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*The Virginia Bar Association*

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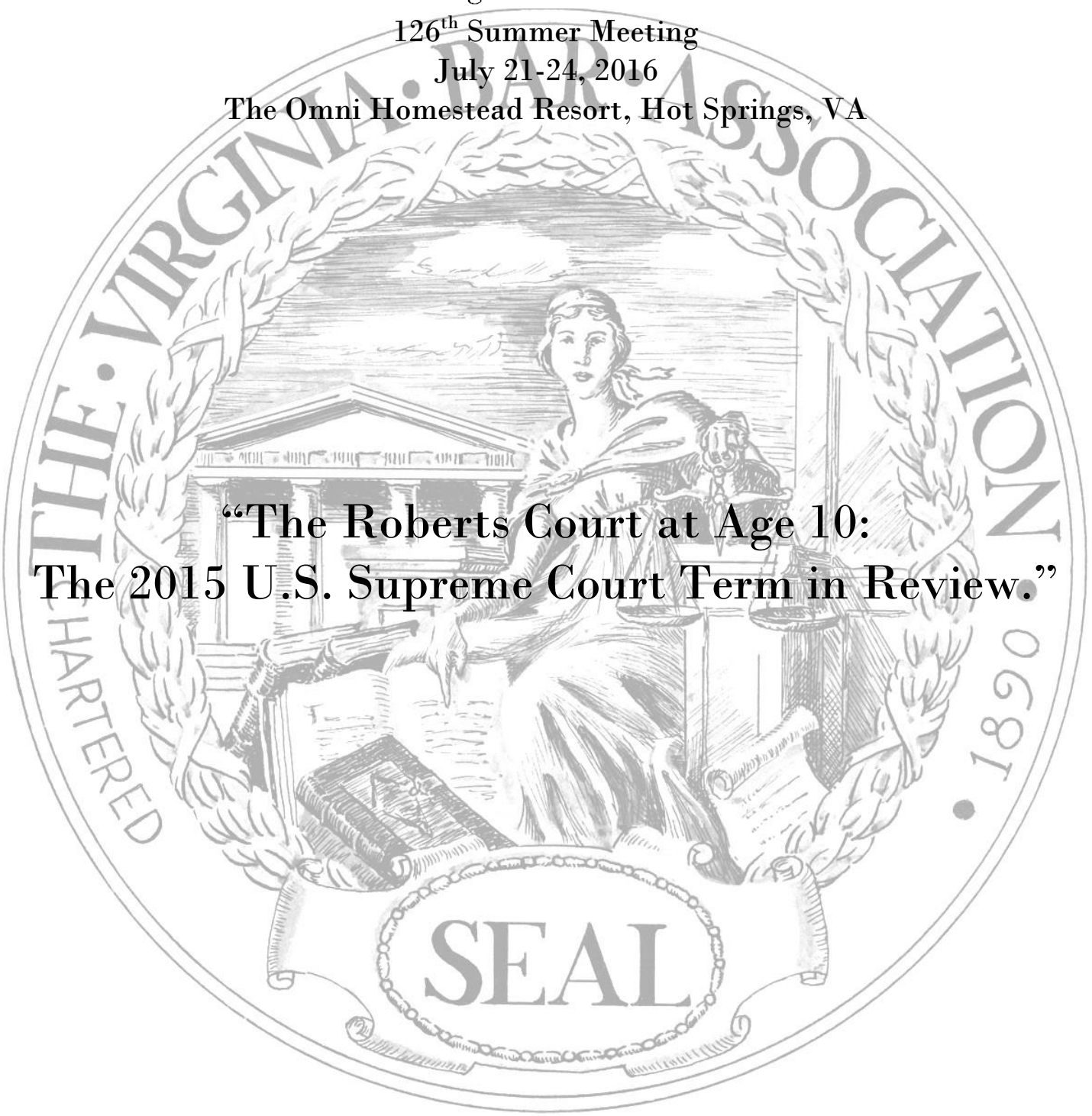


# "The Roberts Court at Age 10: The 2015 U.S. Supreme Court Term in Review."

*A presentation by the VBA Appellate Practice Section and the Civil Litigation Section*

## *Presenters**

**Dori K. Bernstein**

Dori Bernstein is the Director of the Supreme Court Institute and an Adjunct Professor of Law at Georgetown Law School. Dori previously served for many years as an appellate litigator in the Office of General Counsel at the U.S. Equal Employment Opportunity Commission. Ms. Bernstein previously worked as a law clerk to then-Judge Ruth Bader Ginsburg on the U.S. Court of Appeals for the D.C. Circuit, a staff attorney in the Office of the Chief Staff Counsel for the D.C. Circuit, and a trial attorney in the Civil Rights Division of the U.S. Department of Justice. She is a graduate of New York University Law School and earned an LLM in Appellate Advocacy as a supervising attorney in the Appellate Litigation Clinic at Georgetown Law.

