How the Cases Before the Supreme Court Could Impact You and Your Business
Sam Gandhi, Kwaku Akowuah, and Rob Hochman
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Sam Gandhi:
The Supreme Court is in session. After its seismic decisions last term, the court has set its sights on another slate of high-stakes cases that could again transform elections, policy, and public life. On the docket, the First Amendment, gun rights, racial gerrymandering, and the power of the executive branch over regulation. Companies are bracing for decisions that could impact the way they do business. All this while the court faces a crisis over its ethics, and indeed, its very legitimacy.

Kwaku Akowuah:
I think the Supreme Court — it is majority conservative — is going to continue to think of the prerogatives of the states and the ability of the states to shape the electoral processes as the signal driving part of the law.

Sam Gandhi:
That's Kwaku Akowuah, co-leader of Sidley's Supreme Court and Appellate practice.

Robert Hochman:
Where the court seems to be going is they are doubting that Congress can or ever means to offer the executive branch the opportunity to do big things in regulation without meaningful guidance or just on the basis of ambiguity in congressional statutes.

Sam Gandhi:
And that's Robert Hochman. He co-leads the Supreme Court and Appellate practice with Kwaku. In today's podcast, we'll discuss the monumental cases decided by the Supreme Court last term and upcoming ones the business community should know about. From the international law firm Sidley Austin, this is *The Sidley Podcast*, where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this edition of *The Sidley Podcast*, Episode number 36. Kwaku, Rob, great to have you on the podcast.

Kwaku Akowuah:
Nice to be with you, Sam.

Robert Hochman:
Happy to be here.

Sam Gandhi:
We're into the first month of the Supreme Court's new term, and yet again, America's culture wars are about to make it to the high court. The Supreme Court has stayed lower court decisions that would limit the availability of the so-called abortion pill, mifepristone, and is likely to review those decisions this term.

Other culture war issues are bubbling up in the lower courts, too. As *Politico* just reported, the emerging question is whether public school children have a right to choose names and pronouns affirming their gender identity, or whether a parent's right to manage the upbringing of children overrides it.

Kwaku, just by definition of what the court is, every year, there are prospects for big legal changes and heightened public scrutiny, and the court's last term was particularly notable for having dealt with thorny public policy issues, and this term could be equally controversial. What do you see as some of the monumental moments last term that shaped the public's perception of the court and its ability to transform life in America?

Kwaku Akowuah:
Sam, your question reminds me of something one of my mentors once said, which is that there are no small terms at the Supreme Court, and I think that's right, and I think we're about to experience that again. In terms of last term, I would probably focus on three moments or groups of moments. I would start with the affirmative action case, *Harvard University* and *North Carolina* decisions, which held that traditional affirmative action violates equal protection and violates the civil rights law.

It really does so for reasons and based on a rationale that, to my mind, suggests that the current court's view is that the Supreme Court was wrong all along in the '70s and the '90s and beyond to uphold affirmative action at all. That is important in its own right. Obviously, college admissions is a signal part of growing up for many people, where you go to college, and the relationships and experiences you have along the way are important, but I think it also has broader importance in terms of litigation coming out of or following along from the *Harvard UNC* decision.

We've seen litigation challenging a range of DEI initiatives pop up, including suits against law firms and prominent companies, you know, and then, along another line, relatedly, you've seen pressure from inside and outside academia on other non-merits criteria for admissions, legacy, most importantly.

Those issues are distinct, generally, from the specific issues in the affirmative action cases, but I think it's worth thinking about those cases, the affirmative action cases, as being part of a broader debate about the proper role of identity and group-based decision making all across our society, and I think it's a good reminder that a lot of the aspects of that debate may end up getting settled at the Supreme Court rather than in other institutions.

Another I would point to is the student loan case, *Biden v. Nebraska*, where the Supreme Court said that the administration's decision to adopt a broad-based program relieving student loan debt was unlawful, overstepped the Department of Education's authority under current law, and in doing so, touched once again on an emerging major question doctrine in the Supreme Court, which suggests or basically curtails the power of administrative agencies to adopt broad-based rules, based on let's say older or narrower or incremental authorities under the law.

