Ep. 21: SCOTUS Wrapup and Preview 2019

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Jose Garriga: Hello and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

The U.S. Supreme Court is beginning its 2019 Term, and it promises to be an exciting one, with a string of hot-button issues embodied in cases before the Justices. By contrast, the preceding Term kept a lower profile, with the Court settling in to a full bench as Justice Kavanaugh worked through his first full Term. This is not to say that the 2018 Term was uneventful, however, as a number of important decisions were handed down by the Court.

In what we'll call our second annual SCOTUS overview, Pratik Shah, co-head of Akin Gump's Supreme Court and appellate practice, returns to our microphone today.

Before joining the firm in 2013, Pratik served with distinction for over five years as an Assistant to the Solicitor General at the U.S. Department of Justice, receiving a number of awards for his advocacy, including the Attorney General's Distinguished Service Award for his role as lead drafter of the successful and historic challenge to the Defense of Marriage Act in *United States v. Windsor*.

Pratik, who represents clients in federal and state appellate courts across the country, including the U.S. Supreme Court, will be looking back at the previous Term and looking forward at the new Term to discuss how the Court is evolving and to spotlight the cases you need to know about.

Welcome to the podcast.

Pratik, thank you for returning to the show today. So, let's start by doing what I mentioned in the intro, which is looking back at the last Term.

It appeared to start off as a low-key Term, but ended with at least a couple of controversial decisions, including on partisan gerrymandering and the census citizenship question. So, that said, could you share your observations on some of the most notable decisions over the last Term?

Pratik Shah: Sure, Jose. The two big-ticket decisions, as you note, were the census citizenship question, in *Department of Commerce v. New York*, and the partisan gerrymandering case, *Rucho v. Common Cause*.

To start with the census citizenship case, that case really featured a little bit of everything. First, you had the Solicitor General skipping over the court of appeals and

moving directly to the Supreme Court, not once but twice in that case, which is emblematic of a recent trend. Two, you had newly discovered evidence emerging at the 11th hour, essentially coming from documents from a Republican pollster who had recently passed away, suggesting that one of the motivations for this census citizenship question was to create data that could be used to more favorably redistrict in favor of whites and Republicans. And third, you had, as reported by CNN, a possible change in the voting lineup before the decision was announced.

Now, at the end of the day, the Chief Justice wrote the opinion, accompanied by the four more-liberal Justices. It held that the citizenship question could not stand, at least as justified to date. Now, the rationales were interesting. The Chief did hold in his opinion that the citizenship question did not violate the Enumeration Clause, and most of the opinion read as if the citizenship question would be upheld. That is, that it recognized that the Secretary would normally have the discretion to make this sort of policy judgment, and that, if the rationale had been legitimate, that it would have passed muster under the Administrative Procedure Act.

However, the Chief Justice held that, based on the record that had been compiled in this case, including after a trial in the district court, that the Secretary's rationale offered in defense of the citizenship question was, to quote the Chief Justice, "contrived." And that is essentially based on the ample record evidence suggesting that the rationale was not, in fact, the one that had been offered, that this was prompted by a DOJ law enforcement need, but, rather, emanated from perhaps preexisting policy preferences. And, so, here you have the Chief Justice in some ways, I think, acting upon his institutionalist bent and quoting one of the judges for whom he himself had clerked, Judge Friendly, saying, "Our review is deferential, but we are not required to exhibit a naiveté from which ordinary citizens are free."

So, at the end of the day, the Chief Justice came to the conclusion, with the four more-liberal Justices, that, looking at the record here, you just couldn't come to the plausible conclusion that the Secretary's justification here was legitimate. I mean, this opinion raises all sorts of questions, including first and foremost, would it have come out the same way without those 11th-hour revelations that I had mentioned about the new evidence suggesting ulterior motives? Other question is whether this decision here is one of those decisions that is good for this case only or whether it might have broader application, particularly with respect to many other agency challenges coming down the pike to actions under the Trump administration.

