Labor and Employment Decisions from the Supreme Court's 2018–19 Term

Peggie R. Smith*

Introduction

The Court's 2018–19 term can aptly be described as the term that did not live up to the hype with respect to its labor and employment law rulings. At the beginning of the term, there was much anticipation that the Court would rule on at least one case that asked whether Title VII of the Civil Rights Act of 1964[1] protected employees from discrimination on the basis of sexual orientation and/or transgender identity.[2] After considerable deliberation, the Court ultimately granted certiorari to hear three cases on this issue during its 2019–20 term.[3]

Yet while the Court's 2018–19 term was devoid of blockbuster labor and employment cases, especially as compared with its prior term,[4] the

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*Charles Nagel Professor of Labor and Employment Law, Washington University in St. Louis.

1. 42 U.S.C. §§ 2000e to e-17.

2. *See, e.g.*, Chris Johnson, *Rulings in Favor of Title VII Protections for LGBT Workers on the Rise*, Wash. Blade (Mar. 19, 2018, 2:40 PM), https://www.washingtonblade.com/2018/03/19/rulings-in-favor-of-title-vii-protections-for-lgbt-workers-on-the-rise [https://perma.cc/6GHD-6NKS] (stating that "whether gay protections are included under Title VII" is "probably a question that [the Supreme Court is] going to take up soon"); Susan Lessack & Troutman Pepper, *Circuit Split on Sexual Orientation Discrimination Continues with New Second Circuit Opinion*, JD Supra (Mar. 6, 2018), https://www.jdsupra.com/legalnews/circuit-split-on-sexual-orientation-19997 [https://perma.cc/FV9E-FSDM] ("Now that there are two circuit court decisions ruling that sexual orientation is protected under Title VII, the Supreme Court might decide that it is time to address the question either in *Zarda*, if the decision is appealed, or in a future case.").

3. Altitude Express Inc. v. Zarda, 139 S. Ct. 1599 (2019) (granting certiorari in Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018)); R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (granting certiorari in Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018)); Bostock v. Clayton Cnty., 139 S. Ct. 1599 (2019) (granting certiorari in Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018)).

4. Notably, during its 2017–18 term, the Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that an employer does not violate the National Labor Relations Act by requiring workers to sign arbitration agreements that include class action waiver provisions); *Janus v. American Federation of State County & Municipal Employees*, 138 S. Ct. 2448 (2018) (holding that mandatory fair share fees violated the plaintiff's First Amendment rights to free speech); and *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (holding that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause).

Court did decide several cases with important implications for workplace rights. The first part of this article reviews those cases in two key areas: workplace discrimination and arbitration agreements. The latter part of the article discusses a number of additional cases that touch on a range of work-law issues.

I. A Trio of Employment Discrimination Cases

The Court decided three employment discrimination cases during its 2018–19 term, *Mount Lemmon Fire District v. Guido*,[5] *Fort Bend County v. Davis*,[6] and *Yovino v. Rizo*.[7] Although these decisions do not involve fundamental alterations to our understanding of antidiscrimination doctrine, both *Mount Lemmon* and *Fort Bend County* represent small victories for discrimination plaintiffs in contrast to the mostly pro-employer bent of the Roberts Court.[8]

A. Mount Lemmon v. Guido

The first of the three discrimination cases, *Mount Lemmon v. Guido*, involved the Age Discrimination in Employment Act (ADEA)[9] and was argued during the first week of the term, before Justice Brett Kavanaugh joined the Court. The question before the Court was whether the Act's twenty-employee threshold, which applies to private employers,[10] also applies to state and local governments. Facing a budget shortfall, the Mount Lemmon Fire District terminated its two most senior firefighters. In response to the firefighters' age discrimination charge, the Fire District maintained that it was too small to qualify as an "employer" under the ADEA.[11]

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5. Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22 (2018).
6. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843 (2019).
7. Yovino v. Rizo, 139 S. Ct. 706 (2019).
8. *See, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 Wayne L. Rev. 947, 962 (2008) (describing the Roberts Court as "the most pro-business since the mid-1930s" and observing that this stance is evident in various areas including employment discrimination); Michael Z. Green, *Reading* Ricci *and* Pyett *to Provide Racial Justice Through Union Arbitration*, 87 Ind. L.J. 367, 372 (2012) (stating that the Roberts Court "provides little hope for those seeking a judicial remedy for racial discrimination"); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 Emp. Rts. & Emp. Pol'y J. 253, 283 (2009) (observing that "[f]or the Roberts' Court majority, employment discrimination is not a problem—or, at the least, employment discrimination litigation is a larger problem"); Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. Chi. Legal F. 19, 80 (commenting that, under the Roberts Court, "workers who are most in need of protection and most likely to be victims of discrimination are being denied a chance to have their cases decided on the merits in federal court or by arbitration if that is their choice").
9. 29 U.S.C. §§ 621–634.
10. *Id.* § 630(b).
11. Guido v. Mount Lemmon Fire Dist., No. CV-13-00216-TUC-JAS, 2014 U.S. Dist. LEXIS 198475, at *2 (D. Ariz. Dec. 11, 2014).