The sort of nominal target of that doctrine is the agencies themselves, but I think it's part of a broader shift that in some ways limits the power of the presidency itself and the President's power to adopt broad-based rule. So, I think we're going to see that as being very influential, looking forward, and then I would think about a couple of doors that didn't open, one, the *Google v. Gonzalez* case, where the Supreme Court declined to announce any rule on the scope of Section 230 immunity, which, broadly speaking, says that

content providers like Metas and Googles of the world, aren't responsible as the publisher of or the speaker of information posted by others.

That scope of immunity has let the internet flourish, but part of that flourishing, I think we've all seen, has been the development of negative networks and destructive flows of information, and so, there's been growing controversy about that. For now, the Supreme Court stepped aside, but I think, as we'll see, it's about to get right back into the content moderation business.

Sam Gandhi:
Rob, as a follow up for you on this, from your point of view, what stands out in terms of how the court has come to make its decisions in its current make-up?

Robert Hochman:
Sure, and just building on what Kwaku said, everybody knows that now there's a 6-3 conservative majority, and one of the most striking things about that conservative majority, and it's maybe the most obvious one, is I think a sort of willingness to really rethink how to do constitutional law, at least in significant areas. So, the kind of reasoning that you see, going back, way back in history, leaning heavily on historical sources in both the affirmative action case and especially in the gun rights case, *Bruen*, from two terms ago, as well as in the *Dobbs* abortion decision from two terms ago.

It shows a real willingness of this more than bare majority when it has an issue it wants to do something with to really sort of swipe the slate clean and start over, you might say, and there's, in addition, in the administrative law context, as Kwaku pointed out, and as we're going to see, this term, without any doubt, a willingness to reconsider the relationship between the three branches of government, the legislative, the executive, and the judicial branch, and how rules are made in that process.

You know there's a sort of simple model that people like to hold in their head, but it doesn't really comport with the way things are done in a complex modern world that's governed by the United States government and vast administrative agencies, and the court is willing to rethink how much role the court wants to have as a judicial matter in policing which part of the elective branches gets to make substantive policy.

And then the last thing I think we've seen, and this is really sort of inside baseball, especially, is what's called the shadow docket, which is the portion of the court's docket where they can make things happen, but without full briefing and oral argument. It's sort of a fast-moving, you know, intercede in emergency situations. During the COVID crisis, when the court was closely divided, there was a lot of substantive activity on the shadow docket, and there was a lot of criticism of that, and the court seems to have responded to that.

As far as I can tell, now, there seems to be a firm majority. There are three justices, I think, who feel differently, but there's a fairly firm, consistent majority for delaying court action in favor of a sort of deliberative, slow, full briefing argument process that the court historically has used and is more comfortable using. So, in that way, you sort of see the supermajority saying we don't need to rush, we have what we have, and let's do this in the ordinary course so that we can be thorough and comprehensive.

Sam Gandhi:
Kwaku, although this is a majority conservative court, some of its rulings have surprised or relieved Americans in the middle and on the other side with decisions involving our elections process. Can we talk about that?

Kwaku Akowuah:
We saw two important electoral cases last term, the decisions in *Allen v. Milligan* and *Moore v. Harper*, which I think pointed more to continuity than a break from precedent, and it's certainly an interruption of the process of disruption that some people had seen in the way that the Supreme Court was handling election cases.

I think the bigger picture is that the Supreme Court — it is majority conservative — is going to continue to think of the prerogatives of the states and the ability of the states to shape their electoral processes as sort of the signal driving part of the law and to continue to approach cases with a lot of sympathy for that perspective, and in some ways, *Moore v. Harper* really fits in that paradigm.

Moore is a case where the challengers had brought up something that came to be known as the Independent State Legislature Doctrine, and the idea behind that doctrine was that the elections clause calls out the state

legislature by name as the body within the states that has a right to regulate elections for federal office, and so, the idea was it only names the legislatures.

