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SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit In the Supreme Court

By **Martin Flumenbaum** And **Brad S. Karp**

With the U.S. Supreme Court beginning its October Term 2022 in the coming week, we conduct our 38th annual review of the performance of the U.S. Court of Appeals for the Second Circuit in the Supreme Court during the past term.

The Supreme Court's October Term 2021 was one of the most consequential terms in American history. The Court issued major decisions overturning *Roe v. Wade*; expanding the Second Amendment right to carry firearms; halting some of the federal government's efforts to address the COVID-19 pandemic; and invalidating some of the EPA's most sweeping efforts to combat climate change. Those decisions took place under the ascendancy of a 6-3 majority held by the Court's Republican-appointed Justices. Notably, nearly 30% of the Court's merits decisions were divided along ideological lines, and the percentage of unanimous decisions declined to a two-decade low. *Stat Pack for the Supreme Court's 2021-22 Term*, SCOTUSblog 3 (July 1, 2022).

The 2021 Term closed with the retirement of Justice Breyer, who had served on the Court since his appointment by President Clinton in 1994.

Circuit	Number	Affirmed	Reversed Or Vacated	% Reversed Or Vacated
First	5	0	5	100%
Second	4	0	4	100%
Third	1	0	1	100%
Fourth	3	1	2	67%
Fifth	8	1	7	87%
Sixth	7	1	6	86%
Seventh	3	2	1	33%
Eighth	2	0	2	100%
Ninth	12	0	12	100%
Tenth	3	1	2	67%
Eleventh	5	2	3	60%
D.C.	2	0	2	100%
Federal	1	1	0	0%
District	4	1	3	75%
State Court	5	0	5	100%

*This chart counts separately cases from different courts that were consolidated and resolved in a single opinion. It also includes per curiam opinions and summary reversals; it excludes merits in original actions and cases that were dismissed for various reasons.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss.* WILLIAM T. MARKS, *a litigation associate at the firm, assisted in the preparation of this column.*

Although best known by advocates for his complicated and often lengthy hypotheticals at oral argument, his colleagues uniformly extolled his "optimism," "wit," and "generosity." Press Release, U.S. Supreme Court, Statements from the Supreme Court Regarding Justice Stephen G. Breyer's Retirement (Jan. 27, 2022). Replacing Justice Breyer is Justice Ketanji Brown Jackson, who will be the first African-American woman to serve as a Justice. Justice Jackson was elevated to the Court from the U.S. Court of Appeals for the D.C. Circuit; she previously served as a federal district judge and a federal public defender.

Overall, the Court issued opinions in 66 cases, four of which arose out of the Second Circuit. The Supreme Court reversed in all four of those cases, but the Second Circuit was not an outlier in that respect: The Supreme Court reversed all of the cases before it from five other circuits. Indeed, the Court reversed in 82% of cases this year, including in 12 from the Ninth Circuit alone. *Stat Pack*, supra, at 24. The table accompanying this article compares the Second Circuit's performance during the October Term 2021 to those of its fellow federal courts of appeals, as well as the federal district courts and the state courts. We will next discuss the Supreme Court's four decisions from this past term that arose out of the Second Circuit. *(See chart below)*

Section 1983 Malicious Prosecution Claims

Thompson v. Clark presented the question whether, to bring a Fourth Amendment claim for malicious prosecution under 42 U.S.C. §1983, a plaintiff must show that the criminal proceeding against the plaintiff ended in a manner that affirmatively indicates the plaintiff's innocence. 142 S. Ct. 1332 (2022). The Second Circuit held that an affirmative indication of innocence was required.

In an opinion written by Justice Kavanaugh, the Supreme Court reversed in a 6-3 decision. To determine the elements of a Fourth Amendment claim under §1983 for malicious prosecution, the Court drew an analogy to the elements of a common law claim for malicious prosecution. The Court explained that "most American courts" had concluded by 1871—the year §1983 was enacted—that "the favorable termination element of a malicious prosecution claim was satisfied so long as the prosecution ended without a conviction," including where there was no "affirmative indication of innocence." Id. at 1338, 1339. The Court construed a Fourth Amendment claim under Section 1983 for malicious prosecution to carry the same requirement.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. In their view, the requirements imposed by the Fourth Amendment "have almost nothing in common" with the common law tort of malicious prosecution. Id. at 1341. They would have held that "a malicious-prosecution claim may not be brought under the Fourth Amendment." Id. at 1347.

