Consumer Finance Monitor Podcast (Season 8, Episode 44): The Supreme Court's Ruling on Universal Injunctions in the Birthright Citizenship Cases – Part 2

Speakers: Alan Kaplinsky, Suzette Malveaux, Alan Trammell, Portia Pedro, Burt Rublin, and Carter Phillips

Alan Kaplinsky:
Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. And I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program. For those of you who want even more information, either about the topic that we're going to be talking about today or anything else in the world of consumer or financial services, please don't forget about our blog consumerfinancemonitor.com. We've hosted our blog since 2011 when the CFPB became operational. There's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry.

So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you access your podcasts. And also, please let us know if you have ideas for any other topic that we should consider covering on a future podcast show or speakers that we should consider as guests on our show. Today is part two of the repurpose webinar that we conducted and produced on August 13th involving the Supreme Court's landmark ruling on universal injunctions. And we're going to be talking about the class action and complete relief workarounds to the opinion, the future implications of Trump v. CASA, that's C-A-S-A, on everyday people, the shaky future of associational standing. That is where trade associations represent their members in seeking injunctive relief or monetary relief, typically injunctive relief.

How much further will the Supreme Court go in expanding use of the unitary executive theory? If you have not listened to part one, I strongly encourage you to do that before listening to part two. Part one really lays the foundation for part two of our repurposed webinar. In part one, we discussed the majority opinion in Trump v CASA, the concurring opinion of Justice Kavanaugh, including the statement by the justice that the Supreme Court will continue to use its emergency docket to act as the ultimate arbiter on the propriety of injunctive relief and the dissenting opinions in Trump v. CASA. So here are your presenters for today and they're in alphabetical order. They are all very distinguished lawyers in their own right. So to the right of my photo is Suzette Malveaux. She's the Roger D. Groot professor of Law of Washington Lee University School of Law.

Over the last 20 plus years, she has taught civil procedure, complex litigation, employment discrimination, civil rights, and constitutional law. She has been cited in opposition in the Trump v. CASA opinion and in Trump v. Hawaii regarding the propriety of universal injunctions. Her writing focuses on issues at the intersection of civil procedure and civil rights with a focus on access to justice. To Portia Pedro. Portia is an associate professor at Boston University School of Law who studies civil procedure remedies and federal courts. Professor Pedro is written articles, what many refer to as nationwide or universal injunctions. First, she has urged scholars to define the

function and importance of this form of relief. And second, she argues that no rule present in her doctrine prohibits federal courts from issuing what she calls impact injunctions and calling for a more complete and less biased framing of the function, context and future for these injunctions.

She has other works forthcoming on this very topic including an essay on aggregation and the so-called universal injunction that she is co-authoring with Adam Steinman for the Harvard Law Review's Symposium entitled Judicial Review in Jeopardy. Next is Carter Phillips. Carter is one of the most experienced Supreme Court and appellate lawyers in the country. As a partner at Sidley, he has argued 82 cases, that's right, 82 before the Supreme Court, more than any other lawyer in private practice. Prior to joining Sidley, Carter served as an assistant to the Solicitor General and in that position he argued non cases before the Supreme Court on behalf of the government. He thus currently has a total of 91 oral arguments before that court. On the bottom left is my colleague Burt Rublin. Burt is the practice leader of Ballard Spahr's Appellate Group and has handled numerous significant appellate matters during the past 47 years.

He also has substantial experience in defending class actions, a lot of them in the consumer finance area and other complex commercial litigation in a wide range of subject areas that have been brought in state and federal courts around the country. And then last but certainly not least is Alan Trammell. Alan is a professor of law at Washington Lee University School of Law where his teaching and scholarship focused on civil procedure, federal courts and constitutional law. His scholarship has appeared in leading law reviews throughout the country. He's been cited by numerous courts and treatises. His commentary has also appeared in the Washington Post Slate and the Wall Street Journal. So we're going to talk now, I'm going to go to Portia who's going to talk about what's happened after the May 27th order and opinion was issued by the court and have there been other cases that have also come down that have shed any further light on the Supreme Court's opinion? So Portia.