So, only the legislatures have a voice here, and they can act in ways that are independent of state constitutions and state judicial decisions, and the Supreme Court pretty roundly rejected that, upholding, really, the authority of the state judges and of the state constitutions to regulate what the state legislatures do in the electoral area. So, I think that's one way to see it is that the Supreme Court protected the federal elections from the possibility of rogue actors at the state level, but another way to see it, and I think maybe the more prudent way to see it, is that the Supreme Court sought to protect the role of the state as a whole. *Allen v. Milligan* maybe doesn't fit quite as neatly within that paradigm.

It's an application of the Voting Rights Act in which the Supreme Court said that Alabama had violated Section 2 by drawing a redistricting map that created only one majority Black district in Alabama. That case then got almost more attention in the postgame, because when the case went back to the district court and then went back to the Alabama legislature, the legislature adopted yet another map with only one majority Black district.

The lower court again struck that down, and it was quite offended, I think, that the legislature hadn't responded to its initial ruling and to the Supreme Court's ruling. Alabama then went back to the Supreme Court and sought relief, and the Supreme Court unanimously said no and declined to intervene. I think that story, many people had seen it as one of defiance of the Supreme Court's decision by Alabama.

But at the end of the day, I think what it shows is the Supreme Court, although closely divided on the original question, is going to take very seriously its prerogative to settle cases and have its word be final. So, that speaks, again, to continuity and to the ability of the Supreme Court to settle questions once and for all.

Sam Gandhi:
Rob, President Biden had an opportunity to nominate a liberal justice last February, and Justice Jackson was sworn in, in June of '22. What could we say about her impact, thus far, on the court?

Robert Hochman:
The most important thing to say is that you should be hesitant to draw too many conclusions from one term, but there are a few things that we noted and that are noticeable. Obviously, the most immediately noticeable, she's the first Black woman ever to serve on the Supreme Court. She's also the first public defender to sit on the Supreme Court, and how that's going to play out, and the perspectives that she brings to a fairly large volume of criminal cases that the Supreme Court gets to decide remains to be seen, but I think it's an interesting and a useful perspective for the court to have before it.

She has been, and this has been talked about quite a lot, she has been a very vigorous questioner. Now, some people have taken to criticizing her for that. I think that's misplaced. Traditionally, junior justices have deferred to their senior colleagues during oral argument and have been less likely to be vocal during oral argument, but first of all, there's no rule requiring that, but second, and more importantly, there's something of an artifact about the way the court used to do oral argument that's changed considerably since COVID. Oral argument has been running much longer.

The current court, and I don't need to go into all of this, but because of the constraints imposed on the court by having to have remote arguments for a while, the court set up a process which gave each of the justices individual time, where they would be able to communicate their questions and have a back and forth with the attorneys without interruption from any of the other justices, maybe taking a different line. The justices like that.

Sam Gandhi:
Well, I think, particularly, Justice Thomas liked it. We heard more from him during COVID than we did before.

Robert Hochman:
Absolutely, and now, for what it's worth, Justice Thomas, as the senior justice on the court, the longest-serving justice on the court, is generally given the opportunity to ask the initial question and has been taking advantage of it.

So, he's not only asking questions at the end, when everybody's sort of wrapped up, and he has final curiosities, but he's really sort of starting things off, and this is the world Justice Jackson came into immediately, and

she has vigorously taken the opportunity to do exactly what the system is designed to do, make sure that each justice, whatever questions they have, have an opportunity to run to ground their concerns, whether it's about the record or about the legal implications.

And we saw this, just this term, in a case earlier this term, where Noah Francisco, the former Solicitor General of the United States, who's a very well-respected Supreme Court practitioner, got into a long back and forth with Justice Jackson about Congressional spending powers. It's a case about the scope of the Congressional spending power regarding the Consumer Financial Protection Bureau, and you could sort of tell that Noah Francisco, like a good Supreme Court advocate, recognized that he wasn't going to win Justice Jackson's vote and just wanted to move on, but Justice Jackson was interested in pursuing the point and did so.

