
# Ep. 59: 2022 SCOTUS Wrapup and Preview

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

To say that the 2021 Supreme Court Term was momentous is the understatement of the year. The ground shifted, sureties were shattered, and assumptions upended by the decisions, opinions, and reactions. At times like this, you want to hear from the people who know the players and the field.

Today's guests you know from our annual SCOTUS wrapup and preview episodes, so I'm very happy to welcome back to the show today Pratik Shah, who heads our Supreme Court and appellate practice, and Aileen McGrath, senior counsel in that practice.

Welcome to the podcast.

Pratik, Aileen, welcome back to the show. What can I say, but let's dive right in.

Before we look at the individual cases decided by the Court, I thought it might be useful for listeners if we discussed a bit two concept pairings, if you will, that seem central to these discussions.

The first pairing is one we started discussing on our 2020 show and then continued last year, and that's stare decisis and precedent. The second pairing is originalism and historical tradition. So I'll ask you, please, if you could review these terms for our listeners and describe how and why they've been critical in this last session and how the Court's thinking on these concepts has evolved or perhaps, more aptly, intensified. So, Aileen, if I could ask you to lead us off talking about stare decisis.

**Aileen McGrath:** Sure. And stare decisis keeps coming up in our conversations, I think, because the composition of the Court has just changed so much in the last few years. We've gone from a Court with a real swing vote in Justice Kennedy, who voted with liberals often enough, especially on social issues, to a Court with a supermajority of reliably conservative votes. And, so, the result of that has been the expectation that many cases that were decided years ago by a more diverse Court might now be up for grabs. And I think there's no better example of that than *Dobbs* [*v. Jackson Women's Health*

*Organization*], which considered and, of course, reversed 50 years of precedent upholding the right to obtain an abortion.

And to back up a little bit for our listeners, stare decisis is the principle that the Court will follow its previous decisions unless certain heightened circumstances warrant overruling it—or at least that's the way that the Court has historically articulated stare decisis.

And what that usually means is that just because members of a subsequent Court might disagree with an earlier decision—and here, I think there was little doubt that a majority of the current Court disagreed with *Roe* [*v. Wade*]—that itself wouldn't warrant a different result. And typically, stare decisis looks at a number of factors separate and apart from whether the original case was correctly decided, and those include factors like whether the rule that case announced is workable, whether changes in factual understandings or relevant legal principles undermine that decision's foundation, whether reliance interests continue to support adhering to that precedent, even if the current Court wouldn't have decided it the same way in the first place. Those are all some of the factors that the Court usually looks at when it decides whether to overrule a case.

And here in *Dobbs*, although the Court addressed stare decisis, and it said that all of those factors supported reversal of *Roe v. Wade* and *Planned Parenthood v. Casey*, the bulk of its analysis was on the correctness of the decision. If you read that decision, you come away with the overwhelming sense that the Court was really primarily engaged on whether it would've decided *Roe* the same way 50 years ago and less engaged on the question of, even accepting that it wouldn't have decided *Roe* the same way, whether it should be overruled. And the impression is created that, once the Court decided that *Roe* was incorrectly decided, that the stare decisis ruling was pretty much preordained. And, honestly, the Court was pretty candid about this. In Justice Alito's decision for the majority, he said that *Roe* was egregiously wrong the day that it was decided and, therefore, that it's a decision that almost has to be overruled.

And, so, in this respect, I think what you see, at least on stare decisis grounds, and even though the Court didn't say this explicitly, the Court seemed to be applying an understanding of stare decisis that comes closer to the one that, historically, only Justice Thomas has ever articulated, which is that precedent is always up for grabs, that every time you have a case, you kind of look at it from first principles. That's never been an approach that the majority of the Court has taken, but it is something that it came close to doing here. And I think it's worth highlighting. I'll very quickly touch on three things that the Court didn't discuss in its stare decisis analysis.

One is the fact that it had actually already decided not only the underlying legal question, which is whether there's a constitutional right to an abortion, but also how stare decisis operates in this exact scenario. In *Planned Parenthood v. Casey*, the Court had decided and considered all of these stare decisis factors already. And, so, in *Dobbs*, the Court was not just overruling precedent on the foundational legal question, but it was also overruling precedent on the stare decisis question. And, yet, you don't really understand that from looking at the opinion itself, even though this was one of the arguments that the challengers to Mississippi's law made, which was that stare decisis operates with special force here given the multiple decisions, and there are dozens besides *Casey*, that have consistently reaffirmed *Roe* over the years.

Two other things that didn't get very much discussion in the Court's opinion: One is workability, which is a traditional factor that the Court looks at in deciding whether precedent should be overruled. The Court left out...or actually, I think the better way to

put it is the Court focused its workability analysis entirely on the “undue burden” question from *Planned Parenthood v. Casey*, which is a totally separate question from whether women have the right to an abortion before viability. There's virtually no authority for the suggestion that the viability line is unworkable. But the Court emphasized all of its cases really focusing on the undue burden question, but none of those suggest that there's anything unworkable about *Roe*'s central holding, which is a pre-viability right to an abortion, and that piece of the workability analysis is really entirely absent from the Court's opinion.

