



## Another Momentous Term in the Supreme Court: October Term 2022

**Friday, May 5, 2023**

**Moderator:**

Glenn Danas

**Speaker:**

Dean Erwin Chemerinsky

**MCLE: 1 Hour of MCLE including 1 Hour of Legal Specialization in Appellate Law**

### **Conference Reference Materials**

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Another Momentous Year in the Supreme Court

CLA Appellate Summit  
San Francisco, California  
May 5, 2023

Erwin Chemerinsky  
Dean and Jesse H. Choper Distinguished Professor of Law  
University of California, Berkeley School of Law

I. Affirmative action

*Students for Fair Admissions v. University of North Carolina*, No. 21-707 (argued October 31, 2022). (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

*Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (argued October 31, 2022). (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.

II. Civil rights litigation

*Groff v. DeJoy*, No. 22-174 (to be argued on April 18, 2023). (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate “undue hardship on the conduct of the employer’s business” under Title VII merely by showing that the requested accommodation burdens the employee’s coworkers rather than the business itself.

III. Dormant commerce clause

*National Pork Producers Council v. Ross*, No. 21-468 (argued October 11, 2022). (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause, or whether the extraterritoriality principle described in the Supreme Court’s decisions is now a dead letter; and (2) whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.*

#### IV. Elections

*Merrill v. Milligan*, No. 21-1086 (argued October 4, 2022). Whether the state of Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act.

*Moore v. Harper*, No. 21-1271 (argued on December 7, 2022). Whether a state’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof,” and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.

#### V. Executive power – and state challenges to it

*U.S. v. Texas*, No. 22-58 (argued November 29, 2022). (1) Whether state plaintiffs have Article III standing to challenge the Department of Homeland Security’s Guidelines for the Enforcement of Civil Immigration Law; (2) whether the Guidelines are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a), or otherwise violate the Administrative Procedure Act; and (3) whether 8 U.S.C. § 1252(f)(1) prevents the entry of an order to “hold unlawful and set aside” the guidelines under 5 U.S.C. § 706(2).

*Biden v. Nebraska*, No. 22-506 (argued February 28, 2023). (1) Whether the respondents have Article III standing; and (2) whether the [student loan] plan exceeds the Secretary's statutory authority or is arbitrary and capricious.

*Department of Education v. Brown*, No. 22-535 (argued February 28, 2023). (1) Whether two student-loan borrowers have Article III standing to challenge the Department of Education's student-debt relief plan; and (2) whether the department's plan is statutorily authorized and was adopted in a procedurally proper manner.

#### VI. First Amendment – speech (and Section 230)

*303 Creative LLC v. Elenis*, No. 21-476 (argued December 5, 2022). Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

*Counterman v. Colorado*, No. 22-138 (to be argued on April 19, 2023). Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

*Gonzalez v. Google LLC*, No. 21-1333 (argued on February 21, 2023). Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in

traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.

*Twitter v. Taamneh*, No. 21-1496 (argued on February 21, 2023). (1) Whether a defendant that provides generic, widely available services to all its numerous users and “regularly” works to detect and prevent terrorists from using those services “knowingly” provided substantial assistance under 18 U.S.C. § 2333 merely because it allegedly could have taken more “meaningful” or “aggressive” action to prevent such use; and (2) whether a defendant whose generic, widely available services were not used in connection with the specific “act of international terrorism” that injured the plaintiff may be liable for aiding and abetting under Section 2333.

## VII. Indian Child Welfare Act

*Haaland v. Brackeen*, No. 21-376 (argued on November 9, 2022). (1) Whether various provisions of the Indian Child Welfare Act of 1978 — namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) — violate the anticommandeering doctrine of the 10th Amendment; (2) whether the individual plaintiffs have Article III standing to challenge ICWA’s placement preferences for “other Indian families” and for “Indian foster home[s]”; and (3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

## VIII. Personal jurisdiction

*Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (argued November 8, 2022). Whether the due process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.



Erwin Chemerinsky is Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. Prior to assuming this position he was the founding dean of the University of California, Irvine School of Law, and a professor at Duke Law School, University of Southern California Law School, and DePaul Law School. He is the author of 15 books and over 200 law review articles. He frequently argues appellate cases, including in the United States Supreme Court. In 2022, he was the President of the Association of American Law Schools.



**Glenn Danas** is a partner at Clarkson in Malibu, California, heading the firm's appellate practice group. Glenn has argued 48 appeals in state and federal appellate courts throughout the country, including multiple unanimous wins in the California Supreme Court. These successes have earned Glenn recognition from numerous organizations, including twice receiving the Daily Journal's award for "Top Appellate Reversal" of the year, in 2023 and 2017. Glenn was named among the "Top 100 Attorneys in California" by the Daily Journal in 2017 and earned a California Lawyer Attorney of the Year ("CLAY") award from California Lawyer magazine in 2015. Glenn was also named one of the "Top Labor and Employment Attorneys in California" by the Daily Journal five years in a row, from 2015 to 2019, and one of the "Top 20 Attorneys in California under 40" in 2013.