

U.S. Supreme Court Preview

Current Trends and Cases for the 2022-23 Term (OT22)

Thursday, November 3, 2022

Presenters

Jonathan Y. Ellis, Partner

Matthew A. Fitzgerald, Partner

Benjamin L. Hatch, Partner

Kathryn M. Barber, Associate

McGuireWoods

The Panel



Jonathan Y. Ellis (Moderator)
Partner

Co-Chair, Appeals & Issues
Complex Commercial Litigation
Raleigh, NC & Washington, DC

*Law Clerk to Chief Justice John G. Roberts, Jr.
October Term 2012*



Matthew A. Fitzgerald
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Business & Securities Litigation
Richmond, VA

*Law Clerk to the Hon. Clarence Thomas
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October Term 2003*



Kathryn M. Barber
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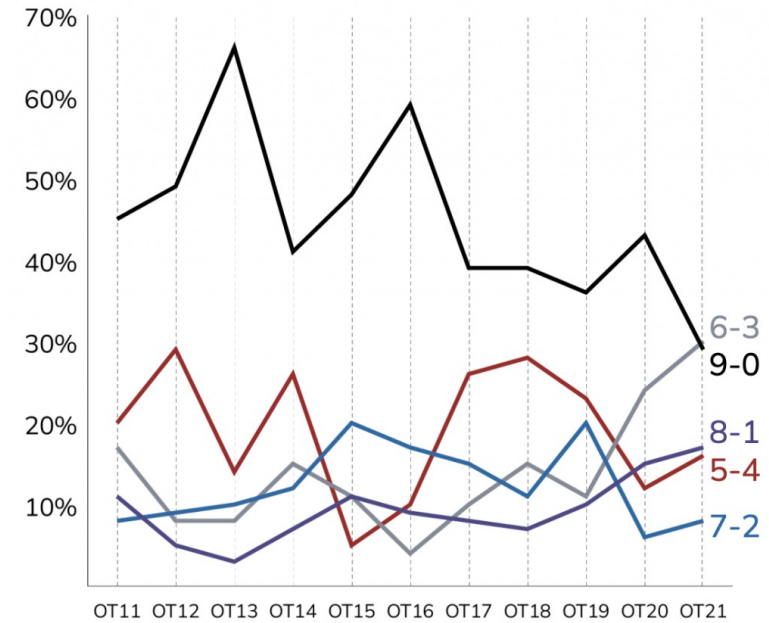
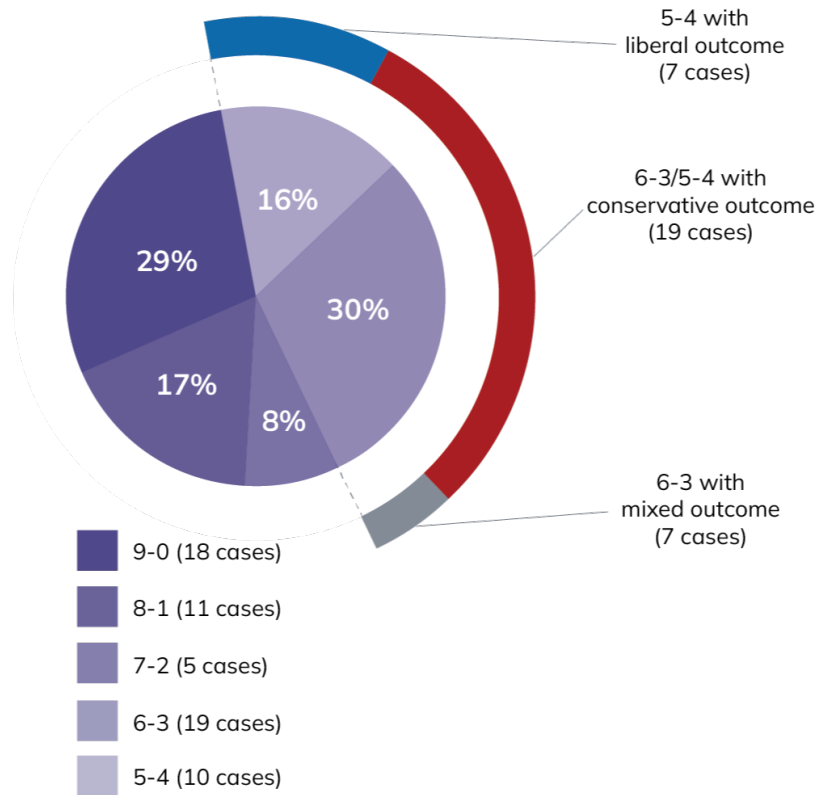
Appeals & Issues
Business & Securities Litigation
Richmond, VA

