



## THE TOP 10 SUPREME COURT CASES YOU NEED TO WATCH THIS YEAR

AND KEYS FOR CONSIDERING WHETHER AND HOW TO ENGAGE

The Supreme Court's 2022-2023 term began on October 3. The Court has agreed to hear 52 cases during this term, though more cases could be added. As of this writing, arguments have been heard or scheduled for 41 cases; 11 cases are still waiting to be scheduled. Most of the Supreme Court's major decisions are announced in June, at the end of the term. The Court does not announce in advance when they will release their decision on a specific case. The only information provided ahead of time are the set of dates on which opinions will be announced. A number of cases that will be heard this term address hot-button topics like voting rights, affirmative action, free speech, immigration, and tech companies' liability.

### HOW TO EVALUATE ENGAGEMENT

When thinking about whether to engage publicly around Supreme Court rulings, there are a few key questions to consider:

- 1) **Where does your company have offices and employees?**
- 2) **Which issues are central to your company's brand and mission?**
- 3) **Are there issues where your company has exposure?**
- 4) **Does your workforce expect engagement from the C-Suite?**
- 5) **Is the case or the ruling so high-profile that many companies will be weighing in?**
- 6) **Where will you draw the line? Once your company weighs in on a controversial issue, how will you manage employee expectations for your company to weigh in on more issues?**

### KEY ACTIONS TO CONSIDER

If it is determined that there are cases where it makes sense for your company to engage, there are also various levels of engagement to consider:

- 1) **Signing onto an Amicus Brief**  
If an issue (LGBTQ rights, voting rights, racial equity, immigration, free speech) is key to brand identity and it impacts a wide swath of your employees, you could consider signing onto an amicus brief with other companies to explain your business's interest in the case.
- 2) **Issuing a Public Statement**  
Companies have to consider whether a Court decision is crucial to your brand identity to speak out, and whether it raises to the level where your employees will expect a public response. If neither is the case, staying quiet should be the standard position.
- 3) **Issuing an Internal Communication**  
If there is an internal group of employees who will be directly impacted by a decision, it could be worth an internal communication from appropriate leadership. Beyond that, a company should evaluate whether a Supreme Court decision relates to a core brand principle that warrants a communication to employees.
- 4) **Updating Internal Policies**  
Many companies are focused on this point because they had to consider whether to update internal policies that affected their employees. This year, there are not any cases with the same reach as Dobbs, which returned abortion policy to the state level and created a patchwork impact effect. Attention is mostly on the affirmative action case, but the Supreme Court's decision will apply nationwide. Unlike Dobbs, people will not be able to cross state lines for a different policy to apply.

## 5) Engaging in the Legislative Process

Many of these cases involve statutory construction, federalism or regulatory authority, so opinions often spark legislative responses. Companies may want to join these efforts, or need to respond to customer or employee demands that they do so.

## AND DON'T FORGET

While there are no likely Supreme Court retirements in the offing, the possibility of a surprise vacancy due to death, medical emergency, or other reason is always there – think Ruth Bader Ginsburg passing away in 2020 or Antonin Scalia passing four years earlier. If a justice from the liberal wing of the Court needed replacement, it might be a fairly straight-forward confirmation, but if a conservative justice was to be replaced by a Biden nominee, the fireworks would be intense, and likely drag corporations into the fray.

## TOP TEN CASES TO WATCH

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### AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS

**Students for Fair Admission v. Harvard and Students for Fair Admission v. UNC (arguments for both cases heard on October 31)**



These two cases challenge the use of race-based affirmative action in college admissions. The questions posed by the cases are very similar; both will look at whether the Supreme Court should hold that institutions of higher education cannot use race as a factor in admissions. In the UNC case, the plaintiffs argue that UNC discriminated against white and Asian American applicants, and that, as a public institution, UNC violated the 14th Amendment's Equal Protection Clause and Title VI of the Civil Rights Act. The Harvard case focuses on the treatment of Asian American students. And while it is a private institution, it is also subject to Title VI of the Civil Rights Act because it receives federal funds. Justice Ketanji Brown Jackson will not participate in the Harvard case because she recently completed a six-year term on Harvard's Board of Overseers; she will participate in the UNC case. The Supreme Court is widely expected to rule that institutions cannot utilize race as a factor in admissions, overturning a series of cases since the 1970s that have allowed such programs. The impact will be felt nationwide, especially at highly selective colleges and universities which argued they would see significant declines in the number of Black and Latino students. Nearly seventy major U.S. companies joined a brief to the Court stating they will lose access to "a pipeline of highly qualified future workers and business leaders" and will have a tough time meeting internal diversity hiring goals.

