Bar Association for the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

Fall 2021

Back to the courthouse

The Eighth Circuit has returned to in-person oral arguments. Find out more in the newsletter's new "Ask the Clerk" column, page 9.

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Eighth Circuit at SCOTUS during 2020 Term

U.S. Supreme Court decided four cases from the Eighth Circuit last term

By Timothy J. Droske and Caitlinrose H. Fisher

A disproportionately large spotlight was shown on the Supreme Court this past term. Justice Ginsburg's death on the eve of the October 2020 Term's commencement, and the quick confirmation of Justice Barrett just one week before the presidential election, placed all eyes on the Court as the term began. To some extent, the forecasts that this change in Court composition would result in a seismic shift turned out to be exaggerated, at least in the short term. Speculation that the newly constituted Court signaled the Affordable Care Act's demise, or would decide the Presidential election, failed to materialize. *See California v. Texas*, 141 S. Ct. 2104 (2021) (7-2 decision finding challenge failed for lack of standing); Jessica Gresko, *Supreme Court rejects Trump election challenge cases*, AP News (Feb. 22, 2021), *available at* https://apnews.com/article/joe-biden-donald-trump-pennsylvania-elections-us-supreme-court-5cc6aee8c328c7bb1d423244b979bcec. And broad consensus carried the day more often than not, with 58% of the Court's decisions having at most only one dissenting justice, and 43% being unanimous. SCOTUSblog, Stat Pack for the Supreme Court's 2020-21 term at 9 (July 2, 2021).

Evidence of the Court's new conservative super-majority, however, was also displayed. While in the October 2019 Term 23% of the Court's decisions were 5-4 splits and 11% were 6-3 votes, those numbers effectively flipped last term, with 24% of the Court's decisions being 6-3, and 12% being 5-4 splits. Moreover, the Court's shift rightward was further reflected in many orders issued from the Court's shadow docket, which included orders enjoining COVID-related restrictions on churches and COVID-related voting modifications, and most recently, the 5-4 decision refusing to enjoin Texas's abortion law pending litigation and, now, merits briefing. *See* Lawrence Hurley and Andrew Chung, *Analysis: U.S. Supreme Court's 'shadow docket' favored religion and Trump*, Reuters (Jul. 28, 2021), *available at* https://www.reuters.com/legal/government/us-supreme-courts-shadow-docket-favored-religion-trump-2021-07-28/; *Whole Woman's Health v. Jackson*, No. 21A24, 594 U.S. __ (Sept. 1, 2021) (Roberts, Breyer, Sotomayor, and Kagan, dissenting).

The four decisions before the Supreme Court last term from the Eighth Circuit are discussed below, along with a statistical glance at how the Eighth Circuit performed at the Supreme Court compared to past terms.

Eighth Circuit Statistics

The four decisions before the Supreme Court from the Eighth Circuit last term reflect some of the same trends seen from the Court as a whole—large unanimity, along with an increase in 6-3 decisions. Half of the Court's decisions from the Eighth Circuit were unanimous—both authored by Justice Sotomayor (with accompanying concurrences), both of which were reversals. (*Davis/Carr* and *Rutledge*). The other two decisions likewise highlighted the uptick in 6-3 votes. The *Pereida* immigration-related decision was

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Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2020	4	6%	1-3	25%
2019	1	1%	1-0	100%
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Average	3.3	4.4%		28.1%

heard before Justice Barrett took the bench, but resulted in a 5-3 affirmance, with Justices Breyer, Sotomayor, and Kagan in dissent. The *per curiam* unargued opinion in *Lombardo* was also a 6-3 vote, but—proving that the Court sometimes splits in different ways—instead had Justices Alito, Thomas, and Gorsuch sitting in dissent.