International Child Abduction

Golan v. Saada presented a question concerning the Hague Convention on the Civil Aspects of International Child Abduction. 142 S. Ct. 1880 (2022). Under the Hague Convention, a country must return an abducted child to his or her country of habitual residence unless there is a grave risk that return would harm the child. The question presented was whether, upon finding that such grave risk is present, a district court must consider ameliorative measures that would nevertheless facilitate the return of the child. Adhering to circuit precedent, the Second Circuit held that consideration of ameliorative measures was required. (Our law firm, Paul, Weiss, Rifkind, Wharton & Garrison, represented petitioner Golan throughout the litigation, including at the Supreme Court.)

The Supreme Court vacated and remanded in a unanimous decision. In an opinion by Justice Sotomayor, the Court explained that "[n]othing in the Convention's text either forbids or requires consideration of ameliorative measures." Id. at 1892. By imposing a requirement to consider them in every case, the Court held, the Second Circuit had erred. At the same time, the Court noted that lower courts should "address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case." Id. at 1893.

International Arbitration

ZF Automotive US v. Luxshare, Ltd. was an international-arbitration case that arose from the Sixth Circuit but was consolidated with a case from the Second Circuit. 142 S. Ct. 2078 (2022). It presented the question whether 28 U.S.C. §1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in "a foreign or international tribunal,"

encompasses private commercial arbitral tribunals. The Second Circuit had held that a private commercial arbitrable tribunal qualified as "a foreign or international tribunal."

The Supreme Court reversed in a unanimous decision. In an opinion by Justice Barrett, the Court concluded that, because the word "tribunal" has "potential governmental or sovereign connotations," the word "foreign" was best understood to mean "[b]elonging to another nation or country" as opposed to "from" another country. Id. at 2086. The Court then held that the word "international" was best understood to mean "involving two or more *nations*," because the alternative definition—"two or more *nationalities*"—would yield the strange result of the "international" nature of the arbitral forum turning on "the national origin of the adjudicators." Id. at 2087 (emphasis added). The Court further concluded that statutory history and context confirmed that §1782 did not permit a court to order discovery for a private commercial arbitration.

Second Amendment

New York State Rifle & Pistol Association v. Bruen involved a Second Amendment challenge to the state of New York's firearm regulations. 142 S. Ct. 2111 (2022). Under those regulations, an individual who wanted to carry a handgun in public places for self-defense could obtain a license to do so only by demonstrating a special need for self-protection distinguishable from that of the general community. The Second Circuit upheld the regulation under intermediate scrutiny, concluding that the requirement was substantially related to the achievement of an important governmental interest.

The Supreme Court reversed in a 6-3 decision. In an opinion by Justice Thomas, the Court began by rejecting the Second Circuit's application of intermediate scrutiny. Instead, the Court held that a firearm regulation is permissible only if the government "affirmatively prove[s] that [the] regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id. at 2127. The Court then concluded that the plain text of the Second Amendment protects a right to "carr[y] handguns publicly for self-defense," and that the historical record before it did not "demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense." Id. at 2135, 2138.

Justices Alito, Kavanaugh and Barrett all filed separate concurring opinions to underscore certain parts of the majority opinion, including the limits of the Court's holding.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. As a preliminary matter, they expressed a lack of certainty about how onerous New York's licensing requirement actually was in practice and thought that additional evidentiary development was warranted. On the Court's legal holding, they stated that it was "constitutionally proper, and indeed often necessary," for courts "to consider the serious dangers and consequences of gun violence" when interpreting the Second Amendment. Id. at 2164. They worried that it is "deeply impractical" to require lower courts to "resolv[e] difficult historical questions." Id. at 2177. But even under the majority's historical framework, the dissenting Justices would have held that sufficient historical evidence existed to uphold New York's regulation.

The 2022 Term

The Supreme Court currently has four merits cases arising out of the Second Circuit for the October Term 2022. *Andy Warhol Foundation v. Goldsmith* presents the question whether a work of art is "transformative" for purposes of the Copyright Act when it conveys a different meaning or message from its source material. *Percoco v. United States* presents the question whether a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decision-making, can be convicted of honest-services fraud. *Ciminelli v. United States* presents the question whether the federal wire-fraud statute criminalizes the deprivation of complete and accurate information bearing on a person's economic decision. Finally, *MOAC Mall Holdings v. Transform Holdco* presents the question whether §363(m) of the Bankruptcy Code limits the jurisdiction of the federal courts of appeals over any sale order or order deemed "integral" to a sale order.