And finally, reliance is another hallmark of stare decisis. And here, in saying why women don't have a reliance interest in *Roe*'s ongoing vitality, the Court focused on the fact that abortion is an "unplanned event." And for that reason, the Court says there's no reason that women can't take "immediate account," which is another quote, of any restoration of state authority in this area. But the Court said nothing about the many other circumstances that, again, advocates really emphasized before the Court in which abortion is not a planned event. That includes cases like rape or incest, cases in which women have abortions to protect their own health, cases where women have an abortion because the fetus isn't developing normally—a whole swath of areas where reliance interests are very strong, and yet the Court said pretty much nothing about them.

And, so, to bring the stare decisis analysis back to the question of how to situate it in this Term, I think that *Dobbs* suggests a new view of stare decisis that's different from what we've long expected in the Roberts Court. I mean, we've seen that the Roberts Court has not been shy to overrule precedent. It's certainly not been shy to cut back and erode existing precedent, but what it has hesitated doing, at least under the Chief's leadership, is reaching out to overrule cases, reaching out to aggressively reconsider precedent. And that's something that we see in *Dobbs*, and something that we'll also talk about, I think, as we discuss some of the other cases in the Term. And whether that view gets more traction, I think, is something we'll continue to learn more about, particularly in the next Term, because stare decisis will continue to be front and center in cases set for argument in the fall.

And I think the best example is the Harvard/UNC affirmative action cases that are expressly asking the Court to overrule *Grutter v. Bollinger*, which has given universities, for almost a quarter of a century, constitutional authority to consider race as part of a holistic admissions process. Challengers are very candidly asking the Court to reconsider that precedent and overrule it. And I think that odds are quite likely that the Court will, at a minimum, chip away at what it said in *Grutter* 25 years ago. But I think the real question will be how explicitly it does that. Does it pursue the approach that it did in *Dobbs*--aggressively overruling that precedent--or does it leave some aspects of it in place, which is more of the hallmark Roberts approach to these kinds of cases, while still effectively gutting it in practice?

**Jose Garriga:** Thank you, Aileen. Pratik, then. Originalism. What do you think about that?

**Pratik Shah:** Sure, Jose. Good to be back on the show. I think the discussion of originalism this Term really goes hand in hand with Aileen's points about stare decisis because employing originalism in the full-throated form that we've seen this Term will sometimes, if not often, require giving short shrift to precedent. Obviously, originalism is not new, but I don't think we've seen it pressed by a robust five-Justice majority to the extent we've seen in the big decisions this Term. We've seen the Justices elevate constitutional text and history to the exclusion of other established doctrines. And I think Aileen's discussion of *Dobbs* illustrates the point well. Justice Alito's opinion is all about first principles from an

originalist viewpoint, adhering to the constitutional text as informed by history at the time of adoption, no matter the Court's prior analysis.

And I think, beyond *Dobbs*, the other high-profile case involving the Second Amendment, *New York Rifle Association v. Bruen*, is another case in point. Justice Thomas wrote that opinion for the majority of the Court, another 6-3 decision. And Justice Thomas starts with the plain text of the Second Amendment, relying on how it was interpreted in [*District of Columbia v.*] *Heller*, the prior big Second Amendment decision, and uses the plain text to say, "Look: Under the Second Amendment, it covers an individual right to possess firearms for self-defense purposes." And then he reasons, when the Second Amendment text covers an individual's conduct, as it does for self-defense in the Court's view, the government must demonstrate that any regulation is consistent with the nation's historical tradition of firearm regulation at the founding. That is a very originalist framework in which to be analyzing that individual right.

Critically, the Court rejects the second step of what has been the existing Second Amendment framework, which is, once you determine a right is protected by the Second Amendment, you look at the means-end scrutiny. That's common in constitutional adjudication throughout various provisions of the Constitution, more commonly known as heightened scrutiny. And the Court typically applies heightened scrutiny to determine if there's a sufficient governmental interest to overcome the burden on the constitutional interest at stake.

So, in this case, it would be: is there a sufficient governmental interest to overcome the burden on that Second Amendment protected interest? But as Justice Thomas puts it, two steps is "one step too many." And, so, he would simply stop and did simply stop. The Court has simply stopped at that first step, that is, does the text of the Second Amendment cover it, and if so, is the regulation consistent with the history of regulation at the time of the founding? And if it's not, case over. It doesn't matter what the competing governmental interest is. That is, I think, a framework-shifting sort of view. And that's one that really is all-in on an originalist framework.

