MODERATOR: Please join me in welcoming Dean Jeffries, Professor Ortiz, and Mr. Canaparo.

[APPLAUSE]

DANIEL ORTIZ: Well, thank you all very much for the invitation. It's a real pleasure to be here and so good to see people interested in legal discussion on such a beautiful day. That's assuming that you're not here just for the Chick-fil-A at the end. Now I'll be talking about two cases, *Fulton versus City of Philadelphia,* the same sex adoption case and *Brnovich versus Democratic National Committee,* the Arizona voting rights case.

The first was a free exercise case and the second a Section Two of the Voting Rights Act case. Fulton first. It's the latest of a whole string of sex versus religion cases. Think of them that way. That's not the technical doctrine of course, but I think that's the way the public at least tends to view them.

And it has culture war written all over it and it attracted perhaps the most public interest I think of any case last term. If not, it was right up there near the top. Now the facts are pretty simple.

Philadelphia stopped referring children to the Catholic Social Services foster care agency because it refused on religious grounds to certify same sex couples as appropriate foster parents. CSS would instead refer same sex couples to other foster care agencies in the city, which would certify them in appropriate cases. Now the city ruled that such refusals to certify violated a nondiscrimination provision in the foster care contract itself and also a citywide fair practices ordinance.

CSS sued, arguing that booting it from the foster care program violated its free exercise rights. The city said no, because a case called *Employment Division versus Smith* had held that neutral and generally applicable regulations were fine, not subject to strict scrutiny. And then CSS said, well then, overrule Smith. It's about time, bad decision anyway.

Now *Smith,* which was written by Justice Scalia, had come in for some criticism by many free exercise proponents from the moment it came down. And in fact, it led to the enactment of the Religious Freedom Restoration Act. So there's a kind of congressional partial, maybe partial overruling, at least push back. And although the case engaged the public's interest because of its context, again sex versus religion, it was the continuing validity of *Smith* that was of legal interest.

Now, this was a real big deal, not only in defining the borders of the culture wars, but in determining when religious belief entitled one to exemptions more generally. So the stakes here going in were pretty large. Surprise, when the opinion came down though.

All nine justices, liberals and conservatives alike agreed that booting CSS from the program was unconstitutional. Wow! You say, how is that possible? It's pretty hard group of people to get together on controversial things.

Now, you might think that the agreement would make the case even bigger and more important. Wrong. OK. The court's unanimity instead reflected the fact that the Court refused to take on the *Smith* issue, the every the one issue that everyone thought that the case was teeing up to the court. Because Philadelphia allowed discretionary exceptions, the court found, its approach wasn't generally applicable.

So it didn't come under the *Smith* approach. Remember you have to be neutral and generally applicable. Therefore, even under *Smith's* strict scrutiny applied and it fell. Chief Justice Roberts wrote a 15 page opinion, which Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett joined. That's a pretty surprising bunch right there.

Now Justice Barrett then wrote a two page concurring opinion saying that she was troubled by *Smith* but also troubled by what might replace it. Should she asked, we quote, "swap Smith's categorical anti-discrimination approach with an equally categorical strict scrutiny regime?" What would happen under such an approach, she wondered, to many, quote unquote, "garden variety laws?"

And then she cited a part of the *Smith* opinion where Justice Scalia had referenced things like requiring military service or the payment of taxes, health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, traffic laws, social welfare legislation like minimum wage laws and things like that. Now Justice Kavanaugh joined her whole opinion and Justice Breyer joined all but the first paragraph. Justice Alito wrote a concurrence in the judgment which was 77 pages.

That's over five times as long as Chief Justice Roberts' majority opinion. And he got Justices Thomas and Gorsuch on board. He lambasted the Court for not overruling *Smith.* He said, quote, "After receiving more than 2,500 pages of briefing and more than a half year of post-argument cogitation, the court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. " Justice Gorsuch then wrote a 10 page concurrence in the judgment, joined by Justices Thomas and Alito underlying how hard the court had worked to avoid the *Smith* question.

Clear he wanted to try to embarrass the Chief Justice and his fellow travelers for what they had done in ducking the issue. Now, those of you who know this area well will easily see a pattern here. The court, or many members of it, will invite litigation in an area, grant a case get everyone excited and exercised about it, and then go out of its way to avoid deciding the big issue.