Portia Pedro:
Thank you. So in talking about this and in talking about what we're seeing in the status of these cases after the June 27th CASA v. Trump opinion, I'm going to talk about two different things. First, I'll talk about what we're looking at from a remedy using civil procedure perspective within these cases, that is my area, but I'll talk very much less so about the actual merits issues that still might be coming up. So for the first part, in looking at these birthright citizenship cases after the Supreme Court opinion, what we're going to see changes completely depending on the type of plaintiff now, right? So now it depends on whether you're talking about individuals, associations, states or a class. And so that's how these cases have separated out. What we've had since the June 27th opinion is we've had the New Hampshire, a new case was filed there, the Barbara v. Trump, and that district court issued an opinion on July 10th that provisionally certified the class and ordered preliminary injunction for the class of individuals.

So there you have the injunction that in effect is the same injunction, but because it is for a class of individuals, it protects everyone in that class and the issue that came up in CASA is not there. Next we have the Ninth Circuit and in Washington v. Trump on July 23rd, the Ninth Circuit affirmed the district court's preliminary injunction for state plaintiffs as being needed for complete relief. So they were specifically only talking about state plaintiffs for this injunction of the enforcement of the executive order saying that that was necessary and appropriate for complete relief for those state plaintiffs. Then in the district of Massachusetts is where we now see a split of the case that initially started as the namesake of this case of CASA v. Trump on July 25th in what is now called New Jersey v. Trump, which had previously been O. Doe v. Trump. You have Judge Sorokin declining to modify the preliminary injunction for state plaintiffs because that injunction the judge said was necessary and appropriate for complete relief.

So there you've got that for state plaintiffs that was necessary for complete relief. And then the most recent one just a few days ago was August 7th and the district of Massachusetts, CASA v. Trump, which certified the class, not provisionally, certified the class and ordered preliminary injunction, issued a preliminary injunction to protect the certified class of individual and associational plaintiffs. So in that case, CASA has become a part of the class along with the individual plaintiffs in that case and you have a certified class in that case where you only have a provisionally certified class in New Hampshire now. So that's where we're standing in terms of the birthright citizenship cases. For the non birthright citizenship cases that are going to be coming up now or that have already been filed, you will see that people are going to start filing multiple cases now to get the same injunction, right?

So you will see that people will file class actions instead of only having individuals and might put associations within that class or might just have the class of individuals and that there will be state plaintiffs who are going for relief as well. Now quickly in terms of the substantive perspective on birthright citizenship, I think people should not rest on their heels thinking that birthright citizenship is secure as we have thought that it was for a very long time and thinking that it is clear that the administration will lose on the merits. What the court has been engaging in is along the lines of what Professor Reva Siegel calls the levels of generality gain. Looking very specifically when that is beneficial to not find an analog, but when an analog is needed to reach the outcome that's preferred looking very broadly for what an analog would be.

And that is something that has come up potentially with trying to say that there was no analog to unlawful immigration to an unlawful immigrant in 1866 to go very narrow on that to say, "Oh, this concept didn't exist then so we're doing something different." And in a way to say that the exceptions to birthright citizenship, to look at that much more broadly to try to argue that it was people not subject to US jurisdiction and to try to say that the people that issue in these cases, that these babies would not be subject to US jurisdiction. So there's a concern that we should be very much still paying attention not only on the injunctions approach, but also on this historical analysis and using the level of generality to become outcome determinative and using two different levels of generality within the same opinion where it's useful to suit the outcome someone is looking for. And I'll leave it at that.

Alan Kaplinsky:
Okay, let's turn now to the class action work around as it appears on the agenda, we've already discussed the fact that the majority opinion and one of the descending opinions, maybe both of them have seemed to bless the use of a putative class action as a way to get around the fact that universal injunctions are being barred in the future. So I've got Burt Rublin and Suzette Malveaux. Burt, are you going first?

