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 12, 2015

I will start this account of the Court's current term with a numerical snapshot. From June 2014 to June 2015, the Court received about 6,500 petitions for review, and some 7,400 in the previous term. From the thousands of requests, we selected only 67 for full briefing and argument, down from 70 last term. To the 67, add eight *per curiam* decisions, cases decided by summary reversals, without argument or briefing beyond the petition for certiorari and brief in

opposition. Total decisions released by the term's end will thus amount to 75. To date, opinions have been handed down in 47 of the argued cases; 20 decisions remain to be announced between now and the summer recess. No set date for that. We will not recess until decisions in all 20 of the still pending cases are released.

The Court split 5-4 (or 5-3 with one Justice recused) in eight of the 47 cases so far rendered. In comparison to that 17% sharp disagreement record, we unanimously agreed on the bottom-line judgment in 20—or 43%—of

the announced cases. In 16 of the 20 cases with unanimous judgments, the opinions were unanimous as well. So far, we have agreed much more often than we have divided sharply. As common at this time of year, however, many of the most controversial cases await decision. Sharp divisions, one can confidently predict, will rise in the term's final weeks, but they will not overwhelm the unanimous judgments.

How has the Second Circuit fared? In the current term, we granted review of only two of the Circuit's judgments—far fewer than the 15 cases we took from

the Ninth Circuit, our perennial top business producer, and the nine cases granted review from Eleventh Circuit judgments, making that Circuit this term's next largest generator of Supreme Court decisions. Of the two petitions we granted from the Second Circuit, one—involving a Securities Act time limitation—was dismissed as improvidently granted after briefing, but before argument.[1] The other, as I will recount in a moment, yielded a reversal.[2] Last term, by contrast, we

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[1] *Public Employees' Retirement Sys.* v. *IndyMac MBS, Inc., et al.*, No. 13-640 (dismissed Sept. 29, 2014) (whether the filing of a putative class action serves, under the *American Pipe* rule, to satisfy the three-year time limitation in §13 of the Securities Act with respect to the claims of putative class members).

[2] *Gelboim* v. *Bank of America Corp.*, 574 U. S. ___ (2015).

granted review of five of the Circuit's judgments,[3] reversing two.[4] The term before, ten of the Circuit's decisions were reviewed.[5] Of those, six were reversed.[6] Of course, that doesn't mean we got it right and the Second Circuit erred. As Justice Jackson famously

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[3] *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U. S. ___ (2013); *Lozano* v. *Montoya Alvarez*, 572 U. S. 1 (2014); *BG Group plc* v. *Republic of Argentina*, 572 U. S. ___ (2014); *Town of Greece* v. *Galloway*, 572 U. S. ___ (2014); *American Broadcasting Cos.* v. *Aereo, Inc.*, 573 U. S. ___ (2014).

[4] *Town of Greece* v. *Galloway*, 572 U. S. ___ (2014); *American Broadcasting Cos.* v. *Aereo, Inc.*, 573 U. S. ___ (2014).

[5] See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. ___ (2013); *Bailey* v. *United States*, 568 U. S. ___ (2013); *Gabelli* v. *SEC*, 568 U. S. ___ (2013); *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. ___ (2013); *Sekhar* v. *United States*, 570 U. S. ___ (2013); *Clapper* v. *Amnesty Int'l USA*, 568 U. S. ___ (2013); *Already, LLC* v. *Nike, Inc.*, 568 U. S. ___ (2013); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. ___ (2013); *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. ___ (2013); *United States* v. *Windsor*, 570 U. S. ___ (2013).

[6] *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. ___ (2013); *Bailey* v. *United States*, 568 U. S. ___ (2013); *Gabelli* v. *SEC*, 568 U. S. ___ (2013); *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. ___ (2013); *Sekhar* v. *United States*, 570 U. S. ___ (2013); *Clapper* v. *Amnesty Int'l USA*, 568 U. S. ___ (2013).

said: "We are not final because we are infallible, but we are infallible only because we are final."[7]

Will the downward trend of grants from the Second Circuit continue next term? It is too soon to predict. But so far, the Circuit is faring well in escaping review. The Court has agreed to review only one of the Second Circuit's judgments in the 2015 term.[8]

The lone Second Circuit case decided this term was *Gelboim* v. *Bank of America Corp.*[9] The question presented: whether a party's right to appeal a district

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[7] *Brown* v. *Allen*, 344 U. S. 443, 427 (1953).