Well, one of *The Little Sister of the Poor* cases is like this. The *Masterpiece Cakeshop* is like this. And now we have *Fulton.* So I want to leave you with two questions about the case. One, what's up with that? Why does that continue to happen? Why is the court constantly teasing us, if you will, that it's going to enter this area and reorganize it in the kind of dramatic way?

Is the worry about where they might end up, as Justice Barrett suggested? Possible, I guess. Are there fractures in the alliances on the court that only become apparent after the case is granted? I guess that's possible of course. Or, and I want to suggest this is a more interesting possibility, no idea how likely it is, the court, like the proverbial dog wondering whether it should still chase the car now that it knows it can catch it.

So think of that also from the public's perspective or from the perspective of the groups that are litigating in this area. Would a big win in these cases be good for religious organizations in the long run? Now in one sense that seems to be a no brainer. But if religions press increasingly broad exemptions from laws the large portion of the public views is protecting people's freedom, wonder how public attitudes towards religion itself will change.

So I just want to leave you with those two questions and I'll turn it over to things to GianCarlo for his talking about one case. And then we'll rotate through for another round.

GIANCARLO CANAPARO: Did you want to do questions now?

No, no, no.

GIANCARLO CANAPARO: OK. So I'm going to talk about a few things. It was hard for me to pick cases to settle on. So I picked two cases and like a theme that sort of distills itself from these cases. But one thing I wanted to mention at the outset is the golden age of judicial agreeableness that we find ourselves in at the moment. At the end of the term I went back and looked at, of the merits cases, what's the breakdown between the justices. And 44% are unanimous, which is much higher than the historical average.

2/3 of all cases have no more than two justices in dissent and we have found this term last term the term before some of the most unusual combinations of justices joining opinions. Five fours that don't split any way that you would have predicted. And when you try to look at those cases that involve what you might call a political issue that resonate outside of the law and into the realms of politics, and then you look at those cases that split by the appointing president, or if you might lump the Chief Justice in with the liberals at times, those are only at most 11% of the court's docket this term.

Which surprised me, you know, because I'm in two times, right? I'm consuming the information from the court and I'm consuming the information about the court from the press. And you don't get the same impression from those two sources, which was just a fun thing to note.

So the first case I want to talk about is *Cedar Point Nursery versus Hassid.* And this was a challenge to a California law that allowed union organizers to enter on, the phrase was take access to farmland, without the permission of the owner up to three hours a day, 120 days a year in order to attempt to organize the laborers on the land. And the challengers said that this was a per se taking under the Fifth Amendment through the 14th.

And the court agreed in a six, three opinion, with the Chief writing the opinion. And it was a really interesting opinion. Well, let me get to what he said, right? So, he starts interestingly enough with a first principles foundational approach quotes that John Adams quote we all property must be secured or liberty won't exist. Goes through the history of regulatory versus per se takings, the importance of physical trespasses on property, the distinction between the government physically trespassing on property, and then the government granting somebody else the ability to physically take access to property.

And then into the all importance of the right to exclude is a fundamental right in that bundle of sticks. That is, property. And so he says, look, this is a physical trespass. So it's per se taking. We're not going to get into the business of, is it enough? Is it too much? Is it regulatory taking?

You've taken away the property owners right to exclude. And so it's a per se taking. Compensation must be owed. Now it's a dramatic opinion in a couple of ways. Number one, it's a pretty radical departure from historical balancing approaches, trying to draw the line when the taking is and isn't regulatory.

It represents a pretty big step and a shift we've seen over the last few years towards bringing property rights onto a more equal footing with life and liberty, much to the consternation or joy of various people, depending on where you fall. To those who are very upset at the opinion, I would say there's an out, right? You could still take it if you pay for it. So there's some harm mitigation there if you're concerned from that point of view.

And then we had a dissent by Breyer which is very interesting. And Breyer said, look unless it's a 365 day a year trespass, it's not a taking. And essentially because in the phrase he used is, some invasion is necessary for the government to regulate our complex world, is the phrase he used.

And it struck me as something of an anachronistic opinion in a way. Because, and the Chief puts this really well, right? This is the debate between two visions that have been going on in the law over time. One says that a right enshrined in the Constitution is inviolable. The other says that there must be some give for the government to regulate our increasingly complex world.

And you have this exact debate play out in *Nolan, Loretto,* and *Cosby.* And, what Breyer does is very interesting in that the opinion doesn't pretend to articulate really an objective standard beyond Breyer's own judgment about what is and what isn't too far. And the reason that strikes me as anachronistic is because with the trend towards originalism and textualism, even if you don't subscribe to those, we've seen that even judges who don't, try to justify their opinions in terms of objective standards, some external constraint on themselves.

