
October 6, 2017

Cases to Watch this Term at the Supreme Court

With nine justices again warming the bench, the Supreme Court's new term will address a number of important subjects. Issues of interest to the business community include the scope of the Alien Tort Statute, the validity of arbitration clauses in certain employment agreements, and the constitutionality of *inter partes* review procedures at the U.S. Patent and Trademark Office. The Court will also take up issues of larger social significance, such as gerrymandering, a baker's refusal to bake a wedding cake for a same-sex couple, and cellphone tracking and the Fourth Amendment. For a discussion of the significant securities cases the Court will address, see the Paul, Weiss client memorandum available [here](#). Below, we survey ten important cases that will be decided this term.

Alien Tort Statute

***Jesner v. Arab Bank, PLC*—Argument Date: October 11, 2017.** This case raises the question whether corporations may be held liable under the Alien Tort Statute. *Jesner*, along with approximately 6,000 non-U.S. citizens, sued Arab Bank for allegedly facilitating terrorism in Israel and in the Palestinian territories. The Second Circuit ruled in favor of Arab Bank, holding that corporations may not be held liable under the statute. This decision is claimed to conflict with those of four other circuits, which have held that corporations may be liable under the Alien Tort Statute.

Bankruptcy

***Merit Management Group, LP v. FTI Consulting*—Argument Date: November 6, 2017.** This case presents the question whether the safe harbor provision of the Bankruptcy Code prohibits avoidance of a transfer made by or to a financial institution regardless of whether the institution has a beneficial interest in the transfer. Specifically, 11 U.S.C. § 546(e) provides a safe harbor prohibiting a trustee from avoiding a transfer that is “made by or to” a financial institution, which some courts have read as applying to any transaction where a financial institution acts merely an intermediary. In this case, a trustee seeks to avoid a transfer of a purchase price payment made in exchange for shares between two financial institutions that acted merely as conduits for the transfer, but did not benefit from it. The Court will resolve a claimed circuit split on the question of whether Section 546(e) prohibits the avoidance of such transfers.

Equal Protection

***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*—Argument Date Pending.** In this case, the owner of Masterpiece Cakeshop, Ltd. (“Cakeshop”), a bakery, refused to create

a custom cake to celebrate a same-sex marriage because the owner claimed that doing so conflicted with his religious beliefs about marriage, and the couple sued for discrimination. The Colorado Civil Rights Commission held that the owner engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act. The Colorado Court of Appeals affirmed, finding that baking a cake was mere “conduct” compelled by a neutral law of general applicability, and not speech. This case presents the question whether a business can invoke the Free Speech Clause or Free Exercise Clause of the First Amendment as a defense to violating anti-discrimination laws prohibiting sexual orientation discrimination.

Labor and Employment

***Epic Systems Corp. v. Lewis; Ernst & Young, LLP v. Morris; National Labor Relations Board v. Murphy Oil USA, Inc.*—Argued on October 2, 2017.** The Court consolidated these three cases to consider the question whether agreements requiring employers and employees to resolve employment-related disputes through arbitration—thereby barring employees from pursuing their claims on a collective or class basis—are enforceable under the Federal Arbitration Act, despite the collective-bargaining provisions of the National Labor Relations Act (“NLRA”). The Seventh and Ninth Circuits held in *Epic Systems* and *Ernst & Young* that the arbitration agreements violated the NLRA, while the Fifth Circuit held in *Murphy Oil* that these arbitration agreements must be enforced. For a discussion of the potential implications of the Court’s decision, see the Paul, Weiss client memorandum available [here](#).

***Janus v. American Federation of State, County, and Municipal Employees*—Argument Date Pending.** This case presents the question whether public-sector employees can be required to pay fees to the union that represents them. If the Court’s answer is no, this decision would deal a sharp blow to public-sector unions in the twenty-two states that authorize mandatory union fees. The remaining twenty-eight states’ “right to work” laws prohibit workers from being compelled to pay union dues. In 1977, the Court ruled in *Abood v. Detroit Board of Education* that while public-sector employees who choose not to join a union cannot be forced to pay for the political activities of unions, such as campaign spending, employees can be required to pay fees to finance the union’s core activity—collective bargaining—to prevent freeloading. *Janus* contends that all compulsory fees violate the First Amendment because contract negotiations between the government and unions are inherently political, and he asks the Court to overrule *Abood*. During its 2015 term, the Supreme Court heard argument on this issue in *Friedrichs v. California Teachers Association* and some speculated that the Court was poised to overturn *Abood*. However, following the death of Justice Scalia, the Court affirmed the Ninth Circuit by an evenly divided Court. *Janus* now presents the opportunity for a nine-justice Court to reexamine *Abood*.

