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Remarks for the Second Circuit Judicial Conference
May 26, 2016

**It is fitting to open these remarks with a
remembrance of my dear colleague, Antonin Scalia.**

**Justice Scalia, in his preface to the libretto for the
comic opera *Scalia/Ginsburg*, described as the peak of
his days on the bench an evening in 2009 at the Opera
Ball, held at the British Ambassador's Residence. There,
he joined two Washington National Opera tenors at the**

piano for a medley of songs. He called it the famous Three Tenors performance. He was, indeed, a convivial, exuberant performer. It was my great good fortune to have known him as working colleague and dear friend.

In my treasure trove of memories, an early June morning, 1996. I was about to leave the Court to attend the Second Circuit Judicial Conference at Lake George. Justice Scalia entered, opinion draft in hand. Tossing a sheaf of pages onto my desk, he said: "Ruth, this is the penultimate draft of my dissent in the *Virginia Military Institute* case. It's not yet in shape to circulate to the

Court, but I want to give you as much time as I can to answer it." On the plane to Albany, I read the dissent. It was a zinger, taking me to task on things large and small. Among the disdainful footnotes: "The Court refers to the University of Virginia at Charlottesville. There is no University of Virginia at Charlottesville, there is only *the* University of Virginia." Thinking about fitting responses consumed my weekend, but I was glad to have the extra days to adjust the Court's opinion. My final draft was much improved thanks to Justice Scalia's searing criticism.

Indeed, whenever I wrote for the Court and received a Scalia dissent, the majority opinion ultimately released was notably better than my initial circulation. Justice Scalia homed in on the soft spots, and gave me just the stimulation I needed to write a more persuasive account of the Court's decision.

Another indelible memory, the day the Court decided *Bush v. Gore*, December 12, 2000, I was in chambers, exhausted after the marathon: review granted Saturday, briefs filed Sunday, oral argument Monday, opinions completed and released Tuesday. No

surprise, Justice Scalia and I were on opposite sides.

The Court did the right thing, he had no doubt. I

strongly disagreed and explained why in a dissenting

opinion. Around 9:00 p.m. the telephone, my direct line,

rang. It was Justice Scalia. He didn't say "get over it."

Instead, he asked, "Ruth, why are you still at the Court?

Go home and take a hot bath." Good advice I promptly

followed.

Among my favorite Scalia stories, when President Clinton was mulling over his first nomination to the Supreme Court, Justice Scalia was asked: "If you were

stranded on a desert island with your new Court colleague, who would you prefer, Larry Tribe or Mario Cuomo?” Scalia answered quickly and distinctly: “Ruth Bader Ginsburg.” Within days, the President chose me.

I recall, too, a dark day for me, confined in a hospital in Heraklion, Crete, in the summer of 1999, the beginning of my bout with colo-rectal cancer. Justice Scalia’s was the first outside call I received. Ruth, he said, “Get well,” and “let me know if there is anything I can do to help.”

Justice Scalia was a man of many talents, a jurist of captivating brilliance, high spirits, and quick wit, possessed of a rare talent for making even the most somber judge smile. The press wrote of his “energetic fervor,” “astringent intellect,” “peppery prose,” “acumen” and “affability.”

Not so well known, he was a discerning shopper. In Agra, India, together in 1994, our driver took us to his friend’s carpet shop. One rug after another was tossed onto the floor, leaving me without a clue which to choose. Nino pointed to one he thought his wife

Maureen would like for their beach house in North Carolina. I picked the same design, in a different color. It has worn very well.

Once asked how we could be friends, given our disagreement on lots of things, Justice Scalia answered: "I attack ideas. I don't attack people. Some very good people have some very bad ideas. And if you can't separate the two, you gotta get another day job. You don't want to be a judge. At least not a judge on a multi-member panel." Example in point, from his first days on

the Court, Justice Scalia was fond of Justice Brennan,
as Justice Brennan was of him.

