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## Supreme Court Brief: Justices Eye Section 230 | Title 42 Case Vanishes | Who's at the Podium



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United States Supreme Court



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*Happy Tuesday and welcome to the Supreme Court Brief! Legal Tech News Reporter Cassandre Coyer helped us out this week on this 'curtain raiser' for this week's oral arguments involving the future of Section 230. The dispute stems from claims that social media platforms have allowed terrorism to spread without consequence and the results could have a big impact beyond just the tech world. Then, after the high court removed a dispute over immigration policy – and state intervention – from the calendar without explanation, we spoke to scholars who have some theories as to why. And finally we've got a rundown on who you'll see (or hear) behind the podium for challenges in hearings next week.*

*As always, thanks for reading and we welcome feedback and tips. Contact Avalon Zoppo at [atazoppo@alm.com](mailto:atazoppo@alm.com) and follow her on Twitter [@AvalonZoppo](https://twitter.com/AvalonZoppo). You can find Brad Kutner at [bkutner@alm.com](mailto:bkutner@alm.com) and [@bradkutner](https://twitter.com/bradkutner).*

### Section 230 Cases Could Reverberate Beyond Big Tech

While it's unknown whether or how the high court could limit Section 230 protections, any changes to tech platforms' liability would in turn change their compliance strategies.

While Big Tech is the defendant in these cases, an adverse ruling could impact providers of all sizes as the statute doesn't distinguish between "Meta and Steve down the road," noted Shari Lewis, a member of the Rivkin Radler's Complex Torts & Product Liability, Privacy, Data & Cyber Law, and Professional Liability Practice Groups.

Not only would the repercussions of such a ruling be felt across the entire tech industry, but it would also burden smaller businesses unevenly, legal professionals noted.

"It will make it more expensive to make targeted recommendations, because you'll have to think about what claim could arise," Kumar said. "Large companies might have the resources to do that [but] smaller companies might not and so it does pose a risk to the Internet as we know it. How big is that risk? We don't know."

Read the rest of Cassandre Coyer's report [here](#).

## **Title 42 Removal Sudden, Not Surprising Say Scholars**

The sudden removal of a dispute involving a state's right to intervene in a larger federal policy fight was removed from the high court's calendar without warning last week, but it's not a huge surprise to scholars who follow the Supreme Court.

"I think they'll be happy to get rid of it," said South Texas College of Law professor Josh Blackman in an interview after the U.S. Supreme Court [abruptly removed](#) *Arizona v. Mayorkas* from the court's argument calendar Thursday without explanation.

The case started with the ACLU challenging President Joe Biden's use of Title 42, a Donald Trump-era policy that limited immigration in the wake of the Covid-19 pandemic. An appeals court sided with the civil liberties group, but 17 states asked to intervene after an injunction was granted blocking the policy's use. The Court of Appeals for the District of Columbia denied their intervention and the states appealed.

The high court granted cert in the fight but, on their own, narrowed the dispute to questions about a states' right to intervene.

But now, after its removal from the docket, Rory Little, a professor of law University of Law San Francisco College of the Law, said as much could have been divined from a dissent authored by Justice Neil Gorsuch, and co-signed by Justice Ketanji Brown Jackson, when cert was granted.

"Even if at the end of it all we find that the states are permitted to intervene, and even if the states manage on remand to demonstrate that the Title 42 orders were lawfully adopted, the emergency on which those orders were premised has long since lapsed," the Trump appointee [wrote](#).

"The states contend that they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it," he added, noting "the current border crisis is not a COVID crisis," and the court shouldn't be in the business of "perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency."

"This isn't an immigration case, this is an intervention case and we can do those whenever we want to," Rory said, interpreting Gorsuch's argument that perhaps this dispute wasn't the best vehicle to address the intervention issue at hand.

Blackman agreed, noting the "grant on intervention was weird because the case was really merit dependent," and the policy's demise, according to [filings](#) from Biden's DOJ, is set for May 11, 2023.

Thomas Berry, a CATO Institute research fellow, also pointed to Biden's plan to end the policy as grounds for the case's de-calendaring, but he wondered if the lack of explanation has to do with whether or not the policy will actually be terminated.

"The court is waiting to see whether the state of emergency does in fact end in May," he said. "If it does not, the court can put the case back on the oral argument schedule."

