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Expert Analysis

SECOND CIRCUIT REVIEW

The Second Circuit In the Supreme Court

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With the U.S. Supreme Court commencing its October 2019 term this week, we conduct our 35th annual review of the performance of the U.S. Court of Appeals for the Second Circuit over the past term. We also briefly discuss the Second Circuit's decisions scheduled for review by the Supreme Court during the new term.

In her address to the Second Circuit's annual judicial conference, Justice Ruth Bader Ginsburg remarked that "the event of greatest consequence" for the October 2018 term—and "perhaps for many Terms ahead"—was the retirement of Justice Anthony Kennedy, long considered a critical swing vote on the court. Replacing Justice Kennedy was Justice Brett Kavanaugh, a former judge on the U.S. Court of Appeals for the D.C. Circuit. During his first term, Justice Kavanaugh authored seven majority opinions, four concurring opinions, and three dissenting opinions. Adam Feldman, *Stat Pack for October Term 2018*, SCOTUSBLOG 11 (June 28, 2019) (*Stat Pack*). His votes aligned most closely with the votes of Chief Justice John Roberts (92 percent of cases), and least closely with the votes of Justice Ginsburg (63 percent of cases). Id. at 23.

During the October 2018 term, the court decided 75 cases. Five of the court's cases arose out of the Second Circuit. Two of those decisions were affirmed, and three were reversed, resulting in a 60 percent reversal rate. *Stat Pack* 3. The accompanying table compares the Second Circuit's performance during the 2017 term to those of its fellow courts of appeals. We discuss the Supreme Court's five merits decision that arose out of the Second Circuit last term. *See chart.*

Foreign Sovereign Immunities Act

Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019), presented the question whether a plaintiff may serve process to a foreign state under the Foreign Sovereign Immunities Act (FSIA) via mail directed to the foreign state's diplomatic mission in the United States. The FSIA requires plaintiffs to serve a foreign state with process "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. §1608(a)(3). The plaintiffs in *Harrison* attempted to comply with that requirement by

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addressing their service packet to Sudan's foreign minister at its U.S. embassy in Washington, D.C., rather than at the foreign ministry in Khartoum. In subsequent proceedings to enforce the judgment, the district court ruled that Sudan received sufficient process under the FSIA. The Second Circuit affirmed.

The Supreme Court reversed in an 8-1 decision. In a majority opinion by Justice Alito, the court held that a plaintiff must have addressed and dispatched a service packet to the foreign minister at the minister's office in the foreign state. The court reasoned that the ordinary meaning of the terms "addressed" and "dispatched" in the FSIA required the plaintiff to send the mailing directly to the foreign minister's principal place of business.

Justice Thomas dissented. In his view, the text of the FSIA neither specifies nor precludes the use of any particular address and requires only that the plaintiff send the packet to the foreign minister.

Circuit	Number	Affirmed	Reversed or Vacated	% Reversed or Vacated
First	2	1	1	**50%**
Second	5	2	3	**60%**
Third	3	1	2	**66.7%**
Fourth	4	2	2	**50%**
Fifth	4	2	2	**50%**
Sixth	7	4	3	**42.9%**
Seventh	1	0	1	**100%**
Eighth	4	1	3	**75%**
Ninth	14	2	12	**85.7%**
Tenth	2	1	1	**50%**
Eleventh	7	4	3	**42.9%**
D.C.	3	2	1	**33.3%**
Federal	4	2	2	**50%**

SOURCE: Adam Feldman, Stat Pack for October Term 2018, SCOTUSBLOG 3 (June 28, 2019).
Chart does not include cases decided by the Supreme Court during the October 2018 term from state courts or federal district courts. In addition, we included *Emulex v. Varjabedian*, 139 S. Ct. 1407 (2019), a case in which the court dismissed the petition for certiorari as improvidently granted, as one of the court's cases for the term, bringing the total to 75.

Non-Delegation Doctrine

Gundy v. United States, 139 S. Ct. 2116 (2019), involved a constitutional challenge to the Sex Offender Registration and Notification Act (SORNA). The government charged the petitioner, who was convicted of a qualifying sex offense before SORNA's enactment, with failing to register under SORNA. Although SORNA did not expressly apply to pre-Act offenders, Congress delegated authority to the Attorney General to "specify the applicability" of SORNA to those offenders. 34 U.S.C. §20913(d). The petitioner challenged the delegation as an unconstitutional transfer of legislative power to the executive branch. The Second Circuit rejected that argument.

The Supreme Court affirmed in a 4-1-3 decision. (Justice Kavanaugh did not participate.) Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote the plurality opinion. They concluded that SORNA complied with the court's precedent on the non-delegation doctrine because the Act provided the Attorney General with an "intelligible principle" to follow regarding the registration of pre-Act offenders—namely, "apply SORNA to all pre-Act offenders as soon as feasible." 139 S. Ct. at 2123. Justice Alito provided the fifth vote necessary to affirm but concurred only in the judgment. He would have reconsidered the "intelligible principle" test but declined to do so in this case because there were not five votes to join him.

Justice Gorsuch dissented, joined by the Chief Justice and Justice Thomas. The dissent-

ing Justices would have jettisoned the "intelligible principle" test and re-conceptualized the non-delegation doctrine to follow three "guiding principles" derived from cases decided shortly after the Founding. 139 S. Ct. at 2135-36. Applying those guiding principles, the dissenting Justices concluded that the challenged provision of SORNA violated the non-delegation doctrine.