The overall number of cases from the Eighth Circuit before the Court, along with the affirmance rate, was also consistent with the averages for more than a decade. The Court issued opinions in four cases from the Eighth Circuit last term, approximately 6% of the Court's overall docket, and just a tick higher than the average of 3 cases and 4% of the Court's docket since 2010. The Court's affirmance rate of 25% from the Eighth Circuit last Term was also just slightly below the average affirmance rate of 28% from the Eighth Circuit since 2010, while still beating the Court's overall affirmance rate of just 20% last Term. *See* table, above.

The table above reflects the number of Eighth Circuit cases heard by the Court, the percentage of the docket those cases composed, the Court's voting record on those cases, and the affirmance percentage, as reported by SCOTUSblog. SCOTUSblog, Stat Pack Archive, *available at* http://www.scotusblog.com/reference/stat-pack/ (Circuit Scorecard for 2010-2020 Terms). It is worth noting that the 4-4 split in 2015, although resulting in a nonprecedential affirmance, is not included in the Affirmed Percent. Also, the Average for the Affirmed Percent does not include the 2011 Term, in which no cases from the Eighth Circuit were decided by the Court.

As mentioned above, the Supreme Court's resolution of Eighth Circuit cases last term reflected a number of trends from the 2021–2021 term. Two relatively narrow, unanimous opinions, with splintered decisions on two more politically fraught causes—one involving immigration and the other involving civil rights. Each of these four opinions is discussed below.

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***Rutledge v. Pharmaceutical Care Management Association* – ERISA Preemption**

The often-litigated issue of ERISA preemption was front and center in the first Eighth Circuit case decided by the Supreme Court in the 2020 term—*Rutledge v. Pharmaceutical Care Management Association*, 141 S. Ct. 474 (2020). The case concerned an Arkansas regulation (Act 900) concerning the drug reimbursement rates for pharmacy benefit managers ("PBMs"), who operate as claims-processing middlemen between pharmacies and health insurance plans. Arkansas' Act 900 is similar to dozens of other statutes around the country. PBMs challenged Act 900, and the Eighth Circuit ruled in their favor, holding that the Act was preempted by ERISA, which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plans." 891 F.3d 1109, 1111–13 (8th Cir. 2018) (quoting 29 U.S.C. §1144(a)).

The Supreme Court reversed in a unanimous opinion, holding that Act 900 was not preempted by ERISA. Justice Sotomayor wrote a succinct opinion for the unanimous court. Justice Thomas wrote a concurring opinion, expressing concern about the predictability of the Court's ERISA preemption jurisprudence. And Justice Barrett did not participate in the decision.

At oral argument, some Justices expressed a concern that holding that the act was preempted could make the standard for ERISA preemption—an already hotly litigated issue—even more murky. The Court's opinion reflected that concern. The Court applied its standard test for ERISA preemption, while making clear that a regulation that affects a health plan's *cost* does not have an "impermissible connection" with employee health plans. *Rutledge*, 141 S. Ct. at 480–81. The Court concluded that ERISA does not preempt "any suits under state law that could affect *the price or provision* of benefits." *Id.* at 482 (emphasis added). Rather, the cornerstone of ERISA preemption remains regulations that require employee benefit plans to "structure benefit plans in particular ways." *Id.* at 480. *Rutledge* is an example of the newly composed Court unanimously resolving a case on narrow grounds, tying its analysis to past precedent.

***Pereida v. Wilkinson* – Immigration**

In contrast to the consensus displayed in *Rutledge*, the Court divided 5-3 on ideological lines in *Pereida v. Wilkinson*, an immigration case. 141 S. Ct. 754 (2021). *Pereida* involved a circuit split in how courts analyze whether a noncitizen has been convicted of a disqualifying offense listed in the Immigration and Nationality Act ("INA")—specifically, a crime involving moral turpitude ("CIMT")—thus precluding that individual from applying for discretionary relief from deportation. The circuits had divided in what to do when the underlying statute of conviction is ambiguous as to whether it corresponds to a disqualifying CIMT—does the ambiguity flow in favor of the Government or the noncitizen? The Eighth Circuit held that any ambiguity as to whether the underlying conviction was for a CIMT cuts against the noncitizen, who is thus unable to prove his eligibility for discretionary relief such as asylum or cancellation of removal. 916 F.3d 1128, 1132–33 (8th Cir. 2019). Other circuits had held that such ambiguity in the underlying conviction does not bar relief from removal, since in that event, the conviction does not necessarily establish the elements of a CIMT listed in the INA.

