



GIBSON DUNN

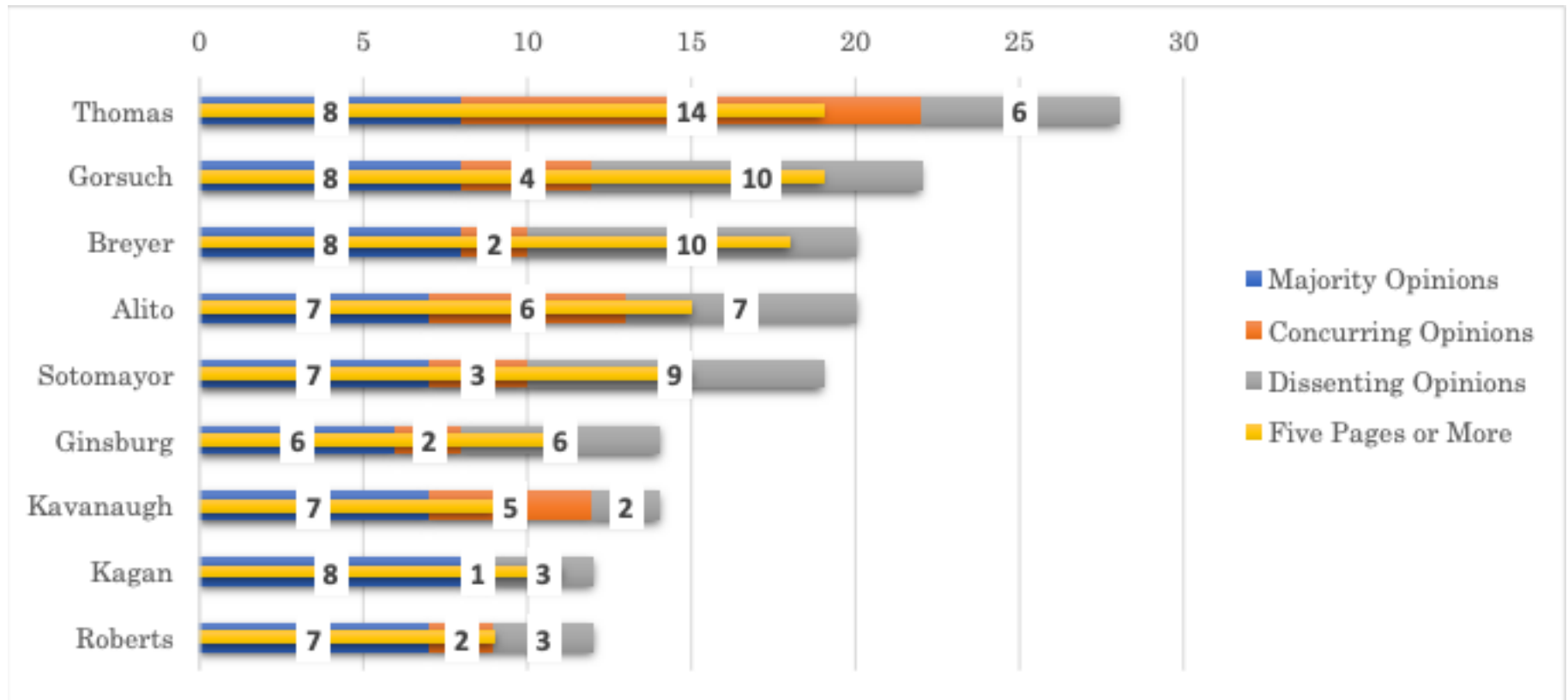
OT2018 SCOTUS Update  
Blaine H. Evanson

July 18, 2019

# The Data

October Term 2018							
	Number	Percent	Decided	Aff'd	Rev'd	Aff'd %	Rev'd %
CA1	2	3%	2	1	1	50%	50%
CA2	5	7%	5	2	3	40%	60%
CA3	3	4%	3	1	2	33.33%	66.67%
CA4	4	5%	4	2	2	50%	50%
CA5	4	5%	4	2	2	50%	50%
CA6	7	9%	7	4	3	57.14%	42.86%
CA7	1	1%	1	0	1	0%	100%
CA8	4	5%	4	1	3	25%	75%
CA9	14	19%	14	2	12	14.29%	85.71%
CA10	2	4%	2	1	1	50%	50%
CA11	7	9%	7	4	3	57.14%	42.86%
CA DC	3	4%	3	2	1	66.67%	33.33%
CA Fed	4	5%	4	2	2	50%	50%
State	11	15%	11	2	9	18%	82%
Dist. Court	3	4%	3	1	2	33.33%	66.67%
Original	0	0%	-	-	-	-	-
	<b>74</b>	<b>100%</b>	<b>74</b>	<b>27</b>	<b>47</b>	<b>36.49%</b>	<b>63.51%</b>

