THE 2018 SUPREME COURT TERM BELONGED TO THE CHIEF JUSTICE

by BLAINE H. EVANSON, RAQUEL SGHIATTI, and NICHOLAS BARBA

When the 2018 Supreme Court Term opened on October 1, the Court was on the front page of every newspaper. Then-Judge Brett Kavanaugh had just finished a day of questioning by the Senate Judiciary Committee regarding allegations of sexual assault, and the Court had become a political lightning rod. But the courtroom on October 9—Justice Kavanaugh's first day of oral argument after his confirmation—was free of any drama or controversy as Justice Kavanaugh deftly settled in as the junior Justice. And the Court very quickly withdrew from the front page and settled back into what it does best—granting, hearing, and deciding important legal questions.

The Term concluded with a series of closely divided cases; there were twenty 5-4 decisions in the 2018 Term—up from nineteen in the 2017 Term. But the Court exhibited an uncharacteristic diversity in the makeup of the majority in these cases. There were *ten* different five-justice majorities this term—the most ever during the Roberts Court, and almost double the average. All five conservative justices provided swing votes to liberal majorities at least once.

Chief Justice Roberts was in the majority in the most controversial cases—casting the fifth vote with the more conservative justices in the political gerrymandering cases and joining the more liberal justices in the case involving the citizenship question on the 2020 census. In each case, the Chief wrote the opinion narrowly and in a way that punted these important questions away from the Court back to the political branches and the states. In these and many other cases, the Court this past Term decided important questions of civil, criminal, and constitutional law narrowly and in a way that exhibited deference to the political branches and the Court's precedents.

Arbitration and Class Actions

The Roberts Court has consistently granted certiorari in cases involving questions related to arbitration and class actions, and the 2018 Term was no exception.

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the Court considered whether arbitration could be rejected consistent with the Federal Arbitration Act (FAA) when the basis for compelling arbitration is "wholly groundless." The Court rejected such an exception as barred by both the FAA and the Court's precedents. Justice Kavanaugh in his first opinion on the Court explained that "a court may not override the contract . . . [E]ven if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."

In *New Prime Inc. v. Oliveira*,[1] the Court interpreted an exclusion in section 1 of the FAA—that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Drawing on early twentieth century dictionaries, cases, and statutes, Justice Gorsuch's unanimous opinion explained that when the FAA was enacted, the phrase "contracts of employment" would have meant any agreement to "perform work"—whether by employees or independent contractors. (Justice Ginsburg wrote a concurrence that bristled at Justice Gorsuch's textualism.)

The Court's decision in *Lamps Plus, Inc. v. Varela* was sharply divided, with the Chief Justice writing for the five more conservative justices. Lamps Plus successfully compelled arbitration of the named plaintiff's claims, but once in arbitration the plaintiff moved to arbitrate on a *classwide* basis, even though the arbitration agreement did not expressly permit classwide arbitration. The Ninth Circuit permitted the classwide arbitration, but the Supreme Court reversed because the FAA "requires more than ambiguity to ensure that the parties *actually agreed* to arbitration on a classwide basis." "[A]rbitration is strictly a matter of consent," and without some "affirmative contractual basis" to show that "a party agreed" to class arbitration, the Court was unwilling to compel it.

The Court had granted certiorari in *Frank v. Gaos* to decide the lawfulness of an $8.5 million cy pres settlement. These types of settlements have come under intense scrutiny, given that they often provide no relief to absent class members, and are viewed by many as simply lining the pockets of plaintiffs' attorneys. But rather than decide that issue, the Court vacated and remanded the case for a determination on whether the plaintiffs had standing under the Court's 2016 *Spokeo v. Robins* decision.

Intellectual Property Law

The Court's docket included a healthy set of intellectual property cases as well. In *Helsinn Healthcare S.A. v. Teva Pharmaceuticals*, the Court addressed the scope of the Patent Act's "on sale bar" to patenting, which prevents the issuance of a patent if the invention has been "on sale" for over one year prior to the filing. Justice Thomas's unanimous opinion for the Court explained that a product could be "on sale" even if it is not available to the public—for example, when the purchaser is required by contract to keep the invention confidential.