*Law Clerk to the Hon. Ruth Bader Ginsburg
October Term 2018*

OT21 Statistics

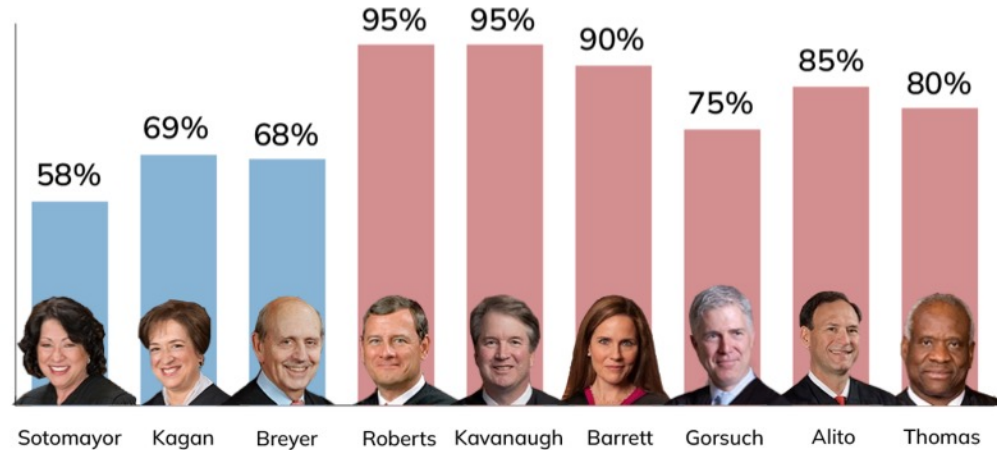


OT21: Blockbuster Term, reduced unanimity

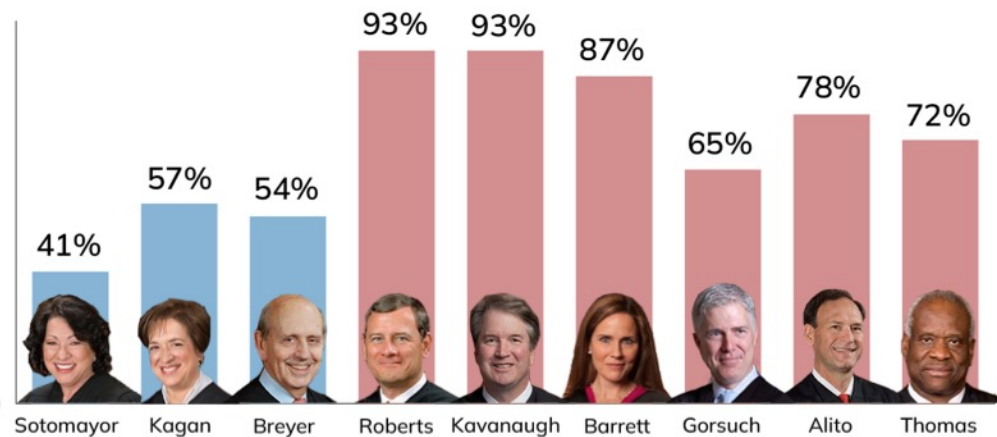


OT21: Frequency in the Majority

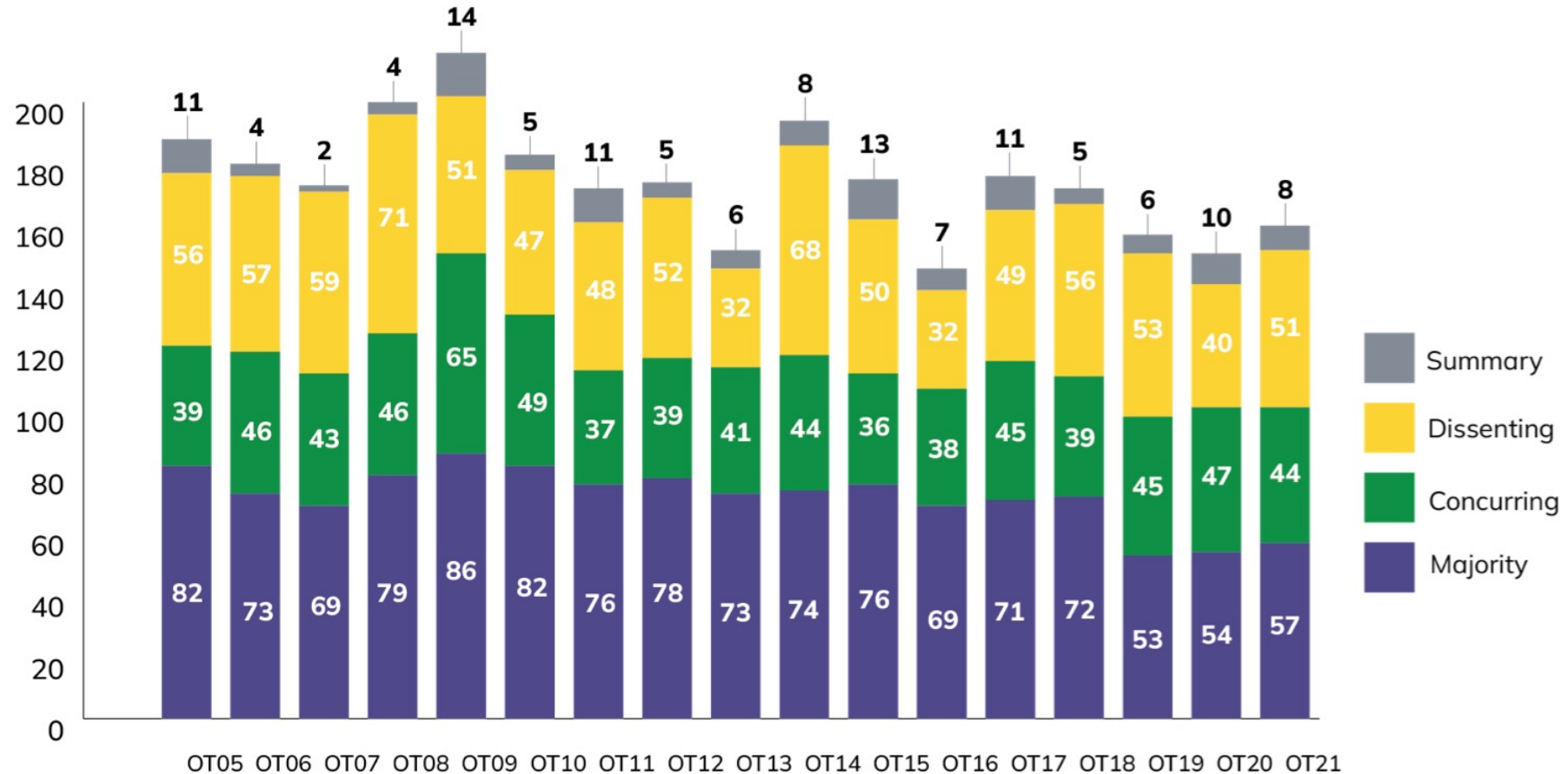
All cases



Divided cases



Declining Merits Docket



Circuit Scorecard

Court below	# of cases	% of cases	# affirmed	# reversed	% affirmed	% reversed
1st Cir.	5	8%	0	5	0%	100%
2nd Cir.	5	8%	0	5	0%	100%
3rd Cir.	1	2%	0	1	0%	100%
4th Cir.	3	5%	1	2	33%	67%
5th Cir.	8	13%	1	7	13%	87%
6th Cir.	7	11%	1	6	14%	86%
7th Cir.	3	5%	2	1	67%	33%
8th Cir.	2	3%	0	2	0%	100%
9th Cir.	12	18%	0	12	0%	100%
10th Cir.	3	5%	1	2	33%	67%
11th Cir.	4	6%	3	1	75%	25%
D.C. Cir.	2	3%	0	2	0%	100%
Fed. Cir.	1	2%	1	0	100%	0%
State Court	5	8%	0	5	0%	100%
District Court	4	6%	1	3	25%	75%
Original	1	2%	1	0	100%	0%
Total	66	100%	12	54	18%	82%

Justice Ketanji Brown Jackson



- B.A., Harvard University
- J.D., Harvard Law School
- Law Clerk to Judge Selya, U.S. Court of Appeal for the First Circuit (1997-1998)
- Law Clerk to Justice Breyer (1999-2000)