**Marcia Coyle**

Marcia Coyle is Chief Washington Correspondent for The National Law Journal. She has covered the U.S. Supreme Court and a wide variety of national legal issues since joining the publication in 1987. Marcia also appears as a regular analyst of Supreme Court news for PBS' The NewsHour. A lawyer as well as a journalist, she has a B.A. in English from Hood College, an M.S. in Journalism from Northwestern University, and a J.D. from the University of Baltimore School of Law. She is the author of the "The Roberts Court: The Struggle for the Constitution (Simon and Schuster, 2013). Among other awards, she has earned the George Polk Award for Legal Reporting, the Investigative Reporters & Editors Award for outstanding investigative reporting, and the American Judicature Society's Toni House Journalism Award for a career body of work covering the courts.

**William H. Hurd**

Bill is a partner in the Richmond office of Troutman Sanders and focuses much of his work on the firm's Appellate practice. He previously served as the first Solicitor General of Virginia (1999 – 2004). In the United States Supreme Court, Bill has appeared on brief (both party and amicus) in more than 30 cases, serving as principal author in more than 25 cases and personally arguing three cases before the Court. Altogether he has appeared on brief in more than 130 appellate cases and has argued more than 50 times before federal and state appellate courts.

Bill served as lead counsel in the statewide election recounts for Attorney General of Virginia in 2005 and 2013 and served as legal counsel to the 2011 Independent Bi-partisan Advisory Commission on Redistricting. In addition to practicing law, Bill is an adjunct professor at George Mason University Law School, where he teaches a course

*The biographical information is provided by the speakers or collected from their websites.

on the Establishment Clause and Free Exercise Clause. He has taught at seminars on a range of topics at the College of William and Mary, the University of Richmond, the Constitutional Court of the Republic of Georgia and Karoli Gaspar University in Budapest, Hungary.

**Brian D. Schmalzbach**

Brian is an attorney at McGuireWoods LLP in Richmond, where he concentrates on appellate litigation in state and federal courts of appeals. He has drafted U.S. Supreme Court merits briefs and petitions for certiorari, as well as briefs and motions in federal and state appellate and trial courts regarding constitutional law, administrative law, civil rights, intellectual property, and tax.

Brian graduated from the University of Virginia School of Law, where he served as articles development editor on the managing board of the Virginia Law Review.

Before joining McGuireWoods, Brian served as a law clerk to Justice Clarence Thomas of the Supreme Court of the United States and Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit.

He lives in Chesterfield County with his wife Alexandra and four children. This is his first week back from paternity leave.

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# The Roberts Court at Age Ten:
# The 2015 Supreme Court Term In Review

A Panel Discussion
presented by
the Virginia Bar Association,
Appellate Law Section

**Panelists:**

**Marcia Coyle**
The National Law Journal

**Dori K. Bernstein**
Georgetown Law School Supreme Court Project

**Brian D. Schmalzbach**
McGuireWoods LLP

**Moderator:**

**William H. Hurd**
Troutman Sanders LLP

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We asked our panelists to name what they view as the top Supreme Court decisions of the 2015 term, which ended in June 2016. Here are the ones they picked:



We also asked our panelists to name some of the more intriguing cases set for decision during the upcoming 2016 term. Here are the ones they picked:

## Criminal Law

***Luis v. United States*, 14-419.**

By a 4-1-3 vote, the Court held that "the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the" Sixth Amendment. To prevent criminal defendants accused of certain kinds of fraud from disposing of their assets before trial — thereby preventing the government from later obtaining criminal forfeiture of that property to use for, among other things, restitution — federal law authorizes the government to institute a civil proceeding to restrain the defendant's use of his assets. In *United States v. Monsanto*, 491 U.S. 600 (1989), the Court held that tainted assets (there, assets traceable to the crime) may be restrained pretrial, even if they are needed to retain counsel of choice. Here, five Justices held that *Monsanto* does not extend to untainted assets. A four-Justice plurality concluded that the defendant's Sixth Amendment right to a counsel of his choice outweighs the government's interests. Justice Thomas provided a fifth vote for the defendant, disagreeing "with the plurality's balancing approach" and instead concluding that "[t]he right 'to have the Assistance of Counsel' . . . implies the right to use lawfully owned property to pay for an attorney."