[8] *Lockhart* v. *United States*, No. 14-8358 (whether 18 U. S. C. §2252(b)(2)'s mandatory minimum sentence is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward").

[9] 574 U. S. ___ (2015).

court's final decision is affected when the case has been consolidated with others for multidistrict pretrial proceedings. Petitioners Ellen Gelboim and Linda Zacher filed a class-action complaint in the Southern District, raising a single claim—that the defendant banks, acting in concert, had violated federal antitrust law. Their suit was consolidated for pretrial proceedings with more than 60 other suits filed in 13 districts, from Massachusetts to California. All complaints in the consolidated actions alleged that the defendant-banks had colluded to depress a key

benchmark interest rate, thus enabling the banks to pay lower interest rates on financial instruments sold to investors. Although the actions raised "common questions of fact,"[10] legal bases were multiple. Unlike the Gelboim-Zacher complaint, the other complaints each asserted claims in addition to a federal antitrust claim. Ruling that none of the plaintiffs could assert a cognizable antitrust injury, the District Court dismissed all of the antitrust claims asserted in the consolidated cases, including the sole claim raised in the Gelboim-Zacher complaint. Claims not based on federal

[10] 28 U. S. C. §1407(a).

antitrust law, however, remained pending in the District Court.

When Gelboim and Zacher appealed the dismissal of their complaint, the Second Circuit, on its own initiative, dismissed their appeal for lack of jurisdiction. Because the "orde[r] appealed from did not dispose of all claims in the consolidated action," the Second Circuit ruled, there was no final order appealable as of right under 28 U. S. C. §1291.[11]

Wrong, declared a unanimous Supreme Court, in an opinion I wrote. Cases consolidated for MDL pretrial

[11] 574 U. S., at ___ (slip op., at 5).

proceedings ordinarily retain their separate identities, my opinion observed, so an order disposing of one of the discrete cases in its entirety should qualify under §1291 as a final decision. 28 U. S. C. §1407, the MDL statute, refers to individual "actions" that may be transferred to a single district court, not to any monolithic multidistrict "action" created by transfer. The District Court's order dismissing the Gelboim-Zacher complaint, without leave to amend, had the hallmarks of a final decision. The order terminated petitioners' action on the merits and ended their

participation in the MDL. Nothing about the initial consolidation of their action with others in the MDL rendered the dismissal of their complaint in any way tentative or incomplete. Enough for a case only a many years teacher of Civil Procedure could love.

I turn now to some of the term's most watched cases. Most of them are among the 20 not yet decided; I will begin with two in which decisions have been released. First, *Williams-Yulee* v. *Florida Bar*,[12] which concerned a fundraising restriction applicable to campaigns for election to judicial office. Florida's Code

[12] 575 U. S. ___ (2015).

of Judicial Conduct, like that of many states, bans personal solicitation of campaign funds by candidates for judgeships. Enforcing the ban, the Florida Bar filed a complaint against Lanell Williams-Yulee for soliciting contributions to her judicial campaign in a letter she mailed to voters and posted online. In her defense, Yulee argued that the ban on her personal solicitation of funds violated the First Amendment. The Florida Supreme Court rejected her argument and sanctioned Yulee for violating the ban.

In an opinion by the Chief Justice, the Court affirmed the Florida Supreme Court's judgment. Joined by Justices Breyer, Sotomayor, and Kagan, the Chief Justice stated, preliminarily, that limitations on speech by candidates for elected office "comman[d] the highest level of First Amendment protection."[13] I did not join that portion of the Chief's opinion. Speaking for five, including me, the Chief Justice then upheld the ban on personal solicitations as serving Florida's compelling interest in preserving public confidence in the integrity of its judiciary.

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[13] 575 U. S., at ___ (slip op., at 7).

In addition to joining that portion of the Chief's opinion, I wrote a concurring opinion reiterating the view I earlier expressed in *Republican Party of Minnesota* v. *White*,[14] In what I call my Gertrude Stein dissent. The Court there erred, I said, in holding that people running for judicial office could not be restricted in what they could say to the electorate. In declaring "an election is an election," I said, the Court missed an important distinction.[15] Judicial elections should not be ranked with elections to political office, I urged. Judges, unlike politicians, are expected to be

[14] 536 U. S. 765 (2002).
[15] *Id.,* at 805 (GINSBURG, J., dissenting).

indifferent to popularity, so States should have leeway to impose campaign rules designed to keep candidates for the judiciary judicious. *Citizens United* v. *Federal Election Commission*,[16] and *McCutcheon* v. *Federal Election Commission*[17] did not stand in the way, I reasoned, because those decisions trained on elections for representative posts, races in which candidates aim to please the voters.

