For Further Information Contact:
Public Information Office (202)479-3211

Ruth Bader Ginsburg
Associate Justice
Supreme Court of the United States

Remarks for the Second Circuit Judicial Conference
June 7, 2019

OT 2018 Highlights

Shortly after our meeting a year ago, Justice Kennedy announced his retirement. It was, I would say, the event of greatest consequence for the current Term, and perhaps for many Terms ahead.

For the first argument week of the 2019 Term, the Court sat with only eight Justices. We regained full strength in the Term's second week, immediately after

Justice Kavanaugh's confirmation. With Justice Kavanaugh's arrival, Justice Gorsuch cheerfully relinquished to our newest colleague the tasks assigned to the Junior Justice—answering the telephone the rare times it rings during Conference, opening the door when an aide appears to deliver papers a Justice left behind, conveying to the entourage from the Clerk's Office, the Public Information Office, and other Court administrators the dispositions reached at Conference, and, most thankless of all chores, sitting on the Court's Cafeteria Committee.

Justice Breyer retained his title this Term as the Justice who spoke the most words during argument.[1] Justice Sotomayor ranked a close second. She also asked the first question more often than any other Justice—a total of 48 times.[2] Justice Thomas, who ordinarily asks no questions because he thinks the rest of us ask too many, broke his silence for the first time since 2016, asking three questions in a single argument—*Flowers* v. *Mississippi*, a case raising a

[1] https://scotusoa.com.
[2] Adam Feldman, Empirical SCOTUS, https://empiricalscotus.com/2019/050/06/competition-to-speak/.

Batson **challenge to a prosecutor's jury selection practices.**[3]

Justice Kavanaugh made history by bringing on board an all-female law clerk crew. Thanks to his selections, the Court has this Term, for the first time ever, more women than men serving as law clerks.[4] **Women did not fare nearly as well as advocates. Only about 21% of the attorneys presenting oral argument**

[3] 240 So. 3d 1082 (2017); Case No. 17–9572.
[4] https://nytimes.com/2018/10/09/us/politics/kavanaugh-women-law-clerks.html.

this Term were female; of the thirty-four attorneys who appeared more than once, only six were women.[5]

Some 6,000 petitions for review have been filed so far this Term. We heard argument in 70 cases. To that number, add five summary *per curiam* decisions—opinions rendered without full briefing or oral argument.[6] That brings to a total of 75 decisions already rendered plus those remaining to be released before the Court recesses. As of today, we have announced 43 decisions in argued cases. That leaves a

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[5] Adam Feldman, Empirical SCOTUS, https://empiricalscotus.com/2019/050/06/competition-to-speak/; https://scotusoa.com.

[6] *Escondido* v. *Emmons*, 586 U. S. ___ (2019) (*per curiam*); *Shoop* v. *Hill*, 586 U. S. ___ (2019) (*per curiam*); *Moore* v. *Texas*, 586 U. S. ___ (2019) (*per curiam*); *Yovino* v. *Rizo*, 586 U. S. ___ (2019) (*per curiam*); *Box* v. *Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U. S. ___ (2019) (*per curiam*).

large number (27) to be announced in the remaining June days. Of the 43 argued cases resolved so far, only 11, or just over 25%, were decided by a vote of 5 to 4 or 5 to 3. Given the number of most watched cases still unannounced, I cannot predict that the relatively low sharp divisions ratio will hold.

Of the 70 cases fully briefed and argued, 12 cases, or 17% of our argued cases docket, came to us from the Ninth Circuit. The Sixth Circuit was a distant second place, accounting for seven argued cases. Of the five cases that came to us from the Second Circuit, we have

so far released only one disposition.

