2018

From ALJs to Wedding Cakes: Civil Cases in the Supreme Court's October 2017 Term

Todd E. Pettys
University of Iowa College of Law

From ALJs to Wedding Cakes:

Civil Cases in the Supreme Court's October 2017 Term

Todd E. Pettys

On the final day of the Supreme Court's October 2017 Term, Justice Anthony Kennedy announced his retirement, capping what already had been a historic year at 1 First Street Northeast. Justice Kennedy's final year on the Court yielded a large number of broadly significant rulings in civil cases on matters concerning administrative agencies, executive power, religious freedom, voter-registration lists, employer-employee arbitration, public-sector unions, and states' power to require out-of-state sellers to collect sales taxes, to name only a few. There is much to discuss, so off we go.

ADMINISTRATIVE LAW

In a case that had been closely followed in administrative-law circles, the Court held in *Lucia v. SEC*[1] that the Securities and Exchange Commission's administrative-law judges are "Officers of the United States" who must be appointed through one of the means authorized by the Constitution's Appointments Clause. The SEC's practice had been to allow its staff members to select the agency's ALJs. When one of those ALJs—Judge Cameron Elliot—presided over the agency's administrative proceeding against Raymond Lucia and issued stiff sanctions against him, Lucia objected that the proceeding was invalid because Judge Elliot had been appointed in an unconstitutional manner. The SEC and the D.C. Circuit rejected that argument, but the Supreme Court reversed and ordered that Lucia be given a new hearing before a properly appointed ALJ.[2]

The Appointments Clause limits the means by which "Officers of the United States" may be appointed. As a general rule, all officers must be nominated by the President and confirmed by the Senate, but Congress can elect to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[3] Are the SEC's ALJs "Officers" within the meaning of that clause, or are they mere employees about whose hiring the Appointments Clause says nothing? The weightiest factor favoring the latter conclusion was the fact that all of the ALJs' rulings may be reviewed by the Commissioners—either at the request of a party or upon the initiative of the Commissioners themselves—and thus there is a significant degree to which the Commissioners supervise the ALJs' work. But only Justices Ginsburg and Sotomayor were persuaded by that argument.[4] Led by Justice Kagan and relying heavily upon its 1991 ruling in *Freytag v. Commissioner*[5]—a case concerning the status of the United States Tax Court's "special trial judges"—the Court concluded that the SEC's ALJs are officers. Their positions are "'continuing'" rather than "'temporary'" in nature,[6] Justice Kagan explained, and they wield "'significant authority,'"[7] including (among other things) the power to administer oaths, make evidentiary rulings, manage the conduct of parties and their attorneys, and impose sanctions for disobeying discovery orders. Just as importantly, they issue decisions that—unless the Commissioners intervene—become the agency's final word on the parties' claims and defenses. Because they are thus officers (of the "inferior" variety), the Court concluded, they may be appointed by the Commissioners themselves (as the collective head of the department) but cannot be appointed by the SEC's staff.[8]

The Court's ruling raises an important question concerning the reach of its 2010 holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[9] In that case, the Court held that—lest the President's ability to faithfully execute federal law be thwarted—Congress cannot give officers job security in the form of two or more layers of good-cause protection from direct or indirect presidential removal. In *Free Enterprise Fund* itself, the SEC's Commissioners were (and today remain) officers who statutorily are subject to removal by the President only for cause, and so the members of the SEC's Public Company Accounting Oversight Board—officers who work under the Commissioners' supervision—could not also be given good-cause protection from removal. So where does that leave the SEC's ALJs, who now enjoy "Officer" status? Current federal law says they can be removed by the Merit Systems Protection Board but only for good cause, and the members of the MSPB themselves may be removed (by the President) only for good cause. Putting together *Lucia* and *Free Enterprise Fund*, are the job-security protections currently enjoyed by the SEC's ALJs unconstitutional? Justice Breyer flagged that issue in a separate opinion—just as he flagged it when dissenting in *Free*

Footnotes

1. 138 S. Ct. 2044 (2018).
2. The Court also held that the ALJ who presides over Lucia's case on remand cannot be Judge Elliot, even if he has now been properly appointed. Justices Breyer, Ginsburg, and Sotomayor disagreed.
3. U.S. CONST. art. II, § 2, cl. 2.
4. Justice Breyer would have held that allowing the SEC's staff to appoint the agency's ALJs violated the Administrative Procedure Act.
5. 501 U.S. 868 (1991).
6. *Lucia*, 138 S. Ct. at 2051 (quoting United States v. Germaine, 99 U.S. 508, 511-12 (1879)).
7. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).
8. Joined by Justice Gorsuch, Justice Thomas would have vastly broadened the group of federal workers who are officers and thus must be appointed by one of the means specified in the Appointments Clause. Drawing from his perception of the Founders' likely understanding of the term "Officers," he argued that the term includes "all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty," including the likes of "recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)." *Id.* at 2057 (Thomas, J., concurring).
9. 561 U.S. 477 (2010).

Enterprise Fund—but Justice Kagan's majority declined the Government's invitation to address it.

In a pair of cases addressing the U.S. Patent and Trademark Office's congressionally authorized "inter partes review" program, the justices sparred over important issues of administrative law. Implemented in 2012, the PTO's program allows private parties to file a petition asking the PTO to reexamine a previously issued patent. If the PTO's director concludes that a patent challenger is likely to prevail on one or more of its claims, the director is authorized to launch inter partes review. Through that process, the patent challenger and patent holder litigate the merits of the challenged patent, and the PTO's Patent Trial and Appeal Board issues a final decision, canceling, confirming, or amending the challenged patent as it sees fit, subject to the Federal Circuit's appellate review.