# The Data (Cont'd)



## The Data (Cont'd)

<b>Average Number of Questions Per Argument</b>	
	<b>Average</b>
Sotomayor	23.9
Breyer	18.8
Kavanaugh	15.5
Kagan	15.2
Gorsuch	14.6
Roberts	13.6
Alito	13.4
Ginsburg	8.3
Thomas	0.0



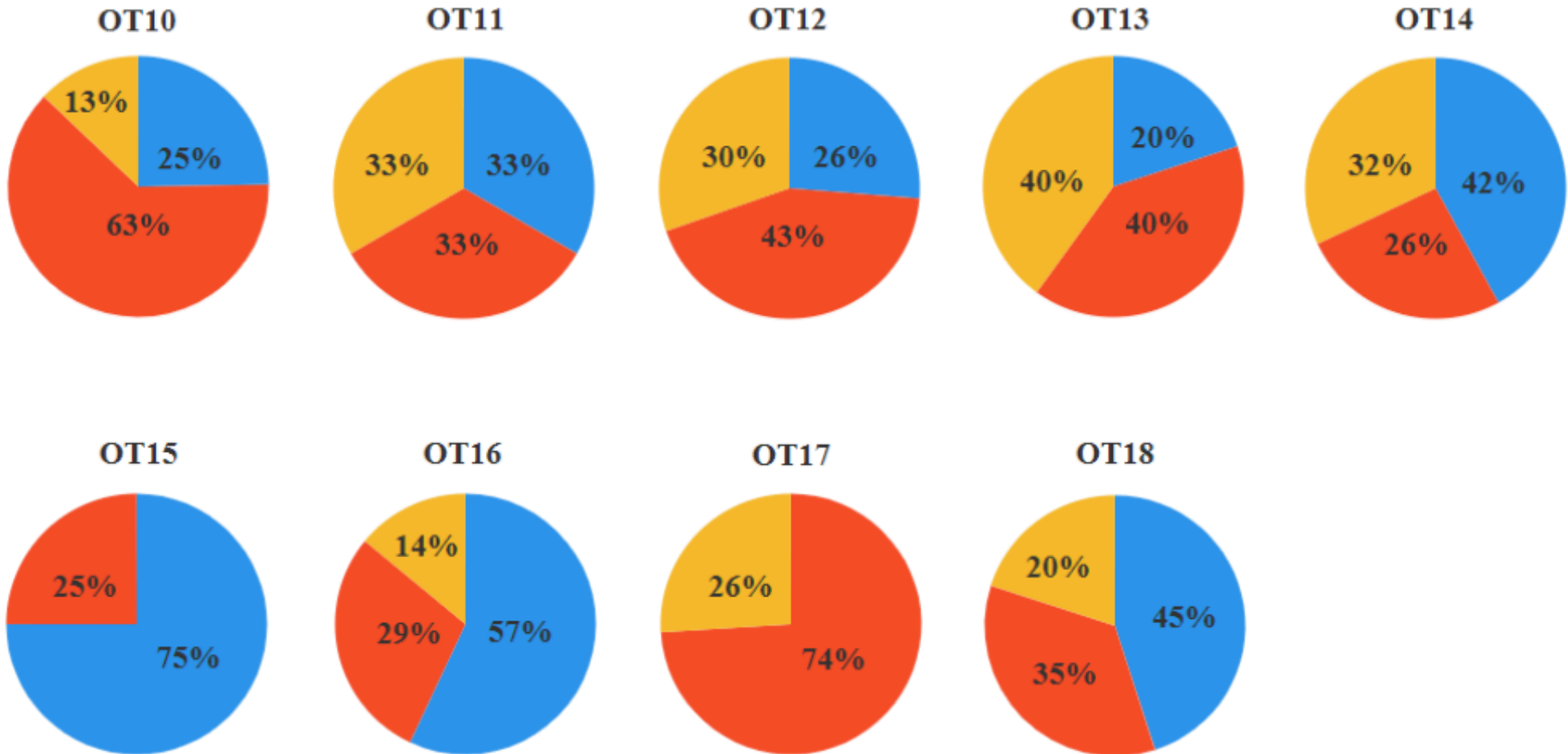
# The Data (Cont'd)

