4 Supreme Court Cases Involving Access To Justice To Watch

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Lawyers are eagerly anticipating the U.S. Supreme Court's upcoming term and arguments on several legal issues touching on the core of the Constitution.

Among the high-stakes matters on the court's docket this term are the right to access abortion and the right to carry guns in self-defense, both of which are flashpoints in the country's deep political divide. Other cases before the court involve the right to a fair trial, surveillance and equal protection under the law.

With the term beginning on Oct. 4, a slew of amicus briefs have been filed in recent weeks by the American Civil Liberties Union, the Cato Institute, the NAACP Legal Defense and Educational Fund, the National Association of Criminal Defense Lawyers, and a host of legal scholars and interest groups.

Here, Law360 has compiled a list of top cases that will examine issues related to civil rights and access to justice. Noted are case details, including the number of amicus briefs filed for each case as of Sept. 23.

Right to Carry Firearms
This case out of New York seeks to clarify whether the government can prohibit ordinary people without criminal records from carrying handguns outside the home for self-defense.

In taking up Bruen, the Supreme Court will hear its first gun rights case since its 2008 decision in District of Columbia v. Heller, which established that law-abiding individuals have a right to possess firearms for self-defense in their homes.

Lower courts have since used that decision, penned by Justice Antonin Scalia, as a measuring stick to determine whether state and local gun control laws violate the Second Amendment. The results have varied widely.

Courts across the country split on similar gun regulations and applied different levels of legal scrutiny to them, said Ilya Shapiro, a vice president of the Cato Institute and director of the Robert A. Levy Center for Constitutional Studies.

"There has been a lot of judicial civil disobedience against the Supreme Court," Shapiro told Law360. "This is a belated opportunity for the Supreme Court to explain how the lower courts are supposed to evaluate these claims."

The Bruen case originated from a legal challenge brought by two residents of New York, who applied for a license to carry a handgun in public for self-defense, but were denied.

New York State law has a nearly total ban on gun possession. People seeking a gun license must establish "proper cause," a term that the law itself doesn't define, but that has largely been interpreted as meaning that applicants must face a severe threat to their lives.

The two applicants sued in the district court, joined by the New York State Rifle & Pistol Association, the largest state affiliate of the National Rifle Association in the country. The case reached the Second Circuit, which affirmed the state law didn't violate the Constitution.

A Supreme Court decision in favor of the applicants could mean that states banning the right to carry firearms will have to change their laws, Shapiro said.

The case has been a formidable magnet for attention. Several interest groups piled up on both sides of the question. Twenty-two amicus briefs were filed on Sept. 21 alone, for a total of 78 since the petition was filed.

The briefs include some from nationally known gun-control advocates and civil rights organizations as well as a long list of states and municipalities. The Biden administration and the American Bar Association have both filed a brief in support of the regulation.

The Cato Institute, a libertarian think tank, filed an amicus in support of the applicants and their "natural right to armed self-defense," Shapiro said.

Twenty-three states filed a joint amicus in support of the petitioners, arguing state laws banning gun possession like New York's are unconstitutional and don't result in more safety. The states

asked the Supreme Court to restore "the original public meaning" of the Second Amendment, which they say lower courts departed from after Heller.

"These courts employ interest balancing to favor a sense of security over liberty. This is backwards: liberty ensures security," the states' brief says.

The NAACP Legal Defense and Educational Fund was among the organizations to file a brief in support of state regulators.

"State's ability to regulate public carry, and concealed carry specifically, is important for contributing to public spaces that are safe," Mahogane Reed, an attorney with LDF, told Law360. "This is especially important, we think, for Black communities and especially young Black men who are disproportionately likely to be killed or injured because of handgun violence."

Favorable Termination

People who were arrested or charged unjustly, and later decide to sue law enforcement in federal court for civil rights violation, must first establish that their underlying cases were terminated in favorable ways to them. The Supreme Court will clarify what constitutes a "favorable" termination in this context.

The Second Circuit set a rather high standard: In 2018, deciding the case Lanning v. City of Glens Falls, the court endorsed the view that a plaintiff must show that his proceeding "ended in a manner that affirmatively indicates his innocence."

But the Eleventh Circuit ruled last year in the case Laskar v. Hurd that a plaintiff must only show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence."

Six other courts of appeals have adopted the more stringent requirement, which the Second Circuit upheld in the Thompson v. Clark case that is now before the high court. The NAACP Legal Defense and Educational Fund is wary that if the Supreme Court embraces that doctrine, victims of wrongful arrests and prosecution, which are more often Black, will be severely limited in their ability to sue their arresting officers.

"The case has serious implications for communities of color, especially Black people, who are disproportionately stopped, searched, arrested, charged, and had charges dismissed by prosecutors without any indication as to whether they were or were not guilty, or innocent of the underlying charges," Reed said. "These plaintiffs would be unable to pursue claims of unreasonable seizure or procedure under the Fourth Amendment."

Critics of the Second Circuit approach say prosecutors, who have wide discretion in determining how cases are terminated, practically have the power of dooming a former defendant's ability to sue law enforcement for civil rights violations.