The other case that you had mentioned, the partisan gerrymandering case, or I guess I could say [*hard “g”*] "gerrymandering." As a quick aside, "gerrymandering" is a term that actually came from one of our lesser-known founding fathers, Elbridge Gerry, and that's how his family pronounces the last name. Apparently, although he was a signer of the Declaration of Independence and very involved with the Constitution, he is more known for his role as a former governor of Massachusetts, in which he engineered the districts, the first known practice of this, and his opponent said, "Look, these new districts look like salamanders." And, so, the name stuck as “gerrymandering,” and his family is actually quite exercised about the mispronunciation. But anyway, however you pronounce it, the Court ended up holding by a 5-4 margin—again, this was the Chief Justice writing as in the census case, except this time joined by the four more-conservative members—that partisan gerrymandering claims present political questions that are inappropriate for resolution by the federal courts. Essentially, that there were not clear enough constitutional standards, and, thus, it was too hard for the Court to come up with a manageable standard to police gerrymandering claims, however undesirable that practice might be.

I think one of the notable things about this decision is Justice Kagan's role, and I think this is emblematic of Justice Kagan taking a bigger role on the left side of the Court and then emerging, really, as a leader on that side of the Court. She took the unusual step of reading her dissent from the bench, in which she expressed her concern over the majority's decision, and she said, "For the first time ever, this court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." She goes on to say, "Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections."

I think, as I said before, this is notable for a couple of things. One, of course, it speaks to the importance of the issue in this case, but, beyond that, I think it does signal Justice Kagan's growing role. She chooses her words very carefully, and these were pretty forceful words.

One other case that I'd mention, just that I think has gotten less press than those two cases, but I really do think is arguably the biggest business case of the Term, and that's *Kisor v. Wilkie*. Now, technically it's not a business case at all, in the sense that the actual issue in the case involved the agency denial of veterans' benefits, but, in terms of its implications, has huge implications for the business community.

The issue in that case, really the question presented, was whether the Court should overrule *Auer v. Robbins*. And for those who need to brush up on their administrative law from law school, *Auer v. Robbins* created the principle under which courts defer to agency interpretations of their own regulations, so it's essentially one step removed from *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*], which, of course, is the principle that courts will defer to an agency's interpretation of an ambiguous statute.

And here, this goes one step further, that says, once they've made that interpretation under *Chevron* in the form of a regulation, that the Court will then defer to the agency's interpretation of its own ambiguous regulation. Now, the Court taking this case is really no surprise. It had been a long time coming. Even the author of *Auer* itself, Chief Justice Scalia had written consistently in recent years that, to quote him, "Enough is enough," that he thought *Auer* had gone too far, that this demonstrated an arrogation of agency power and undermined separation of powers to the extent that it's the judiciary's role to interpret the law. And other conservative Justices individually had written expressing concerns and the desire to revisit *Auer*.

So, finally, the Court did grant cert on that question. This time, again signaling Justice Kagan's growing role on the left, she wrote the opinion, joined by the other liberal Justices, this time joined by the Chief Justice, upholding *Auer* and saying that *Auer*, in fact, is not overruled. However, in the course of that decision, the Court announces some significant limitations on *Auer* and, essentially, lays out a number of conditions, six separate conditions, that have to be satisfied before a court will apply *Auer* deference.

There's a notable dissenting opinion by Justice Gorsuch, who says, "Come on, you've now essentially limited *Auer* in a way. You should just go the extra step and overrule it." And he characterizes it as "more of a stay of execution than a pardon." Now, this opinion raises a couple of interesting issues going forward. One, and again, another issue of huge importance to the business community, and that question is, is *Chevron* next? A lot of the arguments that the dissenters had made in *Auer* and a lot of the concerns about *Auer* deference do translate to *Chevron* deference, although you do have opinions by the Chief Justice and Justice Kavanaugh that go out of their way to say that no, what we say here does not govern *Chevron*.