***Utah v. Strieff*, 14-1373.**

This case involved evidence seized incident to a lawful arrest on an outstanding arrest warrant where the warrant was discovered during an investigatory stop later found to be unlawful (because the officer lacked reasonable suspicion to conduct the stop). By a 5-3 vote, the Court held that the evidence did not need to be suppressed "because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest." In reaching that decision, the Court found "it especially significant" that the officer, in initiating the unlawful stop, "was at most negligent"; "there is no evidence that [the] illegal stop reflected flagrantly unlawful police misconduct."

***McDonnell v. United States*, 15-474.**

The Court unanimously vacated the conviction of former Virginia Governor Robert McDonnell on federal corruption charges. McDonnell was convicted of offenses that make it a felony to agree to take "official action" in exchange for money, campaign contributions, or any other thing of value. The Court held that an "official act," for these purposes, "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." This "may include using [one's] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing and intending that such advise will form the basis for an 'official act' by another official." But "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so — without more — does not fit that definition of 'official act.'" The Court found that the government's broader definition of the term "would raise significant constitutional concerns" and "raise[] significant federalism concerns." The Court concluded that the instructions given by the district court here permitted the jury to convict McDonnell "for conduct that is not unlawful." The Court therefore vacated and remanded to allow the lower courts to assess McDonnell's contention that the evidence is insufficient to show he committed or agreed to commit an "official act" as properly defined.

## Election Law

***Evenwel v. Abbott,* 14-940.**

The "one person, one vote" rule requires states to draw legislative districts with roughly equal populations. Without dissent, the Court held, "based on constitutional history, th[e] Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population" — rejecting appellants' contention that states must draw their districts to contain a roughly equal number of eligible voters. The Court emphasized the choice by the Framers and then the drafters of the Fourteenth Amendment to allocate seats in the House of Representatives based on states' total population. Emphasizing that the allocation of House seats reflects an approach to "*representation*," the Court stated that "[i]t cannot be 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 the same basis." The Court added that it is not resolving whether a state *may* "draw districts to equalize voter-eligible population rather than total population."

***Wittman v. Personhuballah,* 14-1504.**

The Court held that the appellants — 10 current and former Republican members of Congress — lack standing to appeal a three-judge district court ruling that Virginia Congressional District 3 is the product of an unconstitutional racial gerrymander. The Commonwealth of Virginia, after defending the plan at trial, declined to defend the plan on appeal to the Court. The Court found that only three of the 10 appellants now claim to have standing; that one of them is no longer running in his former district; and that the other two have not provided evidence that an alternative to the originally enacted plan will reduce their chances of reelection.

## Civil Rights

***Fisher v. University of Texas at Austin*, 14-981.**

By a 5-3 vote, the Court held that the University of Texas at Austin's manner of taking race into account in its undergraduate admissions decisions does not violate the Equal Protection Clause. The University is required to admit any applicant who graduates in the top 10% of a Texas high-school class; this accounts for about 75% of the freshman class. In determining which students outside the top 10% are admitted, the school holistically assesses the candidates, treating race as a relevant factor. Rejecting a challenge to the latter use of race, the Court held that the University "articulated concrete and precise goals" (such as "provid[ing] an 'academic environment' that offers a 'robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders'"); the University concluded in good faith based on careful study that the Top Ten Percent Plan alone did not produce the needed diversity; and the record shows that none of petitioner's "proposed alternatives" — including increasing the number of students admitted under the Top Ten Percent Plan — "was a workable means for the University to attain the benefits of diversity it sought."

***Zubik v. Burwell*, 14-1418.**

Through a short *per curiam* opinion, the Court vacated the lower court judgments and remanded based on the parties' responses to supplemental briefing requested by the Court. The Court had granted certiorari and consolidated seven cases, all of which ask whether the Affordable Care Act's "contraceptive mandate" violates the Religious Freedom Restoration Act as applied to nonprofit religious employers. The Department of Health and Human Services adopted a regulatory accommodation for nonprofit religious employers under which such an employer may notify its insurer, third-party administrator, or the government that it has religious objections to providing some or all contraceptive methods, after which the employer's insurance company or third-party administrator must provide its employees with contraceptive coverage "without imposing any cost-sharing requirements" on the employer. After oral argument, the Court directed the parties to file supplemental briefs setting out their respective views on an alternative accommodation, one "that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." In its opinion, the Court noted that "[b]oth petitioners and the Government now confirm that such an option is feasible." The Court, while acknowledging that "there may still be areas of disagreement between the parties on implementation," stated that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"