9-0 28 (39%)	8-1 5 (7%)	7-2 8 (11%)	6-3 11 (15%)	5-4 20 (28%)	
<i>Mt. Lemmon (8-0)</i>	<i>Jam (7-1)</i>	<i>BNSF Railway</i>	<i>Moore (PC)</i>	<i>Stokeling</i>	
<i>Weyerhaeuser (8-0)</i>	<i>Frank (PC)</i>	<i>Lorenzo (6-2)</i>	<i>Garza</i>	<i>Madison (5-3)</i>	
<i>Stitt</i>	<i>Harrison</i>	<i>Box (PC)</i>	<i>Air &amp; Liquid</i>	<i>Cougar Den</i>	
<i>Emmons (PC)</i>	<i>Mission Prd.</i>	<i>Gamble</i>	<i>Biestek</i>	<i>Preap</i>	
<i>Hill (PC)</i>	<i>Allina (7-1)</i>	<i>Am. Legion</i>	<i>Nieves</i>	<i>Bucklew</i>	
<i>Culbertson</i>		<i>Rehaif</i>	<i>Return Mail</i>	<i>Lamps Plus</i>	
<i>Schein</i>		<i>Flowers</i>	<i>Va. Uranium</i>	<i>Hyatt</i>	
<i>New Prime (8-0)</i>		<i>Tenn. Wine</i>	<i>McDonough</i>	<i>Apple</i>	
<i>Helsinn</i>			<i>Dutra</i>	<i>Herrera</i>	
<i>Timbs</i>			<i>Brunetti</i>	<i>Home Depot</i>	
<i>Dawson</i>			<i>Food Mrkt.</i>	<i>Mont</i>	
<i>Rizo (PC)</i>				<i>Bethune</i>	
<i>Nutraceutical</i>				<i>Manhattan</i>	
<i>Fourth Est.</i>				<i>Gundy (5-3)</i>	
<i>Rimini</i>				<i>Knick</i>	
<i>Obduskey</i>				<i>Davis</i>	
<i>Sturgeon</i>				<i>Haymond</i>	
<i>Thacker</i>				<i>Rucho</i>	
<i>Cochise</i>				<i>Commerce</i>	
<i>Merck</i>				<i>Mitchell</i>	
<i>Smith</i>					
<i>Fort Bend</i>					
<i>Taggart</i>					
<i>Parker</i>					
<i>Quarles</i>					
<i>PDR</i>					
<i>Kaestner Tr.</i>					
<i>Kisor</i>					

Past Terms					
	9-0	8-1	7-2	6-3	5-4
<b>OT10</b>	46%	12%	15%	5%	20%
<b>OT11</b>	45%	11%	8%	17%	20%
<b>OT12</b>	49%	5%	9%	8%	29%
<b>OT13</b>	66%	3%	10%	8%	14%
<b>OT14</b>	41%	7%	12%	15%	26%
<b>OT15</b>	48%	11%	20%	11%	5%
<b>OT16</b>	59%	9%	17%	4%	10%
<b>OT17</b>	39%	8%	15%	10%	26%
<b>Avg.</b>	49%	8%	13%	10%	19%

# The Data (Cont'd)



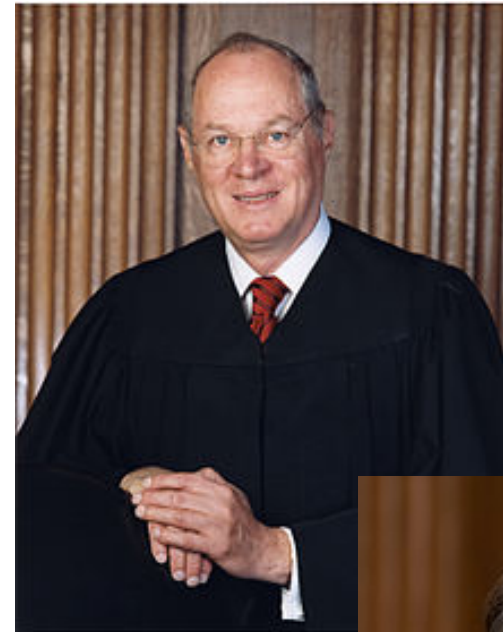
# The Data (Cont'd)

