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Overview of the Supreme Court's 2017–2018 Term

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Abstract

The Supreme Court's last term featured a number of wins for free speech, religious freedom, and a number of compromise decisions, as the Court operated without a ninth justice for most of the term. In the upcoming term, the justices will tackle important issues, including the balance of power between the federal and state governments in a challenge to legalized sports betting, how technology poses new challenges under the Fourth Amendment in a case dealing with police seizure of cell phone location records, the scope of the President's ability to exclude aliens from the country in the travel ban case, and the long-brewing showdown between religious freedom and gay rights over whether states can force bakers to make cakes celebrating gay weddings. Battles over gun rights, sexual-orientation discrimination, unions, and more may reach the Court later this term. The 2017–2018 term promises to be one for the history books.

On October 2, 2017, the Supreme Court begins a new term. The 2016 term saw a number of compromise decisions, as the Court operated without a ninth justice for most of the term. But in April, Neil Gorsuch joined the Court, and a conservative majority delivered a victory for religious freedom in the long-awaited case of *Trinity Lutheran Church v. Comey*. While 2016–2107 was not a blockbuster term with numerous high-profile cases, the Court decided important cases involving legislative redistricting in North Carolina and Virginia, property rights in *Murr v. Wisconsin*, and free speech in *Matal v. Tam*, *Expressions Hair Design v. Schneiderman*, and *Packingham v. North Carolina*.

Key Points

- The Supreme Court's upcoming term begins on October 2, 2017, and the justices have already agreed to hear 32 cases.
- The Court's 2016–2017 term saw a number of compromise decisions since the Court operated without a ninth justice for most of the term.
- In the 2017–2018 term, the Court will hear cases involving challenges to a state's attempt to clean up its voter rolls, the warrantless use of cell phone location records by police, corporate liability under the Alien Tort Statute, President Trump's travel order, and the showdown between religious freedom and state anti-discrimination laws.
- The Court also may take up cases involving deference to administrative agencies' interpretation of regulations, public employee unions, sexual-orientation discrimination, and gun rights.

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Each term features plenty of cases involving legal housekeeping issues, such as when lawsuits must be filed in order to be timely and how cases must be litigated or settled. Generally, the Supreme Court does not consider major legal issues until such matters have been considered by the lower courts. After the Court does address a major legal issue, its decision may lead to a host of related questions on which the lower courts, the academy, the media, and Congress have the opportunity to reflect and opine. For example, in *Obergefell v. Hodges* (2015), the Court held that states must recognize same-sex marriages performed in other states. Since then, lower courts have grappled with how to apply this decision to the "constellation of benefits" related to marriage. The Arkansas Supreme Court ruled that the state was not required to list both members of a same-sex married couple on their child's birth certificate—which the U.S. Supreme Court summarily reversed in *Pavan v. Smith* (2017). The Texas Supreme Court recently determined that benefits policies should not cover same-sex spouses of state employees.

Another example of a Supreme Court decision opening up more issues came in *Trinity Lutheran Church v. Comey*, in which the Court held that a state could not exclude a church from a grant program solely because of its religious identity. The decision exposed fault lines in the Court over religious uses of state funds. While this decision dealt with state funding for resurfacing playgrounds with recycled tires, it is easy to imagine how the ruling could be applied outside the context of playgrounds or children's health and safety. Justices Neil Gorsuch and Clarence Thomas expressed concern about making a distinction between religious identity and religious use. In their view, the Free Exercise Clause covers both. Given the number of school-choice cases involving religious schools making their way to the Supreme Court, this division could resurface soon.

Now the focus turns to the 2017–2018 term.

Cases on the Supreme Court's 2017–2018 Docket

On average, the Court hears about 70 cases out of the roughly 7,000 petitions for review it receives each term. It has already agreed to hear 33 cases and will add more to the schedule at its long conference on September 25. Thirteen cases have been set for oral argument in October, and many more will be scheduled in the coming months. The upcoming term is shaping up to be an important one, with challenges involving a state's attempt to clean up its voter rolls, the warrantless use of cell phone location records by police, corporate liability under the Alien Tort Statute, President Trump's travel order, and the showdown between religious freedom and state anti-discrimination laws, among others. Below is a sampling of cases the Court has agreed to hear this term.

