

3 Takeaways From The Supreme Court's Session

By **Jess Krochtengel**

Law360 (July 3, 2023, 6:35 PM EDT) -- Despite a trio of dramatic decisions by its conservative majority as the term concluded, the U.S. Supreme Court largely defied expectations that its six Republican-appointed justices would use their numbers to run roughshod over their liberal colleagues, instead delivering often narrow decisions that were heavier on consensus than division.

In its final week, the court delivered three opinions in closely watched cases that followed a 6-3 split along partisan lines — **striking down** two universities' affirmative action policies, **blocking** President Joe Biden's student loan debt relief plan and interpreting the First Amendment to allow a website to **refuse to offer creative services** to a gay couple.

Supreme Court Term Wrap-Up

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But those opinions stand out from a term otherwise notable for the **unanimity or near-unanimity of the court's rulings**. Agreements were forged by deciding cases narrowly, while the justices used concurring opinions to air out their divisions on legal reasoning and spell out their takes on issues left undecided by the court.

"The monolithic, 'We're doing what we want regardless' that we saw last year maybe is a somewhat more nuanced picture this year," said Mark Lemley, a Stanford Law School professor who has studied the court.

Lemley said some justices in the conservative majority may have wanted to course-correct from the **previous term** after rulings limiting gun control, abortion rights and environmental regulation left it open to critiques the court was overly politicized, and public polling showed support for the court has sunk to new lows. The court has also faced continued questioning of its ethics policies in the wake of reporting on gifts and travel the justices accepted but omitted from their financial disclosures.

"I think there are glimmers of hope," Lemley said of the court's ability to save its reputation and restore some of its institutional strength and legacy. "It's not a happy, rosy picture, but there are glimmers that suggest some of the justices are in fact worried about this sort of thing and thinking about how the court is going to be perceived."

Better Than Expected Term for Progressives

The last week of the term brought some of its most divisive opinions and some of the sharpest dissents from the court's liberal wing.

Justice Ketanji Brown Jackson called the court's affirmative action decision "a tragedy for us all," and Justice Sonia Sotomayor wrote in her 303 Creative v. Elenis dissent that allowing businesses to discriminate against a protected group is "profoundly wrong."

But those rulings don't overshadow the perception, at least among close court followers, of the term as a relatively moderate one that did not lurch as far to the right as the court did in the 2021 term.

"Obviously, the progressives had a couple bad days at the end of this term on a handful of the most high-profile cases," says John Elwood of Arnold & Porter. "But given that there are six conservative justices on the court, it's still remarkable how well progressives did. At the very least, they had a better term than anyone expected at the outset."

Among the victories for progressive interests were a Voting Rights Act case in which a 5-4 majority of the court held Alabama redistricting maps **wrongly diluted the voting power** of Black residents. And in Moore v. Harper, six justices **rejected the controversial "independent state legislature" theory** that would have restricted courts' power to review election laws.

That opinion, written by Chief Justice John Roberts, was joined by Justices Brett Kavanaugh and Amy Coney Barrett,

along with the three Democrat-appointed justices.

"That's an interesting group of justices to come together on what is considered a very important issue," says appellate litigator Brigid F. Cech Samole of Greenberg Traurig LLP. "I don't think that many people would have put that group of justices together for that particular issue and case prior to the issuance of the opinion."

On immigration, the court **blocked litigation** alleging U.S. Immigration and Customs Enforcement wrongly prioritized the removal of noncitizens who pose a threat to national security, border security and public safety. And it **narrowly read** a statute that criminalizes the encouragement of unauthorized immigration.

Seven justices came together in *Haaland v. Brackeen* to **uphold the Indian Child Welfare Act** against a challenge to provisions intended to protect Native American heritage by keeping Native children connected to their tribes during custody proceedings.

J. Michael Showalter of ArentFox Schiff LLP says an important part of the *Haaland* decision is the series of footnotes in the majority ruling from Justice Barrett that question why states were litigating the issue. Along with the court's ruling that Texas and Louisiana **lack standing** to challenge ICE deportation guidelines, it shows high court skepticism of states' activism on controversial national issues, he said.

"The court retrenching around that and saying states aren't special here is very interesting to me," he said. "Having to have standing is a really good thing for policymaking."

He said the notable exception to that is the court's "outlier" decision in *Biden v. Nebraska* that Missouri, but not private plaintiffs, had standing to challenge the president's student loan debt relief based on the financial impact to a state-created loan servicer.

Despite the high-profile decisions of its last week, the court overall had a more cautious, more stable term, he said.

"The judges have not reached out on a limb quite as far as they did at the end of last term," he said. "The concept that there are red-team and blue-team justices just doesn't always align. It may be true with issues like abortion, but there are shifting coalitions here. It's not just three liberals and six conservative justices."

Narrow Holdings Built on Surprising Coalitions

Supreme Court experts say the term stands out for how often some, if not all, of the three Democrat-appointed justices were in the majority.

Neither group voted as a bloc, with liberal justices not infrequently at odds with each other and teaming up with conservative colleagues.

Justice Elena Kagan's animated **dissent** in the Andy Warhol copyright case, for example, panned a **majority opinion** written by Justice Sotomayor as part of the "I could paint that school of art criticism," and was joined by Justice Roberts.