I miss the challenges and the laughter he provoked,
his pungent, eminently quotable opinions, so clearly
stated that his words rarely slipped from the reader's
grasp, the roses he brought me on my birthday, the
chance to appear with him once more as
supernumeraries at the opera. The Court is a paler
place without him.

Toward the end of the opera *Scalia/Ginsburg*, tenor
Scalia and soprano Ginsburg sing a duet: "We are

different, we are one.” Yes, different in our interpretation of written texts, but one in our respect and affection for each other and, above all, our reverence for the Constitution and the Court.

My rapid review of the current Term starts with a numerical snapshot. From June 2015 to May 2016, the Court received about 6,000 petitions for review, down from 6,500 in the previous Term. From the thousands of requests, we selected only 67 for full briefing and argument, not counting the one petition we dismissed as improvidently granted. To the 67, the same number

we selected last Term, add ten *per curiam* decisions so far—opinions rendered without full briefing or oral argument. That brings total opinions produced, or to be produced, to 76.

Records set during the term. According to a law professor who keeps tabs on these things, then blogs about them, Justice Breyer asked the longest question at oral argument. In *United States v. Texas*, a challenge to the President's immigration executive order, Breyer's inquiry ran 52 transcript lines. In total questions asked, however, Justice Breyer ranked only fourth,

asking 381 questions. He stood behind Justice Alito, whose questions numbered 401, and the Chief Justice, who questioned counsel 417 times. Far out in front with 477 questions, Justice Sotomayor was once again the Justice who asked the most questions at oral argument.

Justice Thomas, after a 10-year silence, astonished all in attendance by asking nine questions, all in the same case, *Voisine v. United States*. The issue that sparked his interest: whether misdemeanor assault convictions for reckless conduct trigger the statutory

ban on possessing firearms contained in 18 U. S. C.

§922(g).

To date, opinions have been handed down in 42 of the 67 argued cases. As of May 23, the Court split 5-3 only twice.¹ And in two cases so far, we affirmed judgments of the Courts of Appeals by an equally divided Court. That means no opinions and no precedential value; an equal division is essentially the same as a denial of review. One of the 4-4 automatic affirmances, *Friedrichs v. California Teachers*

¹ *Ocasio v. United States*, 578 U. S. ____ (2016); *Luis v. United States*, 578 U. S. ____ (2016).

Association,² was among the Term's most closely watched cases. The petitioners in *Friedrichs* asked the Court to overrule *Abood v. Detroit Board of Education*³ and hold that requiring public-sector employees to pay anything to a union violates the First Amendment. *Abood*, which requires all workers to contribute to the cost of collective bargaining and union-operated grievance procedures, thus survives, at least until the Court numbers nine.

We resolved another headline case on May 16, without an opinion on the merits. *Zubik v. Burwell* and

² 578 U. S. ___ (2016) (*per curiam*).

³ 431 U. S. 209 (1977).

the cases consolidated with it involved objections by religious nonprofits to providing contraceptive coverage to their employees, as required by the Affordable Care Act. Attempting to accommodate these objections, the Government called upon third parties to provide contraceptive coverage in the religious employers' stead. Asserting that even this accommodation burdened the exercise of their religious beliefs because it used their health plans, the organizations staked their claims on the Religious Freedom Restoration Act. After hearing argument, the

Court requested supplemental briefing to determine whether the parties might compose their differences.

The additional briefs in hand, the Court issued a *per curiam* opinion remanding the cases so that the Courts of Appeals could consider what the new briefs conveyed. Justice Sotomayor filed a concurring opinion, which I joined, emphasizing that the Court's *per curiam* order in no way endorsed petitioners' arguments.

How has the Second Circuit fared this Term? We granted review of six of the Circuit's judgments—two

less than the eight cases we took up from each of the Term’s biggest business producers, the Fifth and Ninth Circuits. Of the six Second Circuit grants, we have so far decided four, and in each, we affirmed the Circuit’s judgments: *Lockhart v. United States*,⁴ *Torres v. Lynch*,⁵ *Bank Markazi v. Peterson*,⁶ and *Gobeille v. Liberty Mutual Insurance*.⁷ *Lockhart* concerned a sentence enhancement triggered by prior state convictions for “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” Two canons

⁴ 577 U. S. ___ (2016).

