



The Supreme Court's 5 most contentious cases and how experts think they'll rule

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Onlookers who expected fireworks at the Supreme Court over President Trump's travel ban are unlikely to be disappointed by the other battles set to begin Monday as the high court begins its new term.

The Supreme Court's term is loaded with blockbuster challenges featuring questions about political gerrymandering, clashes of free expression and anti-discrimination law, the limits of governmental surveillance, Gov. Chris Christie's battle with America's top sports leagues over betting, and a voting rights case that could affect future elections. The cases provide ample opportunity for decisions to turn on a single justice's vote and for the court to write big or narrow decisions. And in the case of a government surveillance case, how they could decide is a complete mystery.

Here are five cases expected to be among the most contentious and how experts think the justices will rule:

Political gerrymandering: *Gill v. Whitford*

The Supreme Court in its first week will look to answer if it has any role in determining the constitutionality of political gerrymandering and whether the court should develop a new standard about how to resolve those disputes.

Gill v. Whitford involves gerrymandering questions in Wisconsin, where the challengers hope the high court will adopt their proposed standard for resolving political gerrymandering claims. The standard would rely on demonstrating that redistricting maps were drawn with a partisan motivation, fostered a large and lasting partisan effect, and appeared unjustified by other factors used to draw districts after the census every 10 years.

A previous political gerrymandering case, *Vieth v. Jubelirer*, featured no majority opinion from the Supreme Court, producing a 4-4 split with Justice Anthony Kennedy writing a concurrence to Justice Antonin Scalia's controlling opinion that indicated that while Kennedy found no standard to resolve the issue then, it was possible that the high court could do so in the future. Left-leaning court-watchers hope Kennedy is ready to hand them a victory by creating a new standard in the aftermath of the 2016 elections.

"Hopefully the court in the gerrymandering case will realize that healthy elections, that having a system whereby the legislators are choosing their voters as opposed to voters choosing their legislators is deeply undemocratic and undermines critical Republican principles," said Dan

Goldberg, legal director for the left-leaning Alliance for Justice "For the sake of a healthy democracy, hopefully Justice Kennedy who in the past has left open the possibility of invalidating partisan gerrymandering will rule the right way here."

Other legal experts remain skeptical that the justices will definitively answer the question presented in the case. Ilya Shapiro, a senior fellow at the libertarian-leaning Cato Institute, said he does not foresee a ruling on the merits of the controversy.

"I would expect here a fizzle, one way or another, not a solid ruling on the merits," Shapiro said. "It just means that future challenges would go back to the drawing board ... but I think this is, we're in late 2017 already, there's going to be a new census in 2020, I think any subsequent challenge will have to come after the next redistricting."

Cake v. gay rights conflict: *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*

The Supreme Court has yet to send out any save-the-date notice for oral arguments in the *Masterpiece* case, but court-watchers are eagerly anticipating the nine justices' ruling on the wedding vendor controversy that could be the highest-profile case the court hears this term.

The high court will look to determine the constitutionality of Colorado's public accommodations law forcing cake baker Jack Phillips to create speech that defies his religious beliefs. The justices took the case based on First Amendment free speech questions, which may leave religious liberty advocates without reason to react to any decision.

This case has the potential to turn on a few justices' thinking, as they punted the controversy several times while awaiting a full nine-justice bench.

Goldberg said he thinks the case will come down to Justice Anthony Kennedy's vote.

"History will look back on Justice Kennedy as one of the true champions of equality in the United States particularly with respect to LGBTQ persons and this will be another opportunity for him to make sure that the Constitution and our laws really apply deeply to all persons," Goldberg said. "I think it'll be a question of does Justice Kennedy continue his legacy as one of the true champions of equality in our nation's history?"

But Carrie Severino, chief counsel of the right-leaning Judicial Crisis Network, said the Supreme Court should stick to the question of free expression it agreed to hear rather than examining other matters involving LGBT rights or religious liberty questions.

"The court shouldn't make a religious liberty analysis here because that's not what the issue is that's being argued to them particularly," Severino said.

Whether the court makes any religious liberty analysis could hinge on who writes the case's majority opinion. Advocates on both sides of the case will be watching Kennedy, but Shapiro indicated that the newest justice, Neil Gorsuch, and Chief Justice John Roberts could wield a crucial impact on the final vote. Shapiro noted that Gorsuch, a former Kennedy law clerk, could subscribe to his old boss' view or choose to write separately.

Roberts would rather Kennedy write the opinion than let the ruling come from the high court's ideological right, Shapiro said.

"I'm sure [the justices] will try mightily to craft a narrow rule because they — and John Roberts especially — cares about the court and doesn't want it to be even more of the political conversation than it has been," Shapiro said.