And so, I thought that was great, and I think it's terrific for all the justices to have that kind of opportunity. In terms of her votes, again, very, very preliminary to draw any conclusions, but she has not been simply down the line reliable in administrative law in particular, and she's from the D.C. circuit. So, she has some administrative law experience in commerce clause and federalism cases, in other words, in the sort of structural constitutional law cases that are the sorts of things that law nerds, like Kwaku and I, enjoy more than most, Justice Jackson has taken some interesting positions.

The court has fractured in ways that don't fall along the traditional 6-3 lines, and she's a big part of that. So, that's something to watch, but of course, in the most high-profile cases, especially in the affirmative action case, she's weighed in, as expected, on the side of historically marginalized groups, but even there, she's preserved her own individual voice.

The dissents in the affirmative action case, written by Justices Sotomayor and Justice Jackson are noticeably different in tone, and she's really carving out her own place and her own thinking in terms of the role of affirmative action in realizing the ultimate promise of equality in the Constitution, and Justice Sotomayor took a little bit more hardline stance on that, suggesting that racism is an endemic problem in the United States, and Justice Sotomayor took that position, suggesting that racism is an endemic problem in the United States, and Justice Jackson didn't go along with that.

She signed onto to Justice Sotomayor's opinion, but her opinion doesn't talk that way, at all, and it's kind of expression of belief that we can get to a point where true equality is realized. So, that's another thing to watch, these tonal differences that shape the legal culture, so to speak, because that's a not-insignificant part of what justices on the Supreme Court do.

Sam Gandhi:
Kwaku, let me talk about another trend that we're seeing, which is it seems like the Fifth Circuit Court of Appeals often rules in ways dramatically more conservative and different than other federal appeals courts. That may be an anecdotal observation, but that's often led to the Supreme Court having to resolve conflicts between the Fifth Circuit and other appeals courts around the country. What is your thought on that dynamic?

Kwaku Akowuah:
I have the same perception, Sam, and I think a lot of people do, that you're increasingly seeing decisions from the Fifth Circuit that are surprising in some ways and different from the approaches taken by other courts'' appeals, and that is generating some high-profile disputes at the Supreme Court. Rob mentioned the litigation currently at the Supreme Court about the Consumer Financial Protection Bureau's funding mechanism and whether that's constitutional, and that's one example of a case that came out of Fifth Circuit after other courts of appeals had rejected the argument. What explains the dynamic, I think there are a couple of things.

So, one, I think it can't be separated from what the Supreme Court, itself, is doing. As Rob was saying, the conservative majority is taking a fresh look at a lot of structural constitutional doctrinal issues, and I think the Fifth Circuit is seeing, in that, that it has its own role to play. So, on this question of the funding mechanism, the Supreme Court had pointed to that funding mechanism in an earlier case as being at least unusual, and it was part of its decision in the *Seila Law* case, about three years ago, that the CFPB as a whole is unconstitutionally structured because its director was insulated from removal by the President.

The Fifth Circuits seems to have, at least in part, viewed that as an indication that the Supreme Court might be open to a challenge to the funding mechanism as a standalone concern. The argument didn't seem to suggest that a majority of the Supreme Court will vote to affirm the Fifth

Circuit's opinion, but I think there's going to continue to be a back and forth between the Fifth Circuit and the Supreme Court on these emerging structural constitutional issues.

Robert Hochman:
I think we also have to point to what litigators are doing. I think a disproportionate share of the cases challenging administrative structures, bringing up important issues for the conservative legal movement, are coming through the Fifth Circuit, and you hear people in the bar talking about whether they can get their cases there. So, part of what's going on is the lawyers are taking cases to the Fifth Circuit that they think, and sometimes correctly, the Fifth Circuit will be more sympathetic to than other courts.

