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Supreme Court October Term 2017: A Review of Selected Major Rulings

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SUMMARY

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Supreme Court October Term 2017: A Review of Selected Major Rulings

On October 2, 2017, the Supreme Court began one of the most notable terms in recent memory. The latest term of the Court was the first full term for Justice Neil Gorsuch, who succeeded Justice Antonin Scalia following his death in February 2016. The October Term 2017 was also the last term for Justice Anthony Kennedy, who retired in July 2018. With nine Justices on the Court for the first time at the beginning of a term since October 2015, this past term witnessed the High Court issuing fewer unanimous opinions and more rulings that were closely divided relative to previous terms.

The increased divisions on the High Court during the October Term 2017 may have been a product of the nature of the cases on the Court's docket, with the Supreme Court hearing a number of high-profile matters implicating issues of considerable interest for Congress and the public at large. For instance, during its last term, the Court considered a challenge to President Trump's so-called travel ban, several redistricting disputes concerning partisan gerrymandering, and a dispute that pitted a state government's interests in enforcing certain civil rights laws against the interests of those who object to same-sex marriage on religious grounds. Some of the Court's most highly anticipated rulings resulted in opinions where the Justices avoided resolving core issues of dispute, such as the Court's rulings on partisan gerrymandering, in which the legal challenges were largely dismissed on procedural grounds, or the Court's opinion in the case of a baker's refusal to make a cake for a same-sex wedding, which was decided on narrow grounds peculiar to the case before the Court. Nonetheless, the October Term 2017 resulted in several far-reaching opinions. Perhaps most notably, the last term for the Court saw the overturning of several long-standing precedents, including (1) two 20th Century cases interpreting Congress's Commerce Clause power to limit the states' ability to require certain out-of-state retailers to collect and remit sales taxes; (2) a 1977 ruling requiring nonconsenting members of public employee unions to pay certain fees as a condition of employment; and (3) a long-criticized 1944 case that sanctioned the internment of Japanese Americans during World War II.

Of particular note are seven cases from the October Term 2017 that could impact the work of Congress: (1) *Epic Systems Corp. v. Lewis*, which upheld the enforceability of certain agreements between employers and employees to arbitrate labor disputes in lieu of class and other collective actions; (2) *Carpenter v. United States*, which interpreted the Fourth Amendment to impose certain limits on the warrantless collection of the historical cell phone location records of a criminal suspect; (3) *Murphy v. National Collegiate Athletic Association*, a case that held that Congress, by prohibiting a state from partially repealing a state law, impermissibly commandeered the powers of the state; (4) *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, which held that agency fee arrangements that require nonconsenting public employees to contribute a fee to a public employee union violate the First Amendment; (5) *National Institute of Family and Life Advocates v. Becerra*, a case that concluded that a California law imposing various notice requirements for certain facilities providing pregnancy-related services likely violated the First Amendment; (6) *Trump v. Hawaii*, which rejected a challenge to the lawfulness of President Trump's so-called travel ban; and (7) *Lucia v. Securities and Exchange Commission*, which concluded that the appointment of administrative law judges within the Securities and Exchange Commission did not comply with Article II of the Constitution.

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On October 2, 2017, the Supreme Court began one of the most notable terms in recent memory, concluding its work at the end of June 2018.[1] The latest term of the Court was the first full term for Justice Neil Gorsuch,[2] who succeeded Justice Antonin Scalia following his death in February 2016,[3] and the last term of Justice Anthony Kennedy, who retired from the High Court in July 2018.[4] With nine Justices on the Court for the first time at the beginning of a term since October 2015,[5] the October Term 2017 term witnessed an increasingly divided Court. For example, notwithstanding a comparable volume of cases at the Court the last two terms,[6] the most recent resulted in 28 unanimous rulings,[7] a marked decrease from the term before, which saw the Court issuing 41 unanimous decisions.[8] Similarly, the Supreme Court issued 19 decisions that were decided by a single vote during the October Term 2017,[9] which was 10 more than the previous term.[10]

The increased divisions on the High Court may have been a product of the nature of the cases on the Court's docket, with the Supreme Court hearing a number of high profile matters implicating issues of considerable interest for Congress and the public. For instance, during its last term, the Court considered a challenge to President Trump's so-called travel ban,[11] several redistricting disputes concerning partisan gerrymandering,[12] and a dispute that pitted a state government's interests in enforcing certain civil rights laws against the interests of those who object to same-sex marriage on religious grounds.[13] Some of the Court's most highly anticipated rulings resulted in opinions where the Justices resolved cases on grounds that did not reach the core issues of dispute, such as the Court's rulings on partisan gerrymandering, in which the legal challenges were largely dismissed on procedural grounds,[14] or the Court's opinion in the case of a baker's refusal to make a cake for a same-sex wedding, which was decided on narrow grounds peculiar to

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[1] *See Supreme Court Calendar October Term 2017*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/2017TermCourtCalendar.pdf (last visited September 19, 2018).

[2] *See* J. OF THE SUPREME COURT OF THE UNITED STATES 1 (Oct. 2, 2017), https://www.supremecourt.gov/orders/journal/Jnl17.pdf.

[3] *See* Hon. John G. Roberts, Jr., *Statement by Chief Justice John G. Roberts, Jr*. (Feb. 13, 2016), http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16 (announcing Justice Scalia's death).

[4] *See About the Court: Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (noting the retirement of Justice Kennedy on July 31, 2018) (last visited September 19, 2018).

[5] See CRS Report R44949, *Supreme Court October Term 2016: A Review of Select Major Rulings*, coordinated by Andrew Nolan, at 1 (observing that the October 2016 term began without nine Justices on the Court).

[6] *Compare* 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 [hereinafter SCOTUSBLOG STATS OT2016] (listing 69 cases for OT2016), *with* SCOTUSBLOG, STAT PACK: OCTOBER 2017 TERM 1 (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf [hereinafter SCOTUSBLOG STATS OT2017] (listing 72 case for OT2017).

[7] *See* SCOTUSBLOG STATS OT2017, *supra* note 6, at 5.

[8] *See* SCOTUSBLOG STATS OT2016, *supra* note 6, at 5.

[9] *See* SCOTUSBLOG STATS OT2017, *supra* note 6, at 5.

[10] *See* SCOTUSBLOG STATS OT2016, *supra* note 6, at 5 (including six 5-3 votes).

[11] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[12] Benisek v. Lamone, 138 S. Ct. 1942 (2018); Gill v. Whitford, 138 S. Ct. 1916 (2018).

[13] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[14] *See Benisek*, 138 S. Ct. at 1944-45 (affirming the denial of a preliminary injunction in a partisan gerrymandering challenge on grounds unrelated to the likelihood of success of the substantive claims); *see Gill*, 138 S. Ct. at 1929 (dismissing partisan gerrymandering challenge on Article III standing grounds).

the case before the Court.[15] Nonetheless, the October Term 2017 resulted in several far-reaching opinions that are discussed below in more detail. Perhaps most notably, the Court overturned several long-standing precedents, including (1) two 20th Century cases interpreting Congress's Commerce Clause power to limit the states' ability to require certain out-of-state retailers to collect and remit sales taxes;[16] (2) a 1977 ruling requiring nonconsenting members of public employee unions to pay certain fees as a condition of employment;[17] and (3) a long-criticized 1944 case that sanctioned the internment of Japanese Americans during World War II.[18]

This report highlights seven notable cases from the October Term 2017 that could impact the work of Congress: (1) *Epic Systems Corp. v. Lewis,* which concerned the enforceability of certain agreements between employers and employees to arbitrate labor disputes in lieu of class and other collective actions; (2) *Carpenter v. United States*, which examined the limits the Fourth Amendment imposes on the warrantless collection of the historical cell phone location records of a criminal suspect; (3) *Murphy v. National Collegiate Athletic Association (NCAA)*, a case that explored whether Congress, by prohibiting a state from partially repealing a state law, impermissibly commandeers the powers of the state; (4) *Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)*, which concerned whether so-called agency fee arrangements that require nonconsenting public employees to contribute a fee to a public employee union violate the First Amendment; (5) *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, a case that assessed whether a California law imposing various notice requirements for certain facilities providing pregnancy-related services was likely to violate the First Amendment; (6) *Trump v. Hawaii,* which challenged the lawfulness of President Trump's so-called travel ban; and (7) *Lucia v. Securities and Exchange Commission (SEC)*, which explored whether the appointment of administrative law judges (ALJs) within the SEC complied with Article II of the Constitution. The discussion of each of these cases (1) provides background information on the case being discussed; (2) summarizes the arguments that were presented to the Court; (3) explains the Court's ultimate ruling; and (4) examines the potential implications that the Court's ruling could have for Congress, including the ramifications for the jurisprudence in a given area of law.

Business Law[19]

Epic Systems Corp. v. Lewis

Epic Systems Corp. v. Lewis,[20] decided by the Supreme Court on May 21, 2018, presented the question of whether an agreement between an employer and an employee to arbitrate their disputes, waiving rights to class actions and other collective treatment, could be enforced. *Epic Systems* is a potentially significant case because these arbitration agreements are practically

[15] *See Masterpiece Cakeshop,* 138 S. Ct. at 1724 (holding that "whatever the outcome of some future controversy involving facts similar to these," the Colorado Civil Rights Commission's treatment of the plaintiff in the case before the Court violated the Free Exercise Clause).

[16] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) (overruling Quill Corp. v. North Dakota, 504 U.S. 298 (1992), and Nat'l Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967)).

[17] *See* Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2460 (2018) (overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)).

[18] *See* Trump v. Hawaii, 138 S.Ct. 2392, 2423 (2018) (abrogating Korematsu v. United States, 323 U.S. 214 (1942)).

[19] Legislative Attorney Wilson Freeman authored this section.

[20] 138 S. Ct. 1612 (2018).

ubiquitous in various employment settings,[21] and the viability of such agreements may affect the ability of millions of employees to pursue potential class actions against their employers.[22] The Court, in a 5-4 opinion by Justice Gorsuch, concluded that such agreements had to be enforced under the Federal Arbitration Act of 1925 (FAA), notwithstanding provisions of the National Labor Relations Act of 1935 (NLRA) establishing workers' rights to engage in concerted action generally.[23] In so doing, the Court emphasized that arbitration is generally an informal, bilateral procedure, and the FAA, which applies in a variety of commercial contexts, is generally not displaced by other federal statutes without Congress manifesting a clear intention to the contrary.[24]

As background, an arbitration agreement is a contract mandating alternative dispute resolution that avoids courtroom litigation between the contracting parties.[25] The FAA provides that agreements in commerce to settle disputes in arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[26] In *Epic Systems*, the parties—an employer and employee—had an arbitration agreement that provided only for "individualized arbitration" with respect to any employment disputes.[27] The employee nonetheless sought to bring a class action suit under Federal Rule of Civil Procedure 23[28] and argued that, notwithstanding his agreement promising "individualized arbitration" with his employer, Section 7 of the NLRA guaranteed his right to bring such an action.[29] Section 7 guarantees to workers "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[30] The question presented in the Supreme Court was whether Section 7 guarantees a worker's right to bring a class action or other collective lawsuit, and if so, whether it overrides the FAA with respect to the enforceability of the individualized arbitration clause.[31]

Justice Gorusch, in an opinion for five Justices, concluded that Section 7 of the NLRA did not guarantee a right to bring a class action lawsuit.[32] Justice Gorsuch first concluded that under existing Supreme Court precedent, the FAA's saving clause—which allows federal courts to hold arbitration agreements unenforceable if "upon such grounds as exist in law or equity for the revocation of any contract"—could not be interpreted to render contracts unenforceable simply because they barred class treatment.[33] As such, the only remaining question in the case was

[21] Oral Argument at 48:55, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), (No. 16-285), https://www.oyez.org/cases/2017/16-285 (stating that upwards of 25 million employees are subject to similar clauses).

[22] Katherine Stone, *Majority Gives Short Shrift to Worker Rights*, SCOTUSBLOG, (May 23, 2018), http://www.scotusblog.com/2018/05/symposium-majority-gives-short-shrift-to-worker-rights/.

[23] *Epic Systems*, 138 S. Ct. at 1624-30.

[24] *Id.* at 1632.

[25] BLACK'S LAW DICTIONARY 100 (7th ed. 2013).

[26] 9 U.S.C. § 2.

[27] *Epic Systems*, 138 S. Ct. at 1619-20.

[28] Fed R. Civ. P. 23. A class action is "a procedure by which a large group of entities (known as a "class") may challenge a defendant's allegedly unlawful conduct in a single lawsuit, rather than through numerous, separate suits initiated by individual plaintiffs." CRS Report R45159, *Class Action Lawsuits: A Legal Overview for the 115th Congress*, by Kevin M. Lewis and Wilson C. Freeman.

[29] Brief for Respondent at 9, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285).

[30] 29 U.S.C. § 157.

[31] *Epic Systems*, 138 S. Ct. at 1619.

