Ep. 39: SCOTUS Wrapup and Preview 2020

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

In a year marked by political turmoil and controversy unseen in decades, the U.S. Supreme Court and its workings have, unsurprisingly, been the object of intense media and public attention. October 2019 kicked off a Court Term that saw one hot-button issue after another addressed by the Justices, even through pandemic, quarantine and telephonic oral argument, and the October 2020 Term looks to feature another headline-making docket for the Nine.

Coming back to the show for this third annual SCOTUS look back and look ahead is Akin Gump Supreme Court and appellate practice co-head Pratik Shah. He'll be discussing the highlights from the last Term, what to look for next month's new Term and much else you'll want to know about the Court.

Welcome to the podcast.

Pratik, welcome back to the show. Always a pleasure to have you on. So, before we look ahead to the next Term, as I said, it's really hard not to look back at October 2019 Term, which was a barnburner. What were some of the big takeaways for you?

Pratik Shah: Well, thanks, Jose, for having me back, it's my pleasure. First and foremost, I think this Term made clear that this is the Roberts Court and not in name only. Many of us predicted that the Chief Justice would become the median Justice after the arrival of Justices Gorsuch and Kavanaugh, but I can't say that any of us predicted that the Chief Justice would assert that role so forcefully. Just from a numerical matter, the Chief Justice was in the majority in 58 of the 60 cases decided this Term, including in every 5-4 case but one. That makes the Chief Justice the Justice most often in the majority this Term, and it also makes this Term the Term in which he has most often been in the majority since he first joined the Court. So those are pretty remarkable numbers. It's not just the quantity or rate in which he was in the majority, but also the nature of the cases in which the Chief Justice quite apparently and manifestly moved the Court.

A couple of representative examples. First, the much-watched DACA case [*Department Of Homeland Security et al. v. Regents of the University of California et al.*]. I'll give one

caveat there: We did represent the American Historical Association and the Korematsu Center in support of the DACA recipients against the government. In that case, the Chief Justice joined the four more liberal members of the Court to overturn the Trump administration's rescission of DACA, which was, of course, the signature Obama administration protection for hundreds of thousands of undocumented people brought to the United States as children. People who had built lives here, gone to school, served in the military. But the Chief Justice's opinion was most noteworthy, not only for joining the liberals, of course, and essentially invalidating the rescission, but the manner in which the Chief Justice did that. It hearkens a lot back to the census case from last Term [*Dept. of Commerce et al. v. New York et al.*], which, of course, the Chief Justice again joined the four liberals in order to rebuke the Trump administration's addition of a citizenship question to the census.

Like in that case, the Chief Justice here relied on procedural grounds, that is, under the Administrative Procedure Act, saying that the government didn't follow the proper process in rescinding the DACA program. And so it's interesting: The Chief Justice is not disagreeing with the substance. In fact, all the parties here agreed that the administration could, in fact, rescind DACA if it did so properly and made the proper findings. But it simply didn't do that here.

The other example I would point you to is the June Medical case [*June Medical Services, L.L.C. et al. v. Russo*]. That is the abortion case out of Louisiana, in which the state enacted requirements on abortion providers to gain hospital privileges that the challengers argued effectively restricted access to abortion, if not eliminated it, within the state. There, the Chief Justice wrote the controlling opinion, which was a concurrence in the judgment apart from the four liberal members but concurring in the result, to cast the deciding vote invalidating those restrictions.

There, the Chief Justice relied on the principle of stare decisis, which, of course, is the principle that the Court should adhere to its precedents. And the Chief Justice wrote that, look, the Court had basically addressed and decided this very issue with a materially identical law coming out of Texas in the Whole Woman's Health case [*Whole Woman's Health et al. v. Hellerstedt et al.*]. And the Court should not come to a different outcome here.

I think the takeaway here from these cases, which really shows and underscores the Chief Justice as an institutionalist: First, protecting against the public perception that changes in composition of the Court can lead to diametrically opposite results. I think the June Medical case is a great example of that, adhering to stare decisis. The Court is not perceived as moving too quickly simply based on a composition of [*the*] Court to change its jurisprudence. And then, I think, the other aspect of the Chief Justice's jurisprudence, which really crystallized this Term, is essentially sending a message to the Trump administration that not anything goes. I think the Chief Justice views some of the things that the Trump administration says and does as a threat to the legitimacy of the federal judiciary. So I think you can look at the census case, and now the DACA case from this [*past*] Term, as pushing back on that.

Jose Garriga: Thank you. So, besides the Chief Justice, are there any other Justices who really stood out to you the last Term?

