenth Amendment (commandeering).

Haarland v. Brackeen

- In 1978, the Congress enacted the ICWA to protect American Indian children from removal from their tribes to be adopted by non-Indians. **As many as 35 percent of Indian children were being removed from their homes and being placed in non-Indian homes. This was often not in the best interest of the child, but part of a targeted process of assimilation.**
- Congress established the following order of priorities for placing an Indian child who had to be removed from a home:
  - **First**, the child should be placed with a member of the child's extended family,
  - **Second**, the child could be placed with a family or foster home approved by the child's tribe, or
  - **Third**, they could be placed with other Indian families, or Indian foster homes.
  - **Finally**, they could be placed in an institution operated or approved by an Indian Tribe.

Haarland v. Brackeen

The **Brackeens**:

- In June 2016 a 10-mont-old Navajo boy is placed as a foster child with Chad and Jennifer Brackeen; parental rights are terminated by Texas state court.
- The boy's natural mother is Navajo and living in Texas, the father is Cherokee; the mother was found to be using drugs.
- The Brackeens apply to adopt, but the Navajo nation steps in under the provisions of the ICWA to have the boy placed with a Navajo family; that fails, however, and the Brackeens are allowed to adopt the boy.
- The Brackeens then *later* attempt to adopt the boy's sister in Texas state court, but in this case the girl's extended family also wants to adopt her, and the terms of the ICWA are at least part of what prevent the Brackeens from being able to adopt.

Haarland v. Brackeen

Process:

- Adoption petition in **Texas state district court** (the state attorney argued for placement with the Navajo family, judge sided with Brackeens but including visitation with Navajo family).
- Brackeens file a federal lawsuit in the **Federal District Court in Fort Worth**. The states of Texas, Louisiana and Indiana join as state plaintiffs and other families as well, essentially four similar cases joined together. Defendants include the Department of Interior, the BIA, and DHHS as well as their directors.
- **5th Circuit Court of Appeals** panel decision.
- **5th Circuit en banc** decision.
- Now, the 5th circuit's ***en banc*** decision is on appeal at SCOTUS.
- The **US Supreme Court** oral argument, set for one hour, took three hours.

Haarland v. Brackeen

The **Fifth Circuit en banc Opinion** specifically finds:

- the court *unanimously* ruled that at least one party had **standing** to bring the suit, and a *majority* held that Congress had the *authority* to enact the ICWA.
- the "Indian child" classification does not violate 14th Amendment 'equal protection.' (*US v. Antelope* had held "that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications.")
- It did however find that the adoptive placement and preference for an "Indian foster home" violates equal protection.
- The court also held that the ICWA's requirements for "active efforts," an expert witness, and recordkeeping requirements **unconstitutionally 'commandeer' state actors, violating the *Tenth Amendment***. The commandeering doctrine says that 'The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.'

Haarland v. Brackeen

The **Supreme Court** takes on the following issues:

- Does the Federal Government have constitutional authority to enact the ICWA in the first place.
- Do the various parties to this suit have ***standing*** such that there is an actual case or controversy?
- Does the ICWA discriminate based on race, violating the equal protection clause of the 14th amendment?
- Does the provision of the ICWA allowing tribes to adopt their own preferences for the placement of Native children unconstitutionally delegate legislative power to the tribes?
- Do the provisions of the ICWA requiring state and local government agencies to provide 'services' violate the 'anti-commandeering' interpretation of the 10th Amendment?

'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

Haarland v. Brackeen

Justice Barrett wrote the majority opinion of the court, her opinion being joined by Roberts, Sotomayor, Kagan, Gorsuch, Kavanaugh and Jackson (7-2).

1. Barrett readily finds that Congress had the authority to enact the ICWA. The court in the past has characterized Congress' power to legislate with respect to the Indian tribes as "**plenary and exclusive**." Arguments re the Indian commerce clause and the Treaty clause as limiting were not persuasive.

   Arguments that Congress was treading on traditional areas of family law dealt with by the states were also not accepted given its power to legislate over Indian affairs.

Haarland v. Brackeen

2. Anti-commandeering arguments were perhaps the more serious challenge, but Barrett also dismissed these arguments. The acts that were required of the states include, arguably:

- in effect states must provide additional services to the parents of Indian children to comply with the act's requirement for 'active efforts' to keep the native family together;

- the ICWA's placement preferences requires state agencies to perform a diligent search for placements that would satisfy the ICWA hierarchy;

- the ICWA requires state courts to enforce the ICWA hierarchy; and

- Congress cannot force state courts to maintain or transmit records of custody proceedings of Indian children.

