(Intro music)

Kirk McDaniel: Ah… it's that time of year again! Lawyers are sharpening their opening arguments, justices are getting their robes dry-cleaned and protesters are practicing their chants. The United States Supreme Court is back in session! Welcome to Sidebar, a podcast by Courthouse News Service. I'm your host, and Sidebar's producer, Kirk McDaniel. The top court in all the land is back at it again with some of the biggest cases to date. To say the Supreme Court has been active in these past couple of years would be a bit of an understatement. Setting aside the political squabbles over who gets to be on the bench, the court has delivered for the conservative legal movement in rulings ending the constitutional right to an abortion, rewriting Second Amendment jurisprudence and allowing churches to have more influence in public institutions. All the political and legal shake-ups have brought us to where we are today, with the justices set to consider if more people should be allowed to own a firearm, if you can trash talk your mayor and if the government can function as it always has. Trust me, you'll want to stick around for that last one. Now, I'm gonna need some help breaking all of this down, so I called up Kelsey Reichmann, Courthouse News' Supreme Court reporter and the newest addition to the Sidebar team. Welcome to Sidebar, Kelsey!

Kelsey Reichmann: It's great to be here. I'm excited to share all the news that's coming through the Supreme Court since there is a lot.

KM: Now, before we talk about the upcoming term, I think we should start with talking about the 2022 session, which ended just over this past summer. Kelsey, what cases stood out to you most?

KR: In the biggest ruling of the term, the conservative supermajority overturned decades of precedent to essentially end affirmative action as we know it. The high court also threw out President Joe Biden's student loan forgiveness plan. But there's another big case that you might not have heard of out of Colorado, where the Court ruled in favor of a website designer who did not want to make marriage websites for same-sex couples.

News clip: …the U.S. Supreme Court has ruled in favor of a Christian web designer, saying that she can refuse to work on same sex weddings…

KR: We also saw another ruling where the court limited the ability of the EPA to regulate.

News clip: …impacting waterways across the country. The court has limited the EPA's ability to regulate wetlands under the Clean Water Act…

KR: We did see some surprises, though. The Roberts court has consistently thwarted the Voting Rights Act, but when presented with this opportunity to throw the whole thing out altogether, Chief Justice John Roberts cobbled together five votes to save the Voting Rights Act and maintain the status quo.

News clip: The U.S. Supreme Court has ruled that Alabama's Republican-drawn congressional map diluted the power of Black voters…

KM: These past couple of sessions have truly reshaped key areas of American jurisprudence. Is there anything you are looking for or expecting from this next session?

KR: I think something that's interesting is that nothing is following the traditional pattern that we've seen over the decades with the Supreme Court. This conservative supermajority is making its mark and there are many instances where they're going against precedent.

KM: Now, let's look at our first case this session. The ongoing debate surrounding gun control in this country is fueled every year by more and more acts of violence. The Supreme Court, once again, will be wading into this debate in the case *United States v. Rahimi*. *Rahimi* is challenging provisions of the Gun Control Act that strip someone of their right to possess a gun if they are subject to a domestic violence restraining order, sometimes referred to as a protective order. I wanted to learn more about how protective orders work, so I called up an expert in the field.

Sarah Bennett: I'm Sarah Bennett, so I am the principal and managing attorney at Sodoma Law North in Cornelius, North Carolina. I exclusively practice family law so, I represent women and men in all kinds of domestic cases, divorce, child custody, dividing assets, and then another big aspect of that is domestic violence cases. So, if I felt that I was being abused by an intimate partner, I could go out and seek a domestic violence protective order. And it would be Sarah Bennett versus Joe Blow. And in that case, I wouldn't have to prove beyond a reasonable doubt that domestic violence had occurred, I would have to prove since it's a civil case, just by a preponderance of the evidence, there's more evidence than not that some act of domestic violence or a threat of domestic violence has occurred, and then I would be able to get that restraining order or protective order.

KM: Sarah told me that getting guns out of the hands of those who might be abusive is a key step in ensuring that an issue with a partner doesn't turn deadly.

SB: One thing that's clear, according to the CDC, 120 Americans are killed by guns every single day. So, what's really scary, that these numbers are climbing. So, since the pandemic started, basically, between 2019 and 2021, there was a 45% increase in gun-related homicides and with respect to domestic violence in particular, every minute in the United States, 20 people are abused by an intimate partner. And when one of those intimate partners has access to a gun, their partner is five times more likely to be killed.