[32] *Id.* at 1620.

[33] *Id.* at 1221-23 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the FAA preempted California state rule that had allowed parties to arbitration agreements to demand classwide proceedings in certain

whether Section 7 of the NLRA displaced the FAA by mandating the availability of class treatment in employment cases.[34] Justice Gorsuch observed that where two statutes address similar topics, federal courts must strive to "give effect to both," and that courts are bound by the "strong presumption that repeals by implication are disfavored."[35] Applying these principles, the Court concluded that the NLRA could be reasonably read in harmony with the FAA, as Section 7 "focus[es] on the right to organize unions and bargain collectively" rather than the right to litigate collectively.[36] Given this view of Section 7, the Court held that the FAA required the enforcement of the contract as written, necessitating that employee arbitrate his dispute one-on-one with his employer.[37]

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, disagreed with the majority on almost every point. On the NLRA, the dissenters asserted that the history and intent of the statute were focused on protecting the "myriad ways in which employees may join together to advance their shared interests," and asserted that these factors required reading the statute to embrace a right to collective action in litigation as well as other contexts.[38] With respect to the FAA, the dissenters argued that the Court's jurisprudence over the past decades had strayed far from Congress's initial intent, and that the FAA should never have been read to apply to any contracts outside the context of "merchants of roughly equal bargaining power."[39] In so concluding, the dissenters put a heavy emphasis on the allegedly negative policy implications of the case, and asserted that it would cause an "enforcement gap" by reducing employees' ability to enforce wage and hour violations by employers.[40]

Epic Systems is a highly significant case—dissenters in the case, along with numerous commentators, have argued that the Court's decision will threaten workers' rights by diminishing the power of the class action device to rein in wrongful conduct by employers.[41] Others have argued that a contrary decision would have greatly unsettled employer expectations, as "individualized arbitration" clauses are ubiquitous,[42] resulting in benefits for the plaintiffs' bar at

circumstances or void arbitration clauses as contrary to public policy)).

[34] *Id.* at 1624.

[35] *Id.*

[36] *Id*. The Court observed that the specific examples given in the statute, such as the right to organize or to join or assist labor organizations, suggested that the general term "other concerted activities" embraced only similar activities. *Id.* at 1625. The Court, recognizing that Congress "does not . . . hide elephants in mouseholes," also argued that Congress would not have hidden the elephant of a right to class action proceedings in the mousehole of a law dealing primarily with union organization and collective bargaining. *Id.* at 1627.

[37] *Id.* at 1632.

[38] *Id.* at 1636-41 (Ginsburg, J., dissenting).

[39] *Id.* at 1642-43.

[40] *Id.* at 1647-48.

[41] *See id.* 1647-48 (arguing that if employers can use arbitration clauses to diminish workers ability to seek class actions, then violation of wage and hour laws are sure to increase and workers will be unable to enforce their rights). *See also* Adam Liptak, *Supreme Court Upholds Workplace Arbitration Contracts Barring Class Actions*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/business/supreme-court-upholds-workplace-arbitration-contracts.html (quoting Professor Brian T. Fitzpatrick to say that "it is only a matter of time until the most powerful device to hold corporations accountable for their misdeeds is lost altogether"); Mark Joseph Stern, *Neil Gorsuch Just Demolished Labor Rights*, SLATE (MAY 21, 2018), https://slate.com/news-and-politics/2018/05/neil-gorsuch-demolished-labor-rights-in-epic-systems-v-lewis.html (arguing that the Court's opinion "essentially legalizes low-level wage theft).

[42] *See* Liptak, *supra* note 41 (quoting lawyer Gregory Jacob to say that the decision "protect[s] employers' settled expectations and avoids placing our nation's job providers under the threat of additional burdensome litigation drain").

the expense of employers and employees.[43] Both the majority and the dissent noted the importance of Congress's role in this area.[44] Because the entire dispute in *Epic Systems* centered on how to reconcile two federal statutes, Congress retains the power to rewrite the rules in this sphere and has in the past expressly exempted certain disputes from the reach of the FAA.[45] Congress, if it wished, could not only alter the outcome in *Epic Systems*, but could develop an entirely new path for arbitration agreements in the employment or other contexts.[46]

Criminal Procedure[47]

Carpenter v. United States

In its most recent decision considering how the Fourth Amendment applies in the digital age, the Supreme Court held in a 5-4 decision in *Carpenter v. United States* that government acquisition of historical cell site location information (CSLI) from a cell phone user's wireless carrier constitutes a Fourth Amendment search.[48] CSLI is a compilation of time-stamped records showing when a cell phone connects to a particular cell tower;[49] wireless carriers typically maintain CSLI records for up to five years.[50] The Court further held that the government generally needs a warrant supported by probable cause—not merely a court order under the Stored Communications Act (SCA)[51]—to acquire historical CSLI.[52] The highly anticipated decision breaks new ground by recognizing that, at least in some circumstances, the Fourth Amendment protects sensitive information about an individual that is held by a third party.[53] *Carpenter* could lay the foundation for the Court to extend Fourth Amendment protections to other types of sensitive information commonly held by third-party technology companies—such

[43] *See* Archis Parasharami & Dan Jones, *Good News for Employers and Workers, Bad News for Lawyers*, SCOTUSBLOG (May 22, 2018), http://www.scotusblog.com/2018/05/symposium-good-news-for-employers-and-workers-bad-news-for-lawyers/.

[44] *See Epic Systems*, 138 S. Ct. at 1632 (majority opinion) ("While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."); *id.* at 1348-49 (Ginsburg, J., dissenting) ("If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress.").

[45] *See, e.g.*, 7 U.S.C. § 26(n) (stating that no dispute arising out of section protecting commodity whistleblowers shall be arbitrable).

[46] *See, e.g.*, Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017).

[47] Legislative Attorney Ben Harrington authored this section.

[48] 138 S. Ct. 2206, 2217 (2018).

[49] *Id*. at 2211–12.

[50] *Id*. at 2218.

[51] *See* 18 U.S.C. § 2703(d) (2009). To obtain a court order for CSLI records under the SCA, the government must demonstrate "reasonable grounds to believe" that the records are "relevant and material to an ongoing criminal investigation." *Id*. "That showing falls well short of the probable cause required for a warrant." *Carpenter*, 138 S. Ct. at 2210.

[52] *Carpenter*, 138 S. Ct. at 2221.

[53] *See id*. at 2220.

as IP addresses, browsing history, or biometric data—although the decision's ultimate impact will depend on how the Court applies it in future cases.[54]

At the petitioner Carpenter's trial for participating in a series of robberies, the government introduced records of his CSLI as evidence tending to show that he was near the scene of the robberies when they occurred.[55] The government had obtained the CSLI from Carpenter's wireless carriers not through a warrant, but instead through court orders issued under the SCA that did not require a showing of probable cause.[56] Carpenter argued that this warrantless acquisition of the CSLI violated the Fourth Amendment's prohibition on "unreasonable searches and seizures."[57] That provision generally requires the government to obtain a warrant before performing a "search,"[58] which occurs if an investigative measure violates a person's "reasonable expectation of privacy."[59]

The government, relying on a body of Supreme Court precedent known as the "third-party doctrine," countered that its acquisition of the CSLI did not constitute a search because Carpenter's cell phone transmitted the CSLI to his wireless carriers—third parties.[60] The third-party doctrine generally recognizes that no reasonable expectation of privacy exists as to information that a person discloses voluntarily to third parties.[61] It developed in cases from the 1970s holding that individuals have no reasonable expectation of privacy in the telephone numbers that they dial (which pass through third-party phone companies)[62] or in their bank account statements (which are generated by third-party banks).[63] This doctrine appeared to support the government's position, with which the U.S. Court of Appeals for the Sixth Circuit agreed in affirming Carpenter's conviction.[64] Indeed, nearly every federal appellate court to consider the issue applied the third-party doctrine to hold that individuals lack a reasonable expectation of privacy in historical CSLI.[65] But some judges on these courts voiced doubts about whether the 1970s cases provided an adequate framework for analyzing privacy expectations in

[54] *See id.* at 2234–35 (Kennedy, J., dissenting) ("[T]he Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails to provide clear guidance to law enforcement and courts on key issues . . . . [N]othing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history." (internal quotation marks and citations omitted)).

[55] *Id*. at 2212–13 (majority opinion).

[56] *Id*. at 2212.

[57] U.S. Const. amend. IV.

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

[59] *E.g.*, Bond v. United States, 529 U.S. 334, 337 (2000).

[60] *See Carpenter*, 138 S. Ct. at 2219.

[61] Smith v. Maryland, 442 U.S. 735, 743–44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); United States v. Miller, 425 U.S. 435, 442–43 (1976).

[62] *See Smith*, 442 U.S. at 743–44.

[63] *Miller*, 425 U.S. at 442–43.

[64] *See* United States v. Carpenter, 819 F.3d 880, 887–88 (6th Cir. 2016) ("[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. . . . Thus . . . the defendants have no . . . expectation [of privacy] in the locational information here. On this point, *Smith* is binding precedent.").

[65] 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); *but cf.* 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").

the smartphone era.[66] Justice Sotomayor expressed similar concerns in a concurring opinion in a 2012 case about GPS tracking, where she called the third-party doctrine "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[67]

The Supreme Court agreed with Carpenter. The majority opinion, authored by Chief Justice Roberts and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."[68] This legitimate expectation of privacy exists, in the Court's view, because historical CSLI "provides an intimate window into a person's life" given that "[a] cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales."[69] The Court seemed particularly troubled by historical CSLI's capacity to act as a "near perfect surveillance" mechanism capable of producing a "detailed log of [a person's] movements" over an extended time period—not merely a snapshot of the person's location at a particular moment.[70] "With access to CSLI," the Court reasoned, "the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years."[71]

The majority reasoned that the third-party doctrine, as developed in the cases from the 1970s about dialed telephone numbers and bank statements,[72] does not apply to CSLI because "[t]here is a world of difference between the limited types of personal information addressed in [those cases] and the exhaustive chronicle of location information casually collected by wireless carriers today."[73] The majority construed third-party disclosure as a significant but not necessarily determinative consideration in the analysis of whether a person has a reasonable expectation of privacy in information.[74] Specifically, while recognizing that disclosure to third parties "reduce[s]" a person's privacy expectations, the majority concluded that the disclosed information may still warrant Fourth Amendment protection, depending on its sensitivity and on whether the person made a truly "voluntary exposure" of the information to the third party.[75] In the case of CSLI held by third-party wireless carriers, the Court reasoned that it generally warrants Fourth Amendment protection due to its "revealing nature"[76] and automated disclosure, which occurs by virtue of the cell phone's operation and is not voluntary in any "meaningful

[66] *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).

[67] United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

[68] *Carpenter*, 138 S. Ct. at 2217.

[69] *Id*. at 2217–18.

[70] *See id*. 2218. In Carpenter's case, the government had acquired 127 days of CSLI records. *Id*.

[71] *Id*.

[72] *See Smith*, 442 U.S. at 743–44; *Miller*, 425 U.S. at 442–43.

[73] *Carpenter*, 138 S. Ct. at 2219.

[74] *See id*.

[75] *See id*. at 2219–20.

[76] *Id*. at 2219; *see id*. at 2220 (describing CSLI as "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years").

sense."[77] Even so, the Court did not overrule its prior third-party cases holding that no reasonable expectation of privacy exists as to dialed phone numbers or bank statements,[78] and the Court made clear that its opinion did not address circumstances implicating "foreign affairs or national security."[79] The Court also recognized that certain exceptions to the warrant requirement, including the exception for ongoing emergencies, remain in place and will likely allow law enforcement to obtain CSLI without a warrant in some circumstances.[80]

Justices Kennedy, Thomas, Alito, and Gorsuch each wrote separate dissenting opinions focusing on property interests as the touchstone of proper Fourth Amendment analysis.[81] Justices Kennedy, Thomas, and Alito argued, to varying degrees, that Carpenter did not have a demonstrated property interest in the CSLI held by his wireless carriers and that no violation of his Fourth Amendment rights therefore occurred when the government obtained the CSLI from the carriers without a warrant.[82] In contrast, Justice Gorsuch suggested that provisions of the Telecommunications Act that protect the privacy of CSLI gave Carpenter a property interest sufficient to shield his CSLI from an unreasonable government search.[83] Justice Gorsuch ultimately concluded, however, that Carpenter had failed to preserve this argument.[84] Justices Kennedy and Alito made the additional argument that, even if the government's acquisition of Carpenter's CSLI constituted a search, the procedure that the government followed in obtaining the CSLI through a court order under the SCA was "reasonable" and therefore did not violate the Fourth Amendment.[85]

The *Carpenter* decision introduces a potentially significant qualification into the third-party doctrine. Rather than a bright-line rule that disclosure eliminates Fourth Amendment protections, the doctrine as construed in *Carpenter* suggests that courts must weigh the reduction in privacy expectations created by disclosure to a third party against the sensitivity of the underlying

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[77] *Id*. at 2220.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 2222–23.