The Supreme Court affirmed the Eighth Circuit, in an opinion authored by Justice Gorsuch and joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh. Justice Breyer wrote a dissent joined by Justices Sotomayor and Kagan. Justice Barrett did not participate in the decision.

The majority and dissent divided on whether the CIMT issue was one of fact, for which the noncitizen bore the burden of proof, or one of law, for which the categorical approach would apply and any record ambiguity would favor the noncitizen. Justice Gorsuch's majority opinion focused in on the text of the INA, which provides that "'[a]n alien applying for relief or protection from removal has the burden of proof to establish' that he 'merits a favorable exercise of discretion,'" including that the alien "'has not been convicted'" of, among

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other things, a CIMT. *Pereida*, 141 S. Ct. at 760 (quoting 8 U.S.C. § 1229a(c)(f)(A)). The majority opinion concluded that the CIMT determination was one of fact, and that the noncitizen thus bore the burden of proof, meaning any record ambiguity as to whether an underlying conviction is a CIMT results in mandatory removal. Justice Breyer's dissent argued that the categorical approach should apply in the first instance, resulting in any ambiguity cutting in favor of eligibility for relief from removal. The opinion will lead to harsh results for noncitizens in removal proceedings. Pereida himself, for example, is now wholly ineligible for relief from removal after receiving a sentence of a fine of $100 and no jail time. The *Pereida* decision may also lead to more litigation regarding when the categorical approach comes into play, as a threshold matter, or only after a first, factual determination.

***Carr/Davis v. Saul* – Administrative Law**

The last Eighth Circuit decision considered following oral argument was that of *Davis v. Saul*, another unanimous opinion written by Justice Sotomayor, reversing the Eighth Circuit. The issue presented in *Davis* was whether social security claimants must raise a particular issue before the Social Security Administration in order to preserve the issue for judicial review. Specifically, the claimants in *Davis* wanted to raise an appointments-clause challenge to their social-security proceeding, in light of recent Supreme Court decisions. The Eighth Circuit held that the claimants could not raise the appointment-clause challenge if the issue had not been previously exhausted before the agency. 963 F.3d 790, 791 (8th Cir. 2020). Other circuits had held the opposite. The Supreme Court granted review and consolidated the Eighth Circuit's decision in *Davis* with *Carr v. Saul*, a Tenth Circuit decision addressing the same issue.

Justice Sotomayor wrote for the unanimous court. Justice Thomas wrote an opinion concurring in part and concurring in the judgment, joined by Justices Gorsuch and Barrett. And Justice Breyer wrote an opinion concurring in part and concurring in the judgment.

Justice Sotomayor's opinion and the concurrences showed a remaining divide on the Court as to the analysis that applies to determine when issue-exhaustion is required. Justice Sotomayor reasoned that issue-exhaustion requirements are generally "creatures of statute or regulation." *Carr v. Saul*, 141 S. Ct. 1352, 1357 (2021). In the Social Security Administration context, there is no statute or regulation that requires social-security claimants to exhaust specific issues before the agency before pursing judicial review of those issues. Justice Sotomayor also relied on the Court's earlier plurality opinion in *Sims v. Apfel*, 530 U.S. 103 (2000), noting the uniquely un-adversarial process of agency review before the Social Security Administration. *Carr*, 141 S. Ct. at 1359–60. Justice Thomas' concurrence, consistent with his plurality opinion in *Sims*, focused on the no-nadversarial nature of the agency proceedings. Justice Breyer hewed to his dissent in *Sims*, and would impose a broad issue-exhaustion requirement. But here, however, he concluded that the appointments-clause challenges fall into "the well-established exceptions" to issue exhaustion "for constitutional and futile claims." *Carr*, 141 S. Ct. at 1363 (Breyer, J., concurring).

