U.S. Supreme Court Trends Related to Emergency Requests

Since April 2020 the U.S. Supreme Court has handled numerous emergency requests related to COVID-19. Requests involving stay-at-home orders and judge-made changes to elections laws are of most interest to states and local governments. The trends in both categories of cases is clear but the reasons are murky. Oftentimes none of the Justices announce, much less explain, their vote.

In these emergency requests the challenger isn't asking the Supreme Court to decide the case on the merits. Instead, it is either asking the Supreme Court to stay (or freeze) a lower court decision until a higher court can review the decision or to grant an injunction overturning the decision below.

Obtaining a stay (or getting the Court to lift a stay) is difficult; obtaining an injunction is even harder. The Supreme Court only grants stays where it is likely to later hear the case on the merits and overturn the lower court's decision and the party asking for it will likely experience irreparable harm without a stay. The Court only grants injunctions when the legal rights at issue are "indisputably clear." It is more difficult to get an injunction than a stay because an injunction "grants judicial intervention that has been withheld by lower courts" rather than merely stops a lower court decision from taking effect.

To date the Supreme Court has received emergency requests in four cases involving stay-at-home orders. In all four cases the lower courts upheld the stay-at-home orders. In the California, Nevada, and Illinois cases the challengers

claimed religious speech was treated differently than other speech in violation of the First Amendment. The stay-at-home order in the Pennsylvania case was challenged on a variety of grounds. The California and Nevada cases generated a number of brief opinions from the Justices mostly over whether gathering in a house of worship during the pandemic is comparable to gathering in other settings which the states regulated differently.

In all four of the stay-at-home order cases the Supreme Court refused to grant an injunction overturning the lower court decision. While some of the cases appeared to raise valid First Amendment claims, First Amendment rights are rarely "indisputably clear." Also, in the California case the Chief Justice questioned whether an "unelected federal judiciary" should question the restrictions chosen by "politically accountable [state and local government] officials" in "dynamic and fact-intensive" pandemic.

The Supreme Court has received emergency requests in six cases where lower courts have altered rules related to elections. Cases from Oregon and Idaho involve reducing requirements for citizen-initiated ballot measures. A case from Texas allowed all voters regardless of age to vote by mail despite Texas law requiring voters under age 65 to have particular excuses. A district court allowed absentee ballots in Wisconsin to be counted if received later than the date in statute. Finally, a district court in Alabama ordered that certain absentee ballot requirements need not be complied with and a Rhode Island district court issued a consent decree allowing the same.

In all of the cases the Supreme Court stayed the lower court decisions except the Rhode Island case. In that case, the Court issued a statement noting no Rhode Island state officials objected to the consent decree. All of the elections case

except the Alabama and Oregon case (which is very similar to and decided after the Idaho case) drew some commentary from at least one Justice. Challengers in these cases have typically argued that no constitutional right is implicated by the statute the court has rewritten and/or that, as the Court stated in the Wisconsin case, “federal courts should not ordinarily alter election rules on the eve of an election.”

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