Supreme Court's 2023 term a blockbuster for businesses

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

JULY 22, 2024

The Supreme Court's 2023 Term was monumental by any measure. The Court issued a historic decision on Presidential immunity as well as opinions preserving access to medicinal abortion and clarifying that the Second Amendment permits laws banning domestic violence offenders from possessing guns. But the Term also left a significant imprint on areas of the law impacting businesses.

The Court often issues its blockbuster, Term-defining decisions in late June.

This Term, seven of the last ten opinions the Justices released were in cases affecting the business community, including on high-profile issues like whether banning overnight camping violates the Eighth Amendment (something acutely important to retailers in metropolitan areas), the constitutionality of state restrictions on major social media companies' ability to moderate speech on their platforms, and several important questions affecting administrative law.

Seven of the last 10 opinions the Justices released were in cases affecting the business community.

Six of those end-of-term decisions were sharply divided (either 6-3 or 5-4), and four of them were decided along ideological lines.

Further reflecting the prevalence of business cases on the docket, the U.S. Chamber filed 24 amicus briefs in argued cases — more than any other Term in the last decade. While the results for business were mixed — the Court sided with the Chamber's position only slightly more often than not — the Term generated several decisions that are highly consequential for the business community.

In the labor law arena, the Justices tightened the standard for the National Labor Relations Board (NLRB) to obtain an injunction against an employer under Section 10(j) of the National Labor Relations Act. In a nearly unanimous decision in *Starbucks v. National Labor Relations Board*, the Court rejected some circuits' application of a "watered down" test for Section 10(j), which required the NLRB to show merely "reasonable cause to believe that unfair labor practices have occurred" and that injunctive relief is "just and proper."

Instead, the NLRB must satisfy the same test that traditionally governs preliminary injunctions. That familiar four-factor test, most recently articulated by the Supreme Court in its 2008 decision, *Winter v. Natural Resources Defense Council*, requires a "clear showing" that the plaintiff "is likely to succeed on the merits," that she likely will "suffer irreparable harm" without a preliminary injunction, that the balance of equities favors an injunction, and that an injunction serves the public interest.

The 2023 Term will be remembered most vividly for its influence on administrative law.

Starbucks places a significant limitation on a key NLRB enforcement tool. Section 10(j) injunctions in particular can impose significant obligations on employers, including requiring them to rehire employees who have violated company policies, and may remain in place for years while NLRB administrative proceedings play out.

In another significant decision for businesses, *National Rifle Association v. Vullo*, the Justices unanimously revived a lawsuit by the National Rifle Association (NRA) alleging that a New York official violated the group's First Amendment rights by urging banks and insurance companies to sever their ties with the group.

Writing for the Court, Justice Sonia Sotomayor explained that while the NRA is not immune from regulation and state officials are free to express criticism of it, they cannot "threaten enforcement actions" against regulated entities "to punish or suppress the NRA's gun-promotion advocacy." Because that is what the NRA alleges happened here, the Justices agreed that its suit could go forward.

The decision's unanimity is striking given the controversial subject matter. And while the decision is written narrowly — and leaves open whether the official would be entitled to qualified immunity for her actions — it comes as a relief for businesses. A contrary holding could have triggered 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.

But the Justices have now made clear that government officials cannot "wield[] their power selectively to punish or suppress speech, directly or [indirectly] through private intermediaries."

In other cases affecting the business community, the Justices limited the scope of claims under Section 10(b) of the Securities Exchange Act to foreclose suits based on pure omissions (*Macquarie Infrastructure Corp. v. Moab Partners, L.P.*), endorsed a broad approach to monetary relief for trademark infringement (*Warner Chappell Music v. Nealy*), and clarified the standard for analyzing National Bank Act preemption (*Cantero v. Bank of America*).

Jarkesy held that if the SEC wants to pursue civil penalties for securities fraud violations going forward, the Seventh Amendment requires it to do so before a jury in federal court.

The Justices also rejected a constitutional challenge to the Consumer Financial Protection Bureau's funding scheme, foreclosing one avenue for regulated entities to challenge CFPB action (*CFPB v. Community Financial Services Association of America*). And the Court made it more difficult to resolve mass tort claims through bankruptcy by putting a stop to the use of nonconsensual nondebtor releases (*Harrington v. Purdue Pharma L.P.*).

All of these decisions are consequential in their own right, but the 2023 Term will be remembered most vividly for its influence on administrative law. In a trio of sharply divided cases decided along ideological lines, the conservative majority changed the landscape of administrative law in ways that substantially handicap federal agencies' power.