Adopting a position endorsed by the EEOC,[12] the Ninth Circuit held that the Act covers state and local employers of any size.[13] The Supreme Court agreed in a unanimous decision fittingly authored by Justice Ruth Bader Ginsburg, the oldest member of the Court. Resolution of the case turned on the ADEA provision that defines "employer." Although the Act originally reached only private employers, Congress amended the definition in 1974 to read as follows:

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term *also means* (1) any agent of such a person, and (2) a State or political subdivision of a State. . . .[14]

The Court held that the plain meaning of the phrase "also means" "is additive rather than clarifying."[15] In other words, the phrase added new categories of covered employers, as opposed to simply clarifying the meaning of employers referenced in the first part of the clause. The Court explained that the amendment reflected congressional intent to extend the reach of "employer" to include public employers regardless of their size.[16] Justice Ginsburg acknowledged that the Court's interpretation of "also means" gives the ADEA a broader reach than Title VII, but she pointed out that this result is a consequence of the different language used by Congress in enacting the two statues.[17] *Mount Lemmon* makes it clear that the ADEA covers state and local government employees, regardless of employer size. The ruling's implications will be far reaching, as it subjects small public-sector employers to the ADEA's mandates and the potential monetary liability that comes with running afoul of the Act's provisions. Although the Court avoided addressing the implications of its holding for individual liability under the ADEA,[18] many commentators forecast that it may well be a prelude to such liability.[19]

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12. Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 27 (2018) (citing EEOC, Compliance Manual: Threshold Issues § 2-III.B.1 (a)(i), 2009 WL 2966755 (2009) ("A state or local government employer is covered under the ADEA regardless of its number of employees.")).

13. Guido v. Mount Lemmon Fire Dist., 859 F.3d 1168, 1174 (9th Cir. 2017).

14. *Mount Lemmon Fire Dist.*, 139 S. Ct. at 25 (emphasis added) (citing 29 U.S.C. § 630(b)).

15. *Id.*

16. *Id.*

17. *Id.* at 26.

18. In a footnote, the Court stated simply: "We need not linger over possible applications of the agent clause, for no question of agent liability is before us in this case." *Id.* at 26 n.2.

19. *See, e.g.*, David Klass, *Supreme Court: Small Public Employers Now Subject to ADEA*, Fisher Phillips (Nov. 6, 2018), https://www.fisherphillips.com/resources-alerts-supreme-court-small-public-employers-now-subject [https://perma.cc/8CK8-6BYY] (observing that the case "raises the serious specter for individual liability under the ADEA for *all* employers"); Adam Konstas, *The ADEA's Reach in the Public Sector May Contain a Grim Forecast for the Private Sector—Is Individual Liability on the Horizon?*,

B. Fort Bend County v. Davis

In another important discrimination case, *Fort Bend County v. Davis*,[20] the Court considered whether Title VII's administrative exhaustion requirement is jurisdictional. Under Title VII, employees must comply with a multi-step process before filing suit. As an initial matter, employees must file a charge in a timely manner with either the EEOC or an analogous local or state agency.[21] In general, a complainant's failure to complete this process before filing suit is grounds to dismiss the claim.[22]

The *Fort Bend* plaintiff filed a formal charge against her employer alleging sexual harassment and retaliation. While the charge was pending, she further claimed that she was terminated because of her religion, and she subsequently amended her intake questionnaire to include "religion" as another basis of discrimination. However, she did not amend the formal charge document to include a charge of religious discrimination.[23]

On remand from the Fifth Circuit, the employer asserted for the first time (almost five years after the case was first filed in federal court) that the district court lacked jurisdiction to adjudicate plaintiff's religion-based discrimination claim because she failed to include the claim in her EEOC charge.[24] The question before the court was whether Title VII's charge-filing requirement is a "jurisdictional" requirement that can be raised at any stage of a proceeding or a mandatory claim-processing rule, albeit one that is subject to forfeiture if a defendant waits too long to invoke it.[25] In an opinion also authored by Justice Ginsburg, the Supreme Court unanimously held that the charge-filing requirement is a mandatory claim-processing rule that can be forfeited by the employer. [26]

JDSUPRA (Nov. 26, 2018), https://www.jdsupra.com/legalnews/the-adea-s-reach-in-the-public-sector-17346 [https://perma.cc/UVH5-YLQQ] (stating that the Court's decision "raises the specter of potential individual liability of agents of any employer under the ADEA"); *Supreme Court Expands ADEA's Application to Government*, BUSCA L. FIRM (Dec. 2018), https://mjbuscalaw.com/adea-expansion [https://perma.cc/HP8L-WFUY] ("The ruling also may result in individual liability under the ADEA for company employees.").

20. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843 (2019).

21. 42 U.S.C. § 2000e-5(e)(1).

22. *See* 29 C.F.R. § 1601.18(a) (2020) ("Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII . . . , the Commission shall dismiss the charge."); *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) (stating the statutory time period for a party to file a charge under Title VII and noting that "[a] claim is time barred if it is not filed within these time limits").

23. *Fort Bend Cnty.*, 139 S. Ct. at 1847.

24. *Id.* at 1848.

