Ep. 56: The 2021 SCOTUS Wrapup and Preview Episode

September 24, 2021

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

It's mid-September, summer is winding down, which means it's time for *OnAir*'s annual fall classic, our Supreme Court wrap-up and preview episode.

The 2020 Term was a busy one for the Court, and the 2021 Term looks to be equally exciting for Court-watchers as the Justices will be hearing arguments in cases involving some real hot-button topics: reproductive rights, the Second Amendment, the death penalty, religious liberty, and more.

We have with us today for his fourth-consecutive SCOTUS preview episode Akin Gump Supreme Court and appellate practice head Pratik Shah. And joining Pratik is senior counsel Aileen McGrath, who joined the firm earlier this year after serving for nine years in the San Francisco City Attorney's Office, where she, most recently, led their appellate litigation department. They'll be discussing the past Term and forecasting the new Term while looking at the individual Justices and the mood of the Court as a whole.

Welcome to the podcast.

Pratik and Aileen, welcome back to the show. This episode is always one of my favorites, as I know is the case for our listeners, so let's get right to it.

To start, before we look ahead to the coming Term, as I mentioned, what were the big takeaways from the 2020 Term, Pratik, if I could ask you to lead off?

Pratik Shah: Sure, Jose. Looking back to last Term, a lot of the commentary expressed surprise at the outcomes: There was no dramatic shift to the right despite Justice Barrett's replacement of Justice Ginsburg, thereby creating a 6-3 majority in Republican appointees. But from my perspective, those outcomes do not really seem all that surprising. The Court moved incrementally, as it has consistently done and been its hallmark under Chief Justice Roberts, and as is often the case when there are changes in membership in the Court. When there are new Justices, they're often acclimating to

their position on the Court. And as incremental as the change was or the rightward movement in the Court was, there's no mistaking that it was a rightward shift.

And a couple of things I would point you to to show that. First, the six Justices most often in the majority were those that you would expect, the Republican appointees, with Justices Breyer, Kagan and Sotomayor least often in the majority, as you'd also expect on a rightward-moving Court. That was doubly true in the divided cases from last Term, for example, the *Brnovich* [*v. Democratic National Committee*] case out of Arizona, which was the Voting Rights Act case in which the Court rejected challenges under Section 2 of the Voting Rights Act to some limiting measures implemented in Arizona. And it was also true in all 10 of what I would call the "polarized cases" last Term, that is, those that fell along the 6-3 lines that one might expect based upon who the Justices were appointed by. All 10 of those came out exactly the same way and the way in which you would expect.

The Chief Justice was no longer the decisive vote as he was two Terms ago when we recorded this podcast, and it was really all about the Chief Justice. But he still wields, I think, considerable influence. There was still an understandable desire this past Term, at least, to find consensus. You saw Justices Kavanaugh and Barrett in particular, the two newest Justices after somewhat-fraught confirmations, willing to join the Chief Justice to find the middle ground in any number of cases. But to be clear, that middle ground is further to the right.

Justice Kavanaugh was the Justice most often in the majority last Term. He was in the majority 97 percent of the time. That makes him the new median Justice, if you will, rather than the Chief, as I think many of us predicted would happen with Justice Barrett's arrival. And while Justice Kavanaugh is often in agreement with the Chief Justice, I think it's safe to say that he still falls to the right of the Chief Justice, especially given the Chief's strong institutional streak that we've talked about in past years.

I think another telling sign from this past Term about the Court's movement is in cases even where there were lopsided results or lineups. Take *Fulton v. City of Philadelphia*, which was the challenge to the city of Philadelphia's decision to exclude a Catholic group from its foster placement program on the ground that the group discriminated against same-sex couples. In that case, the Court ruled in favor of the challengers raising the religious objections, and the decision was a 9-0 unanimous decision against the city of Philadelphia. I don't think anyone would have expected that result in a normal year. But I think what you saw there happening is the three more-liberal Justices willing to join the more-conservative Justices in a narrower holding. That is, for example in that case, the Court did not go as far as they could have and overrule prior precedent on the Free Exercise Clause. Instead, it ruled against the city of Philadelphia on narrower grounds.