In dissent, Justice Scalia, joined by Justice Thomas, maintained that the ban unnecessarily abridged speech by outlawing personal solicitations from people

[16] 558 U. S. 310 (2010).
[17] 572 U. S. ___ (2014).

unlikely to show up in court as lawyers or litigants. The ban on personal solicitation, Justices Kennedy and Alito agreed, was not narrowly tailored to target concerns about judicial impartiality or its appearance.

Second, a decision announced on Monday, Chapter II in *Zivotofsky* v. *Kerry*.[18] At issue in *Zivotofsky*, an Act of Congress permitting U. S. citizens born in Jerusalem to designate "Israel" as the birthplace shown on their passports. The Secretary of State refused to enforce the law, urging that it conflicted with the longstanding Executive-branch policy of neutrality on sovereignty

[18] 576 U. S. ___ (2015).

over Jerusalem. When the case first came to us from the D. C. Circuit, we reversed the Circuit's ruling that the dispute presented a nonjusticiable political question. "Courts are fully capable," we held, "of determining whether [the law] may be given effect, or instead must be struck down in light of authority conferred on the [President] by the Constitution."[19] On remand, the Court of Appeals decided, 2 to 1, that the law impermissibly infringed on the President's power to recognize foreign sovereigns.

[19] *Zivotofsy* v. *Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 1).

We affirmed. Justice Kennedy wrote for a five-member majority upholding the President's prerogative.[20] "Congress," the Court held, "[may not] command the President [or] his Secretary of State to issue a formal statement that contradicts" the President's non-recognition policy.[21] Justice Scalia, joined by the Chief Justice and Justice Alito, penned the principal dissent. The law Congress passed, he said, remained within the Legislature's bailiwick. In his view, simply "[g]ranting a [citizen's] request to specify

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[20] *Zivotofsy* v. *Kerry*, 576 U. S., at ___ (slip op., at 1).
[21] *Id.*, at ___ (slip op., at 1–2).

'Israel' rather than 'Jerusalem' " on his passport "does not recognize Israel's sovereignty over Jerusalem."[22]

Another high-profile case, yet to be decided, is *Texas Department of Housing and Community Affairs* v. *The Inclusive Communities Project, Inc.*[23] The question presented: May disparate-impact claims be brought under the federal Fair Housing Act? Under Title VII, such suits long ago gained a green light from the Court. The petitioner, the Texas Department of Housing, argued that the Fair Housing Act imposes liability only for disparate treatment. That is so, the Department

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[22] *Id.*, at ___ (SCALIA, J., dissenting) (slip op., at 7).
[23] ___ U. S. ___ (2015).

reasoned, because the statute prohibits discrimination "because of" race or another protected characteristic. Engaging in practices that have a disproportionate impact on minority racial groups, the Department maintained, is not discrimination "because of" race. The respondent, a non-profit agency supported by the United States as *amicus curiae*, countered that the Act's anti-discrimination provisions, read as a whole and in the context of the rest of the statute, are reasonably construed to permit disparate-impact liability. All nine circuits confronted with the issue have concluded that

disparate-impact claims are cognizable under the Fair Housing Act. Will the Court agree with them? We shall soon see.

Two other cases are high on the list of the closely watched. The Elections Clause of the Constitution, Article I, section 4, commits redistricting for congressional elections, in the first instance, to each State, as "prescribed . . . by the Legislature thereof." Arizona voters, tired of partisan gerrymandering by the Arizona Legislature, installed, by popular initiative, a nonpartisan commission to draw district lines. In

***Arizona State Legislature* v. *Arizona Independent Redistricting Commission*,[24] the Court will decide whether the Arizona Legislature has standing to complain that redistricting power vested in it by the Constitution cannot be wrested from it by the electorate. If the standing hurdle is overcome, the Court will decide whether the initiative establishing the commission is constitutional.**

In *Michigan* v. *EPA*,[25] *Chevron* deference to Clean Air Act regulations is at stake. The regulations at issue set hazardous pollutant emission standards for power

[24] ___ U. S. ___ (2015)
[25] ___ U. S. ___ (2015)

plants. Congress called for such standard setting when "appropriate and necessary." The challengers maintain that the EPA must consider costs when deciding whether to regulate. The Agency points to its regulation of other sources of hazardous air pollutants, asserting that costs should be considered in setting the level of regulation, but not in deciding whether to regulate at all.