State-Action Doctrine

At issue in *Manhattan Community Access v. Halleck*, 139 S. Ct. 1921 (2019), was whether the Manhattan Neighborhood Network (MNN), a nonprofit corporation that operates New York City's public-access television channels, was a "state actor" required to comply with the First Amendment. The plaintiffs there alleged that MNN had violated the First Amendment in its operation of the public-access channels, but the district court concluded that MNN was not a state actor subject to constitutional constraints. The Second Circuit reversed, holding that MNN was a state actor because the public-access channels are a "public forum" for First Amendment purposes.

The Supreme Court reversed in a 5-4 decision. With Justice Kavanaugh writing for the majority, the court first held that MNN did not exercise a "traditional, public function" when operating the public-access channels. The court also disagreed that MNN was a state actor because it was "heavily regulated" by New York City or because the public-access channels were the property of New York City. The court rejected the Second Circuit's "public forum" analysis, reasoning that it ignored the threshold "state action" analysis.

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented. In their view, the public-access channels were a public forum, requiring New York City to comply with the First Amendment when administering them. The dissenters would have held that MNN became a state actor when it "took on the responsibility of administering th[at] forum." Id. at 1939-40.

> The Supreme Court so far has agreed to review five cases arising out of the Second Circuit during the October 2019 term.

Fabricated-Evidence Claims Under §1983

The question presented in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), was at what time the limitations period begins to run on a claim under 42 U.S.C. §1983 asserting that a state prosecutor used fabricated evidence in a criminal proceeding. In the decision below, the Second Circuit concluded that the limitations period begins to run as soon as the prosecutor uses the fabricated evidence in the criminal proceeding and a loss of liberty results.

The Supreme Court reversed in a 6-3 decision. In a majority opinion written by Justice Sotomayor, the court concluded that the limitations period in fabricated-evidence claims under §1983 does not begin to run until the underlying criminal proceeding ends in acquittal. To reach that result, the court assumed without deciding that the relevant right in question was the "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." 139 S. Ct. at 2155. Because that claim is similar to a claim for the common-law tort of malicious prosecution—which accrues at the time of acquittal—the court concluded that the limitations period on a fabricated-evidence claim does not begin to run until acquittal.

Justice Thomas, joined by Justices Kagan and Gorsuch, dissented. In their view, the court should have dismissed the petition for a writ of certiorari as improvidently granted because the §1983 plaintiff "declined to take a definitive position" on what specific constitutional right was at issue. 139 S. Ct. at 2161.

The Census Case

Arguably the most high-profile case from the October 2018 term was *Department of Commerce v. New York,* 139 S. Ct. 2551 (2019), presenting the question whether the Department of Commerce could add a question to the upcoming census asking participants whether they were U.S. citizens. The state of New York filed suit to enjoin the addition of the citizenship question, asserting both constitutional and statutory claims. The district court rejected New York's constitutional claims but ruled that the Secretary's addition of the citizenship question violated the Administrative Procedure Act and the Census Act. The Supreme Court granted certiorari before judgment, meaning that the Second Circuit did not have a chance to decide the ensuing appeal.

In a fractured 5-4 decision, the Supreme Court vacated the Secretary's decision to add the citizenship question to the census and remanded for further proceedings. The Chief Justice delivered the principal opinion. Five Justices—the Chief Justice and Justices Thomas, Alito, Gorsuch, and Kavanaugh—agreed that the addition of the citizenship question did not violate the Enumeration Clause or the Census Act. That same group of Justices also concluded that the Secretary had adequately weighed the benefits and costs of addition of the citizenship question to the census, as required by the Administrative Procedure Act.

A different set of five Justices—the Chief Justice plus Justices Ginsburg, Breyer, Sotomayor, and Kagan—concluded that vacatur of the Secretary's decision was necessary under the Administrative Procedure Act because that decision rested on a pretextual rationale: namely, that citizenship data was necessary to assist the Department of Justice in enforcing the Voting Rights Act. Based on the record before it, the court believed that the Voting Rights Act justification was "contrived." 139 S. Ct. at 2575.

Several Justices wrote separate opinions dissenting from various parts of the court's judgment.

The 2019 Term

The Supreme Court so far has agreed to review five cases arising out of the Second Circuit during the October 2019 term. *New York State Rifle & Pistol Ass'n v. City of New York* presents the question whether New York City's ban on transporting a licensed, locked, and unloaded handgun outside city limits violates the Second Amendment and other constitutional provisions. The challenged law has since been amended in relevant part, raising the additional question whether the lawsuit is now moot. *Altitude Express v. Zarda* (consolidated with one other case) presents the question whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's sexual orientation. *Retirement Plans Committee of IBM v. Jander* presents a question regarding the types of allegations a plaintiff must plead to state a claim under the Employee Retirement and Income Security Act of 1974 (ERISA) for breach of the fiduciary duty of prudence. *McAleenan v. Vidal* (consolidated with two other cases) presents the question whether the Trump Administration's decision to wind down the Deferred Action on Childhood Arrivals policy (DACA) is subject to judicial review and, if so, whether it is lawful. Finally, *Lucky Brand Dungarees v. Marcel Fashion Group* presents the question whether federal principles of preclusion can bar a defendant from raising defenses that were not actually litigated and resolved in a prior case between the parties when the plaintiff raises new claims in a subsequent action.