I think another similar example of that phenomenon was *Nestle v. Doe*. That is the Alien Tort Statute case which various human rights claims were brought against U.S.-based companies. And there again, that was an 8-1 result against the Alien Tort Statute plaintiffs, with the liberals, again, joining the conservatives in the majority. And it was a similar story there. While that case did not deliver a knockout blow to plaintiffs by categorically excluding those sorts of suits against U.S. corporations, it continued the trend of limiting liability against U.S. corporate defendants under the Alien Tort Statute.

The takeaway from last Term, we saw clear wins for the conservative position even if not extreme wins. And if anything was surprising about last Term, I think it's how far the

three more-liberal Justices were willing to go to bolster majorities, seemingly to guard against further erosion of positions that they would otherwise favor.

Jose Garriga: Thank you, Pratik. You mentioned Justice Barrett. She took her seat on the Court a month after we recorded our last episode, in fact. So, based on the 2020 Term, Aileen, how would you describe Justice Barrett's leanings and her jurisprudential style?

Aileen McGrath: To Pratik's point about expectations and narrative, one narrative you will hear is that Justice Barrett seems less conservative than anticipated, that she didn't push the law in the aggressively conservative direction that many predicted. I don't know that that really captures the full story of Justice Barrett's first Term. Instead, I would say that she took a page straight out of the Chief Justice's playbook in approaching her first Term on the Court and laying a foundation for the future. She didn't write any bold decisions. She was mostly at the center of a 6-3 conservative majority rather than at its rightmost fringe. She pretty notably declined to go as far as groups were inviting her to in certain cases, like the *Fulton v. City of Philadelphia* case that Pratik discussed.

These are all signs that Justice Barrett doesn't want to be perceived as an instrument of the conservative movement. She's going to act independently and incrementally. She also appears to be trying to cultivate a reputation as someone who cares about the Court as an institution. This is also true of the Chief and Justice Kavanaugh as well, likely less true perhaps of some of the other members of the more-conservative wing of the Court. And her concurrence in *Fulton*, which got a lot of media attention because she expressly declined to overrule existing Supreme Court precedent that would have expanded religious liberties protection, is very consistent with this. She showed her respect for *stare decisis* in her desire to preserve the Court's reputation and institutional credibility.

But I would not make the mistake of assuming that this means that Justice Barrett is not a true conservative or that she won't move the Court to the right. As Pratik has been describing, it's already happening. There really weren't any decisions this Term where Justice Barrett broke with the conservative majority. She might not have adopted all of their reasoning, but she certainly went in that same direction as far as results go. And there are plenty of instances where she has already pushed the law in a much more conservative direction. And the best example of this is the shadow docket decisions that we saw this fall and winter on COVID-related restrictions on religious gatherings.

In the spring and summer of 2020 when those issues first started making their way up to the Court, and when Justice Ginsburg was also still alive, the Court upheld some of those restrictions with the Chief aligning with the more-liberal wing of the Court to basically stay out of the fray in terms of what states were doing in the COVID arena. And then we saw a pretty abrupt change in the fall and winter of 2020 into 2021, with the Court aggressively striking down similar restrictions, presumably with Justice Barrett's vote replacing Justice Ginsburg to play the dispositive role. And I think that we'll continue to see cases like that over time, where Justice Barrett's mark on the Court will be more obvious, and her impact and nudging the law in a rightward direction will be more clear.

Pratik Shah: I agree with all of those observations from Aileen, which I think are completely right. I guess I would add just one thing, that this coming Term will be much more revealing, I think, with a couple of the hot-button cases that I'm sure we'll be discussing later today.

Justice Barrett was notably cautious in both her questioning from the bench as well as her opinion writing this past Term. And, of course, on the shadow docket cases that

Aileen mentioned, we really didn't have well-written opinions. To me, the key question, which again I think we'll have much more insight after this Term, is whether this past Term was simply a result of a new Justice proceeding deliberately or was it a reflective of a longer-term judicial approach. I think it's going to be difficult to answer that question with any level of certainty until at least after this Term and maybe longer.