It's what you even saw in Breyer's book, *Active Liberty,* is an attempt to articulate an external constraint on his own judicial vision. But in this case, it strikes me that Breyer sort of abandons that and hearkens back to an older time when that pursuit of objectivity wasn't necessary. So that's my two bits on *Cedar Point,* worth what you paid for it.

John.

JOHN JEFFRIES: Do you mind if I stand?

MODERATOR: Not at all.

JOHN JEFFRIES: I'm used to standing, so I hope you don't mind if I do. I want to thank the Federalist Society for asking me here. As you may have heard, I was away from the law school for three years. And it is enormously gratifying to know that the Federalists at least, know I exst. I assure you that puts you ahead of many of my junior colleagues.

I also need to apologize to the Federalist Society for not playing ball. I was asked to talk about maybe three decisions. I'm going to talk about two. I was asked to talk about things from the last term of the Court. I'd like to start off with *Ex Parte Young,* decided in 1908.

Ex Parte Young is the canonical citation for the power of federal courts to enjoin violations of the federal Constitution. It was a suit brought by shareholders for railroad against the attorney general of Minnesota, Mr. Young, alleging that the state law had set the railroad rates so low that they were confiscatory and therefore unconstitutional under the doctrine at that time. Now there was concern that state sovereign immunity, as encapsulated or revived or memorialized by the 11th Amendment would prohibit an order striking down the state statute.

And *Ex Parte Young* came up with a way of describing that that validated suits against states by naming a state officer. In other words, you sued the state to enjoy the statute, but you name the attorney general or the head of the law enforcement agency or the head of the regulatory agency or some other state officer. And from that time till this, the federal Constitution has been enforced by injunctive relief against states in the name of state officers.

Now comes Texas, which in its wisdom, has decided to prohibit abortion, essentially all abortions. Texas may hope and expect, as many others hope and/or expect that the Supreme Court will overrule *Roe versus Wade* and allow prohibition of abortion. That may happen. It may not happen. It hasn't happened yet.

And until it does, under the precedents as they exist as we speak here today, the Texas statute is flagrantly, dramatically, incontestably unconstitutional. So what would do you expect to happen? Well ordinarily, if Texas adopted a flagrantly unconstitutional law, somebody with an interest in the matter, and there are many, would go to court, sue, the Texas Attorney General.

They would get a preliminary injunction against enforcement of the statute. Any federal judge would grant that, and hold the matter until the case had been adjudicated, and the case would be adjudicated and the statute struck down unless it happened to be the case that the Supreme Court used to change the underlying law. Anticipating exactly that outcome, which would be obvious, quick, and free from doubt, Texas did something that was very clever.

They provided that no state officer at any level, would have any role in enforcing the anti-abortion statute, not the attorney general, not the law enforcement, not any state regulator of health, no one. Well, if no state official can enforce the statute, how can this statute be enforced? Texas created a system of bounty hunters. Any resident of Texas can sue to attack an abortion provider or someone who abets in the provision of an abortion and is awarded a $10,000 fee for every successful abortion prevented.

Now if this sounds strange and unfamiliar, it should. There has never been anything remotely like it. It is wholly unprecedented. Not admirable in my view, but very clever. And what's the purpose of this bizarre scheme? It is to circumvent *Ex Parte Young.*

If no state officer can enforce the Texas abortion statute, then perhaps no state officer can be enjoined from enforcing the Texas abortion statute. And maybe the Texas abortion statute gets to operate despite its invalidity because of the absence of a conventional target for injunctive relief. Texas hopes that *Ex Parte Young* would be unavailable, and by the time the statute is actually enforced by one of the millions of Texans who can bring such an action, that an injunction against that one individual will not deter the next one.

And that by this device, the institution of judicial review will be circumvented. So an abortion provider in Texas went to the courts to enjoin or stay the Texas law, naming as a defendant, a judge in Texas, saying somebody is going to enforce this statute, not directly to bring the action, but a judge will have to decide the case to award the $10,000. And the Supreme Court in a 5 to 4 decision declined to issue the stay, letting the law stand at least for now. It's called *Whole Woman's Health versus Jackson.*

It was decided by an order on September 1 of this year. Five, four, each of the four dissenters to send it from the bench. Now I'm going to make some harsh comments about this decision. But I wish to be clearly understood that these comments are not based, not at all, based on my opinion of *Roe versus Wade.*

For many of you, and for many of the people whom I read in the newspapers, this was an abortion case. I see it differently. For me, it's a rule of law case. By adopting the bizarre scheme of barring all enforcement by state officials, Texas hopes both to act unconstitutionally under the law as it stands and to prevent judicial review of its unconstitutional actions.