Burt Rublin:
Yeah, I'm going to lead off. As Portia just mentioned, several courts in the wake of the CASA decision have recognized that rule 23(b)(2) class actions can serve as a vehicle for a nationwide group of similarly situated persons or entities to challenge an executive order or a federal statute or regulation that would adversely affect them. Now class counsel who are seeking a TRO or preliminary injunction need prompt relief, but I can tell you from personal experience having litigated class actions for over 45 years, that class actions are protracted. In connection with a class certification motion, there is generally speaking months of fact and expert discovery. There's voluminous briefing over months, then there's a class certification hearing and then you can wait weeks or months for the judge to render the class certification opinion. So that begs the question as to can a TRO or preliminary injunction be entered in favor of a putative class before the class has been certified?

And the Supreme Court actually dealt with that precise issue in its per curiam opinion in A.A.R.P. versus trump, which is another case that arose on the emergency docket. Now that case was interestingly decided on May 16th, which was just one day after the oral argument in the Supreme Court in Trump versus CASA. During that oral argument in the CASA case, the subject of class actions and injunctive relief was raised no fewer than 35 times by the council arguing the case as well as several of the justices. Going back to A.A.R.P. versus Trump, that was a putative class of Venezuelan detainees who were alleged to be gang members who had brought claims alleging that their proposed deportation under the Alien Enemies Act was improper and that they had not received adequate notice of their threat and removal. Now significantly in that case the class had not yet been certified on that due process claim.

The Supreme Court held that nonetheless it could issue temporary injunctive relief to the putative class in order to preserve its jurisdiction pending adjudication of the appeal. And here's the key passage of that opinion. Because courts may issue temporary relief to a putative class, we need not decide whether a class should be certified as to the detainees due process claims in order to temporarily enjoin the government from removing putative class members. Now, there was a dissent by Justice Alito that was joined by Justice Thomas, which stated that even if the majority was correct, that injunctive relief can be granted to a putative class. The propriety of class certification cannot be entirely sidestepped. Instead, justice Alito asserted that quote, "A court must at least consider whether class certification is likely as part of its consideration of the likelihood of success on the merits."

Now the Supreme Court's decision in A.A.R.P. versus Trump was very heavily relied upon by the Southern District of New York in a very comprehensive opinion rendered on July 25th in a case called American Council of Learned Societies versus McDonald. In that case, the court granted a preliminary injunction to punitive class members who were represented by the Author's Guild and it stayed DOGE's proposed mass termination of grants previously awarded by the National Endowment for the Humanities to 1400 punitive class members. The proposed classes had not yet been certified and in fact the plaintiffs had not even yet filed a motion for class certification. The court when it analyzed the issue described the tension between the plaintiff's request for quote, "necessarily quick and responsive preliminary relief on the one hand," and quote, "the deliberative and fact-intensive class certification process."

On the other hand, the court held that under A.A.R.P. versus Trump, they could award injunctive relief because the author's guild had made a preliminary showing in the brief that the criteria of rule 23 A and 23 B were likely to be satisfied after discovery and after briefing was ultimately completed and therefore the punitive class could receive the preliminary injunction. There's also a Ninth Circuit decision that was rendered on August 1st case called Perdomo versus Gnome, which likewise recognized that a trial court can certify a provisional class for purposes of entering a preliminary injunction. Now further on the subject of class actions, I want to turn the podium over, so to speak, the virtual podium over to Suzette.

Suzette Malveaux:
Yeah, I'll just jump in. Burt and I were joking that I'm going to be the cold water, I'm going to throw cold water on this. I want to start by saying the good news is that provisional class certification for purpose of emergency relief is possible. It's not the norm, but the Supreme Court has not held that it is impermissible. So we know that we have that and I think it's an important strategy plaintiffs are using and choosing in terms of getting relief quickly and that is systemic. So that is important. And I do recognize as a former class action attorney how powerful and important that class action tool can be for so many people. So it is in many ways seen as sort of the saving grace to the Trump versus CASA ruling, which some feel as a Draconian ruling in terms of not having nationwide injunctions.