In *Oil States Energy Services, LLC v. Greene's Energy Group*,[10] the Court ruled 7-2 that the legislation authorizing the Patent Trial and Appeal Board to revoke patents does not violate Article III's vesting of the judicial power in courts staffed by politically insulated judges. Particularly noteworthy is the conflict between two of the Court's most conservative members—Justice Thomas, who wrote for the majority, and Justice Gorsuch (joined by Chief Justice Roberts), who dissented. Justice Thomas emphasized that the Court's "precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts,"[11] and "[i]nter partes review falls squarely within the public-rights doctrine."[12] Justice Thomas reinforced the majority's conclusion with the claim that, at the time of the founding, the English law of patents authorized the Executive—acting through the Privy Council—to revoke patents. For Justice Gorsuch in dissent, the details of the public-rights doctrine were irrelevant. The Constitution authorizes only Article III courts to adjudicate matters that England's common-law courts would have handled in 1789, he argued, and—on his view of the historical record—"only courts could hear patent challenges in England at the time of the founding."[13]

Leading a 5-4 Court that divided along familiar lines, Justice Gorsuch wrote for the majority in *SAS Institute Inc. v. Iancu*.[14] The issue in that case was whether, when launching the inter partes review process, the PTO's director is statutorily authorized to narrow the proceedings to focus on some (rather than all) of the patent challengers' claims. The PTO had concluded that the director did possess this authority, but the Court held that Congress had unambiguously directed to the contrary. For Justice Breyer and the three other dissenters, the statutory language was ambiguous and the PTO's interpretation of the statute was reasonable, so deference to the agency's interpretation was appropriate under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[15]

"Justice Kennedy wrote that the Court should reexamine *Chevron* 'in an appropriate case[.]'"

Justice Gorsuch's reply on behalf of the majority will give little comfort to proponents of *Chevron* deference and its role in today's administrative state: "[W]hether *Chevron* should remain is a question we may leave for another day."[16] In fact, skepticism about *Chevron* emerged as a theme as the Term proceeded. In his opinion for a 5-4 majority in *Epic Systems Corp. v. Lewis*[17] (discussed below under the "Arbitration" heading), Justice Gorsuch similarly noted that "[n]o party to these cases has asked us to reconsider *Chevron* deference."[18] In a concurring opinion filed in a subsequent case concerning the removal of nonpermanent residents, Justice Kennedy even more explicitly urged litigants—and ultimately the Court—to give *Chevron* a second look. He said that he was "troubl[ed]" by lower courts' frequent "reflexive deference" to agencies' statutory interpretations, and that "more troubling still" is courts' deference to agencies on statutory questions concerning the agencies' own authority.[19] Justice Kennedy wrote that the Court should reexamine *Chevron* "in an appropriate case," to ensure that the prevailing rules of statutory interpretation "accord with constitutional separation-of-powers principles and the function and province of the Judiciary."[20]

ALIEN TORT STATUTE

Adopted as part of the Judiciary Act of 1789, the Alien Tort Statute declares, in full: "The district courts shall have original jurisdiction of 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."[21] In *Jesner v. Arab Bank, PLC*,[22] roughly 6,000 foreign nationals sought to rely upon the ATS when suing Arab Bank in a federal district court. They alleged that, with the aid of its New York branch, the bank had helped finance terrorist attacks on the plaintiffs and their families in the Middle East. In a 5-4 ruling, the Court held that—until Congress says otherwise—"foreign corporations may not be defendants in suits brought under the ATS."[23] A ruling to the contrary, Justice Kennedy wrote for the majority, would raise complex foreign-policy issues and would not further the original purpose of the ATS, which was to provide "foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable."[24] In a lengthy dissent joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor argued that "[n]othing about the corporate form in

10. 138 S. Ct. 1365 (2018).
11. *Id.* at 1373.
12. *Id.*
13. *Id.* at 1381 (Gorsuch, J., dissenting).
14. 138 S. Ct. 1348 (2018).
15. 467 U.S. 837 (1984).
16. *SAS Institute*, 138 S. Ct. at 1358.
17. 138 S. Ct. 1612 (2018).
18. *Id.* at 1629.
19. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).
20. *Id.* at 2121 (Kennedy, J., concurring).
21. 28 U.S.C. § 1350.
22. 138 S. Ct. 1386 (2018).
23. *Id.* at 1407.
24. *Id.* at 1406.

"Justice Thomas expressed qualms about the Court's severability precedents[.]"

itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged."[25]

ANTI-COMMANDEERING DOCTRINE

In *Murphy v. NCAA*,[26] the Court held 7-2 that Congress's Professional and Amateur Sports Protection Act ran afoul of the anti-commandeering doctrine. In that legislation, Congress had taken steps to curb gambling on amateur and professional sports. Rather than make sports gambling a federal crime, however, Congress declared that *states* could not "authorize" gambling on "competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."[27] The financial and political burden of ensuring that sports gambling did not occur, in other words, would rest primarily on state governments.

Relying heavily upon its rulings in 1992's *New York v. United States*[28] and 1997's *Printz v. United States*,[29] the Court held that "[a] more direct affront to state sovereignty is not easy to imagine."[30] The statute, Justice Alito wrote for the majority, "unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."[31] If Congress wishes to ban gambling on sports, the Court concluded, it must do so directly. Finding the commandeering provision not severable from the rest of the legislation, the Court struck down the entire Act.

In a concurring opinion, Justice Thomas expressed qualms about the Court's severability precedents insofar as they require judges to speculate about what legislators would have preferred in counterfactual scenarios. By virtue of her having filed a dissent, we know that Justice Ginsburg—joined by Justice Sotomayor—did not embrace the Court's reasoning on the anti-commandeering issue. Rather than say anything on that subject, however, she focused all of her attention on attacking the majority's conclusion that the entire Act had to fall. On this issue of severability, Justice Breyer aligned himself with the dissent.

ARBITRATION

In *Epic Systems Corp. v. Lewis*,[32] the Court handed down a major 5-4 ruling concerning arbitration and employer-employee agreements. The case concerned contracts in which employees had agreed to use individualized arbitration—rather than class or collective actions—to resolve any disagreements that arose between them and their employers. When employees filed class and collective actions alleging they were owed overtime pay, the employers sought to compel individualized arbitration pursuant to the prior agreements. The employees argued that those agreements were unenforceable. Pointing out that the Federal Arbitration Act's saving clause allows courts to declare arbitration agreements void "upon such grounds as exist at law or in equity for the revocation of any contract,"[33] the employees insisted their contracts' arbitration provisions violated their right under the National Labor Relations Act "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[34]

The Court rejected the employees' argument. Writing for the five-member majority, Justice Gorsuch first emphasized that the FAA's saving clause explicitly refers only to grounds that can render "any" contract unenforceable. That is a reference, he explained, to such things as fraud and unconscionability, rather than to legal grounds that apply only to particular kinds of agreements. Turning to the employees' argument that the NLRA's protection of "other concerted activities" supersedes the FAA in any event, the Court disagreed. Group litigation akin to today's class and collective actions was rare when Congress enacted the NLRA in 1935, Justice Gorsuch said, and the text of the statute provides no clear evidence that Congress had such litigation devices in mind.

