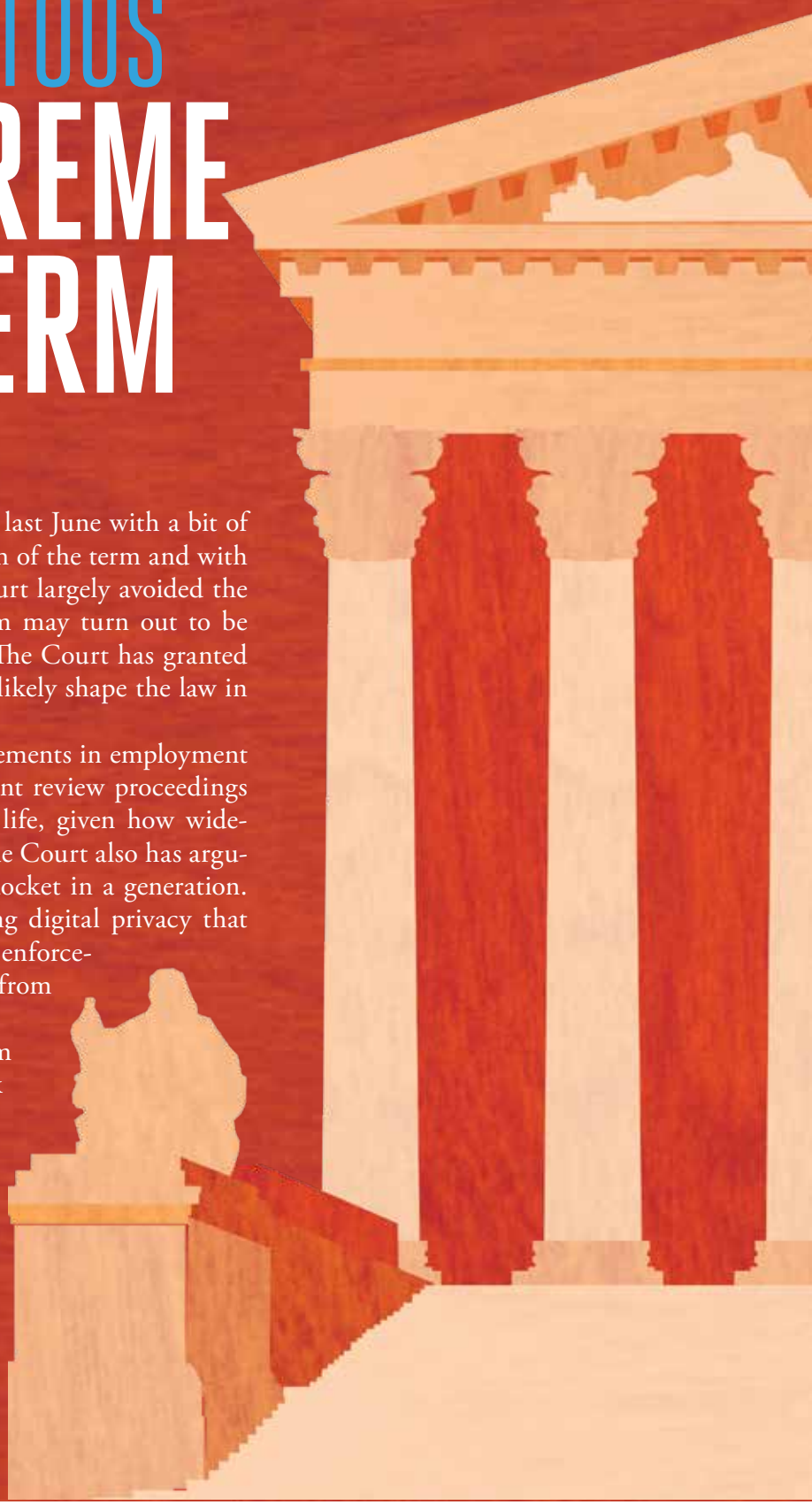
MIDWAY THROUGH THE MOMENTOUS 2017 SUPREME COURT TERM

by BLAINE H. EVANSON

The Supreme Court's 2016 Term ended last June with a bit of a whimper—short one justice for much of the term and with a relatively low-profile docket, the Court largely avoided the headlines. By contrast, the 2017 Term may turn out to be the most momentous in many years. The Court has granted certiorari on a host of issues that will likely shape the law in several important areas.