Sam Gandhi:
You're listening to *The Sidley Podcast*, and we're speaking with Sidley thought leaders, Kwaku Akowuah and Rob Hochman, about the new Supreme Court term and the pending decisions on the First Amendment, gun rights, racial gerrymandering, and the power of the executive branch over regulation. Okay. I'm going to get into kind of third rail talk here. There are a number of ethical issues that have arisen, over time, involving some of the justices on the current court.

Perhaps in acknowledgement of that, recently, Conservative Justice Clarence Thomas, for the first time, recused himself from a case involving the January 6 attack on the Capitol by then-President Trump supporters, and Thomas had earlier faced scrutiny for failing to recuse himself from Trump's January 6 case. His wife, who's a conservative political activist, had been a vocal supporter of Trump's efforts to overturn the election. So, Rob, is Justice Thomas' recusal in that case a sign that the court intends to bend a bit to public scrutiny, going forward?

Robert Hochman:
Let me begin by resisting phrases like bend a bit and the like. I think that those are actually obstacles to progress in this area. I think the court is aware that it needs to make progress on these ethical concerns, and maybe we could take a step back. Throughout most of our history, the Supreme Court has, while it's been controversial and enjoyed a surprising amount of power, surprising to the framers, probably, but also surprising in historical context compared to judiciaries around the world.

Our Supreme Court is a significant player in our government and has been for a long time, but even so, even so, the justices themselves have not been, in the main, public figures, have not been subject to public scrutiny. That's by design. They have life tenure. They're supposed to be able to operate free of political motivations, and they've largely, as a result, regulated themselves, and their own conduct on the bench, from ethical concerns, but the world has changed.

The world has changed enormously. As social media and the news media, itself, has changed in light of the decentralization of information around the world, the justices are subject to much more scrutiny from nontraditional sources than in the past. Everyone's a reporter now, and through this process, there have been, you know, justices, themselves, have even sought or not resisted publicity, and this goes back long before the current court.

I mean this goes back to the '90s, when both Justice Scalia became a hero of the conservative movement, and later Justice Thomas, and Justice Ginsburg, who was, of course, dubbed the Notorious RBG, became something of a rock star when she would travel around the country, and justices promote their books, and the like.

So, all of this has been pointing in a direction where there's more, for lack of a better way to put it, more of a spotlight shed on the justices, themselves, and now, in light of the court's both increasing activity in political cases, overtly political cases, the kinds of election cases that Kwaku talked about, and the sort of decentralization of reporting, the justices' conduct is coming under a much greater degree of public scrutiny, and the reason why I resisted language like bend a bit is this is both good and bad from the point of view of the justices.

It's good that the justices recognize that they should be held accountable, in certain ways, for making sure that the fairness and impartiality of their rulings cannot be reasonably questioned. That's a very important matter for all of the justices. It's a very important matter for all judges. The one thing the judges seem to agree on, across the spectrum, preserving the integrity and perception of impartiality of the judiciary is paramount.

It is the source of all of our courts' power, and it is the jewel, actually, of our independent judiciary, and every single judge I know cares deeply about that, but how to achieve that is the subject of dispute, and if the justices feel like they are being forced to take actions because of public scrutiny, that, from a certain point of view, undermines judicial independence. So, you have a lot more talk about a judicial ethics code.

We've had Justice Kagan talk about it. We've recently had Justice Barrett talk about it. The justices have never subjected themselves to an ethics code. They'd rather internally police themselves, and maybe the ethics code amounts to a kind of low-hanging fruit here that the justices should grab.

And I think that's where this is going, although when remains unclear, and by low-hanging fruit, I mean it's a simple step they can take that everybody would acknowledge advances the ball in the direction of increasing public confidence in the independence of their judgments, and I think that's where this is going.

I just think it has to be handled in a way that the justices don't feel like they're caving, that they've been brought to their knees by political pressure, because they very much want to resist the notion that that's what's going on because that is contrary to what their views are.