Barret's primary response is that, because the ICWA applies equally to state and non-state placement agencies, i.e. **both private and public agencies**, it does not violate the anti-commandeering doctrine.

With respect to courts, Barrett noted that state courts are routinely called on to enforce federal law, and keeping records is just part of what they do.

Haarland v. Brackeen

3. Barrett found that a number of parties did **not** in fact have standing here, and those parties are the actual adoptive families involved. Why? Because all adoptions that were the subject matter of these suits had been finalized!

4. As a result, the question of whether the ICWA discriminates based on race, violating the equal protection clause of the 14th amendment, and the question of whether the provision of the ICWA allowing tribes to adopt their own preferences for the placement of Native children unconstitutionally delegate legislative power to the tribes, are not properly before the court, and the court does not decide these issues.

Kavanaugh wrote a concurring opinion pointing out that the court had not dealt with the equal protection issue, which he characterized as 'serious.' "Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race – even if the placement is otherwise determined to be in the child's best interest. … And, a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race."

Haarland v. Brackeen

Note:

Justice Barrett is the mother of two adoptive children from Haiti.

Your presenters were foster parents and became adoptive parents to two sisters that spent seven years in foster care before being able to be adopted.

Employee Religious Accommodation

Groff v. DeJoy

PETITIONER: –

- **Gerald Groff** was an Evangelical Christian and former **U.S. Postal Service worker** who **began work in 2012 at a time when there was no Sunday delivery**.
- When the USPS began **delivering for Amazon, Sunday shifts were required on a rotating basis**.
- Believing that Sunday should be devoted to worship, **Groff moved to a rural USPS station** that did not make Sunday deliveries.
- When Amazon deliveries began at the new station, **Groff refused Sunday shifts and received "progressive disciplinary action."**
- He **eventually resigned**.

RESPONDENT – **Louis DeJoy** was the U.S. **Postmaster General**

Employee Religious Accommodation

Groff v. DeJoy (cont.)

DISTRICT COURT granted summary **judgment for USPS**

3RD CIRCUIT affirmed, both ruling that **USPS's need to shift burden of Sunday work to other employees met the standard of "undue hardship" the Court set in 1977 in *TWA v. Hardison*.**

QUESTION BEFORE THE COURT – Is inconvenience to coworkers an **"undue burden" under Title VII of the Civil Rights Act of 1964** such that it excuses an employer from providing an accommodation requested for religious exercises?

TITLE VII – Prohibits discrimination based on religion, and subsequent regulations issued by the EEOC **require employers to make reasonable accommodation of an employee's religious beliefs unless doing so would cause "undue hardship" to the employer.**

Employee Religious Accommodation

Groff v. DeJoy (cont.)

SCOTUS RULING – 9:0 decision written by **Alito** (with Sotomayor writing in a separate concurrence):

- The 1977 standard set in *TWA v. Hardison* of ***"undue hardship"* has been interpreted to mean *"any effort or cost that is 'more than…de minimus,'"*** and **that interpretation is *"a mistake."***
- Instead, Alito set a **new standard** – *"…an employer must show that the burden of granting an* ***accommodation would result in substantial increased costs in relation to the conduct of its particular business."***
- **Sotomayor's concurrence** emphasized that "costs" should be interpreted to **include impact on employees.**
- 3rd Circuit's ruling was vacated and the **case remanded back to the 3rd Circuit to reconsider under the new interpretation.**

WHERE THE PUBLIC STANDS – Nearly 50:50 **in all categories**

Employee Religious Accommodation

Groff v. DeJoy (cont.)

IRONICALLY:

- In recent years, it has been the **Court Conservatives** that have sought to **carve out exceptions for religious beliefs**:
  - ***2023 – 303 Creative v. Elenis***
  - ***2014 – Burwell v. Hobby Lobby Stores***
- **In the 7:2 decision in *TWA v. Hardison* (1977),** it was the **Court Liberals** who dissented. Thurgood Marshall, joined by William Brennan, wrote:

  "The ultimate tragedy is that despite Congress's best efforts, one of this Nation's pillars of strength -- our hospitality to religious diversity -- has been seriously eroded. ***All Americans will be a little poorer until today's decision is erased."***

Andy Warhol Foundation v. Goldsmith

- The work on the right is an original photograph by Lynn Goldsmith from 1981.
- The work on the left was made by Vanity Fair & Andy Warhol under license from Goldsmith in 1984.
- Conde Nast (owns Vanity Fair) used the 'Orange Prince' version on the left in a commemorative publication in 2016.

