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Affirmative Action, Class Actions And Conspiracy On Supreme Court's Fall Docket

Daniel Fisher
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Beginning Oct. 5 and extending across 16 argument days until Dec. 9, the Supreme Court will hear a mix of civil and criminal cases chosen mostly to resolve unsettled areas of the law. Some are oddities like Dollar General . The Mississippi Band of Choctaw Indians, in which the discount store is being sued over a sexual assault that allegedly occurred in a store on a Choctaw reservation. The case will resolve whether non-members can be sued in reservation courts, where the law is frequently unwritten and tribal elders hold great influence.

It will also hear at least one case of landmark significance: Fisher v. University of Texas. Commonly known as Fisher II, this marks the return trip of the lawsuit by would-be UT student Abigail Fisher, who claims she lost a spot at the school's premier Austin campus due to racial preferences. In Fisher I two years ago, Justice Anthony Kennedy delivered a strong opinion requiring all such preferences based on race or ethnic origin to be subject to strict scrutiny, the highest level of judicial review. By voting to grant certiorari or Supreme Court review, at least four justices decided that the Fifth Circuit Court of Appeals, in approving UT's affirmative-action program, may not have been strict enough.

Fisher II will determine how much deference courts can give schools that take race or ethnicity into account in any way in their admissions procedures. UT-Austin says it uses race to achieve diversity in the classroom, especially among students who came from school districts with low minority enrollment. Conservative and libertarian groups like the Cato Institute hope Kennedy, who will be the swing vote on this case, finally decides racial preferences are unworkable in practice and adopts the view of Chief Justice Roberts, who famously wrote in a 2007 decision: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

The cases above are a selection I feel have the most implications for business and civil law more generally. Three cases challenge different elements of class-action law, where plaintiff lawyers use the courts to assemble large groups of “clients” that serve as powerful bargaining tools in settlement negotiations. The Supreme Court’s conservative justices have been picking away at this strategy in recent years with decisions like Dukes v. Wal-Mart, rejecting a class action on behalf of more than 1 million female employees because they were too diverse. This fall, the court considers a case involving workers at Tyson pork-processing plants who lawyers say are owed extra pay for donning and doffing gear. Tyson says there are too many different classifications of workers, with different pay schemes, to lump them into a single group for litigation. That’s the same complaint Uber is making as it fights a class action a Massachusetts lawyer is trying to press on behalf of thousands of independent drivers, of course. The Supreme Court’s ruling here might affect the trajectory of that case.

One criminal case, Ocasio v. U.S., involves a police officer convicted of taking bribes to steer car-accident victims to specific repair shops. But the case could affect how aggressive federal prosecutors are in going after white-collar crimes, since it challenges the government’s decision to indict Ocasio for conspiracy in addition to bribery when the “conspiracy” involved taking money from people who were part of the scheme. (The government is seeking Supreme Court review of U.S. v. Newman, a Second Circuit decision that greatly tightened the standards for insider trading cases.)

Coming after this year’s Yates v. U.S., reversing a fisherman’s conviction under the Sarbanes-Oxley Act for disposing of undersized fish, and last year’s Bond v. U.S., reversing a woman’s conviction under a chemical-weapons statute for poisoning the mailbox of her husband’s lover, Ocasio could complete a trilogy of decisions instructing prosecutors on when they’ve gotten too creative with the criminal statute book.

Ocasio “is another case in which the government is inventing a crime that goes way beyond the plain language of the statute,” said Andrew Pincus, a partner with Mayer Brown in Washington who wrote a brief in favor of the defendant for the National Association of Criminal Defense Lawyers. “It will be interesting to see whether the court follows up on the line they’ve drawn in Yates and Bond.”