At the same time, interestingly, the majority of the Court holds that that original meaning developed at the founding, that can apply to new circumstances. For example, it says the arms that were around in the 18th century, for example, are not the only arms that are going to be protected by the Second Amendment. So, while adhering to an originalist framework, they do, at times, allow for flexibility to new circumstances.

Now, as you can imagine, the dissent saw things differently. Justice Breyer, writing for the dissent, pointed to the tragic rise in gun violence plaguing the nation in a manner that the framers certainly could not have contemplated. And Justice Breyer, of course, has long favored a more-nuanced approach that takes into consideration practical consequences in construing the contours of the Constitution. But the majority of this Court has plainly rejected that view.

So, I think you look at *Dobbs*, you look at the guns case, you look at the religion cases that I think we're going to talk a little bit more about later, I think those are all good examples of where we now have at least five Justices of this Court, and sometimes six, willing to put aside existing doctrine in favor of a more aggressive assertion of originalism. So, I think my takeaway on originalism is that it has reached a new height this Term, and it remains to be seen whether that is a pinnacle, or whether there is more to come.

**Jose Garriga:** Thank you both. That's fascinating. So, in discussing stare decisis and originalism, you mentioned at least two big cases, *Dobbs* and *Bruen*, that are hugely divisive, politically and socially. So, Aileen, was the Court's decision to grant cert on these particular issues basically a numbers game based on the number of conservative Justices now on the bench, or were there actually valid and urgent jurisprudential issues at play?

**Aileen McGrath:** So Jose, I would say that the answer is that it's a combination, and the answer looks a little different as to each of those issues, but, certainly, as to each of them, numbers and votes played an enormous role. I think that's certainly true when it comes to abortion. I mean, the Court, over the last 20 years or so, has been taking abortion cases, but prior to the Court being reconstituted in the last few years, the Court didn't seem to have an appetite to take cases that really struck right at the heart of *Roe*. And, certainly, I think the reason that it took up a case like *Dobbs* when it did reflects that there were the votes to do that, perhaps for the first time.

But at the same time, it goes hand in hand with the valid and urgent jurisprudential issues question, because I think there was a significant push, especially among red states, among anti-abortion advocates, to try to get these issues up to the Court. And, so, what you saw, particularly once there was a public perception that the votes existed, was legislatures in red states testing *Roe*, coming up with laws and enacting laws that would test whether *Roe* continued to be good law. And, so, there was a jurisprudential need, but it was a little bit, I might say a manufactured one, but what I mean by that is that there was a momentum in the public sphere to try to get *Roe* back before the Court because people perceived correctly that there were enough votes to overrule *Roe* where there hadn't been before.

On guns, I think it's a little bit of a different story. I think that the fact that the Court took a guns case for the first time in many years does show that there are now votes to really start to probe what the Second Amendment means. And, again, much like abortion, the Court had really not been taking guns cases for years. But unlike abortion, there really was a valid jurisprudential need that had nothing to do with public perceptions or the desire to elevate Second Amendment issues to the courts. And I think that comes from the fact that cities and states have really been struggling with what the Second Amendment means basically since *Heller* was decided. And there has been abundant litigation in the district courts and in the circuit courts about whether various kinds of state regulations or local regulations are lawful under *Heller*. But for many years, it seemed like the Court wasn't really interested in putting meat on the bones of the Second Amendment until now.

And one thing that's interesting about the way that the Court resolved *Bruen* that I'll say that ties back a little bit to what Pratik was talking about is that it wasn't clear to me initially that the Court would take *Bruen* and use it to really issue such a sweeping decision because there were narrower ways that decision could have come out. *Bruen* challenged a New York state licensing regime that the Court could have very easily struck down on different grounds. The Court could have said this licensing regime gives standardless discretion. The Court didn't need to weigh in on the levels of scrutiny to decide that that was a problem with the licensing regime here.

But instead, the Court obviously, especially Justice Thomas, was interested in taking the case, not ruling on a narrow ground, but, instead, laying out the entire methodology for Second Amendment cases going forward, even though that methodology is entirely different from what courts of appeals have been applying in the 10 years-plus since *Heller* has been decided. And, so, it suggests to me that there was, at least among some

members of the Court, certainly a desire to weigh in in a really sweeping way on these issues.

**Pratik Shah:** Yeah, I would just add there, I agree with Aileen. There was a lot of pent-up demand on the Second Amendment front, and, really, the fulcrum was Justice Kennedy. He is the reason why the Court did not grant any Second Amendment cases post-*Heller* because, at that point, with Justice Kennedy holding the deciding vote, the other four conservatives, I think were, quite candidly, too nervous to be granting a Second Amendment case because they didn't know where Justice Kennedy would come out on some of the less-extreme state regulations. At the same time, the four liberals certainly didn't want to grant a Second Amendment case and allow for further limitation on state and local regulations.

