

# SCOTUS Review

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Organized by the **State and Local Legal Center**

Hosted by the **National Association of Counties**

Featuring **Elbert Lin, Tyler Green, and Adam Liptak**

# About the Webinar

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- Speakers' bios
- Questions
- Recording
- Technical difficulties
- The views expressed in this webinar do not necessarily reflect the views any of the sponsoring organizations
- Survey

# About the SLLC

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- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- National League of Cities
- National Association of Counties
- International City/County Management Association
- U.S. Conference of Mayors
- International Municipal Lawyers Association
- Government Finance Officers Association

# About NACo

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- **MISSION**

- Strengthen America's counties

- **VISION**

- Healthy, safe and vibrant counties across America

- **NACo strengthens America's counties**, serving nearly 40,000 county elected officials and 3.6 million county employees. Founded in 1935, NACo unites county officials to:

- **Advocate county priorities** in federal policymaking
- **Promote exemplary county policies** and practices
- **Nurture leadership skills** and expand knowledge networks
- **Optimize county and taxpayer resources** and cost savings, and
- **Enrich the public's understanding** of county government.

# About the Speakers

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- Elbert Lin, Hunton Andrews Kurth
- Tyler Green, Consovoy McCarthy
- Adam Liptak, New York Times

# *Barr v. American Assn of Political Consultants*

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- Background
  - Telephone Consumer Protection Act of 1991 – bars robocalls
  - 2015 exception for calls “made solely to collect a debt owed to or guaranteed by the United States”
  - AAPC challenges the unequal treatment as violation of the First Amendment

# *Barr v. American Assn of Political Consultants*

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- Fractured opinions – 4 total
- 6 justices find the exception unconstitutional
  - Kavanaugh plus CJR, CT, SAA
  - Sotomayor
  - Gorsuch
- 7 justices vote to sever the exception
  - Kavanaugh plus CJR, SAA
  - Sotomayor
  - Breyer plus RBG, EK

# *Barr v. American Assn of Political Consultants*

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- First Amendment:
  - Reaffirms *Reed v. Town of Gilbert*
  - Justice Breyer (plus Ginsburg and Kagan) call *Reed* into question
  - Justice Gorsuch does not cite *Reed*
- Severability
  - Severability clauses apply to later amendments
  - Presumption of severability
  - Gorsuch joins Thomas's skepticism of severability



# *County of Maui v. Hawai'i Wildlife Fund*

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- Background
  - Underground injection wells at wastewater treatment facility since 1980s
  - “[T]he discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311
    - “Discharge of a pollutant”: “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)
  - Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater

# *County of Maui v. Hawai'i Wildlife Fund*

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- Three opinions
  - All nine justices reject three tests
  - Six-justice majority (Breyer, Roberts, Ginsburg, Kagan, Sotomayor, Kavanaugh) reject County's "means of delivery" test, as well, and create "functional equivalence" test
  - Kavanaugh concurrence emphasizes importance of time and distance
  - Thomas dissent (with Gorsuch) and Alito dissent require direct discharge

# *County of Maui v. Hawai'i Wildlife Fund*

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- “We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.”
- Non-exhaustive, multi-factor test
- Court does not anticipate “unmanageable expansion”?
- “EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30 years. In that time we have seen no evidence of unmanageable expansion.”

# *Espinoza v. Montana Dept of Revenue*

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- Background
  - Government scholarships for private schools
  - Montana Constitution bars government aid to any school “controlled in whole or in part by any church, sect, or denomination”
  - Montana Department of Revenue promulgated “Rule 1,” which prohibited families from using the scholarships at religious schools
  - Montana Supreme Court invalidated entire program

# *Espinoza v. Montana Dept of Revenue*

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- Six opinions
  - Roberts (joined by Thomas, Alito, Gorsuch, Kavanaugh)
  - Thomas (joined by Gorsuch)
  - Alito
  - Gorsuch
  - Ginsburg (joined by Kagan)
  - Breyer (joined in part by Kagan)
  - Sotomayor
  
- 5-4 holding that Montana Constitution no-aid provision violates Free Exercise Clause

# *Espinoza v. Montana Dept of Revenue*

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- No violation of Establishment Clause
- Applies *Trinity Lutheran*
  - Disqualification cannot be solely because of religious status, as opposed to religious use
  - “Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.”
  - “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”
- Cites *Locke v. Davey* to funding of training clergy
- Focused on the error of federal law

# *Bostock v. Clayton County*

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- Background
  - Title VII of the Civil Rights Act of 1964
    - “It shall be an unlawful employment practice for an employer to . . . discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”
  - Three consolidated cases: (1) Gerald Bostock, child welfare advocate who worked for Clayton County, GA; (2) Donald Zarda worked as a skydiving instructor in NY; (3) Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in MI.
    - Bostock and Zarda alleged they were fired for being gay; Stephens alleged she was fired for being transgender.
- Does discrimination “because of” “sex” include discrimination based on sexual orientation?