***Lombardo v. City of St. Louis, Missouri* – Civil Rights**

The final Eighth Circuit decision reviewed by the Supreme Court in the 2020–2021 term came in a unargued civil rights appeal, *Lombardo v. City of St. Louis, Missouri*. *Lombardo* involved a civil rights excessive force action, brought by the parents of detainee restrained by officers in the prone position for fifteen minutes after already being handcuffed and shackled. During those fifteen minutes, the detainee stopped breathing and died. The Eighth Circuit granted summary judgment to the officers, relying on prior precedent that it "is not objectively unreasonable" to use a prone restraint "when a detainee actively resists officer directives." 956 F.3d 1009, 1013 (8th Cir. 2020).

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The Supreme Court reversed in a 6-3 per curiam opinion, with Justices Alito, Thomas, and Gorsuch in dissent. The per curiam majority cautioned courts that an excessive-force analysis cannot be applied "mechanically." *Lombardo*, 141 S. Ct. 2239, 2241 (2021) (per curiam) (quotation omitted). Courts must instead pay "careful attention to the facts and circumstances of each particular case." *Id.* (quotation omitted). The majority construed the Eighth Circuit's opinion to potentially adopt a rule that "use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." *Id.* The Court vacated the decision below and remanded to the Eighth Circuit to engage in the requisite fact-specific analysis.

The dissent authored by Justice Alito argued that the majority opinion "unfairly interprets" the Eighth Circuit's opinion. *Id.* at 2242 (Alito, J., dissenting). The dissent argued that the majority should have either denied the petition, and borne "the criticism that would inevitably elicit," or granted the petition for review and done "the work that would entail." *Id.* Justice Alito's dissent favored granting the certiorari petition, proceeding to merits briefing, and deciding the issue on the merits.

The dissent is likely right that, in the wake of George Floyd, this may have been a difficult certiorari petition to deny. The majority's analysis, however, does provide some helpful precedent for civil rights plaintiffs bringing excessive force claims, reiterating that even excessive-force claims must go through a fact-specific analysis. The Eighth Circuit has not yet issued an opinion on remand, and recently denied a request for supplemental briefing and argument.

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Free virtual CLE for members

2021 SUPREME COURT TERM IN PREVIEW

A fast-paced preview of cases the Supreme Court will decide in its term beginning in October 2021. Moderated by Judge David Stras, a panel of practitioners will discuss high-profile cases in the areas of constitutional law, criminal law and procedure, intellectual property, federal jurisdiction and procedure, and more.

November 2, 2021
3-4 p.m. Central
Registration: https://8thcircuitbar.wildapricot.org/event-4488347/Registration
Members - $0
Government/Public Interest - $25
Private Practice - $50

"A class act in every way"

District of Minnesota Judge Richard H. Kyle passes away at age 84

By the Hon. Donovan W. Frank

Judge Richard H. Kyle, Sr. was a treasured role model and caring mentor to lawyers, his fellow judges, and his many law clerks and staff. Each day he gave true meaning to the phrase "Equal Justice Under Law."

Judge Kyle, known to all as "Sarge," died on June 22, 2021, at the age of 84. Judge Kyle served on the District of Minnesota bench for nearly thirty years, having been appointed by President George H.W. Bush in 1992. The bench and bar of the Eighth Circuit honor Judge Kyle's service to the federal judiciary and the rule of law.