Justice Ginsburg emphatically dissented, arguing that the majority had disregarded Congress's effort to protect employees' ability to find "strength in numbers."[35] "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert," she wrote, "is urgently in order."[36]

CONTRACTS CLAUSE AND DIVORCE

Like twenty-five other states, Minnesota has enacted legislation declaring that—unless a court says otherwise in a divorce decree—a divorce automatically revokes a person's designation of his or her former spouse as the beneficiary of a life insurance policy. The legislation permits the insured individual to retain the former spouse as the beneficiary, however, by sending the insurance company a notification to that effect. Suppose the insured fails to send any such notice. Does the state's default rule violate the Contracts Clause[37] if the insured's contract was formed prior to the legislation's enactment?

In *Sveen v. Melin*[38]—a case pitting a former wife against two children who had been named as a policy's contingent beneficiaries—the Court held 8-1 that Minnesota's law is constitu-

25. *Id.* at 1419 (Sotomayor, J., dissenting).
26. 138 S. Ct. 1461 (2018).
27. 28 U.S.C. § 3702(1).
28. 505 U.S. 144 (1992).
29. 521 U.S. 898 (1997).
30. *Murphy*, 138 S. Ct. at 1478.
31. *Id.*
32. 138 S. Ct. 1612 (2018).
33. 9 U.S.C. § 2.
34. 29 U.S.C. § 157 (emphasis added).
35. *Epic Systems*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).
36. *Id.* (Ginsburg, J., dissenting).
37. *See* U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").
38. 138 S. Ct. 1815 (2018).

tionally permissible. Writing for the majority, Justice Kagan found that "Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements."[39] She explained:

> First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment.[40]

Justice Gorsuch dissented, questioning whether the Court's analytic framework for Contracts Clause cases is consistent "with the Constitution's original public meaning,"[41] and arguing that changing a life insurance policy's beneficiary designation amounts to a substantial and unreasonable impairment of a contract. Minnesota's law, he concluded, "cannot survive an encounter with even the breeziest of Contracts Clause tests."[42]

ELECTIONS[43]

Throughout much of the Term, there was widespread anticipation that the justices would shed significant new light on whether the Constitution gives the judiciary a prominent role in policing partisan gerrymandering. It was not to be. Much (though not all[44]) of the attention was focused on *Gill v. Whitford*,[45] a case concerning Wisconsin Republicans' adoption of district lines that, in 2012, enabled them to win 60 of the State Assembly's 99 seats with just 48.6 percent of the statewide vote and that, in 2014, enabled them to win 63 of the State Assembly's 99 seats with 52 percent of the statewide vote. A dozen Democratic voters in the state challenged the map, arguing that, by making it harder for Democrats than Republicans to convert votes into victories, the legislature had violated the plaintiffs' rights of association and equal protection. The three-member district court ruled in favor of the plaintiffs and enjoined the state from using the map in future elections, but the verdict did not hold. The justices unanimously concluded that the plaintiffs had failed to demonstrate the individualized harm necessary to establish standing under Article III.

Writing for the Court, Chief Justice Roberts explained that, although the plaintiffs had included a First Amendment association claim in their complaint, they proceeded to litigate their case almost entirely upon a theory of vote dilution. Specifically, the plaintiffs focused on proving that, on a statewide basis, Democrats had suffered a loss in voting power because they had been both "packed" and "cracked" into legislative districts. That is, the plaintiffs sought to prove that Wisconsin Democrats had (in some instances) been crammed into districts where their numbers were far greater than necessary to elect a Democratic candidate and had (in other instances) been scattered among districts in which their low numbers would make it exceedingly difficult to elect a candidate of their choosing. In advancing those claims at trial, the plaintiffs emphasized what they believed Republican legislators had done to Democratic voters on a statewide basis; the plaintiffs never sought to prove that *they themselves* had been packed or cracked in their own individual districts and that redrawing the boundaries of *all* of the state's legislative districts was necessary to remedy those individual harms. Rather than dismiss the case outright for lack of jurisdiction, however, the Court remanded with instructions to allow the plaintiffs to try to produce the evidence necessary to establish standing.[46]

"Justice Kagan . . . train[ed] a flashlight on the legal path that lies ahead."

Joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan filed a concurring opinion aimed at training a flashlight on the legal path that lies ahead. She suggested that it should not be difficult on remand for the plaintiffs to produce sufficient evidence of individualized harm, she appeared to encourage the plaintiffs to develop their First Amendment association claim, and she argued that today's technology-empowered partisan gerrymandering produces democracy-degrading harms that only courts can effectively remedy. In his opinion for the Court, Chief Justice Roberts explicitly declined to take a position on whether partisan-gerrymandering claims are justiciable.

The Court divided 5-4 along familiar lines in two of the Term's election-law cases. The first—*Husted v. A. Philip Randolph Institute*[47]—concerned one of the ways in which Ohio (together with a handful of other states) purports to maintain an accurate list of individuals who are eligible to vote because they continue to reside in the voting districts for which they are registered.[48] Under the program in question, Ohio first identifies registered voters who, over a two-year period, failed to vote or engage in any other voter activity (such as signing a petition). The state then sends each of those individuals a notice alerting them that their voter registration will be canceled unless they either (1) return a preaddressed, postage-prepaid

39. *Id.* at 1822.
40. *Id.*
41. *Id.* at 1827 (Gorsuch, J., dissenting).
42. *Id.* at 1831 (Gorsuch, J., dissenting).
43. I discuss *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018)—a case concerning political apparel at polling places—under the "Speech" heading, below.
44. The Court also handed down a ruling in *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), a case concerning Maryland's use of a districting map that allegedly was drawn to retaliate against Republican voters in the state's Sixth Congressional District. In a per curiam ruling, the justices unanimously concluded that the balance of equities and the public interest weighed in support of the district court's refusal to issue a preliminary injunction barring Maryland from using that map in the 2018 congressional elections.
45. 138 S. Ct. 1916 (2018).
46. Joined by Justice Gorsuch, Justice Thomas refused to join this part of the Court's opinion. In these two justices' view, the Court should have dismissed the plaintiffs' claims altogether.
47. 138 S. Ct. 1833 (2018).
48. The litigated program is not Ohio's sole means of purporting to keep its list of eligible voters up to date. The state also relies upon change-of-address data supplied by the U.S. Postal Service.

"[A] majority of the Court concluded that Ohio's program is permissible."

card confirming that they continue to reside in the district where they are registered or (2) vote in at least one election during the following four years. The battle in *Husted* was about whether this program violates federal statutory law.