# *Bostock v. Clayton County*

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- By a 6-3 vote, held yes, it does
- Six-Justice majority: Justice Gorsuch writing + the Chief Justice & Justices Ginsburg, Breyer, Sotomayor, and Kagan
  - “An employer violates Title VII when it intentionally fires an individual employee based in part on sex...[And] it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex...[H]omosexuality and transgender status are inextricably bound up with sex.”
  - “We agree that homosexuality and transgender status are distinct concepts from sex. But as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”
- 2 dissenting opinions
  - Justice Alito + Justice Thomas
  - Justice Kavanaugh



# *Bostock v. Clayton County*

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- Textualism battle
  - Majority: “We must determine the ordinary public meaning of Title VII’s command.... To do so, we orient ourselves to the time of the statute’s adoption, here 1964, ... and then” consider prior related precedent.
  - Alito: “The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.... The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”
- Unanswered potential questions
  - Free Exercise accommodations?
  - Preferences for other protected classes?

# *Kahler v. Kansas*

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- Background
  - James Kahler murdered his ex-wife, two daughters, and ex-wife's grandmother
  - Insanity defense in Kansas: cognitive capacity, or *mens rea* (unable to understand actions were a crime). Shoot a gun at a human, but thought your target was something else.
    - Compare other versions: moral capacity (right vs. wrong)—part 2 of *M'Naughten* test; volitional capacity (irresistible impulse); product of mental illness
    - Kansas law at sentencing: evidence under any mental-illness test admissible in mitigation
  - Whether the Due Process Clause requires a state to adopt moral capacity as part of insanity defense

# *Kahler v. Kansas*

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- By a 6-3 vote, Court rejects Kahler's claim
- Majority: Justice Kagan + the Chief Justice & Justices Thomas, Alito, Gorsuch, Kavanaugh
- Dissent: Justice Breyer + Justices Ginsburg and Sotomayor

# *Kahler v. Kansas*

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- “A challenge like Kahler’s must surmount a high bar.... [A] state rule about criminal liability — laying out either the elements of or the defenses to a crime — 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.’ . . . An affirmative answer, though not unheard of, is rare.”
- Thorough analysis of approaches to insanity defense in England and early U.S.
- Prior opinions rejecting claims that due process requires other formulations of insanity defense (*Leland v. Oregon*, *Clark v. Arizona*)
- Complex interplay between ever-evolving medical science, law, politics, values (what’s culpable?)
- Kansas AGO hat trick (*Kansas v. Garcia*, *Kansas v. Glover*)

# *Dep't of Homeland Security v. Regents of the Univ. of California*

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- Background
  - In 2012, DHS announces Deferred Action for Childhood Arrivals (DACA)
  - In 2014, DHS expands DACA and adds Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)
    - DAPA & DACA expansion challenged under APA; CA5 upheld injunction; SCOTUS affirms 4-4
  - In 2017, DHS rescinds DAPA memo. In 2018, DHS rescinds—on AG's advice—DACA.
  - DACA rescission challenged under APA in NDCal, EDNY, DDC. DHS responds to DDC decision with new 2018 memo “declining to disturb” 2017 DHS memo. Cert before judgment granted.
  - Does DACA rescission violate APA or “equal protection guarantee of 5A Due Process Clause”?

# *Dep't of Homeland Security v. Regents of the Univ. of California*

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- Five opinions
  - Chief Justice (joined in full by Justices Ginsburg, Breyer, Kagan; Justice Sotomayor joined all but part IV on equal protection)
  - Justice Sotomayor concurred in part and concurred in judgment
  - Justice Thomas (+Justices Alito & Gorsuch) concurred in judgment in part (equal protection) and dissented in part
  - Justice Alito concurred in judgment in part and dissented in part
  - Justice Kavanaugh concurred in judgment in part (equal protection) and dissented in part
- 5 votes: DACA rescission was arbitrary and capricious

# *Dep't of Homeland Security v. Regents of the Univ. of California*

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- DACA rescission reviewable under APA because it “is more than a non-enforcement policy”
- What agency action to review? 2017 rescission memo, not 2018 memo. DHS thus “limited to agency’s original reasons” and can’t rely on “impermissible *post hoc* rationalization”
- Memo was arbitrary & capricious because DHS did not consider (1) whether to continue deferring removal, but focused only on ending benefits (work authorization, Social Security, Medicare); and (2) recipients’ reliance interests.
- No equal protection problem: allegations do not suffice to establish that rescission was motivated by animus (8 votes)

*June Medical Services v. Russo*

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*Chiafalo v. Washington & Colorado Department of  
State v. Baca*

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*NY State Rifle and Pistol Association v. City of New  
York*

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# Questions?

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Thanks for attending