The Court also decided two copyright cases—both unanimously. In *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, the Court held that a copyright infringement claim may not be brought until the Copyright Office actually registers the claimant's copyright, precluding infringement suits during the period in which the Copyright Office is considering whether to register the copyright. And in *Rimini Street, Inc. v. Oracle USA, Inc.*,[2] the Court reversed the Ninth Circuit's decision to award Oracle $12.8 million for a variety of litigation expenses. The Copyright Act permits an award of "full costs," and the Court held that the "costs" permitted are only those identified in the general costs statute. (The Court also granted certiorari to consider during the 2019 Term a related question in *Iancu v. NantKwest*—whether the phrase "all expenses of the proceedings" allows the Patent and Trademark Office to recover attorney's fees.)

The most closely watched intellectual property case of the 2018 Term was *Iancu v. Brunetti*—on whether the Lanham Act's restrictions on registering trademarks deemed to be "immoral" or "scandalous" violated the First Amendment. The Court had ruled in 2017 that the Act's restriction on "immoral" trademarks was unconstitutional, and a six-justice majority in *Brunetti* held the same regarding the "scandalous" restriction in the Act. Writing for the majority, Justice Kagan concluded that the "immoral" and "scandalous" prohibitions were impermissible "viewpoint-based" restrictions because they favored ideas "aligned with conventional moral standards" and disfavored those "provoking offense and condemnation."

Administrative Law and Separation of Powers

The most unique feature of the Court's 2018 Term was the series of important administrative law and separation of powers cases the Court agreed to hear—most significantly *Kisor v. Wilkie* and its challenge to the deference that courts give to administrative agencies interpreting their own regulations.

In *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court had held that judges should defer to an agency's interpretation of its ambiguous regulations unless the agency's interpretation is plainly erroneous or inconsistent with the regulation. Critics of *Auer* have contended that such deference creates an incentive for the agency to draft vague and broad regulations, which the agency can later clarify through interpretive rules without having to undergo notice-and-comment rulemaking. When agencies regulate in this way, the public is denied the opportunity to participate in the notice-and-comment process, which can insulate the agencies from public accountability.

The Supreme Court granted certiorari in *Kisor* to consider whether to overrule *Auer*. The Chief Justice joined the four more liberal justices in upholding *Auer*. But although the Court left *Auer* on the books, it "reinforce[d]" the limits on when such deference can be deployed: "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. . . . But that phrase 'when it applies' is important—because it often doesn't."

Although the Court did not formally overrule *Auer*, Justice Gorsuch suggested in his concurrence that the Court's decision "is more of a stay of execution than a pardon." "[T]he [*Auer*] doctrine emerges maimed and enfeebled—in truth, zombified." Indeed, so

significantly did the majority opinion limit the scope and effect of *Auer* deference that the Chief Justice and Justice Kavanaugh each concurred separately to express their view that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."

Gundy v. United States presented a challenge under the so-called "non-delegation doctrine" to the Sex Offender Registration and Notification Act (SORNA). In SORNA, Congress gave the Attorney General the authority to specify a host of registration requirements for those who were convicted of a sex offense before the law was enacted. The petitioner (convicted for failing to register properly under the Attorney General's requirements) argued that the Act impermissibly delegated to the Executive the authority both to define the crime and punish those who violated it. The Court narrowly upheld the delegation. Justice Kagan wrote for a four-justice plurality, and Justice Alito concurred only in the judgment, explaining that he would consider a future non-delegation challenge (Justice Kavanaugh did not participate).

The final administrative law case before the Court this Term was *Azar v. Allina Health Services*, which involved the limits of an agency's ability to regulate without notice-and-comment rulemaking. The Department of Health and Human Services changed its reimbursement formula through adoption of a policy rather than a formal rulemaking. But the Medicare Act requires public notice and a sixty-day comment period for any policy change that "establishes or changes a substantive legal standard governing . . . the payment for services." And the Supreme Court held that the significant change effected by the agency's new policy was substantive, and therefore could not be promulgated in the absence of notice-and-comment rulemaking.