At the heart of the dispute were two provisions of the National Voter Registration Act of 1993. The first—referred to by the Court as "subsection (d)"—says that a state cannot remove a person from its voting rolls unless one of two things has happened: (1) the person confirms in writing that he or she has moved out of the district where he or she is registered to vote or (2) the person (a) fails to return a preaddressed, postage-prepaid card in response to a mailed notice that the voter's registration will be canceled if he or she does not vote during the period covered by the following two federal general elections and then (b) does indeed fail to cast a ballot during that four-year period. As described thus far, Ohio's program appears unassailably compliant with the NVRA's requirements. But the NVRA contains a second provision—the "Failure-to-Vote Clause"—that complicates matters. It declares that, while a state may rely upon the list-pruning procedures specified in subsection (d), a state cannot remove a person from its voting rolls "by reason of the person's failure to vote."[49] Does Ohio violate this provision when it uses a person's failure to vote as the sole basis for triggering the notification process and four-year clock authorized by subsection (d)?

Led by Justice Alito, a majority of the Court concluded that Ohio's program is permissible. Justice Alito reasoned that the Failure-to-Vote Clause prohibits a state from relying *solely* upon a person's nonvoting as a basis for removing him or her from the state's list of authorized voters. For that interpretation, Justice Alito relied heavily upon the Help America Vote Act of 2002, in which Congress clarified that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote."[50] Ohio had not relied "*solely*" upon individuals' failure to vote, the Court found—it had also relied upon individuals' failure to respond to mailings alerting them that their voter registrations were in peril. The majority concluded that Ohio had thus met Congress's standards.

Joined in dissent by Justices Ginsburg, Sotomayor,[51] and Kagan, Justice Breyer argued that Congress had barred states from using a person's failure to vote as the sole basis for launching a process that may culminate in his or her removal from the voting rolls. He further contended that Ohio's program was unreasonable—and thus violated another provision of the NVRA[52]—because the number of registered voters who fail to respond to their written notifications vastly exceeds the number of voters whom statistics indicate likely did, in fact, move to a different state or voting district.

Justice Alito wrote for an identically composed five-member majority in *Abbott v. Perez*,[53] a case concerning congressional and state districting maps that Texas's Republican-led legislature adopted in 2013. The next few sentences will give readers a taste of the complexity that awaits them in the full opinion. The Texas legislature adopted the contested maps in 2013, amidst litigation concerning maps that it had previously adopted in 2011. With only a few modifications, the 2013 maps—which the state deployed for the 2014 and 2016 elections—were the same maps that a three-member federal district court produced on an interim basis for the 2012 elections during the litigation over the 2011 maps. In the 2017 ruling that precipitated the Supreme Court's decision in *Abbott*, the district court held that the reason the legislature in 2013 adopted the district court's 2012 maps was because it believed those maps would discriminate against racial-minority voters in some of the same ways that, in the court's judgment, the legislature had illegally intended back when it drew the 2011 maps. Wholly apart from that finding of unlawful discriminatory intent, the district court further held that three districts diluted the strength of Latino voters in violation of Section 2 of the Voting Rights Act and that a fourth district—House District 90—was an impermissible racial gerrymander.

The Supreme Court agreed that House District 90 had been illegally drawn along racial lines, but reversed the district court in all other respects. A preliminary issue on which the nine justices narrowly divided was whether the Court had jurisdiction in the first place. Under 28 U.S.C. § 1253, the Court has mandatory appellate jurisdiction to review any issuance or denial of an injunction by a three-member federal district court. The complicating factor here arose from the fact that the district court never explicitly granted injunctive relief. What *did* happen is that the court announced that the state's 2013 maps were illegal and needed to be fixed; it gave the state three days to tell the court whether the Texas legislature would take steps to remedy the problems; Texas's governor declared that the state would not be taking any action; and the district court scheduled hearings to discuss what should happen next. Rather than participate in the remedy-focused hearings that the district court had scheduled, Texas appealed to the Supreme Court. Did Section 1253 give the Court jurisdiction to hear the case?

A majority of the Court concluded that it did. The district court's orders had the "'practical effect'" of an injunction,[54] Jus-

49. 52 U.S.C. § 20507(b)(2).
50. 52 U.S.C. § 21083(a)(4)(A).
51. In a separate dissenting opinion, Justice Sotomayor accused the majority of "ignor[ing] the history of voter suppression against which the NVRA was enacted and uphold[ing] a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." *Husted*, 138 S. Ct. at 1865 (Sotomayor, J., dissenting).
52. *See* 52 U.S.C. § 20507(a)(4) (directing each state to "conduct a general program that makes a *reasonable* effort to remove the names of ineligible voters from the official lists of eligible voters") (emphasis added).
53. 138 S. Ct. 2305 (2018).
54. *Id.* at 2319 (quoting Carson v. American Brands, Inc., 450 U.S. 79, 83 (1981)).

tice Alito wrote, and this is all that Section 1253 requires. For Justice Sotomayor and her colleagues in dissent, the majority's handling of the jurisdictional question was far too permissive and signaled the majority's willingness to "go[] out of its way" to uphold racially discriminatory maps.[55]

On the merits, the majority held that the district court impermissibly shifted the burden of proof to the state, requiring it to demonstrate that, when it adopted the state's current maps in 2013, it had abandoned the racially discriminatory objectives that, in the district court's judgment, animated the legislature's prior adoption of the 2011 maps. The dissent insisted that the district court had kept the burden of proof on the maps' challengers, and argued that the majority had failed to give proper deference to the district court's factual findings concerning the 2013 legislature's motivations. The justices disagreed just as sharply on whether the district court had properly found that three of the districts violated Section 2 of the Voting Rights Act by diluting Latino voters' strength. The justices found agreement only with respect to House District 90, one of the rare districts that the legislature in 2013 had not simply copied from the district court's own 2012 work. Texas conceded that race was the predominant factor for drawing House District 90's boundaries, but argued that Section 2 necessitated the state's race-conscious actions. None of the justices was persuaded by that argument.[56]

EXECUTIVE POWER

After promising on the campaign trail to curb the influx of Muslims into the United States, and after litigating an initial executive order that some concluded was aimed at fulfilling that promise, President Trump issued the presidential proclamation at issue in *Trump v. Hawaii*.[57] The president issued that proclamation after several federal agencies worked together at his request to identify countries that—by virtue of their documentation systems, links to terrorist groups, and other factors—fail to provide adequate assurance that their nationals traveling to the United States would not pose a security threat upon their arrival. The president's proclamation imposes substantial travel restrictions on foreign nationals from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. The order provides various waivers and exemptions, and also provides for a reassessment of those countries' status every 180 days. Together with U.S. citizens and lawful permanent residents who have family members in the targeted nations, the State of Hawaii challenged the proclamation, arguing that it exceeds the president's powers under the Immigration and Nationality Act and violates the First Amendment's Establishment Clause. Ruling in favor of the plaintiffs, the district court issued a nationwide injunction barring the president from implementing the proclamation, and the Ninth Circuit affirmed.