What I do want to offer, sort of putting aside some of the real positives and importance of class actions is some caveats and maybe just a larger context first, the pragmatic issues, and we've talked a little bit about that a moment ago from Burt, and they're not easy to bring and it was hard. I was sitting in oral argument during Trump v. CASA and I was overhearing, people say, just bring a class action. I'm like, "Oh my God, they're not that easy to bring." And I think there was some of that was even heard on the podium itself that this is the obvious alternative to a nationwide injunction. And we know that there are lots of barriers to class actions in terms of expense and time. They're highly complex and they're certainly not for the faint of heart.

In my own practice, I had the privilege of working on Wal-Mart v. Dukes and it took 10 years for the case to get to the Supreme Court, not on the merits, but simply on the question of whether or not this should have been a class action. So these can be very difficult and time-consuming and hard cases. And in some ways the class action also has... there are similar complaints made about it as to nationwide injunctions, you form shopping being one of them, asymmetrical enforcement being another. So many of the things that people seem to care deeply about and had problems with the nationwide injunction, those things haven't necessarily been solved by the class action. So in addition to sort of pragmatic issues, I would say I think a healthy dose of skepticism about whether or not the class certification will stick is also warranted, particularly when it comes to the Supreme Court.

As Burt mentioned, there's the A.A.R.P. case, I don't know, I mean a pure curiam case certainly does have precedential value, but I think it also reveals some cracks amongst the justices in terms of their own commitment to the mechanism. Certainly Alito suggested that in Trump v. CASA, and it seemed to me that in reading his concurrence, that he was projecting that the class action litigation that is coming out of the birthright citizenship case and others is in some ways like a workaround, right? He's using language that suggests the class action is kind of the boogeyman here, that it's a potentially significant loophole that you've got. The courts have got to look out for abuse, that this should be rare and only allowed in discrete scenarios, that you should appeal immediately if you don't like a class action ruling. So that gives me pause.

It's hardly a sort of full-throated welcome of aggregate litigation and a way of people having their voices heard. And I think that's certainly the solicitor general oral argument sounded like, again, class actions were the obvious alternative. But I think make no mistake, the talk that we were hearing about class actions being that ready-made alternative, that there is significant opposition to it. That's certainly been the case for the court for decades, including the Wal-Mart v. Dukes case making commonality much more difficult. Certainly for Congress, which enacted the what's called the Class Action Fairness Act, which actually makes it easier for class actions to be removed from state to federal court where they may not be as receptive to class certification and certainly the defendants themselves like the government and big corporations who have pushed back very hard against class certification. So I think the Barbara v. Trump case is a perfect example of that.

The government has picked up the mantle, has picked up the script so to speak, and is actually drilling down all the familiar concerns that you would have about a class action for birthright citizenship, talking about concerns around commonality, typicality, adequacy of representation, needing discovery. I think the judge in that case actually fixed the class definition, so you don't have to worry about that. But these are the kinds of challenges that are pretty standard operating procedure when you bring class actions that you can expect that to be the case. So we'll see how it goes. I think that's sort of where I'm at. And then just the larger context, as was mentioned by the dissents, really the requirement that you have to go through the cumbersome class action litigation in order just to have your fundamental constitutional rights respected is problematic. And so that's kind of the context and that's how we got where we are.

Alan Kaplinsky:
Thank you, Suzette. Let's go to Portia now, we've talked a little bit about the complete relief workaround. It's really not a workaround as such, and it was mentioned by Portia a little bit earlier that at least one court, maybe more have applied the complete relief workaround with respect to state plaintiffs in the CASA case. So, Portia, if you could briefly just explain what that is, and we'll go from there.

Portia Pedro:
Yes, thanks. And I agree with what you said, perhaps even stronger than you stated it. So I don't see this the idea of a complete relief workaround as a workaround at all. The idea of complete relief for the plaintiffs has long been a part of consideration for remedial and injunctive principles, especially for scope. When trial court judges were deciding whether to grant injunctions and what they should look like. Even within these cases, some judges, as I mentioned, were using the idea of complete relief before Trump v. CASA came out to determine what type of injunction they should be granting. As you mentioned with state plaintiffs, I do still think this complete relief idea is very relevant for individual plaintiffs, for associational plaintiffs. But with this court, no one is likely to try this for individuals or associations. They will most likely only address those in the class context in terms of appeals.