Still, Little thinks the entire process started due to the high level of scrutiny has faced. Now, with the so-called "long recess" between sessions wrapping up, the justices have had time to review additional briefing and they realized they just didn't want to have another public fight without resolution. He pointed to *In Re: Grand Jury*, a dispute over legal privilege, that held oral arguments but was just as abruptly dismissed as improvidently granted a few weeks later.

"What they really don't want is to look like they don't understand an issue," he said, pointing to Justice Elena Kagan's comments during *In Re: Grand Jury* "if it ain't broke, don't fix it."

In Little's eyes, the court took up the privilege dispute thinking it was a corporate tax dispute. Then, when they got to oral arguments, they realized they weren't ready to decide the case. They don't want the same instance playing out this time around.

As for the future of the case, an excuse for its removal could come as early as Tuesday morning when the high court is set to release a batch of orders. We'll let you know if that's the case after the fact.

-BK

## At the Podium

After hearing the blockbuster Section 230 cases today and tomorrow, the justices will be back on the bench next week for more petitions. The fight over Biden's student loan forgiveness plan tops the list, but other disputes will be heard. Here's what you need to know about the cases, and which attorneys will be taking to the podium.

### Feb. 27

#### *Dubin v. United States*

The case asks the court to clarify when a person violates the federal aggravated identity theft law if they give someone else's name while committing a larger offense.

In the underlying case, the government accused David Durbin, who was convicted of healthcare fraud, of also committing aggravated identity theft because he put another patient's identifying information on a fraudulent Medicaid claim form (even though he had authority to use that patient's name and didn't misrepresent their identity).

For Durbin: Stanford Law School Jeffrey L. Fisher, co-director, Supreme Court Litigation Clinic, will argue for Durbin. It will be Fisher's 46th time arguing before the justices.

For government: Vivek Suri, Assistant to the Solicitor General, Department of Justice. This will be his seventh argument before SCOTUS.

### Feb. 28

#### *Biden v. Nebraska and Department of Education v. Brown*

This pair of disputes aims to curb President Biden from forgiving nearly half a billion dollars in federal student loan debt.

In *Nebraska*, six states led by Republican attorneys general brought a challenge to President Joe Biden's executive order forgiving student loan debt, arguing the plan exceeds the Secretary of Education's authority and is arbitrary and capricious.

In *Brown*, plaintiff borrowers argue they have been unfairly excluded from the program.

The government, meanwhile, contends that the allegedly harmed parties in both disputes lack standing to bring their claims, an argument that convinced both lower courts, but was over turned on appeal for both as well.

For Biden in both hearings: Elizabeth B. Prelogar, Department of Justice Solicitor General. This will be Prelogar's 21st and 22nd time before the high court.

For Nebraska: James Campbell, Nebraska's Solicitor General. This will be his first time arguing before SCOTUS.

For Brown: Michael Connolly with Consovoy McCarthy. This will be his first argument before the high court.

## March 1

### *New York v. New Jersey*

The case centers around New Jersey's attempts to withdraw from the Waterfront Commission Compact and dissolve the bistate commission created by the agreement with New York. The compact gives the commission broad law-enforcement and regulatory powers over the Port of New York and New Jersey.

For New York: New York Deputy Solicitor General Judith Vale will go before the justices in her first Supreme Court argument.

For New Jersey: Jeremy Feigenbaum, New Jersey Solicitor General, will go before the court. He previously argued *PennEast Pipeline Co. v. New Jersey* in 2021.

-AZ

## What We're Reading

►► **When Is a Social Media Post a 'True Threat'?:** "As the U.S. Supreme Court is set to decide the standard that should be used to determine when an online statement is a "true threat" unprotected by the First Amendment, this article looks at the issues surrounding social media speech when courts must differentiate between mere hyperbole and actual threat." [[New York Law Journal](#)]

►► **An Appellate Lawyer's Perspective on the Rise of 'Nuclear' Verdicts:** "Frederick Yarger and Theresa Wardon Benz, both partners at Wheeler Trigg O'Donnell based in Denver, discuss how—and when—appellate lawyers are getting called on to deal with the threat of big punitive damages awards." [[Litigation Daily](#)]

►► **Clarence Thomas Statue Backed by Georgia Republicans:** "The Georgia state Senate voted 32-20 along party lines on Tuesday to mandate a statue of the Pin Point, Georgia, native. Minority Democrats had proposed amending the measure to also mandate a statue of the late Georgia congressman and civil rights icon John Lewis, but then pulled back the amendment." [[Daily Report](#)]

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