⁵ ___ U. S. ___ (2016)

⁶ 578 U. S. ___ (2016).

⁷ 577 U. S. ___ (2016).

of statutory interpretation vied for attention: the “series qualifier” canon, and its rival, the “last antecedent” rule. We chose the latter because the series-qualifier canon, in context, made less sense.

The question in *Torres* was whether Congress intended to count as “aggravated felonies” for federal immigration-law purposes state crimes lacking an interstate commerce element. Unlike Congress, States have no need to include interstate-commerce elements in their criminal laws. State offenses could qualify as “aggravated felonies,” the Court held, if their elements

matched all but the interstate-commerce requirement of comparable federal offenses.

Bank Markazi involved the constitutionality of a provision of the 2012 Iran Threat Reduction and Syria Human Rights Act. The provision identified a set of assets held at a New York bank for Bank Markazi, the Central Bank of Iran; it made those assets available to satisfy some 16 District Court judgments against Iran for its part in terrorist attacks abroad that took the lives of many U. S. citizens. The cases were consolidated for post-judgment execution in a

proceeding the statute named by docket number. The question presented: Did the provision violate the separation of powers by directing a particular result in a pending case? In an opinion I wrote, the Court upheld the statute. Congress, we reaffirmed, can't tell a court how a case should be decided under existing law, but it can amend the law applicable to a pending case, even when the amendment will determine the outcome in that case. The decision drew a strong dissent from the Chief Justice, joined only by Justice Sotomayor, and

an irate response from Iran, including a threat to sue the U. S. in the International Court of Justice.

In *Gobeille v. Liberty Mutual Insurance*, the Court held that Vermont’s healthcare data-collection statute was preempted by the federal Employee Retirement Income Security Act (ERISA). Like 17 other states, Vermont sought to collect comprehensive health-claims data to aid the State in designing healthcare-market reforms. In accord with the Second Circuit, Justice Kennedy, writing for the majority, held that Vermont’s

statute encroached on ERISA's territory by requiring health plan reporting, disclosure, and recordkeeping.

I dissented, this time joined by Justice Sotomayor.

We agreed with District Court Judge Sessions that

Vermont's law did not touch or concern matters at

ERISA's core: benefits vesting, claims processing, and

beneficiary designations. And we saw no evidence

showing that the State's law was unduly burdensome.

Therefore, we concluded, the State's traditional role in

regulating health care should have carried the day.

Decisions are still awaited in two cases from the Second Circuit. In *RJR Nabisco, Inc. v. European Community*, the extraterritorial application (or not) of civil RICO is at stake. And *Kirtsaeng v. John Wiley & Sons, Inc.*, involves the standard for awarding attorneys' fees to a prevailing party—in *Kirtsaeng*, a successful defendant—in a copyright case.

We have not yet granted review of a Second Circuit decision for next Term. But the Circuit has weighed in on an issue presented in a Ninth Circuit case on our OT 2016 docket: *Salman v. United States*. Addressed earlier

by the Second Circuit in *United States v. Newman*, the question is: In an insider trading case, must the tip-providing insider receive an economic benefit, or is it enough that the insider provides the information as a gift to the tippee, if the two share a close personal relationship? Judge Rakoff, sitting by designation, wrote the Ninth Circuit's opinion holding, in conflict with the Second Circuit, that the insider offends even if he presents the tip as a gift.