"The majority acknowledged the President's anti-Muslim statements[.]"

Splitting 5-4 along familiar lines, the Court reversed.[58] Writing for the majority, Chief Justice Roberts concluded that, so far as statutory authority is concerned, the president's proclamation falls squarely within the power that Congress conferred in 8 U.S.C. § 1182(f). That statute declares that,

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation . . . suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate.

Chief Justice Roberts wrote that this statutory provision "exudes deference to the President in every clause" and that the proclamation "falls well within this comprehensive delegation."[59]

With respect to the Establishment Clause, the majority acknowledged the President's anti-Muslim statements and hinted that those statements were not consistent with the nation's historic commitment to religious freedom.[60] When it comes to evaluating a president's decisions about whom to exclude from the country for national-security reasons, however, the majority said that the judiciary should apply nothing more searching than rational-basis review. The Court then upheld the president's proclamation, finding that it can reasonably be understood as a measure aimed at preventing the entry of foreign nationals who cannot be adequately vetted for security risks. The majority placed particular weight on the proclamation's content, the multi-agency review on which the president purported to rely, the fact that the proclamation leaves much of the world's Muslim population free to travel to the United States, and the fact that the president has targeted countries that Congress and prior administrations have deemed problematic.

55. *Id.* at 2335 (Sotomayor, J., dissenting).
56. Joined by Justice Gorsuch, Justice Thomas filed a one-paragraph concurring opinion, arguing that Section 2 of the Voting Rights Act does not even apply to redistricting, and that compliance with Section 2 thus "cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90." *Id.* at 2335 (Thomas, J., concurring).
57. 138 S. Ct. 2392 (2018).
58. The majority declined to say whether it approved of the nationwide scope of the injunction that the district court had issued. In a concurring opinion, Justice Thomas questioned district courts' power to issue nationwide injunctions, observed that district courts are issuing such injunctions with increasing frequency, and urged the Court to consider the issue in a future case.
59. *Trump*, 138 S. Ct. at 2408.
60. In a concurring opinion, Justice Kennedy made the point more unambiguously. Even when government officials act beyond the reach of judicial scrutiny or intervention, Justice Kennedy wrote, they should honor their oath to uphold the Constitution by honoring "its meaning and its promise." To send the appropriate message to "[a]n anxious world," he wrote, "[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs." *Id.* at 2424 (Kennedy, J., concurring).

"Justice Thomas . . . argue[ed] that Phillips's . . . wedding cakes amounted to protected expression."

Justice Breyer dissented, joined by Justice Kagan, arguing that there is evidence indicating that, although the proclamation might be valid on its face, it is not being applied as written. They invited the district court to explore that possibility on remand. If pressed to rule on the proclamation without any further litigation, however, these justices said that the evidence of anti-Muslim bias is sufficient to render the proclamation unconstitutional. Joined by Justice Ginsburg, Justice Sotomayor argued the Establishment Clause point at greater length, insisting that—based on a long list of statements made by President Trump both before and after taking office—"a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus."[61] Justice Sotomayor also appeared to worry that the Court itself was manifesting anti-Muslim bias by looking closely at government actors' past statements to root out anti-Christian bias in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[62] (discussed under the "Religion" heading, below) but by refusing to make any significant evidentiary use of President Trump's anti-Muslim statements. Justice Sotomayor also warned that the majority's ruling bore "stark parallels" to *Korematsu v. United States*,[63] in which the Court infamously upheld President Franklin D. Roosevelt's order authorizing the military to place thousands of Japanese-Americans in internment camps during World War II.[64] On behalf of the majority, Chief Justice Roberts replied that "it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission."[65]

FAIR LABOR STANDARDS ACT

Suppose you take your car to a dealership for servicing. A service advisor greets you, listens while you describe the automotive problems you've been experiencing, recommends a particular course of action, and telephones you if the mechanic spots any unforeseen problems while doing the work. Is your service advisor "primarily engaged in . . . servicing automobiles" within the meaning of the Fair Labor Standards Act, and thus exempt from that statute's overtime-pay requirement? The Court answered that question in the affirmative in *Encino Motorcars, LLC v. Navarro*.[66] Writing for the 5-4 majority, Justice Thomas reasoned that "[s]ervice advisors are integral to the servicing process,"[67] there is no good reason to continue the practice of construing the FLSA's exemptions narrowly, and the legislative history's silence on the question of service advisors' status is insignificant. Writing for the dissent, Justice Ginsburg argued that, because service advisors do not themselves typically perform repairs, they fall outside the exemption and thus are entitled to overtime pay under the statute. By refusing to construe the servicing exemption narrowly, Justice Ginsburg charged, the majority disregarded "more than half a century of our precedent," "without even acknowledging that it [was doing so]."[68]

RELIGION[69]

In one of the Term's most widely discussed cases, the justices ruled 7-2 in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[70] that Colorado officials had violated the First Amendment free-exercise rights of a Christian baker who refused to produce a custom-made wedding cake for a same-sex couple. The Colorado Civil Rights Commission determined that the baker, Jack Phillips, had violated the Colorado Anti-Discrimination Act, which forbids discrimination on grounds of sexual orientation (among other traits) in places of public accommodation.

Writing for the majority, Justice Kennedy observed that, as a general matter, "religious and philosophical objections . . . do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable law."[71] Were the rule otherwise, Justice Kennedy explained, "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[72]

But in this particular instance, Justice Kennedy wrote, Colorado officials manifested "a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips's] objection."[73] During public hearings on Phillips's case, for example, a member of the Colorado Civil Rights Commission had indicated that Phillips's religious objections amounted to "'one of the most despicable pieces of rhetoric.'"[74] Moreover, in at least three instances, the commission had ruled that bakers could refuse to make cakes conveying messages of disapproval of same-sex marriage, and the manner in which the commission handled those cases differed in noteworthy ways from the manner in which it handled Phillips's case. Putting all of those evidentiary pieces together, the Court concluded that the commission had violated "the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[75]

61. *Id.* at 2433 (Sotomayor, J., dissenting).
62. 138 S. Ct. 1719 (2018).
63. 323 U.S. 214 (1944).
64. *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).
65. 65 *Id.* at 2423.
66. 138 S. Ct. 1134 (2018).
67. *Id.* at 1140.
68. *Id.* at 1148 n.7 (Ginsburg, J., dissenting).
69. I discuss *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)—a case partially concerning an Establishment Clause challenge to the President's so-called "travel ban"—under the "Executive Power" heading, above.
70. 138 S. Ct. 1719 (2018).
71. *Id.* at 1727.
72. *Id.*
73. *Id.* at 1729.
74. *Id.*
75. *Id.* at 1732.

