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Supreme Court October Term 2017: A Preview of Select Cases

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Summary

On October 2, 2017, the Supreme Court is to begin its new term. While the Court issued a number of notable decisions during its last full term, Court watchers have largely agreed that, at least compared to recent terms, the Court's October 2016 term was diminished both with regard to volume and content. With the Court already accepting over 30 cases for its next term, many of which raise deep and difficult questions in various areas of law, the October 2017 Supreme Court term could be considerably different. The next Court term has the potential to be one of the most consequential in years.

A full discussion of every case that the Court will hear during the October 2017 term is beyond the scope of this report (indeed, the Court has to grant certiorari to the majority of cases that will likely make up its docket for the upcoming year). But **Table 1** provides brief summaries of the cases the Court has already agreed to hear during the October 2017 term, and many of the cases on the Court's docket are discussed in existing or forthcoming CRS products. The majority of this report highlights four notable cases of the new term that could impact the work of Congress: (1) *Carpenter v. United States*; (2) *Christie v. National Collegiate Athletic Association (NCAA)*; (3) *Gill v. Whitford*; and (4) *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

In a case that could decide whether cell phone users have a protected privacy interest in the trove of location data held by their wireless carriers, the Court in *Carpenter v. United States* will examine whether the government's warrantless collection of historical cell phone location data is constrained by the Fourth Amendment of the Constitution. In *Christie v. NCAA,* the Court will consider whether a federal statute understood to bar the partial repeal of New Jersey's sports gambling prohibition runs afoul of the Tenth Amendment's anti-commandeering principle. In a case that could significantly impact how congressional and state legislative redistricting maps are drawn, *Gill v. Whitford* will examine whether a state's redistricting map constitutes an unconstitutional partisan gerrymander. Finally, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court will examine a dispute that weighs states' interests in enforcing their civil rights laws against the interests of those who object to same-sex marriage on religious grounds. The discussion that follows of each of these cases (1) provides background information; (2) summarizes the arguments that were or are likely to be presented to the Court; and (3) examines the implications that the Court's ruling could have for Congress, including broader ramifications for the jurisprudence in a given area of law.

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The makeup of the Court appears to have directly affected the nature of the Court's most recently completed term. From the beginning of the term until April 2017, the Court was staffed by eight, rather than nine, Justices. As a result, the Court necessarily lacked an additional vote that could have allowed for additional cases to be granted for review[9] or broken a tie in a relatively close

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[1] *See* CRS Report R44949, *Supreme Court October Term 2016: A Review of Select Major Rulings*, coordinated by Andrew Nolan (providing an overview of the major cases decided during the October 2016 Supreme Court term).

[2] *See, e.g.*, Richard Wolf, *For Supreme Court, the Term That Just Ended Was the Calm Before the Storm*, USA TODAY (June 28, 2017), https://www.usatoday.com/story/news/politics/2017/06/28/supreme-court-term-just-ended-calm-before-storm/103229942/ (describing the October 2016 term as a "sleepy term of cases and controversies"); Todd Ruger, *Next Supreme Court Term Stacked With Major Cases*, ROLL CALL (June 27, 2017), https://www.rollcall.com/news/politics/next-supreme-court-term-stacked-major-cases ("The Supreme Court ended its current term this week without deciding the kinds of blockbuster issues that usually draw demonstrators to its plaza at the end of June.... "); Jonathan H. Adler, *The Supreme Court's 2016-2017 Term—"The Calm Before the Storm,"* WASH. POST (June 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/27/the-supreme-courts-2016-2017-term-the-calm-before-the-storm/?utm_term=.7afcbd441b4e.

[3] *See* SCOTUSBLOG, STAT PACK: OCTOBER 2016 TERM 1 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf.

[4] Washington University in St. Louis School of Law's Supreme Court Database indicates that the last term in which the Court issued fewer than 70 opinions was 1864, when the Court issued 59 opinions. *See* THE SUPREME COURT DATABASE, WASHINGTON UNIVERSITY LAW, http://scdb.wustl.edu/data.php?s=6 (last accessed September 15, 2017).

[5] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). For more on this decision, see CRS Report R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized*. The Court during the October 2016 term did issue an opinion holding that *Obergefell* required the invalidation of an Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent. *See* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (per curiam). *Pavan*, however, was a five-page, unsigned opinion issued without oral argument.

[6] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214-15 (2016). For more on this decision, see CRS Legal Sidebar WSLG1609, *Supreme Court Upholds University of Texas's Affirmative Action Plan*.

[7] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016). For more on this decision, see CRS Legal Sidebar WSLG1610, *Supreme Court Strikes Down Texas Abortion Requirements*, by Jon O. Shimabukuro.

[8] *See, e.g.*, Geoffrey Lou Guray, *The Supreme Court Just Had a Quiet Term. These High-Profile Cases are About to Change That.*, PBS (July 3, 2017), http://www.pbs.org/newshour/updates/supreme-court-just-quiet-term-high-profile-cases-change/ ("Nearly every single Supreme Court term in recent memory has had at least one-headline grabbing decision. That changed in the court's latest term, when it kept high-profile legal disputes off the docket."); Joseph P. Williams, *The Supreme Court Term: No Big Blockbusters, but Plenty of Work*, U.S. NEWS & WORLD REPORT (June 19, 2017), https://www.usnews.com/news/national-news/articles/2017-06-19/what-did-the-supreme-court-do-in-2016-2017 ("The justices didn't hand down any blockbuster rulings that reshaped the social or political landscape.").

[9] Under the "rule of four," the vote of four Justices for the Supreme Court is generally required to hear a case. *See* Bailey v. Central Vt. Ry., 319 U.S. 350, 358-59 (1943) (Stone, C.J., concurring) (noting that the Court has adhered to the "long standing practice of granting certiorari upon the affirmative vote of four Justices"); Harris v. Pennsylvania R.R. Co., 361 U.S. 15, 18 (1959) (Douglas, J., concurring) ("[T]he practice of the Court in allowing four out of nine votes to control the certiorari docket is well established and of long duration."). The Court opted not to grant review in several closely watched cases during the October 2016 term. *See, e.g.*, Arthur v. Dunn, 137 S. Ct. 725, 734 (2017)

case.[10] And, in recent talks, Justices Samuel Alito and Elena Kagan both independently intimated that the eight-member Supreme Court actively worked during the past term to issue rulings in which the Court could find common ground to avoid 4-4 splits.[11] The Court's efforts toward compromise and consensus during the October 2016 term may be evidenced in the number of unanimous rulings from the Court over the past year, with all of the Justices agreeing to the final judgment of the Court in 59% of the opinions issued during the October 2016 term.[12]

The open question is whether the Court—now with a full complement of Justices with Justice Neil Gorsuch's appointment in April 2017—will continue to find common ground at the same rate it did during the past term. With the Court already accepting over 30 cases,[13] many of which raise difficult questions in various areas of law, the October 2017 term has the potential to be one of the most consequential in years.[14] For example, the Court has already agreed to hear:

- a major elections law case exploring the scope of a state's authority under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002 to maintain voter rolls and remove inactive voters;[15]

(Sotomayor, J., dissenting from the denial of certiorari) (arguing that the Court should have granted certiorari in challenge that the State of Alabama's method of execution was cruel and unusual under the Eighth Amendment); Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., statement respecting denial of certiorari) (noting that a case challenging Texas's voter identification law would be "better suited for certiorari review" at a later time); *see generally* Robert Barnes, *Supreme Court Declines to Hear Immigration and Redskins Cases*, WASH. POST (October 3, 2016) https://www.washingtonpost.com/politics/courts_law/supreme-court-declines-to-hear-immigration-and-redskins-cases/2016/10/03/142eeb60-8973-11e6-b24f-a7f89eb68887_story.html?utm_term=.3f2ba52986f9 (noting that the Court declined to hear appeals respecting a number of issues, including on immigration and campaign finance law).

[10] In two highly anticipated immigration cases, the eight-Member court was apparently deadlocked, as the cases were rescheduled for argument for the October 2017 term. In *Jennings v. Rodriguez*, No. 15-1204, *restored to calendar for re-argument*, June 26, 2017, the Court is asked to review immigration authorities' practice of detaining certain categories of aliens while seeking orders of removal against them. In *Sessions v. Dimaya*, No. 15-1498, *restored to calendar for re-argument*, June 26, 2017, the Court will consider whether 18 U.S.C. § 16(b), as incorporated into provisions of the Immigration and Nationality Act (INA) concerning alien eligibility for removal from the United States, is unconstitutionally vague.

[11] *See* Pat Schneider, *Justice Elena Kagan said short-handed court talked more to reach consensus*, CAP TIMES (September 9, 2017), http://host.madison.com/ct/news/local/education/university/justice-elena-kagan-said-short-handed-court-talked-more-to/article_e705fc71-2223-5125-a814-8d192c80d057.html (quoting Justice Elena Kagan as saying that "if members decided issues too quickly along broad ideological lines, there would be a lot of split 4-4 decisions that would leave lower court rulings intact" and, as a result, "[t]he only way to get un-split was to keep talking and find a way to reframe the question and find common ground."); Jess Bravin, *With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc*, WALL STREET J. (April 21, 2017), https://blogs.wsj.com/washwire/2017/04/21/with-court-at-full-strength-alito-foresees-more-aggressive-conservative-majority/ (quoting Justice Samuel Alito that "[h]aving eight [Justices] ... probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases than we would have issued otherwise, but as of this Monday we were back to an odd number").