That case, *Republic of Sudan* v. *Harrison*,[7] involved an attempt to serve process on Sudan by sailors injured in the terrorist bombing of the *U. S. S. Cole*. The Foreign Sovereign Immunities Act requires that a summons, complaint, and notice of suit be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."[8] The question presented: Does it suffice to dispatch service documents to a foreign minister by

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[7] 802 F. 3d 399 (CA2 2015) (panel); 838 F. 3d 86 (CA2 2016) (denial of panel rehearing); Case No. 16–1094.
[8] 28 U. S. C. §1608(a)(3).

mailing them to the foreign state's diplomatic mission in Washington, D. C.? The Second Circuit said yes,[9] but the Fourth Circuit answered no.[10] In line with the Solicitor General's argument, we held, 8 to 1, that a packet is not "addressed and dispatched" to a country's foreign minister when it is mailed to an embassy rather than to the foreign ministry itself.[11]

First of the four yet to be announced Second Circuit cases, *Gundy* v. *United States*.[12] Gundy was convicted of violating the Sex Offender Registration

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[9] 802 F. 3d 399.
[10] *Kumar* v. *Republic of Sudan*, 880 F. 3d 144 (CA4 2018).
[11] *Republic of Sudan* v. *Harrison*, 587 U. S. ___ (2019).
[12] 695 Fed. Appx. 639 (CA2 2017); Case No. 17–6086.

and Notification Act, or SORNA, which generally requires sex offenders to register where they reside. The Act vests authority in the Attorney General to specify whether and how SORNA's registration requirements will apply to persons, like Gundy, who committed qualifying offenses before SORNA's 2006 enactment. Congress, Gundy argued, had impermissibly delegated authority to the Attorney General to make a fundamentally legislative decision, *i.e.,* did SORNA's registration requirements apply to pre-Act offenders. The District Court and, in turn, the

Second Circuit,[13] rejected Gundy's attempt to revitalize the "Nondelegation Doctrine," which the Court last invoked to hold legislation unconstitutional in 1935.[14] Though argued October 2, the second day of the Term, *Gundy* will be among the decisions rendered during the final weeks of the Term.

Who counts as a state actor subject to First Amendment constraints is at issue in *Manhattan Community Access Corp.* v. *Halleck*.[15] New York law requires local governments to establish public access

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[13] 695 Fed. Appx., at 641, n. 2.
[14] See *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).
[15] 882 F. 3d 300 (CA2 2018); Case No. 17–1702.

channels when issuing a cable franchise to an operator with more than 36 channels. New York City assigned management of public access channels for the Borough of Manhattan to a private, nonprofit corporation, Manhattan Neighborhood Network (MNN). Halleck and Melendez, initiators of the litigation, produced content for MNN's public access channel. When Halleck and Melendez made and broadcast a video critical of MNN, MNN barred them from the channel. They sued, asserting that MNN violated their First Amendment rights. MNN's answer: We are not a state actor,

therefore the First Amendment does not apply to our conduct. The District Court agreed and dismissed the suit.[16] The Court of Appeals reversed 2 to 1. As you know, the state-action doctrine is not a crystal clear area of the law; it has had its ups and downs. Do not anticipate a decision that will dispel further controversies over what qualifies as state action.

Two Second Circuit cases appeared on our April calendar, the most crowded sitting of the Term. We try to front load, with a heavy calendar in October, and a lighter one in April. This Term, the opposite occurred,

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[16] 224 F. Supp. 3d 238 (SDNY 2016).

but not because we planned it that way.

The first week of the April sitting, we heard *McDonough* v. *Smith*,[17] a case concerning a charge that a county prosecutor had fabricated evidence in order to gain conviction of a County Board of Elections Commissioner for forging absentee ballots in a primary election. Once acquitted, the former Commissioner sued the prosecutor under 42 U. S. C. §1983 for violation of his Fourth, Fifth, and Sixth Amendment rights. Was the suit timely? Most circuits would have said yes, because it was commenced within three years (the

[17] 898 F. 3d 259 (CA2 2018); Case No. 18–485.

applicable limitations period) after the criminal proceedings terminated in the indicted Commissioner's favor.[18] The Second Circuit generated a split by holding that the three-year clock began ticking when the Commissioner first knew, or should have known, that tainted evidence had been used against him.[19] That point was reached, both the District Court and the Second Circuit concluded, no later than the end of McDonough's first trial, which had terminated in a

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[18] *Floyd* v. *Atty. Gen. of Pa.*, 722 Fed. Appx. 112 (CA3 2018); *Bradford* v. *Scherschligt*, 803 F. 3d 382 (CA9 2015); *Mondragon* v. *Thompson*, 519 F. 3d 1078 (CA10 2008).