This is a direct attack on American constitutionalism, on the institution of judicial review, and the rule of law. And I put it to you that no matter what you think about abortion or *Roe versus Wade,* we should all be United in condemning this attack on the rule of law. Now let me return for a second to *Ex Parte Young.*

Everyone knows that case for the proposition that you can enjoin states. But there was also a ruling on the merits. *Ex Parte Young* involved a constitutional challenge-- today it seems quite anachronistic --to railroad rates set by statute. And the law at the time was, you can set the rates but they have to allow some fair return on the capital of the railroad. You can't just take the railroad by setting rates at a confiscatory level.

That was the claim. Now to determine whether that claim was valid, whether the rates were or were not confiscatory, you would have had to examine the cost structure of the railroad and exactly what the rates were and how much they could recover and what service of the debt that recovery's allowed, et cetera, et cetera. There is a complicated financial and economic analysis necessary to conclude whether rates by the standards of 1988 were or were not confiscatory. The Supreme Court did none of that.

It made no analysis of that sort in*Ex Parte Young.* Neither did it order any other court to do so. The Supreme Court in *Ex Parte Young* struck down the Minnesota statute on its face without regard to whether the rates were confiscatory or not. Why would it do such a thing?

Well, it's because Minnesota had piled up criminal penalties. This is a low rent regulatory statute that's going to be applied 1,000 times a day to the rate of every single passenger. And the state piled up criminal penalties against everyone who charged a rate in excess of what was allowed.

And the Supreme Court decided that what Minnesota was really doing by enforcing this rate statute with major criminal penalties, it was trying to intimidate anyone from going to court to challenge the rate statute, because they would be guilty of a crime if they did so. And no mechanism existed for challenging the event in advance say through declaratory judgment. And the Supreme Court said in *Ex Parte Young,* whether the rates are confiscatory or not we don't know we don't say.

But the attempt to construct a statute that precludes judicial review, that's unconstitutional. Now it seems to me we should take a lesson from *Ex Parte Young.* That Court found a way to prevent state lawlessness. And this Court should too. In its order denying relief joined by five justices, not signed by any, the court said that the stay application presented complex and novel procedural questions.

And that's perfectly fair. It did present complex and novel procedural questions. The courts ordinarily historically enjoin officers. When there are no enforcing officers, can the court just enjoin the state itself? Kind of a new question. Can they enjoin state judges under the authority of *Ex Parte Young?* That's not all standard practice. It's a new, novel procedural question.

Now these are indeed novel procedural questions. And they may perhaps be difficult. But that's why they're the Supreme Court. And taking a powder in the face of a direct attack on judicial review is not the answer.

The court should have heeded the Chief Justice's wide admonition to give preliminary relief to preserve the status quo ante before the law went into effect so that the courts would have an opportunity to consider whether Texas could adopt an anti-abortion statute and avoid responsibility for it, as they have tried to do here. But the Supreme Court did not take that advice. And their failure to do so, their willingness to allow this statute to go into effect gives rise to a suspicion I hope is ill founded, a suspicion that the majority is so eager to get rid of the abortion right that they're willing to throw the rule of law over the side to do it.

I hope that's not true. But at this point, I have to tell you, I do not know. This issue will come back. When it does let's hope wiser heads and stronger spines prevail.

All right. Well thank you, John.

[APPLAUSE]

JOHN JEFFRIES: So, my second case and the last case is the Arizona voting rights case, which I'm sure many of you have heard about. And *Brnovich versus Democratic National Committee* basically concerned two particular provisions of Arizona law. First, Arizonans who vote in person on election day in a county that uses electoral precincts had to vote in the precinct to which their address assigned them. If they voted in the wrong precinct, the vote was just not counted.

And second, Arizona made it a crime for any person other than a postal worker, an election official, a voter's caregiver, or family member or household member to knowingly collect an early ballot before or after it was completed. So first, I want to be clear about exactly what was going on here. At oral argument, Justice Barrett asked the Republican National committee's lawyer quote, "what's the interest of the Arizona RNC here in keeping say, the out of precinct ballot disqualification rules on the books?