[12] *See* SCOTUSBLOG, STAT PACK: OCTOBER 2016 TERM 16 (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf. This feat has been surpassed only one other time during the Roberts Court era—the October 2013 term (when the Court unanimously agreed on a final judgment in 66% of cases). *Id.*

[13] For a description of the cases the Court has already accepted for this term, see **Table 1**. This table is current as of the date of this report, which predates the Court's "long conference" on September 25, 2017, in which the Court traditionally adds several more cases to its docket.

[14] *See* Hon. Ruth Bader Ginsburg, *Supreme Court Justice Ruth Bader Ginsburg Discusses the 2015-16 Term*, DUKE LAW (Aug. 4, 2016), https://law.duke.edu/video/supreme-court-justice-ruth-bader-ginsburg-discusses-2015-16-term/ ("We can safely predict that next term will be a momentous one."); John M. Greabe, *SCOTUS's 2016-17 Term: The Calm Before the Storm?*, CONCORD MONITOR (July 2, 2017) at D1, D4 ("All of these cases could yield blockbuster rulings by a deeply divided court.").

[15] *See* Husted v. Randolph Inst., 137 S. Ct. 2188 (2017).

- a follow-up to a closely watched 2013 case[16] exploring whether a foreign corporation can be sued under the Alien Tort Statute;[17]
- a case on whether President Trump's March 6, 2017, executive order limiting certain foreign nationals and refugees from traveling to the United States violates the Establishment Clause of the First Amendment and exceeds the President's authority to restrict the entry of aliens;[18] and
- a group of consolidated cases examining whether agreements to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, are enforceable under the Federal Arbitration Act and the National Labor Relations Act.[19]

A full discussion of these cases and others that the Supreme Court will hear during its upcoming term is beyond the scope of this report (indeed, the Court has to grant certiorari to the majority of cases that will likely make up its docket for the upcoming year). But **Table 1** provides brief summaries of the cases the Court has already agreed to hear during the October 2017 term, and many of the cases on the Court's docket are discussed in existing or forthcoming CRS products. The majority of this report highlights four of the notable cases of the new term that could impact the work of Congress: (1) *Carpenter v. United States*, which examines the limits the Fourth Amendment imposes on the warrantless collection of the historical cell phone location records of a criminal suspect; (2) *Christie v. National Collegiate Athletic Association (NCAA)*, a case exploring whether Congress, by prohibiting a state from partially repealing a state law, impermissibly commandeers the powers of the state; (3) *Gill v. Whitford*, which considers when a state's redistricting plan amounts to impermissible partisan gerrymandering; and (4) *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which asks whether a baker has a First Amendment right to decline to make cakes for same-sex weddings. Each case is addressed in a separate section below[20] that (1) provides background information on the case; (2) summarizes the arguments that were or are likely to be presented to the Court in each case; and (3) examines the implications that the Court's ruling could have for Congress, including broader ramifications for the jurisprudence in a given area of law.

Fourth Amendment: *Carpenter v. United States*

Carpenter v. United States raises the question whether the government's collection of historical cell phone location data without a warrant violates the Fourth Amendment of the Constitution. The case could decide whether cell phone users have a protected Fourth Amendment privacy interest in the trove of location data held by their wireless carriers.

The Fourth Amendment prohibits "unreasonable searches and seizures,"[21] which generally requires the government to obtain a warrant before conducting a "search."[22] A "search" occurs if a

[16] *See* Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108 (2013).

[17] *See* Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (2017).

[18] *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

[19] *See* Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017).

[20] These cases will be the subject of a seminar at CRS's Continuing Legal Education series, the Federal Law Update. For more information, see CRS, FEDERAL LAW UPDATE: FALL 2017, http://www.crs.gov/Events/Details/16684c3b-cd8c-e711-80fb-005056ab2cfe.

[21] U.S. CONST. amend. IV.

[22] Birchfield v. North Dakota, 136 S. Ct. 2160, 2173 (2016).

government investigative measure violates a person's reasonable expectation of privacy.[23] Thus, as the Supreme Court held in the landmark 1967 case, *Katz v. United States*, law enforcement officers contravene the Fourth Amendment if they attach a listening and recording device to a public telephone booth to listen to a suspect's conversations without a warrant.[24] Importantly, however, the Supreme Court, under what is known as the third-party doctrine, has held that no reasonable expectation of privacy exists as to information that a person discloses voluntarily to third parties.[25] Thus, the Court held in a 1976 case, *United States v. Miller*, that police do not violate the Fourth Amendment by obtaining microfilms of a suspect's account statements and deposit slips from his bank without a warrant because the suspect has voluntarily disclosed the information contained in those documents to the bank.[26] Similarly, the Court determined in a 1979 case, *Smith v. Maryland*, that police do not violate the Fourth Amendment if, without a warrant, they ask a telephone company to install a "pen register" in its central office to record the phone numbers dialed from a suspect's home phone.[27] The Court reasoned in *Smith* that because the suspect voluntarily conveys the numbers to the phone company when he dials them, he cannot reasonably expect such information to remain secret.[28]

Carpenter poses questions about how the third-party doctrine applies to more modern technology. The petitioner in *Carpenter* was convicted of a series of robberies.[29] At trial, to tie him to the general location where the robberies took place, the government presented data about the towers to which his cell phone connected during calls made around the time of the robberies.[30] Such data is known as cell site location information (CSLI). Instead of acquiring a warrant supported by probable cause, the government obtained Carpenter's CSLI from his wireless carrier under Section 2703(d) of the Stored Communications Act (SCA) of 1986.[31] That provision allows the government to obtain a court order for wire or electronic communication records by offering "specific and articulable facts showing that there are reasonable grounds to believe" that the records "are relevant and material to an ongoing investigation."[32] The probable cause needed for a warrant, in contrast, imposes a higher standard on the government.[33] Carpenter moved to exclude the CSLI evidence on Fourth Amendment grounds, but the trial court denied the motion and the federal Court of Appeals for the Sixth Circuit (Sixth Circuit) affirmed.[34]

In Carpenter's case, the Sixth Circuit, relying on the third-party doctrine, held that the government's warrantless collection of the historical CSLI did not constitute a Fourth Amendment search.[35] Just as a person does not have a protected privacy interest in dialed phone numbers, the circuit court reasoned, Carpenter did not have a protected interest in the location

[23] *See* United States v. Jones, 565 U.S. 400, 406 (2012).

[24] 389 U.S. 347, 359 (1967); *id*. at 360-61 (Harlan, J., concurring).

[25] Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

[26] United States v. Miller, 425 U.S. 435, 442-43 (1976).

[27] Smith, 442 U.S. at 744-45.

[28] *Id*. at 744.

[29] United States v. Carpenter, 819 F.3d 880, 885 (6th Cir. 2016).

[30] *Id*.

[31] 18 U.S.C. § 2703(d) (2009); *Carpenter*, 819 F.3d at 884.

[32] 18 U.S.C. § 2703(d).

[33] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (probable cause requires "a fair probability that contraband or evidence of a crime will be found in a particular place").

[34] *Carpenter*, 819 F.3d at 884.

[35] *Id*. at 887-88.

data that his phone transmitted to his carrier.[36] The court framed the distinction as one between the "content of personal communications" and the "routing information" that transmission of those communications reveals: a reasonable expectation of privacy generally exists as to the first, but not the second type of information.[37]

The Sixth Circuit decision aligns with decisions of other federal appellate courts rejecting Fourth Amendment challenges to the warrantless collection of historical CSLI.[38] But some judges on these courts, while accepting that the Supreme Court's third-party cases require this outcome, have nonetheless voiced doubts as to whether cases about phone booths, pen registers, and microfilm provide an adequate framework for analyzing privacy expectations in the smartphone era.[39] One of the Sixth Circuit judges who decided *Carpenter* went even further. In a concurring opinion expressing disapproval of "the nature of the tests [courts] apply in this rapidly changing area of technology," the judge declined to apply the third-party cases.[40] Instead, she declined to join the majority opinion holding that no Fourth Amendment search had occurred and, instead, voted to uphold Carpenter's convictions on an independent ground.[41]

Ultimately, only the Supreme Court can determine whether its third-party disclosure precedents should be retained, discarded, or modified to account for technological developments. The Court has considered Fourth Amendment cases about searches in the context of more modern technology in recent years, but it has largely avoided making major doctrinal pronouncements. In perhaps the most relevant case, *United States v. Jones*, the Court held that police violated the Fourth Amendment by attaching a Global Positioning System (GPS) tracking device to a suspect's vehicle to track his movements for 28 days.[42] The majority opinion did not apply the "reasonable expectation of privacy" test. Instead, it made a much more limited holding under a theory of physical trespass: that a Fourth Amendment violation occurred when the police physically attached a GPS device to a vehicle without the suspect's consent.[43] However, five Justices authored or joined concurring opinions concluding (in the case of four Justices) or

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[36] *Id*.

[37] *Id*. at 888 ("[A]ny cellphone user who has seen her phone's signal strength fluctuate must know that, when she places or receives a call, her phone 'exposes' its location to the nearest cell tower and thus to the company that operates the tower.").

[38] United States v. Graham, 824 F.3d 421, 424-25 (4th Cir. 2016) (en banc); United States v. Davis, 785 F.3d 498, 499 (11th Cir. 2015); *In re* Application of U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013); *see also* United States v. Stimler, 864 F.3d 253, 263, 266-67 (3d Cir. 2017) (holding that third-party doctrine does not apply to the transmission of CSLI, which is not "truly voluntary," but that individuals nonetheless lack a reasonable expectation of privacy in CSLI due to the data's "inexact nature"). All of these cases, like *Carpenter*, concern the collection of historical CSLI. Different issues arise when the government requests so-called "prospective" CSLI to track a suspect in real time. *See* United States v. Wallace,—F.3d—, 2017 WL 3304087, at *1, (5th Cir. 2017) ("Whether obtaining [prospective CSLI] constitutes a search within the meaning of the Fourth Amendment is still an open question in this Circuit.").