Joined by Justice Gorsuch, Justice Thomas wrote a separate opinion concurring in part and concurring in the judgment, arguing that Phillips's custom-made wedding cakes amounted to protected expression and that Colorado could restrict that expression only if its reasons for doing so were sufficient to satisfy strict scrutiny. (The majority declined to reach Phillips's free-speech claim.) Joined by Justice Sotomayor, Justice Ginsburg dissented, finding insufficient evidence of hostility toward Phillips's religion. Justice Ginsburg's dissent prompted Justice Gorsuch (joined by Justice Alito) to respond with a concurrence aimed at underscoring the evidence of impermissible hostility.

SEPARATION OF POWERS

Two years ago, the Justices all agreed that Congress could not enact a statute declaring that, in the pending hypothetical case of *Smith v. Jones*, "Smith wins."[76] In 2018's *Patchak v. Zinke*,[77] however, the justices sharply divided on whether that is what Congress had done in a lawsuit involving the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Band") in southwestern Michigan. In 2009, the Secretary of the Interior took a 147-acre tract of land known as the Bradley Property into trust for the benefit of the Band so that the Band could build a casino there. At the same time those events were occurring, a nearby landowner—David Patchak—was pursuing federal litigation challenging the legality of the Secretary's actions. In 2012, the Supreme Court rejected the Secretary's defense of sovereign immunity and held that Patchak's lawsuit could proceed.[78] Congress then enacted a statute ratifying the Secretary's actions and declaring that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed."[79] Was that an unconstitutional declaration of "Smith wins"?

No, concluded a plurality formed by Justices Thomas, Breyer, Alito, and Kagan. Writing for that group, Justice Thomas explained that the key question was whether Congress had purported to compel a result in a particular lawsuit under old law (impermissible) or whether Congress had changed the law and thereby influenced the outcome in a pending lawsuit (permissible). The plurality determined that Congress had done the latter:

> [The statute] changes the law. Specifically, it strips federal courts of jurisdiction over actions "relating to" the Bradley Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. See 28 U.S.C. § 1331. Now they do not. This kind of legal change is well within Congress's authority and does not violate Article III.[80]

"[Justice Kagan] accused [the majority] of 'weaponizing the First Amendment[.]'"

Joined by Justices Kennedy and Gorsuch in dissent, Chief Justice Roberts wasn't buying it. Never before, he argued, had Congress "gone so far as to target a single party for adverse treatment and direct the precise disposition of his pending case."[81] The Chief Justice wrote:

> Does the plurality really believe that there is a material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith v. Jones*, Smith wins"? In both instances, Congress has resolved the specific case in Smith's favor.[82]

Joined by Justice Sotomayor, Justice Ginsburg opted to avoid the "Smith wins" issue altogether. All that Congress had done here, Justice Ginsburg reasoned, was reassert the federal government's sovereign immunity in any action concerning the Bradley Property. Justice Sotomayor wrote separately to say that she would join the dissent on the "Smith wins" question, were it not for the strength of Justice Ginsburg's reasoning on sovereign immunity. With their two votes added to those in the plurality, the Band emerged from the lawsuit victorious.

SPEECH

If points were given to each ruling based on the degree to which its outcome was important, predictable, and likely to produce a 5-4 split along familiar ideological lines, the prize this year would likely go to *Janus v AFSCME*,[83] handed down on the Term's final day. In 2012 and 2014,[84] the Court's Republican appointees signaled that they had serious constitutional doubts about *Abood v. Detroit Board of Education*.[85] In that landmark 1977 ruling, the Court held that the First Amendment permits a public-sector union and the governmental employer with which it contracts to require employees within a union-represented bargaining unit to pay the union "agency fees," even if those employees have refused to become union members. "Agency fees" are fees calculated to cover an employee's share of the costs the union incurs in collective bargaining and related activities. Shortly after Justice Scalia's death, the eight-member Court divided 4-4 in a case that asked whether *Abood* should be retained or overruled.[86] With Justice Gorsuch now holding the Court's ninth seat, the 5-4 *Janus* Court explicitly overruled

76. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 n.17 (2016); *id.* at 1326; *id.* at 1334-35 (Roberts, C.J., dissenting).
77. 138 S. Ct. 897 (2018).
78. Match-E-Be-Nash-She-Wish Band of Pottawatomie Indians v. Patchak, 567 U.S. 209 (2012).
79. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014).
80. *Match-E-Be-Nash-She-Wish Band*, 138 S. Ct. at 905.
81. *Id.* at 917 (Roberts, C.J., dissenting).
82. *Id.* at 920 (Roberts, C.J., dissenting).
83. 138 S. Ct. 2448 (2018).
84. *See* Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. SEIU, 567 U.S. 298 (2012).
85. 431 U.S. 209 (1977).
86. Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam).

"[Justice Thomas] drew at least a loose parallel [with] actions taken by Mao Zedong[.]"

Abood, holding that agency-fee requirements violate the First Amendment rights of public employees who are not union members and do not wish to subsidize the union's speech.

Justice Alito wrote for the majority. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," he said, and "[c]ompelling a person to *subsidize* the speech of other private speakers" is no less troubling.[87] Pointing out that the federal government and twenty-eight states ban agency fees, Justice Alito found that imposing such fees is not necessary to create functional workplaces and successful employer-employee relations. Nor is the government's interest in preventing free-riding by non-members on the backs of dues-paying union members sufficiently compelling to justify forcing non-members to subsidize speech they find objectionable.[88] With respect to the analytic framework launched in *Pickering v. Board of Education*[89] for evaluating public employees' freedom of speech, Justice Alito found that *Pickering* is a bad fit for determining the scope of the government's power to compel large numbers of its employees to speak. Even if the Court did apply *Pickering* here, he wrote, unions would lose. The positions that unions take in collective bargaining on wages, health insurance, and the like concern matters of great public significance, and there is no governmental interest sufficiently weighty to justify requiring employees to subsidize the union's speech on those subjects. Turning to *stare decisis*, the Court said that the doctrine "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."[90] In the eyes of the majority, neither reliance interests nor any other factor weighed heavily in favor of retaining the *Abood* framework.