And something interesting to note with this is that when someone wins an injunction and it is narrower than they would like, that party, the winning plaintiffs are unlikely to be able to appeal to say that the injunction should be broader, right? There's something that will go on that's a little bit uneven in terms of whether people can eventually get a broader injunction than the lower court issues. Something to note here for complete relief is that this idea, everything that the court said in the opinion applies to preliminary and permanent injunctions. There's no differentiation between those two and that it is not limited to executive orders or executive action at all, right? So this is for executive actions, policies orders also for congressional things, right? So statutory provisions. Also, there's no differentiation between what you have here, a federal action and state or municipal action, right?

So if a state government or municipality is doing something that applies broadly, this idea of needing complete relief will also still be there for federal courts deciding how to enjoin those actions where necessary. What you have with this complete relief addition is that the Supreme Court has said that courts can preliminarily or permanently enjoin defendants from taking unconstitutional or illegal action without only limiting those injunctions to the specific plaintiffs. As long as the injunction benefiting entities beyond the named plaintiffs is necessary and appropriate to provide complete belief to the named plaintiffs. So the same type of injunction we're talking about is fine for courts to continue to issue as long as it's necessary and appropriate to provide complete relief to the named plaintiffs. Now, what does that mean? That means that this is still in addition to the preliminary or the permanent injunction standard that courts should be using, right?

So you still have a reparable injury. Remedies at law are inadequate, balance of the hardships, interest of the public for permanent injunctions. And for preliminary injunctions, you have likely to succeed on the merits, which I would connect back to an early question here. The question for those injunctions is not whether the defendant is likely to succeed on what they say the scope of the injunction should be. When you're reviewing the court should have been discussing likelihood of success on the merits overall. A nice thing here is that the court did not lean in towards any of the more restrictive jurisdictional or prudential criticisms of injunctions as Alan mentioned. There is no defaults against these injunctions. There is no need to delay these injunctions until other courts have heard them. It is solely based on the injunction standard, preliminary or permanent that you're looking at, and whether doing so is necessary and appropriate to provide complete relief to the plaintiffs.

When it comes up, it will be reviewed for abuse of discretion. So the granting of a preliminary or permanent injunction, including the scope of such an injunction, is supposed to be reviewed for abuse of discretion while the legal conclusions would be de novo, factual findings for clear error. Something important to remember standing is always jurisdictional. So to the extent there are questions about state plaintiffs having standing in these cases, that could completely derail this idea of complete relief. So there's something to really pay attention to on that front. And I think the last thing that I will say on this is that it is really important to look out for a misunderstanding of cases. So complete relief standard of what the court has described is, as I said, there is some leakage with ideas of Califano v. Yamasaki coming into this. Something to remember from that is that the Supreme Court opinion in Califano v. Yamasaki in no way adopted, created, or stood for the principle that an injunction must be no more burdensome for defendants than necessary to provide complete relief for plaintiffs.

We are not looking at that as a standard. It has come up, it is listed in one of the concurrences as though that's true, but in that case, the governmental defendants proposed that principle that Califano v. Yamasaki court did not adopt that principle. And instead that court indicated support for very broad relief in certain senses. So there's a concern that the majority gives kind of a gloss of that and that some courts might interpret complete relief to need to be no more burdensome than necessary for the defendants. But that is not what is required, it's just that a broad injunction would be necessary and appropriate to give the plaintiffs complete relief. I'll leave it there.

Alan Kaplinsky:
Yeah, thank you, Portia. Let's go to Alan now, Alan Trammell to talk about a footnote in the majority opinion where the court said they are not dealing with section 705 and 706 of the Administrative Procedure Act and I've described that as a potential work around. And Alan, we are running out of time, so if you could just give a high level review of what's involved there.

Alan Trammel:
Absolutely. I appreciate that. There are a couple of footnotes in the CASA majority opinion that are relevant. There's the one that explicitly says we are not dealing with sections 705 and 706 of the Administrative Procedure Act. And then there's the footnote that I had mentioned earlier on in the webinar where the Supreme Court says, our ruling finding that universal injunctions are improper is based entirely on the Judiciary Act of 1789. It is not a constitutional ruling based on Article 3. And in this way, I think the court actually did a nice job of squaring the circle because during the first Trump administration you would have a lot of people saying these universal injunctions are unconstitutional. And then yet they would turn around during the Biden administration and want to use the administrative procedure Act to more or less get universal relief. So by engaging in statutory analysis only, the majority, as I say, squares that circle.