[39] *Davis*, 785 F.3d at 525 (Rosenbaum, J., concurring) ("In our time, unless a person is willing to live 'off the grid,' it is nearly impossible to avoid disclosing the most personal of information to third-party service providers.... Since we are not the Supreme Court and the third-party doctrine continues to exist and to be good law at this time, though, we must apply the third-party doctrine where appropriate."); *Graham*, 824 F.3d at 436 ("We recognize the appeal—if we were writing on a clean slate—in holding that individuals *always* have a reasonable expectation of privacy in large quantities of location information, even if they have shared that information with a phone company.") (emphasis in original).

[40] *Carpenter*, 819 F.3d at 894 (Stranch, J., concurring).

[41] *Id*. ("I would hold that the district court's denial of Carpenter and Sanders's motion to suppress was nevertheless proper because some extension of the good-faith exception to the exclusionary rule would be appropriate.").

[42] 565 U.S. 400, 405-07 (2012).

[43] *Id*.

expressing approval of the conclusion (in the case of the fifth concurring Justice) that the warrantless tracking violated the suspect's reasonable expectations of privacy.[44] *Jones* did not implicate the third-party doctrine because the government tracked the defendant's location directly, through its own GPS device.[45] Nonetheless, the sensitivity that the five concurring Justices showed to the privacy concerns inherent in warrantless location tracking suggests that they may not be willing to view the warrantless collection of CSLI as a simple issue under the third-party disclosure doctrine.[46]

Depending on the Supreme Court's decision in *Carpenter*, the case could prompt judicial calls for congressional action. Justice Alito made such a call in his concurring opinion in *Jones* when he argued that the legislative branch is in the best position to balance privacy concerns against law enforcement requirements, particularly in "circumstances involving dramatic technological change."[47] As the prime example of such legislative action, he pointed to the Wiretap Act (Title III of the Omnibus Crime Control and Safe Streets Act),[48] which largely displaced constitutional case law in setting boundaries on law enforcement use of wiretaps.[49] One might argue that the SCA—the statute under which the government obtained the court orders for Carpenter's CSLI after demonstrating "reasonable grounds to believe" that the data would be relevant to the robbery investigation—constitutes a similar example of the legislature attempting to balance privacy and law enforcement concerns. But the SCA was enacted in 1986,[50] and the relevant provision has not undergone substantive amendment since 1994,[51] before cell sites proliferated on the American landscape.[52] Whether the SCA strikes a compelling legislative balance between the privacy concerns and law enforcement interests implicated by modern CSLI collection is a question likely to figure prominently in the Court's decision.

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[44] *Id*. at 415 (Sotomayor, J., concurring) ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'") (quoting *id*. at 430 (Alito, J., concurring)). Justice Sotomayor found it unnecessary to actually reach the *Katz* analysis because she concurred in the majority's resolution of the case on the physical trespass theory. *Id*. at 414.

[45] *Id*. at 403.

[46] *Id*. at 430 (Alito, J., concurring) ("[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period."); *id*. at 416 (Sotomayor, J., concurring) ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.").

[47] *Id*. at 427 (Alito, J., concurring); *see also* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) ("[I]t would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment.").

[48] 18 U.S.C. §§ 2510-2522 (2006).

[49] *Jones*, 565 U.S. at 427 (Alito, J., concurring).

[50] Electronic Communications Privacy Act of 1986, P.L. 99-508, 100 Stat. 1848 (1986).

[51] *See* Communications Assistance for Law Enforcement Act, P.L. 103-414, 108 Stat. 4279 (1994).

[52] *See Carpenter*, 819 F.3d at 885 (describing Federal Bureau of Investigation evidence that cell sites are now typically spaced less than two miles apart in urban areas). The GPS Act, introduced in House and Senate versions on February 15, 2017, would require law enforcement to obtain a warrant for "geolocation information"—a term that, as defined in the bills, would appear to cover CSLI. H.R. 1062, 115th Cong. (2017); S. 395, 115th Cong. (2017).

Federalism: *Christie v. National Collegiate Athletic Association*

In *Christie v. NCAA*,[53] the Supreme Court is asked to consider whether a federal statute understood to bar the partial repeal of New Jersey's sports gambling prohibition runs afoul of the Tenth Amendment.[54] The Court's resolution of this case could be consequential not only for federal regulation of sports gambling,[55] but also more broadly for the anti-commandeering doctrine, which generally prohibits the federal government from directly compelling states to enact or carry out a federal regulatory program.[56]

The Supremacy Clause of the Constitution establishes that properly enacted federal laws, treaties, and the Constitution itself are "the supreme Law of the Land."[57] Accordingly, federal law may displace otherwise valid, but conflicting state actions.[58] The Court has "long recognized" that federal law can preempt state regulation of a particular activity in whole or in part,[59] and federal law can also permissibly condition a state's ability to regulate an activity upon conformity with federal standards.[60]

But while the federal government has broad authority to influence or constrain state activities, the Supreme Court has recognized that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[61] The anti-commandeering doctrine, which is derived from the Tenth Amendment's recognition of the states' separate and residual sovereignty,[62] prohibits Congress from directly compelling the state political branches to perform regulatory functions on the federal government's behalf.[63] In *New York v.*

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[53] No. 16-476, 137 S. Ct. 2327 (June 27, 2017) consolidated with N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2326 (June 27, 2017).

[54] *See* Questions Presented, Christie v. Nat'l Collegiate Athletic Ass'n, No. 16-476, https://www.supremecourt.gov/docket/docketfiles/html/qp/16-00476qp.pdf ("Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?").

[55] Gambling regulation has primarily been a matter of state law, with federal statutes filling certain gaps in limited areas, such as internet gambling and the interstate transmission of bets and gambling-related information. 18 U.S.C. § 1084; 31 U.S.C. §§ 5361-5367.

[56] *See* Elbert Lin and Thomas M. Johnson Jr., *Symposium: High Stakes for Federalism in Heavyweight Clash Over the Anti-commandeering Doctrine*, SCOTUSBLOG.COM (Aug. 17, 2017) (describing *Christie* as having "the markings of a sleeper blockbuster" because of its possible effect on the scope and viability of the anti-commandeering doctrine).

[57] U.S. CONST., art. VI, cl. 2.

[58] *See* Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.").

[59] *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76, 129 S. Ct. 538, 543 (2008) ("Consistent with [the Supremacy Clause's] command, we have long recognized that state laws that conflict with federal law are without effect.") (internal citations and quotations omitted).

[60] New York v. United States, 505 U.S. 144,173-74 (1992) ("[W]e have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). *See generally Hodel*, 452 U.S. 264; Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982).

[61] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[62] *See* Printz v. United States, 521 U.S. 898, 919 (1997).

[63] *See New York*, 505 at 155-60 (discussing division of sovereignty in the federalist system, and stating that although

United States, for example, the Court struck down a federal law requiring states to either adopt a federal regulatory program or take title to low-level radioactive waste.[64] While the Constitution confers Congress with broad power "to pass laws requiring or prohibiting certain acts" by private actors, the Court declared in *New York* that the federal government "lacks the power directly to compel the States to require or prohibit those acts."[65] As a result, by either requiring the state to adopt certain laws or take possession of low-level radioactive waste, the law in question unconstitutionally commandeered the states' legislative branches.[66] Five years later, in *Printz v. United States*, the Court extended these anti-commandeering principles to state executive officials, holding that a law requiring gun background checks to be performed by state law enforcement officers unconstitutionally "conscripted the States' officers directly."[67]

In *Christie*, the Court may provide further clarity as to where the line is drawn between the permissible preemption of state regulatory activity and the impermissible conscription of a state's political branches into the service of the federal government. The case concerns the interplay between the Professional and Amateur Sports Protection Act of 1992 (PASPA)[68]—a federal statute that, among other things, makes it unlawful for most states to "authorize by law" sports gambling[69]—and a 2014 New Jersey statute that partially repeals the state's prohibition on such activity.[70] The selective repeal effectively allows sports gambling to occur at most New Jersey casinos and racetracks without state penalty, while maintaining restrictions on (1) sports gambling at other locations, (2) gambling on New Jersey sporting events and collegiate teams, and (3) gambling by persons under the age of 21.[71]

"[t]he actual scope of the Federal Government's authority with respect to the States has changed over the years," "the constitutional structure underlying and limiting that authority has not"); *see also Printz*, 521 U.S. at 918-19. ("It is incontestible that the Constitution established a system of 'dual sovereignty.' ... Although the States surrendered many of their powers to the [] Federal Government, they retained 'a residuary and inviolable sovereignty' ... rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'") (internal citations omitted).

[64] *New York*, 505 U.S. at 188.

[65] *Id*. at 166. The Court has also recognized that Congress may permissibly subject states to the same legal requirements as private parties, or regulate state activities that do not implicate state regulation of private conduct, without violating the Tenth Amendment. *See* Reno v. Condon, 528 U.S. 141 (2000) (upholding federal law preventing states from disclosing or sharing a driver's personal information without the driver's consent); South Carolina v. Baker, 485 U.S. 505 (1988) (upholding federal prohibition upon states' issuance of unregistered bonds in the face of a Tenth Amendment challenge); Garcia v. San Antonio San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (extension of overtime and minimum wage requirements of the Fair Labor Standards Act to public transit company authority did not violate the Tenth Amendment).