In *Loper Bright Enterprises v. Raimondo*, the Court overruled the 40-year-old *Chevron* doctrine. Under *Chevron* — the most cited case in administrative law — courts were required to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. That meant that the agency's interpretation would prevail even if a court disagreed with it.

While the Justices had limited the doctrine in recent years, *Loper Bright* — in the words of Justice Neil Gorsuch's concurring opinion — "places a tombstone on *Chevron* no one can miss." Writing for the conservative majority, Chief Justice John Roberts concluded that the Administrative Procedure Act (APA) requires courts to decide whether an agency has acted within its statutory authority without deferring to an agency's views.

The demise of *Chevron* makes it easier to challenge regulations and harder for agencies to change their position (a phenomenon that is especially common upon changes of administration). But *Loper Bright*'s impact was amplified by another decision the Justices issued a few days later, *Corner Post v. Board of Governors of the Federal Reserve System*.

The question in *Corner Post* was when the six-year clock for challenging agency rules under the APA begins to run. The prevailing rule had been that the limitations period for a facial challenge to a rule starts to run when the rule becomes final. But in an opinion by Justice Amy Coney Barrett, the conservative majority held that the clock starts running when a plaintiff is injured by the rule.

In her dissent, Justice Ketanji Brown Jackson predicted that the combination of *Corner Post* and *Loper Bright* authorizes a "tsunami of lawsuits against agencies." Indeed, although the majority in *Loper Bright* emphasized that it was not overruling decisions relying on *Chevron*, the combined effect of *Loper Bright* and *Corner Post* opens the door to regulatory challenges even of longstanding, long-settled rules.

Now any rule — no matter how old — is subject to challenge by the right plaintiff, and the calculus for challenging it has changed. Even if a rule had previously been upheld, a new or newly affected entity can relitigate its validity, and without *Chevron*, the agency no longer gets the upper hand.

The Court dealt another blow to agencies' power in *Securities and Exchange Commission v. Jarkesy* by constraining the SEC's ability to secure civil penalties for securities fraud. Civil penalties are a potent tool for the Commission, and it often pursued them through its own in-house courts. But *Jarkesy* held that if the SEC wants to pursue civil penalties for securities fraud violations going forward, the Seventh Amendment requires it to do so before a jury in federal court.

For the SEC, *Jarkesy* means that the Commission may consider pursuing more securities fraud actions in federal court — where such civil penalties are available — than it typically does. Alternatively, the SEC might bring only what it views as the most serious violations to federal court, while continuing to pursue other equitable remedies — like injunctive relief — through agency proceedings.

The decision also may create uncertainty for other agencies that typically pursue civil penalties through in-house agency proceedings if those penalties are akin to common law remedies and the claims have common law analogues.

Indeed, Justice Sotomayor's dissent, citing the federal government's statements at oral argument, identified "more than two dozen agencies that can impose civil penalties in administrative proceedings." Parties facing civil penalties in in-house proceedings are likely to challenge those proceedings on Seventh Amendment grounds.

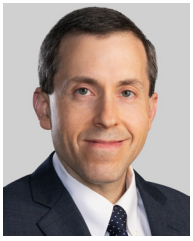
Together, these decisions curtail federal agencies' power and create significant opportunities for businesses to challenge unfavorable regulations. Parties will see their reverberations for years to come.

These decisions also ensure that a defining aspect of the Roberts Court's legacy will be having diminished the administrative state. The Court may do even more in that arena next Term, when it will

consider petitions regarding the major questions doctrine and other important administrative law issues. In the meantime, businesses should closely watch how this Term's decisions play out in the lower courts.

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 LLP**'s Washington, D.C., office, is the head of the firm's Supreme Court and appellate litigation group. One of the nation's leading appellate advocates, he has argued 19 cases in the U.S. Supreme Court and briefed and argued cases across a range of subject areas in all the federal courts of appeals and numerous state appellate courts. He can be reached at shay.dvoretzky@skadden.com. **Emily Kennedy** (C), a firm counsel in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office, has argued cases before multiple federal courts of appeals. She has drafted numerous merits- and cert-stage briefs filed in the U.S. Supreme Court, as well as state and federal appellate courts across the country. She can be reached at emily.kennedy@skadden.com. **Parker Rider-Longmaid** (R), a partner in the Supreme Court and appellate litigation group in the firm's Washington, D.C., office, has significant argument and briefing experience before federal and state appellate and trial courts. He has argued before the U.S. Supreme Court and the Second, Fourth, Seventh, and Ninth Circuits and led briefing and strategy in the Supreme Court and all the federal circuit courts of appeals. He can be reached at parker.rider-longmaid@skadden.com.

This article was first published on Reuters Legal News and Westlaw Today on July 22, 2024.