[81] *See id.* at 2224 (Kennedy, J., dissenting) ("In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases."), 2235 (Thomas, J., dissenting) ("This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control."), 2247 (Alito, J., dissenting) ("Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter's in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them."), 2264 (Gorsuch, J., dissenting) ("The [Fourth] Amendment's protections do not depend on the breach of some abstract 'expectation of privacy' whose contours are left to the judicial imagination. . . . Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.").

[82] *Id*. at 2224 (Kennedy, J., dissenting) ("Customers like petitioner do not own, possess, control, or use [CSLI] records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process."), 2235 (Thomas, J., dissenting), 2247 (Alito, J., dissenting).

[83] *Id*. at 2272 (Gorsuch, J., dissenting) ("It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. . . . 47 U.S.C. § 222 designates a customer's cell-site location information as 'customer proprietary network information' (CPNI), § 222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves.") (emphasis in original).

[84] *Id*.

[85] *Id*. at 2234 (Kennedy, J., dissenting) ("The Court's [holding] . . . has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations."); *see also id.* at 2255 (Alito, J., dissenting).

information and the nature of the disclosure (i.e., whether it was voluntary or not).[86] Justice Kennedy opined that the majority had reformulated the third-party doctrine as a "balancing test," although the majority itself did not use that term.[87] The Court could, in future cases, apply *Carpenter* to hold that the government must also obtain a warrant before acquiring other types of technologically generated information from third parties.[88] But the *Carpenter* majority declined to forecast how the decision might apply in other contexts, such as with respect to other variants of CSLI (such as prospective or "real-time" CSLI) or even to historical CSLI requested in other circumstances (such as those involving emergencies or national security, or when the government requires access to a "limited period" of less than seven days' worth of CSLI records).[89] It is at least possible that historical CSLI could end up as an outlier in third-party search doctrine—the only category of information held to be sensitive enough to warrant Fourth Amendment protection despite third-party disclosure.[90]

Congress could mitigate the uncertainty by establishing statutory parameters for law enforcement access to information held by third-party technology companies.[91] Justice Alito has repeatedly called on Congress to do so, arguing that "[l]egislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw [concerning new technologies] for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope."[92] After *Carpenter*, however, one point is clear: the Constitution requires law enforcement to get a warrant before obtaining historical CSLI in most nonemergency circumstances.[93] Moreover, the Court reached this holding despite a federal statute (the SCA) that established an alternative, warrantless procedure.[94] It appears, therefore, that statutory authorization of warrantless acquisition of personal information from third-party service providers will not shield law enforcement from Fourth Amendment scrutiny—even if the statute provides for an alternative access procedure—if the Supreme Court considers the information at issue sufficiently sensitive.[95]

[86] *See id*. at 2219–20 (majority opinion).

[87] *Id*. at 2231-32 (Kennedy, J., dissenting) ("The Court appears, in my respectful view, to read [the third-party cases] *Miller* and *Smith* to establish a balancing test. . . . When the privacy interests are weighty enough to 'overcome' the third-party disclosure, the Fourth Amendment's protections apply.").

[88] *See id.* at 2234–35 (Kennedy, J., dissenting) (mentioning website browsing history and IP addresses).

[89] *Id*. at 2217 n.3, 2220.

[90] *See id*. at 2220 ("Our decision today is a narrow one.").

[91] *See, e.g.*, Kelsey Smith Act, S. 2973, 115th Cong. § 2 (as introduced in the Senate on May 24, 2018) (regulating law enforcement acquisition of CSLI from wireless carriers in emergency situations).

[92] *Carpenter*, 138 S. Ct. at 2261 (Alito, J., dissenting); 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.").

[93] *Id*. at 2221.

[94] *Id*.

[95] *See id*.

Federalism[96]

Murphy v. NCAA

In *Murphy v. NCAA*,[97] the Court concluded in an opinion by Justice Alito that a federal law prohibiting states from "authorizing" sports gambling unconstitutionally "commandeered" the authority of state legislatures.[98] This decision has important ramifications for not only sports gambling, but also for the scope of Congress's powers vis-à-vis the states. The *Murphy* Court explained that because the Professional and Amateur Sports Protection Act of 1992 (PASPA) "unequivocally dictates what a state legislature may and may not do" with respect to sports gambling, it impermissibly placed state legislatures "under the direct control of Congress."[99] In reaching this conclusion, Justice Alito rejected the argument that PASPA represented a valid exercise of Congress's power to preempt state law, placing an important limit on that power by holding that Congress can preempt state law only in the course of directly regulating private actors and not by issuing direct commands to state governments.[100]

Murphy centered on PASPA, which made it "unlawful" for most states "to sponsor, operate, advertise, promote, license, or authorize by laws" sports gambling.[101] In 2014, New Jersey enacted a statute partially repealing its former prohibition on sports gambling.[102] *Murphy* presented two main questions to the Court. The first question was whether New Jersey could liberalize its gambling law in any way without it constituting such an "authorization."[103] The NCAA argued that while a "full repeal" of sports gambling restrictions would not constitute an "authorization" under PASPA, a partial or selective repeal of sports gambling laws, such as the one conducted by New Jersey, could.[104] In turn, New Jersey argued that any legalization of gambling would be construed as an authorization under PASPA, and that this broad reading of the law was an unconstitutional commandeering of its state legislature.[105] Under the anti-commandeering doctrine, although the Constitution grants Congress broad power "to pass laws requiring or prohibiting certain acts" by *private* actors, the federal government may not "directly . . . compel the States to require or prohibit those acts."[106] The NCAA, joined by the United States as amicus, argued that the anti-authorization provision was nothing more than a valid preemption provision and within Congress's Commerce Clause power to ban sports gambling.[107]

Justice Alito's majority opinion concluded that PASPA's "anti-authorization" provision was unconstitutional under either of the proffered interpretations of the statute.[108] Under either

[96] Legislative Attorney Wilson Freeman authored this section.

[97] 138 S. Ct. 1461 (2018).

[98] *Id.* at 1484-85.

[99] *Id.* at 1478.

[100] *Id.* at 1479-80.

[101] 28 U.S.C. § 3702(1).

[102] *Murphy*, 138 S. Ct. at 1472 (citing 2014 N.J. Laws p. 602).

[103] *Id.* at 1473-75.

[104] *Id.* at 1473-74.

[105] *Id.*

[106] New York v. United States, 505 U.S. 144, 166 (1992).

[107] *Murphy*, 138 S. Ct. at 1479-80.

[108] *Id.* at 1478.

interpretation, the Court explained, PASPA "dictate[d] what a state legislature may and may not do" and, accordingly, placed state legislatures "under the direct control of Congress."[109] The Court determined that PASPA was tantamount to installing federal officers "in state legislative chambers . . . armed with the authority to stop legislators from voting on any offending proposals" in an "affront to state sovereignty."[110] In response to the argument that PASPA merely preempted state law, the Court explained that Supremacy Clause preemption was not an independent source of authority for Congress.[111] Instead, federal law can preempt state law only when Congress acts pursuant to one of its enumerated powers,[112] and, Justice Alito reasoned, those powers, centrally found in Article I, Section 8 of the Constitution, generally confer Congress with the power to regulate individuals rather than state governments.[113] Because the anti-authorization provision regulated state legislatures instead of individuals, the law could not, in the majority's view, stand as a valid preemption provision. Lastly, the Court analyzed whether PASPA's remaining provisions should be invalidated in light of the "anti-authorization" provision's invalidity. The Court reasoned that because Congress would have been unlikely to enact the provisions prohibiting states and individuals from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" gambling activity in the absence of the invalid "anti-authorization" provision, they were not "severable" from the "anti-authorization" provision and were accordingly inoperative.[114]

Murphy produced three other opinions. Justice Thomas's concurring opinion "joined the Court's opinion in its entirety" but wrote to express "discomfort" with the severability analysis.[115] Justice Breyer concurred in part and dissented in part. He agreed that PASPA's prohibition on "authoriz[ing]" sports gambling amounted to unconstitutional commandeering, but argued that this prohibition was severable from the other components of PASPA.[116] Lastly, Justice Ginsburg authored a dissent that was joined in full by Justice Sotomayor and in part by Justice Breyer.[117] Justice Ginsburg's opinion argued that the Court unnecessarily took a "wrecking ball" to PASPA, and that, even assuming that unconstitutional commandeering had taken place with respect to PASPA's ban on authorization by the states, the remaining provisions of PASPA should have been severed from the unconstitutional provision.[118]

Murphy could have important implications not only for sports gambling but for Congress's authority more generally. The decision makes it lawful for states to adopt sports gambling regulatory schemes as they please, which many are proceeding to do.[119] But the decision also has important implications for other existing federal statutes, which frequently, on their face, prohibit state legislatures from enacting certain laws. While the Court distinguished PASPA's anti-authorization provision from other express preemption clauses on the grounds that such

[109] *Id.*

[110] *Id.* at 1478-79.

[111] *Id.* at 1479.

[112] *Id.*

[113] *Id.* at 1479-80.

[114] *Id.* at 1482-84.

[115] *Id.* at 1485 (Thomas, J., concurring).

[116] *Id.* at 1488 (Breyer, J., concurring in part and dissenting in part).

[117] *Id.* at 1488-89 (Ginsburg, J., dissenting).

[118] *Id.* at 1489-90.

[119] *See, e.g.*, Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (Sept. 4, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states (tracking status of sports gambling law developments in the states after *Murphy*).

provisions are in the context of federal regulation of the activities of private parties,[120] not all federal laws are readily distinguishable. For instance, one commentator has argued that the Court's reasoning in *Murphy* calls into question the constitutionality of a number of federal statutes limiting state taxing authority.[121] The Court's decision may also have important implications for state and local "sanctuary" policies concerning immigration enforcement.[122] Accordingly, *Murphy*'s distinction between (1) federal laws that regulate *private* conduct and validly preempt state law, and (2) federal laws that impermissibly commandeer state regulatory authority, is likely to have important significance for Congress's legislation in the future.

Freedom of Speech[123]

Janus v. American Federation of State, County, and Municipal Employees, Council 31

The Supreme Court held in *Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)*,[124] that "public-sector agency-shop arrangements violate the First Amendment," overruling a forty-year old precedent, *Abood v. Detroit Board of Education*.[125] As described in *Abood*, under an "'agency shop' arrangement . . . every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues."[126] The Court recognized in *Abood* that compelling employees to financially "support their collective-bargaining representative has an impact upon their First Amendment interests,"[127] but nonetheless concluded that "important government interests" justified the "impingement upon associational freedom"[128] insofar as the fees were used to finance certain collective bargaining activities,[129] rather than "ideological activities unrelated to collective bargaining."[130] In *Janus*, the Court overruled *Abood*, holding that

[120] *See, e.g.*, 17 U.S.C. § 301(a) (stating that copyright under federal law shall be the only rights applicable to copyrightable works notwithstanding contrary State law); 27 U.S.C. § 216 (no statement relating to alcoholic beverages and health other than federal statement may be required to be placed on packaging of alcoholic beverages); 46 U.S.C. § 4306 (no state shall adopt a performance standard for recreational vessels other than federal performance standard).

[121] *See e.g.*, Daniel Hemel, *Justice Alito, State Tax Hero?* MEDIUM (MAY 15, 2018) (arguing that *Murphy* "invalidated a broad swath of congressional limitations on state tax authority…and it also saved sanctuary cities").

[122] *See* 8 U.S.C. § 1373 (prohibiting state or local government officials from restricting "in any way" government entities or officials "from sending to or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status . . . of any individual"); City of Chicago v. Sessions, Case No. 17 C 5720, 2018 U.S. Dist. LEXIS 125575 at *18-36 (N.D. Ill. July 28, 2018) (applying *Murphy* to conclude that 8 U.S.C. § 1373 violates the anti-commandeering doctrine); City of Phila. v. Sessions, 309 F. Supp. 3d 289, 330 (E.D. Pa. 2018) (ruling that 8 U.S.C. § 1373 violates the Tenth Amendment because it "directly tells states and state actors that they must refrain from enacting certain state laws").

[123] Legislative Attorney Valerie Brannon authored this section.

[124] 138 S. Ct. 2448, 2478 (2018).

[125] 431 U.S. 209, 229 (1977). See also CRS Legal Sidebar LSB10174, *Supreme Court Invalidates Public-Sector Union Agency Fees: Considerations for Congress in the Wake of Janus*, by Victoria L. Killion.

[126] 431 U.S. at 211.

[127] *Id.* at 222.

[128] *Id.* at 225.

[129] *Id.* at 225–26.

[130] *Id.* at 236.