Justice Kagan wrote the principal dissent, joined by Justices Ginsburg, Breyer, and Sotomayor. She argued that, consistent with *Pickering* and other cases, "the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer."[91] "But the worse part of today's opinion," she wrote, "is where the majority subverts all known principles of *stare decisis*,"[92] overturning *Abood* for no better reason than that the justices in the majority "wanted to."[93] She accused those justices of "weaponizing the First Amendment,"[94] using it to declare winners and losers in economic and social matters that should be left to the democratic process.

The justices found somewhat greater unity in *Minnesota Voters Alliance v. Mansky*.[95] Led by Chief Justice Roberts, the 7-2 Court struck down Minnesota's wide-ranging ban on political apparel in polling places on Election Day. Finding that polling places are nonpublic forums, where speech restrictions need merely be viewpoint-neutral and reasonable, the Court did not entirely close the door to speech restrictions in those locations. The Chief Justice emphasized that "we see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as an island of calm in which voters can peacefully contemplate their choices."[96] The problem with Minnesota's law concerned the First Amendment's reasonableness requirement. In the eyes of the majority, the state had failed "to articulate some sensible basis for distinguishing what may come in from what must stay out."[97] The state had argued that the ban extended only to messages concerning matters on which candidates or parties had taken positions, but the Court found that "[a] rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable."[98] The state ran into further trouble with the Court at oral argument when handling the justices' hypotheticals. The state's attorneys argued, for example, that a shirt bearing the text of the Second Amendment would be barred, while a shirt bearing the text of the First Amendment would be permitted. The Court concluded that Minnesota's law swept too broadly and left election officials with too much unguided discretion.[99]

In the Term's other major ruling on speech—*National Institute of Family & Life Advocates v. Becerra*[100]—the 5-4 Court weighed in against a California law requiring that notices of specified types be posted in pro-life clinics providing pregnancy-related services. The law requires licensed clinics to post notices alerting clients that the state provides free or low-cost family-planning services—including abortions—and to post a phone number that clients can call for further information about those services. The law requires *un*licensed clinics to post a notice alerting clients that the clinics' personnel are not licensed to provide medical services. The Ninth Circuit denied clinics' request for preliminary injunctive relief against both requirements, finding that the First Amendment gives California significant latitude to regulate "professional speech" and that the clinics are unlikely to succeed on the merits at trial. The Supreme Court, however, reversed.

Writing for the five-member majority, Justice Thomas

87. *Janus*, 138 S. Ct. at 2464.
88. Labor's only victory in *Janus* came in the majority's apparent concession that a union can require non-members to pay for representation that the union gives them in grievance proceedings.
89. 391 U.S. 563 (1968).
90. *Janus*, 138 S. Ct. at 2478.
91. *Id.* at 2487 (Kagan, J., dissenting).
92. *Id.* at 2497 (Kagan, J., dissenting).
93. *Id.* at 2501 (Kagan, J., dissenting).
94. *Id.* (Kagan, J., dissenting).
95. 138 S. Ct. 1876 (2018).
96. *Id.* at 1887 (internal quotation marks omitted).
97. *Id.* at 1888.
98. *Id.* at 1889.
99. Joined by Justice Breyer in dissent, Justice Sotomayor argued that the Court should have certified the case to the Minnesota Supreme Court for a definitive construction of the challenged statute. The majority rejected that suggestion, finding (among other things) that the state had raised the possibility of certification "very late in the day" and that neither the state nor the dissent had "suggested a viable alternative construction that the Minnesota Supreme Court might adopt instead." *Id.* at 1891 n.7.
100. 138 S. Ct. 2361 (2018).

turned first to the law concerning licensed clinics. California's requirement is content-based, he explained, because it alters the content of what the clinics are required to tell their clients. He then said there is no historical basis for the Ninth Circuit's (and some other lower courts') finding that content-based regulations of professional speech merit something less demanding than strict scrutiny. The closest the Court has come to that view, Justice Thomas wrote, is in rulings applying a more permissive form of review to "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'" regarding the services they provide and in rulings allowing states to "regulate professional conduct, even though that conduct incidentally involves speech."[101] The Court found that neither of those lines of precedent was applicable here. In a remarkable passage, Justice Thomas drew at least a loose parallel between California's requirement and actions taken by Mao Zedong, the Soviets, the Nazis, and Nicolae Ceausescu. Even if intermediate scrutiny were applied, the Court concluded, the notice requirement could not meet it because, if the state's aim is to inform low-income women about state-sponsored services, the requirement is vastly under-inclusive. With respect to the notice requirement imposed on unlicensed clinics, the Court held both that the state has not yet identified any real, non-hypothetical need that the requirement meets and that the law is unduly burdensome.

Joined by Justices Ginsburg, Sotomayor, and Kagan in dissent, Justice Breyer argued that (among other things) the Court's ruling threatens to imperil a vast range of state laws requiring speech of various kinds; that the majority undermined the evenhanded rule of law by striking down a statute requiring a notice about abortion services while not satisfactory distinguishing laws requiring a notice about adoption services; and that the majority was insufficiently deferential to the state's conclusion that clients of unlicensed clinics should be alerted on-site that the personnel at those clinics are not licensed to provide medical care.

SUPPLEMENTAL JURISDICTION

When a federal district court has original jurisdiction over a given claim, the supplemental jurisdiction statute—28 U.S.C. § 1367—authorizes the court also to take jurisdiction over state claims that form part of "the same case or controversy."[102] If a court subsequently dismisses the claim over which it initially had original jurisdiction, it typically will also dismiss any additional claims that it had swept in. When that occurs, the claimant might naturally wish to file his or her trailing claims in state court. But what if the state's statute of limitations for those claims expired during the federal proceedings? Congress anticipated that problem in Section 1367(d):

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

"[T]he Court did not entirely close the door to speech restrictions in [polling places]."

In *Artis v. District of Columbia*,[103] Stephanie Artis sought to take advantage of that tolling provision. She had sued the District of Columbia in federal court for employment discrimination, asserting a claim under federal law as well as claims under D.C. law.[104] At the time Artis filed her suit, nearly two years remained in the limitations period for her D.C. claims. Two and a half years later, the federal district court granted the District's motion for summary judgment on the federal claim and declined to retain jurisdiction over Artis's remaining claims. Artis filed the non-federal claims in the D.C. Superior Court 59 days later. Were those claims now time-barred?