KM: Zackey Rahimi was subject to such an order for allegedly assaulting his ex-girlfriend. When Rahimi's home was searched in connection to an unrelated crime, police uncovered a handgun and a rifle. He was later indicted for violating the terms of the protective order and convicted. Attempts at appealing his conviction were unsuccessful until the Supreme Court issued its ruling in *New York State Rifle & Pistol Association Inc. v. Bruen*. Kelsey, you covered this ruling and wrote extensively about its impacts. What did the court do here?

KR: The court adopted this new test that looks at the text and history of the Second Amendment and compares it to gun regulations of today. So, according to *Bruen*, gun laws in 2023 have to have a twin from the 18th Century. This means if our founders did not have a similar regulation, neither could modern society.

KM: Yeah, and this ruling allowed Rahimi to have the Fifth Circuit Court of Appeals rehear his case, and when it did, the New Orleans-based court made it so that people subject to protective orders can possess a gun in Texas, Louisiana and Mississippi.

KR: The government says that 48 states have similar laws and that could mean that this ruling can have ripple impacts across the United States. There's an amicus brief in this case that caught my eye from former state chief justices and chief judges. They told the court that laws disarming domestic domestic abusers play a vital role in how they administer justice and protect the public. These are judges who see these cases in their courtrooms every day so their perspective will be valuable to the justices.

SB: In the family law field this is a huge deal, protecting clients, you know, allegations of domestic violence are at play in a large number of my cases whether it is a threat or an action has already happened, and so whether or not we can prevent someone who hasn't necessarily been criminally prosecuted for actually having done something wrong but instead we're saying ahead of time, before that bad thing is happening we control that person. So, it's kind of for family law, this gets a little scary, are we going to be able to prevent someone from possessing a gun ahead of time or we're just going to be able to punish them after they've done something bad with that gun.

KM: If the Supreme Court were to side with Rahimi's argument, it wouldn't just mean those subject to protective orders can have a gun. The Gun Control Act also bars people from possessing a gun who are on probation or use illegal substances or have been committed to a mental institution. And the worry for lawyers like Sarah Bennett is that such a ruling could lead to not only more homicides but also suicides.

SB: Gun violence is not just homicide, gun violence is suicide, gun violence is accidental shootings. So, there are lots of forms of gun violence, and there's a huge risk that we're going to be exposed to a lot more of it if we can't have these regulations in place. Tons of areas where there are going to be a lot more guns and in combination with substance abuse, familial discord and other issues, this could potentially be a really deadly combination.

KM: This case is in many ways a consequence of the court's decision to rethink Second Amendment law with its ruling in the *Bruen* case. We will all be watching to see how the court applies its own standard and what the road going forward may look like going forward for future gun regulations. It surprised many in August when the court agreed to hear a case filed by the government challenging the bankruptcy settlement of Purdue Pharma. That name may sound familiar as it is the company that manufactures OxyContin and has been largely responsible for fueling the opioid epidemic in this country. The company has faced thousands of lawsuits for its reported role in causing hundreds of thousands of deaths, and the price to settle them is in the billions of dollars. Kelsey, this is a case that I think surprised a lot of people whenever it made it to the court.

KR: Yeah, this case wasn't on my radar, but when it popped up on the court's emergency docket, also sometimes referred to as the shadow docket, the government was looking for the court's intervention in this bankruptcy settlement. Purdue Pharma is trying to settle the many, many lawsuits against it and so the company itself filed for bankruptcy, but its wealthy owners did not. And what's really happening here is the government is saying, we want more accountability than what Purdue is willing to give in this settlement.

KM: You mentioned the very wealthy Sackler family just then. How exactly do they play into this case?

KR: So, the Sackler family have been the longtime owners of Purdue. The family came to an agreement that had them handing over about $5 billion and getting out of the opioid business altogether. The government is saying that when the Sackler family withdrew money from Purdue Pharma, it took too

much and now what is left in the company that will be used to assist in remedying the opioid crisis, it's not enough. And these plaintiffs, whether they're the states or the tribes, or just families, will not be able to get the accountability they're seeking.

KM: Well, whatever the court rules will impact how we move forward in the opioid epidemic and how corporations are held accountable when their products harm people.

KM: Kelsey, I'm sure you are on social media, right?

KR: Of course!

KM: Is there anything in particular you like to post?

KR: You know, if it's not Supreme Court news, it's probably pictures of my cat getting into trouble. I'm also a huge Swiftie, so, you will see me engaging in all the Easter eggs and conspiracies.