Pratik Shah: I think we continue to learn more about Justice Gorsuch. Not unlike his predecessor Justice Scalia, while certainly conservative, Justice Gorsuch has carved out a role as somewhat of a maverick on certain issues and in certain areas of the law. I think I would

say Justice Gorsuch is responsible for perhaps the two most surprising decisions of last Term. The first of being the landmark Title VII case [*Bostock v. Clayton County, Georgia*], in which Justice Gorsuch, along with the Chief Justice, joined the four more-liberal members of the Court to hold that Title VII's prohibition on employment discrimination based on sex extends to discrimination against gay and transsexual persons. And the most interesting thing, I think, about Justice Gorsuch's opinion is his reliance on textualism. Justice Gorsuch, of course, has become one of the foremost proponents of textualist interpretation, and here he invokes textualism, however, to reach a result which most people would view as liberal in content.

I think Justice Gorsuch viewed this as sticking to his principles, and wherever those principles lead him, that is where he will go. And based on his reading of the text of the statute, discrimination based on sex, when you discriminate against a gay person or a transsexual person, for example, in the case of a gay person, based upon who he or she is in a relationship with, well, if it was a person of the opposite sex, there wouldn't have been a problem. So I think Justice Gorsuch's conclusion was that textualism can only take him to this result. And now, interestingly, the other textualists on the Court—Justice Thomas, Justice Kavanaugh, Justice Alito—disagreed. Justice Alito's dissent, I think, was the most forceful, in which he said: "The Court's opinion is like a pirate ship: It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated."

I think what's most revealing here, to me, is that textualism, which is often billed as this theory that is much more objective and precise than other modes of interpretation, has led to these diametrically opposite conclusions from folks who subscribe to that same philosophy.

The other decision, I would point to from Justice Gorsuch is the McGirt case [*McGirt v. Oklahoma*]. That's a hugely important case in the area of Indian law. There, Justice Gorsuch again joined the four more-liberal members of the Court to recognize the Creek Indian reservation as spanning Tulsa and, in conjunction with other reservations, really most of Eastern Oklahoma. And Justice Gorsuch wrote, in coming to that conclusion, he observed this: "Many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking."

This is of piece with Justice Gorsuch's votes now in other Indian law cases since he has joined the Court. He has, more often than not, taken the tribe's side in various treaty disputes, construction disputes, other sorts of issues implicating Indian tribes. I think his arrival really does mark a reversal of fortunes for Indian tribes before the Supreme Court, which had largely been perceived as struggling to gain a toehold in the Court before his arrival. I would footnote that one exception to that is Justice Gorsuch's vote in the Gun Lake Tribe case, which I argued a couple of Terms ago, in which he ruled against the Tribe. But, fortunately, we did not need his vote because the tribe had already had a majority in our favor!

Now, I don't want to overstate things in this rendition of the Chief Justice and Justice Gorsuch. It happens to be that the examples that I've pointed out to you are all cases in which they join the more-liberal members of the Court. But let's remember: This is still a conservative Court, and I think you can look at the trio of religion cases this past Term as emblematic of that. There was the Espinoza free exercise clause case [*Espinoza et al. v. Montana Department of Revenue et al.*], which basically barred Montana's exclusion of religious schools from its scholarship program. There was the Little Sisters

of the Poor case [*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania et al.*], which permitted an expansion of the exception to the Affordable Care Act contraception mandate for religious employers and others with moral objections. And then there was the Our Lady of Guadalupe case [*Our Lady of Guadalupe School v. Morrissey-Berru*], which expanded the ministerial exception barring employment discrimination claims against Catholic school teachers. So, I think it's important to note: This is still a conservative Court despite some of these important wrinkles that we saw this [*past*] Term.

Jose Garriga: Thank you. That's interesting. Moving to, perhaps something a bit more of an operational issue, I alluded to this earlier, but to what extent did the coronavirus pandemic affect the functioning of the Court?

Pratik Shah: Well, it certainly had an impact on the Court's operations. Oral arguments, for example, were postponed in March and April. That's the first time that the Supreme Court did not hold oral arguments or canceled oral arguments since 1918, which, of course, was the year of the Spanish flu. But I think somewhat surprisingly to a lot of Court observers including myself was how quickly and effectively the Court pivoted. The Court is not really known as an institution for doing things on the fly, but it adjusted remarkably smoothly when it transitioned to oral arguments by telephone in May.

Now, that new telephone format did have some pros and cons. I think, on the positive side, it allowed for livestream audio, which we've never had for Supreme Court arguments. And now people across the country could tune in on any number of streaming media to listen to the arguments in real time, which I thought was a real positive change and, perhaps, is one that we may see stick around (who knows?) even when we return to normal in-person arguments.