So what happened once Justice Kennedy was replaced by Justice Kavanaugh, suddenly you had a constituency in the Court that no longer had that reluctance. They started granting. And while Aileen's exactly right, this case could have gone in multiple directions, narrowly or broadly, it was clear New York's law was going to go down. The question was only how broadly or how narrowly. And now we know: broadly. And remember, this is the second Second Amendment case that this new Court has taken post-Justice Kennedy. They tried to even do it last Term, but that case was dismissed, I think, as we discussed on the podcast last time, dismissed as improvidently granted. This case, of course, they got to the merits, and they took advantage of it.

**Jose Garriga:** Yes. Thank you. And let me stick with you, Pratik, for the follow-up here. So, you had already quoted Justice Thomas, and here's another quote. This is from his concurring opinion in *Dobbs* that certainly was on a lot of screens and a lot of social media after the opinion was issued. And it goes like this: "For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." What does this mean in practice?

**Pratik Shah:** So analytically speaking, I think those precedents are fair game, as the dissent makes clear. There's likely no meaningful distinction to be drawn in terms of the historical inquiry in Justice Alito's majority opinion for those other fundamental rights cases at the time of the 14th Amendment's adoption. It's hard to find, for example, a deep historical tradition of gay marriage in 1868. And if you're looking at it at that level of specificity, which is what the majority opinion seems to indicate in *Dobbs*, I think the dissent is quite clear to sound the alarm that, as a matter of pure legal logic, those precedents become vulnerable.

Now, practically speaking, however, I think, is another matter. Query whether there is a fifth vote for revisiting and reversing those precedents governing contraception, same-sex intimacy, or marriage equality. The answer, in my view, is probably not. Assuming Justice Alito backtracks from his majority opinion, which I believe is quite likely based on his prior statements on his views on *Obergefell*, and that Justice Barrett and Justice Gorsuch come along—I don't think either of those is a sure thing—you would still need the Chief Justice or Justice Kavanaugh. And I just don't see that happening. So without a further change in the Court's composition that would move it even further to the right, I don't believe there's any practical risks to those precedents right now. So, I think marriage equality is safe. I think *Lawrence v. Texas* safe. I think contraception, at least in the mainstream sense, is safe.

I think more likely, what you're going to might see happen is perhaps some aggressive lower courts making waves, making suggestions. I would think that, at the court of

appeals level, given that multiple Justices, including in the majority opinion, have made clear that those other cases remain good law, that a court of appeals won't go down that road. And, so, I think the most likely outcome in the foreseeable future, again, absent some change in composition in the Court that would take it further to the right and provide a fifth vote, I think the more likely outcome is that the Court simply denies cert in the event that you do see a state trying to challenge one of these laws, and then the Court sort of stays out of it. So, that's my assessment of where those other fundamental rights cases stand right now.

**Jose Garriga:** Thank you. Aileen, so, reference, I think, was made earlier to these, but the other notable set of socially divisive cases are the religion cases. *Kennedy* and *Carson*. So, could you describe how the decisions in those cases fit into the larger narrative that you and Pratik have sketched out regarding the Court's direction?

**Aileen McGrath:** Sure. I mean, those cases are *Carson v. Makin* and *Kennedy v. Bremerton School District*. Both are 6-3 cases. They're both about religion; in particular, about the interaction between the two religion clauses in the Constitution, the Free Exercise and the Establishment Clause. And besides showing that the Court has an ongoing appetite to tackle socially divisive issues, I think they also provide a really interesting study in contrast in the current Roberts Court's approach to judicial precedent. Both cases pretty dramatically move in the direction of giving religion a greater place in public life and forbidding anything that appears to be discrimination against religion, especially Christian religion. And this has been a signature effort of the Roberts Court for years, led by the Chief Justice in particular. But the way that the two decisions get to that result shows a contrast in approaches that, I think, ties back to questions about stare decisis and originalism and the themes that pervade so many of the decisions this Term.

And to start with *Kennedy v. Bremerton*, Kennedy was a public high school football coach who had a practice of praying on the 50-yard line after games. And in his version of events, he said that he offered that prayer quietly without encouraging students to join him, without creating a spectacle, that he did it during a pause in the game where he wasn't really on duty, and the school district asked him to stop but suspended him after he refused to. And he claimed a Free Exercise violation. Now, Justice Gorsuch wrote the majority opinion, and he, writing for the Court, accepted that version of events, and as I'll explain in a moment, that version of events is not the version that other members of the Court saw when it was presented in the briefing. But assuming that is the version of events that happened, the way that the case unfolded is pretty remarkable, because if it is true, as Justice Gorsuch described them, then this actually could have been a very easy case.