All right, so 705 and 706 at a high level of abstraction. 706 is very critical, and I'm just going to quote from the Administrative Procedure Act itself. It says that, "A court is allowed to hold unlawful and set aside agency action findings and conclusions that are found to be arbitrary, capricious and abusive discretion or otherwise, not in accordance with law." This traditionally has led courts to say that they can vacate a rule in its entirety or agency action in general that is unlawful, arbitrary, and capricious and the like. Now, when the universal injunctions debate started about 10 years ago, there were some folks who said, "Well, maybe vacatur is improper." And in fact, in recent years you have some of the justices including Justice Gorsuch, Justice Thomas and Justice Barrett, who have expressed doubt about vacatur. This doesn't actually track the traditional ideological divisions of the court because then you have justices like Alito and Kavanaugh joining with the more progressive justices saying, "No, no, this is a mainstay of administrative law."

Congress has spoken very, very explicitly and authorized courts to vacate these rules, not just as to the people challenging them, but in their entirety. And Justice Kavanaugh has mounted one of the most vocal and I think eloquent defenses of this. He's cited favorably to Professor Sohoni's work as well as Jonathan Mitchell. And he has said essentially, this is the way that Congress has always understood what courts are supposed to do in this instance. And he said that it would be inconsistent with more or less the entire trajectory of individuals being able to hold government accountable when the government transgresses the bounds of the Constitution and statutes. I won't get into all of the history, but that is an extremely important development across a number of doctrines through the 20th century, including the Declaratory Judgment Act.

So vacatur can be an important way of getting universal relief, and there's been a good amount of writing since the CASA decision came down where some scholars have said this is exactly how people should be trying to challenge Trump administration orders. Even though the President himself is not going to be within the ambit of the APA, the President almost always is going to have to deputize people within the administration to implement these directives, including the one that is at issue in the birthright citizenship case. And so there is a good argument then that these kinds of challenges can be brought. And the final note that I will offer is Section 705 authorizes a court to postpone the effective date of agency action. Basically it's a stay that is akin to a preliminary injunction, and we've seen several of those since the CASA decision.

To take just one example in July, there was a decision out of the Eastern District of New York about the Homeland Security's decision to terminate Haiti's temporary protected status following the devastating earthquake in 2010. In other words, Homeland Security was trying to make it easier to deport Haitians who had protective status in the United States. 705 was used as a way of essentially putting a pause button on that. So it remains to be seen how effective challenges under the Administrative Procedure Act can be. But I would tentatively say that a majority of the court seems on board with the idea that universal vacatur is still allowed precisely because Congress has expressly authorized it in the APA rather than in the majorities telling what Congress did in the Judiciary Act of 1789.

Alan Kaplinsky:
Well, if that's the case, Alan, does that take care of the problem? Is the problem here, just the pleading was flawed in the case, could they have relied upon 705 and 706?

Alan Trammel:
Not necessarily because they're going to be different standards for ripeness, for example, under Abbott Labs. And this is something that Justice Kavanaugh has been concerned about. And in 1992, Franklin versus Massachusetts, a Supreme Court case said then that the president's actions are not reviewable under the APA. So there's a bit of fancy footwork that's still going to need to go on. I think that it's kind of like the folks who are more sanguine about class actions, they will say, "Look, after A.A.R.P. in particular, this is an avenue for pursuing very meaningful accountability for the government. But in no way are the APA and class actions going to be panaceas." I'm not faulting in any way the lawyers who litigated this case in the first sentence.

Alan Kaplinsky:
Yeah, okay. All right. Time is moving very, very quickly. Suzette and Portia, you are going to talk about the future implications of the case on everyday people. Can you give us a very abbreviated discussion what you're talking about there?