Jose Garriga: Thank you both. Let me circle back to something that you've both just mentioned, and that's the shadow docket, a term that came into popular usage. Maybe folks didn't know about this idea, this concept, and it received a fair amount of media attention this summer. So, just to give listeners some background on this, how unusual is this shadow docket activity? Do you think it's here to stay, and what does it say about the Roberts Court, Pratik?

Pratik Shah: Sure, Jose. Just to step back for our listeners, we've already thrown around the term "shadow docket." What we mean when we say "shadow docket": that refers to Court decisions separate and apart from either the normal certiorari-stage docket that the Court has in deciding whether to hear a case or not on the merits, and separate from the Court's merits docket, where you have full briefing, oral argument and written opinions distilling the Court's decisions. Instead, in the shadow docket, you often have summary orders. These most often arise in the context where litigants are seeking emergency relief from the Supreme Court while litigation is still pending in lower courts, often either to maintain the status quo or change the status quo while that litigation is happening.

Briefing and decision often happens very quickly, in a matter of days, which is not the Supreme Court's usual style. I think it puts the Supreme Court outside its comfort zone. And, as a result, the Court often acts via unsigned orders with little, if any, reasoning, and those decisions, those shadow docket orders, have unclear precedential value for lower courts. We've seen that the lower courts have struggled with what to do with the Supreme Court's orders from the shadow docket; how much to defer to them, how controlling are those orders, especially when you have unexplained findings that might pertain to the likelihood of success on the merits, which is one of the factors that's often at play when you're talking about a grant of emergency relief.

Now, the shadow docket itself is not new. It's always existed. I think the classic example are death penalty cases back long ago even when I clerked and when Aileen clerked more recently. That was, I think, the predominant piece of the shadow docket. But the shadow docket grew in both volume and profile significantly during the last few years, during the Trump administration. I think it was kind of the perfect storm of extreme or, at least, unprecedented executive orders; challenges by states and other groups to those orders; nationwide injunctions often following as a result of those challenges; and then aggressive action by the Solicitor General, then taking those up to the Court to seek emergency relief; and, perhaps most importantly, the Supreme Court seemingly receptive of those petitions for emergency relief and often granting relief.

I think we have seen some signs that trend will not abate completely and, in fact, will continue and has continued into the Biden administration. I think we can point to a few examples at least. As Aileen already mentioned, there was the COVID restriction cases, and those cases are, I think, exhibit A for many people who want to criticize the shadow docket in which you have the Court displacing health and safety measures often legislated by the state or through executive order of the state on a very truncated schedule under less-than-transparent procedural circumstances. And, so, I think that's one subset of cases that has, of course, gotten a lot of attention with some significant implications.

More recently, we have the “remain in Mexico” policy. The Supreme Court refused to block an order requiring the Biden administration to reinstate that policy. And that was a 6-3 summary order along traditional lines. And then we have the CDC eviction moratorium in which the Court blocked the new CDC eviction moratorium in an eight-page unsigned order, again, breaking along sharply divided lines. And that was two months after a 5-4 Court permitted the earlier moratorium to stay in place. And it seems the decisive vote in that was Justice Kavanaugh, who stayed his hand the first time around and said, "Look, the CDC eviction moratorium is going to be expiring soon. So the Court shouldn't get in." But then when the Biden administration re-upped that moratorium, the Court did step in.

And then, of course, perhaps the most provocative case that's been on the shadow docket during the Biden administration is the SB 8 case, in which the Supreme Court permitted the Texas ban on abortion after six weeks of pregnancy to go into effect. Again, a sharply divided Court, on 5-4 lines, denied emergency relief that therefore permitted that Texas ban to go into effect. But it provided just a paragraph of reasoning, which was almost exclusively on procedural grounds despite nobody disputing (and what I think most people would agree) is a flagrantly unconstitutional law. And then you had separate dissents from the Chief Justice and each of the three liberal Justices.