Next, some of the Term’s headline cases. *Evenwel v. Abbott*⁸ concerned who counts under the one-person, one-vote principle derived from the Fourteenth Amendment’s Equal Protection Clause. In drawing state and local legislative districts, should the State count only eligible voters, as the plaintiffs, Texas voters, urged, or does everyone—the district’s total population—count? We held that jurisdictions may draw legislative districts to equalize total population. The Framers of the Fourteenth Amendment, we emphasized, selected total population as the basis for

⁸ 578 U. S. ___ (2016).

congressional apportionment. “It cannot be,” I wrote for the Court, “that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on that same basis.”⁹

Of headline cases that remain undecided, *Fisher v. University of Texas at Austin* is back for a second look. The question, does the University’s affirmative-action admissions policy meet the Court’s equal protection measurement? When the Fifth Circuit invalidated the

⁹ *Id.*, at ___ (slip op., at 12).

University's initial plan, the Texas Legislature adopted a Top Ten Percent Plan, under which all Texas students who graduate in the top 10% of their high-school classes gain admission. That accounts for up to 75% of the freshman class. To complete the class, the University considers a number of factors, including a student's race.

Last time around, in 2012, the Court returned the case to the Fifth Circuit, holding that the Court of Appeals, which had upheld the University's policy, had

applied strict scrutiny with insufficient rigor.¹⁰ I dissented on the ground that the University had followed assiduously the holistic, race-conscious model the Court approved in *Grutter v. Bollinger*,¹¹ the University of Michigan Law School affirmative-action case. Like Michigan's Law School, the University of Texas used race as only one factor among many. The Top Ten Percent Plan, which the majority regarded as race neutral, I suggested, could not fairly bear that description, for it was adopted with the State's racially segregated neighborhoods and schools in full view. On

¹⁰ *Fisher v. University of Tex. at Austin*, 570 U. S. ____ (2013).

¹¹ 539 U. S. 306 (2003).

remand, the Fifth Circuit again upheld the University's admissions policy. By June's end, the Court will decide Round 2.

In addition to *Evenwel* and *Fisher*, Texas is before the Court in two other large-interest cases. In *Whole Woman's Health v. Hellerstedt*, Texas abortion providers challenge the constitutionality of two state abortion restrictions: first, a requirement that abortion-clinic physicians obtain admitting privileges at local hospitals and, second, a mandate that clinics meet minimum standards required of ambulatory surgical centers. The

result of the restrictions, most clinics in Texas could no longer provide access to abortion services. If the law became fully operative, the District Court found, only seven or eight clinics out of some 40 would remain. The plaintiffs urged that the Texas requirements did not genuinely protect women's health. Instead, they burdened a woman's access to an abortion for no tenable reason. The Fifth Circuit upheld the Texas restrictions in principal part. We granted a stay pending our decision.

Last on my list, in *United States v. Texas*, a number of States joined in a challenge to the legality of the Obama Administration's policy of deferring deportation of some four million unlawfully present aliens whose children are U. S. citizens or lawful permanent residents. Under longstanding Government policies, individuals who receive such deferred action are eligible to receive certain benefits, prime among them, permission to work legally in this country. A divided Fifth Circuit panel enjoined implementation of the policy. We heard arguments on April 18.

A few notes on the lighter side of life at the Court.

During an argument, the courtroom suddenly turned dark. Without skipping a beat, the Chief Justice said: “I knew we should have paid that bill.” During argument in *Birchfield v. North Dakota*, a case about administering breath and blood alcohol tests to car drivers stopped for traffic violations, a question was asked about the amount of time it takes for law-enforcement officers to procure warrants. North Dakota’s counsel responded that, in the State’s rural areas, it can be hard to reach a judge by phone to rule

on a warrant application. Justice Kennedy, unsatisfied with that answer, quipped: “I [thought] people in . . . rural areas were sitting waiting for the phone to [ring].”

And on the term’s last day for argument, an advocate responded to my question: “There are lots of other statutes that would prohibit precisely what you are suggesting, Justice O’Connor” I gently reminded counsel “[t]hat hasn’t happened in quite some time.”

The first woman on the Supreme Court retired a decade ago, yet confusion of the two of us lingers.

Eight, as you know, is not a good number for a multimember Court. When we meet at the Circuit Conference next year, I anticipate reporting on the decisions of a full bench.