## Alignment of the Majority

Majority	20	Cases
Roberts, Thomas, Alito, Gorsuch, Kavanaugh	7	<i>Preap, Bucklew, Lamps Plus, Hyatt, Manhattan, Knick, Rucho</i>
Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch	4	<i>Cougar Den, Herrera, Davis, Haymond</i>
Roberts, Ginsburg, Breyer, Sotomayor, Kagan	2	<i>Madison, Commerce</i>
Roberts, Thomas, Ginsburg, Alito, Kavanaugh	1	<i>Mont</i>
Roberts, Thomas, Breyer, Alito, Kavanaugh	1	<i>Mitchell</i>
Thomas, Ginsburg, Breyer, Sotomayor, Kagan	1	<i>Home Depot</i>
Thomas, Ginsburg, Sotomayor, Kagan, Gorsuch	1	<i>Bethune</i>
Thomas, Breyer, Alito, Gorsuch, Kavanaugh	1	<i>Stokeling</i>
Ginsburg, Breyer, Alito, Sotomayor, Kagan	1	<i>Gundy</i>
Ginsburg, Breyer, Sotomayor, Kagan, Kavanaugh	1	<i>Apple</i>

Term	Number of 5-4 Opinions	Percentage of Total Opinions	Percentage of 5-4 Split Ideological *	Conservative Victory * (Percentage of Ideological)	Conservative Victory (Percentage of All 5-4)	Number of Different Alignments
OT05	11	12%	73%	53%	45%	7
OT06	24	33%	79%	68%	54%	6
OT07	12	17%	67%	50%	33%	6
OT08	23	29%	70%	69%	48%	7
OT09	16	19%	69%	73%	50%	7
OT10	16	20%	88%	71%	63%	4
OT11	15	20%	67%	50%	33%	7
OT12	23	29%	70%	63%	43%	7
OT13	10	14%	60%	67%	40%	7
OT14	19	26%	68%	38%	26%	7
OT15	4	5%	100%	25%	25%	2
OT16	7	10%	86%	33%	29%	3
OT17	19	26%	74%	100%	74%	5
OT18	20	28%	80%	44%	35%	10
<b>Average</b>	16	21%	75%	57%	43%	6

# New Justices





# The Chief



# Justice Kavanaugh



# October 2018 Term: Key Cases of Interest

## Arbitration and Class Actions

- *Henry Schein, Inc. v. Archer & White Sales, Inc.*
- *New Prime Inc. v. Oliveira*
- *Lamps Plus, Inc. v. Varela*
- *Frank v. Gaos*

## Intellectual Property

- *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*
- *Rimini Street, Inc. v. Oracle USA, Inc.*
- *Helsinn Healthcare S.A. v. Teva Pharmaceuticals*
- *Iancu v. Brunetti*

# October 2018 Term: Key Cases of Interest (Cont'd)

## Administrative Law

- *Azar v. Allina Health Servs.*
- *Gundy v. United States*
- *Kisor v. Wilkie*

## Constitutional Law

- *The American Legion v. American Humanist Association*
- *Box v. Planned Parenthood of Indiana and Kentucky Inc.*
- *Rucho v. Common Cause*
- *Department of Commerce v. New York*



# Arbitration

## *Henry Schein, Inc. v. Archer & White Sales, Inc.*

- **Issue:** Whether arbitration may be denied where the basis for asserting arbitration is “wholly groundless.”
- **Holding:** The “wholly groundless exception” is inconsistent with the Federal Arbitration Act. Courts must interpret the Act as written, and it contains no such exception.

# Arbitration

## *New Prime Inc. v. Oliveira*

### Issues:

- (1) Whether a dispute over the Federal Arbitration Act's section one exemption is an arbitrability issue that can be delegated to an arbitrator.
- (2) Whether the section one exemption for "contracts of employment" applies to independent contractor agreements.