So, I think when you look at all of that, I think folks who thought, okay, well, maybe the shadow docket will abate, now that we're beyond the Trump administration, that has not happened. It continues to be in the spotlight ironically despite its name. I think the reasons for that have most to do, obviously, a lot of folks are unhappy depending on which side of the aisle you are with the results. But I think what makes it particularly provocative is the process. There's often a lack of reasoning, a lack of consistency and at least a perceived lack of deliberation. And, again, all of that is heightened by the fact the results seem to be skewing in one direction as the Court's composition has changed in recent Terms.

The million-dollar question is, how do you address these concerns with the shadow docket? And to me, the only solution is going to have to come from the Court. Until the Court actually expresses some limits or expresses its disapproval of these types of petitions or circumscribes their nature, I think this will continue. We'll continue to see activity on the shadow docket going forward.

Aileen McGrath: I was just going to add quickly, Jose. As you can probably get the sense, we could do an entire podcast on the shadow docket because there's been so much that's happened there over the last several years.

Two things that I think are especially interesting for listeners to focus on. One is the way that, in the shadow docket, you can really see the Chief's institutionalist streak coming out. He often, not always but often, breaks with the conservative bloc and is much more reluctant than some of the others to get involved in these hot-button issues. And seeing whether he's able to regain control over the shadow docket over time is an interesting way of measuring the continuing influence that the Chief has with the changing Court. Pratik referred earlier to the Chief as in his kingmaker role, and I think watching that on the shadow docket can measure where he continues to stand there.

The other interesting thing, there are many, but looking at the reasons that the Court gives for declining to intervene or choosing to do so, there's a lot of inconsistency between some of these decisions. You can compare and contrast the COVID cases with

the SB 8 case. In the COVID cases, the Court struck down orders coming out of New York state, for instance, notwithstanding that the particular plaintiffs in the case were no longer impacted by the order; the order had been modified. These are often reasons the Court decides not to get involved in a fight, but they did so anyway. Contrast that with the SB 8 abortion case, where the Court says, gosh, nothing we can do; there's a procedural obstacle here. How that all continues to play out over time too will probably affect the perception that these orders have and the institutional legitimacy that the Court continues to hold.

Jose Garriga: It's a fascinating topic. Thank you both for your explanation of it. Now let's look forward to the 2021 Term. You all have done a great job of setting up the dynamics of the Court over the last Term and through the summer now. Looking forward, what are the big cases that everyone will be watching? Let me stay with you, Aileen, on this.

Aileen McGrath: One of the headline cases, if not the headline case, is *Dobbs v. Jackson Women's Health Organization*, which is the first abortion-related merits case that the Court will have considered since Justice Ginsburg's death and Justice Barrett's confirmation. The Mississippi law prohibits abortion after the 15th week of pregnancy. The Court's existing abortion jurisprudence*, Roe v. Wade*, *Planned Parenthood v. Casey*, and so forth, prohibits states from banning abortion before viability, which is thought to be around 23 weeks. So, that would suggest that the Mississippi law is clearly unconstitutional—and, yet, the Court decided to take this case.

And it did so after the case was on the Court's conference list for months, something like 17 conferences where the Justices debated what to do with this case. And that suggests that, despite the state of controlling jurisprudence, there was considerable momentum, at least among a certain segment of the Justices, to take this case. Obviously, it's going to be one of the flashpoints of the Term. And to tie it back to our discussion about Justice Barrett's jurisprudence and her impact on the Court, this is probably the paradigmatic case where everyone is looking to Justice Barrett to see what she will do. Will she overrule *Roe*? That's clearly the result that Mississippi and its supporters are looking for.

Without engaging in too much tea leaf reading, it's hard not to look at the fact that the Court took this case at all, given where the law stands very clearly and has for decades, as well as the fact that it's currently allowing the Texas abortion law to stand, and to imagine that we won't see the Court cut back on *Roe* in some fashion. And, so, I think that the consensus is that Justice Barrett will play some role in that decision, but it remains to be seen whether and how far she's willing to go in this very fraught area.

