SUPREME COURT UPDATE

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AGENDA

1. Background on the Court and Recent Developments
2. Cases of Significance to Business from 2021 and 2022 Terms
3. Questions?

BACKGROUND ON THE COURT AND RECENT DEVELOPMENTS

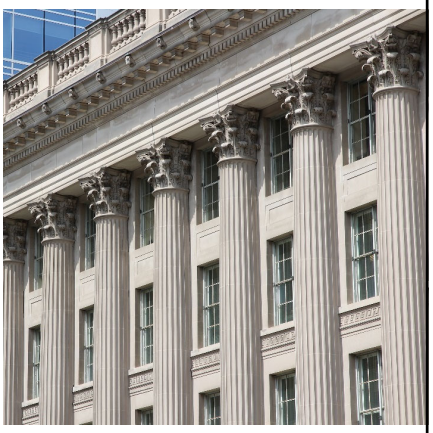
THE 2021-22 TERM OVERVIEW

- An uneventful term . . . for business
- Four biggest cases: (1) *Dobbs*, (2) *Bruen*, (3) *Bremerton*, (4) *WV*
- 6-3 is the new 5-4
- Keep an eye on methodology not just issues and results
- Just because it's conservative doesn't mean it's pro-business
- That said, business continues to do relatively well at the Court . . .

THE COURT'S BUSINESS DOCKET

Chamber of Commerce success rate:

- OT 2021: 6 of 9 Chamber victories (67%)
- OT 2020: 10 of 12 Chamber victories (83%)
- OT 2019: 10 of 15 Chamber victories (67%)
- OT 2018: 14 of 22 Chamber victories (64%)
- OT 2017: 9 of 10 Chamber victories (90%)
- OT 2016: 12 of 15 Chamber victories (80%)
- OT 2015: 6 of 13 Chamber victories (46%)



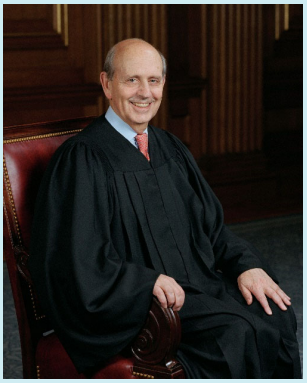
REVERSAL REMAINS THE NORM

- If review is granted, the Court is more likely to reverse than to affirm
- In OT21, the Court reversed in 82% of decided cases
  - 64% in OT18, 68% in OT19, 80% in OT20
  - Between 1999 and 2008, the average was about 68%
- The most reversed court was CA9 (12-0)
  - CA5 had 7 reversals and CA6 had 6 reversals

JUSTICE BREYER RETIRES

- Appointed by President Clinton in 1994
- Regarded as a pragmatist
- "For 28 years, this has been his arena for remarks profound and moving, questions challenging and insightful, and hypotheticals downright silly."

  -Chief Justice Roberts



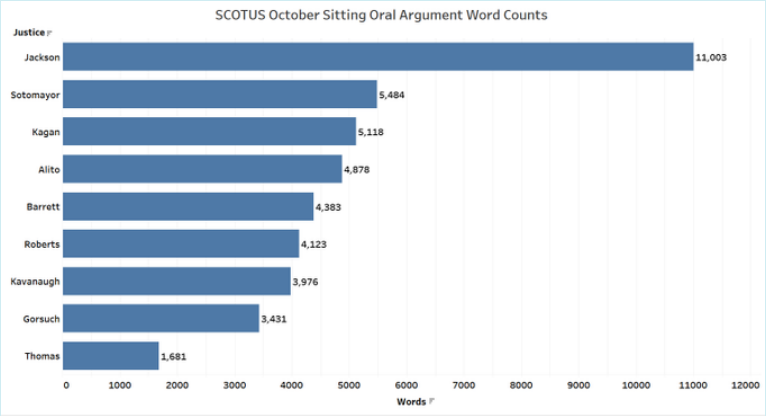
JUSTICE JACKSON JOINS THE COURT

- Education
  - Harvard University, A.B. *magna cum laude* 1992
  - Harvard Law School, J.D. *cum laude* 1996
- Clerkships
  - Judge Saris, District of Massachusetts (1996–97)
  - Judge Selya, First Circuit (1997–98)
  - Justice Breyer, Supreme Court (1999–2000)
- Selected experience
  - Federal public defender (2005–07)
  - Vice Chair of U.S. Sentencing Commission (2010–14)
  - U.S. District Judge, District of Columbia (2013–21)
  - U.S. Circuit Judge, D.C. Circuit (2021–22)