- Private practice (2000-2003)
- Federal Public Defender (2005-2007)
- Vice Chair of U.S. Sentencing Commission (2010-2014)
- Judge, U.S. District Court for the District of Columbia (2013-2021)
- Judge, U.S. Court of Appeals for the District of Columbia Circuit (2021-2022)
- Sworn in as Justice on June 30, 2022

The Current Court



Students for Fair Admissions, Inc. v. Harvard, UNC

- **Background:** Challenge to use of race as a factor in admission decision at Harvard and UNC, the oldest private and public universities in the U.S., respectively.
- **Issue:** Whether the Supreme Court's decision in *Grutter v. Bollinger* should be overturned?
- **Holding Below:** Harvard and UNC's admissions practices upheld after trial under strict scrutiny review.



- **In the Supreme Court:** Argument scheduled for October 31, 2022.
- **What to Watch:** Approach of more recently appointed justices to race-conscious admission practices and to *stare decisis*. In 2003, *Grutter* stated that race-conscious admissions policies must be limited in time and that it “expect[ed]” that “25 years from now” the use of racial preferences would no longer be necessary.
- **Prediction:** *Grutter* overturned; Court holds that race-conscious admissions violate the Equal Protection Clause (for public universities) and Title VI (for private schools that accept federal funds).

National Pork Producers v. Ross

- **Background:** California's Proposition 12 bans the sale of pork raised in gestation crates under 24 square feet. But California does not farm pork; it all comes from other states, where the gestation crates are 14-18 square feet. California's law thus threatens major impacts to pig practices in other states.
- **Issue:** Does a California law barring the sale of pork raised in "cruel" conditions violate the dormant commerce clause?
- **Holding Below:** No.
- **In the Supreme Court:** Argued Oct. 11.
- **Notes:** The U.S. Government supported the pork producers. Court is wrestling with morals as a justification (can be needed by both sides in other cases).
- **Prediction:** Pork producers will win, possibly on narrow grounds, and look for many different opinions on the dormant commerce clause