Two cases yet to be decided have garnered more press attention than any others. One of them is *King* v.

***Burwell*,[26] the latest challenge to the Affordable Care Act. The current contest, unlike the one that made front-page news in 2012, involves statutory—not constitutional—interpretation.**

The Affordable Care Act establishes "exchanges" where individuals can purchase health insurance policies at competitive rates. The Act provides that "[e]ach State shall . . . establish an . . . Exchange."[27] If a State does not establish an exchange, the Act further provides, the federal government "shall establish and

[26] ___ U. S ___ (2015).
[27] 26 U.S.C. §1311.

operate such exchange within the State."[28] The federal government now operates the exchanges in 34 States that have declined to set up their own exchanges. To ensure that exchange-listed policies are affordable, the Act grants a federal tax credit to low- and moderate-income earners, thus subsidizing the cost of insuring them. The question presented is whether the Act authorizes the IRS to give those credits to people who buy insurance on federally-operated exchanges.

The IRS interprets the Act as authorizing it to grant tax credits on an equal basis to people who buy

[28] 26 U.S.C. §1321(c)(1).

insurance on an exchange, whether operated by a State or the federal government. Petitioners are four Virginia residents whose low income would excuse them from compliance with the obligation to purchase insurance if tax credits are unavailable for people who buy insurance on Virginia's federally-run exchange. They argue that the Act authorizes tax credits only for people who buy insurance on state-run Exchanges. In support, they point to a provision in the Act stating that the amount of the credit depends in part on whether the insured has selected a plan through "an Exchange

established by the State."[29] No credit, they assert, is authorized for people who buy insurance on a federally-established exchange. The Government rejoins that petitioners take the "established by the State" language out of context and so misread the statute in a way that makes the Act unworkable.

I will conclude this quick survey with the same-sex marriage cases. They top the most-watched list. The ticket line for seats formed four days before the argument, and on the day of argument, the sidewalk in front of the Court was crowded with hundreds of

[29] 26 U. S. C. §36B(b), (c).

protestors and counter-protestors. The cases drew a record number of *amicus* briefs—148, exceeding the previous record of 136 set in the 2012 challenge to the Affordable Care Act.[30]

Petitioners seek to have their committed same-sex relationships recognized as "marriages" by States within the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. The cases present two questions: First, does the Fourteenth Amendment require States to issue marriage licenses to same-sex couples? Second, does

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[30] Nina Totenberg, Record Number Of Amicus Briefs Filed In Same-Sex-Marriage Cases, NPR, April 28, 2015, available at http://www.npr.org/blogs/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases (as visited May 31, 2015).

the Fourteenth Amendment require States to recognize same-sex marriages licensed in other States? The second question, all agree, will be eclipsed if petitioners prevail on the first question.

So much for the heavy work of the Court. To end these remarks, I will mention some other highlights of the Court's 2014-2015 term. Our Musicales. In November, we gathered in the East Conference Room for a recital by soprano Alyson Cambridge and bass-baritone Eric Owens. And in May, Wynton Marsalis, with four accompanying artists from Jazz at Lincoln

Center, raised our spirits sky high. Baroness Brenda Hale, first lady law lord, and still sole woman on the Supreme Court of the United Kingdom, spoke about Magna Carta at the Supreme Court Historical Society's annual meeting.

I have mentioned at prior Circuit conferences reports on laughter provoked by the Justices at oral argument. Justice Scalia remains in first place, I continue to be ranked "least funny Justice who talks." A new measure of our attributes is scheduled for publication in the Washington University Law Review,

a "friendliness" assessment of 107 Justices, from the first Court up to Justice Alito.[31] The measurement, usage of positive and negative words in opinions. Overall, the researchers reported, the trend has been markedly toward increasing grumpiness, with four of my current colleagues ranked among the five least friendly justices in the Court's history. To my delight, I am number 56 on the list, ahead of all members of the Roberts Court who received rankings. (Justices Kagan and Sotomayor were too new to be ranked.) Personally,

[31] Carlson, Livermore, Rockmore, A Quantitative Analysis of Writing Style on the U. S. Supreme Court (March 11, 2015). Washington University Law Review, Vol. 93, No. 6, 2016; Virginia Public Law and Legal Theory Research Paper No. 3. Available at SSRN: http://ssrn.com/abstract=2554516.

although glad to be aligned with the less grouchy, I am skeptical of the results. Despite sharp disagreements on matters of interpretation, the current Court is as collegial as can be.