Dividing 5-4, the Court held that the claims were timely filed. All of the justices agreed that there were two possible ways to read Section 1367's tolling provision. On the "stop the clock" reading, the clock on D.C.'s limitations period entirely stopped during the federal proceedings, such that Artis had roughly two years to file her D.C. claims after the federal district court dismissed them. On the "grace period" reading, the clock on D.C.'s limitations period continued to run, but Section 1367(d) ensured that, if that clock had counted down to zero by the time her D.C. claims were dismissed, Artis would have at least 30 days to file those claims in an appropriate court. Led by Justice Ginsburg, a majority of the Court adopted the "stop the clock" interpretation, finding that, in all other legislation in which Congress has used the word "tolled," it has meant "'suspended,' or 'paused,' or 'stopped.'"[105] Writing for the dissent, Justice Gorsuch argued that the Court's ruling "ensures that traditional state law judgments about the appropriate lifespan of state law claims will be routinely displaced—and displaced in favor of nothing more than a fortuity (the time a claim sits in federal court) that bears no rational relationship to any federal interest."[106]

TAXES

For the past half century, the Dormant Commerce Clause rule under *National Bellas Hess, Inc. v. Department of Revenue of Illinois*[107]—as reaffirmed in *Quill Corp. v. North Dakota*[108]—was that a state could not require a seller to collect sales taxes on goods and services sold to residents of that state unless the seller had a physical presence there. In this Term's *South Dakota v. Wayfair*,[109] the justices all agreed that *Bellas Hess* was wrongly decided. What divided them 5-4 was whether the Court should do anything about it.

101. *Id.* at 2366.
102. 28 U.S.C. § 1367(a).
103. 138 S. Ct. 594 (2018).
104. Section 1367(e) instructs federal courts to treat D.C. law like state law.
105. *Artis*, 138 S. Ct. at 602-03.
106. *Id.* at 617 (Gorsuch, J., dissenting).
107. 386 U.S. 753 (1967).
108. 504 U.S. 298 (1992).
109. 138 S. Ct. 2080 (2018).

Led by Justice Kennedy, a majority of the Court concluded that it should. The case concerned South Dakota's effort to require out-of-state sellers to collect sales taxes for goods and services sold within the state if they annually did business exceeding $100,000 in South Dakota or engaged in at least 200 separate transactions there. The state sought to compel three large online retailers to collect sales taxes pursuant to the new legislation, even though they did not maintain physical presences within the state. Citing *Bellas Hess* and *Quill*, the courts below ruled in favor of the online retailers. Justice Kennedy and his colleagues in the majority concluded, however, that *Bellas Hess* and *Quill* should be overturned.

The Court reasoned that (among other things) the physical-presence requirement makes no sense in an era in which so many economic transactions are conducted over the Internet, "is a poor proxy for the compliance costs faced by companies that do business in multiple States,"[110] incentivizes sellers to avoid establishing stores or other potentially desirable presences in multiple states, and amounts to "an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions."[111] Justice Kennedy acknowledged that Congress has long had the authority to reject the physical-presence requirement and that the Court should be reluctant to overturn its own precedents, but he concluded that "[i]t is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation."[112] The Court said that the lower courts could determine on remand whether any other Commerce Clause principle invalidates South Dakota's tax law, but the Court also indicated that South Dakota has gone a long way toward successfully avoiding any discrimination or undue-burden concerns. It has done so by exempting out-of-state sellers that do only minimal business in the state, by declaring that the tax law will not be applied retroactively, and by adopting the Streamlined Sales and Use Tax Agreement (legislation that, in a variety of ways, aims to simplify the adopting state's sales tax system and thereby reduce the compliance burden).

Joined by Justices Breyer, Sotomayor, and Kagan in dissent, Chief Justice Roberts argued that the Court should have left it to Congress to respond to any problems created by *Bellas Hess*'s physical-presence requirement. Chief Justice Roberts noted that most of the nation's largest online retailers already collect sales taxes on behalf of the states in which they make sales. Forcing the rest of them to do so, he argued, carries pros and cons that Congress is best equipped to evaluate.

OTHER NOTABLE RULINGS

In *Cyan, Inc. v. Beaver County Employees Retirement Fund*,[113] the Court held that the Securities Litigation Uniform Standards Act of 1998 does not take away state courts' power to adjudicate class actions brought entirely under the Securities Act of 1933. The Court further held that SLUSA does not allow defendants to remove such class actions from state to federal court.

The Court held in *China Agritech, Inc. v. Resh*[114] that, when a district court refuses to certify a proposed class, "a putative class member [may not], in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations."[115]

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*,[116] the Court held that, when trying to determine a question of foreign law, a federal district court is not rigidly required to accept as dispositive an official statement submitted by that foreign nation's government. Rather, a district court may consider such things as "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."[117]

In *Ohio v. American Express Company*,[118] the 5-4 Court rejected an antitrust challenge to American Express's use of contractual provisions barring merchants from steering their customers away from using their American Express cards.

LOOKING AHEAD

One can find a continually updated list of cases slated for the October 2018 Term on the "Merits Cases" page at SCOTUSblog.com. At the time of this writing, perhaps the most broadly significant civil cases on the Court's docket involve disputes about whether small public employers are bound by the Age Discrimination in Employment Act's requirements,[119] whether the Court should overrule precedent allowing one state to be sued in another state's courts without its consent,[120] and whether property owners should continue to be required to exhaust their state remedies before filing a Fifth Amendment takings claim.[121] Given the unfailing ability of human interaction to produce legal disputes of great import to the rest of us, that list will surely grow.

Professor Todd E. Pettys holds the H. Blair and Joan V. White Chair in Civil Litigation at the University of Iowa College of Law. He regularly teaches courses on constitutional law, as well as a Supreme Court seminar, and he is the author of The Iowa State Constitution *(Oxford University Press 2018). He joined the Iowa faculty in 1999.*

110. *Id.* at 2093.
111. *Id.* at 2095.
112. *Id.* at 2096.
113. 138 S. Ct. 1061 (2018).
114. 138 S Ct. 1800 (2018).
115. *Id.* at 1804.
116. 138 S. Ct. 1865 (2018).
117. *Id.* at 1873-74.
118. 138 S. Ct. 2274 (2018).
119. Mount Lemon Fire District v. Guido, No. 17-587.
120. Franchise Tax Board of California v. Hyatt, No. 17-1299.
121. Knick v. Township of Scott, Pennsylvania, No. 17-647.