"States and public-sector unions may no longer extract agency fees from nonconsenting employees" even if those fees are used for core collective bargaining activities.[131]

The petitioner in *Janus*, an employee of the State of Illinois who refused to join AFSCME, the union representing Illinois public employees,[132] challenged an Illinois statute authorizing unions to enter into agreements that required employees to pay a fee for their "share of the costs of the collective bargaining process."[133] Janus claimed that forcing him to pay this fee, as a nonmember who opposed many of the union's positions—"including the positions it takes in collective bargaining"—compelled his speech in violation of the First Amendment.[134] Janus argued that *Abood* was wrongly decided and should be overruled, citing some of the Supreme Court's recent criticisms of that case.[135] The Solicitor General, acting on behalf of the federal government, filed a brief in support of Janus, agreeing that *Abood* "should be overruled."[136] AFSCME defended *Abood*, arguing that it was consistent with both the "original meaning" of the First Amendment and with subsequent case law interpreting that provision.[137] The State of Illinois, another respondent in the case, also argued that the Court should adhere to *Abood*, noting that agency fees "are an integral part of the [state's] 'comprehensive regulatory scheme for public sector bargaining' that has been in place for more than three decades."[138]

Justice Alito, writing for the Court in *Janus*, began by reaffirming the general principle that "the compelled subsidization of private speech seriously impinges on First Amendment rights."[139] He then said that such an impingement "occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'"[140] Noting that prior cases had subjected "the compulsory subsidization of commercial speech" to "'exacting' scrutiny,"[141] the majority opinion considered whether the Illinois statute "serve[d] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[142]

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[131] Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018).

[132] *Id.* at 2461.

[133] *Id.* at 2462; 5 ILL. COMP. STAT. ANN. 315/6(a) (LexisNexis 2018) ("Employees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment . . . .").

[134] 138 S. Ct. at 2461–62.

[135] *See* Brief for the Petitioner, *Janus*, 138 S. Ct. 2448 (No. 16-1466); Harris v. Quinn, 134 S. Ct. 2618, 2632–34 (2014) (describing the reasoning of *Abood* as "questionable" and outlining practical problems in application).

[136] Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Janus*, 138 S. Ct. 2448 (No. 16-1466); *see also id.* at 9 (noting that the "United States previously defended *Abood*").

[137] Brief for Respondent American Federation of State, County, and Municipal Employees, Council 31 at 1, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

[138] *See* Brief for Respondents Lisa Madigan and Michael Hoffman at 53, *Janus*, 138 S. Ct. 2448 (No. 16-1466) (quoting Bd. of Educ. of Cmty. Sch. Dist. No. 1, Coles Cty. v. Compton, 526 N.E.2d 149, 152 (Ill. 1988)).

[139] *Janus*, 138 S. Ct. at 2464.

[140] *Id.* (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012)).

[141] *Id.* at 2464–65 (quoting *Knox*, 567 U.S. at 310–11).

[142] *Id.* at 2465 (quoting *Knox*, 567 U.S. at 310) (internal quotation marks omitted). The majority opinion clarified that it was reserving the question of whether this "'exacting' scrutiny" or the more demanding "strict scrutiny" test properly governs review of "the compulsory subsidization of commercial speech," because the statute failed "even the more permissive standard." *Id.* at 2464–65 (quoting *Knox*, 567 at 310).

The Court concluded that neither of the state interests identified in *Abood*—promoting labor peace and preventing free riders—could justify the agency fees.[143] "Labor peace," or "avoidance of the conflict and disruption that . . . would occur if the employees in a unit were represented by more than one union," was the "main defense" of agency fees in *Abood*.[144] The *Janus* Court assumed that labor peace was "a compelling state interest," but held that it could "be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees."[145] *Abood* also said that agency fee arrangements help stop free riding, preventing "nonmembers from enjoying the benefits of union representation without shouldering the costs."[146] But in *Janus*, the Court held that the risk of free riding was not a compelling interest, noting that private groups frequently speak in ways that benefit nonmembers, but the government usually cannot compel nonmember beneficiaries to subsidize that speech.[147]

The Court also rejected the "alternative justifications" for agency fees proffered by the respondents,[148] including the argument that *Abood* was "supported by the original understanding of the First Amendment."[149] Additionally, the Court decided that the agency fees could not be upheld[150] under *Pickering v. Board of Education*.[151] In *Pickering*, the Supreme Court stated that public employees retain some of "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," but acknowledged that the government has countervailing "interests as an employer in regulating the speech of its employees."[152] The balancing test established in that case instructs courts to weigh these two interests when analyzing whether public employees' speech is protected under the First Amendment.[153] The Supreme Court held in *Janus* that the *Pickering* balancing test was "a poor fit" for the context,[154] giving three reasons it would not "try to shoehorn *Abood* into the *Pickering* framework."[155] Specifically, the Court said (1) that "the standard *Pickering* analysis requires modification" when applied to "general rules that affect broad categories of employees," such as the blanket subsidization requirement at issue in *Janus*; (2) that *Pickering* has not been applied to circumstances "where the government compels speech or speech subsidies in support of third parties"; and (3) that "recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme."[156]

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[143] *Id.* at 2465–69.

[144] *Id.* at 2465.

[145] *Id.* at 2466 (quoting Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014)).

[146] *Id.*

[147] *Id.* at 2467–69. The Court said that the fact that the unions were "statutorily required to 'represen[t] the interests of all public employees in the unit,' whether or not they are union members," did not compel a different conclusion. *Id.* at 2467 (alteration in original) (quoting 5 ILL. COMP. STAT. ANN. 315/6(d) (LexisNexis 2018)). In the Court's view, any benefits from being designated as an exclusive representative under the statute "greatly outweigh[ed] any extra burden imposed by the duty of providing fair representation for nonmembers." *Id.*

[148] *Id.* at 2469.

[149] *Id.* at 2471 (concluding that AFSCME had offered "no persuasive founding-era evidence that public employees were understood to lack free speech protections," stating that "most of its historical examples involved limitations on public officials' outside business dealings, not on their speech").

[150] *Id.* at 2471–74.

[151] 391 U.S. 563 (1968).

[152] *Id.* at 568.

[153] *Id.*

[154] *Janus*, 138 S. Ct. at 2474.

[155] *Id.* at 2472.

[156] *Id.* at 2472–74.

Accordingly, the Court "conclude[d] that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise."[157] The remaining question was "whether *stare decisis*," the doctrine stating that courts should generally follow previously decided cases, "nonetheless counsel[ed] against overruling *Abood*."[158] The majority opinion concluded that it did not, analyzing five factors.[159] First, the Court explained that *Abood* was "poorly reasoned."[160] Second, the Court concluded that *Abood* did not set out a workable rule, stating that its test for distinguishing permissible fees had been difficult for both courts and employees to apply.[161] Third, the Court cited legal, economic, and political developments since *Abood* that had, in the majority's view, "'eroded' the decision's 'underpinnings' and left it an outlier."[162] Noting that "public-sector unionism was a relatively new phenomenon" at the time *Abood* was decided, the Court concluded that *Abood*'s factual assumptions regarding the necessity of agency shop arrangements had not been borne out by experience, especially as public-sector union membership grew.[163] Further, the Court said that "the mounting costs of public-employee wages, benefits, and pensions" gave "collective-bargaining issues a political valence that *Abood* did not fully appreciate."[164] Fourth, the Court held that *Abood* was "an 'anomaly' in [the Court's] First Amendment jurisprudence," because it applied a lower level of scrutiny to analyze agency fee arrangements than the scrutiny "applied in other cases involving significant impingements on First Amendment rights."[165] The Court said that "*Abood* particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party."[166] Finally, the Court acknowledged that there had been reliance on *Abood*, and specifically, that a number of collective bargaining agreements had been negotiated in reliance on that decision, but concluded that under the circumstances, reliance did not "carry decisive weight."[167]

Justice Kagan wrote the primary dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor. The dissent would have upheld *Abood*, concluding first that it was correctly decided.[168] Perhaps most notably, the dissent maintained that *Abood* was consistent with the *Pickering* framework, stating that *Abood* "dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech."[169] This "usual attitude," in Justice Kagan's view, "is one of respect—even solicitude—for the government's prerogatives as an employer" to regulate employees' speech.[170] Second, the dissent argued that even if *Abood*

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[157] *Id.* at 2478.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 2479–80.

[161] *Id.* at 2481–82.

[162] *Id.* at 2482–83 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

[163] *Id.* at 2483.

[164] *Id.*

[165] *Id.* at 2483 (quoting Harris v. Quinn, 134 S. Ct. 2618, 2627 (2014), and Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012)).

[166] *Id.* at 2484.

[167] *Id.* at 2484–85; *see also id.* at 2485 ("[T]he uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.").

[168] *Id.* at 2493 (Kagan, J., dissenting).

[169] *Id.*

[170] *Id.*

were incorrectly decided, principles of stare decisis supported continued adherence to that decision.[171] In particular, Justice Kagan highlighted "the massive reliance interests at stake,"[172] stating that the majority opinion "wreaks havoc on entrenched legislative and contractual arrangements."[173]

Following *Janus*, "public-sector unions may no longer extract agency fees" from nonmembers without affirmative employee consent,[174] a potentially major change for millions of public employees and the unions that represent them. According to the Bureau of Labor Statistics, in 2017, over 6.8 million state and local employees were represented by unions; roughly 576,000 of these employees were nonmembers.[175] A variety of experts and other commentators have maintained that the decision will likely lead to decreased union membership[176] and may weaken unions' political power.[177] Others have argued that even if the short-term impact on unions is decreased funding and membership, both unions and states may respond in ways that ultimately strengthen the labor movement.[178] Regardless of this policy debate, perhaps the most immediate legal consequence of *Janus* is that a number of nonconsenting public employees who have paid mandatory union dues have filed lawsuits seeking retroactive repayment of those dues.[179]

Although the Court's decision in *Janus* was limited to public-sector unions, some have questioned whether *Janus*'s reasoning could open the door to possible challenges to agency-shop

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[171] *Id.* at 2497.

[172] *Id.*

[173] *Id.* at 2499. *See also id.* at 2501 ("The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood*'s legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision.").

[174] *Id.* at 2486 (majority opinion). The Court said that consent to pay "an agency fee" or "other payment to the union" would have to meet constitutional waiver requirements: "to be effective, the waiver [of First Amendment rights] must be freely given and shown by clear and compelling evidence." *Id.* (internal quotation marks omitted).

[175] NEWS RELEASE, BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, USDL-18-0080, UNION MEMBERS – 2017 tbl. 3 (Jan. 19, 2018, 10:00 AM), https://www.bls.gov/news.release/pdf/union2.pdf. According to this source, 6,820,000 workers in state and local government were represented by unions, and 6,244,000 workers in state and local government were union members. *Id.* The difference in these figures is 576,000.

[176] *See, e.g.*, Amy Howe, *Opinion Analysis: Court Strikes Down Public-Sector Union Fees (Updated)*, SCOTUSBLOG (June 27, 2018, 1:56 PM), http://www.scotusblog.com/2018/06/opinion-analysis-court-strikes-down-public-sector-union-fees; Patrick Wright, *Symposium: Evidence Shows Unions Will Survive Without Agency Fees*, SCOTUSBLOG (Dec. 22, 2017, 10:06 AM), http://www.scotusblog.com/2017/12/symposium-evidence-shows-unions-will-survive-without-agency-fees.

[177] *See, e.g.*, Brief for the Petitioner at 17, *Janus*, 138 S. Ct. 2448 (No. 16-1466) (arguing that "[a]gency fees transform employee advocacy groups into artificially powerful factions, skewing the 'marketplace for the clash of different views and conflicting ideas'" (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981))); Transcript of Oral Argument at 54-55, *Janus*, 138 S. Ct. 2448 (No. 16-1466), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_bocf.pdf (counsel for AFSCME conceding that if *Abood* is overruled, unions will have less political influence).

[178] *See, e.g.*, John W. Budd, *What Happens in the Aftermath of the Janus Ruling?*, WHITHER WORK? (July 2, 2018, 12:36 PM), http://whitherwork.blogspot.com/2018/07/what-happens-in-aftermath-of-janus.html; *accord*, Steven Greenhut, *Don't Believe the Hype: Janus Ruling Will Help Public Employee Union Members – And Unions*, R STREET (Jan. 30, 2018), https://www.rstreet.org/2018/01/30/dont-believe-the-hype-janus-ruling-will-help-public-employee-union-members-and-unions; Daniel Hemel & David Louk, *How to Save Public Sector Unions*, SLATE (June 27, 2018, 12:23 PM), https://slate.com/news-and-politics/2018/06/supreme-courts-janus-decision-how-blue-states-can-still-save-public-sector-unions.html.