And then the other looming issue here, I guess not so much looming given the question presented was whether the Court should overrule its own precedent, is one of *stare decisis*. That is, how aggressively is the Court going to move to overrule existing precedent in light of the Court's new composition?

Jose Garriga: That's interesting. You mentioned *stare decisis* as this looming or imminent issue in *Kisor*. Is there any more movement afoot, perhaps given the Court's more-conservative orientation now, to overturn longstanding Court precedents?

Pratik Shah: Well, I think that's really one of the biggest undercurrents underlying this Term. If you had to pick a theme that cut through several of the decisions this Term, that would probably be one of them. This concern, I think mostly from the more-liberal Justices, about departures from *stare decisis*, and then, on the conservative side, when to exercise the power to overturn precedent. So, beyond *Kisor*, I think there are a few data points that are worth noting this Term.

One is from the [*Franchise Tax Bd. of Cal. v.*] *Hyatt* decision. That involved a question of state sovereign immunity. It had long been established that states, while they enjoyed sovereign immunity in their own courts, did not enjoy sovereign immunity when sued in the courts of other states. The Court, by a 5-4 decision, overruled that principle, Justice Thomas joined by the other conservative Justices. And there you had Justice Breyer penning a strong dissent, and he, in somewhat ominous tones, cites [*Planned Parenthood of Southeastern Pa. v.*] *Casey* and says, "Today's decision can only cause one to wonder which cases the Court will overrule next."

Now, of course, the citation to *Casey* makes sense on one level, because *Casey* did set forth the standard for *stare decisis* and when it might be appropriate and not appropriate to overrule precedent. But the citation to *Casey* is also noteworthy, of course, because of the abortion issue, which is certainly on the Court's mind, given the new composition of the Court and cases coming down the pike.

Another data point is the *Gamble* [*v. United States*] case from last Term, and that was a case involving the separate sovereigns doctrine, which has to do with double jeopardy, that is, can you be prosecuted for a crime arising out of the same set of facts by both the federal government and the state government? Doctrine had long been recognized, and the answer had been “yes,” and the Court was revisiting that doctrine. And, here, the Court in an opinion by Justice Alito upheld the preexisting doctrine. But what's interesting is that you have separate opinions by Justice Gorsuch and Justice Thomas, essentially chiding the majority for its reliance on *stare decisis*, saying, "Look, if you want to uphold the doctrine, uphold it because you think it's right, not just because you think that's the way the Court had previously been doing it."

And then the third data point I'll mention on the *stare decisis* point is *Gundy* [*v. United States*]. That was a case involving the nondelegation doctrine, the doctrine that deals with Congress's ability to delegate lawmaking power to agencies. And that's a doctrine that largely laid dormant for decades. The governing test under that doctrine is the intelligible principle test, that is, Congress has to lay out an intelligible principle in its laws for agencies to administer. And the view has been, by many commentators, that test no longer has any teeth, basically anything goes in congressional delegation. And here you had an eight-Justice Court because Justice Kavanaugh was not yet on the Court to take part in this decision. So you had the danger of a divided Court. And, so I think, largely because of that, you had Justice Alito joining four other Justices. So you came to a 5-3 vote that did not disturb the nondelegation doctrine's intelligible principle test, kept it intact, but notably noted that this issue is ripe for revisiting with a full Court.

It's pretty clear here that Justice Kavanaugh has the deciding vote here on how the intelligible principle test and the non-delegation doctrine operate going forward. One

footnote I'll put on this is that, maybe it's more than a footnote, that I think the next big test for *stare decisis* is not very far away at all. The *June Medical v. Gee* abortion case out of Louisiana, this was the case that emerged last Term in which the challengers to the law sought an emergency stay from the Supreme Court. This is involving Louisiana law that would require admitting privileges for abortion clinics that would, essentially, have the effect of shutting down many of these clinics, and there, in the emergency stay, in order to keep these clinics running, the Chief Justice joined the four more-liberal Justices in granting an emergency stay, pending a cert petition. That cert petition is now ripe for a decision this fall. So, if the Court, as expected, takes that case, then this will present the question of whether the Court should revisit its decision from a few Terms ago in *Whole Woman's Health* [*v. Hellerstedt*], and whether it is going to permit this restriction on abortion clinics or not.