Existing Free Exercise precedent permits people like school employees to offer quiet prayers. Justice Gorsuch analogized the situation to someone bowing their head to pray before they eat lunch in the cafeteria. No one seriously contended that the Establishment Clause prevents public school employees from doing something like that. But even though the Court presented the facts as falling into that category, this Court still used this case as a springboard to, explicitly or otherwise, overrule decades of Establishment Clause precedent, most notably *Lemon v. Kurtzman*, which is a longstanding Establishment Clause case that is understood to prevent governments from becoming excessively entangled in religion.

*Lemon* has been called into question by a number of the conservative Justices over the years but still remained good law, or at least everyone thought that, until, in *Kennedy*, Justice Gorsuch said, well, *Lemon* has been overruled. So, *Lemon* doesn't provide any

cover for the school district here because that case is no longer good law. And, so, that is clear post-*Kennedy*, which is that the *Lemon* test is no longer applicable to Establishment Clause claims. The Court also slightly less explicitly eroded cases prohibiting school prayer. The Court didn't name that as what it was doing, but implicitly, it certainly did, to the extent that Justice Gorsuch said that students need to learn to tolerate speech and prayer as part of learning how to live in a pluralistic society. That quote is directly at odds with cases saying that prayer doesn't belong in public schools. And, so, what's interesting about all of this is that, if you agree with Justice Gorsuch's version of the facts, then none of this analysis was necessary at all.

But yet the Court seemed inclined to take this case and use it as a springboard to issue a sweeping decision. And, of course, a footnote, a pretty big footnote, to all of this is that Justice Sotomayor's dissent just dismantles whether that factual assumption was true, complete with pictures of exactly what these prayers looked like, with dozens of people kneeling around Mr. Kennedy and what have you. But at the end of the day, I think the fact that the Court, the majority opinion, just really said very little about that and described a version of events that is fairly unremarkable is interesting in the sense that it used it to announce basically a new Establishment Clause methodology.

And you can contrast that approach somewhat with the methodology that the Court used in *Carson v. Makin*, which is another religious liberty case, but one where the Chief, instead, wrote for a 6-3 Court. *Carson* is about a Maine law. Maine has a constitutional provision that requires that all students receive a free public education. But Maine has a unique geography with many rural areas that don't have funding to support public schools, and, so, Maine enacted a law providing that the state will give citizens tuition vouchers that can be used at private schools to replace that public education, but it limited those vouchers to "non-sectarian schools," carving out not necessarily religiously affiliated schools, but schools that actually provide religious instruction.

And Justice Roberts, the Chief, writing for the Court, said that this program violates the Free Exercise clause because it discriminates against religion. And in a kind of classic Chief Justice Roberts line of reasoning, he said that this result flows directly from two decisions from the past several years. One is a case called *Trinity Lutheran* [*Church of Columbia v. Comer*], where the Court struck down a Missouri program that offered grants to organizations that refurbished playgrounds but denied them to religious organizations. Another Roberts decision, *Espinoza v. Montana* [*Dept. of Revenue*], struck down a Montana tax credit system that gave a benefit to donors who sponsored private school tuition scholarships but not religious school scholarships, but there, the exemption turned on religious identity, not on religious exercise.

And until now, the Court had never actually said, until *Carson*, that a state is obligated to directly fund religious activity. And, so, the effect of the Court's decision in *Carson* is to dramatically expand a state's obligation. For the first time, it says that a state, when it provides funding to public schools, is required, as a matter of the Constitution, to provide the same funding to religious schools, which is something that no decision had ever embraced. But in a classic Justice Roberts maneuver, he stacked precedent upon precedent in a sort of quiet and understated way that nonetheless moves the law in a pretty dramatic direction. And, so, I think the question going forward to me is not whether religious liberty cases will still come out in the same way, still gradually moving in the direction of giving religion more and more of a role in public life, but instead which of those two approaches the Court chooses.

And one case that will probably shed some light on this, although it's not specifically a religious liberty case, it's a free speech case, is *303 Creative v. Elenis*, which is a case that will be argued in the fall. It's challenging Colorado's public accommodations law for not creating First Amendment exemptions based on religious beliefs. *303 Creative* shows, again, to bring it back to the first part of my answer, that the Court continues to have an appetite to wade into these socially divisive issues, and we will continue to see more about how aggressive the Court is willing to be in the methodology that it employs to resolve them.

**Jose Garriga:** Thank you, Aileen. A reminder, listeners, we're here today with Akin Gump Supreme Court and appellate practice head Pratik Shah and senior counsel Aileen McGrath discussing the momentous 2021 Supreme Court Term.

So, let's turn to the business cases now, and I know that's something that's always of interest to our listeners in the business community. And Pratik, if I could ask you to lead off on this, can you talk a bit about *West Virginia v. EPA*, which is the climate change case, and its impact more broadly?