[66] *New York*, 505 U.S. at 161.

[67] *Printz*, 521 U.S. at 935.

[68] P.L. 102-559, 106 Stat. 422, codified at 28 U.S.C. §§ 3701-3704.

[69] 28 U.S.C. § 3702(1). PASPA included an exemption for states which already permitted sports gambling at the time of the federal law's enactment, as well as a one-year window from PASPA's enactment when other states could permissibly enact laws authorizing casino-based sports gambling. *Id*. § 3704. New Jersey, however, maintained its existing sports gambling restrictions beyond the one-year exemption period and therefore could not rely on the exemption.

[70] N.J. STAT. ANN. §§ 5:12A–7 to –9 (2014).

[71] N.J. STAT. ANN. §§ 5:12A–7 to –9 (2014). The 2014 law was not the first attempt by New Jersey to modify its sports-gambling laws. In 2011, New Jersey voters amended the state's constitution to make it lawful for the state legislature to allow sports gambling. N.J. CONST. art. IV, § 7, ¶ 2(D).The following year, the state legislature enacted the Sports Wagering Act, establishing a detailed state regulatory scheme to license gambling operators and their employees. N.J. STAT. ANN. §§ 5:12A–1, *et seq*. (2012). Five sports leagues sued to enjoin the 2012 law as preempted by PASPA, and the Third Circuit affirmed an injunction against the state regulatory scheme. Nat'l Collegiate Athletic Ass'n v.Gov. of N.J. [hereinafter "*Christie I*"], 730 F.3d 218, 233 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014). In doing so, the

The NCAA and other sports leagues challenged the New Jersey law as impermissible under PASPA, obtaining a federal district court injunction barring the state repeal from taking effect.[72] Sitting en banc, the U.S. Court of Appeals for the Third Circuit (Third Circuit) upheld the injunction.[73] The en banc majority characterized New Jersey's partial repeal of its sports gambling prohibitions as an "artfully couched" authorization,[74] "selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling."[75] The Third Circuit held that the 2014 New Jersey statute functionally "authorize[d] by law" sports gambling in contravention of the federal statute.[76]

The Third Circuit was unpersuaded by New Jersey's argument that PASPA unconstitutionally commandeered the state's legislative process.[77] The circuit court observed that PASPA did not compel New Jersey to "pass laws ... or in any other way enforce federal laws."[78] Nor did the federal statute, in the en banc majority's view, establish a "coercive binary choice" for New Jersey between maintaining a blanket prohibition on sports gambling and completely repealing all sports-gambling regulations.[79] The majority stated that "not all partial repeals are equal" and suggested that New Jersey might retain discretion to selectively repeal sports gambling restrictions in ways that would not conflict with PASPA.[80] While the court did not explain which sorts of partial repeals would be permissible under PASPA, it noted that "a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect" as the 2014 law.[81]

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court rejected New Jersey's argument that PASPA violates the anti-commandeering doctrine. *Id*. at 233. The court drew a distinction between the *repeal* of a sports-gambling ban, which it explained was permissible under PASPA, and the *affirmative authorization* of sports gambling effectuated by the Sports Wagering Act's licensing scheme, which the court concluded was not. *Id.* at 232-33. When the Third Circuit subsequently held that New Jersey's partial repeal of its sports gambling restrictions similarly was barred by PASPA, the court stated that "[t]o the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning." Nat'l Collegiate Athletic Ass'n v. Gov. of N.J. [hereinafter "*Christie II*"], 832 F.3d 389, 396-97 (3d Cir. 2016).

[72] Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488, 491 (D.N.J. 2014), aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Gov. of New Jersey, 799 F.3d 259 (3d Cir. 2015), reh'g en banc granted, opinion vacated (October 14, 2015), on reh'g *en banc*, 832 F.3d 389 (3d Cir. 2016), and aff'd sub nom. *Christie II*, 832 F.3d 389 (3d Cir. 2016).

[73] *Christie II*, 832 F.3d at 402.

[74] *Id.* at 397.

[75] *Id.* Judge Fuentes, joined by Judge Restrepo, dissented from the en banc majority and argued that PASPA's prohibition on governmental authorization of sports gambling was not meant to apply to a whole or partial repeal of an existing prohibition. *Id.* at 403 (Fuentes, J. dissenting) ("I believe that Congress gave this restriction a special meaning—that a state's 'authoriz[ation] by law' of sports betting cannot merely be inferred, but rather requires a specific legislative enactment that affirmatively allows the people of the state to bet on sports. Any other interpretation would be reading the phrase 'by law' out of the statute."). Judge Vanaskie dissented from the en banc majority and argued that PASPA unconstitutionally commandeered New Jersey's legislative process. Under the majority's reasoning, Judge Vanaskie argued, PASPA "prevents States from passing *any* laws to repeal existing gambling laws." *Id*. at 410 (Vanaskie, J., dissenting). Accordingly, PASPA "directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law" in violation of the anti-commandeering doctrine. *Id*. at 411.

[76] *Id.* at 401-02.

[77] *Id.* at 398-402.

[78] *Id*. at 402 (quoting *Christie I*, 730 F.3d 218, 231 (3d Cir. 2013)).

[79] *Id*.

[80] *Id.* at 401-02 ("[N]ot all partial repeals are created equal.... We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.").

[81] *Id*. at 402.

New Jersey subsequently sought Supreme Court review of the Third Circuit decision, arguing that PASPA unconstitutionally commandeered New Jersey's legislative process. According to New Jersey, a federal statute that prevents a state from repealing its laws, in whole or in part, is no less susceptible to anti-commandeering challenges than a federal law requiring a state to enact a law: "in either case, the [S]tate is being forced to regulate conduct that it prefers to leave unregulated."[82] The Supreme Court granted certiorari to consider whether PASPA violates the anti-commandeering doctrine.[83]

Christie presents the Court with challenging questions. On the one hand, the Court has made clear that Congress has the authority to displace state laws regulating private activity.[84] But PASPA, as construed in the *Christie* litigation, is arguably unique insofar as it may bar states from partially repealing laws in a fashion deemed to undermine a federal policy.[85] However, a decision holding that Congress cannot require a state to maintain laws it wishes to repeal could arguably license creative attempts by states to circumvent federal regulation in other areas. If such a rule were adopted, a state could possibly, for example, repeal taxes on in-state electricity producers but not on out-of-state producers, frustrating a federal statute barring such discriminatory electricity taxes.[86]

Moreover, a decision in New Jersey's favor may have significant ramifications for the federal regulation of sports gambling. If the Court were to strike down PASPA in its entirety, as New Jersey argues it should,[87] it would eliminate the federal government's extant regulations of intrastate sports gambling. But the Court has other options. It may hold that PASPA's prohibition of the "authoriz[ation]" of sports gambling is severable from its rule against governmental entities sponsoring, operating, advertising, promoting, or licensing sports gambling, leaving those federal regulations in place. And even if the Court were to strike down the entire subsection of PASPA concerning governmental entities, it may sever that subsection from a provision regulating participation in sports gambling by private persons.[88] That provision makes it unlawful for "person[s] to sponsor, operate, advertise, or promote" various forms of sports gambling "pursuant

[82] Petition for a Writ of Certiorari, Christie v. NCAA, No. 16-476, 2016 WL 5940876, at *25 (U.S. October 7, 2016) (quoting Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)).

[83] 137 S. Ct. 2327 (U.S. June 27, 2017). The Court granted certiorari to consider whether PASPA violated the anti-commandeering doctrine. *See Questions Presented, supra* note 54. Other issues may also be implicated by the litigation, including PASPA's appropriate construction and constitutional issues relating to notions of equal sovereignty. *See, e.g.*, Marty Lederman, *If federal law prohibits the sports gambling, which way does that cut in Christie v. NCAA?*, BALKINIZATION (Aug. 15, 2017), https://balkin.blogspot.com/2017/08/if-federal-law-prohibits-sports.html (discussing arguments raised in by parties during Supreme Court briefing as to whether PASPA should be construed to separately prohibit sports gambling by private parties, along with the implications such construction would have for anti-commandeering arguments made against PASPA); Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1 (2017) (arguing generally that PASPA raises concerns under the equal sovereignty doctrine by exempting some states' sports gambling laws from the preemptive effect of the statute, and criticizing contrary conclusions reached by the lower courts in *Christie* litigation).

[84] Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 290 (1981) ("A wealth of precedent attests to congressional authority to displace or preempt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law.").

[85] *Compare* Rodenberg & Holden, s*upra* note 83, at 4 (2017) (quoting some observers and litigants representing New Jersey as characterizing PASPA as "unusual," "peculiar and vague," and "facially unprecedented"), *with* Brief for the United States as Amicus Curiae in Opposition to Certiorari, Christie v. NCAA, No. 16-476, 2017 WL 2275823, at *10 (U.S. May 23, 2017) (characterizing PASPA as a "commonplace" prohibition on a state policy that "conflict[s] with federal policy in an area within Congress's enumerated powers").

[86] *See* 15 U.S.C. § 391; Brief for the United States as Amicus Curiae in Opposition to Certiorari, *supra* note 85, at *19.

[87] Brief for Petitioners, Christie v. NCAA, No. 16-476, 2017 WL 3774486, *53 (U.S. Aug. 29, 2017).