Jose Garriga: Just now, you were talking about some of the role played by the two newest Justices, Justice Kavanaugh and Justice Gorsuch. Based on what's transpired over the last Term, some of which you've already discussed, what have we learned about their judicial tendencies? And, beyond them, who, if anyone, is positioning themselves to become the new Justice Kennedy swing voter?

Pratik Shah: Sure. I guess I'll start with a caveat here that we necessarily have limited data. I know we have the tendency to draw big conclusions from the first Term or second Term of a Justice, but, obviously, we have a very limited set to work from. Now, that said, there're a few things that we can say, just looking back at this Term with Justice Kavanaugh, to start with. He was the Justice most often in the majority, which is an interesting development for those who thought he might mark a strong shift towards the right in the Court. His opinions did not make, really, any big waves. There were no big sweeping pronouncements or ideologies announced in his opinions. I think maybe the most notable thing that Justice Kavanaugh wrote actually didn't come in a merits opinion at all, but came out of the Court's death penalty orders, in which case, there were two orders that came within close proximity last Term involving a request for stay of death penalties coming out of the states.

The first involved a Muslim prisoner who wanted to have his imam present for the execution. And state law had allowed a prisoner to have a Christian priest accompany him in the execution chamber, but they did not permit the imam to accompany the Muslim prisoner. So he sought an emergency stay, saying that would violate his religious rights. In that stay petition, that petition was denied by the Court by a 5-4 vote along the traditional conservative/liberal lines. Just weeks later, however, there was another petition, this time from a Buddhist prisoner seeking to have a Buddhist spiritual advisor accompany him into the execution chamber. This time, the result was different, and the difference was Justice Kavanaugh's vote. He now joined the four liberals in granting the stay of execution. Justice Kavanaugh issued a separate statement that, at some length, went to try to draw a distinction between the two cases.

So, there you saw, perhaps in the most significant way, where Justice Kavanaugh's vote made a big difference and in which he explained at length his thinking. So, I think it'll be interesting to see how that plays out in the future.

A couple of other notable things about Justice Kavanaugh's first Term, perhaps not so surprising, the Justice with whom he voted most often was the Chief Justice. Of course, that was not true in all cases. For example, the census decision being perhaps the most significant one. And I guess on a more surprising note, Justice Kavanaugh voted as often with Justice Breyer and Justice Kagan as he did with Justice Gorsuch.

So, I think that belies some of the notion that this would be a lockstep Court now, and, so, you see rules are still evolving, and I think there's a lot still to be learned.

Now, as to Justice Gorsuch, we now have a little bit more data. I tone interesting thing from this Term is that he was the Justice who was most often in the majority when it came to 5-4 decisions. I don't think anyone would describe Justice Gorsuch as a “swing Justice,” but it does appear that he's willing to swing on certain discrete issues.

We saw that this Term in Indian law cases. There were two Indian law cases this Term involving treaty construction in which he sided with the more-liberal Justices on the Court. And we've seen it in certain criminal law cases, where he's willing to side with the liberals, where he thinks the federal government has gone too far in criminalizing conduct. And there we see some similarities to Justice Scalia and what might be called a maverick-like streak in certain cases. So that, I think, became more evident this past Term. What that led to was essentially an even split of the 5-4 cases that went down with the traditional 5-4 liberal/conservative split. There were about the same number of cases that came down in each camp.

Another, I think, notable thing that we can say from Justice Gorsuch is that he's certainly going to be aggressive on revisiting precedent. So, in this way, he may be more like a Justice Thomas, if you want to draw comparisons, and we talked earlier about *Kiser*, *Gamble*, *Gundy*, all of which he wrote opinion suggesting that the Court should revisit precedent if and when it thinks that the earlier decision was incorrect.

