Supreme Court navigates blockbuster issues and procedural trends

By Shay Dvoretzky, Esq., and Emily Kennedy, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

APRIL 4, 2022

The Supreme Court's 2021 Term is a blockbuster, with guns, abortion, religion and a host of other headline-grabbing issues on the agenda. Although we're approaching the final stretch of oral arguments, the Court has issued few decisions so far, and it will still be a few months before we can look back to characterize the Term.

In the meantime, recent grants of certiorari reflect some interesting procedural developments at the Court. We're also getting glimpses of some internal fractures that could manifest themselves in this Term's forthcoming decisions. And looking ahead, a number of questions affecting businesses are likely to come before the Court soon, shaping headlines for the 2022 Term and beyond.

The Court's shadow docket continues to garner scrutiny and reveal internal schisms, most recently in the context of Alabama's redistricting plan.

Race is a defining feature of the next Term, with voter redistricting and affirmative action already on the docket. These issues understandably garner significant public attention, but for Court watchers, they also reflect some interesting procedural trends.

The Court's decision to hear a pair of cases challenging affirmative action policies at Harvard University and the University of North Carolina (UNC) reflects a recent upward trend in granting certiorari "before judgment." Both petitions ask the Court to reverse a lower court's judgment upholding race-based affirmative action policies. But unlike the Harvard case, which challenges a decision from an appellate court, the UNC case seeks direct review of a district court's decision.

Supreme Court Rule 11 specifies that the power to grant certiorari before judgment should be exercised sparingly: "only" in cases of "imperative public importance" requiring "immediate determination in this Court" (think national crises like the Youngstown steel seizure case, 343 U.S. 579 (1952) and the Watergate tapes case, 418 U.S. 683 (1974)).

The Court exercised that power just three times between 1988 and 2004, and not at all between 2004 and February 2019. But the UNC case marks the 14th time that the Court has granted certiorari before judgment since February 2019 — a particularly noteworthy increase in an era when the Court's overall docket has been shrinking. See, "The rise of certiorari before judgment," SCOTUSBlog, Jan. 25, 2022.

Because the Court doesn't explain its grants of certiorari, we can only guess the reasons behind this uptick. It's possible that, with the Court's changed composition in recent years, a new majority views Rule 11 through a more relaxed lens. The Court also may be trying to shift some cases to plenary review from its controversial "shadow docket" (the Court's process for handling emergency applications). In the recent challenges to Texas' abortion law, certiorari before judgment enabled the Court to reach the merits of the dispute quickly and with the benefit of full briefing.

The Court's shadow docket continues to garner scrutiny and reveal internal schisms, most recently in the context of Alabama's redistricting plan. Challengers claim that the redistricting plan violates the Voting Rights Act by diluting Black votes. A three-judge district court panel — comprising two Trump appointees and one Clinton appointee — agreed.

Concluding that the question was not "close," the panel enjoined the plan and gave the state two weeks to redraw the map. Alabama turned to the Supreme Court, which accepted jurisdiction to hear the case on the merits in the next Term but also blocked the lower court's order — effectively allowing the redistricting plan to take effect for Alabama's May primary.

Typical of shadow-docket rulings, the Court offered no explanation for its 5-4 decision. But some Justices openly sparred about the process. Justice Elena Kagan's dissent lamented the "disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument." She also warned that the Court's use of the shadow docket "does a disservice to our own appellate processes, which serve both to constrain and to legitimate the Court's authority." Justice Brett Kavanaugh's concurring opinion rebuffed those concerns, calling them "catchy but worn-out rhetoric" that is "off target."

Such visible acrimony is unusual at the Court, an institution that prides itself on professionalism and collegiality. As the nation awaits

decisions on hot-button issues from this Term, these rifts may well spill over into divided opinions on watershed holdings. There's ample fodder for controversy: In addition to cases involving abortion, guns, and religion, this Term has the potential for seminal holdings affecting administrative law and arbitration. "Administrative law and arbitration to take center stage at Supreme Court," by S. Dvoretzky and E. Kennedy, Reuters Legal News, reuters.com/legal, Jan. 10, 2022.