Sam Gandhi:
Before we move on, let me ask you both a quick question. Do you think that the effort for the court to better their legitimacy among the public is more likely to lead to potentially televising Supreme Court cases? During COVID, we certainly heard them on audio, and then certainly, for significant cases, they have caved in to having audio of those cases. Do you think that maybe rather than having the perception of the court on an *ex post facto* basis that they would want the public to actually see the work that they're doing?

Robert Hochman:
I think we are a generation away from that, at least. I don't want to never say never, but I hear no indication that any of the justices would welcome television. I think they are very happy with the fact that real-time audio is now available. So, people who care to listen, can listen. They get the audio out, the transcripts out, quickly. There is no feeling on the part of the

justices that that is somehow inadequate for allowing people with interest in how the justices do their work in public can get it.

Video, I think, for most of the justices that I'm aware of, they think it would be an obstacle and a disruption to the way in which the justices do their job and to the way in which the lawyers behave in front of them, and I think, again, I don't want to never say never, I do not think that they believe that there's any kind of urgency to make that kind of move.

Kwaku Akowuah:
So, I completely agree with Rob. I don't think that's a change that is coming. The court has a very close relationship with Congress, and not just in the formal sense that they review and interpret the laws of Congress.

The Supreme Court sits literally across the street from the United States Capitol and for long periods of the court's history actually had its chambers within the Capitol structure, and they look across the street, and they see a Congress that started to televise its proceedings, and right or wrong, you can have different views of this, I think the view in the Supreme Court is that the arrival of television cameras in Congress was a bad thing, more grandstanding, less substance, and they have a concern about that in their own house.

The other thing that makes it unlikely is just the rise of social media. I don't think they want their…they don't want to be "memed" and have quick snapshots of their statements, and their faces, in particular, be a significant part of the public perception, and I think part of that may stem back not only to what we've all experienced in different social media realms, in different ways, but also the State of the Union Address and going back to the Obama Administration, the episode where Justice Alito was seen to be shaking his head in response to President Obama's statement about the court.

I think that image really made some waves, and thinking about that being replicated across all their cases is something that the court isn't eager to have. There are obvious downsides to this. Our friend and partner, Carter Phillips, says one of the downsides of having no cameras in the courtroom is that there are no recorded images of Thurgood Marshall arguing before the Supreme Court, and you can multiply that to Justice Ginsburg and many, many other people.

It doesn't exist. That's a loss to history. So, there are many reasons, both for the here and now, and for later, to think about cameras in the courtroom, but whether the 9 people who have a vote on that are going to change their minds, no, I don't think so.

Robert Hochman:
One quick footnote on that historical point, I am aware of…it hasn't even started yet, but I am aware of the idea being floated to use AI to generate…use AI in combination with recording material of oral arguments by people like Thurgood Marshall to generate video presentations of what those might've looked like. We know what Thurgood Marshall looked like. We know what the justices looked like. We know what the Supreme Court looked like. We have the audio, and so, the idea is to put this together, and what a wonderful teaching tool that would be if it could be done successfully. We'll see.

Sam Gandhi:
All right. So, I won't go into whether the likelihood of real-time tweeting is possible. So, Kwaku, let's move away from public perception and into the corporate sphere. In your opinion, would you consider this now a firmly pro-business court?

Kwaku Akowuah:
You know, Sam, I wouldn't, in this sense. I don't think the Supreme Court is an anti-business court, but I don't think it's a pro-business court, either. It's a court that is very focused on methodology and doctrine, and for that reason, I think the results have drifted down in the priorities of the justices, and what a particular result could mean for the business community, I think, isn't a high priority. That's not to say no one cares. I just don't think it's a high priority, and to point to a case from last term that I think underscores this dynamic, think about the *National Pork Producers v. Ross*.

So, this is a dormant commerce clause case. California adopted a humane treatment law relating to animal husbandry and swine in particular and said unless the pig is raised according to California's humane treatment standards, pork products from that animal can't be sold in California. Well, California doesn't have a lot of pork production. Most of that, as you'd imagine, is done in other states, the Midwest and the South, but it's by far the biggest market.