[179] *See* Jason Tashea, *Lawsuit to Claw Back Union Dues Filed after* Janus *Decision*, ABA Journal (July 6, 2018, 7:00 AM), http://www.abajournal.com/news/article/lawsuit_to_clawback_union_dues_filed_after_janus_decision.

arrangements in the private sector.[180] To warrant First Amendment protection, however, any litigants challenging private-sector agency-shop arrangements would have to demonstrate state action.[181] The ruling may also cast doubt on the constitutionality of mandatory dues to professional organizations and other "compelled speech subsidies outside the labor sphere."[182] The Supreme Court is set to consider in September whether to hear an attorney's constitutional challenge to mandatory membership in the State Bar Association of North Dakota.[183] And since *Janus* was issued, at least one suit has been filed in federal district court citing *Janus* for the proposition that mandatory bar dues violate the First Amendment.[184]

NIFLA v. Becerra

In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, the Supreme Court held that notice requirements outlined in the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) were likely unconstitutional under the First Amendment's Free Speech Clause.[185] The opinion partially clarified the standards that courts should use to review First Amendment challenges to commercial speech, but left open some significant questions. Notably, the Court largely rejected the existence of a special "professional speech" doctrine[186] and also suggested that some commercial disclosure requirements might be subject to strict scrutiny,[187] rather than the intermediate scrutiny that generally governs commercial speech,[188] or the rational basis applicable to other commercial disclosure requirements.[189]

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[180] *See, e.g.*, Alexia Elejalde-Ruiz, *Supreme Court's Janus Ruling Could Undercut Private Sector Unions Too*, CHICAGO TRIBUNE (July 11, 2018, 10:00 AM), http://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html.

[181] The majority opinion expressly distinguished public-sector agency-shop arrangements from the private-sector agency-shop arrangements that the Supreme Court had upheld in *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956), and *International Association of Machinists v. Street*, 367 U.S. 740, 749–50 (1961). *Janus*, 138 S. Ct. at 2479–80. But the Court also said: "No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today." *Id.* at 2479 n.24.

[182] *Id.* at 2498 (Kagan, J., dissenting) (noting that the Supreme Court has relied on *Abood* in a variety of contexts).

[183] Docket, Fleck v. Wetch, No. 18-886 (U.S. June 27, 2018) https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-886.html. However, in the 2014 case *Harris v. Quinn*, the Supreme Court recognized states' "strong" interests "in regulating the legal profession and improving the quality of legal services," and "in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." 134 S. Ct. 2618, 2644 (2014) (quoting Keller v. State Bar of Cal., 496 U.S. 1, 13 (1990)) (internal quotations omitted). In that case, the Court declined to extend *Abood* to "personal assistants" because they were not "full-fledged public employees." *Id.* at 2368. The Court rejected arguments that its decision called into question two decisions upholding certain mandatory fees outside the union context, concluding that *Keller*, which upheld mandatory bar dues, "fits comfortably within the framework applied in the present case." *Id.* at 2643.

[184] *See* Jason Tashea, *Oregon Lawyers Sue over Mandatory Bar Dues in Wake of Supreme Court's Union Dues Decision*, ABA J. (Sept. 4, 2018), http://www.abajournal.com/news/article/citing_supreme_court_decision_2_lawyers_sue_oregon_state_bar.

[185] 138 S. Ct. 2361, 2378 (2018).

[186] *See id.* at 2371–72.

[187] *See id.* at 2374–75.

[188] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980) (asking whether "the asserted governmental interest is substantial" and "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest").

[189] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (asking whether the "disclosure

The FACT Act set forth two distinct notice requirements for certain facilities providing pregnancy-related services.[190] First, the FACT Act required any "*licensed* covered facility" to notify clients that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women," and give the telephone number of the local social services office.[191] This notice had to be posted on-site or provided directly to clients either in printed or digital form.[192] Second, any "*unlicensed* covered facility" had to provide notice "on site and in any print and digital advertising materials" that the "facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[193] Both notices had to be provided in English and, for some counties, in other languages determined by the state.[194]

NIFLA and two other "religiously-affiliated non-profit corporations" that operated pregnancy centers and were "strongly opposed to abortion"[195] sought a preliminary injunction to enjoin enforcement of the FACT Act.[196] They argued that the FACT Act's notice requirements were content-based regulations that should be subject to strict scrutiny under the First Amendment and that the requirements failed this test.[197] In response, the State of California claimed that the "neutral"[198] requirements of the FACT Act should be analyzed under a less stringent standard, but should, in any event, be upheld under any standard of review.[199] The U.S. Solicitor General filed an amicus brief arguing that the disclosure requirements for licensed pregnancy centers were unconstitutional, but that the requirements for unlicensed pregnancy centers were constitutionally permissible.[200]

Writing for the Court in *NIFLA*, Justice Thomas held that the challengers were "likely to succeed on the merits of their claim that the FACT Act violates the First Amendment."[201] First, he stated that the licensed notice requirement regulated protected speech on the basis of content,[202] noting that content-based speech regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[203] The majority opinion then reviewed a number of exceptions to the general "rule that content-based regulations of speech are subject to strict scrutiny," concluding that none applied.[204]

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requirements are *reasonably related* to the State's interest in preventing deception of consumers") (emphasis added).

[190] NIFLA v. Harris, 839 F.3d 823, 831 (9th Cir. 2016).

[191] CAL. HEALTH & SAFETY CODE § 123472(a)(1) (emphasis added).

[192] *Id.* § 123472(a).

[193] *Id.* § 123472(b) (emphasis added).

[194] *Id.* § 123472.

[195] *NIFLA*, 839 F.3d at 831.

[196] *Id.* at 832.

[197] *See* Brief for Petitioners at 19, NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140).

[198] Brief for the State Respondents at 15, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

[199] *Id.* at 19, 32–33, 47.

[200] Brief for the United States as Amicus Curiae Supporting Neither Party, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

[201] *NIFLA*, 138 S. Ct. at 2378.

[202] *Id.* at 2371 ("The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" (alterations in original) (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988))).

[203] *Id.* (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)) (internal quotation marks omitted).

[204] *See id.*

As a preliminary matter, the Court rejected the existence of "'professional speech' as a separate category of speech."[205] Some lower courts had created a professional speech doctrine, carving out the speech of certain "professionals" from normally applicable First Amendment doctrines and analyzing regulations of professional speech under more lenient standards.[206] The majority opinion explained that the "Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking."[207]

The first recognized exception[208] was announced in *Zauderer v. Office of Disciplinary Counsel*, in which the Supreme Court had upheld a commercial disclosure requirement after concluding that it was "reasonably related to the State's interest in preventing deception of consumers."[209] The *NIFLA* Court stated that the *Zauderer* standard should be applied only to disclosures that give "purely factual and uncontroversial information about the terms under which . . . services will be available."[210] The Court held that this standard was not applicable to the FACT Act, because the licensed notice did not "relate[] to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic."[211] Second, the Court observed that it "has upheld regulations of professional conduct that incidentally burden speech," citing the example of malpractice suits.[212] The *NIFLA* Court concluded that the FACT Act was not such a regulation because it was "not an informed-consent requirement" or "tied to a [medical] procedure at all."[213]

Although the Court suggested that content-based regulations of professional speech should be subject to strict scrutiny if they do not fall within one of these two categories,[214] it declined to state definitively that this was the case because, in its view, "the licensed notice cannot survive even intermediate scrutiny."[215] The majority assumed that "providing low-income women with information about state-sponsored services . . . . is a substantial state interest," but held that "the licensed notice is not sufficiently drawn to achieve it."[216] In the Court's view, the regulation was underinclusive, because it did not apply to all clinics that "serve[d] low-income women and could

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[205] *Id.* Although it concluded that no professional speech exception currently existed and rejected the arguments proffered to support the creation of such a category, the majority opinion did leave open the possibility that "some . . . reason" may exist to treat "professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. *See generally, e.g.*, Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J. FORUM 185 (2018) (discussing scope of professional speech doctrine "through the lens of *NIFLA v. Becerra*"). However, the Court later noted the "difficult[y]" of defining this category with any "precision," arguing that the creation of a "professional speech" category would give "the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement," creating "a powerful tool to impose 'invidious discrimination of disfavored subjects.'" 138 S. Ct. at 2375 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 n.19 (1993)).

[206] *See* 138 S. Ct. at 2371.

[207] *Id.* at 2372.

[208] *Id.*

[209] 471 U.S. 626, 651 (1985).

[210] 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651) (internal quotation marks omitted).

[211] *Id.*

[212] *Id.* at 2373.

[213] *Id.*

[214] *See id.* at 2374–75.

[215] *Id.* at 2375 ("In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny.").

[216] *Id.*

educate them about the State's services," raising the concern that the state was targeting disfavored speakers.[217] Further, the majority noted that California could itself inform women of its services.[218]

Turning to the unlicensed notice requirement, the Court similarly assumed without deciding that the *Zauderer* standard applied rather than intermediate or strict scrutiny because it held that the disclosure requirement failed even that more deferential standard.[219] In *Zauderer*, the Court "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment."[220] The *NIFLA* majority held that the FACT Act was unconstitutional under *Zauderer* because California had not met its "burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome."[221] The Court concluded that California's asserted interest in "ensuring that 'pregnant women in California know when they are getting medical care from licensed professionals'"[222] was "purely hypothetical" and unsupported by any evidence in the record.[223] Further, "even if California had presented a nonhypothetical justification for the unlicensed notice," in the Court's view, "the FACT Act unduly burden[ed] protected speech."[224] As an example, Justice Thomas noted that under the FACT Act, a billboard saying only, "Choose Life," "would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages."[225] The majority opinion also emphasized that the requirement "target[ed] speakers, not speech," stating that the Court is "deeply skeptical" of such laws.[226]

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan, concluding that the FACT Act was "likely constitutional."[227] At the outset, the dissenting opinion warned that the majority's "constitutional approach . . . threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation" because "many ordinary disclosure laws," including those found in securities or consumer protection laws, require "individuals 'to speak a particular message,'" and "fall outside the majority's exceptions for disclosures related to the professional's own services or conduct."[228] Justice Breyer argued that precedent suggested that the Court should evaluate laws regulating "business activity, particularly health-related activity," under a standard closer to rational basis than strict scrutiny.[229]

With respect to the licensed notice requirements, Justice Breyer believed that the Court "should focus more directly" on its prior cases evaluating "disclosure laws relating to reproductive

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[217] *Id.* at 2375–76.

[218] *Id.* at 2376.

[219] *Id.* at 2376–77.

[220] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[221] 138 S. Ct. at 2377.

[222] *Id.* (quoting 2015 Cal. Stat. ch. 700, §1(e)).

[223] *Id.* (quoting Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S.136, 146 (1994)) (internal quotation marks omitted).

[224] *Id.*

[225] *Id.* at 2378.

[226] *Id.* Justice Kennedy seemed to build on this point in a concurring opinion, noting that the requirements applied to "primarily pro-life pregnancy centers" and arguing "that viewpoint discrimination [appeared to be] inherent in the design and structure of" the FACT Act. *Id.* at 2379 (Kennedy, J., concurring).

[227] *Id.* at 2379 (Breyer, J., dissenting).

[228] *Id.* at 2380 (quoting *id.* at 2371 (majority opinion)).

[229] *Id.* at 2381.

health."[230] In particular, the dissent noted that the joint opinion of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[231] had held that a state statute requiring doctors to provide certain information "about the risks of abortion" did not violate the First Amendment.[232] The statute in *Casey* included "the requirement that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance."[233] Justice Breyer concluded that *Casey* was controlling.[234] He argued that "if a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services," it should also be able "to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services."[235] While noting that the majority opinion had distinguished *Casey* because the FACT Act disclosure was "unrelated to a 'medical procedure,'"[236] the dissent found this distinction unpersuasive, saying that both "choosing an abortion" and "carrying a child to term and giving birth" involve "medical procedure[s]" carrying "certain health risks."[237] And "in any case," the dissent argued, "informed consent principles apply more broadly than only to discrete 'medical procedures.'"[238] The dissenting opinion separately concluded that the notice was consistent with *Zauderer*, and would have held that the disclosure was related to the services that licensed clinics provide.[239]

The dissenting opinion believed that the majority opinion had also erred in its evaluation of the unlicensed notice requirement. First, Justice Breyer argued that there was "no basis for finding the State's interest 'hypothetical,'" stating that the conclusions of the state legislature were "reasonable."[240] Next, he agreed that "speaker-based laws warrant heightened scrutiny"—if they represent viewpoint discrimination.[241] But he concluded that there was "no cause for such concern here," where the statute was neutral on its face and there was no "convincing evidence . . . that discrimination was the purpose or the effect of the statute."[242] The dissent ended by disagreeing with the majority's conclusion that the FACT Act was overly burdensome, at least when viewed on its face, as opposed to a particular application of the law.[243]

While arising in the context of a regulation concerning reproductive health, the Court's decision in *NIFLA*, as the majority and dissenting opinions suggest, could have broad implications for First Amendment law, particularly with respect to the regulation of commercial speech. Possibly most directly relevant, state and federal laws contain a wide variety of commercial disclosure

[230] *Id.* at 2383.

[231] 505 U.S. 833, 882–84 (1992).