### Holdings:

- (1) Given the statute's terms and sequencing, a court should decide for itself whether section one's "contracts of employment" exclusion applies before ordering arbitration.
- (2) Because the Act's term "contract of employment" refers to any agreement to perform work, Mr. Oliveira's agreement with New Prime falls within section one's exception.



# Arbitration

## *Lamps Plus, Inc. v. Varela*

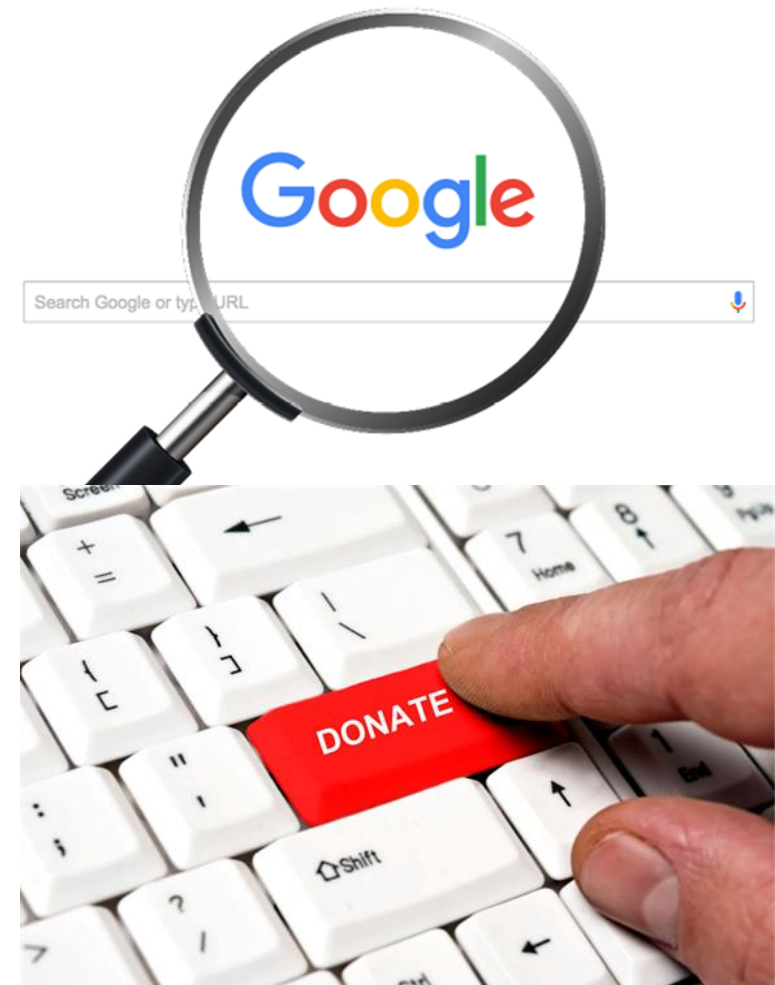


- **Issue:** Whether, consistent with the Federal Arbitration Act, an ambiguous agreement can provide the necessary “contractual basis” for compelling class arbitration.
- **Holding:** Courts may not infer from an ambiguous agreement that the parties have consented to arbitrate on a classwide basis. The doctrine of contra proferentem cannot substitute for the requisite affirmative contractual basis for concluding that the parties agreed to class arbitration.

# Class Actions

## *Frank v. Gaos*

- **Issue:** Whether a class action where all of the settlement funds are distributed to “cy pres” beneficiaries is fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e).
- Plaintiffs alleged that Google’s privacy practices violated the Stored Communications Act.
- Over 129 million people were in the class, which was settled for \$8.5 million.
- **Holding:** The case is remanded for the courts below to address the plaintiffs’ Article III standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).





# Intellectual Property

## *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*

- **Issue:** Under section 411(a) of the Copyright Act, has “registration been made” when the claimant submits his or her application, or has “registration been made” only after the Copyright Office reviews and registers the copyright?
- **Holding:** Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.



# Intellectual Property

## *Rimini Street, Inc. v. Oracle USA, Inc.*

- **Issue:** Whether the Copyright Act's reference to "full costs" authorizes a court to award litigation expenses beyond the six categories of "costs" specified by Congress in the general costs statutes.
- **Holding:** A statute awarding "costs" will not be construed as authorizing an award of litigation expenses beyond the six categories listed in sections 1821 and 1920, absent an explicit statutory instruction to that effect.