And so, I think as it came into litigation into the Supreme Court, it was basically undisputed that this California rule, although wouldn't directly regulate a lot of conduct in California, was going to require a restructuring of the national pork industry. Seems like a pretty big deal, except that the majority opinion says not a big deal. At the introduction of his opinion, Justice Gorsuch says the Constitution is here to address many weighty subjects. Pork isn't one of them.

I found that pretty striking, and Justice Kavanaugh actually found that pretty striking in dissenting, and what you had is an opinion that talks in a lot of detail about what the commerce clause doesn't and doesn't do, and then there's a lot of division within the justices about exactly how to think about what the rules are and whether other constitutional doctrines, instead of the commerce clause, are the right source for limiting how states can step on the prerogatives of other states, even how to count votes without the justices, issue after issue after issue, across a number of opinions.

Very interesting, very important doctrinally, but when it comes to the signal question of can one state, through a promulgation of law, restructure national industries, Supreme Court kind of says, well, I guess so, and without, at least in the majority side of the opinions, a ton of concern about the outcome. That's how I read them, anyways. Rob, I don't know if you read it any differently.

Robert Hochman:
I agree, and I would just add this. I think that what we talked about in terms of an interest in finding occasions in public law to sort of start from scratch, to reset, I think that the intuitions of this court, in business cases, in straight commercial cases, especially in statutory commercial cases, but even more broadly in commercial cases, generally, is the opposite.

I think they are still generally favorable towards consistency and that commercial policy-making belongs in the legislative branches, and the kinds of changes they're making in public law, the kinds of unsettling of public law, the kinds of invitations to the Fifth Circuit or other lower courts, and laws, to make arguments, to rethink public law, they're not as open to those invitations in commercial law, and I think that's a significant difference that people need to understand about how this court is functioning.

Sam Gandhi:
Rob, as we look to the future with regard to the court's upcoming docket, what cases should businesses look out for?

Robert Hochman:
I think the most significant area deals with the administrative state. That's obviously a big one. I think there's another one which maybe Kwaku will talk to, having to do, especially in light of recent events, having to do with the relationship of the government and public speech on social media networks, but really, the administrative state is sort of right in the crosshairs, this year, at the Supreme Court.

There are a couple of cases up for consideration that will determine the role of the government, of the executive branch, in issuing regulations, how much room they have. This is picking up off of a line of cases that have been developed, starting, primarily, during the COVID era, and developed further, called the major questions doctrine, which is where the court seems to be going, is they are doubting that Congress can or ever means to offer the executive branch the opportunity to do big things in regulation without meaningful guidance or just on the basis of ambiguity in Congressional statutes.

In other words, there's lots of situations, and regulations have to come into play, because words can only define so much. Congress can set policy, but it can't get into the nitty-gritty, and everyone is comfortable with the executive branch making regulations in those situations, but what happens when somebody finds an ambiguity in the statute, and for instance, the result is a complete shift in energy policy, away from coal towards renewable energy.

The Supreme Court has reacted to that sort of thing by saying, hold on, that can't just be a regulatory agency acting on its own without the imprimatur of real policy-making guidance from Congress. That's Congress' role, and the other thing I want to say about this that's of particular importance is it looks like a question about Congress' role in policymaking versus the executive branch's role in policymaking.

It is that, but it isn't only that, because it's also about the court's role in policymaking, as well, because the court is the one who decides what's a

major question and what isn't, and it's a notoriously difficult thing to decide, but a lot turns on the decision because anybody who pays attention to our legislative branch recognizes that policymaking in the legislative branch is difficult.

The system doesn't produce big policy changes easily. So, when the court says something is a major question, they are putting it in a place where, going forward, regulation is going to be challenging. That's an enormous policy decision unto itself. There is also a set of cases that have to do with SEC courts, with administrative courts, another part of the administrative state that's of great significance.

What's the full range of authority that administrative agencies have to adjudicate and punish people for violations of their rules? That's on the docket, and as we've already alluded to, the funding mechanisms for administrative agencies in the Consumer Financial Protection Bureau case is also on the docket.