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### VOTING RIGHTS

## "INDEPENDENT STATE LEGISLATURE" THEORY

**Moore v. Harper (arguments heard on December 7)**



This voting rights case has the potential to reshape how federal elections are conducted. The case comes out of North Carolina, where the North Carolina Supreme Court ruled the GOP-led legislature's congressional and state legislature maps were unconstitutional. Republicans are arguing that state legislatures have independent power to set the rules for federal elections, and that state courts have no power to review those rules. This "independent state legislature" theory would give state legislatures outsize power in setting the rules for how federal elections are run.

## REDISTRICTING

### **Merrill v. Milligan** (arguments heard on October 4)



This voting rights case has the potential to affect how states draw their congressional district maps. The case comes from Alabama, where civil rights advocates sued after the state legislature released its congressional redistricting map in 2021. Advocates argued that the map violated the Voting Rights Act by diluting the power of Black voters by packing them into one congressional district. Alabama argued that drawing a second majority-minority district would be racially discriminatory by favoring Black voters. A lower court ruled that Alabama likely violated the Voting Rights Act and that the map should be redrawn; the Supreme Court halted that court's order and agreed to hear the case.

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## STUDENT LOAN FORGIVENESS

### **Department of Education v. Brown and Biden v. Nebraska** (arguments for both cases scheduled for February 28)



The Court will hear two challenges to President Biden's student loan debt relief program. The first case, brought by a conservative-leaning organization on behalf of individual borrowers, argues that the loan forgiveness program was not established properly because it did not go through the public comment process. The Biden Administration will argue that it had the authority under the Heroes Act of 2003, which allows the government to implement regulations during times of national emergency. The U.S. has been operating under an emergency declaration since March 2020. In the latter case, six states, led by Nebraska, argue that the loan forgiveness program will harm state finances by depriving them of future tax revenue. The Biden Administration will argue that the states don't have standing to sue because they cannot demonstrate that they would suffer a concrete injury from the program. Nearly 26 million borrowers have applied to the program and 16 million applications have been approved, though no debt has been canceled at this point. Applications are no longer being accepted as legal challenges make their way through the courts.

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## LGBTQ RIGHTS AND FREEDOM OF EXPRESSION

### **303 Creative LLC v. Elenis** (arguments heard on December 5)

This case has implications for free speech and LGBTQ rights. A Colorado website designer wants to create custom wedding websites but wants to include a statement on her own website noting that she opposes same-sex marriage on religious grounds. This violates Colorado law, which bars discrimination against LGBTQ people or announcing an intent to do so. Notably, this case is focused on freedom of expression, not on freedom of religion.

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## TECH COMPANIES' LIABILITY: SECTION 230

### **Gonzalez v. Google LLC** (arguments scheduled for February 21) and **Twitter, Inc. v. Taamneh** (arguments scheduled for February 22)

The Court will hear two cases related to Section 230 of the 1996 Communications Decency Act, which has historically shielded social media platforms from being held liable for third-party content on their sites. In *Gonzalez v. Google*, the Court will decide whether there are limits to Section 230 protections when a platform's algorithms recommend or amplify problematic content to users. The family of Nohemi Gonzalez, who was killed in 2015 in an ISIS terrorist attack in Paris, sued Google — the owner of YouTube — for allegedly assisting ISIS by hosting ISIS recruitment videos on YouTube. While Section 230 shields platforms from liability over content posted by third parties, this case centers over whether Section 230 also grants immunity when a platform's algorithms recommends that content to users. In *Twitter, Inc. v. Taamneh*, the Court will decide whether a company can be held liable, regardless of Section 230, for "aiding and abetting" terrorism if any pro-terrorism content appears on its platform, even despite their best efforts to monitor and remove such content.