To which the lawyer in a moment of breathtaking honesty, replied, because it puts us at a competitive disadvantage relative to Democrats. Politics is a zero sum game. It's the difference between winning an election 50 to 49 and losing an election 51 to 50. Now his arithmetic is a little bit suspect, but I think you'll get the point.

Indeed, in the last year's presidential election, the vote was 49.36% Democrat and 49.06% Republican. Interesting. Seems to be more than the numbers Mr. Garvin was talking about and perhaps that was what he was thinking about at the time. We'll see though you know after the Arizona Senate announces the results of its forensic audit whether we have different numbers to deal with.

The DNC sued, challenging both provisions under Section Two of the Voting Rights Act of 1965. And it argued that both provisions were enacted with a discriminatory intent and therefore independently violated Section Two and the 15th Amendment. But it also more centrally made the argument that it violated the so-called results test, which I'll walk you through in a minute.

The district court rejected both the results test claim and the intent claim. A Ninth Circuit panel affirmed the district court. But then a mini en banc of the Ninth Circuit reversed. Now here you need a little bit of background on the Voting Rights Act to understand what's going on.

So bear with me while I pull you through Section Two of the statute and explain its historical background. Now, the Voting Rights Act was enacted in 1965 before the court had made intent a central part of equal protection analysis. In 1980, the court decided a case called *City of Mobile versus Bolden,* in which a plurality of four justices would have held that Section Two added nothing to the 15th Amendment. And that like the 14th Amendment, it required a showing of discriminatory intent.

Congress then decided to amend Section Two to make it clear that it didn't require intent. The House passed a bill which added what is now Section 2A of the Voting Rights Act. And instead of outlawing any requirement or procedure that quote, "denies or bridges the right to vote in account of race or color" as the original version of section two did. And that was the bit that they were interpreting in *Mobile versus Bolden.*

The new section 2A outlawed any requirement or procedure quote which results in a denial or abridgment of the right of any citizen to vote on account of race or color. Now that is the so-called results test. And it was thought that the House version of it would outlaw any procedural requirement that had discriminatory effects. So the Senate resisted this approach. And they reached an eventual compromise which added section 2B.

It left proposed section 2A in the bill unchanged, but then it added section 2B. And it's a little bit long but I'll read it to you because this is the bit that Justice Alito worked with. "A violation of subsection A is established if, based on the totality of the circumstances it is shown that the political process leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection A, in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." So it was thought-- 2B was thought to have two critical parts, the totality of the circumstances test, which told you what you could look at. Seems pretty encompassing, totality the circumstances.

And the so-called Dole proviso, that's the bit that ruled out any requirement of proportional racial representation. Now the Senate report-- and these-- remember, these were the days when the courts paid attention to legislative history --made clear what the totality of the circumstances consisted of. And I'll just read you some of them.

The history of voting related discrimination, the extent of radial polarization, the use of voting practices that tend to enhance opportunities for discrimination, whether minority candidates have been denied access to any candidate slating process, the extent to which minorities have born the effects of past discrimination in relation to education, employment, health, whether local political campaigns have used overt or subtle racial appeals, the extent to which minority group members have been elected to public office, the responsiveness of public officials to the particular needs of minority groups, and whether the policy underlying the use of the voting qualifications is tenuous. Now note one really, really, really interesting thing about all those factors, not one of them goes to intent.

Right? They're all about results, discrimination in education in the past, you know, that kind of stuff. And they came from a 1973 Supreme Court case called *White versus Regester.* So what was happening was that the Senate report was basically saying, listen, this is how you did things before intent was a requirement in equal protection.

That's what we want to do now going forward. And it was decided, *White versus Regester* was decided three years before *Washington versus Davis,* the case which established equal protection's intent requirement. Now, President Reagan signed the Voting Rights Act Amendment in 1982, on June 29, 1982. Two days later, the Supreme Court decided another case called *Rogers versus Lodge,* which was a follow up to *Mobile versus Bolden.*

But this time seven justices held that intent was required to prove a constitutional violation. So it took the pluralities position from before on that. But, but, but, but it said, it applied the *Regester* factors to prove them. So it said, yeah, you have to have intent. But you use these factors, none of which really bears on intent, to prove intent.