Husted v. A. Philip Randolph Institute. States balance competing interests of increasing the total number of citizens registered to vote and safeguarding the integrity of elections by mandating that only eligible voters cast ballots. The National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) govern the process by which states clean up their voter rolls and remove inactive voters. The NVRA mandates that states conduct regular maintenance to ensure the accuracy of their voter rolls and sets out a process for states to remove from their rolls individuals who have moved out of state. Under HAVA, states may not remove people from the voter rolls solely because they failed to vote. The federal government has sued states for failing to clean up their voter rolls. Since 1994, Ohio has used the U.S. Postal Service's change-of-address database to identify registered voters who have moved. The state sends notices asking for confirmation whether voters have moved, and automatically removes them from the voter roll if they do not respond or vote in an election within four years. The state also sends notices to registered voters who have not voted for two years, asking whether they have moved. If, after another four years, they have not responded to the notice or voted in an election, the state will remove them from the voter roll. A group of individuals challenged this process, and the lower court held that Ohio violated both federal laws by using voter inactivity as the reason for inquiring whether a voter had moved. Ohio maintains that its process is consistent with HAVA and the NVRA. A number of states use voter inactivity to identify individuals who may no longer be eligible to vote in that jurisdiction, so the Supreme Court's ruling in this case will have implications far beyond the Buckeye State.

Carpenter v. United States. As technology advances, the Supreme Court continually re-evaluates the contours of the Fourth Amendment's prohibition on unreasonable searches and seizures. In the past decade, the Court has reined in law enforcement

officers' use of technology to gather evidence without a warrant. In *United States v. Jones* (2012), the Court held that police tracking of a suspect's car with a GPS device constitutes a search under the Fourth Amendment. In *Riley v. California* (2014), the Court ruled that police must obtain a warrant before searching a cell phone seized incident to an arrest. Now the Court will decide whether the government may seize cell phone location records from service providers without a warrant. The Stored Communications Act, 18 U.S.C. § 2703, allows law enforcement officers to acquire an individual's cell phone location records from telecommunications service providers after obtaining either a warrant or a court order—the latter under a lower standard of proof. These records include incoming and outgoing calls, text messages, and location data. Timothy Carpenter is challenging his conviction for six robberies based on the prosecution's use of his cell phone location records. The lower court held that information shared with third parties receives no Fourth Amendment protection under *United States v. Miller* (1976) and *Smith v. Maryland* (1979), and that law enforcement authorities can obtain such records from service providers without a warrant. But other courts have concluded that this third-party doctrine does not apply, given the sensitivity of these records and the fact that, at least in a meaningful way, individuals do not give this information to their service providers voluntarily.

Masterpiece Cakeshop v. Colorado Civil Rights Commission. Jack Phillips owns a bakery in Colorado that he runs in accordance with his religious beliefs. This includes declining to design custom cakes for Halloween, same-sex weddings, and cakes with profanity or containing alcohol, among others. A gay couple asked Phillips to design a cake for their wedding. Phillips declined, but offered to sell them something off the shelf. The couple filed a complaint with the state Civil Rights Commission, and an administrative law judge found that Phillips engaged in sexual-orientation discrimination in violation of the state's public accommodation law, and ordered him to make custom cakes for same-sex weddings. Phillips argues that forcing him to create custom cakes endorsing same-sex marriage violates his free speech and free exercise rights. He points out that the administrative law judge would allow exemptions from the state's public accommodation law for a black baker who declined to make a cake with a white supremacist message, or a Muslim baker who declined to make a cake disparaging the Koran. If Colorado would allow some exemptions but denies Phillips one based on his faith, the state must show a compelling interest that is narrowly tailored in order to single out certain faiths for disfavored treatment, as the Court held in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993). With dozens of similar cases pending across the country, this showdown between religious freedom and gay rights will be one of the most anticipated decisions this year.

Gill v. Whitford. Since entering the political thicket in 1962's *Baker v. Carr*, it seems the Supreme Court's work on legislative redistricting is never done. Just last term, the justices heard cases dealing with racial gerrymandering and majority–minority districts in North Carolina and Virginia. This term, the justices will consider a case involving political gerrymandering in Wisconsin. Federal courts have been heavily involved in Wisconsin's redistricting process for 30 years, drawing up plans for the state to follow. A three-judge panel invalidated the redistricting plan the Wisconsin legislature adopted in 2011, finding that the Republican-controlled legislature intended to "entrench" its power with the plan it adopted. This was despite the fact that the legislature followed the traditional redistricting criteria, such as compactness and contiguity. In *Vieth v. Jubelirer* (2004), the Supreme Court held that, as opposed to racial gerrymandering or "one person, one vote" equal protection claims, political gerrymandering claims are non-justiciable. This is because federal courts generally lack the authority to hear disputes raising political questions that are better left to the political branches. In his concurring opinion, Justice Anthony Kennedy agreed that the Court should not intervene unless "workable standards emerge" to measure any burden imposed by political gerrymandering. The challengers in *Gill* debuted a new theory—the "efficiency gap"—for challenging political gerrymandering, arguing that votes for one party over a certain threshold are considered "wasted" and demonstrate that a redistricting plan has been drawn to pack voters of one party into a small number of districts. Another explanation is that like-minded people tend to live near each other, and Democrats are often concentrated in urban areas. Wisconsin points out that one in three redistricting plans would be potentially invalid under the efficiency gap theory—including plans drawn by

courts. Following the 2020 Census, states across the country will be drawing new district lines, so this case could have huge implications in elections for years to come.