[88] 28 U.S.C. § 3702(2).

to the law or compact of a governmental entity."[89] Whether the relevant activities would qualify as being undertaken "pursuant to" the 2014 New Jersey law is unclear, and that question has been contested in this litigation.[90] Should the Court strike down the challenged provision of PASPA but leave its provision concerning private persons intact, there is likely to be additional litigation over that provision's scope that will determine the new boundaries of federal sports-gambling regulation.

A decision affirming the Third Circuit would also require the Court to confront difficult questions. The circuit court rejected New Jersey's anti-commandeering argument because it held that PASPA does not compel states to take affirmative action or present them with a "coercive binary choice" between maintaining existing sports-gambling bans and totally repealing them.[91] But while the circuit court suggested that some partial repeals, such as one allowing for *de minimis* wagering between friends and family, would not necessarily constitute "authoriz[ation]" of sports gambling in violation of PASPA, the court declined to explain what types of selective repeals would be allowed.[92] Nor did the Third Circuit explain why other selective repeals would more likely comply with PASPA than the New Jersey statute, or why the availability of such alternatives would provide New Jersey with sufficient leeway in setting its own policies to pass constitutional muster.[93] If the High Court opts to address these issues, its explanation of the degree of flexibility federal preemption statutes must provide states to avoid commandeering problems could affect how Congress structures preemption statutes going forward. A decision affirming the Third Circuit may also affect the federal government's ability to pursue its goals in other regulatory arenas. For example, if the Court were to approve of PASPA as construed by the Third Circuit, the federal government may be able to regulate other areas like recreational marijuana or the concealed carrying of firearms by freezing existing state laws in place, instead of through direct federal regulation.[94]

Redistricting: *Gill v. Whitford*

On October 3, 2017, the Supreme Court will hear oral arguments in *Gill v. Whitford*, a case that could significantly impact how congressional and state legislative redistricting maps are drawn.[95] In *Gill*, the Court has been asked to establish a standard for determining whether a redistricting map is an unconstitutional partisan gerrymander under the Equal Protection Clause of the

[89] *Id*.

[90] *See* Supplemental Brief for Petitioners in Support of Certiorari, Christie v. NCAA, No. 16-476, 2017 WL 2459690, at *10 (U.S. June 6, 2017); Brief for the United States as Amicus Curiae in Opposition to Certiorari, *supra* note 85, at *10; Brief for Respondents in Opposition to Certiorari, Christie v. NCAA, No. 16-476, 2016 WL 7321803, at *34 (U.S. December 14, 2016).

[91] *Christie II*, 832 F.3d at 402.

[92] *Id.* ("We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn.").

[93] *See* Brief for Petitioners, Christie v. NCAA, No. 16-476, 2017 WL 3774486, *21-22 (U.S. August 29, 2017) (disputing the Third Circuit's contention that "not all partial repeals are created equal," *Christie II*, 832 F.3d at 402, as an "elusive and essentially meaningless aphorism," and declaring that "[o]ur Constitution does not leave the 'division of authority between the Federal Government and the States' to such indeterminate vagaries") (quoting New York v. United States, 505 U.S. 144, 149 (1992)).

[94] Petition for a Writ of Certiorari, *supra* note 82, at *3.

[95] *See* SUPREME COURT OF THE UNITED STATES, ARGUMENT CALENDARS, https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalOctober2017.html (last visited August 31, 2017).

Fourteenth Amendment and the First Amendment.[96] The Court has defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power."[97]

Although the Supreme Court has invalidated redistricting maps as unconstitutional *racial* gerrymanders,[98] it has not invalidated a map because of *partisan* gerrymandering. In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Court has left open the possibility that such claims could be judicially reviewable,[99] but has been unable to determine a manageable standard for adjudicating such claims. For example, in a 2004 decision, *Vieth v. Jubelirer*,[100] a plurality of four Justices determined that a claim of unconstitutional partisan gerrymandering presented a nonjusticiable political question,[101] while four other Justices concluded that such claims are justiciable, but could not agree upon a standard for courts to use in assessing such claims.[102] The deciding vote in *Vieth*, Justice Kennedy, concluded that the claims presented in that case were not justiciable because neither comprehensive, neutral principles for drawing electoral boundaries, nor rules limiting judicial intervention, exist.[103] Nonetheless, he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."[104] Two years later, in *League of United Latin American Citizens ("LULAC") v. Perry*, the Court was again divided on the question of whether partisan gerrymandering claims are within the scope of judicial review.[105]

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[96] 137 S. Ct. 2268 (U.S. June 19, 2017) (No. 16-1161).

[97] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

[98] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Fourteenth Amendment's Equal Protection Clause. *See* 509 U.S. 630, 639-52 (1993). *See also* Cooper v. Harris, 137 S. Ct. 1455, 1472, 1481-82 (2017) (affirming a three-judge district court ruling that two North Carolina congressional districts were unconstitutional racial gerrymanders in violation of the Fourteenth Amendment's Equal Protection Clause); Miller v. Johnson, 515 U.S. 900, 911 (1995) (holding that a redistricting map was unexplainable on grounds other than race and, therefore, could not be upheld unless narrowly tailored to achieve a compelling state interest). *See generally* CRS Report R44798, *Congressional Redistricting Law: Background and Recent Court Rulings*, by L. Paige Whitaker.

[99] In a 1986 case, *Davis v. Bandemer*, the Supreme Court first established that a claim of unconstitutional political gerrymandering is justiciable under the Fourteenth Amendment's Equal Protection Clause, creating a scheme whereby claims could succeed only where challengers showed both intentional discrimination against an identifiable political group and a discriminatory effect on that group. As has been observed, the criteria proved difficult to meet. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002) (characterizing the criteria as resulting in a "new equal protection doctrine with an impossibly high burden of proof for actually making out a claim").

[100] 541 U.S. 267 (2004) (plurality opinion).

[101] *See id.* at 281 (Scalia, J., joined by Rehnquist, C.J., & O'Connor & Thomas, JJ.).

[102] *See id.* at 317-41 (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 355-68 (Breyer, J., dissenting).

[103] *See id.* at 306-07 (Kennedy, J., concurring). ("With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.")

[104] *Id.* at 306 (Kennedy, J., concurring).

[105] 548 U.S. 399, 408 (2006). In this ruling, the nine Justices of the Supreme Court filed six different opinions, each with subparts.

Whitford is an appeal from a federal district court panel[106] decision holding, by a 2-to-1 vote, that a Wisconsin state legislative redistricting map is an unconstitutional partisan gerrymander.[107] According to the district court, the Equal Protection Clause of the Fourteenth Amendment and the guarantees of free speech and association under the First Amendment prohibit a redistricting map that is drawn with the purpose, and has the effect, of placing a "severe impediment" on the effectiveness of a citizen's vote that is based on political affiliation and cannot be justified on other, legitimate legislative grounds.[108] Although the redistricting map complied with traditional redistricting principles—which include contiguity and compactness[109]—based on the record in the case, the court held that the map nonetheless had a purpose and effect of entrenching one party in its control of the legislature without justification.[110]

Under the challenged map, the majority noted that a disparity existed between the share of a party's vote and the power that party wielded. For example, in the 2012 election, "the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly,"[111] and in the 2014 election, "the Republican Party received 52% of the two-party statewide vote share and won 63 assembly seats."[112] In assessing the asymmetry among districts, the court utilized a new measure, which had been proposed by the plaintiffs, termed the "efficiency gap" or "EG."[113] As described by its creators, the EG "represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail."[114] In other words, as the court observed, the EG measures two redistricting methods that are designed to diminish the electoral power of the voters of one party: "cracking" and "packing."[115] As used here, packing refers to the concentration of voters of one party into a limited number of districts so that the party wins those districts by large margins, and cracking refers to the division of voters of one party across a large number of districts so that the party is unable to achieve a majority vote in any district.[116] The EG, the court announced, is "a measure of the degree of both cracking and packing of a particular party's voters that exists in a given district plan, based on an observed electoral result."[117] According to the court, the EG does not impermissibly require that each party receive a share of seats in the legislature in proportion to its

[106] A provision of federal law provides that cases challenging the constitutionality of redistricting maps be considered by a three-judge federal district court panel with direct appeal to the Supreme Court. 28 U.S.C. §§ 2284, 1253.

[107] Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016). After holding that the Wisconsin state legislative plan constituted an unconstitutional partisan gerrymander, the court deferred ruling on an appropriate remedy. *See id.* at 930. In January 2017, the court enjoined the State of Wisconsin from using the plan in all future elections and ordered the state to enact a new plan by November 1, 2017, for use in the November 2018 election. *See* Whitford v. Gill, Case No. 15-cv-421, 2017 U.S. Dist. LEXIS 11380 at *8 (W.D. Wis. January 27, 2017).

[108] *Whitford*, 218 F. Supp. 3d at 884.

[109] *See e.g.*, *Vieth*, 541 U.S. at 348 (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[110] *See Whitford*, 218 F. Supp. 3d at 883, 898, 910.

[111] *Id.* at 853.

[112] *Id.*

[113] *Id.* at 903.

[114] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

[115] *Whitford*, 218 F. Supp. at 903.

