

# LAW WEEK COLORADO

## CU Law Hosts Annual Supreme Court Review

*Panelists share their opinions and practical lessons from the recent U.S. Supreme Court session*

BY **JULIA CARDI**  
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Anti-discrimination laws, political gerrymandering and travel bans: The topics barely scratch the surface of the breadth of issues the U.S. Supreme Court considered during the recently concluded session. The Uni-

versity of Colorado Law School hosted its annual Supreme Court review Wednesday in Denver, where panelists reflected on the court session's biggest decisions and looked ahead to the court in a post-Anthony Kennedy era. Law professor Craig Konnoth, Bartlit Beck partner Eric Olson and Faegre Baker Daniels partner

Aaron Van Oort participated, while Colorado Supreme Court Justice Melissa Hart moderated the panel.

"I used to be a panelist, and now I'm not allowed to have opinions," Hart joked. But Konnoth, Olson and Van Oort shared their own opinions and lessons for litigants from cases like *Masterpiece Cakeshop v. Color-*

*ado Civil Rights Commission, Trump v. Hawaii, South Dakota v. Wayfair and Gill v. Whitford.*

### JUSTICE KENNEDY'S LEGACY

At the discussion's outset, Van Oort used numbers pulled from SCOTUS Blog to show how Kennedy's influence as the Supreme Court's



Moderated by Hart, panelists Craig Konnoth, Eric Olson and Aaron Van Oort talk about retiring Justice Anthony Kennedy's influence as the Supreme Court's swing vote. / **HANNAH BLATTER**



**TOP:** At CU Law's annual Supreme Court review, Colorado Supreme Court Justice Melissa Hart shares her thoughts about how the U.S. Supreme Court approached some of its biggest cases from the most recent session. / **HANNAH BLATTER**

swing vote has not been overstated. During each of the past eight court sessions, he has been in the majority on 5-4 decisions at least 84 percent of the time. In the October 2015 term, he came down in the majority in every 5-4 split. And in 5-4 decisions issued during the most recent term, not once did he side decisively with the court's liberal justices.

But with as much attention as Kennedy's June retirement announcement and Trump's replacement nomination of Judge Brett Kavanaugh have generated, the panelists talked about the weight that should also be given to Chief Justice John Roberts' influence on the court. In particular, two of his votes from the just-concluded session show his occasional role as the court's wild card.

Despite his typical hesitancy to overturn long-standing precedents, he joined the majority in *Janus v. AFSCME* to overturn *Abood v. Detroit Board of Education* concerning agency fees in public-sector unions. And in *South Dakota v. Wayfair*, Roberts came down in the center, voting to leave in place a precedent that prohibited requiring states to collect

sales tax on online sales from out-of-state companies. Justice Ruth Bader Ginsburg also crossed party lines, siding with the majority.

"I think the people who are finding it easy to count to five to roll back a lot of the social issues cases may be counting the fifth vote from the chief that might not be there," Van Oort said.

#### **PRACTICAL LESSONS FROM THE SESSION**

In addition to personal laments and reflections about the Supreme Court session's biggest decisions, the panelists also shared practical litigation strategies they gleaned.

Olson said the court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which held the commission did not give baker Jack Phillips a fair hearing that was neutral toward his religious beliefs, highlights the lesson for lawyers to frame the story they tell to the court in a way that does not give them unnecessary considerations. As in the *Masterpiece Cakeshop* case, the simplest path to victory may be different than how a party pitches their case to the court.

"One comment by a commissioner at one step of the state process was used in a very, very powerful way," he said. "But it wasn't used in a way that required the justices to share this world view in order to win. In other words, it was an alternate path to victory."

Van Oort added attorneys should grab onto facts their gut tells them will help their side win, and then give the court a "minimally restrictive legal framework to give the decision-maker an opportunity to find their own path."

Konnoth decried the Supreme Court's disregard in *Trump v. Hawaii* of statements of animus President Donald Trump made during his campaign when he spoke about a "Muslim ban," pointing out the discrepancy between the import of bias in *Masterpiece Cakeshop* and the court's disregard of biased statements in *Hawaii*. When the court upheld the third version of Trump's travel ban that included five Muslim-majority countries, the court found it neutral on its face and held Trump had met the prerequisite of showing "the entry of the covered aliens 'would be

detrimental to the interests of the United States.'"

Olson agreed the two cases lack consistency of how the court viewed statements of animus. But litigants can still glean strategic lessons from the Trump administration's approach, he said, from the administration's ability to pivot quickly enough to present a convincing justification for the third travel ban to the Supreme Court. The version that went in front of the court had been significantly modified from the first and second travel bans, and Van Oort added the administration was able to create a comprehensive record to support its argument that they had based the ban on the ability of the covered countries to conduct security screenings on those traveling.

"The *Trump v. Hawaii* case offers a great example of a normally plodding litigant — the government is not known for its agility in changing position — able to change enough of the case while it was going on where they created an ultimate victory out of something that was very, very challenging," Olson said. •

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—Aaron Van Oort, class action litigator & appellate lawyer