KM: Very nice. I mean, do you ever want to go on social media and maybe criticize your local public official?

KR: Of course, the urge is always there but I try to resist that tendency.

KM: Well, there are some folks out there who did not resist. And the justices will be hearing arguments in two cases concerning one big question: are public officials allowed to block you on social media? In *O'Connor-Ratcliff v. Garnier*, parents Christopher and Kimberly Garnier sued members of their local school district in Poway, California, when school officials removed the couple's critical comments from their social media pages and blocked them. The Garniers argued that being blocked by the school district officials violated their right to free speech. A federal judge in San Diego and the Ninth Circuit Court of Appeals ruled in favor of the parents. But in Michigan, a similar case didn't shake out quite the same way. In that case, Kevin Lindke wasn't too happy with the response to the Covid-19 pandemic by Port Huron City Manager James Freed.

Kevin Lindke: Well, our city manager, Mr. Freed, he began posting things on his Facebook page. And he was posting pictures at some restaurants and some different things. And it just didn't sit right with me when Mr. Freed and our mayor, Pauline Repp, were posting pictures about eating at this restaurant when everything was being shut down, no one was going to work, this was prior to the checks being sent out, all the unemployment money. I mean, people didn't know what was going on and what was happening. And it didn't sit right with me that our local officials were just kind of out like, "Hey, look at us. We're at lunch and having a great time." So, I made some comments on there. They were very civil comments. They were very non-threatening, and it was just basically, "Hey, you know, you probably shouldn't be out at one of the pricier restaurants in town when this is going on. And I believe that your response to the pandemic to this point has been abysmal." And Mr. Freed didn't like those comments.

KM: Those comments were later removed from Freed's page and Lindke was blocked from accessing the page. Lindke continued posting on Freed's Facebook through other accounts, but those too were later blocked as well. He told me that in talking with other residents of Port Huron on social media, others had had a similar experience, leading Lindke to file a First Amendment lawsuit against Freed. Unlike the Garniers' case, Lindke's suit was unsuccessful when a federal judge ruled in favor of Freed, and the Sixth Circuit Court of Appeals affirmed.

Robert Corn-Revere: The issue of when public officials use their social media accounts for public business has been kicking around for some time and it has been well litigated. I am Robert Corn-Revere, I am Chief Counsel for FIRE, the Foundation for Individual Rights and Expression. Former President Trump very prominently used his Twitter account for official business, and it became really one of the primary ways in which he interacted with the public. This is something that has been emulated by public officials at all levels, which has raised the question of when the use of a politician's or public official's, private media account becomes entwined with their government business, that the use of that private social media account becomes a matter of state action.

KM: Revere is a 40-year veteran of First Amendment and communications law. He even worked at the Federal Communications Commission as a legal adviser. Revere told me that the Sixth Circuit took a very limited view in looking at Lindke's case, while the Ninth Circuit had a more nuanced approach, examining the ways in which the defendants used the account to determine whether the action was made by a public official or a private person who just isn't very fond of criticism.

RCR: It made more sense to us that a more inclusive test that looks at all of the factors and looks at how a public official is both identifying use of a social media site, whether or not they're performing the functions of government, the more the public official uses that in sort of a range of various factors as an extension of the office, the more it should be treated as state action and so, as a consequence, that would limit the ability of public officials to then cut off comments from the public, whenever they find them to be annoying or abusive. Part of the job of being a public official is hearing from members of the public. And if you take too narrow a view of when these sites become state action, then you give them a very easy and convenient way of cutting off public contact.

KM: These cases have captured the attention of many free speech hawks because they will essentially set the road map for how we citizens interact with public officials on the internet.

KL: With the prevalence of social media use, and public officials using social media and local governments using it, I think it's vitally important that we get some hard rules in place on this, you know, and we get some framework there. That way people know what to do. You know, when you see a stop sign, you know you're supposed to stop. You know, when you see a green light, you know you get to proceed. We need that here. We need to know exactly what we can do, what we can't do, what the public officials can do, what they can't do. Once you have the highest court in the land weighing in on it and putting their decision out there, then that's the law and it makes it, I think it's going to make it much easier for not only public officials, it's going to make it easier for just normal regular every day citizens such as myself.

RCR: I think the court in recent years has been quite sensitive to the First Amendment issues at stake. I think that it values the innovation of the internet and social media as a new form of communication, and I think it's going to be reluctant to allow government officials to arbitrarily limit that open forum.