***Whole Woman's Health v. Hellerstedt,* 15-274.**

By a 5-3 vote, the Court invalidated a Texas law that requires any doctor performing an abortion to hold admitting privileges at a local hospital and requires all abortion clinics to comply with standards applicable to ambulatory surgical centers. After holding that res judicata does not bar plaintiffs' challenge to either requirement, the Court held that when a court applies the "undue burden" standard set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." The Court then found, based largely on the district court's factual findings, that "there was no significant health-related problem that the [admitting-privilege requirement] helped to cure," yet it "places a 'substantial obstacle in the path of a woman's choice'" by causing "the closure of half of Texas' clinics, or thereabouts," which "meant fewer doctors, longer waiting times, and increased crowding." As to the surgical-center requirement, the Court found that it "does not benefit patients and is not necessary," while "further reduc[ing] the number of abortion facilities." Responding to the contention that the remaining clinics can handle the load, the Court stated that, "in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities."

## Civil Procedure

***Campbell-Ewald Co. v. Gomez,* 14-857.**

By a 5-1-3 vote, the Court held that a case does not become moot when the defendant offers the plaintiff complete relief on his claim, but the plaintiff does not accept the offer. The Court concluded, "in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." (The defendant here offered complete relief to the plaintiff to stave off a class action the plaintiff sought to bring.) The Court also rejected the defendant's claim that, as a government contractor, it was entitled to derivative sovereign immunity. The Court reasoned that government contractors do not obtain derivative immunity when they do not comply with the federal government's directions; and the plaintiff has alleged just that here.

***Spokeo, Inc. v. Robins*, 13-1339.**

This case addressed "whether respondent Robins has standing to maintain an action in federal court against petitioner Spokeo" — which operates an online "people search engine" and allegedly disseminated incorrect information about him — "under the Fair Credit Reporting Act." The Court did not resolve that question, and instead vacated the Ninth Circuit judgment (which had found standing) and remanded for consideration of whether Robins' claim is sufficiently "concrete." The core issue in the case was whether and when Congress can confer standing to assert a right it created. Without adopting any bright-line rules to answer that question, the Court explained that Congress's judgment about "whether an intangible harm constitutes injury in fact" is "instructive and important"; that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law"; a "risk of real harm" can satisfy the concreteness requirement; but "a bare procedural violation, divorced from any concrete harm" does not satisfy Article III. The Court remanded to allow the Ninth Circuit to address "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.

## Immigration

***United States v. Texas,* 15-674.**

Through a one-line opinion, the Court affirmed the Fifth Circuit's judgment by an equally divided Court. The Fifth Circuit had upheld a preliminary nationwide injunction barring implementation of the President's "Guidance" that the Department of Homeland Security defer action on the deportation of about five million aliens who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents. Texas and 25 other states filed suit challenging the program.

**To Be Heard in the Upcoming October 2016 Term**

***Bethune-Hill v. Virginia Board of Elections***, **15-680**.

The Court noted probable jurisdiction to review a three-judge district court decision holding that none of the 12 majority-minority districts in the Virginia House of Delegates were drawn based on an unconstitutional racial gerrymander. The questions presented by the plaintiffs who challenged the districts are: "(1) Did the court below err in holding that race cannot predominate even where it is the most important consideration in drawing a given district unless the use of race results in 'actual conflict' with traditional districting criteria? (2) Did the court below err by concluding that the admitted use of a one-size-fits-all 55% black voting age population floor to draw twelve separate House of Delegates districts does not amount to racial predominance and trigger strict scrutiny? (3) Did the court below err in disregarding the admitted use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts? (4) Did the court below err in holding that racial goals must negate *all* other districting criteria in order for race to predominate? (5) Did the court below err in concluding that the General Assembly's predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest?"

***Trinity Lutheran Church v. Pauley***, **15-577.**

The question presented is "[w]hether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern." In *Locke v. Davey*, 540 U.S. 712 (2004), the Court upheld a state college scholarship program that did not allow scholarships to fund devotional training of clergy. Courts are divided over whether *Locke* extends to programs that exclude religious institutions more generally. Here, a state agency rejected a church's request for a grant under a state program that helps nonprofit organizations resurface their playgrounds. The agency pointed to a provision of the Missouri Constitution which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion."

***Salman v. United States*, 15-628.**

In *Dirks v. SEC*, 463 U.S. 646 (1983), the Court held that a "tippee" who receives confidential insider information is liable if "the insider personally will benefit, directly or indirectly, from his disclosure" and "the tippee knows or should know that there has been such a breach" of fiduciary duty. At issue here is whether an insider obtains such a "personal benefit" when he gifts confidential information to a relative or friend who trades on that information. The Ninth Circuit answered that question yes, and held that the tippee could be held liable in that situation.