But it will still be a few months before we know whether the narrow consensus that characterized the 2020 Term will hold. And in the meantime, there are several issues worth watching that are likely to make their way to the Supreme Court.

The Court has been asked to hear several questions about whether federal law preempts state employment regulations, including break rules and sick-leave laws. In November, the Court invited the Solicitor General to express the United States' views on a petition from Alaska Airlines and Virgin America (which Alaska Airlines acquired). The question in *Virgin America, Inc. v. Bernstein* is whether the Airline Deregulation Act (ADA)—which preempts state laws that have a significant impact on airline prices, routes, or services—preempts California's meal-and-rest-break laws with respect to flight attendants. (Disclosure: authors Shay Dvoretzky and Emily Kennedy represent Alaska and Virgin in the litigation.)

Other pending petitions for certiorari present similar questions, including whether the ADA preempts Washington's paid-sick-leave law. *Air Transport Association of America, Inc., dba Airlines for America v. Washington Department of Labor& Industries.* Another case in the railroad context is now before the 9th U.S. Circuit Court of Appeals, which is considering whether the federal Railroad Unemployment Insurance Act preempts California's sick-leave rules.

In the internet arena, the Court will continue to face questions about the scope and potential liability of web hosts for the content and use of their sites. Section 230 of the Communications Decency Act provides that social media companies and other web hosts are not liable for content that third parties post on their platforms. But the statute allows states to enforce laws "consistent with" Section 230.

Lower courts are wrestling with the interplay between these provisions, and a recent petition asked the Supreme Court to review a Texas Supreme Court decision holding that Section 230 shields Facebook from state-law claims that the social-media platform facilitates human trafficking. The U.S. Supreme Court denied certiorari in March in *Doe v. Facebook, Inc.*, No. 21-459, but Justice Clarence Thomas wrote separately to encourage the Court to "clarify §230's scope" in an appropriate case. If it does, the Court's decision could provide valuable guidance to web hosts and their users.

It will still be a few months before we know whether the narrow consensus that characterized the 2020 Term will hold.

Finally, questions arising from the deluge of COVID-related litigation continue to percolate and may make their way up to the Court. One issue to watch is whether the Worker Adjustment and Retraining Notification Act's bar on terminating workers en masse without sufficient notice applies to pandemic-induced layoffs, or whether such layoffs fall within the Act's exceptions for layoffs caused by natural disasters or unforeseen business circumstances. Several of those cases are now on appeal and, depending on how lower courts rule, may ultimately head to the Supreme Court.

Numerous businesses also are facing questions about whether the Fair Labor Standards Act requires them to pay employees for time spent completing mandatory pandemic-induced health screenings. The answer likely depends on whether the screenings are necessary for an employee's main work activity — but employers and employees don't always agree about the nuances of that test or how it applies in this particular context. While few courts have considered the question so far, more than a dozen lawsuits are pending around the country. Depending on how courts rule, this issue could be destined for the Supreme Court.

Between this spring's impending decisions and the many cert-worthy issues in the pipeline, the coming months are full of anticipation. On top of that, the Court will soon adjust to yet another change in membership as Justice Breyer prepares to retire and his successor awaits confirmation. We'll discuss many of those developments in our next quarterly column, so stay tuned.

Shay Dvoretzky and Emily Kennedy are regular, joint contributing columnists on the U.S. Supreme Court for Reuters Legal News and Westlaw Today.

About the authors

Shay Dvoretzky (L), a partner in **Skadden, Arps, Slate, Meagher & Flom's** Washington, D.C., office, is the head of the firm's Supreme Court and Appellate Litigation Group. He represents clients in appellate matters in the U.S. Supreme Court, federal courts of appeals and state appellate courts. He can be reached at shay.dvoretzky@skadden.com. **Emily Kennedy** (R) is a Supreme Court and Appellate Litigation associate in the firm's Washington, D.C., office. She can be reached at emily.kennedy@skadden.com.

This article was first published on Reuters Legal News and Westlaw Today on April 4, 2022.