The Court's cases involving arbitration agreements in employment contracts, political gerrymandering, and patent review proceedings will have a significant impact on American life, given how wide-ranging the effects of these rulings may be. The Court also has arguably the most significant First Amendment docket in a generation. And the Court has taken two cases involving digital privacy that together may substantially affect the way law enforcement is allowed to collect digital information from third parties.

Most of the marquee cases from the term already have been argued. Although the bulk of those decisions likely won't be released until June, there are plenty of tea leaves to read.



I. Arbitration, Gerrymandering, and Patent Validity Tribunals

In the first argument of the 2017 Term, *Ernst & Young LLP v. Morris*,[1] the Court grappled with the balance between the Federal Arbitration Act and the Court's repeated rejection of lower-court hostility to arbitration, and the National Labor Relations Board's interpretation of the National Labor Relations Act as precluding class waivers. The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable," whereas the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NLRA provides that employees have the right to engage in "concerted activities" for "mutual aid or protection." If an employment agreement mandates individual arbitration and forbids class actions, which command controls? And how much deference does the NLRB's interpretation of the NLRA deserve?

The issue could not be more divisive. The lower courts were split on the issue, the Court's previous arbitration decisions often divided the Justices, and the two government lawyers (from the Office of the Solicitor General and the NLRB) took opposite positions in the case.

It became apparent during the employers' argument that the Court's four more liberal justices were against enforcement of the class waivers. Justice Ginsburg, for instance, remarked several times that the "driving force" of the NLRA was to permit employees to band together in concerted activity to obtain redress. It also became apparent that at least Chief Justice Roberts and Justice Alito were siding with the employers. Justices Thomas and Gorsuch were silent, but are presumed to be on the side of the employers as well. That leaves Justice Kennedy.

Most commentators believe that Justice Kennedy will side with the employers, but his questions indicate that he may see some role for the NLRA in arbitration. He asked the NLRB's lawyer whether three employees can "go to the same attorney and say please represent us, and we will share our information with you," such that the three individual arbitrations might be considered "collective action" under the NLRA. That was not enough for the NLRB's lawyer, who argued that the collective action right in the NLRA requires that employees be able not just to hire the same lawyer, but also to bring a joint claim, which the employers' arbitration agreements forbid.

However the Court decides the case, its decision will have a widespread and lasting impact given that (according to the employees) around 25 million employment contracts in the United States contain class arbitration waivers.[2]

One day after the class arbitration argument, the Court heard argument in perhaps the most important case of the term: *Gill v. Whitford*,[3] regarding the constitutionality of Wisconsin's political gerrymandering. The Court last addressed political gerrymandering in 2004, when the Court split 4-4-1. Four conservative justices in *Vieth v. Jubelirer*[4] determined that political gerrymandering was a non-justiciable political question; four liberal justices determined the opposite; and Justice Kennedy wrote alone to explain that, although the Court *could* weigh in on whether a particular gerrymander was too political, the parties in *Vieth* had not given the Court a workable standard for doing so.

The challengers' argument in *Gill* is essentially that social science answered Justice Kennedy's call, and has developed a scientific method for determining whether a particular gerrymander is too political. They pointed to various metrics such as the "efficiency gap," "mean-median difference" calculations, and "sensitivity testing"—none of which is dispositive, but all of which (they say) undermine Wisconsin's gerrymander in this case.

Chief Justice Roberts was deeply concerned with the challengers' position. He stated quite plainly that, if the plaintiffs were to win, the courts would be flooded with partisan-gerrymandering claims, the bulk of which will need to be decided by the Supreme Court (the Supreme Court is generally *required* to review redistricting challenges). The average person on the street, the Chief opined, will think the Court is picking Republicans or Democrats. This "is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country."

