



SECOND CIRCUIT REVIEW

Expert Analysis

Second Circuit Review: The Second Circuit in the Supreme Court

With the U.S. Supreme Court beginning its October Term 2020 in the coming months, we conduct our 36th annual review of the performance of the U.S. Court of Appeals for the Second Circuit during the past term.

The pandemic caused by the novel coronavirus transformed nearly every aspect of American life, and the Supreme Court was not immune from its effects. Beginning in March 2020, the Supreme Court postponed all oral arguments, rescheduling nearly a dozen of the postponed cases to the upcoming term. When the court resumed hearing arguments in May 2020, it did so in an entirely new way: by telephone. For the 10



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cases heard in that manner, the court followed a new format in which each Justice had an allotted

amount of uninterrupted time to question counsel. Even Justice Clarence Thomas, contrary to his normal practice, asked questions in this new format. The court also live-streamed the audio from oral arguments to the public for the first time. While the process went fairly smoothly overall, there were some notable glitches (including the apparent sound of a toilet

Circuit	Number	Affirmed	Reversed or Vacated	% Reversed or Vacated
First	1	0	1	100%
Second	8	2	6	75%
Third	4	2	2	50%
Fourth	4	3	1	25%
Fifth	7	1	6	85.7%
Sixth	3	3	0	0%
Seventh	1	0	1	100%
Eighth	1	1	0	0%
Ninth	10	1	9	90%
Tenth	3	1	2	66.7%
Eleventh	7	3	4	57.1%
D.C.	4	1	3	75%
Federal	4	1	3	75%
State Court	11	3	8	73%

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SOURCE: Feldman, Final Stat Pack for October Term 2019, "Circuit Scorecard."
* 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 cases that were dismissed for various reasons.

flushing during one argument). See Lyle Denniston, “Were the Supreme Court’s Phone Arguments a Success?,” N.Y. Times (May 18, 2020). Making the term even more unusual, the Supreme Court issued nine decisions after June, the most such opinions since 1986.

The court issued only 53 signed merits opinions during the October Term 2019—its fewest since the Civil War. Yet the court had no shortage of high-profile decisions. The court considered a wide range of weighty topics, including employment protections for LGBT individuals, the president’s private financial records, the constitutionality of the Consumer Financial Protection Bureau, and the Trump administration’s rescission of the “DACA” immigration policy.

Eight of the Supreme Court’s decisions from this past term arose from the Second Circuit. The Supreme Court affirmed two of those decisions and reversed or vacated six, resulting in a 75% reversal-or-vacatur rate. See Adam Feldman, “Final Stat Pack for October Term 2019,” SCOTUSBLOG (July 10, 2020). That reversal rate places the Second Circuit tied for the third-highest reversal rate of all courts of appeals with more than one case before the court during the term. Notably, of all federal courts of appeals, only the Ninth Circuit had more cases decided by the court than

the Second Circuit during the October Term 2019. The table below compares the Second Circuit’s performance during the October Term 2019 to the performance of the other federal courts of appeals and the state courts. We will next discuss the particular decisions from this past term that arose from the Second Circuit. See *chart below*.

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Employment Discrimination And LGBT Rights

As we discussed in our July 2020 column, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), consolidated with *Altitude Express, v. Zarda* from the Second Circuit, the Supreme Court addressed the question whether Title VII of the Civil Rights Act of 1964 prohibits its employment discrimination on the basis of sexual orientation or transgender status. In *Zarda*, the Second Circuit, sitting en banc, held that Title VII prohibited discrimination based

on sexual orientation; it did not address the question of transgender discrimination. In a 6-3 decision authored by Justice Neil Gorsuch, the Supreme Court held that Title VII’s prohibition on employment discrimination “because of” an individual’s “sex” prohibited discrimination based on sexual orientation or transgender status. The court reasoned that, if an employer takes adverse action against an employee based on the employee’s sexual orientation or transgender status, “the employer must, along the way, intentionally treat [the] employee worse based in part on that individual’s sex.” For example, an employer that discharges a male employee because he is attracted to men—but does not discharge female employees who are attracted to men—treats the discharged employee differently “because of” his sex. Justices Clarence Thomas, Samuel Alito and Brett Kavanaugh dissented.

Private Presidential Records

The Supreme Court decided two cases that concerned President Donald Trump’s ability to shield his private financial information, including his tax records, from disclosure.

Trump v. Vance, 140 S. Ct. 2412 (2020), involved a subpoena for Trump’s financial records issued by a New York state grand jury to a third party. The Second Circuit

rejected an attempt by the President to enjoin enforcement of the subpoena, and the Supreme Court affirmed in a 7-2 decision written by Chief Justice John Roberts. The court first held that a sitting president does not have absolute immunity from state criminal subpoenas, reasoning that “two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the president’s constitutional duties.” The court further held that no heightened showing of need was necessary to enforce a subpoena for the president’s financial records, given the records’ private nature, the public’s interest in fair and effective law enforcement, and the absence of any interference with the President’s official duties. Kavanaugh, joined by Gorsuch, wrote a separate opinion concurring in the judgment; Justices Thomas and Alito dissented.

Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020)—consolidated with *Trump v. Deutsche Bank* from the Second Circuit—involved a subpoena issued by Congress to third parties for the president’s financial records. In another 7-2 decision written by the chief justice, the Supreme Court held that the lower courts had not adequately considered separation-of-powers concerns in deciding whether the

congressional subpoena was enforceable. The court therefore vacated and remanded, instructing the lower courts to weigh the asserted legislative purpose for the subpoena; the breadth of the subpoena; the nature of the evidence supporting the subpoena; and the burdens that enforcement of the subpoena imposed on the president. Justices Thomas and Alito again dissented.

The Supreme Court will hear argument in 11 cases at the beginning of the 2020 term that were postponed due to the pandemic.

Deferred Action for Childhood Arrivals

In *Department of Homeland Security v. Regents of University of California*, 140 S. Ct. 1891 (2020), consolidated with *Wolf v. Vidal* from the Second Circuit, the Supreme Court reviewed the Trump administration’s decision to rescind DACA, a program that deferred the deportation of certain individuals who immigrated to the United States as children without legal authorization. The Second Circuit issued a preliminary injunction against the rescission, and the Supreme Court affirmed in a 5-4 decision authored by the chief justice. After determining that it had jurisdiction, the Supreme Court held

that the decision to rescind DACA was “arbitrary and capricious,” in violation of the Administrative Procedure Act, because the government did not sufficiently consider the reliance interests of DACA recipients or other ways of modifying DACA without ending the program entirely. The court, however, rejected the plaintiffs’ equal-protection argument that the rescission of DACA was based on animus toward Latinos. Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented from the court’s primary holding under the Administrative Procedure Act; Justice Sonia Sotomayor dissented from the court’s equal-protection holding.

Second Amendment

New York State Rifle & Pistol Association v. City of New York, 140 S. Ct. 1525 (2020), was the blockbuster Second Amendment case that never came to be. There, the plaintiffs challenged New York City’s firearms-licensing scheme, under which holders of a “premises” license could transport a handgun outside the home only to travel to a shooting range or small-arms club within city limits. The Second Circuit upheld the law, but before the Supreme Court could issue a decision in the case, New York City amended the law to permit travel with a handgun to a second home or a range outside the city. As a result, the Supreme

Court dismissed the case as moot in a per curiam opinion. Justice Kavanaugh wrote a short concurring opinion, and Justice Alito, joined by Justices Thomas and Gorsuch, dissented.

First Amendment

In *Agency for International Development v. Alliance for Open Society International*, 140 S. Ct. 2082 (2020), the Supreme Court addressed a question left open by its 2013 decision in the same case. In the prior decision, the court held that the First Amendment forbid the federal government from withholding certain federal funding from a private organization merely because the organization lacked an explicit policy opposing prostitution and sex trafficking. See 570 U.S. 205. In the follow-on case from this past term, the court considered whether its prior holding applied only to domestic organizations, or also to a domestic organization's foreign affiliates. The Second Circuit held that the prior holding applied to the foreign affiliates, but the Supreme Court reversed in a 5-3 decision authored by Justice Kavanaugh (Justice Kagan was recused). The court concluded that the foreign affiliates lacked First Amendment rights because they "operat[ed] abroad" and were "legally separate" from their domestic counterparts.

Justice Thomas wrote a concurring opinion, and Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sotomayor, dissented.

Claim Preclusion

In *Lucky Brand Dungarees v. Marcel Fashions Group*, 140 S. Ct. 1589 (2020), the court considered the question whether the doctrine of claim preclusion prevented a defendant from raising new defenses not raised in a previous suit between the same parties regarding similar subject matter. The Second Circuit held that principles of claim preclusion would bar the raising of such a defense, but the Supreme Court reversed. In a unanimous opinion written by Justice Sotomayor, the court held that the doctrine of claim preclusion did not apply on the particular facts before it because the previous suit and the later suit between the parties in the case did not share a "common nucleus of operative facts."

ERISA

In *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2019), the court was slated to consider the facts necessary to plead a breach of the duty of prudence by a fiduciary of a retirement or health plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). After

the court granted review, however, the parties focused their briefing on issues that the Second Circuit had not considered when the case was before it. For that reason, the Supreme Court issued a per curiam opinion vacating the Second Circuit's judgment and remanding the case for further proceedings. Justice Elena Kagan, joined by Justice Ginsburg, wrote a separate concurring opinion, as did Justice Gorsuch.

The 2020 Term

The Supreme Court will hear argument in 11 cases at the beginning of the 2020 term that were postponed due to the pandemic. One of those cases—*Tanzin v. Tanvir*—is on appeal from the Second Circuit, presenting the question whether the Religious Freedom Restoration Act of 1993 authorizes lawsuits seeking money damages against individual federal employees. The Supreme Court has not yet granted review in any other cases from the Second Circuit for October Term 2020.