[19] 898 F. 3d, at 267.

mistrial.[20] An array of *amici*, including the SG, ACLU, and Cato Institute, has urged reversal of the Second Circuit's judgment.

On the next to last hearing day of the Term, we heard argument in *Department of Commerce* v. *New York*,[21] a case of huge importance. Secretary of Commerce Wilbur L. Ross, Jr., decided to include a citizenship question on the 2020 census questionnaire. He said he was responding to a Department of Justice request for citizenship data to aid in enforcement of the Voting Rights Act. Census Bureau analyses predicted

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[20] *Ibid.*
[21] 351 F. Supp. 3d 502 (SDNY 2019); Case No. 18–966.

that adding the question would depress the census response rate for noncitizen and Hispanic households, resulting in poorer census data. Evidence from DOJ showed that Ross had sought inclusion of a citizenship question long before the Department's request.

Several States and non-governmental organizations challenged Secretary Ross's decision as arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act. Plaintiffs also asserted that addition of the citizenship question violated the Constitution's Enumeration Clause. After trial, in an

opinion and order by Judge Furman spanning almost two hundred pages in F. Supp. 3d, the District Court ruled for the plaintiffs on their APA claims. The court accordingly enjoined the addition of a citizenship question to the decennial census.[22]

The Government pressed upon us the imminent need to print the census forms, and asked us to take up the case immediately without awaiting Second Circuit review. We complied with that request. After we agreed to hear the case, two other courts—the Northern District of California and the District of Maryland—

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[22] 351 F. Supp. 3d, at 679.

weighed in, issuing decisions enjoining addition of the citizenship question.[23] Speculators about the outcome note that last year, in *Trump* v. *Hawaii*,[24] the Court upheld the so-called "travel ban," in an opinion granting great deference to the Executive. Respondents in the census case have argued that a ruling in Secretary Ross's favor would stretch deference beyond the breaking point.

Some headline cases from other circuits. Also

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[23] *California* v. *Ross*, 358 F. Supp. 3d 965 (ND Cal. 2019); *Kravitz* v. *Department of Commerce*, 366 F. Supp. 3d 681 (Md. 2019).
[24] 585 U. S. ___ (2018).

involving deference to administrators, *Kisor* v. *Wilkie*[25] came to us from the Federal Circuit. The question squarely presented: Should the Court overrule *Auer* v. *Robbins*,[26] a 1997 opinion, and *Bowles* v. *Seminole Rock and Sand Co.*,[27] *Auer*'s 1945 predecessor, both holding that courts should defer to an agency's reasonable interpretation of its own ambiguous regulation. Immediately at issue, a Department of Veterans Affairs regulation governing reconsideration of a claim. Reconsideration was in order, the regulation provided,

[25] 869 F. 3d 1360 (CAFed 2017); Case No. 18–15.
[26] 519 U. S. 452 (1997).
[27] 325 U. S. 410 (1945).

if *relevant* records turned up in the VA claim file, records that existed when the claim was first decided, but were not then associated with the claim. The VA read "relevant" to exclude a record that would not have mattered if initially presented in light of the other evidence. Kisor, the veteran who sought reconsideration, gave the term "relevant" a broader, more veteran-friendly, interpretation.

The Federal Circuit, in accord with *Auer* and *Seminole Rock*, deferred to the VA's interpretation.[28] As a result, Kisor lost his plea for retroactive benefits.

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[28] 869 F. 3d, at 1368.

Kisor asks the Court to condemn the *Auer-Seminole Rock* doctrine because it gives agencies too much interpretive authority in violation of the separation of powers and the Administrative Procedure Act. What role, if any, will *stare decisis* play in the Court's decision, we shall soon know.