25. *Id.* at 1846, 1848.

26. *Id.* at 1850, 1852.

In reaching this holding, the Court observed that, because it uses "jurisdiction" narrowly to refer primarily to subject-matter and personal jurisdiction, jurisdictional defenses can be raised at any time.[27] By contrast, mandatory claim-processing rules are nonjurisdictional and can be waived if a defendant does not properly raise them. While Congress can impose jurisdictional requirements, it must speak clearly to do so. If a requirement does not satisfy the clear statement rule, it should be treated as nonjurisdictional in character.[28] Against this backdrop, the Court concluded that Title VII's exhaustion requirement did not indicate a congressional intent that it should be a jurisdictional requirement.[29]

The Court's *Fort Bend* ruling neither eliminates the mandatory charge-filing requirement nor does it deprive employers from continuing to move to dismiss Title VII claims where an employee fails to exhaust her administrative remedies. However, the opinion serves as a warning for employers not to delay in promptly asserting such a defense, as delay can result in forfeiture of the defense.[30]

C. Yovino v. Rizo

Yovino v. Rizo was the third discrimination-related case decided by the Court. One of the more closely watched cases of the term, *Yovino* offered the Court an opportunity to decide whether "prior salary" qualifies as a "factor other than sex" under the Equal Pay Act.[31] The Act requires employers to pay men and women equal pay for equal work regardless of sex.[32] However, pay differentials do not violate the law if they are based on a "factor other than sex."[33]

In *Yovino*, the employer stated that a disparity between the compensation paid to plaintiff and her male colleague was the result of their differing salary histories.[34] When the case reached the Ninth Circuit,

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27. *See id.* at 1848–49.

28. *Id.* at 1849–50.

29. *Id.* at 1850.

30. *See, e.g.*, Bret G. Daniel & Erin B. Edwards, *Employment Law*, 54 U. Rich. L. Rev. 103, 114 (2019) (noting that "for practitioners, the [*Fort Bend*] message is clear: raise such a defense at the earliest possible opportunity"); *see also* Lisa Soronen, *Employers Lose Important Procedural Employment Discrimination Case*, Nat'l Conf. of State Legislatures (June 4, 2019), https://www.ncsl.org/blog/2019/06/04/employers-lose-important-procedural-employment-discrimination-case.aspx [https://perma.cc/N2C7-JRZE] (commenting that under *Fort Bend*, employers may still raise administrative exhaustion claims, but "must be more vigilant about making sure the employee met the charge-filing requirement as soon as a lawsuit is filed").

31. 29 U.S.C. § 206(d).

32. *Id.* § 206(d)(1) ("No employer having employees subject to any provision of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . .").

33. *Id.*

34. Rizo v. Yovino, 887 F.3d 453, 458 (9th Cir. 2018) (en banc), *vacated on other grounds*, 139 S. Ct. 706 (2019).

the court ruled, in an opinion written by Judge Stephen Reinhardt on behalf of an *en banc* panel, that “prior salary alone or in combination with other factors cannot justify a wage differential.”[35]

The Ninth Circuit’s decision was widely heralded as a victory for female employees against the backdrop of significant evidence indicating that employer use of salary history often perpetuates gender-based pay inequities.[36] The Supreme Court, however, overturned the decision on a technicality. The Ninth Circuit opinion authored by Judge Reinhardt was not issued until April 9, 2018, eleven days after his death.[37]

As it turns out, Reinhardt’s vote mattered. Absent his vote, only five of the ten members of the *en banc* panel would have joined the opinion, and, as result, it would not have constituted a majority opinion with the effect of binding precedent.[38] The Supreme Court had to decide which votes counted. Specifically, the issue before the Court was whether a federal court can count the vote of a judge who dies before the decision is issued.[39] In a *per curiam* opinion, the Court held that the Ninth Circuit’s decision must be overturned given that Reinhardt, as a result of his death, was not a judge at the time when the decision in the case was filed. The Court explained that, because judges may change their votes up until the date the decision is released to the public, counting Judge Reinhardt’s vote was improper.[40] As a result, the Court vacated and remanded the case. On remand, the Ninth Circuit once again ruled that employers may not rely on prior salary to justify unequal pay.[41] On July 2, 2020, the Supreme Court refused to hear the

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35. *Id.* at 456.

36. *See generally* Torie Abbott Watkins, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should Be Ousted as a Factor Other Than Sex*, 103 MINN. L. REV. 1041 (Dec. 2018) (discussing how salary history perpetuates gender-based pay inequity in the workplace); *see also* Appellee’s Answering Brief at 33–35, *Rizo*, 887 F.3d 453 (No. 16-15372), 2016 WL 5846093 (citing employment statistics to show the challenged policy prolonged preexisting pay disparities between males and females).

Notably, the Ninth Circuit’s decision in *Rizo* is even more stringent than the position endorsed by the EEOC. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 584 (2020) (“The Ninth Circuit’s new decision is . . . the most restrictive in comparison with other circuit courts and the EEOC’s approach . . . .”).

37. A footnote at the beginning of the opinion stated: “Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death.” *Rizo*, 887 F.3 at 456 n.*.

