

Administrative law and arbitration to take center stage at Supreme Court

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The Supreme Court's 2021 term is in full swing, and several trends we predicted for the Court's "new normal" (<https://reut.rs/3mRKcRh>) appear to be taking hold. Justice Thomas continues to be an active questioner at oral argument, and all the Justices seem to appreciate the new hybrid format's extra time for questions — sometimes extending arguments by more than 40 minutes.

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The Court's docket is once again full of blockbuster issues, including three that the Court shifted from the "shadow docket" to its expedited "rocket docket." Those shifts represent a marked departure from the Court's typical practice, suggesting that the Court is taking criticisms of its use of the shadow docket seriously.

The last time the Court heard oral argument on a stay application (as it is doing in two cases challenging the Biden administration's vaccine policies) was in 1970, and the Texas abortion cases went from a cert grant to briefing and argument in just 10 days — faster than any case since *Bush v. Gore*. But while abortion and COVID vaccines have dominated headlines, this Term could produce some watershed decisions for businesses, particularly in administrative law and arbitration.

The Court could create a seismic shift in administrative law by abandoning or significantly curtailing its 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel*. *Chevron* provided a framework for determining when a federal court must defer to an agency's interpretation of a statute it administers. If the statute is clear about an issue, the court will interpret the statute according to its terms, no matter the agency's views. But if the statute is ambiguous, the court will defer to the agency's interpretation if it is reasonable. The rationale for *Chevron* deference is that Congress at least implicitly intends for the agency administering a statute (rather than Article III judges) to fill in any ambiguities.

Controversial since its inception, *Chevron* has generated criticism from academics, practitioners, and the judiciary — including several Justices. Justice Thomas has been most vocal, arguing that *Chevron* raises "serious separation-of-powers questions" by usurping the judiciary's role in interpreting the law and delegating too much legislative authority to agencies. And while sitting on the 10th U.S. Circuit Court of Appeals, Justice Gorsuch lamented that *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."

Other Justices have questioned *Chevron*'s conceptual underpinnings. While on the U.S. Court of Appeals for the D.C. Circuit (which is known for its heavy administrative-law docket), Justice Kavanaugh wrote in a law review article that *Chevron* "encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints" and often leads to situations where "every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law."

Justice Breyer has urged courts to treat *Chevron* as "a rule of thumb" rather than "a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision." And although they have spoken less directly on the issue, Chief Justice Roberts and Justice Alito have suggested a willingness to at least narrow *Chevron*.

Against this backdrop, the Court's decision to grant certiorari in a case asking it to overrule or curtail *Chevron* is particularly noteworthy. *American Hospital Association v. Becerra* involves a Department of Health and Human Services (HHS) rule that cut Medicare reimbursement rates for certain drugs dispensed by hospitals participating in a program for underserved communities (so-called "340B hospitals").

Those hospitals pay deeply discounted rates for prescription drugs, but under the Medicare statute the hospitals were recouping the drugs' full sales prices from the government. Troubled by the gap between actual drug costs and Medicare payments, HHS adopted a rule that reduced 340B hospitals' reimbursement rates for certain

outpatient drugs to a rate intended to reflect the hospitals' average acquisition price for those drugs.

The hospitals challenged the rule as overstepping the agency's authority under the Medicare statute. HHS says its interpretation of the Medicare statute is entitled to *Chevron* deference, but the hospitals claim that the agency's action is far outside *Chevron's* bounds. At oral argument, several Justices asked whether the Court should abandon *Chevron*.

While the hospitals' counsel at first demurred and focused on cabining *Chevron*, Justice Alito pressed him: "If the only way we can reverse the D.C. Circuit is to overrule *Chevron*, do you want us to overrule *Chevron*?" The answer was clear: "Yes. We want to win the case. Yes."

Morgan v. Sundance asks the Court to clarify its holding in AT&T v. Conception that the FAA requires courts to put arbitration agreements "on an equal footing with other contracts."

Although multiple Justices have their doubts or criticisms of *Chevron*, it's not clear the Court has five votes to abandon it. During oral argument in *American Hospital Association*, several Justices suggested an interest in narrowing *Chevron* instead. And as recently as 2019, the Court stopped short of overruling the related doctrine of *Auer* deference. Under *Auer v. Robbins*, courts defer to an agency's reasonable reading of its own genuinely ambiguous regulations.

Like *Chevron*, *Auer* has sparked controversy, and critics claim that it encourages agencies to promulgate ambiguous rules to maximize their authority later. *Kisor v. Wilkie* offered an opportunity to overrule *Auer*, and Justices Thomas, Alito, Gorsuch, and Kavanaugh would have jettisoned the doctrine. But five others — including Chief Justice Roberts — voted to limit *Auer* instead.

In *Kisor's* wake, *Chevron's* fate may hinge on Justice Barrett. At a minimum, Justice Barrett's vote will shed light on her approach to administrative law, an area where her views remain somewhat opaque. The modern conservative approach tends to favor judicial scrutiny of agency action, but many conservatives — including

Justice Antonin Scalia and Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit, the two jurists for whom Justice Barrett clerked — favored deference to agencies of the elected executive branch over deference to unelected judges.

American Hospital Association will provide the first significant glimpse of Justice Barrett's approach to these issues. Wherever her views lie, it seems likely that *Chevron* is at least destined for some serious curtailment.

Another area that could see major changes this Term is arbitration, with at least five arbitration questions on the docket.

Southwest Airlines Co. v. Saxon is a case about the scope of the Federal Arbitration Act's (FAA) exemption for interstate "transportation workers." This issue has broad ramifications for arbitration involving workers in various industries. (Disclosure: author Shay Dvoretzky represents Southwest Airlines Co. in the litigation.)

Also on the docket is *Viking River Cruises v. Moriana*, in which the Court will decide whether the FAA requires enforcing a bilateral agreement precluding employees from raising representative claims, including under the California Private Attorneys General Act (PAGA). Plaintiffs have used California's PAGA to obtain substantial awards, and the ability to curtail PAGA actions in arbitration is significant to corporate defendants.

Another case, *Morgan v. Sundance*, asks the Court to clarify its holding in *AT&T v. Conception* that the FAA requires courts to put arbitration agreements "on an equal footing with other contracts."

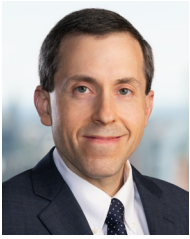
And in two consolidated cases, *ZF Automotive US v. Luxshare, Ltd.*, and *AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States*, the Court will consider federal courts' authority to order third-party discovery in foreign arbitrations.

Finally, in *Badgerow v. Walters*, the Court will decide whether federal courts have subject-matter jurisdiction to confirm or vacate certain arbitration awards.

All of these cases raise important questions about agreements to arbitrate and arbitration proceedings, and the Court's decisions could collectively shift the landscape governing alternative dispute resolution.

The public understandably focuses on hot-button social issues pending before the Court. But businesses should not be surprised if the Term's most significant decisions turn out to be on less scintillating topics, and it's worth watching those issues closely.

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