[232] 138 S. Ct. at 2385 (quoting *Casey*, 505 U.S. at 884).

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 2386 (quoting *id.* at 2373 (majority opinion)).

[237] *Id.*

[238] *Id.* (noting other examples of informed consent requirements, including warnings on prescription drug labels and other signage requirements in medical clinics).

[239] *Id.* at 2386–87.

[240] *Id.* at 2390.

[241] *Id.* at 2391.

[242] *Id.*

[243] *Id.*

requirements, which presumably should be analyzed under the framework set forth in *NIFLA*.[244] If the disclosure does not require the provision of "purely factual and uncontroversial information" "relate[d] to the services that [the speaker] provide[s],"[245] or is not "tied to" a conduct-focused regulation of a professional service,[246] the requirement may be subject to strict scrutiny.[247] The *NIFLA* majority clarified that it did not mean to "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products,"[248] but commentators have argued that future litigants likely *will* challenge various disclosure requirements based on *NIFLA*.[249]

Others have noted that the Court did not mention *Central Hudson*, the case setting out the general rule that commercial speech should be evaluated under intermediate scrutiny,[250] let alone explain why the rule that content-based speech regulations are subject to strict scrutiny trumped the application of the *Central Hudson* standard.[251] At least one commentator has argued that *NIFLA* is only the most recent in a series of cases undermining *Central Hudson*'s holding that commercial speech may be more freely regulated than other speech under the First Amendment.[252] Rather than proceeding under *Central Hudson*, Justice Thomas's majority opinion in *NIFLA* relied

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[244] *See id.* at 2380. In a prior opinion, Justice Breyer had articulated examples of content-based speech regulations where, in his view, "a strong presumption against constitutionality has no place":

> Consider governmental regulation of securities, *e.g.*, 15 U.S.C. § 78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 42 U.S.C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U.S.C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e.g.*, 38 U.S.C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e.g.*, 26 U.S.C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e.g.*, 14 C.F.R. § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); . . . and so on.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

[245] 138 S. Ct. at 2372 (majority opinion).

[246] *Id.* at 2373.

[247] *See id.* at 2374–75.

[248] *Id.* at 2376.

[249] *See, e.g.*, Michael C. Dorf, *SCOTUS Crisis Pregnancy Center Case Shows Originalist Justices Are Originalist Except When They're Not*, DORF ON LAW (June 26, 2018), http://www.dorfonlaw.org/2018/06/scotus-crisis-pregnancy-center-case.html; Eugene Volokh, NIFLA v. Becerra *and Speech Compulsions*, THE VOLOKH CONSPIRACY (June 26, 2018 3:53 PM), https://reason.com/volokh/2018/06/26/nifla-v-becerra-and-speech-compulsions. Future litigation may also test what types of disclosures qualify as "uncontroversial." *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment Strikes Back*, TAKE CARE BLOG (July 3, 2018), https://takecareblog.com/blog/the-deregulatory-first-amendment-strikes-back.

[250] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980).

[251] *See, e.g.*, Cory L. Andrews, *The Dog That Didn't Bark in the Night: SCOTUS's* NIFLA v. Becerra *and the Future of Commercial Speech*, FORBES (July 5, 2018, 11:02 AM), https://www.forbes.com/sites/wlf/2018/07/05/the-dog-that-didnt-bark-in-the-night-scotuss-nifla-v-becerra-and-the-future-of-commercial-speech/#2e3b0ab43ddc; Catherine Fisk, *Compulsion and Complicity*, TAKE CARE BLOG (July 12, 2018), https://takecareblog.com/blog/compulsion-and-complicity.

[252] *See* Andrews, *supra* note 251. *See also, e.g.*, Expressions Hair Design v. Schneiderman, 808 F.3d 118, 136 (2d Cir. 2015) (noting that "commercial speech doctrine has undergone substantial changes" in recent decades and citing law review articles arguing that the Court has viewed commercial speech restrictions under increasingly stricter scrutiny), *vacated on other grounds*, 137 S. Ct. 1144 (2017).

largely on his prior opinion for the Court in *Reed v. Town of Gilbert*.[253] *Reed* had characterized a local sign ordinance as a content-based restriction subject to strict scrutiny.[254] Some lower courts had previously held that *Reed* did *not* require strict scrutiny for regulations governing commercial speech.[255] Although the Court expressly reserved the question of whether strict or intermediate scrutiny applied to the FACT Act's requirements, the Court did seem to cast doubt on these lower court rulings by failing to cite *Central Hudson* as a "reason" that "professional speech" should not be subject to strict scrutiny.[256] This issue, too, may be raised in future challenges to commercial disclosure requirements.

Immigration Law[257]

Trump v. Hawaii

In perhaps the most closely watched case of the last term, *Trump v. Hawaii*, a five-Justice majority held that Presidential Proclamation No. 9645[258] likely does not violate the First Amendment's Establishment Clause or the Immigration and Nationality Act (INA).[259] The proclamation denies entry indefinitely into the United States to specified categories of nationals from seven countries—including five Muslim-majority countries—subject to a recurring agency review and some exemptions and case-by-case waivers.[260] Two earlier executive orders had

[253] *See NIFLA*, 138 S. Ct. at 2371; Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[254] 135 S. Ct. at 2224.

[255] *See, e.g.*, EMW Women's Surgical Ctr., P.S.C. v. Beshear, No. 17-6151, 2017 U.S. App. LEXIS 24931, at *7–8 (noting that under *Reed*, "[s]trict scrutiny generally applies to content-based restrictions on speech," but stating that "commercial speech and professional conduct . . . are typically scrutinized at a lower level of review"); Contest Promotions, LLC v. City & Cty. of San Francisco, 874 F.3d 597, 601 (9th Cir. 2017) (rejecting argument that under *Reed*, restriction on commercial speech should be subject to strict rather than intermediate scrutiny); Free Speech Coalition, Inc. v. Attorney General, 825 F.3d 149, 176 n.7 (3d Cir. 2016) (Rendell, J., dissenting) ("Notably, because the Court in *Reed* never even mentioned *Central Hudson*, at least two district courts in California have concluded that *Reed* does not compel strict scrutiny for laws affecting commercial speech."). *Cf., e.g.*, Flanigan's Enters. v. City of Sandy Springs, 703 Fed. Appx. 929, 935 (11th Cir. 2017) ("There is no question that Reed has called into question the reasoning undergirding the secondary-effects doctrine."); Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228, 1234 n.7 (11th Cir. 2017) ("There is some question as to whether under the Supreme Court's decisions in *Sorrell v. IMS Health Inc*.[, 564 U.S. 552 (2011)] and *Reed v. Town of Gilbert* an analysis to determine if the restriction is content based or speaker focused must precede any evaluation of the regulation based on traditional commercial speech jurisprudence, and if so, whether this would alter the *Central Hudson* framework.").

[256] *See* 138 S. Ct. at 2375.

[257] Legislative Attorney Ben Harrington authored this section.

[258] 82 Fed. Reg. 45,161 (2017). The proclamation's title is "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." *Id*. at 45,161.

[259] 138 S. Ct. 2392, 2415, 2423. Because the case came to the Supreme Court on review of an appeal from a preliminary injunction against the proclamation, the Court did not decide the ultimate legality of the proclamation but instead determined that challenges against the proclamation were not likely to succeed on their merits. *See id*. at 2423 ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion."). The plaintiffs in the case have since dismissed their claims voluntarily. Attorney General News Release 2018-47, *Hawaii Concludes Travel Ban Case* (Aug. 13, 2018), https://governor.hawaii.gov/newsroom/latest-news/attorney-general-news-release-2018-47-hawaii-concludes-travel-ban-case/.

[260] Proclamation No. 9645, 82 Fed. Reg. at 45,165–67. The proclamation originally applied to nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id*. The President terminated the restrictions on nationals of Chad, however, after determining that their government "had made sufficient improvements to its identity-management protocols." *Trump*, 138 S. Ct. at 2410.

imposed temporary entry restrictions of a similar nature.[261] As authority for the proclamation, President Trump relied primarily upon 8 U.S.C. § 1182(f).[262] That statute, a provision of the INA, grants the President power "to suspend the entry of all aliens or any class of aliens" whose entry he "finds . . . would be detrimental to the interests of the United States."[263] The stated purpose of the proclamation is to protect national security by excluding non-U.S. nationals (aliens) whose national governments do not share adequate information with the United States to satisfy immigration screening protocols.[264] The Court rejected arguments, premised on campaign statements and other extrinsic evidence, that the proclamation was unlawful because the President's actual purpose in issuing it was to exclude Muslims from the United States.[265] The Court's decision interprets § 1182(f) as a delegation of extraordinarily broad power to the President to impose entry restrictions that go beyond the restrictions specifically set forth in the INA.[266] The *Trump* decision also holds that constitutional challenges to the Executive's exclusion policies trigger only rational basis review—a highly deferential form of judicial review—even when some extrinsic evidence suggests that the Executive may have acted for an unconstitutional purpose and when constitutional doctrine outside the immigration context would have subjected the policy to more rigorous scrutiny.[267]

The State of Hawaii and other plaintiffs, including U.S. citizens and lawful permanent residents with foreign relatives subject to the proclamation, challenged the proclamation on statutory and constitutional grounds.[268] As for the statutory grounds, the plaintiffs argued that § 1182(f), despite its broad language, conferred only "residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct," and that the proclamation exceeded this authority by providing for the indefinite exclusion of nationals of seven countries.[269] Plaintiffs also argued that the proclamation did not make sufficient findings that the entry of the excluded aliens would be "detrimental to the interests of the United States," as the language of § 1182(f) requires.[270] In addition, plaintiffs argued that the proclamation engaged in nationality-based discrimination in violation of another INA provision, 8 U.S.C. § 1152(a)(1)(A), which prohibits nationality-based discrimination in the issuance of immigrant visas.[271]

As for their constitutional challenge, plaintiffs argued that the proclamation violated the Establishment Clause because the President issued it for the actual purpose of excluding Muslims from the United States.[272] As such, according to plaintiffs, the proclamation ran afoul of the "clearest command" of the Establishment Clause: "'that one religious denomination cannot be

[261] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see Trump*, 138 S. Ct. at 2403–04 (discussing executive orders and attendant litigation histories).

[262] Proclamation No. 9645, 82 Fed. Reg. at 45,162; *see Trump*, 138 S. Ct. at 2403.

[263] 8 U.S.C. § 1182(f).

[264] Proclamation No. 9645, 82 Fed. Reg. at 45161–62; *see Trump*, 138 S. Ct. at 2421 ("The Proclamation is expressly premised on . . . preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.").

[265] *Trump*, 138 S. Ct. at 2420–22.

[266] *Id*. at 2406–07, 2408.

[267] *See id*. at 2419–20.

[268] *Id*. at 2406.

[269] *Id*. at 2408.

[270] *Id*. at 2409.

[271] *Id*. at 2413–14.

[272] *Id*. at 2406.

officially preferred over another.'"[273] And although the Supreme Court had upheld past executive branch decisions to exclude aliens so long as the Executive supplied a "legitimate and bona fide" reason for the decisions[274]—an extremely deferential standard of review—plaintiffs argued that the proclamation's national security justification was not "bona fide" in light of a series of statements by President Trump (many of which he made as a candidate during the presidential campaign) proposing to exclude Muslims from the United States.[275]

A five-Justice majority of the Supreme Court rejected all of plaintiffs' challenges. On the statutory issues, the Court held that the proclamation "falls well within" the President's exclusion authority under § 1182(f), the language of which "exudes deference to the President" and grants him "'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA."[276] The Court concluded that the proclamation explained "thoroughly" and in "detail[]" the President's determination that deficiencies in information provided by some foreign governments rendered entry of their nationals "detrimental" for purposes of § 1182(f).[277] And in any event, the Court reasoned, the "deference traditionally accorded the President" in national security and immigration matters means that courts must not conduct a "searching inquiry" into the basis of the President's determination to invoke his exclusion authority under § 1182(f).[278] The Court also held that the nationality-based classifications in the proclamation did not violate the INA because the proclamation concerns the admissibility of aliens (i.e., whether they qualify to be granted lawful entry) while the INA prohibition on nationality-based discrimination in the issuance of immigrant visas concerns "the allocation of immigrant visas" among admissible aliens.[279] In other words, the INA prohibition concerns "the act of visa issuance alone" and operates in a "different sphere[]" than the proclamation.[280]

On the constitutional issue, the Court reaffirmed prior case law establishing that matters concerning the admission or exclusion of aliens are "'largely immune from judicial control'" and are subject only to "highly constrained" judicial inquiry.[281] The Court did not decide whether such limited inquiry barred consideration of extrinsic evidence of the proclamation's actual purpose,[282] as some lower court judges had concluded in dissenting opinions.[283] Instead, the Court held that

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[273] *Id*. (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).