38. Yovino v. Rizo, 139 S. Ct. 706, 708 (2019).

39. *Id.* at 707 (“May a federal court count the vote of a judge who dies before the decision is issued?”).

40. *Id.* at 708–09.

41. Rizo v. Yovino, 950 F.3d 1217, 1227–29 (9th Cir. 2020).

case,[42] which effectively leaves the Ninth Circuit's ruling in place as well as the circuit split on the issue.[43]

II. A Trio of Arbitration Cases

The Court also decided three cases interpreting the Federal Arbitration Act (FAA) during its 2018–19 term, *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[44] *New Prime, Inc. v. Oliveira*,[45] and *Lamps Plus, Inc. v. Varela*.[46] Although none of the three was as epic as the Court's 2018 decision in *Epic Systems Corp. v. Lewis*,[47]and only one centered on an employment dispute,[48] all three will shape workplace rights going forward.

A. Henry Schein, Inc. v. Archer & White Sales, Inc.

Over the years, the Supreme Court has repeatedly demonstrated a preference for enforcing the terms of arbitration agreements as written by the parties. That preference was on full display last year in *Epic Systems* when the Court favored the right of parties to contract for arbitration over judicially imposed exceptions to that right.[49] The holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*[50] continues the trend.

Schein involved a contract between a dental equipment distributor and a manufacturer that provided for arbitration of any dispute in accordance with the rules of the American Arbitration Association (AAA) except for actions seeking injunctive relief.[51] After a dispute arose between the parties, the distributer, Henry Schein, filed an antitrust lawsuit against the manufacturer, Archer and White.[52] Schein sought monetary damages as part of its claimed relief and also asked the court

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42. Yovino v. Rizo, 141 S. Ct. 189 (2020) (mem.); *see* Erin Mulvaney, *High Court Won't Review Salary History Defense in Pay Bias Suits*, Bloomberg Law (July 2, 2020, 8:43 AM), https://news.bloomberglaw.com/us-law-week/high-court-wont-review-salary-history-defense-in-pay-bias-suits [perma.cc/ZPG9-V7S2].

43. *Rizo*, 950 F.3d at 1219–20, 1231; *see* Jennifer Nutter & Robert O'Hara, *U.S. Supreme Court Lets Stand Ninth Circuit Ban on 'Salary History' Defense to an Equal Pay Act Claim*, JDSupra (July 25, 2020), https://www.jdsupra.com/legalnews/u-s-supreme-court-lets-stand-ninth-57648 [perma.cc/YQ2V-3ASP]; Mulvaney, *supra* note 42.

44. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

45. New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019).

46. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

47. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622, 1628 (2018) (holding the Federal Arbitration Act's saving clause "recognizes only defenses that apply to 'any' contract" and refusing to find that the National Labor Relation Act "provide[d] a congressional command sufficient to displace the Arbitration Act['s]" protection of employee class waivers).

48. *See New Prime, Inc.*, 139 S. Ct. at 536–37 (discussing the employee's labor complaint).

49. *Epic Sys. Corp.*, 138 S. Ct. at 1621 (emphasizing how the parties "proceeded to specify the rules that govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures").

50. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

51. *Id.* at 528.

52. *Id.*

to enforce the arbitration provision. Schein maintained that, consistent with AAA rules, an arbitrator should decide if the dispute was arbitrable.[53] Archer and White countered that, since Schein's arbitration request was "wholly groundless," inasmuch as the contract barred arbitration of a complaint that sought injunctive relief, the court should decide the arbitrability issue.[54]

In a unanimous opinion, the Supreme Court vacated the Fifth Circuit's ruling and held that the "wholly groundless" exception was inconsistent with the FAA and the Court's precedent including *Rent-A-Center, West, Inc. v. Jackson.*[55] In *Rent-A-Center*, the Court had held that parties could contractually agree to have an arbitrator decide "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."[56] Authoring his first opinion since joining the Court, Justice Kavanaugh explained that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract . . . ."[57] They are not at liberty to "short-circuit that process" by using the "wholly groundless" exception to decide questions of arbitrability themselves.[58] Assuming delegation,[59] arbitrators are responsible for assessing whether any particular

53. *Id.*

54. *Id.*

55. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010) (holding "a district court may [not] decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator").

56. *Id.*

57. *Henry Schein, Inc.*, 139 S. Ct. at 528.

58. *Id.* at 527–28.

59. In its decision, the Court underscored that its holding was limited to the validity of the "wholly groundless" exception, and that it was not deciding whether the parties' incorporation of AAA rules in their contract served as an effective, clear, and unmistakable delegation of arbitrability to the arbitrator as required by its holding in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). *Henry Schein, Inc.*, 139 S. Ct. at 531; *see* David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L. J. 1323, 1379 (Apr. 2019) (observing that "the impact of incorporating the AAA's . . . model rules . . . appears far from clear").