KM: Online critics beware! If the Supreme Court upholds the Sixth Circuit's ruling in Lindke's case, you may want to tread lightly when dishing out the mudslinging or you may just find yourself blocked. But, say the court sides with the Ninth Circuit in the Garniers' case, it may just be open season. These two social media cases may not be the only that the court takes up this session. Isn't that right, Kelsey?

KR: Yes. So, just recently the court took up two cases from Texas and Florida that could change what kind of speech social media companies host. These cases were really born of former President Donald Trump's expulsion from Facebook and Twitter following the January 6 insurrection. Texas and Florida enacted laws that punish social media companies for what they see as unconstitutional censorship.

KM: I remember covering the passage of, and subsequent legal challenges to, Texas' law by internet trade groups. These groups also challenged Florida's law on the same grounds that the law violates the First Amendment rights of social media platforms to manage what content is allowed to be posted.

KR: If allowed to go forward, these trade groups argue that they could be forced to host speech they don't agree with and that could even get them into trouble with future lawsuits. Florida's law would require companies to disclose how and when they choose to censor speech, and it would also carry monetary consequences for taking down the speech of political candidates. The court showed a lot of interest in this case when it landed on its docket. In January, the court asked the Biden administration to weigh in on the cases and this summer, the solicitor general urged the court to decide if the two states' laws comply with the First Amendment. Both were big indicators that these petitions were to be granted, so not a huge surprise that the court just took up these cases.

KM: We may likely see a ruling in these cases just as we head into a presidential election. I wonder just how different online speech will look once we get there. America is big. Fourth largest in geographic size, third largest in population and first in GDP. Only a fool would tell you it's easy to run a country this big. In fact, it takes over two million civilian employees to keep it running every day. All of those employees belong to something referred to in legal circles as the administrative state. That term may be unfamiliar, but you can find traces of its existence in your everyday life. The administrative state is the bureaucracy that manages the day-to-day functions of the federal government. It's the EPA enforcing environmental regulations, the Department of State issuing you your passport, and it's the FDA inspecting the food we eat. There are some on the political right that have fought to dismantle the administrative state, calling its constitutionality into question. Such an argument has made it all the way up to the Supreme Court in three cases that have the potential to entirely reshape the bureaucratic apparatus.

KR: You might want to tune out when you hear that we'll be talking about fishery protections, policies for payday lenders, and how the SEC polices fraud, but I urge you to stay tuned because this part is really important.

KM: I think it says something, that during this time of seismic change in how Americans view their government, we are looking at possibly having that government changed right before our very eyes without casting a single vote.

Dan Walters: We really are at an inflection point in determining how our democracy functions. And you might think that all of this is administrative law stuff is really not relevant to all of that. But it's actually pretty central. My name is Dan Walters, I'm an associate professor of law at the Texas A&M School of Law in Fort Worth, Texas. I mean, the question in so many of these cases is whether we're going to allow courts to make decisions, or whether we're going to allow Congress via the administrative agencies that it delegates power to, to make these determinations. And, you know, people need to realize that there are trade-offs involved with both of those choices, whether we choose administrative agencies or whether we choose courts as the primary expositor of our law.

KM: Before discussing the cases directly, I asked professor Walters if there was a common thread that link them all together.

DW: It's growing skepticism of the legitimacy and authority of the administrative state. For the last several decades, and especially I would say in the past decade or so, we've seen growing attacks on the administrative state. A lot of that has been through litigation, working through the courts, to try to use administrative law, the area of law that I study, to check what agencies are doing, in some cases, to change the doctrine fundamentally to limit the power and authority of administrative agencies. So, it's been a long-standing trend that has really accelerated in recent years.

KM: So, what are the cases? Well, the first case we can take a look at is *Loper Bright Enterprises v. Raimondo*. The suit concerns how the government regulates fishing companies. Loper Bright sued the government over a regulation enacted by the National Marine Fisheries Service, forcing the fishing industry to foot the bill for marine monitoring projects. Now, why did the agency think it could make such a rule in the first place? Well, enter the Supreme Court's 1984 ruling in *Chevron U.S.A. v. Natural Resources Defense Council.*

DW: You know, Chevron is a staple of administrative law. It's widely interpreted as giving the agency discretion to interpret statutes where there's ambiguity in the statute that needs to be resolved.