In a Sixth Circuit case, *Gamble* v. *United States*,[29] the petitioner asks us to end the separate-sovereigns exception to the Double Jeopardy Clause. Under that exception, separate prosecutions for the identical offense do not constitute double jeopardy if the charges

[29] 694 Fed. Appx. 750 (CA6 2017); Case No. 17–646.

are brought by a State and the Federal Government, even though the second prosecution would be barred if brought by the same government that brought the first prosecution. Gamble was first prosecuted and convicted under Alabama law for possession of a handgun by a person with a prior conviction of a "crime of violence" or a "misdemeanor offense of domestic violence."

Meanwhile, Gamble was indicted by a federal grand jury on a charge of possession of a firearm by a convicted felon. Gamble argued that the federal

indictment should be dismissed, and the separate-sovereigns exception abandoned. His position: The States compose one Federal Union; parts of that Union are not separate from the whole.

***Nielsen* v. *Preap*,[30] a Ninth Circuit case, concerns 8 U. S. C. §1226(c), a provision of the Immigration and Naturalization Act which directs the Attorney General to take certain removable aliens into immigration custody "when [they are] released" from criminal custody, and to detain them without possibility of bond throughout their removal proceedings. The question**

[30] 831 F. 3d 1193 (CA9 2016); Case No. 16–1363.

presented: Are aliens who have committed crimes subject to mandatory detention without bond if the Government does not detain them immediately after their release from criminal custody?

In the cases consolidated for our hearing, lawful permanent residents, after serving time for a criminal offense, were released into the community; they returned to their families and resumed their lives. Long after, immigration authorities took them into custody and detained them without bond hearings. In an opinion by Justice Alito for a sharply divided Court,

the majority read the statute to mandate bondless detention pending completion of removal proceedings, which may take years to unfold.[31] Justice Breyer, speaking for the four dissenters, read the mandatory detention statute to apply only to aliens detained within a reasonable time—presumptively no more than six months—after serving their criminal sentences.

From the Fourth Circuit, *American Legion* v. *American Humanist Association*[32] presents the question whether a 40-foot-tall cross located on a traffic median in Maryland, and maintained by the Maryland-National

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[31] 586 U. S. ___ (2019).
[32] 874 F. 3d 195 (CA4 2017); Case Nos. 17–1717, 18–18.

Capital Park and Planning Commission, violates the Establishment Clause. Known as the Bladensburg Peace Cross, the monument was erected as a memorial to soldiers from the county who died in World War I. The Fourth Circuit, dividing 2 to 1, held the towering monument an unconstitutional endorsement of religion.[33] The Latin Cross, the majority reasoned, is not a generic symbol of death, it is the "preeminent symbol of Christianity," the "symbol of the death of Jesus Christ."[34]

State courts, as always, account for important

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[33] 874 F. 3d, at 212.
[34] *Id.,* at 206–207.

issues brought before us. In *Timbs* v. *Indiana*,[35] for example, the state supreme court had held that the Eighth Amendment's Excessive Fines Clause applied only to the Federal Government, not to the States. In the case we took up, Indiana seized, in civil forfeiture, a car petitioner Timbs had recently purchased for almost $42,000. The drug crime to which Timbs had pleaded guilty, and in connection with which his car was seized, carried a maximum fine of $10,000. The question we addressed: Does the Fourteenth Amendment incorporate the Eighth Amendment's protection against

[35] 62 N. E. 3d 472 (Ind. 2017); Case No. 17–1091.

excessive fines? In a unanimous judgment, we answered yes. Like the Federal Government, States may not impose exorbitant fines.[36]

One of the cases awaiting decision involves alleged racial gerrymandering in Virginia.[37] And very high on the most-watched cases list, alleged partisan gerrymandering in North Carolina[38] and Maryland.[39] All three cases were initially aired before three-judge federal district courts with the Supreme Court as first and last appellate instance.

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[36] 586 U. S. ___ (2019).
[37] *Bethune-Hill* v. *Virginia Bd. of Elections*, 326 F. Supp. 3d 128 (ED Va. 2018); *Virginia House of Delegates* v. *Bethune-Hill*, Case No. 18–281.
[38] *Rucho* v. *Common Cause*, 318 F. Supp. 3d 777 (MDNC 2018); Case No. 18–422.
[39] *Lamone* v. *Benisek*, 348 F. Supp. 3d 493 (Md. 2018); Case No. 18–726.