The court was unanimous on a wide range of issues, including how **trademark law applies to parodies**, double jeopardy issues and the scope of federal fraud statutes, Title VII religious accommodations and **whether** Anti-Terrorism Act claims were plausible.

"We've seen a surprisingly high degree of unanimity or near-unanimity including in cases that people thought could be controversial," said Shay Dvoretzky, who leads the Supreme Court practice at Skadden Arps Slate Meagher & Flom LLP.

Another decision notable for its unanimity was the court's holding that constitutional challenges to the structure of the U.S. Federal Trade Commission and U.S. Securities and Exchange Commission **can be brought in federal court** without first going through administrative appeals.

"The chief has always strived for as much unanimity as possible, and he has instilled that in his colleagues," Elwood said. "I think they make an effort to be unanimous or close to it where reasonably possible."

But where those justices did forge agreement, they often did so with narrow holdings, Supreme Court experts say.

In the case upholding the child custody provisions in the Indian Child Welfare Act, for example, the justices decided the case on grounds of standing, rather than deciding the substantive issue of whether the law amounts to racial discrimination because it gives preference to Native families in the adoption process.

In an **appellate procedure case**, *Dupree v. Younger*, a unanimous court set out the rule that "purely legal" questions exist that can be reviewed on appeal without being reasserted after trial, but skirted the question of whether the facts of that case qualified as purely legal. And in a False Claims Act case, nine justices **shot down** corporate attempts to limit their liability for objectively reasonable interpretations of compliance duties, though they left undecided a number of issues discussed at oral argument.

In rulings where only a slim majority prevailed, the deep divisions among the justices often surfaced.

In *National Pork Producers v. Ross*, the court **divided 5-4** on the outcome of the case, which said a California law on

pork standards did not unfairly discriminate against out-of-state businesses and interstate commerce.

The decision yielded five different opinions that **revealed the justices' disagreements** about how to analyze dormant commerce clause claims.

"Compared to previous courts where you felt like there was often a swing vote in the middle of two blocs of 4, here the 5-4s — and there weren't many — have varied quite a bit in their composition," notes Steffen Johnson, co-chair of the appellate practice at Wilson Sonsini Goodrich & Rosati PC.

Johnson says cases like National Pork Producers "defy a simple explanation of any justice's ideology," with differences in reasoning even where they agree on the outcome

In the **unanimously decided** Tyler v. Hennepin County, the court said a county overstepped its taxing power by keeping excess proceeds from the sale of property seized for unpaid property taxes. Justice Neil Gorsuch wrote separately on the issue of excessive fines, joined by Justice Jackson.

And Justice Jackson joined five conservative justices in a ruling **allowing deportation for obstruction of justice**, with Justices Sotomayor and Kagan on the other side, along with Justice Gorsuch.

"The addition of a new member of the court may have shaken up some of the traditional alignment on some issues," Lemley said of Justice Jackson's first term. "That's an encouraging sign."

No Banner Term for Big Business

The court continued its trend of hearing fewer cases, and as a result granted review in fewer traditional "business" cases. Its body of cases also focused less on how its rulings will impact the business community, court observers say.

Among the rulings least warmly received by corporate America was the court's fractured decision in National Pork Producers v. Ross. Critics say the ruling makes it possible for states with large market power to pass laws that influence commerce across the country.

"National Pork may reflect that the court is not as focused on the policy consequences of its decisions for businesses as perhaps it was 20 years ago," Dvoretzky said.

Corporations also **frowned upon** the Mallory v. Norfolk Southern decision upholding a Pennsylvania law that says corporations can be sued in the state by virtue of registering to do business there, no matter where the company is headquartered or incorporated.

Lawrence Ebner, who is general counsel for the Atlantic Legal Foundation and chair of defense bar group DRI Center for Law and Public Policy, both of which are active amicus brief filers at the court, said the Mallory decision "significantly, and surprisingly, muddies the waters on general personal jurisdiction" and will "significantly increase forum shopping."

But Ebner praised the court's decision in Coinbase v. Bielski — that litigation is **automatically stayed** during appeals on questions of arbitrability — as one that reinforces the Federal Arbitration Act as well as the benefits of arbitration over litigation. He also praised the Axon v. FTC and Cochran v. SEC decisions, which he described as important victories for corporations and corporate officers facing enforcement actions.

"Those agencies' ability to coerce consent decrees from enforcement targets who lack the resources to try to defend themselves in the agencies' own administrative courts may now be diminished," Ebner said.

Also in the win column for business is the court's decision in Sackett v. EPA that **restricted** the federal government's power to regulate wetlands under the Clean Water Act, Showalter said. He had been hoping the court would agree to review a series of cases in which major energy companies tried to stop climate tort cases from being heard in state court, but the court denied certiorari.

"That would have been a big deal if they took those cases," Showalter says. "Big business wants those issues resolved in federal court."

Johnson said the court is not "immune to practical consequences" as it decides cases, but that it is not narrowly focused on what is "good for business."

"It's a really intellectually rigorous court," he said. "They care a lot about the coherence of the law as a whole."

--Editing by Pamela Wilkinson and John Campbell.