Pratik Shah: In addition to Dobbs, I think another major case for this coming Term is *New York State Rifle Association v. Corlett* on yet another hot-button issue, this time, the Second Amendment. This is, potentially, the first significant Second Amendment decision in over a decade, since the Supreme Court's decision in [*District of Columbia v.*] *Heller* and then *MacDonald* [*v. City of Chicago*] in which the Supreme Court recognized an individual's Second Amendment right to firearms for self-defense and then extended that right to the states.

Now, the Court has had many opportunities to take up a Second Amendment case in that intervening decade, and I think the best speculation as to why they didn't is this: there was reluctance by both sides while Justice Kennedy was still on the Court to take up another Second Amendment case because they just didn't know where Justice Kennedy would land. I think that reluctance on the conservative side has faded away

after Justice Kennedy's retirement and certainly now, and even more so, after Justice Ginsburg's passing with the new Justices on the Court.

And, so, we saw two Terms ago that the Supreme Court granted a case out of New York City, a Second Amendment case, but ended up vacating that case as moot because New York City ended up revising the provision at issue there. But now we have another case from the state of New York in which the Court has granted cert. This particular case arises out of the state of New York licensing scheme for New York residents who want to carry concealed firearms. Now, absent certain disqualifying conditions like criminal history or mental health issues and the like, New York ordinarily will issue a concealed carry permit for a variety of purposes, including job-related reasons, to go hunting, target practice, those sorts of things. It will also grant a permit for self-defense, but only if the applicant establishes sufficient good cause or what New York calls “proper cause,” that is, some specific threats to safety that might go beyond that of the general public.

Now, the precise limits, and this may be part of the problem of what that standard is, is unclear. These are kind of decided on a case-by case-basis. So in this case, we have the individual plaintiffs who applied for one of these concealed carry permits, had none of those disqualifying conditions that I mentioned, and yet they were denied a concealed carry permit because they failed to make any showing of a special need for self-defense. Now, like in Heller, there's an extended debate over the history, this time of public carry restrictions throughout various periods in history in England, the time of adoption of the Constitution, the time of ratification of the 14th amendment. Again, there's a battle of history here as to the scope and extent of permissible restrictions on public carry.

Like many of these historical debates, I don't think there is a clear answer. Each side cites evidence in their favor, which I guess the Court will have to sort through. There's also a debate over the level of scrutiny that such restrictions should trigger. I think everyone agrees that, at least, state or local government can impose certain restrictions on concealed carry, and the question is, what standard of review do you impose on those limitations or restrictions? And then here, there's the further difficulty, I think, of a lack of a well-developed record. This is on a motion to dismiss with little details on how New York actually applies this licensing scheme more broadly.

Now, despite all of those things that I mentioned that complicate this case, I don't think any of those make it unlikely that this Court will rule against the state of New York. That is, this Court seems poised to broaden Second Amendment rights to recognize the right to carry outside the home for self-defense as a central component of the Second Amendment. And if it does that, it's hard to imagine a world in which this New York licensing scheme can continue to exist. So, I think the real question here is, how far is the Court willing to go? How robust of an articulation of the Second Amendment right is it going to be? What sort of standard of review is it going to set up? Is it going to issue a narrow ruling that says we don't reach the outer limits of state regulation but this New York regulation, which seems to impose the burden on the individual to show a special heightened need for self-defense goes too far? I think that's the real question in this case.

Jose Garriga: That's interesting. Thank you, Pratik. Aileen, these are clearly headline, marquee, what have you topics and cases to look for. What else is there on the docket that people might want to know about?

Aileen McGrath: I'll mention a couple of cases, or really categories of cases. One is, although none of them are billed as blockbusters, there are a fair number of cases raising First

Amendment and religious liberty issues on the docket for the fall. For instance, there's *Carson v. Makin*, which will decide whether a law restricting state tuition assistance payments from being used at religious schools violates the First Amendment. There's *Ramirez v. Collier*, which is a death penalty case the Court just granted that asks whether the Free Exercise Clause requires a state to allow a pastor to pray and lay hands upon a person in the execution chamber. And there's also *Houston Community College v. Wilson*, which is a case about whether the First Amendment restricts elected bodies, in this particular case the school board, from censuring their members for their speech.