[274] Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

[275] *Trump*, 138 S. Ct. at 2417 ("For example, while a candidate on the campaign trail, the President published a 'Statement on Preventing Muslim Immigration' that called for a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'") (quoting record).

[276] *Id*. at 2408 (quoting Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993)). The Court did not decide whether the doctrine of consular nonreviewability barred judicial review of the statutory claims. *Id*. at 2407 ("[W]e may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis."); *see also, e.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1060 (9th Cir. 2008) ("'[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review.'") (quoting Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir.1986)).

[277] *Trump*, 138 S. Ct. at 2409.

[278] *Id*.

[279] *Id*. at 2414.

[280] *Id*.

[281] *Id*. at 2418–20 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[282] *Id*. at 2420.

[283] *See, e.g.*, IRAP v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (Niemeyer, J., dissenting) ("[Supreme Court decisions] have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion [to exclude aliens] in search of circumstantial evidence of alleged bad faith.").

the proclamation survived a limited level of inquiry even when taking plaintiffs' extrinsic evidence into account:

> A conventional application of . . . [the] facially legitimate and bona fide [test] would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[284]

This decision to review the proclamation under a rational basis standard that takes extrinsic evidence into account represents perhaps the most novel aspect of the legal analysis in the opinion. Lower courts considering the constitutionality of the proclamation generally proceeded under a different framework that posed a binary choice: either (1) limit review to the deferential "facially legitimate and bona fide" inquiry—in which case the government would almost certainly prevail given the proclamation's stated national security justification; or (2) hold that plaintiffs' extrinsic evidence of anti-Muslim animus called for more exacting scrutiny under domestic Establishment Clause jurisprudence, which requires the government to show that a reasonable observer would conclude "that the *primary* purpose, not just *a* purpose, of the Proclamation is secular."[285] But the Supreme Court implicitly rejected this framework. Even if plaintiffs' evidence of anti-Muslim animus warrants expansion of the scope of judicial review beyond the four corners of the proclamation itself, the Court concluded, the appropriate inquiry remains extremely limited: whether the proclamation is rationally related to the national security concerns it articulates.[286] And that rational basis inquiry, the Court explained, is one that the government "hardly ever" loses unless the laws at issue lack any purpose other than a "'bare . . . desire to harm a politically unpopular group.'"[287] Applying this forgiving standard, the Court held that the proclamation satisfied it mainly because agency findings about deficient information-sharing by the governments of the seven covered countries established a "legitimate grounding in national security concerns, quite apart from any religious hostility."[288]

Justice Sotomayor, in a dissent joined by Justice Ginsburg, argued that the majority failed to provide "explanation or precedential support" for limiting its analysis to rational basis review after deciding to go beyond the "facially legitimate and bona fide reason" inquiry.[289] In Justice

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[284] *Trump*, 138 S. Ct. at 2420 (citations omitted).

[285] IRAP v. Trump, 883 F.3d 233, 265 (4th Cir. 2018) (emphasis in original); *see id*. at 264–65 (reasoning that the "facially legitimate and bona fide" standard "accounts for those very rare instances in which a challenger plausibly alleges that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review" and proceeding to apply domestic Establishment Clause jurisprudence after determining that "the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself"), *vacated and remanded*, 138 S. Ct. 2710 (2018); IRAP v. Trump, 857 F.3d 554, 592 (4th Cir. 2017) ("Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine."), *vacated on mootness grounds*, 138 S. Ct. 353 (2017).

[286] *Trump*, 138 S. Ct. at 2420.

[287] *Id*. (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[288] *Id*. at 2421 ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review . . . . But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country.").

[289] *Id*. at 2441 (Sotomayor, J., dissenting).

Sotomayor's view, the Court's Establishment Clause jurisprudence required the Court to strike down the proclamation because a "reasonable observer" familiar with the evidence would have concluded that the proclamation sought to exclude Muslims.[290] She also reasoned that, even if rational basis review were the correct standard, the proclamation failed to satisfy it because the President's statements were "overwhelming . . . evidence of anti-Muslim animus" that made it impossible to conclude that the proclamation had a legitimate basis in national security concerns.[291] Finally, Justice Sotomayor criticized the majority for, in her view, tolerating invidious religious discrimination "in the name of a superficial claim of national security."[292] She compared the majority decision to *Korematsu v. United States*, a case that upheld as constitutional the compulsory internment of all persons of Japanese ancestry in the United States (including U.S. citizens) in concentration camps during World War II.[293] (The majority responded that unlike the exclusion order in *Korematsu* the proclamation did not engage in express, invidious discrimination against U.S. citizens and that, as such, "*Korematsu* has nothing to do with this case."[294] The majority also took the occasion to overrule *Korematsu*—which had long been considered bad law but which the Supreme Court had never expressly overruled—calling it "gravely wrong the day it was decided."[295])

In a separate dissent, Justice Breyer, joined by Justice Kagan, argued that the Court should have remanded the case for further proceedings to determine whether the government was applying in good faith the proclamation's provisions providing for case-by-case waivers for aliens who demonstrate undue hardship and who do not pose security risks.[296] "[I]f the Government is not applying the Proclamation's exemption and waiver system," Justice Breyer reasoned, "the claim that the Proclamation is a 'Muslim ban,' rather than a 'security-based' ban, becomes much stronger."[297] In the absence of further evidence on this point, Justice Breyer concluded that the "evidence of antireligious bias" in the record formed "a sufficient basis to set the Proclamation aside."[298]

For Congress, *Trump v. Hawaii* establishes one important proposition of law and suggests another. First, *Trump* holds that Congress has granted the President extremely broad power to impose entry restrictions not expressly contemplated in the INA.[299] The U.S. Court of Appeals for the Ninth Circuit had agreed with plaintiffs that § 1182(f) should be read in the context of the INA's overall scheme of immigration regulation to give the President only a limited power to set temporary entry restrictions during crises.[300] The Supreme Court disagreed, holding instead that § 1182(f) is a "comprehensive delegation" that gives the President discretion over every detail of the entry restrictions he sets under it, including "when to suspend entry," "whose entry to

[290] *Id*. at 2445 ("[A] reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.").

[291] *Id*. at 2442.

[292] *Id*. at 2448.

[293] *Id*. at 2447–48 (citing Korematsu v. United States, 323 U.S. 214 (1944)).

[294] *Id*. at 2423 (majority opinion).

[295] *Id*.

[296] *Id*. at 2433 (Breyer, J., dissenting).

[297] *Id*.

[298] *Id*.

[299] *Id*. at 2408 (majority opinion).

[300] *See id*. at 2406–07 (explaining that the U.S. Court of Appeals for the Ninth Circuit held that § 1182(f) "authorizes only a 'temporary' suspension of entry in response to 'exigencies' that 'Congress would be ill-equipped to address.'") (quoting Hawaii v. Trump, 878 F.3d 662, 684, 688 (2017)).

suspend," "for how long," and "on what conditions."[301] Further, the Court established that the President's discretion under § 1182(f) extends to the determination of whether the statute even applies: where the President finds that the entry of a class of aliens would be "detrimental to the interests of the United States" within the meaning of the statute, the Court made clear that it would largely defer to those findings and would not conduct a "searching inquiry" into their basis.[302] After *Trump*, the primary remaining question about the scope of the authority that § 1182(f) confers on the President is whether he may create entry restrictions that "expressly override particular provisions of the INA."[303] Because the Court held that the proclamation did not conflict with any INA provisions, the Court assumed without deciding that § 1182(f) does not confer such "override" authority.[304]

The second important point for Congress is more subtle: the Court upheld the proclamation as a valid exercise of the immigration authority that *Congress* granted the president.[305] The Court did not consider the idea—embraced in a concurring opinion by Justice Thomas—that the President might possess inherent authority under Article II of the Constitution to establish entry restrictions.[306] Thus, the Court's analysis of executive exclusion decisions continues to proceed on the premise that the power to regulate the admission and exclusion of aliens, which the Constitution does not mention and thus does not expressly assign to any particular branch of the federal government, rests in the first instance with Congress.[307] As such, if Congress did not delegate such broad authority to the President to establish entry restrictions, it is not clear that the President would be able to premise such restrictions on any other source of authority.[308]

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[301] *Id*. at 2408.

[302] *Id*. at 2409.

[303] *Id*. at 2411.

[304] *Id*.

[305] *Id*. at 2415 ("The Proclamation is squarely within the scope of Presidential authority under the INA.").

[306] *Compare id*. at 2415, *with id*. at 2424 (Thomas, J., concurring) ("Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. Nor could it, since the President has *inherent* authority to exclude aliens from the country."); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1249 (2018) (Thomas, J., dissenting) ("[T]here is some founding-era evidence that 'the executive Power,' Art. II, § 1, includes the power to deport aliens."); Brief for the Petitioners at 47, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) ("[T]he President's authority to exclude aliens 'stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.'" (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950))). The bulk of Justice Thomas's concurrence questioned whether district courts have authority to issue nationwide or "universal" preliminary injunctions of the sort that multiple district courts issued against the proclamation. *Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring) ("[U]niversal injunctions . . . appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.").

[307] See Trump, 138 S. Ct. at 2415; see also CRS Report R44969, *Overview of the Federal Government's Power to Exclude Aliens*, by Ben Harrington, at 17 ("At least one [] Supreme Court decision [United States ex rel. Knauff v. Shaughnessy] states that the Executive does possess inherent authority to exclude aliens. The case makes this statement, however, only in the context of a now-antiquated challenge to the constitutionality of congressional delegations of immigration authority to executive agencies. The case also acknowledges that, notwithstanding any inherent executive authority, in immigration matters the Executive typically acts upon congressional direction. Moreover, the weight of Supreme Court precedent assigns the immigration power to Congress rather than the Executive.").

[308] *See Trump*, 138 S. Ct. at 2415.

Separation of Powers[309]

Lucia v. SEC

In another significant ruling, the Court in *Lucia v. SEC*[310] held that administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) qualify as officers of the United States who must be appointed in accordance with the requirements of the Appointments Clause.[311] The Constitution requires that officers be appointed by the President, a department head, or a court of law;[312] but does not impose any procedures for non-officer employees–that is, "lesser functionaries subordinate to officers of the United States."[313] According to Supreme Court precedent, those individuals occupying "continuing positions"[314] and exercising "significant authority" on behalf of the United States[315] qualify as officers under the Constitution. Nonetheless, determining precisely what constitutes the exercise of "significant authority" has divided lower federal courts.[316] Given the substantial number of ALJs and potentially similar hearing officers serving in the federal government,[317] the decision has important ramifications for the structure and practice of the administrative state.

A central issue in *Lucia* was whether ALJs at the SEC exercised significant authority, which would mean they are officers of the United States. That inquiry, in turn, centered on a prior Supreme Court case, *Freytag v. Commissioner*, which had held that special trial judges of the U.S. Tax Court wielded significant authority and constituted officers.[318] The *Freytag* Court reached this conclusion because of the significance of the duties the special trial judges held. Specifically, the *Freytag* Court observed that the position of special trial judge is "established by law," and its "duties, salary, and means of appointment" are specified in statute.[319] In particular, the *Freytag* Court noted that special trial judges are entrusted with duties beyond "ministerial tasks," including (1) taking testimony, (2) conducting trials, (3) ruling on evidence, and (4) enforcing compliance with discovery orders.[320] And in carrying out these functions, the Court recognized that special trial judges exercise significant discretion.[321] Finally, the *Freytag* Court noted that

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[309] Legislative Attorney Jared Cole authored this section.

[310] 138 S. Ct. 2044, 2049 (2018).

[311] U.S. CONST. art. II, sec. 2, cl. 2.

[312] *Id*. More specifically, the Constitution divides officers into two types. Principal officers must be appointed by the President subject to Senate confirmation, while Congress may vest the appointment of "inferior" officers with the President alone, department heads, or courts of law. *See* Edmond v. United States, 520 U.S. 651, 659-660 (1997). *Lucia* did not concern the distinction between these types of officers. *Lucia*, 138 S. Ct. at 2051 n.3.

[313] *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (*per curiam*); United States v. Germaine, 99 U.S. 508, 510 (1879).

[314] *See Germaine*, 99 U.S. at 511-12.

[315] *Buckley*, 424 U.S. at 126 (1976).

[316] *Compare* Lucia v. SEC, 832 F.3d 277, 280 (D.C. Cir. 2016); Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000), *with* Bandimere v. SEC, 844 F.3d 1168, 1182-84 (10th Cir. 2016); Burgess v. FDIC, 871 F.3d 297, 301-03 (5th Cir. 2017).

[317] *See Federal Administrative Law Judges by Agency and Level as of March 2017*, OFFICE OF PERSONNEL MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Sep. 17, 2018); *see also* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652-62 (2016).

[318] 501 U.S. 868, 881-82 (1991).

[319] *Id*. at 881.

[320] *Id*. at 881-82.

