Relatively Luddite court increasingly faces questions about technology in modern life

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Early spring is often uneventful for Court watchers: Oral arguments are winding down, the Court has yet to issue most of its decisions, and the docket for the next Term is still taking shape. This spring at the Court is especially quiet. The Justices have been issuing decisions at a record-slow pace, and the Term's already-small docket actually has shrunk a bit.

Shortly after hearing oral argument in January, the Court dismissed as improvidently granted *In re Grand Jury*, a case about the scope of the attorney-client privilege for multipurpose communications containing a mix of legal and business advice. And in February, the Court removed from its argument calendar an immigration case in which Republicans sought to keep in place Title 42, a COVID-era policy introduced by the Trump administration that allowed immigration officials to expel thousands of migrants at the U.S.-Mexico border. The Biden administration told the Court in February that the case would become moot because Title 42 will expire when the COVID public health emergency ends on May 11.

Meanwhile, as this article goes to press, the Court is grappling with whether it has the power to reach a decision in one of the Term's blockbuster cases. *Moore v. Harper*, which involves state legislatures' power to regulate federal elections, was argued in December, but the North Carolina Supreme Court recently agreed to rehear the case. The parties disagree about whether that rehearing order divests the U.S. Supreme Court of jurisdiction, so it's possible that this Term's docket will shrink even more before the Term ends.

Of course things are not quiet for the Justices, who still have outstanding opinions in an unprecedented percentage of their merits docket (about 85%). Those forthcoming decisions include highly anticipated questions about affirmative action in college admissions, the scope of the Voting Rights Act's protections against racial gerrymandering, and the intersection of free speech and anti-discrimination laws.

While the nation awaits these and other decisions from the 2022 Term, a number of important questions affecting businesses are making their way up to the Court. Several of them share a common theme, and for Justices who — as Justice Elena Kagan recently quipped — are not exactly "the nine greatest experts on the internet," that theme might be surprising: technology in modern life. Indeed, the Court has long been known for its almost Luddite tendencies: Chambers still circulate important communications via hard copy, and it took a global pandemic for the Court to livestream oral argument audio.

Two cases on the Court's current docket highlighted the Justices' awareness of their relative lack of tech savvy. *Gonzalez v. Google* and *Twitter v. Taamneh* are both about the extent to which social media companies can be held liable for content posted on their platforms. *Gonzalez* represents the first time that the Court will consider the scope of section 230 of the Communications Decency Act, which generally immunizes website hosts from liability arising from third-party content.

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The question in that case is whether section 230's immunity applies when a site uses an algorithm to recommend content posted by others. And *Twitter* tests a novel theory that would hold social media platforms liable under the Antiterrorism Act for "aiding and abetting terrorism" because they allegedly could have taken more aggressive steps to detect and prevent terrorists from using their widely available platforms.

During the lengthy February oral arguments in these cases — which collectively spanned over five hours — the Justices wrestled with where and how to draw appropriate lines in this area. The Court's decisions in these closely watched cases could have major consequences for website hosts and users.

In the meantime, another significant question impacting the internet may soon be before the Court. A trio of pending petitions involves First Amendment challenges to Texas and Florida laws that restrict major social media companies' ability to moderate speech on their platforms (*NetChoice v. Paxton*, *NetChoice v. Moody*, and *Florida v. NetChoice*).

The Texas law generally prohibits large social media companies from censoring speech based on a speaker's viewpoint. Florida's law bars large social media companies from banning political candidates or "journalistic enterprises" and imposes various disclosure and notice requirements on the companies' content-moderating policies. For example, social media companies must publish their standards for censoring content and speakers, must notify users before implementing any changes to their policies, and must provide a "thorough rationale" for any content-moderation decisions they make.

The 11th U.S. Circuit Court of Appeals struck down Florida's content-moderating restrictions but upheld most of the law's notice provisions, while the 5th U.S. Circuit Court of Appeals upheld Texas' law in its entirety.

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Last May, the Court granted an emergency application to stay the Texas law from going into effect, and given the split of authority and importance of the issue, many Court watchers expected a cert grant earlier this year. Instead, on Jan. 23, the Court invited the Solicitor General to express the views of the United States.

That may have been a move by the Court to postpone consideration of these laws until it has decided *Gonzalez* and *Twitter*. After all, whether social media companies can be held liable for third-party content — the question at the heart of *Gonzalez* and *Twitter* — may impact the Court's view of whether a state can constitutionally restrict social media companies from censoring that content.

There is no formal deadline for the invited briefs, and we'd typically expect the Solicitor General to chime in before the 2022 Term comes to a close this spring. But given the potential interplay between *NetChoice* and *Gonzalez* and *Twitter*, along with the likelihood of late-June decisions in the latter cases, the *NetChoice* petitions may remain pending until the Court's 2023 Term opens in October.

Other questions arising from the use of technology in modern life are also on the horizon. Two recently filed petitions ask the Court to consider whether and how a defendant's virtual presence in a state via a website or app affects the "minimum contacts" analysis for assessing personal jurisdiction (*Daimler Trucks North America v. Superior Court of Los Angeles County* and *VNG Corp. v. Lang Van, Inc.*).

That's an issue the Court left open in recent cases — including *Walden v. Fiore* (2014) and *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021) — and its significance is only increasing. While plaintiffs argue that a defendant's online presence is sufficient for personal jurisdiction, many defendants worry that the mere maintenance of a website could expose even a small business to suit in all 50 states. Time will tell whether the Court will provide clarity in this important area.

With recent news buzzing about the implications of Chat GPT for practicing lawyers, it's no surprise that questions about artificial intelligence are also making their way to the Justices. On March 17, an AI developer filed a cert petition asking the Court to consider whether an AI system can be listed as an inventor on a patent application (*Thaler v. Vidal*).

In the decision below, the U.S. Court of Appeals for the Federal Circuit held that the Patent Act's definition of "inventor" includes only natural persons and accordingly rejected the patent applications that listed only AI inventors. Urging the Court to grant cert, the petitioner argues that depriving AI-generated inventions of patent protection will "discourage technological advancement and needlessly squander the United States' opportunity to be the global leader at the forefront of AI and the law."

The Court is scheduled to consider this petition before the end of the Term, but it's possible that we won't know until the fall whether the Court will take it up, depending on when the Patent Office files its response. Whether or not the Court grants this petition, questions about intellectual property and AI are likely to recur. In February, for example, the Copyright Office indicated in a letter ruling that only images that are the product of human authorship can be copyrighted.

Finally, the Justices will soon decide whether to address an issue of interest to the tech industry and smartphone users alike: whether Federal Communications Commission (FCC) guidelines on reporting cellphone radiation impliedly preempt state health and safety laws on the theory that those state laws would effectively require emissions levels lower than what the FCC has allowed.

A group of iPhone users has urged the Court to resolve this question, claiming that it has not only split the courts of appeals three ways but also implicates more fundamental questions about how to approach intent in the context of implied agency preemption (*Cohen v. Apple Inc.*). The Court called for a response to these arguments, and Apple's brief in opposition to cert is due on April 14, meaning that we should know by late May whether the Justices will resolve the case.

All of these questions have the potential to impact businesses, but whether or not the Court decides to take on these issues remains to be seen. If it does, the Justices will be on their way to becoming a little more tech savvy.

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