And although none of these cases seems that monumental in its own right, if Justice Barrett is indeed modeling herself on the Chief in certain respects, as we're hypothesizing she might be, by moving incrementally and using smaller decisions to lay a foundation for later bigger ones, it will be interesting to see how she approaches these cases. And, to return to Pratik's observation about her longer-term approach, that could shed some light on whether she is an incrementalist for now or an incrementalist permanently.

The other case that is poised to be a blockbuster, the question is really just when, is the Harvard affirmative action case, *Students for Fair Admissions* [*v. Harvard*]. Affirmative action is another issue where the composition of the Court has changed dramatically. The last time the Court heard an affirmative action case, in *Fisher v. University of Texas* a few years ago, Justice Kennedy wrote the leading opinion joined by Justices Breyer, Ginsburg and Sotomayor to uphold the university's policy regarding the consideration of race in admissions.

So all eyes are on this case, which is basically asking the Court to revisit not only that precedent, but all of the Court's affirmative action precedent before that. The Court considered this petition back in the spring. A few months ago, we thought that this would be part of the 2021 Term. But then in June, the Court asked the Solicitor General to weigh in with the federal government's view about these affirmative action policies. That has the effect of delaying the timeline—I would say it's probably just delaying the inevitable grant, I would guess. It remains possible that we'll see this case argued in the spring, but it may get pushed to the 2022 Term. So, stay tuned for developments on that trajectory.

Jose Garriga: Thank you, Aileen. Now, one topic that we always feature on this episode, and that's the business orientation of the docket upcoming. Pratik, if I could ask you to lead off on this, what should business listeners in particular be looking for in thinking about the 2021 Term docket?

Pratik Shah: Well, Jose, the 2021 Term business docket is unusually quiet. The Court has granted fewer cases overall, perhaps due in no small part to the COVID-related restrictions that have been going on. I think that trend in granting fewer cases the last couple of years has impacted not just the overall numbers but, in particular, the numbers of business cases where the Court might feel less of an imperative to hear the case as opposed to striking down a federal statute or something like that. And then the relative dearth of business cases was exacerbated by the fact that we had two cases just in the last couple of weeks, two of the more-significant business cases on an already-lean business docket settle or at least announce an intent to settle such that they're removed from the oral argument calendar.

The first one was *Servotronics* [*Inc. v. Rolls-Royce PLC*]. That was a case posing the question about a district court's authority to gather evidence for foreign arbitration proceedings. And then the other one was Pivotal Software, which is a PSLRA [*Private Securities Litigation Reform Act*] securities case about whether the discovery stay applies in state court suits. Both of those cases, which I think a lot of folks in the business community were watching, seem to be headed to settlement and, therefore, off the docket.

The one other arbitration-related case that still is on the docket, *Badgerow v. Walters*, I think is one that folks will be watching. That case involves federal court jurisdiction. Specifically, there's a Supreme Court case called *Vaden* [*v. Discover Bank*], and under *Vaden*, if the underlying claims could have been brought in federal court (save for the arbitration agreement) as would be true for claims arising under federal law, a federal court has the jurisdiction over a motion to compel arbitration under Section 4 of the Federal Arbitration Act. The question presented in this case is whether the same look-through analysis applies to motions to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act.

So, really beyond that, there's one other significant case that I think Aileen is going to talk about, but, unfortunately, not a whole lot more to discuss. There's a copyright case and a couple other cases, but again, it's a pretty lean docket this year.

Aileen McGrath: The case I'll touch on is *CVS v. Doe*. And I should first mention that Akin Gump is counsel for America's Health Insurance Plans. Pratik and I wrote an amicus brief on their behalf supporting CVS in this case. The case is about the federal Rehabilitation Act. The Rehabilitation Act prohibits certain federally funded programs from discriminating on the basis of disability. And the question in this case is whether that prohibition extends to disparate impact claims, meaning claims based on policies that affect disabled people differently even if they're not facially discriminatory.