Trump v. International Refugee Assistance Project. Shortly after taking office, President Donald Trump issued his now-infamous executive order restricting travel to the United States by aliens from several predominately Muslim countries that are terrorist safe havens. The order quickly drew legal challenges and was revised. Two federal judges enjoined the Trump Administration from enforcing the order, and appeals courts agreed, finding the order violates the Establishment Clause and exceeds the President's delegated authority over restricting the entry of aliens. The Administration asked the Supreme Court to weigh in, and the justices stayed part of the lower courts' injunctions. This allows much of the order to go into effect before the justices hear the merits of the case this fall. The Administration argues that the case is not justiciable because, with limited exceptions, aliens outside the United States do not have a constitutional right to enter the country. Further, courts may not second guess the President's decision to exclude aliens from entering the country, as the Court held in *Kleindienst v. Mandel* (1972) and Justice Anthony Kennedy reiterated in his concurrence in *Kerry v. Din* (2015), where the President is acting pursuant to authority delegated by Congress and his own constitutional authority over foreign affairs. The Administration also maintains that the lower court judges inappropriately credited statements made during the presidential campaign and on Twitter as proof of an improper motive of excluding Muslims from entering the country.

Jesner v. Arab Bank PLC. This case involves an application of the Alien Tort Statute, which was part of the Judiciary Act passed by the first Congress in 1789. It authorizes district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This law has been used since the 1980s in lawsuits alleging that individuals committed torture, murder, and other human rights violations. The Court twice heard *Kiobel v. Royal Dutch Petroleum*, a case dealing with whether this law applies to corporations. Instead of resolving the question over corporate liability, the justices decided that U.S. courts lacked jurisdiction since the alleged misdeeds took place outside the United States. Now the justices have agreed to look at the issue once again. This case involves claims brought by non-U.S. citizen plaintiffs against a non-U.S. company for acts that occurred outside the United States. Joseph Jesner and other victims of Hamas are suing Jordan's Arab Bank for holding accounts for terrorists; sending large sums of money from its New York branch to support attacks in Israel, the West Bank, and the Gaza Strip; and paying out "martyrdom" payments to the families of suicide bombers. The lower courts held that, under *Kiobel*, they lacked jurisdiction over the claims. Jesner argues that the text, history, and purpose of the Alien Tort Statute make clear that it presumptively allows actions against corporations. The bank points out that Jesner chose to sue in the United States, instead of Israel, because the latter's courts rarely award punitive damages. After declining to hear similar cases brought since *Kiobel*, it seems the justices are ready to reach the underlying issue of corporate liability under the Alien Tort Statute.

Christie v. NCAA. Aside from Nevada, most states have long prohibited betting on sports. In 2012, New Jersey voters approved a state constitutional amendment allowing the legalization of sports betting at casinos and racetracks. The federal Professional and Amateur Sports Protection Act (PASPA), however, bars states from repealing existing laws that ban sports betting. The National Collegiate Athletic Association (NCAA) and professional sports leagues challenged New Jersey's amendment in court, arguing that it violated PASPA. New Jersey maintained that PASPA violates the anti-commandeering doctrine, recognized in *New York v. United States* (1992), which holds that Congress may not force states into the service of the federal government. The lower court disagreed, noting that states are not required to prohibit sports betting; instead, they must keep prohibitions that are already on the books. In *New York*—a case dealing with states' disposal of radioactive waste—the Supreme Court explained that while Congress may incentivize states to pass certain laws, the Constitution does not allow Congress to override states' sovereignty to regulate the private conduct of their own citizens. Certainly, Congress can take a "carrot or stick" approach to encourage states to enact federal priorities. But when Congress seeks to commandeer states, it violates the vertical separation of powers that is essential to preserving Americans' liberty. New

Jersey points out that if PASPA is permissible, the federal government could intervene in states' decisions whether or not to legalize other conduct, such as concealed carrying of handguns, working on Sundays, or recreational use of marijuana.

Cases on the Horizon

Attempting to predict what the Supreme Court will or will not do is a gamble. The Court receives roughly 7,000 petitions for review each term, and the justices agree to hear less than 1 percent of those cases. The justices are more likely to take up a case when an issue divides the lower courts, and sometimes, they will invite the opportunity to revisit a past decision. For these reasons, the following cases have a good chance of being reviewed by the Supreme Court in the near future.

