



SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit In the Supreme Court

With the U.S. Supreme Court beginning its October Term 2021 in the coming months, we conduct our 37th annual review of the performance of the U.S. Court of Appeals for the Second Circuit in the Supreme Court during the past term.

On June 9, 2021, the Second Circuit experienced a devastating loss: Former Chief Judge Robert Katzmann lost his battle with pancreatic cancer. Judge Katzmann served on the Second Circuit since 1999. He was an intellectual giant and a staunch advocate of civic education. He was deeply committed to educating young people about America's constitutional system and ensuring legal representation for immigrants. The late Justice Ruth Bader Ginsburg—a



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close friend of Judge Katzmann's—described him as possessing the “personal qualities important to

sound judging: an inquiring mind, extraordinary diligence, patience, and a readiness to learn and listen.”

The Supreme Court also experienced a major shift in its composition this past term. With the passing of Justice Ginsburg, Justice Amy Coney Barrett was elevated to the court from the Seventh Circuit in late October 2020. Justice Barrett

| Circuit | Number | Affirmed | Reversed or Vacated | % Reversed or Vacated |
|-------------|--------|----------|---------------------|-----------------------|
| First | 1 | 0 | 1 | 100% |
| Second | 3 | 1 | 2 | 67% |
| Third | 6 | 2 | 4 | 67% |
| Fourth | 3 | 0 | 3 | 100% |
| Fifth | 7 | 2 | 5 | 71% |
| Sixth | 5 | 0 | 5 | 100% |
| Seventh | 1 | 0 | 1 | 100% |
| Eighth | 4 | 1 | 3 | 75% |
| Ninth | 16 | 1 | 15 | 94% |
| Tenth | 3 | 0 | 3 | 100% |
| Eleventh | 5 | 2 | 3 | 60% |
| D.C. | 4 | 0 | 4 | 100% |
| Federal | 3 | 0 | 3 | 100% |
| State Court | 4 | 3 | 1 | 25% |

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SOURCE: Stat Pack for the Supreme Court's 2020-21 Term, SCOTUSblog 24 (July 2, 2021). *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.

faced a politically charged confirmation process, with the division in the Senate reflecting the proximity of her nomination to the 2020 election and the change in the court's composition marked by her elevation. With Justice Barrett's confirmation, the Supreme Court is now comprised of six Republican appointees and three Democratic appointees.

The court's docket for the October Term 2020 included a number of high-profile issues, including the scope of the Voting Rights Act, the continued validity of the Affordable Care Act, and the propriety of Philadelphia's prohibition on discrimination on the basis of sexual orientation by adoption service providers. Yet many of the court's decisions were notably incremental, and two-thirds of its decisions were either unanimous or had a single dissenting Justice—more than a 20% increase from the prior term.

Overall, the court issued 65 merits decisions and two additional decisions in per curiam opinions granting emergency relief. Three of those decisions arose out of the Second Circuit. One was affirmed and two were reversed, resulting in a 67% reversal rate. *Stat Pack for the Supreme Court's 2020-21 Term*, SCOTUSblog 24 (July 2, 2021). That reversal rate places the Second Circuit tied for the second-lowest reversal rate of all federal courts

of appeals. Of the 61 cases from the federal courts of appeals that the Supreme Court reviewed, the court reversed 52 of them. Indeed, of the 16 cases decided from the Ninth Circuit, 15 were reversed. The table below compares the Second Circuit's performance during the October Term 2020 to those of its fellow federal courts of appeals and the state courts. We will next discuss the Supreme Court's three decisions from this past term that arose out of the Second Circuit.

Securities Class Actions

Goldman Sachs Group v. Arkansas Teacher Retirement System, 141 S. Ct. 1512 (2021), addressed two questions: whether a defendant in a securities class action can rely, at the class-certification stage, on the generic nature of the alleged misstatements to rebut the presumption of reliance for securities traded in an efficient market; and whether a defendant seeking to rebut that presumption, instead of the plaintiff invoking the presumption, has the ultimate burden of persuasion. A divided panel of the Second Circuit upheld the district court's decision to certify a class, declining in the process to consider the generic nature of the alleged misstatements when deciding whether price impact had been shown. (Our law firm, Paul, Weiss, Rifkind, Wharton & Garrison, represented Goldman Sachs

at the Supreme Court.)