Merrill v. Milligan

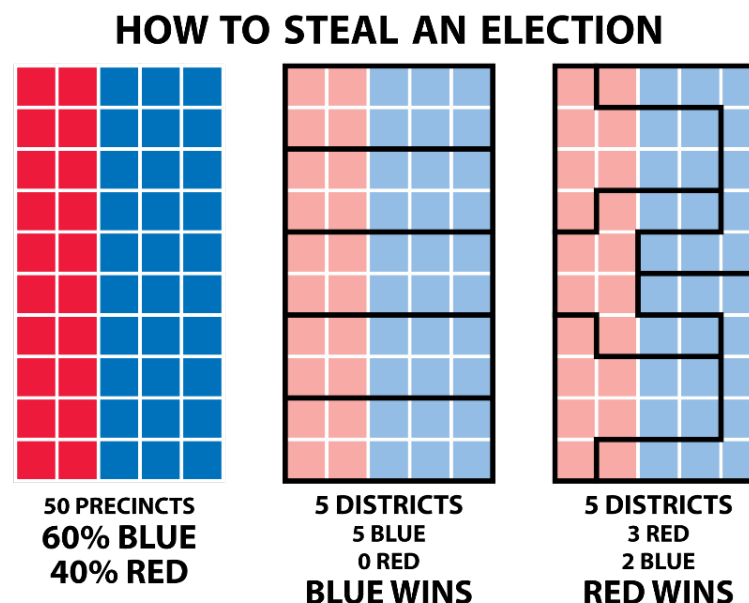
- **Background:** Court's *Gingles* decision provides a multi-pronged test for proving vote dilution under the VRA; plaintiffs must show at prong 1 that the minority group is sufficiently large and compact to form a new, reasonably configured majority-minority district.
 - Black voters brought vote dilution claim that Alabama's congressional redistricting plan violated the VRA by "cracking and packing" the Black voting population.
- **Issue:** Whether Alabama's congressional redistricting plan violates Section 2 of the Voting Rights Act.
- **Holding Below:** The district court granted a PI enjoining implementation of the map. SCOTUS stayed the PI and granted review.

- **In the Supreme Court:** Argued on October 4, 2022.
- **Notes:** Race neutrality vs. racial equality. Majority receptive to restricting *Gingles*/vote dilution claims but unwilling to go as far as AL wants them to
- **Prediction:** VRA is weakened/*Gingles* test is modified



Moore v. Harper

- **Background:** North Carolina redistricting issue. The federal Constitution directs that the “manner of holding elections for Senators and Representatives [be] prescribed . . . by the Legislature [of each state].” But the N.C. courts found that the map the legislature drew was an unconstitutional partisan gerrymander (under the NC Constitution) and ultimately the courts re-drew it.
- **Issue:** Whether a state judiciary can reject a redistricting map drawn by a state legislature as violating the state constitution and then draw its own map.
- **In the Supreme Court:** Half briefed; not yet set for argument.
- **What to watch:** Partisan craziness; the “independent state legislature” theory having a moment; concern for the future of independent commissions and other election-improving devices.
- **Prediction:** A split-the-baby approach that follows the text of the federal constitution but still leaves room for state courts to insist that legislatures follow state rules.



Mallory v. Norfolk Southern Railway

- **Background:** PA law provides that a foreign corporation's registration to do business in PA constitutes consent to general personal jurisdiction. Norfolk Southern is a VA corporation and was sued in PA by Mallory, a former employee who alleges he was exposed to chemicals while working in VA and OH.
- **Issue:** Whether the 14th Amendment's Due Process Clause prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.
- **Holding Below:** Yes—PA's statute is unconstitutional under *International Shoe*.
- **In the Supreme Court:** Argument scheduled for Nov. 8, 2022
- **What to watch:** Potentially huge implications for corporations/plaintiff forum shopping.
- **Prediction:** Majority will cross ideological lines and try to harmonize existing precedents; look for fractured reasoning across concurrences; PA's statute will be held unconstitutional in narrow decision.



Sackett v. Environmental Protection Agency

- **Background:** When the Sacketts tried to build a house on a subdivision lot in Idaho, EPA told them that they couldn't because their lot contained navigable waters.
- **Issue:** What counts as the “waters of the United States” under the Clean Water Act?
- **Holding Below:** Wetlands count so long as they have a “significant nexus” to other navigable waterways.
- **In the Supreme Court:** Argued on October 3, 2022.
- **Rerun:** This is the Sacketts second trip to the Supreme Court. In 2012, the Supreme Court unanimously ruled in their favor on a procedural issue, holding that EPA's compliance order was “final agency action” that they could sue to challenge. See 566 U.S. 120 (2012).
- **Prediction:** The Court either fails to garner five votes for a single definition of “waters of the United States”—as happened in *Rapanos v. United States*, 547 U.S. 715 (2006)—or it retains Justice Kennedy's “substantial nexus” test from *Rapanos* in a narrow opinion that leaves a lot of hard questions open.