Now as to your question about who is the new swing justice, I think all of this goes to say is that there isn't a single swing Justice that we can identify like an O'Connor or a Kennedy in prior Courts. I think, in some cases, it may be Justice Gorsuch going forward. As I just mentioned, in some cases, it may be the Chief Justice who acts as the median Justice, showing his institutionalist tendencies like we saw in the census case. And then, perhaps, in some cases, it may be Justice Kavanaugh, perhaps in death penalty cases based upon the stay votes that I had mentioned earlier. So, I think there's a lot to be learned still, and the Court is still finding itself with this new composition.

Jose Garriga: Thank you. A reminder, listeners, we're here today with Akin Gump Supreme Court and appellate practice co-head Pratik Shah, looking back at the Supreme Court's last Term and looking forward to its new one.

So, let's do that now. Let's look forward a bit. This Term looks to present a number of hot-button issues right from the start. Sexual orientation and transgender discrimination under Title VII. The Trump administration's wind-down of the DACA [*Deferred Action for Childhood Arrivals*] program. We have a Second Amendment case involving a New York City gun ban, among others. So, looking at these, any early observations or thoughts on where the Court might be headed in these cases?

Pratik Shah: Sure. Happy to share initial thoughts. Start with the Title VII case, which is actually a trio of cases, and they present the question whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of sex,” prohibits discrimination on the basis of sexual orientation and transgender status. So, a couple things to pay attention to here. First is, we have the Solicitor General now joining the employer in saying that Title VII does not cover that sort of discrimination. This is a flip in position from the EEOC's position in litigating these cases in the lower courts, where they've taken the opposite position.

Now, the arguments in this case are quite interesting. I think you see both sides jockeying for the mantle of textualism here. And by “textualism,” I mean the argument that their arguments are, in fact, more faithful to the plain text of the statute. It seems to be clear enough appeals to the more-conservative side of the Court, as each side is in search of that fifth vote. Here, you have the challengers saying that their argument is the more-faithful application of the plain text of Title VII, which says “because of sex,” and their argument is, quite literally, this is discrimination because of sex. That is, if a gay

man had been a woman attracted to a man, then, presumably, that employee would not have been fired. Or if a biological male presenting as a woman had been a female presenting as a woman, they also would not have been fired.

The government here, which has flipped position from the EEOC's position below—the EEOC had taken the side of the employees, but now the government is joining the employers—the government now, for its part, argued that, no, the actual purpose that Congress had in enacting Title VII and using the “because of” sex language was to bar treatment of one sex better than the other on a systematic basis. And they would say that discrimination based on sexual orientation and transgender status doesn't do that because the employee would be fired whether they are a man or a woman—a gay man or a gay woman would be fired either way.

I think the real question in this case is whether there is a fifth vote among the more-conservative Justices to join the four liberals in embracing a reading of Title VII that would encompass sexual orientation discrimination and transgender discrimination. And the question is, if there is a fifth Justice, who would that be? I think that is the million-dollar question here.

Jose Garriga: So, then following up, the next one we were looking at was this DACA question.

Pratik Shah: The DACA case presents a question whether the Department of Homeland Security's decision to terminate the DACA program is, one, judicially reviewable, and two, if so, whether that decision is lawful. In some ways, this case implicates many of the same themes and arguments from the census case that we had discussed, but with somewhat of a twist. Here, it's the government that, in some ways, is seeking to go beyond the contemporaneous agency explanation. In this case, at the time the government terminated the DACA program, the agency's explanation was focused almost exclusively on the notion that the DACA program was unlawful, and that was their reason for terminating it.

After that fact, the agency issued, once it had a new Secretary, some post-hoc reason that explained more fully both the legal rationale, but also gave some additional policy justification for terminating the DACA program. So, in some ways, while, in the census case, you had the government saying, "Let's stick to the contemporaneous agency decision," here, you have them seeking to expand the record, and then the opposite in terms of the challengers.