Patent

***Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*—Argument Date Pending.** The Court will address whether *inter partes* review, an adversarial proceeding in which a panel of

administrative judges at the U.S. Patent and Trademark Office's Patent Trial and Appeal Board ("PTAB") may reconsider whether claims of a previously-issued patent are patentable, violates the Constitution by invalidating a patentholder's rights through a non-Article III forum without a jury. Congress created *inter partes* review to provide a faster, more efficient alternative to district court litigation for considering challenges to patents for lack of novelty or obviousness based on earlier patents or printed publications. This case raises the question of whether the Patent and Trademark Office may constitutionally reconsider and correct its decision to issue a patent that it determines should not have been issued in the first place—a question the Federal Circuit answered in the affirmative.

Search and Seizure

Carpenter v. United States—Argument Date Pending. This case presents the question whether the warrantless search and seizure of historical cellphone records revealing the location and movement of a cellphone user violates the Fourth Amendment. The Stored Communications Act authorizes the disclosure of certain telecommunications records without a warrant when "specific and articulable facts" show that they may be relevant and material to an ongoing criminal investigation. In this case, one conspirator confessed to having committed a series of armed robberies and provided the government with the cellphone numbers of his co-conspirators. The government applied for and obtained the "cell site" records associated with those phone numbers pursuant to the Stored Communications Act. These records provided the dates, times, and locations of calls, which were used to demonstrate the conspirators' proximity to the sites of the robberies at issue. One defendant moved to suppress the cell site evidence, arguing that the government needed a warrant to obtain the records. The district court denied the motion, and the Sixth Circuit affirmed. The Court will determine whether the collection of cell site records constitutes a Fourth Amendment search, and if so, whether it is a search that demands a warrant rather than merely reasonable suspicion, which is all that is required under the Stored Communications Act.

Collins v. Virginia—Argument Date Pending. The Court will consider whether the automobile exception to the Fourth Amendment's warrant requirement applies to an unoccupied vehicle parked on private property. The automobile exception allows officers to search a vehicle without a warrant so long as there is probable cause to believe that contraband or evidence will be found in the vehicle. In this case, police officers entered onto Collins's property without a warrant and searched a motorcycle that was parked in the driveway, covered by a tarp. After discovering that the Vehicle Identification Number and license plate matched those of a stolen motorcycle, the police arrested the property owner. Collins moved to suppress the evidence, arguing that the rationales underpinning the automobile exception—that vehicles are "readily mobile" and drivers have a reduced expectation of privacy when they are traveling by motor vehicle—fail to justify the search at issue in this case. The Court will resolve an apparent circuit split over whether the automobile exception applies to vehicles parked on private, residential property.

Voting Rights

Gill v. Whitford—Argued on October 3, 2017. The Court will consider whether partisan gerrymandering violates the First Amendment rights of association or the Equal Protection Clause. In 2011, with a Republican governor and Republican majorities in the state assembly and the senate, Wisconsin’s lawmakers developed a voting district map allegedly calculated to allow Republicans to maintain a majority under all likely voting scenarios. In the subsequent 2012 election, Republicans gained 60 percent of the seats in the State Assembly despite receiving only 49 percent of the statewide vote. The Campaign Legal Center, representing twelve Democratic voters, challenged the map in district court, arguing that the map was unconstitutional gerrymandering. A three-judge panel declared the map unconstitutional and ordered Wisconsin to redraw its districts by November 1, 2017. The State appealed to the Supreme Court. In *Vieth v. Jubelirer*, in 2004, Justice Kennedy cast the deciding swing vote in another challenge to partisan gerrymandering. Justice Kennedy appeared to leave the door open to redistricting challenges based on partisan gerrymandering if a workable standard could be found. This is a highly watched case, particularly in advance of the 2020 census, after which states will redraw their voting districts.

Husted v. A. Philip Randolph Institute—Argument Date: November 8, 2017. This case presents the question whether Ohio’s roll-maintenance system for its voter registration lists violates the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. Under Ohio’s system, voters who lack voter activity for two years receive notices to confirm their registration. If the State receives no response and the voter does not vote over the next four years, including in two general federal elections, the voter is removed from the roll. The Sixth Circuit ruled in favor of various plaintiff civil rights groups, holding that using an individual’s failure to vote as a “trigger” for sending out the confirmation notices violates federal voting laws, which prohibit states from removing “the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.” Ohio contends that its procedure is proper under federal law, which requires states to remove a voter if the voter does not respond to a confirmation notice.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

J. Steven Baughman
+1-202-223-7340
sbaughman@paulweiss.com

Susanna M. Buergel
+1-212-373-3553
sbuergel@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Alex Young K. Oh
+1-202-223-7334
aoh@paulweiss.com

Stephen J. Shimshak
+1-212-373-3133
sshimshak@paulweiss.com

Liza Velazquez
+1-212-373-3096
lvelazquez@paulweiss.com

Associates Crystal Johnson and Michelle S. Kallen and law clerk Grace H. Tiedemann contributed to this Client Memorandum.