KM: Without the court's ruling in Chevron, the National Marine Fisheries Service would have never had the authority to make its funding rule in the first place. So, now in 2023, the court is considering whether agencies should still have that authority going forward.

DW: Some people look at Chevron and say, "Well, that looks like judicial abdication." And, it's certainly possible to see that perspective. In a sense, courts are saying that we're going to allow agencies to have a lot of discretion, rather than imposing our own view of what the statute means when the meaning runs out as a matter of text. So, you can understand the abdication argument, and that has caught on I think with a lot of people.

KM: Those in opposition to Chevron think agencies like the National Marine Fisheries Service should have less power. Many think Chevron deference is unconstitutional, while others think it's just bad policy. But let's say the fishermen get what they want, and Chevron is gutted. What happens next? Government agencies will have less leeway to do anything Congress hasn't specified — and we all know how easy it is for lawmakers to come to an agreement.

DW: You know, if Chevron wants to go away entirely, there would be huge open questions about the mass of regulations that are currently on the books, and how, if at all, they could still be enforced. Agencies would have to revisit a lot of the decisions that they had made in the past, and possibly rethink whether they could really defend their position before a court that is going to engage in an independent review, rather than a deferential review.

KM: So, we talked about agencies making their own rules when Congress isn't clear. This next case concerns how agencies receive funding from the federal government. Ladies and gentlemen … ahem … *The Consumer Financial Protection Bureau (or CFPB) v. Community Financial Services Association of America*. The CFPB establishes and enforces rules that banks, credit unions and money lenders follow.

KR: I think a lot of people will remember the 2008 financial crisis and how broad the impact was. CFPB was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Basically, lawmakers said they wanted an agency to have an independence and be able to prevent another financial crisis. Community Financial Services Association of America is a trade group that represents payday lenders. The trade group sued the agency over rules affecting the payday loan industry, but that case became the vehicle for the trade group to argue that the way CFPB is funded is unconstitutional. Unlike other federal agencies funded through regular appropriations bills, CFPB gets its funding directly from the Federal Reserve, which in turn gets its funding through user fees paid by member banks.

KM: A federal judge disagreed with the trade group's argument, but once the case was in the hands of the Fifth Circuit Court of Appeals, we got a ruling that kind of shocked people.

DW: There have not been many cases that raise appropriations clause, constitutional claims that an agency is just funded in a completely unconstitutional way. We just don't see that. And consequently, the arguments that were made and ultimately accepted by the Fifth Circuit here are entirely unprecedented. So, it's not an exaggeration to say that this is completely unchartered waters.

KM: It's a wild thing to think that the CFPB's funding scheme could be entirely invalidated. Say the court accepts this argument, that could mean that agencies must be beholden to lawmakers to get their funding, placing them more in the middle of political tiffs. This also means that if the government shuts down, those agency employees will be affected. Although, professor Walters isn't convinced that the court is going to buy into this.

DW: The fact that the Supreme Court took this case is, in my opinion, a pretty good indication that they intend to disagree with the Fifth Circuit and to reject this challenge. And in this case, this is such a novel theory and so untested. Again, there are not other cases, there's not a circuit split on this. There's nothing. I think the court itself, the Supreme Court, was a bit shocked that the Fifth Circuit went there and intends to reset on this question, maybe not to completely reject the idea that there could be appropriations clause challenges in some circumstances, but certainly not to accept the extremely broad understanding of the appropriations clause that this circuit adopted.

KR: CFPB was enacted as part of Congress' efforts to prevent another financial crisis. And the challenge in this case is brought by trade groups representing some of the very people the agency was tasked to protect against. And if they get their way, it could send the housing market into chaos, threaten the financial security of millions of Americans, and throw the country into recession.

KM: Alright, on to our final government-related case and get ready because it's a big one. It is *Securities and Exchange Commission v. Jarkesy*.

KR: This one also comes from the Fifth Circuit and concerns whether the SEC's authority to enforce laws against financial crimes is constitutional. And while the case deals with an agency that typically handles white-collar crimes, the Supreme Court's ruling could affect all government agencies' ability to … enforce anything.

KM: So, what are the facts of the case? Well, back in 2013, the SEC initiated an action against George Jarkesy for allegedly overvaluing hedge funds that he owned. Now, Jarkesy wasn't happy about having the SEC come down on him, but instead of challenging the specific action taken by the agency, he challenged the agency's authority to act against him in the first place. The first of Jarkesy's three

arguments in this case is that the SEC does not have the authority to resolve the action through an internal proceeding with an administrative law judge, or ALJ. These are the judges that work within a government agency to adjudicate disputes brought by the agency against a member of the public who committed some alleged violation. Here's Dan Walters, our scholar of administrative law, again.