So, why is this case interesting to the business community? And it's primarily because the Affordable Care Act imports the Rehabilitation Act requirements and applies them to virtually all health care activities that receive federal funds. So, that means that the Rehabilitation Act now applies to a much broader set of entities than it used to, including health care companies, insurance providers, hospitals, pharmacies, and so forth.

The health care context is one where disparate impact liability could, potentially, be unusually disruptive because many commonplace health-related policies affect people with disabilities differently because of their particular health care needs. I can give you some examples in the health insurance context, for instance. Those would be preferences for plan members to see in-network physicians, prescription co-pay structures, formularies. All of these commonplace health care policies could be subject to challenge on a disparate impact theory if the Rehabilitation Act embraces such a theory.

And you can see that from the facts of this case, where the plaintiffs are challenging their health insurance plan’s requirement that they obtain certain prescription drugs via mail order instead of at a brick-and-mortar pharmacy to receive in-network prices. The plaintiffs are saying that that policy has the effect of denying them adequate health care and thereby discriminating against them on the basis of their unique health care needs. So, while all sides in this case agree that discrimination in health care is wrong, the heart of the case is really about whether disparate impact liability is an ill fit for that particular context. The 9th Circuit said that it's not, and it allowed the plaintiffs’ claims to go

forward, so it will be interesting to see whether and to what extent the Court cuts that ruling back.

Pratik Shah: One additional point I would mention about *CVS v. Doe* for those of you who are statutory interpretation nerds and interested in textualism is that the argument between the parties involves the text of the Rehabilitation Act, and, in particular, the language of discrimination solely "by reason of" a person's disability.

The arguments in this case invoke, they look back to a Supreme Court case from 1985 called *Alexander v. Choate*, where the Supreme Court first grappled with this issue of whether you could have disparate impact liability under Section 504 of the Rehabilitation Act. But I think when you look at *Alexander v. Choate*, it's a real lesson in how far the Supreme Court has come and how differently it conducts statutory interpretation in the intervening years that have passed.

It's no coincidence that *Alexander v. Choate*, a Thurgood Marshall opinion in 1985, is exactly one year before Justice Scalia joined the Court, and, of course, the textualist revolution happened. And when you read *Alexander v. Choate*, there's barely a mention of the text. They go right into Congress's purposes and policy and all of that. Whereas I think this Supreme Court will approach the issue quite differently. And quite frankly, all nine of the Justices on this Supreme Court will approach the question differently. And the opinion, regardless of who ends up writing it, I think will look quite a bit different than the analysis from 1985. So, I think that's something else interesting beyond just the legal issue to look for in *CVS v. Doe*.

Jose Garriga: Thank you, Pratik. Let me stay with you. We talked about amicus for AHIP. Can you tell us a little bit about the immigration case in which the Court, from what I understand, somewhat unusually granted cert this summer and in which you serve as lead counsel?

Pratik Shah: Sure, Jose. We represent Mr. Arteaga-Martinez, a Mexican citizen who entered the United States fearing gang reprisals in Mexico. ICE detained him in 2018 and reinstated a removal order that had previously been entered from a prior attempt to enter the United States. After an asylum officer determined that Mr. Arteaga-Martinez had a reasonable fear of persecution or torture if he were returned to Mexico, he filed an application for what's called "withholding of removal" protection, essentially stops the removal from happening. The withholding proceeding remains pending now with a hearing scheduled, currently, for 2023.

Now, meanwhile, Mr. Arteaga-Martinez remained in detention. So his counsel, who we are now co-counsel with, filed a habeas petition to secure his release pending a determination on the withholding of relief claim. After about six months, he was given a bond hearing before an immigration judge who ordered his release pending removal after assessing risk of flight and dangerousness.

The Supreme Court granted cert in this case to resolve a circuit split on whether a noncitizen like Mr. Arteaga-Martinez [*who*] is detained pending removal while awaiting adjudication of his statutory withholding of removal claim is entitled to a bond hearing to determine whether he should be released pending that determination. And here again, it's critical to keep in mind that these statutory withholding of removal proceedings can take years, as it has in this case. The hearing on the merits of that claim won't even happen until 2023, after he was detained in 2018.