From an advocate's standpoint, I'll say it was a big benefit in terms of being able to respond to the Justices' questions much more fully. In a normal oral argument, where all nine Justices are participating at the same time, often you are cut off immediately when you begin to respond to a question. In this new telephonic format, because the Court moved to sequential questioning where each Justice, in order of seniority after the Chief Justice, got his or her turn to ask questions, there were much fewer interruptions, which, again, from an advocate standpoint, has some benefits. And then I would say the other real positive is that we heard from Justice Thomas. Justice Thomas, of course, is well known not to ask questions during oral argument, and he's explained on a number of occasions that he doesn't ask questions because he thinks that there are too many questions already asked, and there's too much interruption of the advocates. But because of this new format, without the threat of constant interruptions to the advocate, he actually engaged in questioning. Some of his questioning, because he was second in the queue after the Chief Justice, often set the tone, in some ways, for the rest of the argument.

Now, there weren't all positives, despite the Court's remarkable ability to shift to these telephonic arguments. I think that the telephone arguments lent themselves to less-robust exchanges for the very same reason that I mentioned the advocates had a fuller opportunity to answer questions. There wasn't as much of the back and forth and crispness you get from that back and forth when you have more of a free-for-all argument. So, personally, I won't miss the telephonic arguments, and, hopefully, we can return to the good old days of in-person oral arguments before too long.

The other observation I'd make about the pandemic's effect is on opinions. This was the fewest number of opinions the Court has rendered since 1862, and, of course, there's no coincidence there: The Court did push off a number of cases in light of the pandemic, and the opinions extended later than normal. Normally, the Justices finish their work by the end of June in time for various boondoggles and 4th of July vacations. This Term, it extended into mid-July, second week of July, before all the opinions were issued. But, otherwise, the Court did function quite effectively and did its normal business.

Jose Garriga: Thank you. A reminder, listeners, we're here today with Akin Gump Supreme Court and appellate practice co-head Pratik Shah for our third annual SCOTUS look back and look ahead, so, looking ahead: Should we expect another barnburner of a Term like the last one?

Pratik Shah: Well, Jose, I would say not if the Justices can help it. I think they've taken a lighter load for the fall, just in terms of the volume of cases, and, with a few notable exceptions, the docket is also lighter on what you would call the blockbuster cases. Now, I think, that's attributable in part to the pandemic, not wanting to overload themselves. But, perhaps even more importantly, I think it has to do with the impending election. The Supreme Court doesn't like to be the center of attention generally, but I think particularly so in an election year. However, despite the Court's best efforts to have that lighter docket, I suspect that being the center of attention may be unavoidable this fall. I think the election itself, of course, could spawn some big battles and perhaps some of the biggest battles we've seen since *Bush v. Gore*.

Jose Garriga: Thank you. Let's talk about some of these exceptions you mentioned. What are the big cases you as an advocate and Court follower will be watching?

Pratik Shah: I think the biggest granted case so far would be the Affordable Care Act case. This is *California v. Texas*. And I should offer one caveat here: I represent AHIP (America's Health Insurance Plans), which is the national association of health plan providers, in support of the Affordable Care Act.

If that sounds familiar to you, it should: This is now the seventh time in eight years that the Affordable Care Act will be in front of the Court. And that dates back to the original *NFIB v. Sebelius* [*National Federation of Independent Business et al v. Sebelius*] decision from 2012, in which the Court famously upheld Obamacare's so-called "individual mandate." There, it was the Chief Justice joining the four more-liberal members to uphold the Act under the taxing power. Now we fast forward to 2017, when Congress enacted a single amendment to the Affordable Care Act that zeroed out the tax payment that one would owe should they choose to forego individual coverage.

No other change was made to the Affordable Care Act. In response to that amendment, Texas, joined by a number of other red states and other individuals, sues the Trump administration. DOJ defends the Affordable Care Act, only in part, essentially agreeing that the amendment made the individual mandate unconstitutional, but then disagreeing about the validity of other portions of the Affordable Care Act. And then California and other blue states step in to defend the Affordable Care Act as a whole.

The district court found the individual mandate provision unconstitutional, that it was no longer a tax, which, of course, was the basis on which it had been upheld in 2012, because Congress had zeroed out the tax payment. But, you might ask, who really cares if the individual mandate provision is declared unconstitutional if the tax payment had

been zeroed out anyway? That is, if there's no consequences for not buying insurance, well, does it really matter whether the mandate is unconstitutional or not?