DW: Lots of agencies have adjudicators and they internally process violations of the law and determine whether there's liability, whether penalties need to be paid.

KM: Many agencies are responsible for setting guidelines, enforcing those guidelines and then adjudicating violations. These judges are typically experts on administrative law and know the statutory mandate of the agency in which they serve. The central idea is that going through an ALJ leads to a quicker adjudication, whereas cases that work through a federal judge might take years to reach a resolution. And say someone thinks the ALJ made the wrong call in their ruling, then the option is always there for that person to file an appeal in federal court. But Jarkesy believes that by having his case adjudicated by an ALJ, his Seventh Amendment right to a jury trial was violated, striking at the heart of the agency's authority to hear the case in the first place. He also believes the insulation ALJs enjoy – they can't be removed from the agency by the president, even though an agency's top brass are appointed by the president – is a violation of Article 2 of the Constitution, which outlines the executive branch.

DW: One of the big upshots of this decision is if ALJs cannot be protected from removal, they're going to be a lot more like immigration judges. So, take all the things that you don't like about immigration law, and superimpose them on other important programs in, you know, the Environmental Protection Agency, the SEC, Social Security Administration, it's pretty safe to say that you would have a lot of the same kind of toxic political dynamics playing out in a way that taints a lot of that adjudication.

KR: OK, OK. But let's get to the real meat of this argument, where the administrative state nerds are going to go absolutely crazy.

KM: As we mentioned in this case earlier, the SEC in this case gets to make the final decision whether the case goes to an ALJ or to a federal judge. It is that decision that brings us to Jarkesy's final claim, and that is that the choice violates the nondelegation doctrine. This doctrine has been hotly debated as a theory of law for many decades in this country, and without a professional there to work you through it, pretty hard to understand.

DW: The nondelegation doctrine, to the extent that it exists, says that Congress may not delegate that legislative power to administrative agencies. So, what that means, though, is really hard to figure out, because we don't have any great definitions of what the legislative power even is. And even if we were able to define what the legislative power is, the court has, at least since the beginning of the 20th century, recognized that certain powers that are given by Congress to administrative agencies don't run afoul of the nondelegation doctrine. So, I think it's safe to say we wouldn't have an administrative state, if it wasn't for the court having a receptive attitude to at least some delegation.

KM: This idea is one that actors within the conservative legal movement have championed for years. The Federalist Society has lauded the legal theory to curtail federal agencies from taking actions on issues ranging from levying fines against polluters to enforcing laws against financial crimes. In this case, the Supreme Court must determine if the SEC is wielding the power of Congress or acting within its regulatory purview.

DW: Now, I think what's probably most controversial about this decision, other people might tell you different things are controversial because there are a lot of things that are controversial about this, but to my mind, one of the biggest problems is the courts' really quick definition of this choice that SEC has to make as a legislative power. Right, so, if you think about it, SEC, in choosing whether to go to court first or to do agency adjudication first, it doesn't really look like writing a statute at all. So, it doesn't seem like the paradigmatic legislative power. In fact, it seems much more akin to classic executive power, right, the ability to choose how to prosecute and enforce the law.

KM: The fight to take on big government has brought us to here, where the justices will seemingly get a final say in how these key government agencies will operate. If the administrative state is gutted, what fills the Grand Canyon-size hole left behind? Who takes on the role of managing the day-to-day functions of our very big nation? Things could get quite chaotic. That is a lot to wrap your mind around. So, how about a quick break here and then we will get back to the preview.

(Music break)

KM: Making travel plans these days often involves a lot of planning. Going from website to website, making sure that hotels are booked and excursions are planned. That is undoubtedly stressful but can certainly be more challenging if you are someone who lives with a disability. This next case involves a person who sued a hotel for violating the Americans with Disabilities Act. Before getting into that, let's do a quick refresher on the Americans with Disabilities Act, or ADA. The ADA prohibits discrimination against anyone who is living with a disability. So, employers cannot turn prospective employees away if they have a disability and must provide reasonable accommodations for said employee. Public spaces must also provide such accommodations, whether that be ramps for individuals who get around via a wheelchair or allowing service animals to enter places where animals are usually restricted. Really, the ADA is there to ensure that Americans with disabilities have an equal access and opportunity as everyone else.