Relying primarily on a case called *Jennings* [*v. Rodriguez*], which involved a different immigration statute, not the one at issue here, the government claims that Mr. Arteaga-Martinez and those situated like him have no entitlement to a bond hearing to determine whether they should be released pending these year-long withholding of removal proceedings. But *Jennings* itself distinguished a prior Supreme Court case called *Zadvydas* [*v. Davis*] in which the Supreme Court interpreted the very same detention statute actually at issue in this case to permit release after prolonged detention where the removal was not reasonably foreseeable.

In our views, *Zadvydas*' reasoning controls here. And even beyond all that precedent, a bond hearing is really the only just outcome to avoid forcing noncitizens to choose between accepting removal at the risk of life and limb, or spending years in detention to avail themselves of their statutory right to relief. We hope the Court sees it the same way.

Jose Garriga: Thank you, Pratik. To close, there's a topic that has been in the press and in social media, and that's Justice Breyer. He had been the focus of a lot of attention last Term, beyond his jurisprudence, on the topic of many liberals urging his retirement. So, Aileen, do you have any predictions for where this might go this Term?

Aileen McGrath: Justice Breyer himself said in an interview recently that there are "many considerations and many factors" that he is weighing to decide when he'll step down, which I thought was kind of funny and suggests that the Justice is approaching his retirement much the same way that he answers legal questions and opinions through a multifactored analysis.

But, in seriousness, it's hard to make any predictions. As you indicate, all of the predictions suggested that Justice Breyer would step down last Term, and yet here we are. But I will make this observation, which is that, on the one hand, yes, there are the obvious political pressures. Next year, assuming he does stay on through the entire Term, gets closer to the midterm elections. As every day passes, it potentially becomes harder for Democrats to confirm a successor. That's certainly the narrative that many politicians are spinning. And the Justice has been talking about these pressures in interviews lately. He's clearly very aware of them and thinking about them.

But, on the other hand, Justice Breyer is a consensus builder within the Court. I think that's how he sees himself. I think that's how others see him. And I also think that we saw that approach have an effect, albeit maybe a small one, in some of the cases last Term like *Fulton*, like *California v. Texas*, the Affordable Care Act case where we expected more sweeping results, and we saw something short of that that reveals evidence of internal compromise. I wonder whether seeing those outcomes increases the pressure that Justice Breyer feels to remain on the Court and continue to play that role behind the scenes. And as far as where that balance leaves us next Term, it seems like only Justice Breyer knows the answer of exactly when he will step down. And, so, only time will tell.

Pratik Shah: I would just add a few quick thoughts. First, although both Aileen and I did have the privilege of clerking for Justice Breyer, I think it's safe to say that neither of us have any inside knowledge on this question. But what I would say is this, putting politics and timing and all of those issues aside, it will be a real loss for the judiciary and our country whenever Justice Breyer does decide to retire.

He's a true believer in our democratic system, I think, more than perhaps any other Justice on the Court. And that's true both in theory, his mode of constitutional interpretation, as well as practice. He often tells his former clerks to get involved in government or other public endeavors as he himself practiced before coming onto the bench.

He's also a model, in my view at least, of the type of judicial temperament we would want to see on the bench. He's fundamentally decent, fair minded, has a constructive approach despite facing some of the most-heated and polarizing issues facing the Court and the country in our times. And the last thing I would note is that Justice Breyer practiced diversity and inclusion in hiring long before it was a thing, and I think that's something that folks often don't recognize about him. He doesn't talk about it a lot, but I venture that he has one of the most diverse clerk families in the history of the Court, and I think both Aileen and I are living proof of that.

Jose Garriga: That's terrific. Thank you. Listeners, you've been listening to Akin Gump Supreme Court and appellate practice head Pratik Shah and senior counsel Aileen McGrath. Thank you both for making the time to come on the show today. I know you've given listeners plenty to think about as we approach that first Monday in October.

And thank you, listeners, as always for your time and detention. 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 and appellate matters, look for “Supreme Court and appellate” at the Experience and the Insights & News tabs at akingump.com and then take a moment to read Pratik and Aileen's bios on the site as well.

Until next time.