LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, OCTOBER 2, 2017
OCTOBER TERM 2017

Ginsburg was right: It will be 'momentous'

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New York Times News Service

The U.S. Supreme Court did not dominate the headlines this past June the way it has in recent years. Reduced to eight justices and without a replacement in sight, the Supreme Court appeared to avoid high-profile cases that might have split the justices in a 4-4 vote, instead opting for the sorts of cases on which the justices are in general agreement. The result was that the justices were unanimous in 59 percent of their cases — only the second time in the last decade that the court was unanimous in more than half of its decisions.

By contrast, the 2017 term begins this week with a bang. As Justice Ruth Bader Ginsburg recently put it in a speech at Georgetown Law School, "there's only one prediction that's entirely safe about the upcoming term, and that is: it will be momentous."

On the first day of the term, the court will hear three consolidated cases regarding arbitration waivers in employment agreements. In *Epic Systems Corp. v. Lewis*, the Supreme Court will consider whether employment agreements that require individual arbitration are enforceable under the Federal Arbitration Act despite provisions of the National Labor Relations Act that give employees the right to engage in certain forms of "concerted activities." The National Labor Relations Board concluded that a contract requiring individual arbitration violated the NLRA, and the 7th and 9th U.S. Circuit Courts of Appeals agreed. But the 5th Circuit, later joined by the 2nd and 8th Circuits, rejected the board's conclusion, and enforced the arbitration agreement. The Supreme Court in recent years generally has supported arbitration agreements, and *Epic Systems* provides yet another opportunity for the court to consider hostility to such agreements.

The next day, the Supreme Court will consider the constitutionality of political gerrymandering in *Gill v. Whitford*, which Justice Ginsburg called "perhaps the most important grant thus far." The Supreme Court last addressed a challenge to political gerrymandering in 2004 in *Vieth v. Jubelirer*. In that case, four of the justices determined that the issue was a nonjusticiable political question, four justices found the opposite, and Justice Anthony Kennedy provided the dispositive fifth vote, determining that, although the case was nonjusticiable, political gerrymandering might become justiciable if "workable standards do emerge to measure" the burdens caused by such gerrymandering. In the years since *Vieth*, political scientists and researchers have attempted to develop a workable standard for measuring the burden of a particular gerrymander, and Justice Kennedy almost certainly will be the swing vote once again in determining whether these claims are justiciable.

The following week, the Supreme Court will consider whether the Alien Tort Statute allows for corporate liability in *Jesner v. Arab Bank*. The Supreme Court previously considered this issue in 2013 in *Kiobel v. Royal Dutch Petroleum Co.*, but in that case did not reach the merits question of corporate liability. Jesner squarely presents the question whether corporate liability may be imposed under the Alien Tort Statute, as Arab Bank argues that this case involves "foreign plaintiffs seeking relief against a foreign defendant for injuries that occurred on foreign soil" with the only connection to the U.S. being wire transfers "initiated by foreign parties located in foreign countries, for the benefit of other foreign parties." The solicitor general argues that the statute does allow for corporate liability, but asks the Supreme Court to remand the case to the 2nd Circuit to consider extraterritoriality and other threshold issues because the claims at issue "have already caused significant diplomatic tensions" and "the adverse foreign-policy considerations would be considerable" if the case proceeds to trial.

These important cases occupy only the first two weeks of the Supreme Court's term. The court also has granted certiorari on the tension between public accommodations laws and the First Amendment in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* — the case involving a Colorado baker that declined to design a wedding cake for a same-sex couple's wedding; the warrant requirement under the Fourth Amendment for police to receive a person's cell-site data, which can reveal a cellphone user's historical location and movements, in *Carpenter v. United States*; the constitutionality under the First Amendment of the compelled payment of agency fees by public-sector employees who are not members of a union that represents them in collective bargaining in *Janus v. American Federation of State, County, and Municipal Employees*, Council 31; and the constitutionality under Article III and the Seventh Amendment of inter partes review proceedings at the Patent and Trademark Office to challenge the validity of patents in *Oil States Energy Services LLC v. Greene's Energy Group, LLC*.

Perhaps the most high-profile case of the term involves President Donald Trump's "travel ban," but the court may not end up ruling in the case. The court granted certiorari in *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii* to address the constitutionality of the travel ban, and had set the case for oral argument on Oct. 10, the second week of the term. But on Sept. 24, the White House announced that new, country-specific measures will go into effect on Oct. 18 to replace the previous travel ban. In a brief notifying the Supreme Court of the president's announcement, the solicitor general suggested that the justices order the parties to file additional briefs addressing the effect of the new measures on the dispute. The Supreme Court promptly took the case off its calendar, and in a one-paragraph order directed the parties to file briefs on whether the executive's action (as well as the expiration of the original travel ban) rendered the case moot. As a result, it remains to be seen if and when the Supreme Court will have the opportunity to rule on the constitutionality of the travel ban.

In short, Justice Ginsburg's prediction of a "momentous" term may prove to be quite an understatement.

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