KR: Okay, well, big question here. How does all this get enforced?

KM: The best place to start is to talk about a tester. Testers are people who take it upon themselves to go out into the world and find violations under the act and then bring a lawsuit to force compliance.

Jasmine Harris: So, Congress designed Title III of the Americans with Disabilities Act in a way to deputize private citizens to go out and help enforce the act.

KM: That is Jasmine Harris, she's a law professor at the University of Pennsylvania and studies disability rights and anti-discrimination issues.

JH: Testers take on dignitary harm, that they are themselves absorbing harms that other people will experience.

KM: In 2020, Deborah Laufer sued Acheson Hotels, saying that the hotel's website failed to provide accessibility information. Since 2018, Laufer has sued hundreds of hotels for this very reason.

Harris: With respect to Laufer, for example, she herself is a person with multiple disabilities and has been denied information in terms of accessibility information for hotels, so she took it upon herself to do this work to prevent that from happening to other people.

KM: The issue in this case doesn't quite focus on whether the hotel ran afoul with the ADA. In fact, since the lawsuit has been filed and worked its way up to the court, the website's accessibility info has already been updated. This case looks at Laufer's standing to sue in the first place.

JH: So, the fundamental question with testers is, what is the harm that a tester experiences if they themselves are not denied access to the public service, or place of public accommodation? And the answer is, in case the question is, well, Ms. Laufer was not intending to stay at Acheson Hotels, and therefore, she was not intending to book and therefore, she was not actually denied the ability to stay in these places because she was denied accessibility information, she didn't need it. She says she didn't experience harm.

KM: A federal judge initially dismissed the case, finding that since Laufer had no intention of visiting the hotel, she did not experience any harm that would give her standing to sue. On appeal, the First Circuit Court of Appeals reversed. The appeals court reasoned that Laufer sustained an injury by not having the proper information.

JH: And so the harm that she experiences is the compounded dignitary harm of encountering, yet still, 33 years after the Americans with Disabilities Act, hotel websites that do not have accessibility information, that sends a message to her that she is not one of the patrons, one of the intended patrons…

KM: Who has the right to sue is pretty crucial when it comes to enforcing a landmark piece of legislation such as this. Professor Harris told me that the argument offered by Acheson Hotels has the potential to significantly redefine when a person is truly harmed by inaccessibility.

JH: By stripping tester standing, you're basically saying that individuals with disabilities are no longer going to get the benefit of being able to avoid those harms. You know, it's basically saying, look, if you want to sue a hotel for inaccessibility, you have to go there. But guess what, when you're there, you don't have time to put that trip on hold and say, "Hold on, I need to file my complaint right now." You can't, you're not going to remedy that situation. You're only going to remedy your future situation. And so, it's ignoring the fact that you have to deal with the prospective harm in advance.

KM: So, what are the chances that the court upholds the First Circuit's ruling, giving Laufer standing to sue?

JH: I mean, I'm not a betting woman with respect to this court. You know, I think, if the court says, "No, people like Ms. Laufer, who are self-proclaimed testers do have standing irrespective of motive, irrespective of other factors," then I think that's a critical, obviously a critical win. I think that the court in order to get there is going to have to fundamentally understand the nature of the harm.

KM: When should someone have standing to sue: Before a possible act of discrimination happens or after that person has already been discriminated against? How will the mission of creating a more inclusive society be impacted if the ability to call foul gets limited? The answer to those questions may mean new limitations on testers across the country. Alright, Kelsey, now those are many of the cases that we will be watching this session. However, there are some cases that have caught our eye that aren't quite on the docket yet but may very well be in the coming months. At the top of that list is *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*. If that name doesn't ring a bell, I am sure the details of the case will. Anti-abortion physicians filed this case in a Texas federal court to challenge the

FDA's approval of the abortion drug mifepristone. They argue that the drug is dangerous, and the agency employed a flawed process to allow its introduction onto the market. Now, mifepristone is commonly used with another drug to terminate a pregnancy in its first couple months, around 70 days of gestation. It is also the most common way abortions happen in the United States. It's hard to imagine this case even existing without the court's 2022 ruling in *Dobbs v. Jackson Whole Women's Health Organization*, which eliminated the constitutional right to abortion.

KR: This case was filed only months after the court struck down *Roe v. Wade*, and the Tennessee-based group Alliance for Hippocratic Medicine actually incorporated in Texas to put this in front of Judge Matthew Kacsmaryk.