Suzette Malveaux:
Yeah, sure. Let me just jump in. I think in terms of the implications of the case, on the one hand you could look at this case and think there's nothing to see here. And on the other hand, people are saying this is an existential crisis, so which is it, right? What is going on here? And I think that depends on some of the different ways that you might look at it. We talked about class actions. On the one hand, nothing to see here we can bring class actions. On the other hand, are they actually going to work and survive this court? You have the growth of the shadow docket, right? The emergency docket. Kavanaugh is saying on the one hand, don't worry, the Supreme Court has this, we can do this. On the other hand it's like, does the court have the competency to deal with this?

The deluge of executive orders coming at it, right? And then you have another argument when we think about complete relief, maybe in the birthright citizenship case you get the complete relief through states or you get the universal injunction, but that doesn't necessarily going to work. In other cases where states have very different interests than individual plaintiffs and organizations. And so hard to know. I think we're still trying to figure out the implications of this case. Is this nothing to see here or are we in an existential crisis? It originally does depend on the context that we're in. I think I would say that the main thing I would share is I think one of the implications of the case that's very important is that even though the language of the majority, it is not the same sort of screed that you hear about judges being unhinged, radical, politically motivated, activist judges trying to move against the laws.

Trump knows it. But I do think that in some ways the majority's message is similar in that it is saying be careful, right? Be careful what judges are doing. They're going too far. And so I do think that majority opinion is part of a larger problem in terms of undermining the legitimacy of the judiciary as a check on executive abuse of power and lowering the confidence that people have in judges overall. So I think it's part of a larger problem that we need to get a handle on. I'll just leave it there.

Alan Kaplinsky:
Okay, Portia-

Portia Pedro:
And I'll say just two things here. One is it's very problematic in this case because it can seem as though citizenship is a status that can get fixed after. Now that's not necessarily true. This is potentially going to change where people give birth, but in many other situations. So think about elections, think about situations with abortion. If you change whether or not a broader injunction can be issued, that's going to directly change people's lives irreparably on a day-to-day basis. And that could be seen as part of the reason that this injunction issue came up. In this case where it could seem to be a status that can be altered later on instead of coming up for voting rights or something like that to say, only those three people get to vote. And you could see that differentiation that cannot be fixed after. So there are serious things to consider for everyday people from this decision.

Alan Kaplinsky:
Thank you. Okay, we're at the penultimate item on the agenda, and I'm going to give a very abbreviated discussion of the associational standing because we're going to run over a little bit, hopefully not more than about five minutes, but I want Carter to have time to talk about the last item on the agenda. So associational standing, the Supreme Court recognized the concept of associational standing in a 1977 case called Hunt v. Washington State Apple Advertising Commission. And in that case, the Supreme Court held that a state commission could sue on behalf of Apple growers and dealers affected by a North Carolina statute, even though the commission itself wasn't a traditional membership organization. And the court laid out a three-part test for associational standing. And the

three-part test very briefly is that members would otherwise have standing to sue in their own right, at least one member of the association.

The interest of that the association seeks to protect are germane to the organization's purpose and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. This opinion is of critical importance to industry that wants to challenge regulations or executive orders or statutes that they believe are unlawful and that are harmful to the industry. During the Biden administration, there are many, many lawsuits brought by the American Bankers Association, Consumer Bankers Association and many other trade associations, challenging regulations issued by the CFPB, the SCC, and literally almost every important federal agency in the government. And if that concept of associational standing were to be eliminated, that would create an enormous problem because individual companies or banks don't like... they very often don't have the resources to prosecute a lawsuit, so they don't have the funds to prosecute it.

And very often they're suing their own regulator and they don't want to actually be in a direct adverse position to a regulator who you're going to have to live with after the litigation is over, many of those regulators examine and supervise the members of the association. Now, the class action work around, to me it is a nothing burger with respect to what I'm talking about here. Trade associations bringing lawsuits, challenging regulations, trade associations, their function is to benefit their members. They don't have any real interest in getting relief for people who are not members of the trade association or third parties. And I don't think they're going to be very highly motivated to use a putative class action as a way of providing relief for nonmembers because of cost considerations and the sheer complexity and the time-consuming nature of class actions, which have been described by Burt and by Suzette and others today.