JUSTICE JACKSON ON HER JUDICIAL PHILOSOPHY

- "I do not have a judicial philosophy per se . . . ."
- "The philosophy is my methodology . . . Unlike some judges who come to appellate work from academia and who have some overarching theory of the law, I approach cases from **experience**, from **practice** and consistent with my constitutional obligations."
- "I believe that the Constitution is fixed in its meaning . . . I believe that it's appropriate to look at the original intent, original public meaning of the words . . . that's a limitation on my authority to import my own policy views."
  - See, for example, *Merrill v. Milligan* (Alabama redistricting)—Fourteenth Amendment originalism

ORAL ARGUMENT



ORAL ARGUMENT FORMAT

- The laughs are back for the public!
  - After the first sitting, 23 instances of laughter on transcript
  - OT ’21: 56 instances
- Court is keeping changes implemented during pandemic
  - Oral argument begins with two minutes of uninterrupted time, after which any Justice may question counsel
  - At the end of argument, Chief Justice Roberts initiates seriatim questioning
  - Live audio of arguments still provided
- Longer arguments – and the advocates approve

CASES OF SIGNIFICANCE TO BUSINESS

PERSONAL JURISDICTION

Mallory

v.

Norfolk Southern Railway Co.

(2022 Term)

- **Facts:** Mallory sued Norfolk under the Federal Employers' Liability Act, which makes railroads liable to their employees for negligence. Mallory, a citizen of Virginia, worked for the railroad in Virginia and Ohio. Norfolk is incorporated and has a principal place of business in Virginia. Yet Mallory sued in Pennsylvania state court. Pennsylvania law requires that corporations consent to general jurisdiction by registering to do business there. The Pennsylvania Supreme Court concluded that the Commonwealth cannot compel consent to general jurisdiction.
- **Issue:** Does the Constitution's Due Process Clause bar a state from requiring a corporation to consent to personal jurisdiction as a condition of doing business in the state?
- **Status:** The Court will hear oral argument on November 8.

ADMINISTRATIVE LAW – "MAJOR QUESTIONS" DOCTRINE

West Virginia

v.

Environmental Protection Agency

(Last Term)

- **Facts:** In 2019, acting under the Clean Air Act, the Environmental Protection Agency promulgated the Affordable Clean Energy Rule and repealed the Obama-era Clean Power Plan. The D.C. Circuit held that the EPA acted unlawfully in adopting the Affordable Clean Energy Rule and repealing the Clean Power Plan.
- **Issue:** The degree to which Congress authorized the EPA to issue rules regulating greenhouse gas emissions under the Clean Air Act.
- **Holding:** Congress did not grant the EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the agency took in the Clean Power Plan.

ADMINISTRATIVE LAW – "MAJOR QUESTIONS" DOCTRINE

Biden v. Missouri

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NFIB v. Department of Labor

(Last Term)

Biden v. Missouri

- **Facts:** HHS issued a COVID-vaccine mandate for all healthcare workers at facilities that receive Medicare and Medicaid funding. After two district courts enjoined the rule, the Court heard argument on whether to stay the injunctions.
- **Holding:** Congress did authorize HHS to implement conditions on funding that are necessary for patient health and safety. HHS appropriately determined that this rule fits.

National Federation of Independent Business v. Department of Labor

- **Facts:** The Occupational Safety and Health Administration (OSHA) issued a vaccine-or-test mandate for all employers with 100 or more employees (2/3 of the private sector). Numerous businesses, states, and nonprofits challenged the mandate. The challenges were consolidated and rejected in the Sixth Circuit. The Court heard oral argument on whether to stay the mandate.
- **Holding:** Because of the rule's significant effects on the lives of many people, Congress must speak clearly if it intends to give a federal agency such authority. Congress did not clearly do so with the workplace-safety statute at issue.

ADMINISTRATIVE LAW – THE QUIET DEMISE OF *CHEVRON*?