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# Intellectual Property

## *Helsinn Healthcare S.A. v. Teva Pharmaceuticals*

- **Issue:** Whether the sale of an invention to a third party who is contractually obligated to keep the invention confidential places the invention “on sale” within the meaning of section 102(a).
- **Holding:** A commercial sale to a third party who is required to keep the invention confidential may place the invention “on sale” under the Leahy-Smith America Invents Act.



# Intellectual Property/First Amendment

## *Iancu v. Brunetti*

- **Issue:** Whether the Lanham Act's prohibition on registering "immoral or scandalous" trademarks violates the First Amendment.
- **Holding:** The Lanham Act's prohibition on registration of "immoral" or scandalous" trademarks violates the First Amendment.



# Administrative Law

## *Azar v. Allina Health Services*

- **Issue:** Whether the Administrative Procedure Act and Medicare Act require the Department of Health and Human Services to conduct notice-and-comment rulemaking before implementing a rule that changes its Medicare reimbursement formula.
- **Holding:** Because the Department of Health and Human Services neglected its statutory notice-and-comment obligations when it revealed the new policy, its policy must be vacated.



# Administrative Law

## *Gundy v. United States*

- **Issue:** Whether the Sex Offender Registration and Notification Act (SORNA) unlawfully delegates authority to the U.S. Attorney General to impose the law's registration requirements upon sex offenders who were convicted before the statute was enacted.
- **Holding:** SORNA's registration requirements do not constitute an unconstitutional delegation of legislative authority.



Only twice in the country's history has the Court found a delegation excessive.



# Administrative Law

## *Kisor v. Wilkie*

- **Issue:** Whether the Supreme Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.
- **Holding:** *Auer* and *Seminole Rock* are not overruled, and courts will continue giving deference to an agency's reasonable reading of its own *genuinely* ambiguous regulations.



# Constitutional Law

## *Box v. Planned Parenthood*

- **Issues:** 1), Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains; and 2) whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.
- **Holding:** Indiana's law relating to the disposition of fetal remains by abortion providers passes rational basis review; certiorari is denied on the question whether the state may bar the knowing provision of sex-, race- or disability-selective abortions by abortion providers.

# Constitutional Law

## *Rucho v. Common Cause*

- **Issue:** Whether the test for partisan vote dilution claims set forth by the district court—requiring proof of (1) the intent to subordinate adherents of one party and entrench a rival party in power; (2) the effect of such subordination and entrenchment; and (3) the lack of a legitimate justification for such subordination and entrenchment—is judicially discernible and manageable?
- **Holding:** Partisan gerrymandering claims present political questions beyond the reach of the federal courts.



# Constitutional Law

## *The American Legion v. American Humanist Association*

- **Issue:** Whether a 93-year-old memorial to the fallen of World War I is an unconstitutional establishment of religion, in violation of the First Amendment, and whether the expenditure of funds for the routine upkeep and maintenance of the memorial amounts to an excessive entanglement with religion in violation of the First Amendment.
- **Holding:** A forty-foot cross honoring World War I veterans on public land in Maryland does not violate Constitution's bar on establishing religion.



# Constitutional/Administrative Law

## *Department of Commerce v. New York*

- **Issue:** Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act.
- **Holding:** The Secretary of the Department of Commerce did not violate the enumeration clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire, but the district court was warranted in remanding the case back to the agency where the evidence tells a story that does not match the secretary's explanation for his decision.

# October 2019 Term: Key Cases of Interest

## *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*

- **Issue:** Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

## *Comcast v. National Association of African American-Owned Media*

- **Issue:** Does a claim of race discrimination under 42 U.S.C. § 1981 require that the plaintiff show but-for causation, or only that race is a motivating factor?

## *Bostock v. Clayton County, Georgia*

- **Issue:** Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act.



## October 2019 Term: Key Cases of Interest (Cont'd)

### *New York State Rifle & Pistol Association Inc. v. City of New York, New York*

- **Issue:** Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

### *Department of Homeland Security v. Casa de Maryland York*

- **Issue:** Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is lawful.

### *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*

- **Issue:** Whether the appointments clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

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