[116] *See id.*

[117] *Id.*

vote share, but instead measures the degree to which a redistricting plan "deviat[es] from the relationship we would expect to observe between votes and seats."[118]

The dissent, in contrast, criticized the "entrenchment test" that had been adopted by the majority, arguing that it offers no improvement over other tests that the Supreme Court has already rejected.[119] Further, the dissent denounced the EG—or any measure that is a simple comparison of statewide votes to seats won—as the "enshrinement of a phantom constitutional right" that voters for one party are entitled to representation proportional to the number of votes won by each party's candidate in every district throughout the state.[120] Shortly after agreeing to hear this dispute, by a vote of 5 to 4, the Supreme Court issued a stay of the lower court's decision.[121]

In the Supreme Court, the parties have submitted briefs proffering arguments on both procedural grounds and the merits of the case. As a threshold matter, the appellants—members of the Wisconsin Elections Commission—argue that the district court lacked jurisdiction because statewide claims of partisan gerrymandering are nonjusticiable.[122] That is, the Elections Commission maintains that in view of Court precedent holding that challengers to redistricting maps based on *racial* gerrymandering can dispute the boundaries of only their own districts, not an entire statewide map, challengers in *political* gerrymandering cases are similarly restricted.[123] The Election Commission further asserts that the appellees have failed to state a claim upon which relief can be granted by not articulating a "limited and precise" legal standard, criticizing the tests proffered as likely to "sow chaos" because they fail to provide legislatures with a clear metric by which redistricting maps would be evaluated in court.[124] Finally, the Election Commission argues that the challenged map should be upheld because it comports with traditional redistricting principles, pointing out that Justice Kennedy stated in *Vieth* that any standard for adjudicating partisan gerrymandering claims would need to establish that the legislature drew districts "in a way *unrelated* to any legitimate legislative objective."[125]

In contrast, drawing a distinction between claims of racial and partisan gerrymandering, the appellees—registered voters in Wisconsin—argue that they have standing to challenge the redistricting map.[126] According to the registered voters, racial gerrymandering claims are district-specific because challengers allege that race is the predominant factor in placing a significant number of minority voters within a district, whereas partisan gerrymandering claims involve the "completely different harms" of subjecting voters to vote dilution and viewpoint discrimination.[127] Therefore, these voters argue that they have standing to bring a statewide

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[118] *Id.* at 907.

[119] *Id.* at 965 (Griesbach, J., dissenting).

[120] *Id.* at 934 (Griesbach, J., dissenting).

[121] *See* Gill v. Whitford, 137 S. Ct. 2289 (2017). Perhaps of note, Justice Kennedy, who was the deciding vote in *Vieth*, voted with the majority of the Court to issue the stay.

[122] *See* Brief for Appellants at I, Gill v. Whitford, No. 16-116, 2017 WL 3485551 (U.S. July 28 2017).

[123] *See* Brief for Appellants, *supra* note 122, at 28 (citing Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015)). For more on this decision, see CRS Legal Sidebar WSLG1230, *Supreme Court Rules: Incorrect Standards Used in Upholding Alabama Redistricting Map Against Claim of Unconstitutional Racial Gerrymandering*, by L. Paige Whitaker.

[124] Brief for Appellants, *supra* note 122, at 46.

[125] Brief for Appellants, *supra* note 122, at 59-60 (quoting *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring) (emphasis added)).

[126] *See* Brief for Appellees at I, Gill v. Whitford, No. 16-116, 2017 WL 3726003 (U.S. July 28 2017).

[127] Brief for Appellees, *supra* note 126, at 30 (citing *Shaw*, 509 U.S. at 649-50 ("Classifying citizens by race ... threatens ... harms that are not present in our vote-dilution cases.")).

challenge alleging partisan gerrymandering.[128] Furthermore, they maintain that partisan gerrymandering claims are justiciable under the test articulated by the lower court requiring a finding of discriminatory intent and effect, lacking any legitimate justification by the legislature.[129] Among other arguments, these voters assert that the test is judicially discernible because it is based on the "comprehensive and neutral principle" of partisan symmetry, as determined by measures such as the EG, whereby maps treat parties symmetrically by enabling them to translate their support into legislative representation.[130] In addition, they maintain that the test is judicially manageable because, among other things, it is neutral and limited, with an effect prong that is easily administered.[131] The appellee voters also counter the argument from the Elections Commission that compliance with traditional redistricting principles serves as a safe harbor, arguing that Court precedent belies such a contention.[132]

The Supreme Court's ruling in *Gill v. Whitford* could have major consequences for pending[133] and future claims of partisan gerrymandering.[134] The Court could rule in a variety of ways. As a threshold matter, the Court could find that the challengers to the redistricting plan lack standing, dismissing the case for procedural reasons. Similarly, invoking other procedural grounds for dismissal, the Court could reject the standards that the lower court applied in this case and hold that claims of unconstitutional partisan gerrymandering present a nonjusticiable political question, thereby foreclosing all such claims in the future. Notably, the issuance of a stay in this case might indicate a greater likelihood that the Court will rule in favor of the Elections Commission because a key factor a court will consider in deciding to issue a stay is whether there is a strong showing of likely success on the merits.[135] On the other end of the spectrum, and perhaps of greatest significance, the Court might agree with the standards that the lower court applied or identify different standards for courts to use in evaluating future claims. Such a change to Court precedent would likely result in additional challenges to congressional and state legislative maps nationwide, and impact how maps are drawn during the next round of redistricting that follows the 2020 census.

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[128] *See* Brief for Appellees, *supra* note 126, at I.

[129] *See* Brief for Appellees, *supra* note 126, at II.

[130] *See* Brief for Appellees, *supra* note 126, at 37.

[131] *See* Brief for Appellees, *supra* note 126, at 44.

[132] *See* Brief for Appellees, *supra* note 126, at III.

[133] Partisan gerrymandering challenges to redistricting maps in other states are currently pending. *See, e.g.*, Benisek v. Lamone, Case No. JKB-13-3233, 2017 U.S. Dist. LEXIS 136208, at *3 (D.Md. 2017) (denying plaintiff's motion for a preliminary injunction of Maryland's 2011 congressional redistricting map and ordering a stay pending the outcome of the Supreme Court's ruling in *Gill v. Whitford*); Common Cause v. Rucho, Case No. 1:16-CV-1026, 2017 U.S. Dist. LEXIS 30242, at *5 (M.D.N.C. 2017) (denying defendants' motion to dismiss in a partisan gerrymandering challenge to North Carolina's 2016 congressional redistricting map).

[134] *See, e.g.*, Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. TIMES MAG. (August 29, 2017), https://www.nytimes.com/2017/08/29/magazine/the-new-front-in-the-gerrymandering-wars-democracy-vs-math.html ("The outcome of the Supreme Court's decision in *Gill v. Whitford* is likely to shape American politics for years and perhaps decades to come."); Elizabeth Slattery, *Overview of the Supreme Court's 2017–2018 Term*, Heritage Found. Legal Memorandum No. 214 (September 5, 2017), http://www.heritage.org/courts/report/overview-the-supreme-courts-2017-2018-term ("Following the 2020 Census, states across the country will be drawing new district lines, so this case could have huge implications in elections for years to come.").

[135] *See, e.g.*, Nken v. Holder, 556 U.S. 418, 426 (2009) (noting that under the traditional standard for determining whether to issue a stay, a court will consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

Civil Rights and Free Speech: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

In a number of highly publicized cases over the past few years, professional vendors have refused to provide their services for same-sex weddings, citing religious objections.[136] In response, states have charged these vendors with violating local anti-discrimination laws, pitting statutory protections against the interests of those who object to same-sex marriage on religious grounds.[137] The Supreme Court has agreed to hear one of these cases next term in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[138] A decision from the Court in this case could affect the reach of federal and state public accommodation laws and other anti-discrimination provisions.[139]

Masterpiece Cakeshop implicates two separate[140] clauses of the First Amendment:[141] the Free Speech Clause and the Free Exercise Clause.[142] The Free Speech Clause protects not only "the right to speak freely," but also "the right to refrain from speaking at all."[143] As a result, the government generally may not compel citizens to affirm "a belief with which the speaker disagrees."[144] This principle extends to both "pure speech"[145] and expressive conduct.[146] For

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[136] *E.g.*, Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, Arlene's Flowers, Inc. v. Washington, No. 17-108, 2017 WL 3588210, at *2 (U.S. August 18, 2017) ("There is currently a wave of religious wedding vendor litigation around the country."); *id.* at *6-7 (describing "important recurring fact patterns").

[137] *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543, 548 (Wash. 2017), *petition for cert. filed*, No. 17-108 (U.S. 2017); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787, 1787 (2014).

[138] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, 2290 (2017).

[139] See CRS Report RL33386, *Federal Civil Rights Statutes: A Primer*.

[140] In his brief on the merits, petitioner has also argued that he presents a "hybrid" claim that implicates both clauses. In *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990), the Supreme Court suggested that if a case involves a free exercise claim "in conjunction with other constitutional protections, such as freedom of speech," it might be subject to a heightened review standard. Petitioner claims that his free-exercise challenge, when viewed in conjunction with his "colorable" free speech challenge, should subject the state law to strict scrutiny. Brief for Petitioners at 46-47, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, No. 16-111, 2017 WL 3913762, at *46-47 (U.S. August 31, 2017). This case could therefore offer the Court an opportunity to recognize and clarify this "hybrid claim" exception suggested by *Smith*, 494 U.S. at 881-82.

[141] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[142] Petition for a Writ of Certiorari at 2, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, No. 16-111, 2016 WL 3971309 (U.S. July 22, 2016).

[143] Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.").

[144] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995). *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein ... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

[145] *E.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (discussing distinction between pure speech and expressive conduct).