The court looks very likely, if you read the teas leaves from oral argument, to leave things where it stands on that and to uphold the CFPB's authority, but we're going to get a statement on the scope of spending clause authority and Congress to empower the administrative agencies, and that's a first. We've never had that before. So, that'll be interesting to watch.

Kwaku Akowuah:
So, let me add two sets of cases. So, one is the mifepristone litigation having to do with FDA's approval of mifepristone and then the conditions of use for mifepristone the FDA has adopted along with its approval, and which it has amended, in a couple of stages, over the years. The societal importance of that decision is vast, and I don't want to lose sight of that in talking about it as a business case.

There are also broader implications to that case that our friends in the biopharmaceutical industry are watching very closely. They rely, and there's a brief, pharma asking the Supreme Court to take up this case, that underscores this. They rely on the FDA's decisions about the science, whether a drug is safe and effective enough to be approved, to essentially be the final word, subject to ordinarily very limited judicial review.

And there's a concern that the Fifth Circuit's decision here, which overturns certain aspects of the conditions of use surrounding the approval by the FDA that the Fifth Circuit's decision opens up a new gateway for private litigants to come in after the fact and say, no, no, no, don't prescribe like this, prescribe like that, don't use like this, don't use like that, and that's of significant concern from a business perspective, again, distinguishing the business from the societal importance of that case.

The other set that I would point to is one that Rob alluded to in his response to your earlier question. That's on the content moderation cases, and there are really two. So, now, turning back to social media and its importance. One is what role do state regulators properly have in the area?

So, you have state laws, one from Texas, one from Florida, that say, in broad strokes, the Facebooks, the Instagrams of this world, you can have a role in deciding what content is on your platforms, but we're going to have a role, too, and here are some rules that you have to abide by that the state legislatures have said are aimed at protecting against bias in the process. Well, the platforms say, wait, this is our First Amendment right to make content moderation decisions.

The Eleventh circuit sided with the platforms. The Fifth Circuit sided with the state legislature. So, you have a split between the Fifth and the Eleventh Circuit, both conservative jurisdictions, on this very question. So, that's an important case. That's going to go up to the justices. The other, coming from a different angle, is what role does the federal government have?

There's no federal law in the sense of the state laws that says you shall moderate content in the particular ways, but there are communications between federal officials and these platforms saying, you know, have you seen this post, or line of posts, we think this is dangerous, maybe it's terrorist activity, maybe it's communications about the reliability, or lack thereof, of vaccines, maybe it's statements about public officials, maybe about the family members of public officials, and the instances where the law enforcement community is talking with the platforms and saying would you take a look at this?

And part of the argument here is that sometimes they go beyond saying would you take a look at this, and explicitly, or implicitly, are leaning on the

platforms, and it's this leaning-on effect that the challengers are saying is impermissible and violates the First Amendment. So, the Supreme Court has stayed a Fifth Circuit decision upholding the challengers' side of that federal suit and now has granted review of that case. So, we're going to have two major decisions, I think, on the role of government with respect to social media content moderation, which, in and of itself, is a significant area of development in the law.

Sam Gandhi:
We've been speaking with Sidley thought leaders, Kwaku Akowuah and Rob Hochman, about seismic cases decided by the Supreme Court and upcoming ones that the business community should know about. Kwaku, Rob, great look at the Supreme Court, and a great look at the landscape regarding the court. Thanks for your insights. Thanks for being on the podcast.

Kwaku Akowuah:
Thank you, Sam. It's been fun talking with you.

Robert Hochman:
Thank you, Sam. What a pleasure.

Sam Gandhi:
You've been listening to *The Sidley Podcast*. I'm Sam Gandhi. Our executive producer is John Metaxas, and our managing editor is Karen Tucker. Listen to more episodes at Sidley.com/SidleyPodcast, and subscribe on Apple Podcasts, or wherever you get your podcasts.