American Hospital Association v. Becerra

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Becerra v. Empire Health Foundation

(Last Term)

American Hospital Association v. Becerra

- **Facts:** Several hospitals challenged a Department of Health and Human Services (HHS) decision to reduce reimbursement rates for certain drugs. The D.C. Circuit upheld the agency's decision.
- **Holding:** (Unanimous) Without mentioning *Chevron* deference, the Court held that the plain text of the relevant Medicare statute barred HHS from varying reimbursement rates because of its failure to survey hospitals' acquisition costs.

Becerra v. Empire Health Foundation

- **Facts:** Several hospitals challenged an HHS decision altering how the Medicare fraction is calculated for "disproportionate share hospital" designation. HHS determined that anyone who qualifies for Medicare benefits should be counted in the fraction, not just people who receive the benefits. The Ninth Circuit affirmed an injunction against the agency.
- **Holding:** (5-4) Regardless of administrative deference, the unambiguous meaning of the statute—consistent with the regulation—includes anyone who meets the basic statutory criteria for Medicare in the fraction.

ADMINISTRATIVE LAW – THE NOT-SO-QUIET DEMISE OF *CHEVRON*?

Buffington

v.

McDonough

(2022 Term)

- **Facts:** Buffington, an Air Force veteran, sought additional disability compensation. But the statute does not specify the effective date of a recommenced disability compensation award when a veteran who had returned to active duty is later released from service. The Federal Circuit deferred to the Department of Veterans Affairs construction of the statute under *Chevron*.
- **Issues:** (1) Does *Chevron* permit courts to defer to the Department of Veterans Affairs' construction of a statute designed to benefit veterans without first considering the "pro-veteran" canon of construction? (2) Should *Chevron* be overruled?
- **Status:** The Court rescheduled the case seven times last term and has relisted it twice so far this term.

ADMINISTRATIVE LAW – CONSTITUTIONAL CHALLENGES

SEC

v.

Cochran

(2022 Term)

- **Facts:** The SEC brought administrative proceedings against the plaintiff and the Administrative Law Judge (ALJ) found against her. After *Lucia v. SEC* in 2018, the plaintiff's case was sent back for a hearing in front of different ALJ. Plaintiff then brought constitutional challenges against the SEC in federal court, seeking to enjoin the new administrative proceedings.
- **Issue:** Whether a district court has jurisdiction to hear a suit in which the respondent in an ongoing SEC administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the ALJ who will conduct the proceeding.
- **Status:** The Court will hear argument on November 7.

FEDERAL JURISDICTION

Whole Women's Health

v.

Jackson

(Last Term)

- **Facts:** Texas enacted a law prohibiting abortion after about six weeks in pregnancy. The law did not allow state officials to enforce the prohibition, but rather created a private cause of action for any person to obtain civil damages against any person who provides, aids, or abets a prohibited abortion.
- **Issue:** Can a state insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions?
- **Holding:** Challengers could pursue a pre-enforcement challenge against some defendants but not others. Sovereign immunity and Article III standing preclude equitable suits against state actors that lack sufficient enforcement authority over the relevant law.

INTERNET CONTENT REGULATION

Gonzalez

v.

Google LLC

(2022 Term)

- **Facts:** The family of an American woman killed in a Paris ISIS attack sued Google under the Antiterrorism Act, arguing that Google (which owns YouTube) aided ISIS's recruitment by recommending ISIS videos to users via algorithms. The Ninth Circuit ruled that Section 230 of the Communications Decency Act protects such recommendations.
- **Issue:** Does Section 230(c)(1) immunize interactive computer services when they make targeted recommendations of information from another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions about such information?
- **Status:** The Court has not yet calendared argument.

INTERNET CONTENT REGULATION

Twitter, Inc.

v.

Taamneh

(2022 Term)

- **Facts:** Abdulkadir Masharipov, allegedly at ISIS's direction, killed 39 people at a nightclub in Turkey. American family members of a victim sued Twitter, Google, and Facebook for aiding and abetting ISIS under the Antiterrorism Act. The district court deemed the complaint insufficient for aiding-and-abetting liability without addressing Section 230 immunity. The Ninth Circuit reversed.
- **Issues:** (1) Does a defendant's generic services without more aggressive preventative action constitute knowingly providing substantial assistance under 18 U.S.C. § 2333? (2) Must the defendant's generic services connect to the specific "act of international terrorism" that injured the plaintiff for aiding-and-abetting liability under § 2333?
- **Status:** The Court has not yet calendared argument.

