The Supreme Court's 2023 term: Will the conservative majority flex its muscle or forge consensus?

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The Supreme Court's 2023 Term opened quietly. With only 34 cases on the docket so far, the Court's argument calendars for October and November are barely half full. The Term nevertheless promises to be a significant one for businesses.

The Justices will consider key questions on a range of important issues, including the constitutionality of the SEC's in-house courts (*SEC v. Jarkesy*), standing in civil rights "tester" cases (*Acheson Hotels, LLC v. Laufer*), the extent of Title VII's protections against discrimination in transfer decisions (*Muldrow v. City of St. Louis*), and the scope of the Sarbanes-Oxley Act's whistleblower protection provision (*Murray v. UBS Securities*).

The biggest thing to watch this Term is how often and where the conservative majority chooses to wield its power. Last Term showed that the Justices can often find common ground even in controversial cases. They voted unanimously or nearly unanimously in about two-thirds of the 2022 Term's decisions, including on hot-button issues like the burden under Title VII for employers to deny religious accommodations (*Groff v. DeJoy*), the constitutionality of the Indian Child Welfare Act (*Haaland v. Brackeen*), and the validity of an immigration policy prioritizing certain groups of unauthorized immigrants for arrest and deportation (*United States v. Texas*). Even in divided cases, Chief Justice John Roberts and Justice Brett Kavanaugh occasionally teamed up with their more liberal colleagues to generate surprising results, including to reject the so-called independent state legislature theory (*Moore v. Harper*) and to affirm voting rights (*Allen v. Milligan*).

But alongside those liberal victories and the Term's relatively high rate of agreement, the 2022 Term also brought major wins for conservatives on critical issues like affirmative action in college admissions, religious liberty, and administrative power. Those decisions confirm that the conservative majority is very much intact when it comes to the issues it cares about most.

This Term, too, has its share of high-profile cases. A few in particular are worth watching to see if the conservative majority exerts its power or builds consensus with the Court's more liberal members.

United States v. Rahimi will test how far the Court is willing to take its 2022 decision in *New York State Rifle & Pistol Association v. Bruen*. *Bruen* struck down New York's requirement that applicants for a concealed carry permit show "a special need for self-protection distinguishable from that of the general community." In a 6-3 decision divided along ideological lines, Justice Clarence Thomas explained that the law impermissibly prevented law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment rights. In reaching that conclusion, the majority set forth an expansive view of the Second Amendment and explained that government regulation of the right to "keep and bear arms for self-defense" is permissible only if it is "consistent with the Nation's historical tradition of firearm regulation."

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In *Rahimi*, the Justices will apply *Bruen*'s framework to a federal law banning the possession of a firearm by someone who is subject to a domestic violence restraining order. The 5th U.S. Circuit Court of Appeals — which previously had upheld the federal ban — determined that it could no longer pass constitutional muster under *Bruen*'s historical framework. The United States swiftly sought cert, and the Justices will hear oral argument in November.

Oral argument may provide a preview of how the Justices will approach the case: Will they underscore and embrace *Bruen*'s framework to strike down a longstanding, common-sense ban, or will they find ways to foster agreement by distinguishing or even limiting *Bruen*? For example, while *Bruen* emphasized the breadth of Second Amendment rights, the decision also referred repeatedly to "law-abiding citizens."

That phrase may provide a key distinction in *Rahimi*, where the defendant dragged his girlfriend through a parking lot after knocking her to the ground and threatened to shoot her if she reported the incident. And although Justice Kavanaugh joined the *Bruen* majority opinion, he wrote separately (joined by Chief Justice Roberts) to emphasize the limits of the decision and note that the Second Amendment "allows a

variety of gun regulations," including "prohibitions on the possession of firearms by felons and the mentally ill."

Other cases on the Court's business docket likewise may test the majority's willingness to effect change. In *Moody v. NetChoice* and *NetChoice v. Paxton*, the Justices will consider First Amendment challenges to Florida and Texas laws that restrict the ability of major social media companies to moderate speech on their platforms.

Both laws generally prohibit large social media companies from censoring speech based on a speaker's viewpoint and impose various disclosure and notice requirements on the companies' content-moderating policies. The laws also require social media companies to provide users with an individualized explanation for any content-moderation decisions that the company makes.

NetChoice sought to block both laws in federal court, with conflicting results. The 11th U.S. Circuit Court of Appeals struck down Florida's content-moderating restrictions and individualized-explanation requirement, while the 5th Circuit upheld corresponding provisions of Texas' law. Following the United States' recommendation that the Justices intervene, the Court granted cert on Sept. 29 and will hear oral argument later this Term.

These cases bring together several competing interests that may create opportunities for the conservative majority to either exert its power or build consensus. For starters, there are questions about the scope of corporate entities' First Amendment rights — an issue that has long been divisive. At least in some contexts, including political donations and religious exemptions, the conservative Justices have tended to favor robust First Amendment rights for corporations. The Court's decisions in recent years also demonstrate a growing skepticism of government regulation, which could tip the scales against the Florida and Texas laws. See "The Evolving Landscape of Administrative Law," Skadden Insights, September 2023 (https://bit.ly/3ZNNs2a).

At the same time, some Justices may be hesitant to give private entities free rein to moderate speech in what the Court has dubbed "the modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). The same principles that animate the Court's decisions limiting administrative power may also fuel some Justices' skepticism of social media companies' content-moderating policies. In other words, *NetChoice* will require the Court to consider whether government regulation of companies or companies' regulation of the public better comports with the First Amendment's values. All of these tensions may combine to create opportunities for the Justices to find common ground, potentially through surprising coalitions.

Another key case for businesses to watch is *Loper Bright Enterprises v. Raimondo*, in which the Court will consider whether to overrule the *Chevron* doctrine. Decided in 1984, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, requires courts to defer to an agency's reasonable interpretation of an ambiguous statute.

Since its inception, *Chevron* has generated criticism from academics, practitioners and the judiciary (including several Justices). And the Court's decision to grant certiorari in *Loper Bright Enterprises* suggests that a majority of the Justices may be ready to overrule *Chevron*. The Court's decisions in recent years reflect an eagerness to cabin administrative power, and overruling *Chevron* would certainly align with that trend.

At the same time, some Justices may be hesitant to overrule *Chevron* outright and may opt to curtail the doctrine instead — a move that could facilitate agreement. In fact, the Justices made a similar move as recently as 2019, when they stopped short of overruling the related *Auer* doctrine (which directs courts to defer to an agency's reasonable reading of its own genuinely ambiguous regulations).

For businesses, a decision imposing clear limits on *Chevron* may ultimately be the most helpful outcome. To be sure, dispensing with *Chevron* would open the door for businesses to challenge unfavorable regulations. But it also has the potential to become a double-edged sword. While too much leeway for agencies can create unpredictability for businesses, a stronger arsenal for regulatory challenges — such as overruling *Chevron* completely — could have its own destabilizing effects. There are numerous regulatory regimes that businesses have relied on for decades in structuring their operations. Restricting agency power risks empowering attacks on rules that businesses find helpful and predictable.

In sum, even in the 2023 Term's most high-profile cases, there is room for the Justices to forge consensus. Where and when the conservative majority chooses to flex its muscle may end up being the most interesting part of this Term.

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

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