LDF filed an amicus brief in June urging the court to adopt the Eleventh Circuit standard. The American Civil Liberties Union filed one the same day advocating for the same position.

The Biden administration argued in its own brief that a termination may be favorable to the plaintiff, for purposes of a Section 1983 claim, even if it lacks affirmative indications of innocence.

In support of the affirmation of innocence doctrine, the District Attorneys Association of the State of New York said prosecutors routinely dismiss cases for practical reasons, often balancing the seriousness of a crime with the limited resources of their offices, other times because of technicalities. Those dismissals shouldn't give former defendants the opportunity to turn around and sue.

"Under the Eleventh Circuit's rule, any discretionary dismissal by the prosecutor would swing open the door to a great deal of meritless litigation," the association's brief says.

Right to a Fair Trial

The Supreme Court will review a First Circuit decision that overturned the death sentence for Dzhokhar Tsarnaev, one of the perpetrators in the 2013 Boston Marathon bombings. Three people were killed in the attack and about 280 were injured. Tsarnaev and his brother also killed a campus police officer in the attack's aftermath.

The case deals with the obligations of judges to ensure the right to a fair trial, a principle enshrined in the Sixth Amendment, amid national media coverage,

Tsarnaev was convicted in April 2015 and sentenced to death weeks later. But in July last year, the First Circuit overturned the death sentence and three of his convictions on the ground that the district court failed to ask prospective jurors about how much and what kind of media coverage about the case they had been exposed to during jury selection, which lasted 21 days.

The American Bar Association submitted an amicus brief in support of neither party in June, emphasizing the importance of questioning potential jurors about their exposure news coverage in rooting out potential biases, particularly in the current media landscape, where social media spread information fast and widely.

"This Court should affirm that, when it is likely that prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial," the brief says.

The American Civil Liberties Union, the National Association of Criminal Defense Lawyers and The Rutherford Institute filed a joint amicus in support of Tsarnaev in August, focusing instead on "powerful mitigating evidence" that was excluded during the penalty phase of his proceedings.

That evidence involved knowledge by Tsarnaev that his older brother, Tamerlan Tsarnaev, had committed three murders in the name of jihad two years before the Boston attack.

"That evidence tended to show Tamerlan instigated the later Marathon bombings and Dzhokhar, who had no history of violence, acted under his influence," the brief says. "That is powerful mitigation evidence."

Representatives from the ACLU and the NACDL declined to comment on the case, citing their involvement.

Religious Liberty and Surveillance

This case involves the surveillance of a Muslim congregation in Orange County, California. Between 2006 and 2007, the Federal Bureau of Investigation sent a paid informant in the county's largest mosque to pose as a convert to Islam. The informant obtained personal information from hundreds of people, inquiring on their religious and political beliefs.

In June 2011, the ACLU of Southern California filed a federal class action against the FBI and the agents involved in the operation, claiming it targeted people for their Muslim faith in violation of the First Amendment. The suit also alleged the collection of information violated the congregants' Fourth Amendment rights as well as the Privacy Act.

In August 2011, the government moved to dismiss the case asserting the "state secrets" privilege, a doctrine that allows the government to exclude from discovery evidence on the basis of national security. About a year later, the U.S. District Court for the Central District of California tossed the claims against the FBI, but allowed those against the individual agents to proceed.

The case meandered until February 2019, when the Ninth Circuit ruled that some of the claims the district court dismissed on state secret grounds should not have been dismissed outright. The decision in part affirmed and in part reversed the lower court's ruling, remanding the case.

In December 2020, the U.S. government asked the Supreme Court to clarify whether Section 1806 of the Foreign Intelligence Surveillance Act of 1978, also known as FISA, displaces the state-secrets privilege and allows the suit challenging the lawfulness of government surveillance based on the privileged evidence to play out in the district court.

FISA does not sidestep the privilege, which enables the executive to fulfill its constitutional duty to protect national security information, the government argued. "The Ninth Circuit's decision to the contrary poses a substantial risk that state secrets will be disclosed on remand in this case."

Laura K. Donohue, a research professor at the Georgetown University Law Center, filed an amicus in support of neither party in August, providing the court with historical background on the state secret privilege.

Erwin Chemerinsky, constitutional legal scholar and dean of University of California, Berkeley School of Law, told Law360 in an email that he finds "very persuasive" the Ninth Circuit's argument that FISA authorizes a course of action.

"The state secrets doctrine is a judicially created, common law doctrine. Where there is a statute, and here there is, that should be followed," Chemerinsky said.

But, he added, "There has not been anything like this before the Supreme Court so it is very hard to predict what it will do."

Before arguments in the Fazaga case get cast on Nov. 8, the state-secrets privilege will be the focus of another case before the high court this term, United States v. Zubaydah, which will be argued on Oct. 6.

There, the Supreme Court will have to rule on whether the Ninth Circuit was wrong in rejecting the government's assertion of the privilege and allowing discovery to move forward in a case brought by a Guantanamo Bay detainee against a contractor for the Central Intelligence Agency involved in a highly controversial post-Sept. 11 detention and interrogation program.