

Among Supreme Court's headline cases, First Amendment questions may be most consequential for businesses

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

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In many ways, the Supreme Court's 2023 Term is following recent trends: A docket that is relatively light on cases but full of controversial issues. While several recent Terms have been dubbed "blockbusters," the 2023 Term may outdo even its weightiest predecessors. On top of consequential cases affecting the 2024 election, abortion, and gun rights, the Justices will grapple with a number of questions impacting business. And several of those cases arise in an unusual context: the First Amendment.

At this point, the 2023 Term's docket is set (barring any grants in expedited cases), and its 62 cert grants accord with recent trends of a shrinking caseload. Even with a light oral argument calendar, the Justices have also continued their trend of backloading decisions.

Since 1917, when the Court implemented its current Term calendar, the Justices routinely issued decisions before the end of the calendar year. That number has slowed to a trickle in recent years, and the 2022 Term's first decision wasn't released until mid-January. This Term is not much different. So far, the Justices have issued only one decision in an argued case: a four-page opinion in *Acheson Hotels LLC v. Laufer* vacating the lower court's decision on technical grounds.

Despite being light on cases, the 2023 Term presents a number of charged questions. Recent Terms have produced watershed decisions on hot-button issues including abortion, affirmative action, gun rights, and religious liberty. The 2023 Term has the potential to produce further seismic shifts in the law.

Some of this Term's headline cases arise in familiar hotbeds. Abortion and guns are back on the Court's docket, requiring the Justices to apply their 2022 decisions in *Dobbs v. Jackson Women's Health Organization* (overruling *Roe v. Wade*) and *New York State Rifle & Pistol Association v. Bruen* (bolstering Second Amendment rights).

On the abortion front, the Justices will review a 5th U.S. Circuit Court of Appeals decision substantially limiting access to the medicinal abortion drug mifepristone (*Food and Drug Administration v. Alliance for Hippocratic Medicine*). They also will consider whether Idaho's restrictions on abortion are preempted by a federal statute requiring facilities participating in Medicare to

provide an abortion as "stabilizing care" when a pregnant woman's "emergency medical condition" requires it (*Moyle v. United States*).

The decision in *Moyle* could impact every state's ability to restrict abortion in the wake of *Dobbs*, and both *Moyle* and *Alliance for Hippocratic Medicine* have national significance for women's health.

The Justices will also revisit questions about the scope of the Second Amendment, including the constitutionality of prohibiting someone who is subject to a domestic violence restraining order from possessing firearms (*United States v. Rahimi*) and whether the National Firearms Act's ban on machine guns includes so-called "bump stocks" — devices that enable a rifle to fire continuously by harnessing its recoil (*Garland v. Cargill*). Both decisions could have dramatic implications for gun-control nationwide.

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Other cases chart new territory. On Jan. 5, the Court granted former President Trump's cert petition — filed only two days earlier — to review the Colorado Supreme Court's decision banning him from appearing on the ballot (*Trump v. Anderson*). The expedited case is scheduled for oral argument on Feb. 8 and will have major consequences for the 2024 election.

Later this spring, the Justices will hear another case that could impact November's ballot. In *Fischer v. United States*, the Court will consider whether a federal law prohibiting the obstruction of congressional inquiries and investigations can be used to prosecute participants in the Jan. 6 attack on the U.S. Capitol. The Court's decision in *Fischer* could affect former President Trump's ongoing prosecution, independent of what the Justices decide in the Colorado ballot case and regardless of whether the Court also agrees to hear additional cases percolating in lower courts about the former president's immunity from prosecution.

The Court will also grapple with consequential questions in other areas. In *Moore v. United States*, the Court will consider whether the 16th Amendment allows Congress to tax unrealized sums (such as the appreciation of an asset that has not yet been sold) without apportionment among the states, a question that could affect the future of a potential wealth tax. The Justices are also poised to shift the landscape of administrative law by possibly overruling the *Chevron* doctrine and invalidating the SEC's in-house courts (*Loper Bright Enterprises v. Raimondo*, *Relentless v. Department of Commerce*, and *Securities & Exchange Commission v. Jarkesy*).

The outcomes in those cases could have ripple effects across federal agencies and major ramifications for businesses seeking to challenge regulatory action. See here: <https://bit.ly/3ZNNs2a>.

In Murthy v. Missouri, the Justices will consider how much the government can communicate with social media companies about their content-moderation decisions before those private decisions become state censorship.

Even in its lower-profile cases, the 2023 Term may produce decisions that are important for businesses. Among other questions, the Justices will decide whether Title VII's protections against employment discrimination extend to decisions about transferring an individual to a different role or department (*Muldrow v. City of St. Louis*), the scope of the Sarbanes-Oxley Act's whistleblower protection provision (*Murray v. UBS Securities*), and whether a company's failure to file a required SEC disclosure gives rise to a private claim under Section 10(b) of the Securities and Exchange Act of 1934 (*Macquarie Infrastructure Corp. v. Moab Partners, L.P.*).

One prominent theme among this Term's cases is the First Amendment. The Justices will hear seven cases touching on the scope of that constitutional provision, and several of them are particularly noteworthy for their potential impact on businesses.

At the end of February, 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 (*Moody v. NetChoice* and *NetChoice v. Paxton*). 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.

In a case implicating similar issues, *Murthy v. Missouri*, the Justices will consider how much the government can communicate with social media companies about their content-moderation decisions before those private decisions become state censorship. Two states and five social media users sued federal officials, claiming that the officials caused social media companies to censor what the government deemed misleading information about Covid-19 vaccines and the 2020 election results.

Among other things, the 5th Circuit held that the federal government's communications with social media companies transformed the companies' moderation activities into state conduct. The 5th Circuit granted a preliminary injunction restricting federal officials' ability to communicate with social-media companies, but the Supreme Court stayed the injunction at the federal government's request and granted cert.

At their core, *NetChoice* and *Murthy* require the Justices to decide who gets to moderate what the Court has dubbed "the modern public square," *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). The Court's answer may have broad ramifications not only for social media platforms and their users but also for any company that exercises editorial discretion over third-party content.

Another First Amendment case for businesses to watch this Term is *National Rifle Association of America v. Vullo*. In the wake of the 2018 school shooting in Parkland, Florida, the head of New York's Department of Financial Services urged New York companies — including banks and insurance companies — to consider the "reputational risks" of doing business with gun-rights groups and encouraged them to cut their ties with such groups. The NRA sued, arguing that those official communications violated its freedom of speech. The Justices granted cert in November and will likely hear argument this spring.

While this case involves opposition to gun rights, it may have broader consequences for regulated companies and anyone doing business with them. The same general fact pattern could arise in numerous contexts: a red state seeking to discourage doing business with climate-change advocates or living-wage reformers; a blue state urging companies to cut ties with pro-life organizations or anti-immigration groups.

The Court's decision in *NRA* also could impact companies' own policies, from Diversity, Equity, and Inclusion hiring practices to Environmental, Social, and Governance strategies. And depending on how the Justices resolve a number of other cases on the 2023 docket — especially those addressing socially divisive questions — all of this could be even more salient.

The 2023 Term will almost certainly be a historic one. Just how impactful its decisions are remains to be seen.

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 firm counsel in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office. She can be reached at emily.kennedy@skadden.com.

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