**Pratik Shah:** Sure, Jose, and I think you're right to start with that case because I do think it is the biggest business case of this past term. The newspaper headlines about this case are largely about the limitation on EPA's authority to enact certain climate change rules regarding transition of power plants to cleaner energy—understandably so, not only because of the importance of climate change, but also because of the Court's somewhat surprising decision to hear the case despite the lack of a ripe rule from the Biden administration.

But the even bigger story, I think, is the potential implications for agency rulemaking across the regulatory landscape. For the first time in a majority opinion—and this was a 6-3 majority opinion written by the Chief Justice—the Court explicitly invokes the so-called “major questions” doctrine. That doctrine requires Congress to speak clearly when authorizing agency action in exceptional cases involving significant economic or political significance, particularly where the agency action is novel.

It's grounded both in separation of powers principles and, according to the Chief Justice, "a practical understanding of legislative intent." Now, the ramifications of the Court's holding in the *West Virginia v. EPA* case are likely to extend far beyond environmental regulations, as the doctrine could well play a role in major rulemakings in a number of fields, including international trade, securities laws, immigration, and health care. Indeed, originating from the Court's shadow docket, the Court, in just the past term or two, has struck down other regulatory actions emanating from the pandemic, the CDC eviction moratorium, for example, and the OSHA vaccine mandate.

Now, although those majority opinions in those cases did not explicitly invoke the major questions doctrine, that was certainly the reasoning that is infused throughout those decisions and separate opinions. And, so, I think what you're seeing in *West Virginia v. EPA* is kind of a consolidation of recent decisions that have been skeptical about agency action in areas that are particularly sensitive where Congress may have tried to act, has not been able to garner a majority to act, and I think it's the Court laying down a marker that it's going to have a particularly skeptical eye towards those sort of more provocative agency rulemakings.

**Jose Garriga:** Thank you. Moving to another one of the big business cases, well, Aileen and labor and employment counsel Jonathan Slowik just recorded a whole *OnAir* episode on *Viking*

*River* [*Cruises v. Moriana*], which is an arbitration case that came before the Court with huge implications for California litigation. So I'll, of course, encourage listeners to find that and listen to it because it's a very good episode, but Aileen, as our resident West Coast appellate guru, what does the Court's decision in *Viking River* mean for client-facing Private Attorneys General Act claims in the state of California?

**Aileen McGrath:** Well, not withstanding our two podcasts on *Viking River*, you will find *Viking River* mentioned in perhaps zero of the front-page headlines that Pratik mentioned with respect to the West Virginia case, but it's an incredibly consequential decision, especially for California employers. But it also sends an important message more broadly, particularly about the Court's arbitration jurisprudence.

*Viking River* was expected to be a hugely significant win for defendant employers who were opposing PAGA claims. And it did turn out to be significant, but not a sweeping as initially hoped. And to back up, PAGA is the California Private Attorneys General Act, which allows "aggrieved employees" to sue their employers for violations of the California Labor Code, and such an employee can also raise claims on behalf of any other employees, including employees who might have suffered from different labor code violations. And the idea behind PAGA is that this helps fill in gaps in state labor code enforcement and reflecting that, the state receives the lion's share of any civil penalties that are awarded in these cases.

And, so, the California Supreme Court had said that because PAGA functions in this way, it allows individuals to represent others, it allows them to represent the state, individual employees can't waive the right to bring those claims in court. And, so, the question in *Viking River* was whether this arbitration-specific rule was preempted by the Federal Arbitration Act. And one way the Court could have resolved this case, which, frankly, was the way that, I think, everyone expected, would've been to say that arbitration is ill-suited to resolving these types of claims raised on behalf of others, that parties to an arbitration agreement can therefore agree to waive the right to pursue those claims in any forum, and finally, that the FAA preempts any state law rules that interfere with those kinds of agreements. And that reasoning would've been entirely consistent, flowed directly from the Court's FAA jurisprudence over the last decade or so, which has consistently held that this exact reasoning applies to class actions and other representative actions in cases like *AT&T v. Concepcion* and *Epic Systems v. Lewis*, which were all 5-4 decisions ruling in favor of the employer.

And, so, it was surprising alone that the Court here issued an 8-1 decision that Justice Alito wrote, and it was also surprising that the Supreme Court did not apply that reasoning that I just described. And in fact, the Court stopped far short of the holding that everyone expected. In fact, the Court distinguished PAGA claims from class actions despite their many shared features. The Court said nothing about whether the agglomeration of many claims in a single proceeding is incompatible with arbitration. In this respect, the Court seemed to walk back, if not cabin, some of its class action FAA cases. And, therefore, the Court said nothing in the FAA prohibits waivers of the right to assert these class...or actually, I should say, prohibits a rule that prevents the enforcement of waivers of the right to assert these representative claims.