KM: This has proved to be a controversial aspect of the case, because filing in Texas guaranteed that the case would be heard by Kacsmaryk, a judge appointed by former President Donald Trump and is well known for his anti-abortion stance.

KR: What I'm hearing from legal experts is if this case was filed anywhere else, it would have been treated differently. However, we are here now, and the court has already intervened in the case and now the justices will decide if they want to officially add the issue to their docket this term.

KM: What will you be watching for as the Supreme Court, once again, wades into the issue of reproductive rights?

KR: Court watchers are going to be paying attention to this case, not only because of its huge impact on abortion but also how the justices react to a challenge like this. They could be deciding another huge battle on abortion. And if you'll remember, overturning *Roe v. Wade* was supposed to get them out of the abortion business. This was supposed to be up to the states, but yet it's up to the high court again. We'll see if the justices are going to stick by their statement that they are done in the abortion business or if they are going to accept what some legal experts call extreme arguments to try to get abortion medications taken off the shelves nationwide. It'll really be a test for how far this conservative supermajority wants to take the issue.

KM: Abortion politics is not the only thing the court can't seem to shake right now. Over the past year, justices on the court have found themselves thrown into a firestorm of controversy concerning court ethics.

KR: This has really been interesting to cover as the justices contend with these allegations against them. You know, the conservative supermajority is not only facing controversy for the rulings they make on the bench, but for the decisions they are making off the bench. And I'm sure this is going to be on the top of their minds as they are just coming back from summer break. These questions over the justices' ethics stem back many years, but they caught recent attention after ProPublica came out with a series of articles about several justices, most notably Clarence Thomas. And really what these articles detail is what his life is like off the bench. Thomas has claimed to live a very quiet life. He says he prefers to go on RV trips and stay in Walmart parking lots. What we're really discovering through this reporting is that's not the case.

KM: Yeah, and we're talking over two dozen private jet flights, a dozen tickets to sporting events, and trips to luxury resorts, all covered by wealthy billionaires.

KR: Why this matters is that the court is not bound by ethics standards, like lower court judges. However, the court is bound by requirements to file yearly financial disclosures and what people are saying is that Thomas and some of his other colleagues should have reported these gifts. While these conversations may seem like they only involve the justices' life off the bench, they are really starting to interfere with the justices' work on the bench. Recently, Clarence Thomas was criticized for his connections with the Koch network, who has funded many of the cases before the court, most notably they've been involved in efforts to overturn Chevron, which is before the court this term, and Thomas has changed his positioning on the issue over the years, so that will likely be a conversation we are having throughout this term.

KM: It looks like this activity hasn't just raised the eyebrows of court watchers, though. It sounds like politicians on Capitol Hill are calling on more regulation and oversight of the justices. How likely are we to see lawmakers act on these reports and put up guardrails?

KR: If I was a betting person, I would not be placing my bets on this one. The court has divided so many people with its recent rulings and that really makes it hard for lawmakers to come together and agree on how the justices should be regulated. Ethics experts really are just asking for the justices to do what every other judge does and abide by a standard of conduct. Over the summer, some of the justices have come forward and said the court is looking into implementing its own standard of ethics and I really think this is how the issue will be resolved. Lawmakers are a little bit too divided and some of the justices aren't sure lawmakers have the ability to implement a code of conduct on them, so I really think this has to come from within the bench.

KM: Thanks for sticking around through this abbreviated preview of the court's upcoming session. All of these cases and more will be argued throughout the term, and who knows what we will be talking about come summer's end 2024. Will a popular abortion drug still be available to Americans? Can someone who is subject to a domestic violence restraining order have a gun? Will people with disabilities have the latitude to challenge discrimination before it happens? Will the federal government be able to function? Courthouse News Service and Sidebar will be there to help get you the answers and analysis you depend on! Thank you to Kelsey Reichmann for joining me on this epic preview of the court's term. Make sure to check out her stories on courthousenews.com and get the full inside scoop on oral arguments, rulings and drama coming out of the highest court in the land. Follow us on social media and drop us a review on Apple Podcasts, we would love to hear what you think about the show. Join us for our next episode, when reporter Hillel Aron turns back the clock and takes us to the height of witch hysteria in the New England colonies. You've likely heard the wild accusations that were made against the supposed witches who were prosecuted, but what about the evidence that was presented? How did the whole wicked affair go down? Find out in this Halloween special episode! See ya!

(Outro music)