In other words, intent is required, but you can prove it by not satisfying it. All right? So those were the same factors that Section Two's totality of the circumstances test seems to require. So question what was going on here? Was all the huffing and puffing around the 19 82 amendments unnecessary?

Did Congress actually not need to pass them at all because the Supreme Court was going to take this odd position just two days later after the president signed the law or did the court basically retreat when it was faced down by Congress? There's no way of knowing? So how does all this stuff apply to the new-- how did the court say that section 2 applies to Arizona's two particular provisions?

Justice Alito writing for six justices, no extra credit for guessing who they were, made several important moves that had the effect of pulling many of the teeth of Section Two. First, he focused on two words in Section Two that no one had ever really thought important before. Not the totality of the circumstances, not the Dole proviso, all that, that's where people had thought the action was.

But he said that the truly critical words in one sense were "in that." Now, this had the effect. And no, you can't remember exactly how I read the statute. But don't worry, I'm not going to read it again. This had the effect of moving the inquiry largely away from whether the process was equally open under the totality of the circumstances test, which is what people thought it was about, to whether minorities had equal opportunity to participate in the political process.

So we go from equally open to equal opportunity. Slight difference, but one I think it was very important, and will be going forward. Then he went on to hold what circumstances counted, and ended up miles away from the register factors. To Justice Alito, size matters. Mere inconveniences cannot be enough to demonstrate a violation of Section 2. And you have to look at the relative size of any disparities. Basically, small differences shouldn't count.

He also then said that 1982, the year that the amendments were passed, is a baseline-- definitely one and possibly two important ways. First, he said the extent to which a practice differs from a quote, unquote "standard practice" in 1982 matters, meaning that if it was around in 1982 and people were applying it, not so important. Second, he said how much the burdens imposed by the practice differ from the burdens imposed by other 1982 practices might make a difference too. So even if something was new, meaning not around in 1982, but it didn't impose burdens much greater than things that were around in 1982, section 2 might not really care either.

Now it's unclear if where this comes from. It's not in the text of the 82 amendments. And the 82 amendments were presumably adopted because Congress thought that an intent requirement not reach some objectionable practices existing in 1982, not just one sometime in the future. Justice Alito said you have to evaluate the voting system as a whole, not just individual features. So if a state is maybe good over here and bad over here, you don't worry too much about the bad part. It's just as counterbalanced in some way about by the good.

And finally, Justice Alito said the strengths of a state's interest matters. And the prevention of fraud, even without any proof that there's a problem or that a practice is particularly likely to promote it, is a quote, "strong and entirely legitimate state interest." Now, there are also things that didn't matter very much to the opinion, at least not so much. And you got it. You know what those are, I'm sure-- the register factors.

Of those, only the past discrimination and the continuing effects of that discrimination matter. And he suggested that it might have to have been intentional. So Justice Alito has masterfully managed, I think, to flip the original understanding of the 1982 amendments on their head. Whatever you think about the result, you have to admire his technique. It's really amazing.

Now, the same also goes for his handling of the question of intent. Now what's interesting here is not so much that he overturns this Ninth Circuit-- that happens all the time-- but how he does it. In his analysis, he doesn't even mention Rogers versus Lodge, the case in which the court had said that intent in these cases could be satisfied by the registers factors. He just applied Arlington Heights. And that had the effect of overruling Rogers without even according at the courtesy of a mention.

So where do we stand now? I want to suggest to you that Brnovich is a kind of bookend for Shelby County versus Holder, another other case decided in 2010, which many of you probably have heard about. In that case, the court effectively deactivated section 5 of the Voting Rights Act pre-clearance requirement, by holding that its coverage formula was unconstitutional. In practice, section 5 was more important than section 2. But the court said, don't have to worry because we have section 2 in the background, and that can backstop it even if we take section 5 away. Not going to work, I don't think, at this point.

Now it's clear that it is stupid for the DNC to have brought this case. But think about how the world was different when it was filed. And that was 2016 and it was probably anticipating a very different Supreme Court. Anyone remember when people thought that Hillary Clinton might have been president?

But it's clear why the DNC did file the case. It thought that it was really important, and actually that small differences matter, especially when small differences are stacked one on top of another. If the precinct and ballot handling rules for example, made only a 0.3% difference in Arizona, which is very, very small, that would have tied the 2020 presidential result in Arizona. Small differences do matter.