And, so, the Court held that the challenger’s representative claims had to be dismissed, but it decided that question not as a matter of FAA preemption, but, instead, on the ground that she had the authority to agree to litigate her individual claim in arbitration, and once that individual claim went to arbitration, she lacked statutory standing, as a

matter of state law, to continue to pursue her PAGA claim in court. But the question that Justice Sotomayor raised in her concurrence is: What if the Court is wrong about that statutory standing question as a matter of California law? What if California courts disagree and think that such an employee continues to have representative standing? Doesn't the whole architecture of this decision fall apart?

So, that's where the action, I think, will be going forward. There is this major potential loophole in the decision that will continue to be litigated in the lower courts. And, so, this case is very important for California employers because it is a victory with perhaps an uncertain scope, but it's also important for employers generally because the fact that the Court did not go as far as it historically has before the current composition of the Court took hold might suggest that there is a shift in the newly constituted Court in its attitude towards arbitration and, specifically, FAA preemption.

And there are also other indications on that front as well. *Viking River* was only one of several arbitration cases the Court considered this Term. In each of those other cases, the Court also reached a somewhat unexpected, more plaintiff-friendly result. *Morgan v. Sundance*, the Court held that the waiver of the right to compel arbitration can't be conditioned on a showing of prejudice to the non-moving party. What's more interesting in this case is that the Court backed away from language that pervaded its arbitration cases in the past about the presumption in favor of arbitrability.

Similarly, *Southwest Airlines v. Saxon*, the Court rejected a narrow definition of the class of workers who are exempted from the FAA, and the Court, instead, performed a historical textual analysis that maybe surprisingly resulted in a somewhat narrower application of the FAA. And, so, I don't know that these cases suggest that the Court is suddenly less friendly, as a categorical matter, to business interests in arbitration cases, but it definitely does suggest that the results in those cases might be less predictable than they once were and that the Chief Justice's perspective on these issues, who usually drove the results in many of the cases that I've described, might be less dominant than it once was.

**Jose Garriga:** Thank you. Chief Justice Roberts has been mentioned by name by both of you throughout our conversation today. And taking a step back, he's been characterized, through the end of this Term, in the media as really having lost control of the Court that bears his name. Pratik, do you think that's a fair assessment?

**Pratik Shah:** Well, I think it's more complicated than that. To be sure, the Chief Justice is now less able to dictate outcomes than when there were four more-liberal justices on the Court. Two Terms ago, for example, the media had been characterizing him as the most powerful Chief Justice since John Marshall, largely because he was not only the Chief Justice, but also had become the swing or median vote. He could slow things down or even stop the conservative majority altogether by joining in full or in part or even threatening to join the other four more-liberal Justices. Now, whether you look many years back to the Affordable Care Act decision or other more-recent cases, the Chief Justice was able to act on his institutionalist impulse, something I know we've talked about in past podcasts at great length, and was able to garner enough votes to effectuate that institutionalist impulse to move in a less-conservative direction than he might otherwise prefer if he were just another Justice voting his preferred outcome.

That's no longer the case. You can contrast the *June Medical Services* [*v. Russo*] decision from just two years ago. That was a 2020 decision in which he joined the four more-liberal justices in striking down an abortion restriction, largely in the Chief Justice's

separate opinion, on stare decisis grounds. And you can obviously contrast that with *Dobbs*, which we've talked about at length. In the case with the highest stakes of his tenure to date, the Chief Justice could not peel off any of the other five conservative justices for his more incremental approach. You saw similar things, I think, in the shadow docket, which we've talked about in prior years as well, where he has been more often in the dissent with the three remaining liberal Justices. It is rather Justice Kavanaugh and, to a lesser extent, Justice Barrett that has emerged as the median Justice on the more-provocative issues.

Now, that said, the Chief Justice was still in the majority as much as any Justice this term. In a remarkable 95 percent of the cases, the Chief Justice was in the majority, tied with Justice Kavanaugh. That's the highest percentage, more than any other Justice. As Chief Justice, he is able to put himself in the majority to become that sixth vote and keep the pen because, as Chief Justice, he gets to assign the opinions when he's in the majority. He can keep the pen and help shape the contours of the decision. Indeed, the Chief Justice wrote that *West Virginia v. EPA* decision that I just talked about. He wrote the "Remain in Mexico" decision [*Biden v. Texas*] this Term, in which he was joined by Justice Kavanaugh and the three more-liberal justices. And, so, while not to the extent before, he doesn't exercise that same level of control where I think he can dictate the outcome, I do think it's an overstatement to say that the Chief Justice has lost all influence.

**Jose Garriga:** Thank you. To close, then, Justice Breyer has been mentioned, and you both clerked for him, as I think we discussed last year in our episode. And now, on the occasion of his retirement, could I ask you all to share any thoughts on his legacy, and, perhaps more importantly, the impact on the Court of his departure? Aileen, if I could ask you to lead off on that.