In addition to some of the same themes and arguments from the census case, it also implicates some of the themes from the travel ban, where the Solicitor General is making strong arguments about executive discretion when it comes to enforcement of the immigration laws here. So, really, I think this one may come down to how the Court views this case. Is it viewed through that executive discretion framing, or is it viewed more through a traditional APA [*Administrative Procedure Act*] confined-to-the-record review case?

Jose Garriga: And then, looking at the third one, if you want to talk about one of the great hot-button issues, guns, what are the facts of this matter, then?

Pratik Shah: So, the gun case that you mentioned comes out of the state of New York, New York City and involves a ban, really, on the transport of guns. There, if you have a permit, you can keep a gun in your primary residence in the city. But if you want to take that gun with you to, say, a second home that is outside of the city or a shooting range that is outside of the city, you are not permitted to do so. Or, at least, were not permitted to do so under existing law even if that gun had been locked in a lock box or had been separated away from its ammunition.

The reason I use the past tense is that New York has since changed that law. Both the city and state law has changed, which would, in many ways, render this dispute moot because it has now changed the law to allow that sort of transportation that gave rise to this case.

So, before anyone gets to the merits of that New York regulation, the real question is: Is there a case at all for the Supreme Court still to here? The parties have briefed that up, and that will be conferenced when the Court returns to session this October. The Court could go in all sorts of different ways. It could dismiss the case or vacate and remand it for resolution of the mootness issue. It could add the mootness question to the current case and tee that up for oral argument along with the merits.

So, there are a lot of different directions the Court could go here. Now, even if this case were to go away, there are currently four other gun petitions pending by my account, or Second Amendment-related petitions, waiting in the wings on different issues, including, I think, most recently, the state of Massachusetts ban on semiautomatic weapons.

The Court up until now had been quite reluctant to take Second Amendment cases that would address any of these quite-controversial issues. I think a lot of people attribute that to the fact that neither side knew how Justice Kennedy was inclined to vote. So, the Court had simply taken the view of declining cert rather than taking a risk on that. But now with the new composition of the Court, perhaps there are four Justices, at least in the cert pool, who may be more aggressive in bringing these issues back to the fore.

Jose Garriga: Thank you. So, finally, what takeaways can you offer listeners in the business community regarding this upcoming Term and the activity you see coming down the pike?

Pratik Shah: I point to a couple interesting cases. The first is actually a trio of cases that implicate public-private partnerships and the terms under which the government can repudiate its prior payment obligations. These cases in particular arise out of the Affordable Care Act. It's not the big sweeping challenge to the Affordable Care Act that's now looming in the 5th Circuit. But this case involves an early program within the Affordable Care Act called the risk corridors program. And what that program did was it made the government…essentially Congress said, when they enacted the Affordable Care Act, that, insurance companies, if you participate in these health care exchanges—which, of course, was a critical element to getting the Affordable Care Act off the ground—then the government will share in the risk. That is, if you end up losing lots of money above a certain percentage, then the government would make payments to reimburse you for part of those losses. And if you made a lot more money than profits beyond a certain percentage, then you would pay those in to the program.

Now, as it turned out, in the early years of the Affordable Care Act, essentially the first three years of the program, what happened was that insurance companies, when they set the premiums along the lines that the government had requested, they ended up, by and large, losing a lot of money, more than folks had predicted. The shortfall from the sums coming in versus the sums going out totaled some $12 billion.

Everyone agrees on both sides of this, both the insurance companies and the government, that the statute as written obligates the government to make those payments, the $12 billion in payments. But what happened after the passage of the statute and after the insurance companies had participated in these exchanges were appropriation riders. Appropriation riders were enacted in Congress that, essentially, limited the source of funds for making those payments. And the government's position is, look, what Congress did in those appropriation riders, by limiting the source of funds, made no funds available, and that is tantamount to a repeal of the original payment obligation.

The insurance companies say, “No, no, all along everyone knew this was not a budget-neutral program, and that if there were going to be shortfalls—and that was the whole point of this program—then the government would pay for it, and it can't repudiate or renege on those obligations through an after-the-fact appropriation rider that simply limits certain sorts of payments. That is not the clear and unequivocal repeal that you need in order for the government to backtrack on its payment obligations.”