**TITLE 42****Arizona v. Mayorkas (arguments scheduled for March 1)**

On December 27, the Supreme Court blocked the lifting of Title 42, a pandemic-era measure used to restrict migration and expel migrants on public health grounds. The Biden Administration is seeking to end the use of Title 42, citing the drop in COVID cases. Nineteen states, led by Arizona, are asking the Court to keep the policy in place. This case is being watched closely, as the end of Title 42 is expected to lead to a surge in migrants seeking asylum at the southern border of the U.S.

**EXECUTIVE BRANCH AUTHORITY****U.S. v. Texas (arguments heard on November 29)**

Texas and Louisiana are suing the Biden Administration over the Department of Homeland Security's policy of prioritizing certain groups of immigrants for apprehension and deportation, based on grounds of "national security, public safety and border security." The outcome of this case will impact the executive branch's authority to set immigration policy.

**Glacier Northwest, Inc. v. International Brotherhood of Teamsters (arguments heard on January 10)**

The Supreme Court will decide whether an employer can sue a union in state court for damages incurred as the result of a strike action, or whether such a lawsuit is preempted by federal labor law. This case stems from a 2017 labor dispute, when 40 Glacier Northwest drivers went on strike as they were delivering concrete, leaving truckloads of mixed concrete unusable. Glacier sued the union in state court for compensation. Washington's Supreme Court ruled that the lawsuit was preempted by the National Labor Relations Act, and that because the strike was arguably protected by that federal law, only the National Labor Relations Board could decide whether the union engaged in unlawful conduct. Glacier will argue that the NLRA does not preempt lawsuits related to illegal conduct such as vandalism, and that it will be left without a remedy if the state court ruling stands because the NLRB lacks the power to award monetary damages for destruction of property. This case is being closely watched for its potential impact on the National Labor Relations Board's authority.

**National Pork Producers Council v. Ross (arguments heard on October 11)**

This case has implications for the regulations a state can enact when those laws have a significant impact on what happens in other states. The trade association for pork producers is challenging a California animal welfare law that makes the sale of pork in the state contingent on specific farm conditions. The measure was approved by California voters by a lopsided margin, but because the state imports more than 99% of the pork it consumes, the law impacts farmers across the country. The association argues that this law violates the "dormant commerce clause," a legal doctrine inferred from the commerce clause and intended to prevent state protectionism by barring state legislation that unduly burdens interstate commerce.

**Axon Enterprise, Inc. v. Federal Trade Commission and Securities and Exchange Commission v. Cochran (arguments heard on November 7)**

The Supreme Court will decide whether an employer can sue a union in state court for damages incurred as the result of a strike action, or whether such a lawsuit is preempted by federal labor law. This case stems from a 2017 labor dispute, when 40 Glacier Northwest drivers went on strike as they were delivering concrete, leaving truckloads of mixed concrete unusable. Glacier sued the union in state court for compensation. Washington's Supreme Court ruled that the lawsuit was preempted by the National Labor Relations Act, and that because the strike was arguably protected by that federal law, only the National Labor Relations Board could decide whether the union engaged in unlawful conduct. Glacier will argue that the NLRA does not preempt lawsuits related to illegal conduct such as vandalism, and that it will be left without a remedy if the state court ruling stands because the NLRB lacks the power to award monetary damages for destruction of property. This case is being closely watched for its potential impact on the National Labor Relations Board's authority.

**AND ONE TO WATCH FOR...**

A DACA case could get added to the Supreme Court's docket this term. On October 5, the 5th U.S. Circuit Court of Appeals upheld a ruling by a Texas-based U.S. District Judge declaring DACA illegal. The 5th Circuit sent the case back to that judge to review revisions to the DACA program that the Biden administration released in late August. The DACA program remains in effect as this case makes its way through the judicial process.