Although the Court did not decide the issue, the question as to whether there was delegation in the case provoked considerable conversation during oral arguments. *E.g.*, Transcript of Oral Argument at 7–11, 16–17, 20, 32, 36–37, 43–44, 45–47, 63–64, *Henry Schein, Inc.*, 139 S. Ct. 524 (2019) (No. 17-1272), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1272_nd89.pdf. Lower court decisions in the aftermath of *Henry Schein, Inc.* suggest that courts are increasingly scrutinizing arbitration agreements to determine if there has been clear and unmistakable evidence of an intent to delegate. *See*, *e.g.*, Metro. Life Ins. Co. v. Bucsek, 919 F.3d 184, 195 (2d Cir. 2019) ("The fact that a claim of arbitrability is groundless does not necessarily mean that the parties did not intend to have the question of arbitrability determined by arbitrators. The parties might nonetheless have agreed to submit arbitrability to arbitrators, and the court should not conclude otherwise without having explored the intentions of the contract on that question."), *cert. denied*, 140 S. Ct. 256 (2019) (mem.); Rivera Colón v. AT&T Mobility P.R., Inc., 913 F.3d 200, 207 (1st Cir. 2019) ("[T]he FAA's 'liberal policy' is only triggered when the parties actually agreed to arbitrate."); Passmore v. SCC Kerrville Hilltop Vill. Operating Co., No. SA-18-CV-00782-FB, 2019 WL 1523472, at *3–4 (W.D.

dispute is sufficiently related to the contract to warrant arbitration, even if the court believes the claim of arbitrability is frivolous.

B. New Prime v. Oliveira

The Supreme Court's decision in the second arbitration case, *New Prime, Inc. v. Oliveira*,[60] serves as a reminder that, while the Court has liberally interpreted and applied the FAA in favor of arbitration, the Act contains several exceptions to coverage. *New Prime* centered on one of those exceptions, section 1 of the FAA, which excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[61] In 2001, in *Circuit City Stores v. Adams*,[62] the Court had held that this language was limited to "contracts of employment of transportation workers."[63] In the aftermath of *Circuit City*, a majority of lower courts to address the issue further limited the exception by holding that it applies only to employees and not to independent contractors.[64] *New Prime* afforded the Court an opportunity to determine if that majority position was correct.

The case centered on a wage dispute in the trucking industry. New Prime, an interstate trucking company, required its drivers to sign an "Independent Contractor Operating Agreement" that contained an arbitration clause and a delegation clause that gave the arbitrator authority to decide threshold questions of arbitrability.[65] After one of its drivers filed a class-action lawsuit alleging violations under the Fair Labor Standards Act and various state labor laws, the company filed a motion to compel arbitration under the FAA.[66] Plaintiff countered that, because he and his fellow drivers were transportation workers, their contract of employment with New Prime was exempted from the FAA irrespective of whether they were employees or independent contractors.[67]

Tex. Mar. 4, 2019) (discussing *Henry Schein, Inc.* and rejecting delegation to an arbitrator when the contract "did not reference the AAA [Employment] Rules"); Optum, Inc. v. Smith, 360 F. Supp. 3d 52, 55–56 (D. Mass. 2019) (finding "no question of interpretation or arbitrability for an arbitrator to resolve").

60. New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019).

61. 9 U.S.C. § 1; *New Prime, Inc*., 139 S. Ct. at 542.

62. Circuit City Stores v. Adams, 532 U.S. 105 (2001).

63. *Id.* at 119.

64. *See, e.g.*, Randle v. Metro. Transit Auth. of Harris Cnty., No. H-18-1770, 2018 U.S. Dist. LEXIS 169033, at *31 (S.D. Tex. Oct. 1, 2018); Aviles v. Quik Pick Express, LLC, No. CV-15-54214-MWF (AGR), 2015 U.S. Dist. LEXIS 127888, at *16–17 (C.D. Cal. Sept. 23, 2015); Alvarado v. Pac. Motor Trucking Co., No. EDCV 14-0504-DOC (DTBx), 2014 U.S. Dist. LEXIS 109740, at *11–12 (C.D. Cal. Aug. 7, 2014); Cilluffo v. Cent. Refrigerated Servs., No. EDCV 12-00886 VAP (OPx), 2012 U.S. Dist. LEXIS 188650, at *11 (C.D. Cal. Sept. 24, 2012).

65. *New Prime, Inc.*, 139 S. Ct. at 541.

66. *Id.*

67. *Id.*

Before interpreting the exception, the Supreme Court first addressed whether a court or an arbitrator determines if the FAA applies to a given contract.[68] Writing for a unanimous court, Justice Neil Gorsuch observed that the courts, not arbitrators, must first decide gateway questions of arbitrability before compelling arbitration.[69] In affirming the lower court's ruling on this issue, the Court reasoned that the judiciary does not have limitless power to compel arbitration of all private contracts.[70] Before a court invokes its power to compel arbitration and "stay" litigation under the FAA, it must first determine whether an exclusion applies.[71] If one does, the court is not at liberty to compel arbitration under the FAA, even if the parties' arbitration agreement contains a delegation clause that requires arbitration of every potential question.[72]