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The Court's decision in this case likely will (again) come down to Justice Kennedy, but he did not show his hand during oral argument. Some of his questions indicate that he is concerned with political gerrymandering that is overt and explicit—the situation where "the state has a law or constitutional amendment that's saying all legitimate factors must be used in a way that favor party X or party Y." But Justice Kennedy's questions did not suggest that he is willing to embrace the statistical metrics the challengers have proposed.

Oil States Energy Services v. Greene's Energy Group[5] challenges "inter partes review," which Congress created in the 2011 American Invents Act in order to shift a large portion of patent validity adjudication away from the federal courts and into the Patent and Trademark Office. The Patent Trial and Appeal Board that hears inter partes review proceedings is not an Article III court, and the patent owner is not afforded a jury trial on the validity of its patents—thus raising the constitutional objections voiced by the patentee in this case.

The institution of inter partes review has had a dramatic effect on the United States patent system. According to the challengers, the PTAB has invalidated almost 80 percent of the patents it reviews, which amounted to almost 10,000 patent claims through March of 2016. The challengers in *Oil States* claim that this has destroyed $546 billion of the United States economy.

Most of the Justices active in the oral argument appeared to side with the government. Justice Kagan struggled with what the patent holders were deprived of in the agency proceedings. "[W]hat is [the defect]? Is it discovery? Is it . . . participation in the hearing? I just want to ground this in something." Justice Sotomayor saw this as a dispute between the patent holder and the government—fundamentally a dispute over a public right. And Justice Kennedy emphasized what he saw as an oddity in limiting Congress' authority to define the procedures for evaluating a right that Congress itself created.

The challengers' only real champion was Justice Gorsuch, who suggested that the separation of powers may prohibit any administrative adjudication in which the decision maker is not at least "adjunct" to an Article III court (as magistrate and bankruptcy judges are). But no other justice seemed to share this view, and there is almost certainly a majority for upholding inter partes review.

II. First Amendment

The Court's First Amendment docket includes two cases involving the intersection of free speech and other fundamental rights, as well as a long-awaited First Amendment challenge to public sector union dues.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission[6] involves Colorado man and self-described custom cake artist Jack Phillips. Mr. Phillips is a devout Christian, and also maintains that same-sex marriage conflicts with his beliefs. So when same-sex couple Charlie Craig and David Mullins requested a cake to celebrate their upcoming marriage, Mr. Phillips turned them away.

The couple filed a complaint with the Colorado Civil Rights Commission, which found against Mr. Phillips and imposed a host of penalties, including a requirement that Mr. Phillips provide "comprehensive training" to his employees on Colorado's public accommodation laws. Mr. Phil-

lips challenges the Commission's decision on both free speech and free exercise grounds.

The justices lined up during the argument just as commentators expected. The focus of the questioning from the four liberal justices was on line-drawing, and on whether baking could properly be considered expression worthy of First Amendment protection. "Food is there to be eaten," remarked Justice Sotomayor. What about a make-up artist? A hairstylist? Justice Breyer expressed concern that siding with Mr. Phillips would undermine decades of progress in enacting and upholding civil rights laws. The Chief Justice and Justices Alito and Gorsuch seemed firmly on Mr. Phillips's side, expressing concern over Colorado's treatment of Mr. Phillips, potential religious bias by one of the administrative law judges, and the Commission's "comprehensive training" requirement, which they say is compelled speech.

Justice Kennedy seemed, unsurprisingly, sympathetic to both sides. Justice Kennedy has authored each of the Supreme Court's gay-rights decisions, and has also written some of the Court's most important First Amendment decisions. The *Masterpiece Cakeshop* case presents Justice Kennedy with the opportunity to reconcile those views. He expressed concern that allowing bakers to put up signs in their windows indicating that they do not bake cakes for same-sex couples would be "an affront to the gay community"; at the same time, he noted that "the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs."

The Court has granted certiorari on two other First Amendment cases that have not yet been argued.