The Virginia case also presents a threshold standing-to-sue question. Originally allied with the Virginia House of Delegates, Virginia's Attorney General decided against fighting on when a three-judge district court ruled for the plaintiffs. Does Virginia's House of Delegates have standing to appeal when the State's Executive does not wish to continue the fray? And if so, did the District Court correctly hold that eleven house districts were unconstitutional racial gerrymanders?

Given modern technology, a state legislature can

create a congressional delegation dramatically out of proportion to the actual overall vote count. In North Carolina, for example, in the 2016 election, Republicans won 53 percent of the statewide vote, yet they won 10 of the 13 congressional seats.[40] And in 2018, with the same map governing, Democrats won a slight majority in the statewide congressional vote, but again won seats in only three districts.

In North Carolina, a Republican-controlled state legislature drew the maps. In Maryland, Democrats controlled the state legislature and conspicuously drew

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[40] *Rucho*, 318 F. Supp. 3d, at 810.

congressional district lines to favor Democrats and dilute Republican votes. However one comes out on the legal issues, partisan gerrymandering unsettles the fundamental premise that people elect their representatives, not vice versa.

Looking ahead to next Term, two cases from the Second Circuit will be frontrunners. We granted review in *New York State Rifle & Pistol Association* v. *City of New York*[41] to decide whether City laws regulating the transport of handguns pass constitutional inspection.

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[41] 883 F. 3d 45 (CA2 2018); Case No. 18–280.

We also took up *Altitude Express, Inc.* v. *Zarda*[42] and consolidated it with an Eleventh Circuit case, *Bostock* v. *Clayton County*,[43] to resolve a circuit split on this question: Does the ban on employment discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964 encompass discrimination on the basis of sexual orientation?

The same day we granted review in *Zarda* and *Bostock*, we agreed to review *R.G. & G.R. Harris*

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[42] 883 F. 3d 100 (CA2 2018) (en banc) (Title VII bars discrimination based on sexual orientation); Case No. 17–1623.

[43] 723 Fed. Appx. 964 (CA11 2018) (Title VII does not bar discrimination based on sexual orientation); Case No. 17–1618.

Funeral Homes **v. *EEOC*,[44] a case from the Sixth Circuit which held that Title VII prohibits employment discrimination against transgender individuals.**

Next Term's cases also include *Mathena* v. *Malvo*.[45] Malvo was the younger of the two snipers involved in the 2002 D. C. area random killings. He was sentenced by a Virginia state court to life without the possibility of parole. In *Miller* v. *Alabama*,[46] we held that the Eighth Amendment bars mandatory sentencing of juveniles (at the time the offense was committed) to life

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[44] 884 F. 3d 560 (CA6 2018); Case No. 18–107.
[45] 893 F. 3d 265 (CA4 2018); Case No. 18–217.
[46] 567 U. S. 460 (2012).

without parole. The question in Malvo's case: May a juvenile (at the time of the criminal conduct) be sentenced to life without parole if imposition of the sentence is discretionary? The Fourth Circuit said no; but the Virginia Supreme Court had reached the opposite conclusion.[47]

And in *Ramos* v. *Louisiana*,[48] we will revisit *Apodaca* v. *Oregon*,[49] which held that a state-court conviction by a non-unanimous jury does not violate the Sixth Amendment, as incorporated by the Fourteenth

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[47] *Jones* v. *Commonwealth*, 795 S. E. 2d 705 (Va. 2017).
[48] 231 So. 3d 44 (La 2017); Case No. 18–5924.
[49] 406 U. S. 404 (1972).

Amendment. Ramos was found guilty of second-degree murder by a 10 to 2 jury verdict. He asks us to overrule *Apodaca* and hold that the Sixth Amendment requires jury unanimity in state as well as federal criminal trials.

On the procedural front, we have followed the lead of the Federal Rules of Appellate Procedure. Effective July 1, the word limit for the parties' main briefs has been cut from 15,000 words to 13,000. Reply briefs, formerly due no fewer than seven days before argument, will now be due no fewer than ten days pre-

argument.