Constitutional Law

The Court granted certiorari in only a few cases involving fundamental questions of constitutional law.

Box v. Planned Parenthood of Indiana and Kentucky Inc. involved an Indiana law that regulates the disposition of fetal remains and prohibits abortions on the basis of the child's race, sex, diagnosis of Down syndrome, disability, or related characteristics. Planned Parenthood challenged the statute, but the Supreme Court in a per curiam decision upheld the portion of the statute regulating the disposition of fetal remains, holding that those provisions are rationally related to a legitimate state interest.

But the Court denied certiorari on the second question—whether the statute burdened the fundamental right to abortion. As a result, the Court did not rule on the constitutionality of the limits the Indiana law imposed on the availability of abortions, and left the Seventh Circuit's decision striking down the challenged provisions of the law in place.

In *The American Legion v. American Humanist Association*, the Court considered an Establishment Clause challenge to a state-owned-and-maintained forty-foot cross. In a 7-2 decision, Justice Alito explained that pre-existing religious monuments are presumptively constitutional, and that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones." The image of the cross was "a symbol of the[] sacrifice" of the American soldiers killed in World War I, "and the design of the Bladensburg Cross must be understood in light of that background."

The Court also decided two cases that may amount to the final nails in the coffin of challenges to political gerrymandering. The Chief Justice explained at oral argument two terms ago in *Gil v. Whitford* that the Supreme Court wading into these issues could "cause very serious harm to the status and integrity of the decisions of this court in the eyes of the country." And that concern drove the Court's decisions this Term.

The Chief Justice wrote the 5-4 opinions in *Rucho v. Common Cause* and *Lamone v. Benisek*, rejecting partisan-gerrymandering challenges to electoral maps as non-justiciable political questions. The Court dismissed challenges by Democratic voters to the North Carolina congressional map drawn by Republican officials, and by Republican voters to the Maryland map drawn by Democrats. The Court explained that the "central problem" in reviewing gerrymandering challenges is "determining when political gerrymandering has gone too far." And the Court found unsatisfactory the various metrics the challengers had proposed.

The final decision of the Term was *Department of Commerce v. New York*, regarding the question whether the Commerce Department may include a question on the 2020 census questionnaire asking whether the respondent was a citizen of the United States. In every census between 1820 and 1950, all households were asked about citizenship or place of birth. Since 1950, however, only some households have been asked these questions. Last year, the Secretary of Commerce announced that the 2020 census would include a citizenship question in order to gather information to aid with enforcement of the Voting Rights Act. In a challenge by a group of state and local governments, the district court held that the Secretary's decision was not supported by the evidence before him, rested on a pretextual basis, and violated the Census Act. The Secretary appealed directly to the Supreme Court.

The Supreme Court, in yet another 5-4 opinion by the Chief Justice, reversed in part and affirmed in part. Although the Secretary's decision was reasonable and supported by the evidence, the Court affirmed the district court's remand of the case to the agency because the Secretary's stated rationale "seems to have been contrived." The Court reasoned that "the Secretary began taking steps to reinstate a citizenship question about a week into his tenure," yet did not identify a need for census data to enforce the Voting Rights Act until much later.

What began as a controversial Term ended without much fanfare. The Chief Justice was able to steer the Court through a series of highly divisive cases and several calls for overruling past precedent, and he did so in a way that largely kept the Court out of the limelight. But that distance from the public eye may be short-lived as the Court prepares for the 2019 Term, which already includes cases involving the Second Amendment, protections under the Civil Rights Act for LGBTQ+ individuals, and the fate of the so-called "Dreamers"—nearly 800,000 young men and women who were brought to the United States illegally as children, and who were previously protected by President Obama's Deferred Action for Childhood Arrivals (DACA) program.[3] The Court will have to resolve these inherently divisive issues during an election year. The Chief Justice has his work cut out for him.

ENDNOTES

(1) Gibson Dunn represented the petitioner in *New Prime*.

(2) Gibson Dunn represented the petitioner in *Rimini Street*.

(3) Gibson Dunn represents respondents in *United States Department of Homeland Security, et al. v. Regents of the University of California, et al.*

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