So, that's the battleground that's been set here. It's under the provocative cloth of the Affordable Care Act, but it's really an issue that's of importance to the business community, more generally, and government contractors, in particular.

Jose Garriga: And, as I understand it, we are an amicus in this case, is that right?

Pratik Shah: Yes, Jose, I should mention out of interest of full disclosure that we represent America's Health Insurance Plans as an amicus supporting petitioner in this case.

Another case that I'll mention to keep an eye out on is a Clean Water Act case. It's out of the state of Hawaii. And, there, the question presented is whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source such as groundwater. I know that's a mouthful, but, just to take a step back, the Clean Water Act normally requires a permit anytime there's a discharge from a point source to a navigable water. So, let's say a pipe. A pipe emits a pollutant and that goes into a river, then that triggers the Clean Water Act. If you don't have a permit, you're liable.

The question here is about whether that discharge from the pipe has to be directly into the navigable water—the river or the ocean—or whether it still triggers Clean Water Act liability if that discharge, let's say, goes to groundwater, not a navigable water, and then that groundwater ultimately empties into the ocean, a navigable water. So, essentially, the question is, does the Clean Water Act require a direct discharge, or is it okay, does it still trigger liability, if that discharge is at least fairly traceable to a point source?

This obviously will have big implications for businesses and the environmental community, and, so, it's definitely shaping up to be probably the most significant environmental case of the Term, and, of course, as most things, there's a wrinkle here. I read just yesterday that, apparently, the petitioner, the county of Maui In Hawaii, the council there voted by a 5-4 vote, perhaps not coincidentally, to settle the case.

And, so, that raises a big question as to whether this case will even get to argument. I hear that there is some complications of whether the council even had authority to do that. So, I'm sure all of that will get sorted out in the coming weeks. And, worst case scenario, if this case does get removed from the calendar, there is another case that's being held that raises essentially the same question, and, so, it's likely, one way or another, that the Court will resolve this issue.

The last one I'll mention is not yet a case that's on the Court's calendar, but it's a cert petition that is pending. Again, out of full disclosure, I'll admit that we filed an amicus brief supporting this petition on behalf of the Retail Litigation Center, and this cert petition comes out of the 9th Circuit. It's filed by Domino’s, and it, essentially, poses the question of the applicability of the Americans with Disabilities Act, the ADA, to business websites.

And the facts of this case I think help distill the issue. It turns out if you order a pizza from Domino's, there's something on the order of 15 different ways to order a pizza. One of those ways is by using an app on your phone, but it turns out that this app for certain readers for the visually impaired will create errors. And, so, the suit was brought under the American with Disabilities Act saying that this app to order pizzas is not fully accessible.

And, so, the question is, really, whether the ADA applies to each and every app or website that a business that is a place of public accommodation has, or, really, is the test one of overall accessibility, that is, does the business simply have to overall provide accessibility to everyone, whether “each and every” means including each and every app is accessible or not?

There is confusion in the courts of appeals on this issue. There are really no Department of Justice regulations. Obviously, the ADA was enacted in an era before we had websites and apps, and, yet, there's no DOJ guidance on this issue. All there really is are private party guidelines that talk about what are the standards that businesses should employ to be ADA-compliant with respect to websites and the like. But that has resulted in a proliferation of both confusion and a whole lot of lawsuits under the ADA against all sorts of entities, not just retailers, but art galleries on their websites, colleges and universities, as well as even Beyoncé. So, we'll see if the Court wants to wade into this dispute and lend some clarity as to the scope of the ADA.

Jose Garriga: Terrific. Thank you. Listeners, you've been listening to Akin Gump Supreme Court and appellate practice co-head Pratik Shah. Thank you, Pratik, as always, for sharing your insights into where the Court has been and where it may be going.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, SoundCloud and Spotify.

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Until next time.