National Institute of Family and Life Advocates v. Becerra[7] is a challenge to a California law that requires "crisis pregnancy centers" (pro-life nonprofits) to convey particular messages mandated by the state. The centers argue that the law violates the First Amendment by requiring them to post signs containing a phone number for information about low- or no-cost abortions and to disclose that they are not licensed to provide medical services. The centers argue that both requirements are viewpoint-based, and require the centers to relay a message they disagree with. They argue that the result of these disclosures is that they are compelled to "begin their expressive relationship with an immediate unwanted or negative message that crowds out and confuses their intended message."

Janus v. American Federation of State, County, and Municipal Employees[8] is the third attempt by public employees to challenge mandatory "agency" fees, which are used to cover the costs for unions negotiating contracts that apply to all public employees. A forty-year old case called *Abood v. Detroit Board of Education*[9] upheld such requirements as constitutional under the First Amendment. The Court was asked to overrule *Abood* in the 2013 Term, but decided the case on narrow grounds and avoided the question. The Court had another opportunity during the 2015 Term, and at oral argument it became apparent that the justices were poised to overrule *Abood* and strike down the agency fees. But Justice Scalia passed away a month later, and the remaining eight justices deadlocked. In *Janus*, the Supreme Court has taken up the issue yet again, and the common wisdom is that *Abood* will not survive the summer.

III. Privacy Rights

The Court heard argument on November 29 in *Carpenter v. United States*[10]—an important privacy-rights case regarding the government's ability to obtain cell-site data without a warrant. Together with *United States v. Microsoft*[11] (which will be argued on February 28), the Court confronts once again the intersection between the Fourth Amendment and increasingly pervasive modern technology.

The government convicted Mr. Carpenter of a series of robberies in part by introducing records of his cell-site usage. Cellphones connect with cell towers whenever they send and receive information, such as when a user makes a call, sends a text, or receives an email. The cellphone companies collect data indicating the tower to which a phone connects and the time of the connection. Mr. Carpenter's argument is that the aggregation of this data (in his case over the course of 127 days) paints a picture of a person's every move, and that the government's collection of the data is therefore no different from attaching a GPS to a suspect's car (which the Court in 2012 held requires a warrant). The government's argument is that this is just another application of the third-party doctrine, which allows the government to collect information without a warrant if the defendant has shared the information with third parties.

The justices did not seem persuaded by the government's bright-line rule. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan all expressed concern that developments in technology and the reality of modern cell phone use would make it inappropriate to apply the third-party doctrine to cell-site data. The Chief Justice likened cell-site data to searching a suspect's cell phone (a "search" under the Fourth Amendment) and Justice Kagan likened it to tracking by GPS (also a search). Justice Sotomayor suggested that the Court carve out an exception to the third-party doctrine when the information retrieved is so pervasive and specific that it intrudes on the defendant's privacy.

Justice Alito seemed less inclined to create an exception to the third-party doctrine, in part because (he opined) cell-site data is no less intrusive than bank records. And Justice Kennedy seemed convinced that everyone recognizes that cell phone companies keep this data, which means that cell phone users have essentially consented to this information being collected. But there did not appear to be a majority for affirming the lower court's decision.

BY THE NUMBERS
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From arbitration and gerrymandering to the First Amendment and digital privacy, the 2017 Supreme Court Term will be a blockbuster. You may want to clear your calendars on Mondays in June.

ENDNOTES

(1) No. 16-300, 2017 U.S. LEXIS 4448 (U.S. Sept. 25, 2017).

(2) *See also* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

(3) No. 16-1161, 2017 U.S. LEXIS 4441 (U.S. Sept. 25, 2017).

(4) *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

(5) No. 16-712, 2017 U.S. LEXIS 6895 (U.S. Nov. 21, 2017).

(6) No. 16-111, 2017 U.S. LEXIS 6894 (U.S. Nov. 21, 2017).

(7) No. 16-1140, 2017 U.S. LEXIS 6883 (U.S. Nov. 13, 2017).

(8) No. 16-1466, 2017 U.S. LEXIS 4459 (U.S. Sept. 28, 2017).

(9) *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

(10) No. 16-402, 2017 U.S. LEXIS 6129 (U.S. Oct. 10, 2017).

(11) No. 17-2, 2017 U.S. LEXIS 6343 (U.S. Oct. 16, 2017).

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