[146] Cressman v. Thompson, 798 F.3d 938, 961 (10th Cir. 2015) (noting similarities and differences in "pure" and "symbolic" speech inquiries). Under *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "when 'speech' and

example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB)*, the Supreme Court held that Massachusetts could not enforce its own anti-discrimination law to require a private organization running a St. Patrick's Day parade to allow another group, GLIB, to march in that parade.[147] The Court concluded that this application of the law would have impermissibly required the parade organizers "to alter the expressive content of their parade."[148] Necessary to its decision was the Court's determination that GLIB's speech would have been attributed to the organizers, because a "parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."[149]

The Supreme Court has recognized that the First Amendment's Free Exercise Clause "protect[s] religious observers against unequal treatment,"[150] and "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[151] The Court, however, has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[152] If an otherwise valid law only incidentally burdens the free exercise of religion, the "compelling interest" test (i.e., strict scrutiny), does not apply.[153] Instead, a court will ask whether the law is "rationally related to a legitimate state interest."[154]

'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *See also Wooley*, 430 U.S. at 716. However, "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992). *See also* Texas v. Johnson, 491 U.S. 397, 406 (1989) ("[The government] may not ... proscribe particular conduct *because* it has expressive elements."). The analysis announced in *O'Brien* applies only if "'the governmental interest is unrelated to the suppression of free expression.'" *Id.* at 407 (quoting *O'Brien*, 391 U.S. at 377). *Cf.* Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that *promote the belief* that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.") (emphasis added).

[147] *Hurley*, 515 U.S. at 559, 561.

[148] *Id.* at 572-73. *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

[149] *Hurley*, 515 U.S. at 577. *Compare* Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 66 (2006) [hereinafter *FAIR*] (holding that hosting military recruiters "is not inherently expressive" because, absent explanatory speech, observer would not understand host's message), *with* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (holding that the placement of a peace sign on flag was expressive because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

[150] Church of Lukumi Babalu Aye v. City of Hialeh, 508 U.S. 520, 542 (1993) (citation omitted). *See also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) (holding state policy "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny") (quoting *Lukumi*, 508 U.S. at 546).

[151] *Lukumi*, 508 U.S. at 533.

[152] Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[153] *Smith*, 494 U.S. at 885.

[154] *See* Cent. Rabbinical Congress of the U.S. & Canada v. N.Y.C. Dep't of Heath & Mental Hygiene, 763 F.2d 183, 186 n.2 (2d Cir. 2014) (internal quotation marks omitted).

The dispute in *Masterpiece Cakeshop* began when Charlie Craig and David Mullins asked Jack Phillips, the owner of Masterpiece Cakeshop, to make a cake for their wedding.[155] Phillips declined without discussing any details of the request, stating that because of his religious beliefs, he does not make cakes for same-sex weddings.[156] Craig and Mullins filed a claim with the Colorado Civil Rights Commission (Commission), asserting that Phillips had violated the Colorado Anti-Discrimination Act by discriminating against the couple on the basis of their sexual orientation.[157] The Commission agreed and ordered the company to "cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples."[158] Masterpiece Cakeshop and Phillips appealed this order in state court, but the Colorado Court of Appeals rejected the challenge and upheld the Commission's order.[159] On June 26, 2017, the Supreme Court granted the baker's petition for a writ of certiorari.[160]

Phillips first argues that by forcing him to make a cake for a same-sex wedding, Colorado is compelling him to express a message with which he disagrees—that is, that he celebrates same-sex marriage.[161] Furthermore, Phillips claims that the state is applying its law "in a viewpoint discriminatory manner," compelling speech "only from cake artists who oppose same-sex marriage but not from those who support it."[162] The Commission argues in response that the lower court correctly rejected this position by holding that under these circumstances, making a cake did not entail compelled speech but instead is commercial conduct that can be regulated by the state.[163] In addition, the argument may be made that even if a wedding cake does express a celebratory message, those observing the cake would not attribute that expression to the cake-maker.[164]

To resolve this freedom-of-speech claim, the Court will likely have to decide whether making a cake for a same-sex wedding[165] is sufficiently expressive as to implicate the First Amendment,

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[155] Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015).

[156] *Id.*

[157] Colo. Rev. Stat. § 24-34-601(2) (2016) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of ... sexual orientation ... the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.").

[158] Craig v. Masterpiece Cakeshop, Inc., Case No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014). The Commission also ordered respondents to "take remedial measures ... including but not limited to comprehensive staff training ... and changes to any and all company policies," and instituted reporting requirements. *Id.*

[159] *Mullins*, 370 P.3d at 288, 294, 295.

[160] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, 2290 (2017). The Colorado Supreme Court had declined to hear the case. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, No. 15SC738, 2016 Colo. LEXIS 249, at *1 (Colo. April 25, 2016).

[161] Petition for a Writ of Certiorari, *supra* note 142, at 14.

[162] *Id.* at 18.

[163] Brief of the Colo. Civil Rights Comm'n in Opposition at 15-16, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2016 WL 7047744, at *15-16 (U.S. November 29, 2016); Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286, 288 (Colo. App. 2015). Mullins and Craig additionally argue that even if Phillips's conduct is expressive, it can be regulated under the test announced in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), because the state has a substantial "interest in prohibiting discrimination in public accommodations" that "is unrelated to the communicative value" of Phillips's conduct. Brief in Opposition at 16, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2016 WL 7011418, at *16.

[164] *See Hurley*, 515 U.S. at 577; *FAIR*, 547 U.S. at 66.

[165] *See Mullins*, 370 P.3d at 288 ("We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be

such that a reasonable observer would understand that the act of providing a cake communicates an approval of same-sex weddings that can be attributed to Phillips.[166] However, even if the Court were to conclude that making a wedding cake is "speech" protected by the First Amendment, it will then have to decide whether the state impermissibly targeted that speech because of its content or viewpoint.

Phillips also claims that Colorado has violated the Free Exercise Clause by discriminatorily applying its public accommodations law in a way that unlawfully burdens his exercise of his religious beliefs.[167] He claims that Colorado singled him out for discriminatory treatment based on his religion when the Commission forced him to make cakes celebrating same-sex marriage, while still allowing other bakers to decline to make cakes that they believed "convey an offensive message."[168] The respondents argue that the state's anti-discrimination statute is a neutral law that applies to protect "everyone in Colorado from discrimination,"[169] serving a compelling state interest.[170] Accordingly, the Court faces the question of whether the statute is "neutral" and "generally applicable,"[171] and, therefore, likely constitutional, or whether instead the law restricts religious practices "because of their religious motivation,"[172] subjecting the law to strict scrutiny. Complicating matters is that, although Phillips claims that the law has been enforced in a discriminatory manner, the Court's decision in *Employment Division v. Smith* seems to require a court to review the validity of the statute as a whole, rather than the statute's application to a particular person, even when—as in *Smith*—the case presents an as-applied challenge.[173] But some lower court decisions suggest that state policies of granting exemptions might suffice to subject a law to strict scrutiny, providing some support for Phillips's position.[174]

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implicated. However, we need not reach this issue. We note, again, that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.").

[166] *See FAIR*, 547 U.S. at 66; *Hurley*, 515 U.S. at 574. Writing as amicus curiae, the United States claims that "[i]n circumstances in which two speakers' messages are intertwined, the risk of mistaken attribution is clear." Brief for the United States as Amicus Curiae Supporting Petitioners at 20, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 4004530 (U.S. September 7, 2017). The federal government also argues that Phillips's cake, unlike a hotel providing tables and chairs, is a "personalized contribution," made for that specific event, that is inherently communicative. *Id.* at 21-22. In its amicus brief, the United States argues that a heightened review standard should apply because "application of the law would fundamentally alter 'speech itself.'" Brief for the United States, *supra* note 166, at 14 (quoting *Hurley*, 515 U.S. at 573). The federal government further contends that the state's position cannot survive heightened scrutiny because unlike "eradicating racial discrimination," eradicating opposition to same-sex marriage is not a compelling interest. *Id.* at 32 (quoting Bob Jones University v. United States, 461 U.S. 574, 604 (1983)).

[167] Petition for a Writ of Certiorari, *supra* note 142, at 28.

[168] Petition for a Writ of Certiorari, *supra* note 142, at 28

[169] Brief in Opposition, *supra* note 163, at 20.

[170] Brief in Opposition, *supra* note 163, at 23.

[171] *See Smith*, 494 U.S. at 879-80.

[172] *See Lukumi*, 508 U.S. at 533.

[173] *See Smith* 494 U.S. at 879 (noting that the Court's "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'") (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The Court did suggest that a statute's facial neutrality may not be "determinative," if the "object" of the law is to target religion. *Lukumi*, 508 U.S. at 534-35 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). *Cf.* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2437 n.3 (2016) (Alito, J., dissenting from denial of certiorari) ("It is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions.... "). But for the reasons discussed, *Smith* arguably requires the Court to consider such evidence only as it relates to the purpose of the overall statute, rather than this particular application. *See Smith*, 494 U.S. at 879.

[174] Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on the

If the Court were to conclude that Colorado's actions should be subject to strict scrutiny under either of the First Amendment claims, Mullins and Craig have argued in their own brief to the Court that even if the law is subject to heightened scrutiny, "the government interest in combating discrimination is ... compelling, and ... anti-discrimination laws are the least restrictive means of achieving that purpose."[175] If the Court were to agree that the law passes even this heightened review standard, it might not need to reach the prior question of which standard applies. On the other hand, only "rarely are statutes sustained in the face of strict scrutiny," as the Court has described such scrutiny as "strict in theory but usually fatal in fact."[176]

Masterpiece Cakeshop presents the Court with an opportunity to elucidate the content of the First Amendment's protections of speech and religion, and to clarify how those constitutional protections can be balanced against the state's interests in enforcing its anti-discrimination laws. Though it implicates distinct legal issues, this case will necessarily be viewed against the backdrop of cases like *Obergefell v. Hodges*, which held that the Constitution affords same-sex couples with the fundamental right to marriage,[177] but also recognized that the First Amendment provides some protections to those who "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[178] Court decisions extending constitutional protections to same-sex individuals, along with the decisions of states and municipalities to expand the protections of local laws, increase the likelihood of a collision with the rights of those who wish not to participate in, or associate with, same-sex marriage ceremonies. The Court's decision in *Masterpiece Cakeshop* could even directly implicate the reach of federal laws, particularly given that some lower courts have interpreted Title VII of the Civil Rights Act of 1964[179] to provide protection from discrimination based on sexual orientation.[180] Depending on how the Court resolves these competing interests, Congress might be able to subsequently weigh in, either by enacting statutory protections of speech or religious beliefs, or altering the federal statutes preventing discrimination in public accommodations.