Turning to the primary dispute between the parties, the Court held that section 1 of the FAA excludes not only employees but also independent contractors.[73] In reaching its holding, the Court had to determine whether the phrase "contracts of employment" should be construed narrowly to refer to contracts that create an employee-employer relationship or broadly to mean "work agreements" and thus inclusive of both employees and independent contractors.[74] The Court adopted the latter interpretation, reasoning that while today there may be a distinction between "employment" and contract work, such a formal distinction did not exist when Congress passed the FAA in 1925.[75] In 1925, "[d]ictionaries tended to treat 'employment' more or less as a synonym for 'work'" and "all work was treated as employment," irrespective of whether a "formal employer-employee or master-servant relationship" existed.[76] The Court also pointed out that Congress's use of the term "workers" in section 1—and not "employees" or "servants"—suggests that the term was meant to be interpreted broadly.[77]

The result in *New Prime* marks a departure from the Court's stance favoring arbitration and resulted in a rare victory for workers.[78] The decision leaves no doubt that independent contractors engaged

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68. *Id.* at 537.
69. *Id.* at 538.
70. *Id.* at 537.
71. *Id.* at 537–38.
72. *Id.* at 538.
73. *Id.* at 543–44.
74. *Id.* at 539–40.
75. *Id.* at 539.
76. *Id.* at 539–40.
77. *Id.* at 541.
78. Following the Supreme Court's decision, New Prime reached a settlement with members of the class and agreed to award the drivers $28 million in back compensation and damages. *See* Eric Miller, *New Prime Agrees to $28 Million Settlement in Contractor Dispute*, TRANSP. TOPICS (July 27, 2020, 4:45 PM EDT), https://www.ttnews.com/articles/new-prime-agrees-28-million-settlement-contractor-dispute [https://perma.cc/ZZM5-T6RL].

in foreign or interstate commerce in the transportation industry fall squarely within the FAA's section 1 coverage exclusion. The decision is already playing out among the lower courts,[79] but it is too soon to tell the extent of its impact on the ability of companies to compel workers classified as independent contractors to arbitrate their grievances.

That said, as some commentators have observed, the impact of the decision may be limited given that it only applies to the FAA.[80] Many analogous state arbitration laws do not exclude transportation workers engaged in interstate commerce. As a result, companies employing transportation workers may be able to bypass the implications of *New Prime* by attempting to compel arbitration pursuant to a state arbitration statute.[81] Two cases on point are *Colon v. Strategic Delivery Solutions* and *Arafa v. Health Express Corp*.[82] In both cases, plaintiffs, who had signed arbitration agreements with their employers, claimed that they were exempted transportation workers under section 1 of the FAA.[83] In *Arafa*, the New Jersey Supreme Court ruled that, even if they were exempt from the FAA, the agreements would be enforceable under the New Jersey Arbitration Act (NJAA), which is nearly

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79. The decision has led to a renewed focus on what it means for a worker to be "engaged in interstate commerce" for purposes of the FAA. *See, e.g.*, Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 800 (7th Cir. 2020); Gray v. Uber, Inc., No. 8:18-cv-3093-T-30SPF, 2019 WL 1785094, at *2 (M.D. Fla. Apr. 10, 2019). In *Wallace* and *Gray*, workers invoked *New Prime, Inc.* to argue that, despite arbitration agreements with their companies, they could not be compelled to arbitrate because they qualified as transportation workers who were exempted from the FAA under section 1 regardless of their status as employees or independent contractors. *Wallace*, 970 F.3d at 799; *Gray*, 2019 WL 1785094, at *2. However, the courts in both cases disagreed and held that the workers did not fall into the exemption because they were not transportation workers "engaged in foreign or interstate commerce" as required for FAA's section 1 exception to apply. *Wallace*, 970 F.3d at 803; *Gray*, 2019 WL 1785094, at *2; *see also* Austin v. DoorDash, Inc., No. 1:17-cv-12498-IT, 2019 WL 4804781, at *2–4 (D. Mass. Sept. 30, 2019) (rejecting the claim of a DoorDash delivery driver that he was exempt from arbitration pursuant to *New Prime, Inc.* and finding instead that the driver was not a transportation worker within the meaning of the FAA). *But see* Singh v. Uber Techs., Inc., 939 F.3d 210, 219–21 (3d Cir. 2019) (holding that workers who transport passengers, as opposed to goods, may also be exempt from section 1 of the FAA so long as they are engaged in interstate commerce).

80. *See, e.g.*, Lise Gelernter, *The Impact of* Epic Systems *in the Labor and Employment Context*, 2019 J. Disp. Resol. 115, 125 (commenting that "state arbitration laws could interfere with transportation workers' freedom from complying with arbitration agreements and class action waivers"); Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After* Epic Systems*,* New Prime*, and* Lamps Plus, 56 Am. Bus. L.J. 815, 822 (2019) (observing that "[e]mployers will undoubtedly argue that transportation workers may be forced to arbitrate under state law provisions that do not exempt them").

81. *New Prime, Inc.* itself is silent on this issue. *See* Gelernter, *supra* note 80, at 125–26 (observing that in *New Prime*, "the Supreme Court ducked the issue of whether parties can use state arbitration laws to enforce FAA-exempt arbitration agreements" even as it was raised by the First Circuit in the lower court decision).

