

U.S. Supreme Court—October 2022 Term Key Cases for Business¹

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I. Affirmative action

Students for Fair Admissions v. University of North Carolina, No. 21-707 (argued October 31, 2022). (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

Students for Fair Admissions Inc. v. President & Fellows of Harvard College, No. 20-1199 (argued October 31, 2022). (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.

II. Regulatory actions

Sackett v. EPA, No. 21-454 (argued October 3, 2022). Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act.

III. Civil rights litigation

Health and Hospital Corporation of Marion County, Indiana v. Talevski, No. 21-806 (argued November 8, 2022). (1) Whether, in light of compelling historical evidence to the contrary, the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983; and (2) whether, assuming spending clause statutes can give rise to private rights enforceable via § 1983, the Federal Nursing Home Amendments Act of 1987’s transfer and medication rules do so.

Groff v. DeJoy, No. 22-174 (argued April 18, 2023). (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate “undue hardship on the conduct of the employer’s business” under Title VII merely by showing that the requested accommodation burdens the employee’s coworkers rather than the business itself.

¹ The questions presented are those set forth by the Court, except where adapted to provide context or clarity.

IV. Dormant commerce clause

National Pork Producers Council v. Ross, No. 21-468 (argued October 11, 2022). (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court's decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*

V. Executive power - and state challenges to it

U.S. v. Texas, No. 22-58 (argued November 29, 2022). (1) Whether state plaintiffs have Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law; (2) whether the Guidelines are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a), or otherwise violate the Administrative Procedure Act; and (3) whether 8 U.S.C. § 1252(e)(1) prevents the entry of an order to "hold unlawful and set aside" the guidelines under 5 U.S.C. § 706(2).

Biden v. Nebraska, No. 22-506 (argued February 28, 2023). (1) Whether the respondents have Article III standing; and (2) whether the [student loan] plan exceeds the Secretary's statutory authority or is arbitrary and capricious.

VI. First Amendment - speech (and Section 230)

303 Creative LLC v. Elenis, No. 21-476 (argued December 5, 2022). Whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech or Free Exercise clauses of the First Amendment.

Gonzalez v. Google LLC, No. 21-1333 (argued February 21, 2023). Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.

VII. Intellectual property

Andy Warhol Foundation for the Visual Arts v. Goldsmith, No. 21-869 (argued October 12, 2022). Whether a work of art is "transformative" when it conveys a different meaning or message from its source material (as the Supreme Court, U.S. Court of Appeals for the 9th Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material (as the U.S. Court of Appeals for the 2nd Circuit has held).

Jack Daniel's Properties v. VIP Products LLC, No. 22-148 (argued March 22, 2023). (1) Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, 15 U.S.C. § 1125(a)(1), or instead receives heightened First Amendment protection from trademark-infringement claims; and (2) whether humorous use of another's mark as one's own on a commercial product is "noncommercial" and thus bars as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act, 15 U.S.C. § 1125(c)(3)(C).

VIII. Personal jurisdiction

Mallory v. Norfolk Southern Railway Co., No. 21-1168 (argued November 8, 2022). Whether the due process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.

IX. Preemption

Glacier Northwest v. Int'l Brotherhood of Teamsters, No. 21-1449 (argued January 10, 2023). Whether the National Labor Relations Act impliedly preempts a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute.

X. Takings

Tyler v. Hennepin County, Minnesota, No. 22-166 (argued April 26, 2023). (1) Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Fifth Amendment's takings clause; and (2) whether the forfeiture of property worth far more than needed to satisfy a debt, plus interest, penalties, and costs, is a fine within the meaning of the Eighth Amendment.

U.S. Supreme Court—October 2023 Term—Key Emerging Cases for Business

Loper Bright Enterprises v. Raimondo, No. 22-451

Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Acheson Hotels, LLC v. Laufer, No. 22-429

Whether a self-appointed Americans with Disabilities Act “tester” has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation.

Murray v. UBS Securities, LLC, No. 22-660

Whether, following the burden-shifting framework that governs cases under the Sarbanes-Oxley Act of 2002, a whistleblower must prove his employer acted with a “retaliatory intent” as part of his case in chief, or whether the lack of “retaliatory intent” is part of the affirmative defense on which the employer bears the burden of proof.