(DORMANT) COMMERCE CLAUSE

National Pork Producers Council

v.

Ross

(2022 Term)

- **Facts:** Proposition 12 criminalizes the sale of pork meat in California if the pig comes from a sow confined to a small space. Few commercially bred sow meet the law's requirements. California consumes about 13% or the nation's pork but imports 99.87% of its pork from other States. As a practical matter all or most sow farmers must comply with California's regulation. The Ninth Circuit upheld the law.
- **Issue:** Does a law requiring sales to comply with conditions that virtually no existing commercial farms meet violate the "dormant" component of the Constitution's Commerce Clause?
- **Status:** The Court heard argument on October 11.

ARBITRATION

Badgerow

v.

Walters

(Last Term)

- **Facts:** The Federal Arbitration Act (FAA) does not itself confer federal-question jurisdiction. When reviewing a petition to compel arbitration under § 4 of the FAA, a court must "look through" the petition to decide whether the parties' underlying dispute gives rise to federal-question jurisdiction. The parties disagree as to whether the same holds true for a motion to confirm or vacate an arbitration award under §§ 9 and 10 of the Federal Arbitration Act.
- **Issue:** Do federal courts have subject-matter jurisdiction to confirm or vacate arbitration awards under §§ 9 and 10 of the FAA when the only basis for jurisdiction is that the underlying dispute involved a federal question?
- **Holding:** No. The "look through" approach does not apply to petitions to confirm or vacate arbitral awards under §§ 9 and 10.

ARBITRATION

Morgan

v.

Sundance, Inc.

(Last Term)

- **Facts:** An employee sued a Taco Bell franchisee, Sundance, for allegedly illegal pay practices. The parties litigated for roughly eight months before Sundance moved to compel individual arbitration. The employee claimed waiver of the arbitration provision due to the delay. The Eighth Circuit held that waiver did not apply because the plaintiff was not prejudiced.
- **Issue:** Does the Federal Arbitration Act permit an arbitration-specific requirement of prejudice for a waiver defense?
- **Holding:** No. The Act's policy favoring arbitration does not permit courts to create special, arbitration-preferring procedural rules.

ARBITRATION

Southwest Airlines Co.

v.

Saxon

(Last Term)

- **Facts:** Saxon, a cargo ramp supervisor for Southwest Airlines, sued the airline for allegedly failing to pay proper overtime wages. Southwest sought in response to enforce the arbitration agreement in their employment contract under the Federal Arbitration Act. The Seventh Circuit held that the Act exempts workers like Saxon under the transportation-worker exemption.
- **Issue:** Does 9 U.S.C. § 1's exemption for the "class of workers engaged in foreign or interstate commerce" apply to this type of employee?
- **Holding:** Yes. Although the Act does not exempt all employees in the airline industry, cargo loaders' work as a class falls within the ordinary meaning of the exemption's text.

ARBITRATION

ZF Automotive US, Inc.

v.

Luxshare, Ltd.

(Last Term)

- **Facts:** Two companies entered into a business agreement that required all disputes to be settled by private arbitration panel in Germany. Luxshare intended to bring claims against ZF Automotive and asked a federal district court to compel discovery.
- **Issue:** Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in "a foreign or international tribunal," encompasses private commercial arbitral tribunals.
- **Holding:** Only a governmental or intergovernmental adjudicative body may qualify as such a tribunal, and the arbitration panels in these cases are not such adjudicative bodies.

WHITE COLLAR – LOBBYING

Percoco*

v.

United States

(2022 Term)

- **Facts:** Defendant is a former aide to then-Governor Andrew Cuomo who left his aide position to manage Cuomo's reelection campaign. While serving as Cuomo's campaign manager, he was paid $35,000 to lobby a state agency. He was convicted of honest-services fraud on the theory that he owed a fiduciary duty to the state, and therefore the $35,000 payment was a bribe, even though he was not formally employed by the State at the time.
- **Issue:** Whether a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owes a fiduciary duty to the general public such that he can be convicted of honest-services fraud.
- **Status:** The Court will hear argument on November 28.