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appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.").

[175] Brief in Opposition, *supra* note 163, at 23. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (rejecting Free Exercise challenge because "the Government has a fundamental, overriding interest in eradicating racial discrimination in education" and no less restrictive means were available to achieve that interest). *Cf. Hurley*, 515 U.S. at 572 ("Provisions like these [public accommodations statutes] are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.").

[176] Bernal v. Fainter, 467 U.S. 216, 249 n.6 (1984). In his brief on the merits, Phillips counters the respondents' strict scrutiny argument by shifting the focus to whether the state has a compelling interest in applying the law *in this instance*, and by arguing that the state's interests in enforcement in this case do not outweigh his own First Amendment rights. Brief for Petitioners, *supra* note 142, at 48-61.

[177] 135 S. Ct. 2584, 2604-05 (2015).

[178] *Id.*at 2607 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

[179] 42 U.S.C. § 2000e-2(a).

[180] Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 341 (7th Cir. 2017). *But see* Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (concluding claims of discrimination based on sexual orientation are "non-cognizable under Title VII").

Table 1. Supreme Court's October 2017 Term

Cases the Court Will Hear As of October 4, 2018

Name of Case	Case Number	Date of Oral Argument	Question(s) Presented (as Quoted from Petitioner or Appellant)	Area(s) of Law[a]
Artis v. District of Columbia	16-460	11/1/17	*Whether the tolling provision in 28 U.S.C. § 1367(d) suspends the limitations period for the state-law claim while the claim is pending and for 30 days after the claim is dismissed, or whether the tolling provision does not suspend the limitations period but merely provides thirty days beyond the dismissal for the plaintiff to refile.*	Civil Procedure
Ayestas v. Davis	16-6795	10/30/17	*Whether the U.S. Court of Appeals for the 5th Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.*	Criminal Law & Procedure
Carpenter v. United States	16-402	Not Yet Scheduled	*Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment.*	Criminal Law & Procedure
Christie v. NCAA; New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA[b]	16-476; 16-477	Not Yet Scheduled	*Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of* New York v. United States.	Constitutional Law Entertainment & Sports
Class v. United States	16-424	10/4/17	*Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.*	Criminal Law & Procedure
Cyan, Inc. v. Beaver County Employees Retirement Fund	15-1439	Not Yet Scheduled	*Whether state courts lack subject matter jurisdiction over covered class actions that allege only Securities Act of 1933 claims.*	Civil Procedure Securities Law
Digital Realty Trust, Inc. v. Somers	16-1276	Not Yet Scheduled	*Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the act's definition of "whistleblower."*	Business & Corporate Law Securities Law

Name of Case	Case Number	Date of Oral Argument	Question(s) Presented (as Quoted from Petitioner or Appellant)	Area(s) of Law[a]
District of Columbia v. Wesby	15-1485	10/4/17	*(1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2) whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.*	Civil Rights Law Criminal Law & Procedure
Epic Systems Corp. v. Lewis; Ernst & Young LLP v. Morris; National Labor Relations Board v. Murphy Oil USA[b]	16-285; 16-300; 16-307	10/2/17	*Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.*	Civil Procedure Contracts Law Labor & Employment Law
Gill v. Whitford	16-1161	10/3/17	*(1) Whether the district court violated* Vieth v. Jubelirer *when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis; (2) whether the district court violated* Vieth *when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles; (3) whether the district court violated* Vieth *by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in* Davis v. Bandemer*; (4) whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed; and (5) whether partisan-gerrymandering claims are justiciable.*	Constitutional Law Election Law Governments
Hamer v. Neighborhood Housing Services of Chicago	16-658	10/10/17	*Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the U.S. Courts of Appeals for the 2nd, 4th, 7th, and 10th Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the U.S. Courts of Appeals for the 9th and District of Columbia Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine.*	Civil Procedure
Husted v. A. Philip Randolph Institute	16-980	11/8/17	*Whether 52 U.S.C. § 20507 permits Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002.*	Election Law Governments

Name of Case	Case Number	Date of Oral Argument	Question(s) Presented (as Quoted from Petitioner or Appellant)	Area(s) of Law[a]
Jennings v. Rodriguez	15-1204	10/3/17	*(1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.* *(Court also asked (1) whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; (3) whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.)*	Constitutional Law Immigration Law
Jesner v. Arab Bank, PLC	16-499	10/11/17	*Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.*	Civil Procedure International Law
Leidos v. Indiana Public Retirement System	16-581	11/6/17	*Whether the U.S. Court of Appeals for the 2nd Circuit erred in holding—in direct conflict with the decisions of the U.S. Courts of Appeals for the 3rd and 9th Circuits—that Item 303 of Securities and Exchange Commission (SEC) Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.*	Securities Law
Marinello v. United States	16-1144	Not Yet Scheduled	*Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action.*	Criminal Law & Procedure Tax Law
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission	16-111	Not Yet Scheduled	*Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.*	Civil Rights Law Constitutional Law

Name of Case	Case Number	Date of Oral Argument	Question(s) Presented (as Quoted from Petitioner or Appellant)	Area(s) of Law[a]
Merit Management Group, LP v. FTI Consulting, Inc.	16-784	11/6/17	*Whether the safe harbor of Section 546(e) of the Bankruptcy Code prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the U.S. Courts of Appeals for the 2nd, 3rd, 6th, 8th, and 10th Circuits, but contrary to the decisions from the U.S. Courts of Appeals for the 7th and 11th Circuits.*	Bankruptcy Law
Murphy v. Smith	16-1067	Not Yet Scheduled	*Whether the parenthetical phrase "not to exceed 25 percent," as used in 42 U.S.C. § 1997e(d)(2), means any amount up to 25% (as four circuits hold), or whether it means exactly 25% (as the U.S. Court of Appeals for the 7th Circuit holds).*	Civil Procedure Civil Rights Law Torts
National Association of Manufacturers v. Department of Defense	16-299	10/11/17	*Whether the U.S. Court of Appeals for the 6th Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F), the portion of the Clean Water Act's judicial review provision that requires that agency actions "in issuing or denying any permit" under Section 1342 be reviewed by the court of appeals, to decide petitions to review the waters-of-the-United-States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.*	Civil Procedure Environmental Law
Oil States Energy Services, LLC v. Greene's Energy Group, LLC	16-712	Not Yet Scheduled	*Whether inter partes review, an adversarial process used by the Patent and Trademark Office to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.*	Constitutional Law Patent Law
Patchak v. Zinke	16-498	11/7/17	*Whether a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this court's determination that the "suit may proceed")—without amending the underlying substantive or procedural laws—violates the Constitution's separation-of-powers principles.*	Civil Procedure Constitutional Law
Rubin v. Islamic Republic of Iran	16-534	Not Yet Scheduled	*Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether assets are otherwise subject to execution under Section 1610.*	Civil Procedure International Law
SAS Institute Inc. v. Matal	16-969	Not Yet Scheduled	*Whether 35 U.S.C. § 318(a), which provides that the Patent Trial and Appeal Board, in an inter partes review, "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner," requires that Board to issue a final written decision as to every claim challenged by the petitioner, or whether it allows that Board to issue a final written decision with respect to the patentability of only some of the patent claims challenged by the petitioner, as the U.S. Court of Appeals for the Federal Circuit held.*	Patent Law

Name of Case	Case Number	Date of Oral Argument	Question(s) Presented (as Quoted from Petitioner or Appellant)	Area(s) of Law[a]
Sessions v. Dimaya	15-1498	10/2/17	*Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.*	Constitutional Law Criminal Law & Procedure Immigration Law
Trump v. Int'l Refugee Assistance Project; Trump v. Hawaii[b]	16-1436; 16-1540	10/10/17	*(1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable; (2) whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause; (3) whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad; and (4) whether the challenges to Section 2(c) became moot on June 14, 2017.*	Constitutional Law Immigration
U.S. Bank National Association v. Village at Lakeridge	15-1509	10/31/17	*Whether the appropriate standard of review for determining non-statutory insider status is the de novo standard of review applied by the U.S. Courts of Appeals for the 3rd, 7th and 10th Circuits, or the clearly erroneous standard of review adopted for the first time by the U.S. Court of Appeals for the 9th Circuit in this action.*	Bankruptcy Law Civil Procedure
Wilson v. Sellers	16-6855	10/30/17	*Whether the court's decision in* Harrington v. Richter *silently abrogates the presumption set forth in* Ylst v. Nunnemaker*—that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc U.S. Court of Appeals for the 11th Circuit held in this case, despite the agreement of both parties that the* Ylst *presumption should continue to apply.*	Criminal Law & Procedure

Note: List includes cases granted via a writ of certiorari or cases in which the Court has otherwise opted to have a merits hearing.

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

b. Consolidated Cases.

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