In an opinion written by Justice Barrett, the Supreme Court unanimously held that a court must consider all evidence relevant to price impact at the class-certification stage, even if that evidence is also relevant to materiality. The court understood that conclusion to follow from its prior precedents, and it explained that the generic nature of a misrepresentation will often be "important" evidence of price impact because a more general statement is less likely to affect a security's price than a more specific one. In a 6-3 portion of the decision, the court further held that defendants bear the ultimate burden of persuasion when attempting to rebut the presumption of reliance. Because the court was unsure whether the Second Circuit properly considered the generic nature of the alleged misstatements, the court vacated the Second Circuit's judgment and remanded for further consideration. Justice Sotomayor dissented from that remedial holding.

Religious Freedom Restoration Act

In *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), the Supreme Court addressed the question whether a court may award damages against a federal officer sued in his or her individual capacity under the

Religious Freedom Restoration Act (RFRA). The Second Circuit held that RFRA's remedies provision encompasses money damages against federal officials.

The Supreme Court affirmed in a unanimous decision. In an opinion by Justice Thomas, the court began by explaining that RFRA permits the award of "appropriate relief against a government" and defines "government" to include officials acting under color of federal law. The court added that the language in RFRA parallels the language in §1983, which the court has long interpreted to permit monetary recovery against officials in their individual capacity. The court thus concluded that damages constituted "appropriate relief" in suits against federal officers under RFRA.

Free Exercise

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020), involved an emergency application filed by religious organizations for preliminary injunctive relief preventing the state of New York from enforcing an executive order limiting the capacity of religious services in certain areas during the COVID-19 pandemic. The plaintiffs argued that they were entitled to relief under the Free Exercise Clause because the order imposed more stringent restrictions on religious organizations than comparable secular organizations. The

district court declined to grant preliminary injunctive relief, and the Second Circuit denied the plaintiffs' request for an emergency injunction pending appeal.

In a *per curiam* decision released late the night before Thanksgiving, the court granted the requested relief in a 5-4 decision, holding that the plaintiffs were likely to succeed on the merits of their Free Exercise claim. The court concluded that some statements made by government officials in connection with the challenged order could be viewed as targeting the Orthodox Jewish community. But even setting that aside, the court concluded that the executive order was subject to strict scrutiny because it limited the capacity for churches and synagogues but placed no capacity restrictions on comparable secular organizations. While the majority concluded that "[s]temming the spread of COVID-19 is unquestionably a compelling interest" for purposes of strict scrutiny, the restrictions were not narrowly tailored to prevent the spread of the virus. Justice Gorsuch and Justice Kavanaugh each wrote separate concurring opinions.

Chief Justice Roberts dissented. In his view, emergency injunctive relief was no longer necessary because the capacity restrictions had since been revised and no

longer applied to the plaintiffs. Justice Breyer also wrote a dissenting opinion, joined by Justice Sotomayor and Justice Kagan. They agreed that emergency relief was no longer necessary but also were skeptical of the merits of the Free Exercise argument.

The 2021 Term

The Supreme Court currently has two merits cases arising out of the Second Circuit for the October 2021 Term. *New York State Rifle & Pistol Association v. Corlett* presents the question whether the state of New York's denial of concealed-carry licenses for self-defense violated the Second Amendment. *Thompson v. Clark* presents two questions: one regarding the elements necessary to prevail on a claim under §1983 for unreasonable seizure by legal process; the other concerning the allocation of the burden in determining whether the exigent-circumstances exception to the Fourth Amendment's warrant requirement applies in a given case. The Supreme Court also granted review in *Department of Homeland Security v. New York* to assess the validity of the Trump Administration's 2019 public-charge rule, but the Biden Administration subsequently withdrew the petition.