Judge Kyle was born in St. Paul and was a lifelong resident of White Bear Lake, Minnesota. After receiving a B.A. with honors from the University of Minnesota, he enrolled at the University's law school. During law school, he served as President of the Minnesota Law Review and was a member of Order of the Coif. After graduation, Judge Kyle served as a law clerk to the Hon. Edward J. Devitt, longtime Chief Judge of the United States District Court for the District of Minnesota. Judge Devitt remained a treasured friend and mentor; it was one of Judge Kyle's regrets that Judge Devitt passed away only days before Judge Kyle took the oath of office to become a District Judge. Judge Kyle endeavored to live up to Judge Devitt's renowned 1961 essay, *Ten Commandments for the New Judge*. Judge Kyle certainly embodied the quality with which Judge Devitt opened that essay: "If we judges could possess but one attribute, it should be a kind and understanding heart."

Judge Kyle joined the law firm of Briggs & Morgan after his clerkship, leaving Briggs to serve as Minnesota's Solicitor General from 1968 to 1970, and then again in 1992 upon his appointment to the federal bench. Alan Maclin, one of Judge Kyle's Briggs & Morgan partners, referred to him as a "great leader in the firm," "mentor to all," "talented trial lawyer," and always available to discuss any case at any time. He had an ideal relationship with so many of his colleagues, in addition to a great sense of humor and great public spirit.

The Hon. Richard H. Kyle

Judge Kyle was justifiably famous among federal practitioners in Minnesota for taking to heart the maxim, "Early to bed, early to rise . . . ." He arrived so early on his first day as a Judge that

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the courthouse was still locked tight. (After that, he was given his own key to the building.) Judge Kyle's work ethic was legendary. He was in his chambers well before 6:00 a.m. six days a week. He scheduled hearings at 8 am and would often begin the hearing a few minutes early. And though his expectations for lawyers were high, his standards for his own work were even higher. One former law clerk described him as a "one-man rocket docket." Another noted that Judge Kyle's decisions on dispositive motions issued within 30 days of the hearing "without fail." To Judge Kyle, justice delayed was truly justice denied.

Judge Kyle was a consummate trial judge. He enjoyed trying cases as a practicing attorney, and that experience served him well on the bench. He presided over many high-profile cases and was well respected by the bar and his colleagues for his handling of them. As lawyers and colleagues have said: "I can't even begin to compete with the example he set on so many levels." "He was a class act in every way." He was a "wonderful role model for the entire legal community" and was indisputably one of the leaders on the Federal Court.

Judge Kyle married the former Jane Foley in 1959. Together, he and Jane had five children: Hon. Richard H. Kyle, Jr., Michael F. Kyle, D'Arcy Kyle, Patrick G. Kyle, and the Rev. Kathleen Brusco. The family now includes ten grandchildren and one great-grandchild. He was justifiably proud of his children's many accomplishments, and although he might have been too humble to admit it, his and Jane's legacy through their long marriage and children is an extraordinary one.

Judge Kyle fostered a family atmosphere in chambers, maintaining relationships with his law clerks long after they left his employ and holding a chambers "reunion" each summer at the Kyle family home in White Bear Lake. He was a wonderful mentor to his clerks and others in the federal family, whether offering, as one former probation officer said, "guidance and support during some challenging and joyous professional times," or a comforting presence during illness or difficult moments, or his always hilarious opinions on the previous evening's *Seinfeld* episode. As more than one clerk stated, he "taught me how to be a better human."

In addition to his judicial work, Judge Kyle served on committees including the Federal Practice Committee, the Eighth Circuit Federal Advisory Committee, the Eight Circuit Model Jury Instructions Advisory Committee, as President of the Minnesota Board of Law Examiners, and as Co-Chair of the Lawyers Committee to Retain Incumbent Justices on the Minnesota Supreme Court. He was President of the University of Minnesota Law School Alumni Association. The yellow hardhat in his chambers evidenced one of his favorite out-of-court tasks: overseeing the extensive three-year renovation of the Warren E. Burger United States Courthouse and Federal Building in St. Paul.