82. Colon v. Strategic Delivery Sols., 210 A.3d 932 (N.J. Super. App. Div. 2019); Arafa v. Health Express Corp., 233 A.3d 495 (N.J. 2020).

83. *Colon*, 210 A.3d at 936; *Arafa*, 233 A.3d at 498.

identical to the FAA.[84] On the issue of preemption, the court observed that the FAA neither contains an "'express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.'"[85] The court further observed that application of the NJAA was automatic such that it would apply even if the parties did not expressly invoke it.[86] The extent to which companies will be able to rely upon state arbitration statutes to compel arbitration of transportation workers, notwithstanding the holding in *New Prime*, will likely vary considerably across jurisdictions depending, in part, on the scope of the applicable statute.

C. Lamps Plus, Inc. v. Varela

The last of the arbitration cases, *Lamps Plus, Inc. v. Varela*,[87] dealt with class arbitration, similar to last year's *Epic* decision. Lamps Plus raised the issue of whether, consistent with the FAA, an ambiguous agreement can provide the necessary "contractual basis" for compelling class arbitration.[88] Contrary to the unanimous decisions in *Schein* and *New Prime*, the Court answered the question in the negative in a 5-4 decision.

The dispute in the case stemmed from a data breach that resulted in the disclosure of tax information for roughly 1300 Lamps Plus employees, many of whom had signed an arbitration agreement with the company.[89] Faced with a putative class action suit on behalf of employees whose tax information had been compromised,[90] Lamps Plus moved to dismiss the suit and compel arbitration on an individual rather than a class-wide basis.[91] The district court granted the motion, but ruled against the company on the matter of arbitration, and ordered class-wide arbitration.[92] The Ninth Circuit affirmed, finding that, while the agreement was ambiguous on the matter of class arbitration, California law required such ambiguity to be construed against Lamps Plus as the drafting party.[93]

The Supreme Court reversed. Writing for the five-member majority, Chief Justice Roberts emphasized that the Court had long recognized that a "'fundamental' difference [existed] between class arbitration and the individualized form of arbitration envisioned by the

84. *Arafa*, 233 A.3d at 506–09; *see* N.J. STAT. ANN. § 2A:24-8 (West 2020).
85. *Arafa*, 233 A.3d at 505 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford, Jr., Univ., 489 U.S. 468, 477 (1989).
86. *Id.* at 506.
87. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
88. *Id.* at 1412.
89. *Id.* at 1413.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

FAA."[94] The opinion relied heavily on the Court's 2010 decision in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, which had held that it was inconsistent with the FAA to compel a party to submit to class arbitration absent a contractual basis indicating that the party had agreed to do so.[95] Because the arbitration agreement in *Stolt-Neilsen* did not address the use of class arbitration, the Court concluded that silence could not be treated as consent to such use. In *Lamps Plus*, the Court held that an ambiguous agreement provided no better evidence of consent to class-wide arbitration than did an agreement that was silent on the issue.[96] In support of this conclusion, the Court reiterated its earlier observations from *Stolt-Neilson* and *Epic Systems, Inc.* that class arbitration "fundamentally" changes the nature of the "traditional individualized arbitration" envisioned by the FAA, and as a result, parties must expressly agree to be bound by it.[97]

III. Other Employment-Related Matters

During the 2018–19 term, the Court also dealt with several additional work-law related issues including the taxation of federal employees, the determination of eligibility for Social Security Disability Insurance benefits, the meaning of compensation under the Railroad Retirement Tax Act (RRTA),[98] and questions of federalism as applied to wage and hour concerns of employees working on the Outer Continental Shelf. This last part summarizes the decisions addressing these matters.

A. Dawson v. Steager

In *Dawson v. Steager*,[99] West Virginia exempted from state taxation the retirement income of state and local firefighters as well as law enforcement officers, but not federal marshals.[100] The Court had to determine if this differential treatment violated 4 U.S.C. § 111, which allows states to tax the pay of federal employees but only if the taxation does not discriminate based on "the source of the pay or compensation."[101] The Supreme Court unanimously held that such treatment ran afoul of § 111 as there were no "'significant differences'" between the former duties of the federal retired worker who was not granted tax-exempt status and those of the retired state and local workers who were granted tax exempt status under West Virginia law.[102] The Court

94. *Id.* at 1416, 1419.
95. 559 U. S. 662, 686–87 (2010); Epic Sys., Inc. v. Lewis, 138 S. Ct. 1612, 1622–23 (2018).
96. *Lamps Plus, Inc.*, 139 S. Ct. at 1416.
97. *Id.*
98. 26 U.S.C. §§ 3201–3300.
99. Dawson v. Steager, 139 S. Ct. 698 (2019).
100. *Id.* at 702.
101. *Id.*; 4 U.S.C. § 111(a).
102. *Dawson*, 139 S. Ct. at 703.

emphasized that it made no difference that West Virginia's intention was to benefit its state retirees and not to harm federal retirees. What matters is treatment, not intent.[103] The Court also observed that, when defining the relevant comparison class for purposes of determining whether discrimination has occurred, the "the relevant question isn't whether the federal retirees are similarly situated to state retirees who don't receive a state tax benefit; the relevant question is whether they are similarly situated to those who do."[104]