So what's the answer here? Well, I think they're just going to have to hope that the Supreme Court doesn't overrule Hunt. And while there's nothing in the opinion and CASA says anything about overruling Hunt, and there are no cases in front of the Supreme Court right now dealing with it. My concern is that under the so-called unitary executive theory, which I think Trump subscribes to very, very much, that I wouldn't be surprised, I don't think he would shed any tears if the Hunt opinion were overturned. So I'm worried about it. With that, let me turn it over. I think that's a good segue to Carter who will wrap things up and talk a little bit about this universal executive theory and how it has just exploded during a very short period of six, seven months.

Carter Phillips:
And let me just supplement one thing in your section on associational standing. The Reagan administration actually challenged associational standing in UAW versus Brock, and that was just an ordinary case. And out of the blue as a respondent, the government threw in the idea that associational standing actually shouldn't be allowed to exist. And that 23 B is the answer, and that all the litigation ought to go that way. Court unanimously rejected that. Now that was that court then and that's 30, 40 years ago. So who knows what the court will do at this point. I'm not saying it's not an answer to the problem, but it does give me some comfort that the court would actually, I think, have to overrule at least two cases in order to-

Alan Kaplinsky:
Correct me if I'm wrong, Carter, but I think the only justice who's I pretty clearly come out against associational standing is Justice Thomas. On several occasions, he is inviting the court to take up the issue again.

Carter Phillips:
And then on the last topic, which is really as much about the unitary executive theory, also sort of the attack by the judiciary on the administrative state, which obviously arises because there is a separation between what the independent agencies are supposed to do and what the president does. And that was something Congress tried to create. And the court has obviously gone aggressively against the administrative state, overruling Chevron, taking to the court the power to make all of the decisions as a question as to what the questions of law mean and not deferring to the agencies on that score. The next one in line almost certainly will be the question of whether or not the president can terminate members at will rather than for cause. The Supreme Court and the Humphreys executor case in the wake of the New Deal said, "No, no, independent agencies are allowed to operate in independent basis, et cetera."

The court has already allowed President Trump to dismiss a number of members in the interim, and they sought injunctive relief. Court denied it. It's pretty much consistent with the way Kavanaugh is looking at this issue that something needs to be resolved and therefore we're giving you an answer. And I'd say that that's going to be the answer we'll give in four years, but I would bet almost anything I have in my pocket, at least, that's exactly the answer we're going to get in four years, which is that Humphreys executor is unconstitutional or is not as unconstitutional as it should be overruled. And I do think the court's going to continue on this track of going after the administrative state. I mean, the big $64,000 question I think is going to be the delegation doctrine. At what point will the court say if Congress wants to delegated authority.

And again, this is somewhat consistent with the unitary. In some ways it's more consistent with just tightening up the separation of powers doctrine, but I think the court's going to could well say, "Look, delegations are things that whether they're reasonable or just too broad, too squishy, and therefore not an appropriate delegation. And that Congress, if it wants to do these things, they're going to have to tighten it up." Since everyone knows that Congress is incapable of passing legislation these days, at least it's substantive in nature. That kind of a ruling would be, if anything, even more disastrous than candidly what we've been talking about today.

Alan Kaplinsky:
Right, right. Interestingly enough, and just one comment on the termination of the Democratic leaders of several federal agencies, so-called independent agencies. Interestingly enough, the court in one of its more recent opinions issued in connection with the emergency docket as stated in DICTA, the Federal Reserve Board is different than all the other agencies. And they cited the First Bank and Second Bank of the United States as being similar to the Federal Reserve Board, and that just didn't seem to wash with me.

Carter Phillips:
I hear you, bud.

Alan Kaplinsky:
I've talked to a lot of people who are experts on the Federal Reserve Board and what they do, and it's not at all similar to what the First Bank and Second Bank of the United States did, but I guess they just wanted to make sure that President Trump wouldn't fire Jay Powell before his term expires. Anyway, I want to thank all of our presenters today for just really doing a fabulous job. I know I learned a heck of a lot today.

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