Kennedy could cast the deciding vote on *Masterpiece*, but how Gorsuch and Roberts rule could reveal fault lines in the new nine-justice court. Gorsuch wrote a concurring opinion in the last term's hallmark religious liberty controversy, *Trinity Lutheran*, in which Gorsuch disagreed with a portion of Roberts' 7-2 majority opinion. Gorsuch also authored a dissent — joined by Justices Samuel Alito and Clarence Thomas — from the high court's per curiam opinion rendering an Arkansas birth certificate law unconstitutional following the justices' legalization of same-sex marriage. A per curiam opinion means it was delivered on behalf of the entire court rather than signed by an individual justice who wrote the opinion.

The limits of government surveillance: *Carpenter v. United States*

"Carpenter versus the United States is probably the biggest Fourth Amendment case that the court has had in at least five or six years, maybe longer," said Orrin Kerr, George Washington University law professor and former Kennedy law clerk, at a Federalist Society preview of the term on Wednesday. "Although this case is just about cell-site records, really it is about much more. This is the first case that has touched on Fourth Amendment rights, what is a search in the context of new technologies, in several years and the one that is getting to the fundamental basis of what is constitutional."

The Supreme Court will review the constitutionality of law enforcement agencies seizing and searching a cellphone user's records to reveal that person's locations and movements. The government in 2011 acquired location data without a warrant on Timothy Carpenter, a suspect in a criminal investigation in Detroit. The 6th Circuit Court of Appeals decided no warrant was necessary, but the Supreme Court may view things differently.

Kerr noted that the Supreme Court took the case without a split on the matter in the federal appeals courts. He noted that none of the high court's justices sat on the Supreme Court when the precedent being relied on in the case was decided last century, which he said makes it "really tough to predict, I think, what the court will do."

"This is the case that's going to determine limits on the government's surveillance power at the state and federal level in new technology for years to come, and I think the justices know that," Kerr said.

Shapiro said he thinks the high court could decide that barring an emergency situation, law enforcement needs to get a warrant if they have the time to conduct a criminal investigation.

"I could see some sort of rule that again not for different classes of people but just in general, if you've taken physical, legal, digital steps to protect your data, then the police should have probable cause to be able to get a warrant and then access it," Shapiro said.

The lack of recent decisions on this type of case makes it a true toss-up in the eyes of legal experts.

The governor's gamble: *Christie v. NCAA*

The Supreme Court will judge the winner of a heavyweight bout pitting New Jersey Gov. Chris Christie against all of America's major sports leagues that could change the fate of sports gambling rules nationwide.

New Jersey's decision to repeal certain prohibitions on sports gambling rankled the sports leagues and ran afoul of a federal law prohibiting various forms of sports gambling. Christie has called the 1992 federal law a "dramatic, unprecedented" takeover of New Jersey's authority, and the Trump administration urged the Supreme Court to reject the case.

Despite Atlantic City's interest, court-watchers say the odds are good that the Supreme Court's ruling will have less to do with the country's growing acceptance of sports betting and more to do with the 10th Amendment.

"The question really is fundamentally about federalism, not about how do we feel about sports gambling," said Severino, noting that it's not hard to imagine either major political party trying to pass a law commandeering states on all sorts of issues.

Shapiro said he thought it was good to see the high court address the tension in the case. While other controversies before the high court have featured questions of federal government overreach, particularly regarding environmental concerns, the commandeering issue in *Christie v. NCAA* is giving the high court a fresh opportunity to resolve such disputes.

"There haven't been too many cases involving commandeering, meaning a challenge by the state that the federal government is doing something beyond its powers," Shapiro said. "We really haven't had that in awhile. So I think this will be a good clarifying opportunity for the court."

Legal experts are hesitant to place any bets on the outcome of the case, but the casino lobby is optimistic and going all-in on Christie.

Voting rights: *Husted v. A. Philip Randolph Institute*

Husted provides the Supreme Court with another opportunity, similar to the political gerrymandering case, to have an impact on the outcome of future elections.

The Supreme Court will examine if Ohio's maintenance of its voter registration list is lawful. Ohio sends voters who have been inactive for two years a confirmation notice that requires a response. If no response is obtained and a voter remains inactive for four years, Ohio strikes that voter from its lists. The National Voter Registration Act of 1993 and Help America Vote Act of 2002 prevent states from stripping names off its voter registration rolls because a person is not voting.

Americans of all political persuasions, including the president, cast doubt on the veracity of the 2016 election's outcome. After winning the White House in November, Trump asserted that 3 to 5 million illegal immigrants voted in the election. His opponents have countered with concerns about foreign powers meddling and changing the outcome of the election.

"It will be a test of the Supreme Court: Are the justices going to side with the Constitution, going to side with making sure we have a healthy democracy where every voter has an opportunity to participate in our political process, or are they just going to side and rule with Republican officeholders who want to, for partisan purposes, make it more difficult to vote?" said Goldberg, of the left-leaning Alliance for Justice.

John Husted, Ohio's secretary of state who petitioned the Supreme Court for review, has argued that, "It is 'far from clear' which of the combinations of programs for maintaining the rolls best balances accuracy against cost" borne by the Buckeye State. Husted's filing with the Supreme Court also noted other steps Ohio has taken, including online registration, to make it easier to register to vote.