B. BNSF Railway Co. v. Loos

Are a railroad's payments to an employee for time lost from work taxable compensation under the RRTA? [105] In a 7-2 decision, the Court ruled "yes" in *BNSF Railway Co. v. Loos*.[106] The case involved a BNSF employee who sued the company following a workplace injury and won a jury verdict that included an award of $30,000 for lost wages.[107] BSNF argued that "compensation" includes payment for lost-work time and that the employee should thus be responsible for paying taxes on the award.[108] The Court, after reviewing the treatment of "compensation" under similar statutes including the Social Security Act,[109] held that the term "compensation" under the RRTA covered not only payments for active service, but also payments for a period of absence from active service stemming from the employment relationship.[110]

C. Biestek v. Berryhill

In *Biestek v. Berryhill*,[111] the plaintiff appealed the denial of his disability benefits application by the Social Security Administration. The administrative law judge (ALJ) who conducted the hearing on the application heard testimony from a vocational expert that plaintiff was still capable of performing various jobs.[112] However, the expert refused to provide the underlying data on which this testimony was based. The question before the Court was whether a vocational expert's testimony can count as "substantial evidence" of "other work" if the expert does not provide the underlying data on which that testimony is premised.[113] Justice Elena Kagan, for the majority, observed that

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103. *Id.* at 704.
104. *Id.* at 705.
105. The Railroad Retirement Tax Act funds retirement benefits for railroad workers by imposing a payroll tax on railroads and their employees. BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 897–98 (2019).
106. *Id*. at 897.
107. *Id.*
108. *Id.*
109. *Id.* at 897–99.
110. *Id.* at 899.
111. Biestek v. Berryhill, 139 S. Ct. 1148 (2019).
112. *Id.* at 1153.
113. *Id.* at 1152.

such a refusal does not categorically preclude expert testimony from counting as "substantial evidence."[114] As she explained, Biestek erred by pressing for a categorical rule that would apply to every case where an expert refused to supply the requested data.[115] The outcome may have been different if Biestek had asked the Court to "decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits."[116]

D. Parker Drilling Management Services, Ltd. v. Newton

A final case worth mentioning is *Parker Drilling Management Services, Ltd. v. Newton*,[117] which dealt with issues of federalism and statutory interpretation in the context of the Outer Continental Shelf Lands Act (OCSLA).[118] The plaintiff, who worked on a drilling platform fixed on the Outer Continental Shelf (OCS) off the coast of California, sued his employer for wage and hour violations under California law, which is more protective than is the federal Fair Labor Standards Act (FLSA).[119] The district court granted the employer's motion to dismiss, holding that OCSLA, which provides that federal law controls on the OCS, left no room for state law to address wage and hour grievances arising on the OCS given the comprehensiveness of the FLSA.[120] The Ninth Circuit Court of Appeals reversed, holding that state law remains "applicable" under OCSLA if it pertains to the subject matter at issue and is not "inconsistent" with federal law. The Ninth Circuit ruled that the California wage-and-hour laws satisfied this standard.[121]

The Court weighed in to determine whether OCSLA permits the application of state law only when there is a gap in the coverage of federal law, or whenever state law pertains to the subject matter of the lawsuit and is not preempted by inconsistent federal law. In a unanimous opinion, the Court adopted the former interpretation, concluding that if federal law addresses an issue at hand, state law is inapplicable.[122]

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114. *Id.*
115. *Id.* at 1155–57.
116. *Id.* at 1157.
117. Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881 (2019).
118. *Id.* at 1886; 43 U.S.C. §§ 1331–1356b.
119. *Parker Drilling Mgmt. Servs., Ltd.*, 139 S. Ct. at 1886.
120. *Id.*
121. *Id.*
122. *Id.* at 1889. For commentary on the potential implications of the holding for other areas of the law beyond wages and hours, see Judy Greenwald, *High Court Salary Ruling Seen Having Broader Impact*, Bus. Ins. (June 18, 2019), https://www.businessinsurance.com/article/20190618/NEWS06/912329095/High-court-salary-ruling-seen-having-broader-impact# [https://perma.cc/9XH5-4S4C].

Conclusion

No work-law decision will be especially memorable from the Supreme Court's 2018–19 term, especially as it was preceded by a term that contained fireworks. Even the anticipation surrounding the appointment of Justice Kavanaugh to fill the seat left vacant by Justice Anthony Kennedy failed to produce any notable impact, no doubt because the work-law docket was largely devoid of cases involving polarizing disputes. The exception was *Lamps Plus*, which resulted in a 5-4 divide along predicable ideological lines. Arguably the most salient work-law takeaway from the term was the high degree of unanimity. The justices unanimously agreed with each other in seven of the ten cases discussed above, including the *per curiam* decision in *Rizo*. Looking ahead, the 2019–20 term promises to once again ignite fireworks as the Court considers cases addressing discrimination based on sexual orientation and gender identity[123] as well as the workplace rights of Dreamers under the Deferred Action for Childhood Arrivals (DACA) program.[124]

123. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
124. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).