The reason that it matters is because the district court did not stop at simply holding the individual mandate provision unconstitutional, but it also declared the entire rest of the Affordable Care Act invalid. And it did so because it said that Congress would not have enacted any other part of the Affordable Care Act without the individual mandate provision. Now, the Fifth Circuit in a divided decision affirmed on the [*un*]constitutionality of the individual mandate, but it vacated and remanded on the severability issue, that is, whether the rest of the Affordable Care Act should rise or fall with the individual mandate provision. In response, California and the House of Representatives, which intervened on the side of California, sought certiorari. And this Court granted cert and scheduled an oral argument for this November, coincidentally just a week after the election.

Now, there's a couple issues that are going to be in front of the Supreme Court. There's threshold standing issues about whether the challenge can be made in the first place. There's, of course, the question about the constitutionality of the individual mandate itself. Basically, the argument from California and the House being: Look, if the mandate is not really mandating anything because there's no longer any consequence from forgoing coverage, well, isn't Congress just providing a voluntary choice, which doesn't require any exercise of an enumerated power?

The third issue is severability, which I think is really where the rubber meets the road here. The question on severability—and severability, of course, is whether the rest of the Affordable Care Act rises and falls with the individual mandate. The best indication [*of Congress's intent*] is what Congress did in 2017, that is, it zeroed out the tax payment without repealing any other part of the Affordable Care Act, whether you're talking about the preexisting condition provisions that guarantee coverage to folks with preexisting conditions at reasonable rates, or the rest of the Affordable Care Act, which spans 900-plus pages and covers all sorts of provisions, most of which have nothing to do with the individual mandate at all.

I think there are two cases from the past Term that foreshadow the Court's thinking on these issues. Both involved severability, and in both cases, the Court strongly reaffirmed what it called a "strong presumption" of severability. That is, a strong presumption that the nonoffending portions of the statute should remain intact, even when an unconstitutional portion falls.

The last point I would make about this case is about the Department of Justice's role, which I think can be described as "irregular," perhaps. In litigating this case, there've been a number of things that have stood out from the government standpoint. First, from the outset, it did not defend the constitutionality of the individual mandate itself, which, of course, is a departure from the normal government duty to defend the constitutionality of federal laws. Beyond that, when it got to the Fifth Circuit, the Justice Department not only continued not to defend the constitutionality of the mandate, but it dropped any defense of the rest of the Affordable Care Act and, in fact, advocated against [*its validity*], just like Texas. At that point, a number of career lawyers from Department of Justice who had been involved in that case took themselves off to the case and even left the Justice Department altogether. Now, with the Supreme Court, I think when you look at the Solicitor General's brief, you'll see the notable omission of one of the most-respected and long-serving members in the Solicitor General's office, who has otherwise been involved in these Affordable Care Act cases. He does not appear on the brief in this case.

I would expect the Chief Justice to be front and center once again in these decisions. I think if there's any doubt about the viability of the Affordable Care Act as a whole, I think the pandemic provides an instructive lens. It seems difficult to imagine that the Court would invalidate the entire Affordable Care Act and leave millions of Americans at risk of losing health coverage during these turbulent times.

Jose Garriga: Thank you. That's very interesting, and certainly anything Obamacare-related is going to get a lot of attention from the press and certainly from members of the public. What other cases are you looking at for this upcoming Term that you think will take on interesting or pivotal topics?

Pratik Shah: Sure. I would mention *Fulton v. City of Philadelphia*. I'll provide another caveat there that we represent the Williams Institute as an amicus supporting the city in that case. But this case lies at the intersection of LGBT rights and religious objections, which, I think, really marks the next frontier of civil rights litigation in this area. Although the LGBT community has achieved massive gains over the last decade, so have religious exercise-based claims, and, so, this case really poses the question: When those two lines of jurisprudence collide, which one wins out?

Now, in this case, Philadelphia declined to renew its contract with Catholic Social Services because Catholic Social Services refused to consider same-sex couples as foster parents. Once that contract was terminated, and once the city made it a requirement that you not discriminate against potential foster parents based on the sexual orientation of those parents, Catholic Social Services argued that that termination violated its First Amendment free exercise rights. Among other things, it asked the Court to overrule Employment Division v Smith, which is a major Supreme Court decision [*Employment Division, Department of Human Resources of Oregon v. Smith*] holding that generally applicable laws, with an incidental burden on religion, [*don't*] violate the free exercise clause.

Now, if the Supreme Court did take up the invitation to revisit *Employment Division v. Smith*, that would be a sea change. It would mark an expansion, a significant expansion, of free exercise rights at the expense of antidiscrimination laws. But I think it's unclear that the Court would go that far and maybe even unlikely that the Court would go that far, even if the Court is otherwise receptive to the sort of religious exercise claims that are being brought on the facts here.