Ciminelli v. United States

- **Background:** Federal prosecutions that flowed from New York’s “Buffalo Billion” plan.
- **Issue:** Whether federal wire fraud (and, by extension, mail fraud) include a “right to control” theory of fraud, under which a deprivation of complete and accurate information bearing on a person’s economic decision qualifies as “property” fraud.
- **Holding Below:** The Second Circuit affirmed convictions, both with respect to sufficiency of the evidence and with respect to the jury instructions.

- **In the Supreme Court:** Argument date TBD. Fun fact: Counsel for defendant is Michael Dreeben, long time government SCOTUS advocate in criminal cases.
- **Implications:** Possible additional ruling restricting the scope of two of the most commonly utilized federal criminal statutes. Federalism in the criminal law arena.
- **Prediction:** “Right to control” theory rejected.



Gonzalez v. Google LLC

- **Background:** Family of an ISIS terror victim sued social media companies for material support of terrorism under the Anti-Terrorism Act, 18 U.S.C. § 2333.
- **Issue:** Whether § 230(c)(1) of the Communications Decency Act insulates from civil liability a social media company that makes targeted recommendations of user content.
- **Holding Below:** The Ninth Circuit held that § 230(c)(1) applies notwithstanding the platforms' recommendation features.
- **In the Supreme Court:** Argument date TBD.
- **Implications:** Section 230(c)(1) lies at the center of hot-button debates over political censorship and online “disinformation.”
- **Companion Case:** The Court will also hear *Twitter v. Taamneh* to address civil liability for social media companies under the Anti-Terrorism Act (the “knowingly” element and aiding-and-abetting liability).
- **Bold Prediction:** Social media companies win in *Twitter* but lose in *Gonzalez*.



303 Creative v. Elenis

- **Background:** Lorie Smith creates custom websites and desires to begin creating custom wedding websites, consistent with her religious belief that marriage is between one man and one woman. Smith sued to challenge Colorado’s Anti-Discrimination Act that bans public accommodations from refusing to serve based on “.... sexual orientation...” Colorado contends that Smith is required to either serve same-sex wedding customers or refuse to serve any wedding customer.
- **Issue:** Whether a public accommodations law violates the Free Speech Clause by compelling an artist to speak or stay silent on an issue.
- **Holding Below:** 303 Creative websites are “pure speech” but Colorado has a narrowly tailored to state interest in providing LGBTQ customers access to unique services. Court held that website design was “inherently not fungible.”
- **In the Supreme Court:** TBD.
- **Prediction:** 303 Creative will win in a split decision that the Free Speech clause does not allow compelled speech absent a more compelling need.



Andy Warhol Foundation v. Goldsmith

- **Background:** *Vanity Fair* hired Warhol in 1984 to produce an image of Prince for a profile. Warhol used a photo from Goldsmith as source material to create a new image. Decades later, Goldsmith saw the Warhol image in a *Condé Nast* tribute to Prince and dispute over “fair use” went to court
- **Issue:** Whether the Warhol image was transformative enough to constitute “fair use” of the Goldsmith source photo
- **Holding Below:** The Warhol work violates the copyright of the Goldsmith photo
- **In the Supreme Court:** Argued Oct. 12, 2022
- **What to watch:** The Court could clarify standards for what constitutes acceptable “fair use” for derivative works of art
- **Prediction:** Warhol will win and the Supreme Court will reverse the Second Circuit for applying a “fair use” standard that is too stringent. The Court will not, however, adopt a clear standard for what constitutes fair use for derivative art



Questions or Comments?