Judge Kyle assumed senior status in 2005, but he did not slow down. He continued to maintain a full caseload until his Alzheimer's disease diagnosis in 2017 forced him to retire.

Judge Kyle was an esteemed member of the federal family. We will miss our kind and valued friend and colleague.

The Hon. Donovan W. Frank is a United States District Judge in the District of Minnesota. This resolution was presented at the Eighth Circuit Judicial Conference

Ask the Clerk

Court returns to in-person oral arguments

This is the inaugural column in what we hope will be a long-running series of tips and practice pointers from the Eighth Circuit Court of Appeals's clerk's office. This month we will focus on tips for our return to in-person oral arguments, but we hope that future columns will be focused on answering questions from you, the practicing bar. Please don't hesitate to send us questions at: ask_theclerk@ca8.uscourts.gov.

The Court returned to in-person oral arguments this fall. Last term, there were more than 450 cases argued using videoconferencing. While the technology allowed the Court to keep pace with its work and created a new "normal" for the presentation of cases, all of the judges (and certainly many attorneys) look forward to a return to the old "normal" of in-person arguments.

While we are returning to in-person arguments, the procedures in the courthouse and the courtroom will continue to be impacted by COVID-19, and you should keep the following points in mind. Review all materials sent with the monthly calendar for updated guidance and procedures.

- Arrive early for your argument. Entry to the courthouse may involve health screening and temperature checks, long lines for security screening, waits for the elevator, *etc.* We suggest arriving at the courthouse by 8:15 a.m. for a 9:00 a.m. argument.
- Expect masking and social distancing to be in effect.
- For the latest COVID-related updates on building entry standards before coming to the courthouses in St. Louis and St. Paul, please check the websites of the United States District Courts for the Eastern District of Missouri and the District of Minnesota, respectively.
- Attorney check-in will be conducted in the courtrooms, rather than the clerk's office, so report directly to your courtroom floor. Clerk's office staff will be present to help you and conduct check-in for your case.
- Social distancing will be enforced in the courtroom, so seating in the courtroom will be limited. Priority will be given to the court's staff.
- Please do not bring more than one person with you. The court will provide a teleconference line for others, including your staff and clients, to listen to the live arguments. The audio recordings of the arguments are always available on the court's website.
- Counsel may be asked to wait in the lobby areas adjacent to the before cases are called.
- The clerk's office will clean the courtroom between arguments and provide new microphone covers.
- You may remove your mask while presenting argument.
- Please leave the courtroom as soon as argument in the case is completed.
- If appearing in person would pose a COVID-related hardship for you, you may request a videoconference oral argument by filing a motion with the clerk's office. The motion should state good cause and whether your opponent consents or objects.
- The court will not hear arguments in a hybrid manner where, for example, one participant is remote and the other is in the courtroom.
- If your motion for a videoconference is granted, the argument may be heard later that day or at a later date. The order will inform you of the time and date of the videoconference.
- All videoconferences are conducted over the Microsoft Teams app. We strongly encourage counsel to download the app rather than use the web version of the program.
- The most important tip is to always call us if you have a question or problem: 314-244-2400.

  - *The Clerk's Office*

Eighth Circuit Bar Association seeks candidates for board

The Eighth Circuit Bar Association is seeking applicants for upcoming openings on its Board of Directors, including from the Northern District of Iowa and at-large positions. Directors will be elected for three-year terms starting in January 2022.

The Board consists of one member from each judicial district in the Eighth Circuit as well as five at-large members. Members of the Board of Directors are expected to attend monthly meetings and also serve on one or more committees.

Any member of the Association is eligible for election to the board of directors. The board is seeking members with diverse backgrounds to serve on the board, including candidates reflecting diversity in gender, race, ethnic background, and professional experience.

To apply, members should fill out an application form, which is available here: http://www.eighthcircuitbar.com/news/11006037.

To be considered for these openings, applicants are advised to apply on or before December 1, 2021.