[321] *Id*. at 882.

even leaving aside these duties, special trial judges qualified as officers because the underlying statute authorized the Chief Judge of the Tax Court to assign authority to special trial judges to render binding independent decisions in certain cases.[322]

In the lower court disposition that preceded the Supreme Court's ruling in *Lucia*, a panel of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), relying on the final observation in *Freytag*, ruled that SEC ALJs were not officers, but were instead mere employees. Specifically, the lower court concluded SEC ALJs were not officers because they did not render final decisions, as the ALJ's decisions are not final until either after de novo review by the Commission or an order by the Commission "declining to grant or order review."[323] Before the Supreme Court, Lucia argued that, under *Freytag*, the SEC ALJs were officers because they "perform all of the same discretionary functions that [the] Court found 'significant' in *Freytag* . . . and then some."[324] In a change from the position taken by the SEC at the D.C. Circuit, the Solicitor General agreed that SEC ALJs are officers.[325] In contrast, the amicus appointed by the Supreme Court to defend the D.C. Circuit's decision[326] argued that significant authority is wielded only by one who "has been delegated (i) the power to bind the government or private parties (ii) in her own name rather than in the name of a superior officer."[327] A rule that considered SEC ALJs to wield significant authority, the amicus argued, would "have significant adverse practical consequences," as it "could cast doubt on the constitutionality of the method of appointment of many thousands of civil servants."[328]

The Supreme Court, in a decision with four separate opinions, held that SEC ALJs qualified as officers who must be appointed according to the requirements of the Appointments Clause.[329] In the majority opinion for the Court, Justice Kagan reasoned that because the duties of SEC ALJs essentially mirrored those of the special trial judges in *Freytag*, the SEC ALJs also constituted officers.[330] As an initial matter, both "hold a continuing position established by law."[331] Further, special trial judges and SEC ALJs "exercise the same 'significant discretion' when carrying out the same 'important functions.'"[332] Both positions (1) "take testimony,"[333] (2) "conduct trials,"[334]

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[322] *Id*.

[323] Lucia v. SEC, 832 F.3d 277, 286 (D.C. Cir. 2016). The full D.C. Circuit granted en banc review, but ultimately issued a short per curiam decision in which it denied the request for review "by an equally divided court." 868 F.3d 1021 (D.C. Cir. 2017).

[324] Brief for Petitioners at 11, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130) (quoting Freytag v. Comm'r, 501 U.S. 868, 881-82 (1991)).

[325] Brief for Respondent Supporting Petitioners at 14, 20, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[326] Lucia v. SEC, 138 S. Ct. 923 (2018).

[327] Brief for Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 22, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[328] *Id*. at 38-39.

[329] *Lucia*, 138 S. Ct. at 2051.

[330] *Lucia*, 138 S. Ct. at 2052.

[331] *Id*. at 2053.

[332] *Id*. at 2053 (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991)).

[333] *Id*. at 2053 (quoting *Freytag*, 501 U.S. at 881) (quotation marks omitted). The Court noted that this included the authority to "receive evidence," "examine witnesses," and conduct pre-hearing depositions. *Id*. at 2053. (quoting 17 C.F.R. §§ 201.111(c), 200.14(a)(4)) (quotation marks omitted).

[334] *Id*. at 2053 (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). This power includes the ability to administer oaths, rule on motions, and determine the course of the hearing. *Id*. at 2053.

(3) "rule on the admissibility of evidence,"[335] and (4) are entrusted with "the power to enforce compliance with discovery orders."[336] Moreover, Justice Kagan observed, SEC ALJs actually had somewhat more independent authority to render decisions than did the special trial judges in *Freytag*—while a major decision made by the special trial judges had no force unless a Tax Court judge adopted it as his own, the SEC can decline to review an ALJ's decision, in which case the decision becomes final and "is deemed the action of the Commission."[337] Accordingly, because SEC ALJs were "near carbon-copies" of the special trial judges in *Freytag*, they constituted officers and must be appointed pursuant to the Appointments Clause.[338] The Court ordered that Lucia receive a new hearing before a properly appointed ALJ (or the Commission), and that the presiding judge could not be the one who originally presided over the hearing, even if he was subsequently appointed correctly.[339]

Justice Thomas, joined by Justice Gorsuch, wrote separately to note that, while he agreed with the majority's conclusion that SEC ALJs were officers under *Freytag*, the Court's Appointments Clause decisions "do not provide much guidance" beyond the features found in that case.[340] While cases like *Freytag* illuminate what is "*sufficient*" for officer status, the Court has not fleshed out what is "*necessary*" to conclude that someone is an officer of the United States.[341] To answer that question, Justice Thomas would look to the "original public meaning" of the Appointments Clause, under which officers were "all federal civil officials 'with responsibility for an ongoing statutory duty.'"[342]

Justice Breyer concurred in the judgment and dissented in part, noting that while he agreed with the majority's conclusion that the ALJ was appointed improperly, he would rest that decision on statutory, rather than constitutional, grounds.[343] The Administrative Procedure Act, Justice Breyer wrote, authorized the Commission to appoint ALJs, but did not permit the delegation of that authority.[344] Likewise, the authorizing statute for the SEC granted power to delegate functions

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[335] *Id*. at 2053 (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted).

[336] *Id*. at 2053 (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). In arguing that SEC ALJs are not officers under *Freytag*, the amicus proffered two distinctions between the power of Tax Court special trial judges and SEC ALJs. First, the amicus noted that the Tax Court special trial judges have more expansive power to compel compliance with discovery orders—including ordering fines and imprisonment—than do SEC ALJs. Justice Kagan rejected this argument, noting that *Freytag* did not reference any particular method of compelling compliance with discovery, and observing that the less stringent power wielded by SEC ALJS, including the power to exclude parties and attorneys from the proceedings, was sufficient under the reasoning of *Freytag*. *Lucia*, 138 S. Ct. at 2054. Second, the amicus noted that the Tax Court's rules provide that a special trial judge's factual finding "shall be presumed" correct, Tax Court Rule 183(d), whereas the SEC regulations do not contain a similar deferential standard. Justice Kagan rejected this argument as well, noting that the level of deference given to factual findings was not relevant to the *Freytag* Court's analysis. Further, Justice Kagan noted, the SEC frequently does afford a similar deference to its ALJs as a matter of practice. *Lucia*, 138 S. Ct. at 2054-55.

[337] *Id*. at 2053 (quoting 15 U.S.C. § 78d–1(c)). *See* 17 C.F.R. §§ § 201.360(d)(2).

[338] *Lucia*, 138 S. Ct. at 2052.

[339] *Lucia*, 138 S. Ct. at 2055-56.

[340] *Id*. at 2056 (Thomas, J., concurring).

[341] *Id*. at 2056 (emphasis in original).

[342] *Id*. at 2056 (quoting NLRB v. SW General, Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring)) (quotation marks omitted). *See* Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 564 (2018).

[343] *Id*. at 2057 (Breyer, J., concurring in the judgment and dissenting in part). Justice Breyer was joined in part by Justices Ginsburg and Sotomayor, who joined the section of his opinion addressing the proper remedy in the case. In that section, he wrote that the majority's conclusion, that the same ALJ whose appointment was now ratified by the Commission could not rehear the case, was mistaken. *Id*. at 2064.

[344] *Id*. at 2058.

through a published order or rule, but the agency here did not do so with respect to the appointment of ALJs.[345] Resting his decision on statutory, rather than constitutional, grounds was, in Justice Breyer's view, necessary because *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB) held that two layers of removal protection from the President for a constitutional officer was unconstitutional.[346] Justice Breyer observed that because SEC ALJs also enjoy two layers of removal protection (i.e., an ALJ can only be removed for cause by the SEC commissioners, who in turn may only be removed by the President for cause),[347] holding that they constitute officers might mean that their removal protection are similarly unconstitutional, which would contradict Congress's intent in originally establishing an independent ALJ position.[348]

Justice Sotomayor, joined by Justice Ginsburg, dissented and wrote that SEC ALJs, in her view, were not officers because they lack "the ability to make final, binding decisions on behalf of the government."[349] For Justice Sotomayor, requiring that a position wield such power in order to constitute an officer would establish a clear rule that could "provide guidance to Congress and the Executive Branch," avoiding the confusion that currently clouds who counts as an officer.[350]

The Court's decision may have important consequences for the federal government and the nearly 2,000 ALJs in federal service.[351] With regard to the SEC, the Commissioners ratified the appointment of the ALJs and ordered that, for proceedings currently pending before an ALJ or the Commission, respondents receive a new hearing before a properly appointed ALJ who did not participate in the matter previously.[352] The status of ALJs at the SEC is particularly significant given the expanded authority the agency received in the Dodd-Frank Act to bring enforcement actions before ALJs, rather than in federal court.[353] Beyond proceedings before the SEC, the impact of the decision for other federal agencies is uncertain. The Court explicitly declined to elaborate on the "significant authority" test for determining if an individual is an officer, concluding that its prior decision in *Freytag* necessarily required finding that SEC ALJs are officers.[354] The executive branch employs a substantial number of ALJs and other hearing officers with duties that might parallel that of SEC ALJs in certain respects, who are selected in a variety

[345] *Id*.

[346] *See* 561 U.S. 477, 484 (2010).

[347] In *Free Enterprise Fund*, the parties agreed that SEC Commissioners could only be removed for cause, and the Court decided the case with that understanding. *Id*. at 486-87.

[348] *Lucia*, 138 S. Ct. at 2061-63 (Breyer, J., concurring in the judgment and dissenting in part).

[349] *Id*. at 2065-66 (Sotomayor, J., dissenting).

[350] *Id*.

[351] The Office of Personnel Management notes that 1,931 ALJs were employed in the federal government as of March 2017. *See Federal Administrative Law Judges by Agency and Level as of March 2017*, OFFICE OF PERSONNEL MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Sept. 17, 2018).

[352] Specifically, on November 30, 2017, the SEC first ratified the appointments of its ALJs. Securities and Exchange Commission, Order, Exchange Act Release (Nov. 20, 2017). On June 21, 2018, the SEC then issued a stay of proceedings before ALJs in light of the Court's decision. Securities and Exchange Commission, Order, Exchange Act Release No. 33-10510 (June 21, 2018). On August 22, 2018, the SEC ordered the stay expired, reiterated its approval of the ALJs' appointment, and ordered that in pending proceedings, respondents receive a new hearing before an ALJ who did not participate in the matter previously. Securities and Exchange Commission, Order, Exchange Act Release No. 33-10536 (Aug. 22, 2018).

[353] *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1219 (2016); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929p, 124 Stat. 1376, 1862-65 (2010).

[354] *Lucia*, 138 S. Ct. at 2051-52 (majority opinion).

of ways,[355] opening the possibility for future challenges to their appointment.[356] On July 10, 2018, President Trump issued an Executive Order changing the hiring process for ALJs, "excepting" them from the competitive service and granting agency heads greater flexibility in their hiring.[357]

More broadly, as intimated by Justice Breyer's separate opinion,[358] the Court majority's decision may have future repercussions for the statutory restrictions on removing ALJs from federal service.[359] The Court has previously held, in *Free Enterprise Fund*, that two layers of removal protection for officers of the PCAOB improperly intruded on the President's power to supervise the executive branch.[360] Although the Court did not decide the issue in *Lucia*, the Solicitor General argued that, in addition to resolving the question of whether ALJs are officers, the Court could avoid any constitutional concerns about the President's authority by construing the removal protections narrowly, "to permit removal of an ALJ for misconduct or failure to follow lawful agency directives or to perform his duties adequately."[361] Going forward, to the extent that an ALJ position constitutes an officer under the reasoning of *Lucia*, the constitutionality of dual removal restrictions might be open to challenge, although whether the Court would look at such restrictions for ALJs in the same way it did for officers of the PCAOB is uncertain.[362]

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[355] *See* Barnett, *supra* note 316, at 1652-62; Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 809-11 (2013).

[356] *See, e.g.*, Respondent's Motion for Remand in Light of the Supreme Court's Decision in *Lucia v. SEC*, Blackburn v. Dep't of Agriculture, (6th Cir. 2018) (No. 17-4102) (noting that petitioner had raised a timely challenge to the ALJ's appointment and that the agency ALJ in the case had not been appointed pursuant to the Appointments Clause; requesting remand to the agency for adjudication by a properly appointed ALJ).

[357] Exec. Order, Excepting Administrative Law Judges From the Competitive Service (July 10, 2018). A bill was introduced in the 115th Congress apparently intended to counter this Order. A Bill to Restore Administrative Law Judges to the Competitive Service, S.3387, 115th Cong. (2018).

[358] *Lucia*, 138 S. Ct. at 2061-63 (Breyer, J., concurring in the judgment and dissenting in part).

[359] 5 U.S.C. § 7521(a).

[360] *See* 561 U.S. 477, 484 (2010).

[361] Brief for Respondent Supporting Petitioners at 39-55, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

[362] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 507 n.10 (2010) (noting that "our holding also does not address that subset of independent agency employees who serve as administrative law judges . . . [U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions").

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