Garco Construction, Inc. v. Secretary of the Army. The modern administrative state touches nearly every aspect of Americans' daily lives, from highways to electricity to health care. Some of the Supreme Court justices have expressed concerns about unchecked administrative agencies and the deference doctrines the Court has developed that allow agencies, rather than judges, to declare what the law is. Under a doctrine called "*Auer* deference," courts defer to an agency's interpretation of regulations it has promulgated, instead of deciding what the best interpretation is under the applicable law. Justices Samuel Alito and Clarence Thomas have both highlighted the problem of deferring to agencies' judgment, as did Justice Neil Gorsuch when he was an appeals court judge. In *Garco*, a construction company that has a contract with the U.S. Army Corps of Engineers to build Air Force housing in Montana seeks to recoup extra costs incurred due to the Corps' contradictory interpretations of an applicable regulation. The company lost in the lower courts, and now it has asked the Supreme Court to take up the case and overrule *Auer v. Robbins* (1997) and *Bowles v. Seminole Rock & Sand Co.* (1945), which together established the standard that judges defer to an agency's interpretation of its regulations unless they are "plainly erroneous or inconsistent with the regulation."

Title VII Employment Discrimination. Title VII of the Civil Rights Act of 1964 prohibits "discriminat[ion] against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." During the Obama Administration, the Equal Employment Opportunity Commission began interpreting Title VII's prohibition on sex discrimination to include sexual orientation. Congress has never amended the statute to include sexual orientation as a protected class and the Supreme Court has never ruled on the issue. Until recently, all the federal appeals courts had ruled against extending Title VII sex discrimination. But in *Hively v. Ivy Tech Community College* (2017), the Seventh Circuit concluded that Title VII extends to sexual-orientation discrimination. Applying the Supreme Court's 1989 *Price Waterhouse v. Hopkins* ruling that sex discrimination includes gender stereotyping, the *en banc* Seventh Circuit held in an eight-to-three decision that sexual-orientation discrimination is indistinguishable from sex stereotyping. The Second and Eleventh Circuits have also recently considered the issue—coming to the opposite conclusion of the Seventh Circuit in *Zarda v. Altitude Express, Inc.* and *Evans v. Georgia Regional Hospital*, respectively. The full Second Circuit is currently considering an appeal of *Zarda*, in which the Justice Department filed a brief explaining that the federal government does not support this new interpretation of sex discrimination. The full Eleventh Circuit declined to reconsider the *Evans* decision, and the plaintiff has announced she will file a petition with the Supreme Court. This split among the lower courts increases the likelihood that the justices will take up the issue.

Janus v. American Federation of State, County, and Municipal Employees, Council 31. In *Abood v. Detroit Board of Education* (1977), the Supreme Court held that public employees may be required to pay fees to the local union even if they have opted not to join the union. In such an "agency shop" arrangement, every public employee is represented by the union for purposes of collective-bargaining agreements, but those who choose not to join the union pay an agency fee for a "fair share" of the union's costs. Two cases in recent years, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014), called into question the validity of *Abood* for imposing a "significant impingement" on an employee's First Amendment free speech and association rights. Court watchers anticipated that the justices would overrule *Abood* when a group of California teachers challenged it in the 2015–2016 term in *Friedrichs v. California Teachers Association*. But Justice Antonin Scalia's sudden

passing left the Court divided four to four on the issue. Now Mark Janus, an Illinois state employee, has asked the Court to hear his case, arguing that *Abood* should be overruled once and for all.

Wrenn v. District of Columbia. In 2008 and 2010, the Supreme Court issued landmark rulings holding that the Second Amendment protects an individual right to keep and bear arms for self-defense, and that it applies against the states in addition to the federal government. Since then, the lower courts have heard numerous cases seeking to further define the scope of that right. The D.C. Circuit recently struck down the District of Columbia's law requiring applicants for concealed-carry permits to demonstrate a special need for self-protection. The court also found that it was unnecessary to decide which standard of review applies, since the District effectively banned most people from exercising their right. Several other federal appeals courts have applied intermediate scrutiny to uphold similar concealed-carry restrictions. Last term, the Supreme Court declined to take up *Peruta v. California*, where the Ninth Circuit upheld a "good reason" requirement for concealed carry permits. Now that there is a split among the federal appeals courts, the justices may decide to hear one such case and provide much-needed guidance to the lower courts on the Second Amendment.

Conclusion

In the upcoming 2017–2018 term, the justices will tackle important issues including the balance of power between the federal and state governments in a challenge to legalizing sports betting, how technology poses new challenges under the Fourth Amendment in a case dealing with police seizure of cell phone location records, the scope of the President's ability to exclude aliens from the country in the travel ban case, and the long-brewing showdown between religious freedom and gay rights over whether states can force bakers to make cakes celebrating gay weddings against their consciences. Battles over gun rights, sexual-orientation discrimination, and more may reach the Court later this term. The 2017–2018 term promises to be one for the history books.

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