*Jones Day represents Percoco

WHITE COLLAR – FRAUD

Ciminelli

v.

United States

(2022 Term)

- **Facts:** After Gov. Cuomo announced a plan to invest in development in upstate New York, Ciminelli's company received a $750 million contract. Investigators later discovered that a member of the board approving contracts intentionally included requirements favorable to Ciminelli's company in the request for proposals. Prosecutors claim Ciminelli and co-defendants defrauded the entity administering the state's contracts.
- **Issue:** Whether the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute.
- **Status:** The Court will hear argument on November 28.

ENVIRONMENTAL LAW

Sackett

v.

Environmental Protection Agency

(2022 Term)

- **Facts:** After the Sacketts began building a home on their land, the EPA said to stop and restore the property or else face steep fines. The EPA claims that the Sacketts' property contains wetlands protected by the Clean Water Act, which prohibits the discharge of pollutants into "navigable waters"—that is, "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Sacketts' property is 300 feet from Priest Lake, a large lake in the Idaho panhandle. A tributary on the other side of a road from their property feeds into the lake. The Ninth Circuit held that the EPA had jurisdiction to regulate the property.
- **Issues:** Did the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States"?
- **Status:** The Court heard argument on October 3.

IMPLIED PREEMPTION

Glacier Northwest, Inc*

v.

Brotherhood of Teamsters

(2022 Term)

- **Facts:** Glacier makes ready-mix concrete and employs unionized truck drivers to deliver the concrete. Truck drivers went on strike during negotiations for a new CBA, causing loss of some of Glacier's concrete. Glacier brought tort claims against Union in state court. Glacier claims that Union coordinated with truck drivers to time the strike to result in destruction of the concrete. The Supreme Court of Washington held that the tort claims were preempted by the National Labor Relations Act (NLRA).
- **Issue:** Whether the NLRA impliedly preempts a state tort claim against a union for intentionally destroying an employer's property during a labor dispute.
- **Status:** The Court has not yet calendared argument.

*Jones Day represents Glacier Northwest, Inc.

ATTORNEY-CLIENT PRIVILEGE

In re Grand Jury

(2022 Term)

- **Facts:** Law firm received grand jury subpoena seeking documents related to investigation of a client for tax crimes. Firm turned over thousands of documents, but withheld communications that included mix of legal advice and non-legal advice about preparing tax returns.
- **Issue:** Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication.
- **Status:** The Court has not yet calendared argument.

INTELLECTUAL PROPERTY

Unicolors, Inc.

v.

H&M, L.P.

(Last Term)

- **Facts:** 17 U.S.C. § 411(b)(1)(A) provides a safe harbor from invalidation of a copyright registration due to inaccurate information, unless the information was included "with knowledge that it was inaccurate." Unicolors sued H&M for copyright infringement. H&M argued that Unicolors' registration was invalid because it contained inaccuracies. The district court found that the inaccuracy was due to Unicolors' misunderstanding of the law, and therefore it did not have "knowledge" the registration was inaccurate. The Ninth Circuit reversed.
- **Issue:** Whether the statute's phrase "with knowledge that it was inaccurate" includes mistakes of law or only mistakes of fact.
- **Holding:** Lack of either factual or legal knowledge can excuse an inaccuracy in a copyright registration.

INTELLECTUAL PROPERTY

Andy Warhol Foundation for the Visual Arts, Inc.

v.

Goldsmith

(2022 Term)

- **Facts:** In 1984, *Vanity Fair* commissioned Andy Warhol to create a silkscreen image of Prince using a photo taken by Goldsmith. The magazine obtained a license from Goldsmith. Warhol then created 16 images based on the photo. In 2016, *Vanity Fair* paid the Warhol Foundation to publish one of the other silkscreen images from the series. No one obtained license from Goldsmith. Goldsmith claims that the Warhol Foundation infringed her copyright in the photo; the foundation raises fair use defense.
- **Issue:** In determining whether a work is "transformative" under fair-use doctrine, is a court forbidden from considering the meaning of the accused work where it "recognizably derives from" its source material.
- **Status:** The Court heard argument on October 12.

QUESTIONS?

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