I think one window into a potential decision we got a few Terms ago in the Masterpiece Cakes decision [*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*]. That was the case involving the baker who owned a shop and refused to bake a wedding cake for a gay couple. There, the Court ruled in favor of the baker against the state, but it was a narrow opinion. It was a Justice Kennedy opinion—of course, who's no longer on the Court—but he had been joined by the Chief Justice, Justice Kagan and Justice Breyer, among others, to craft a narrow opinion that was focused on the facts of that case and hostility to religion in particular, rather than some of these broader principles.

So, I wouldn't be surprised if you again see [*the Court*] trying to find a moderate coalition involving the Chief Justice, Justice Kagan, Justice Breyer. Justice Kagan, in fact, wrote a separate opinion in Masterpiece Cakes that I wouldn't be surprised if it emerges, and she again emerges, as a leading voice on this issue.

The other case I would quickly mention is, for the business community in particular, the Alien Tort Statute case. These are entitled *Nestle v. Doe* and *Cargill v. Doe*. I'll provide one caveat that we represent The Coca-Cola Company as an amicus in this case. Over the last decade or so, the Court has erected barriers to suits under the Alien Tort Statute, which is a 1789 statute enacted originally to protect ambassadors and redress piracy on the high seas.

That statute has long lain dormant, but has [*been*] resurrected to bring suits in U.S. courts for human rights violations abroad. The Court has invoked the presumption against extraterritoriality to require that at least some relevant conduct have occurred in the United States, and, most recently, that foreign corporations cannot be held liable under the Alien Tort Statute. Now, in that case, it reserved the issue as to whether domestic corporations can be held liable under the statute, and that is now the question presented here. There's also a question about the cognizability of aiding and abetting liability against a domestic corporation for violations occurring abroad. I think this case has potential to significantly narrow even further Alien Tort Statute litigation if the Supreme Court accepts either theory. And the fact that the Supreme Court granted cert, I think, portents badly for the plaintiffs. It's hard to imagine that the Supreme Court granted cert here simply to maintain the status quo.

Jose Garriga: Thank you. One topic that you raised and one important case that you raised, goes back to the Bush-Gore campaigns, litigating the outcome of that election, and you mentioned the election we've got upcoming in less than two months. What sort of role could the Court play, do you think, in this year?

Pratik Shah: Well, Jose, the Court has already been playing a role, and this really has happened on what we would call "the shadow docket" of the Supreme Court. So these are not merits cases that everyone sees, where the Court has granted cert, you have full briefing, you have an oral argument and you come to a decision. The "shadow docket" are cases that really come to the Court in an emergency posture, [*in which*] the Court has to rule quickly, and often its ruling becomes decisive.

Now, by my count, there have already been a half-dozen times that the Supreme Court this summer has set aside federal district court orders, usually after a court of appeals has declined an emergency stay that would have altered state election rules in response to the pandemic. All six of those have involved challenges where the challenges have sought to expand ballot access in mostly Republican-governed states: Florida, Oregon, Idaho, Alabama, Texas and Wisconsin.

I think the pattern that's emerged is that the Supreme Court has a strong presumption in favor of preserving state election rules. At the same time, however, that has had the effect, I think the challengers would certainly say, of restricting ballot access. I would expect that we'll see many more such disputes in the run-up to the November election. But I think the real "keep you up at night" scenarios involve cases after the election and, perhaps, cases around issues about counting absentee ballots and the like, obviously all issues that have been thrust to the fore in light of the pandemic. One can easily imagine a *Bush v. Gore*-type situation, involving recounts and counting disputes. Or, God forbid, even worse scenarios where you have no concession, where there may be certification battles within states themselves and where the election is ultimately thrown to Congress, and even with scenarios such as Vice President Pence having to cast the deciding vote. These would all, of course, raise difficult questions that would test our institutions.

Now, I don't want to paint too dark of a scenario. Hopefully, these possibilities are remote. I think all of us, including the Justices in particular, are hoping for a quiet fall for the Supreme Court, but, if not, at least we'll have plenty to discuss when we do this again next September.

Jose Garriga: Well, I look forward to that. Thank you Pratik. Listeners, you've been listening to Akin Gump Supreme Court and appellate practice co-head Pratik Shah. Always great to have you on the show, Pratik, and this episode's always a highlight for listeners who are following the Court and who are following all matters Court-related.

And thank you, listeners, as always, 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, YouTube and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, Supreme Court matters, look for “Supreme Court and appellate” on the Experience or the Insights & News sections on akingump.com and take a moment to read Pratik's bio on the site as well.

Until next time.