

A new normal at the Supreme Court

By Shay Dvoretzky, Esq., and Emily Kennedy, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

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In many ways, the October 2021 Term has begun with aspirations of business as usual. The Court is back to in-person arguments (for the first time since February 2020), with a docket full of headline-grabbing cases. And unlike four of the last five Terms, the Court isn't starting its work with a vacancy or a new Justice. But with a new oral argument structure, a potential three-Justice bloc of swing voters, and brooding controversy over the Court's process for emergency applications, a new kind of "normal" is afoot. This Term promises to help shape it.

Perhaps the greatest harbinger of a new normal is that Justice Clarence Thomas — long silent at in-person arguments (and once going a decade without asking a question) — asked the first question in every case of the Court's October sitting. A silver lining of the pandemic-induced argument format, Justice Thomas' increased participation appears to be here to stay.

Telephonic arguments require greater structure than the free-for-all questioning typical of in-person arguments, so each Justice was allotted time to ask questions in order of seniority. As a result, all the Justices participated more actively in oral arguments. The Court has preserved some of its pandemic format for in-person arguments, allowing each Justice time to ask questions after an advocate's time expires — an experiment that hopefully will continue to encourage broad participation from all Justices.

The Court's new argument structure also has practical significance for advocates, who can't respond to concerns that a Justice doesn't raise. Greater participation from the Justices helps ensure that advocates get the chance to address whatever is on each Justice's mind. Moreover, when nine Justices simultaneously engage with an advocate in a free-for-all format, it is rare for any Justice to secure uninterrupted moments for a targeted line of questions. The new hybrid format allows that previously rare luxury. And because that kind of questioning bears similarities to a law school classroom, it will be especially interesting to see how Justice Elena Kagan and Justice Amy Coney Barrett — those with the most recent academic experience — use their time. Justice Kagan has always been known for her incisive questions, and while Justice Barrett quickly developed a reputation for long questions, they were focused and detail-oriented (often quoting a statute or brief).

Broader participation from the Justices at argument is hopefully here to stay, but it's less clear whether the consensus that characterized last Term will endure. One big takeaway from the 2020 Term was the Court's ability to forge agreement through

narrow rulings, even in cases involving controversial issues like the constitutionality of the Affordable Care Act, a religious charity's right to discriminate against LGBTQ couples for foster-care placements, and a school's ability to punish online student speech.

Each case had the potential for a watershed holding. The Court instead issued unanimous or near-unanimous decisions on technical or fact-specific grounds, largely cabining any disagreement to separate (though sometimes scathing) writings.

The 2020 Term saw more unanimous decisions than the Term before it, and only 15% of cases were decided along ideological lines — all somewhat surprising for a Term that began with the loss of Justice Ruth Bader Ginsburg, the end-of-Administration appointment of Justice Barrett, and the accompanying shift in the Court's balance of power.

If the Court continues last Term's trend of narrow consensus, it might be more likely to do so in business cases, where there may be greater room for individual Justices to find agreement in ways that don't sacrifice their long-term worldview and that preserve institutional legitimacy.

This Term, there is no shortage of controversial issues on the docket. The Court will grapple with the scope of the constitutional right to abortion, the right to carry concealed handguns in public, the use of taxpayer money for religious schools, a bid to reinstate the Boston Marathon bomber's death sentence, and First Amendment limits on campaign-finance restrictions. In the face of such contentious questions, the rumblings of disagreement we saw in last Term's separate writings may spill over into momentous rulings that are sharply divided along ideological lines.

Something to watch will be whether the Court's decisions on headline-grabbing issues correspond to greater consensus in this Term's business cases. Several important questions are on this Term's docket: In *Badgerow v. Walters*, the Court will decide whether federal courts have subject-matter jurisdiction to confirm or vacate

arbitration awards. And in an ERISA case, *Hughes v. Northwestern University*, the Court will consider whether the existence of lower-cost investment options is enough to allege that plan administrators acted imprudently.

In two cases that could have far-reaching implications for public and private entities that receive federal funds, the Court will decide whether plaintiffs can assert claims of disparate impact based on disability (*CVS Pharmacy v. Doe*) and whether plaintiffs alleging disability discrimination can recover damages for emotional distress (*Cummings v. Premier Rehab Keller*). In the commercial speech arena, the Court will consider whether a city can prohibit digital billboards from advertising something off-site without violating the First Amendment (*City of Austin v. Reagan National Advertising*).

There is no denying, however, that the business cases are a bit sleepy compared to abortion, guns, and religion. If the Court continues last Term's trend of narrow consensus, it might be more likely to do so in business cases, where there may be greater room for individual Justices to find agreement in ways that don't sacrifice their long-term worldview and that preserve institutional legitimacy.

Another variable for the new normal is the Court's process for handling emergency applications (the so-called "shadow docket"). That longstanding process has come under increased scrutiny after several orders (often unsigned, and sometimes sharply divided) on contentious issues, including the 2020 election, COVID-19 restrictions, and the Biden Administration's eviction moratorium.

Criticism — including from within the Court — reached fever pitch in early September, when the Court refused to stay Texas' controversial abortion law. In her dissent from that order, Justice Kagan lamented

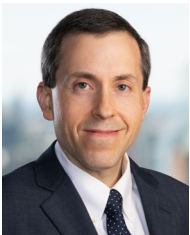
that "th[e] Court's shadow-docket decisionmaking" is becoming "more unreasoned, inconsistent, and impossible to defend." The next week, perhaps in response to that critique, the Court took the unusual step of setting another emergency petition — *Ramirez v. Collier*, involving a death-row inmate's request to have his pastor present in the execution chamber — for expedited briefing and argument. Time will tell whether the Court begins shifting cases from the shadow docket to that "rocket docket."

The biggest question for the new normal is how the Court's newest members — Justice Brett Kavanaugh and Justice Barrett — will vote. The Court has not had a clear swing vote since Justice Anthony Kennedy retired in 2018. And at least in controversial cases, six Justices' votes are fairly predictable: the three most liberal Justices generally vote together, as do Justice Thomas, Justice Samuel Alito, and Justice Neil Gorsuch. Chief Justice John Roberts' voting is less predictable, but he has increasingly shown a willingness to forge consensus with his liberal colleagues, and his presence in the majority declined slightly last Term, while Justice Kavanaugh's increased (voting with the majority 97% of the time compared to Chief Justice Roberts' 91%).

It is still too early to predict how Justice Barrett will vote, but her first Term suggested a greater willingness than some anticipated to join her liberal colleagues when narrow agreement was possible. Justice Kavanaugh's and Justice Barrett's votes likely will be decisive in many of the closely divided cases this Term, and we may even start to see a conservative divide emerge in the form of 3-3-3 plurality decisions.

A new normal is indeed on the horizon.

About the authors



Shay Dvoretzky (L), a partner in **Skadden, Arps, Slate, Meagher & Flom's** Washington, D.C., office, is the head of the firm's Supreme Court and Appellate Litigation Group. He represents clients in appellate matters in the U.S. Supreme Court, federal courts of appeals and state appellate courts. **Emily Kennedy** (R) is a Supreme Court and Appellate Litigation associate in the firm's Washington, D.C., office.

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