**Aileen McGrath:** Sure. I think, if you read the headlines about Justice Breyer, one of the terms that you'll see used about him is that he's a consensus builder. I would put it maybe a little bit differently. I would call Justice Breyer a listener. He was someone and is someone who has strongly held deep views of his own, but despite that, was always interested in hearing what other people had to say about something that was on his mind. And that extended to other Justices on the Court, that extended to his own clerks, that extended to other Justices' clerks, it extended to your friend from college who was visiting the Court for a tour of the building while you were a clerk. He wanted to hear from everyone and was unique, I think, among the Justices in that way when I was there.

And this sense of listening and open-mindedness, I think, is something you see in his own jurisprudence. I think it's reflected in the fact that he, perhaps more so than any other Justice, really took seriously what an agency had to say about a problem, what Congress or what a legislature had to say about a problem. He trusted experts and trusted that people who spent their entire careers thinking about things had something useful that he could learn about from them.

But I think, more importantly, you saw this in his relationships with other Justices. I think that Justice Breyer was really at the center of an effort to keep the Court together, to keep the Court cohesive. And he worked very hard to forge and maintain those relationships among other chambers by having an open dialogue and listening to and taking seriously what other Justices thought. And I think his retirement, coming as it is at a time where we are seeing, even outside the Court, obvious and clear indications that those relationships are fractured and that the schisms at the Court behind the scenes are at an all-time high, I think that will be a significant loss for the institution, that the

relationships that he's maintained behind the scenes will not be the same without his presence on the Court. And I think that is one of the lasting legacies of his retirement that we will observe.

**Pratik Shah:** I agree with a lot of what Aileen said. I think Justice Breyer will be missed. Aileen and I had the privilege of being able to attend the last clerk reunion and, really, a retirement celebration for Justice Breyer a few weeks ago. And in many ways, for me at least, that was a bittersweet event.

Obviously, there was a lot to celebrate in Justice Breyer's long career on the bench: his legal contributions, in particular, providing a counterweight to originalism, to conceptualize constitutional interpretation for the left side of the Court, what he later called “active liberty,” interpreting the Constitution in a manner that maximizes participation and inclusion in our democracy. I think that's a counterweight that will be sorely missed by many. And as Aileen said, I think more broadly what he contributed to the Court. He was a true believer in our democratic system, that government works better when everyone participates, that judges engage in an enterprise different than the political branches, even if they're applying different judicial philosophies. And I think it's remarkable, to this day, despite his very passionate dissents in the guns case, in the abortion case, that I think he remains an optimist about our system of government.

I think one thing that's less celebrated about Justice Breyer, or at least less known than it should be, is his long commitment to hiring equal numbers of men and women clerks and many people of color -- long before diversity, equity and inclusion, DEI Task Forces or any of that, was a thing, long before anyone was paying any attention. He has one of the most diverse clerk families in the history of the Court. You don't have to look any further than this podcast or, much more importantly, the newest Justice who has taken his place now, as we sit here, Justice Ketanji Brown Jackson, a former Justice Breyer clerk who will now be stepping into his role.

And, so, there's a lot to celebrate, but I say bittersweet because I do echo Aileen's sentiments that, in many ways, I think, his retirement is the end of an era. We've seen a rapid turnover, at least in terms of the historical timeline of the Court. Eight new Justices in the last 17 years. So, back from when I clerked, although that was a long time ago, the only Justice now there is Justice Thomas. I think you've seen a proliferation of bitter dissents. Obviously, this Court is now surrounded by eight-foot steel fencing. We're just at a time of divisiveness that I don't recall seeing at the Court. I think the closest is *Bush v. Gore*.

But I think in some ways, the divisiveness now may be more enduring. And I think Justice Thomas, in his public remarks, has all but said that. He said, "This is not the Court of that era," and he's referring to the O'Connor, Kennedy, old Chief [*Justice Rehnquist*] Court that was there from 1994 to 2005 where there had been no changes in lineup. He said that this is not the Court of that era. “We actually trusted each other. We may have been a dysfunctional family, but we were a family.” So I think that sort of speaks volumes there, that you have Justice Thomas, who by the way, is winning much more now than he was back in that old Court, still lamenting the loss of those days. And I think in many ways, Justice Breyer was sort of the quintessential reflection of that old Court. I think the real question now, which remains to be seen, is whether this new Court can become a family, however dysfunctional, without Justice Breyer.

**Jose Garriga:** Thank you. Thank you both. Listeners, you've been hearing Akin Gump Supreme Court

and appellate practice head Pratik Shah and senior counsel Aileen McGrath discussing this most tumultuous of Supreme Court Terms. Thank you both for bringing us all up to speed on what these historic decisions mean for the Court and for American business and, ultimately, society.

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, search for “Supreme Court and appellate” on the Experience or Insights & News sections on akingump.com and then take a moment to read Pratik and Aileen's bios on the site.

Until next time.