Andy Warhol Foundation v. Goldsmith

- The 2016 publication exceeded the license that was originally granted, which was just for the Vanity Fair article.
- Goldsmith sued the Andy Warhol Foundation, successor to Warhol's copyright in the Prince Series, for copyright infringement.
- The Foundation argues 'fair use' as a defense.
- The ***district court granted summary judgment*** for the Foundation, concluding that Warhol had ***"transformed"*** the original photograph by giving it a new "meaning and message."
- The **U.S. Court of Appeals for the Second Circuit**, holding that ***because the Prince Series remained "recognizably derived" from the original, it <u>failed</u> to transform and was thus not fair use.***

Andy Warhol Foundation v. Goldsmith

- **Fair use** is a copyright doctrine which permits limited use of copyrighted material without having to first acquire permission from the copyright holder.
- The doctrine is intended to balance the interests of copyright holders with the public interest in the wider distribution and use of creative works by allowing certain limited uses.
- Classic 'fair use' is for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. That is how I get away with copying both of these images here ☺.
- A recent and key consideration in 'fair use' analysis is whether the later work is **'transformative.'** A transformative work transcends, or places in a new light, the underlying work on which it is based.

Andy Warhol Foundation v. Goldsmith

- Oral Argument was held October 12,2022 with wide ranging discussion about what makes a work transformative.
- A pro-AWF decision could make it impossible for photographers to enforce licenses for artistic reproductions of the sort that Goldsmith originally sold to *Vanity Fair*.
- A less extreme opinion could find ***fair use*** in the fact that this was not just any artist's modification, but *Andy Warhol's* — but that risks furthering an already troubling trend in fair use cases — ***extending greater fair use solicitude to the well known and wealthy, and less to the poor and obscure.***
- A pro-Goldsmith decision risks, as many amicus briefs have observed, "a whole generation of artists working today who will be chilled were this ruling to stand."

Andy Warhol Foundation v. Goldsmith

- **Decision:**
  - In May 2023, the Court ruled 7–2 that AWF's use of Goldsmith's photographs was **not** protected by fair use.
  - **Justice Sonia Sotomayor** wrote for the majority that ***the works shared a similar purpose in the depiction of Prince in magazine articles and are both a commercial product.***
  - Her opinion contained many footnotes disparaging ***Justice Elena Kagan's combative dissent***, which was equally harsh on the majority as she defended the value of transformation in art.
  - Commentators in the art world feared for the future of **appropriation art**, popular with artists inspired by Warhol, like Richard Prince and Jeff Koons, if artists are deterred from creating works by fear of litigation or prohibitive license fees.

Andy Warhol Foundation v. Goldsmith

- **Decision:**
- For a work to be **transformative,** it must be productive and must employ the underlying work in a different manner or for a different purpose than the original. A use of copyrighted material that either repackages or republishes the original is unlikely to pass the test. If, on the other hand, the secondary use adds value to the original—if the underlying work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding—this is the very type of activity that fair use doctrine intends to protect for the enrichment of society.
- The Supreme Court accepted this aspect of fair use of copyrighted works in a holding that rap group **2 Live Crew's** parody of **Roy Orbison's "Oh, Pretty Woman"**, which the publisher had refused to license to them, was not an infringement.
- It was noted that there was a bit of a split between the 2nd Circuit (the CA in this case) and the 9th Circuit (our CA, also California's) on 'transformative' works.

Andy Warhol Foundation v. Goldsmith

- **Decision:**
- **Sotomayor:** The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original. In this case, however, **Goldsmith's original photograph of Prince, and AWF's copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature**. AWF has offered no other persuasive justification for its unauthorized use of the photograph.
- **Gorsuch** wrote a concurring opinion in which he said that if the AWF displayed the Prince series "in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use."
- **Kagan** dissented in what, for the Supreme Court, became a bit of a pissing contest between Sotomayor and Kagan.

Preview of OT 2023 Cases for Week 4

GUN CONTROL

- *United States v. Rahimi*

ADMINISTRATIVE LAW

- *Loper Bright Enterprises v. Raimondo*
- *Consumer Financial Protection Bureau v. Consumer Financial Services Association*

BANKRUPTCY

- *Harrington v. Purdue Pharma*

…AND PERHAPS MORE

Hope to see you next week!