But increasingly these small changes come in large packages, along with things like voter ID requirements, odd registration windows, early voting restrictions, vote drop off requirements. Not to mention, practical matters like insufficient funding of election administration, which leads to different waiting periods for different types of people at the polls. Now the next frontier I think, of voting rights litigation after Brnovich is going to be voting administration. And you've seen some moves of this already in Georgia, in particular. And I don't see how section 2 after Brnovich is going to do any work there at all. Maybe I'm wrong, we'll see.

GIANCARLO CANAPARO: All right, I think we're running out of time if I'm reading the clock right. So I'll just do one case-- Roman Catholic Diocese versus Cuomo. And in this case, the court granted emergency relief to two houses of worship in New York who sought relief from New York's maximum occupancy limits during the pandemic, which set a cap on occupancy for houses of worship, but exempted certain essential secular businesses from those caps. So the Catholic Church and the synagogue in this case, said that the Free Exercise Clause if it means anything, means that you can't treat houses of worship worse than-- you must treat them at least as well as you treat secular businesses.

And the court agreed in a 5-4 per curiam decision. And this was a really big deal coming out of the pandemic and the various COVID restrictions and how they apply to the Free Exercise Clause. And to explain why, we have to go back to the beginning of the pandemic in May of 2020, two months after we all went home. And we had another case that was very similar called South Bay Pentecostal versus Newsom.

And that was a California occupancy limit, did very much a similar thing-- capped occupancy except for certain secular essential businesses were exempted. So houses of worship said we were treated less good than these secular businesses. And so we should be free from this law.

So there was four justices would have granted emergency relief. Five would not. The chief wrote a solo opinion in that case. And the solo opinion joined again, by nobody, explained that the standard for seeking emergency relief at the Supreme Court pending appeal is that and I quote, "the legal rights and issues are indisputably clear. And even then, relief should be granted sparingly and only in the most critical and exigent circumstances, because the COVID-19 pandemic created dynamic and fact-intensive subject matter, subject to reasonable disagreement, but that should be trusted to the state legislature."

That was a reasonable approach. But remember what this approach was, what the standard is. It's the standard for seeking emergency relief at SCOTUS. That's not how the lower courts used it. They took that and turned it into a rule of constitutional review in all things COVID-- free exercise, free speech, Eighth Amendment prisoner, the quality of their conditions, thank you. There are speedy trial rights, mask mandates, voting mandates. It even showed up in disputes between state and local governments about who had a particular power.

It was something of chaos would have ensured, where some houses of worship had sometimes one priest South Bay. After South Bay, they always lost. And so the South Bay opinion took a super precedent, which is very interesting, because not only is it a shadow docket case, it's a solo opinion on emergent denying emergency relief. It's not really clear what the precedential value of that is. There's an ongoing debate about that right now.

I think that the weight of that debate-- correct me if I'm wrong-- but I think the weight of that debate tips towards these are not precedent. But regardless, it had become that. So then you had Roman Catholic Diocese-- really what changed is Justice Barrett comes to the court and flips Justice Ginsburg's vote in South Bay. And now you have to treat houses of worship at least as well as you treat secular businesses.

So one question remains-- so why did the lower courts run with this, why it's not clear that the chief's opinion was precedent. I think that part of it is you had no guidance at all. You were sort of in a brave new world with the COVID pandemic. There hasn't been an emergency of this nature that has involved the courts to such an extent for decades.

So they're desperate for guidance. I think they were sort of falling into the trap of where words like the Constitution doesn't cease to exist in an emergency, or the government has no more powers in an emergency than the Constitution grants it during non-emergencies, I think those become distant memories that don't have a clear application. And so you've got court reaching in desperation and lack of guidance to deference to state legislatures and state governments on this issue.

But so, now you have it. That's where things stand now. One less fun tidbit I thought about the case was in the dissents, especially in Justice Breyer's dissent in this case, essentially, they said look, these exigent circumstances still exist. We must give a great deal of deference to state legislatures. But Justice Breyer described the Chief Justice's South Bay opinion as our opinion. He said we held this. And I thought to myself, I'm not sure you did.

But that's where you have it. So where we go from now, Justice Gorsuch, in his concurrence sort of laid out where we are, which is to say that even if the rationale existed in South Bay, the emergency that we have now-- we're now into our second year of the pandemic. We are back safely into the realm of the Constitution has not gone on a vacation. And so that's what we stand. I'll leave it at that. I won't bring up my last case, since we're out of time.

MODERATOR: Well, thank you.