Intro:

Mr. Chief Justice, may it please the court. It's an old joke that when a man argues against two beautiful ladies like this, they're going to have the last word.

Intro:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet of our necks."

Leah Litman:

Welcome back everyone to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. I'm Leah Litman. For once, Melissa, is not doing the introduction. And I am joined by-

Kate Shaw:

I'm Kate Shaw. Hey, Leah.

Leah Litman:

And we also have a very special guest with us today to discuss one of the major Supreme Court decisions that came down this week, and that is Julie Rikelman, who is a senior director of US litigation at the Center for Reproductive Rights, who argued and won June Medical versus Russo, one of the cases we'll be discussing. Welcome to the show, Julie.

Julie Rikelman:

Thanks so much for having me.

Kate Shaw:

So, let me do a quick overview of our show today. We're going to begin by breaking down the biggest cases that we got this week. Obviously, we're going to lead with June Medical and draw on Julie's expertise. We're then going to do a little bit of a look ahead to next week and what remains in the balance of the term and as always, we will wrap with some court culture.

Kate Shaw:

So, let's start with June Medical. So, Julie, it is great to have you on the show. We have made no secret on the show of what we thought about your argument back in March, just a week or two before the world shutdown. It's wild how recently that happened. So, let's begin by saying, congratulations on your win.

Julie Rikelman:

Thank you so much. I really appreciate it. It means a lot coming from you.

Leah Litman:

So, I'll go ahead and provide a brief background. We obviously did an emergency episode that posted the day of the decision, so our listeners are familiar with it in part for that reason, and also because we've discussed the case several times. But the June Medical case involved a challenge to Louisiana's admitting privileges requirement that required all doctors who perform abortions to obtain admitting

privileges at hospitals within 30 miles of where they perform abortions. That is of course, the same law that Texas enacted and that the Supreme Court struck down in the 2016 decision Whole Women's Health versus Hellerstedt.

Leah Litman:

So, in June Medical the court divides five-four or really, four-one-four, where you have four justices joining an opinion written by Justice Breyer that would have invalidated Louisiana's admitting privileges requirement using the framework that the court had announced in Hellerstedt. And then the one justice, the chief justice writing separately to say, he would invalidate this law, but not using the exact same framework as the court used in Hellerstedt. And then you have the four dissenters, the four angry men who offered different reasons for upholding the Louisiana law. But the bottom line is that the Louisiana's admitting privileges law is invalid. So, with that background out of the way, now we can actually get to discussing the opinion.

Leah Litman:

One thing we did want to note because we didn't have the opportunity to discuss this in our emergency episode, is that a majority of the Supreme Court affirmed that the abortion providers and the clinics had standing to raise this challenge. I think that was significant because the states and the federal government had raised what could have been a potentially momentous challenge to the providers and the clinics standing. So, Julie, congratulations on preserving a fundamental tenet of federal courts law. How does it feel?

Julie Rikelman:

It feels pretty great, actually, because as you said, if we had lost on that it really would have been devastating and we can talk about that a little bit more. But just leave it to say the vast majority of challenges to abortion restrictions that are pending in federal court right now are brought by medical providers and clinics, and so if the court hadn't upheld that principle it would have been unclear what would've happened to all of those lawsuits.

Kate Shaw:

And one thing I thought was important about the Breyer opinion is that it holds that these providers have standing on two independent bases, right? One, you had this intense colloquy with Justice Alito at the oral argument suggesting, as we read the record and as you I think very persuasively demonstrated, the State of Louisiana very clearly waived its right to assert any argument that these providers lack standing. In fact, it conceded very clearly and strategically that they did have standing, and yet Alito wanted to rewrite the history of that.

Kate Shaw:

But the court rejects that effort and says, "Yes, there was a waiver." But then proceeds to find that regardless of waiver, or if you want to characterize it as a forfeiture, it actually doesn't much matter because these providers plainly do have standing, if the court were to decide in the first instance that question based both on, as Leah was saying, independent federal courts jurisprudence and also of line of cases in the abortion realm, specifically making quite clear that standing exists here. And so, I thought that was just belt and suspenders approach was actually really helpful probably in future cases in which you may not have a strategic waiver.

Julie Rikelman:

That's absolutely right. And I've got my opinion printed out here. And the key, it took me four times to print it on my printer at home, but I've got the whole thing. And the key language from Justice Breyer's, on page 16 and just like you said, Kate, what he holds at the end of that section is that the state's strategic waiver and a long line of well established precedence foreclose the state's belated challenge to the plaintiff's standing. And critically, Chief Justice Roberts, joined that entire section of the plurality opinion. So, it is a very clear win on third party standing and not just for reasons of waiver.

Leah Litman:

Yes. And I think that this is a good example about how the power of five, that is the chief justice's willingness to sign on to this portion of Justice Breyer's opinion, communicated a very strong and unanimous rejection wholesale of the state and federal government's argument, which as you noted, not only would have jeopardized all of the ongoing challenges to existing abortion restrictions, but a lot of the court's other cases as well. So, we had talked previously about Craig versus Boren, the challenge to the state beer differential licensing requirements for men and women that was brought by the beer vendors. There are also contraception access cases and just a whole host of other areas of law that depend on, essentially, service providers ability to challenge restrictions that apply directly to them, even if they infringe or restrict other people's constitutional rights.

Leah Litman:

So, if that was the portion of the Supreme Court's opinion that was unanimous, the other parts were more fractured. So, we mentioned the Justice Breyer plurality that was extremely Breyer-esque in basically all different dimensions. It had charts of Louisiana. It had balancing of the benefits of the law, zero, against the burdens of the law, many. It was an ode to precedent and the importance of sticking by the Hellerstedt framework. It was in many ways everything Steve Breyer loves.

Leah Litman:

But then you had the chief justice's concurrence, and I thought it might make sense to talk about this opinion more, just because I think that this will be the opinion that lower courts are essentially tasked with applying in some ways. Because when you have a fractured opinion, that is a majority of justices reaching one outcome, but then not all five agreeing with the reasoning, typically the narrowest of the opinions controls. And the chief justice's vote was necessary to the outcome in this case and is potentially a rationale that could in some applications, and I think some people think will lead to upholding more abortion restrictions and so might be narrower in that sense.

Leah Litman:

But so anyways, that's a long way of saying why the chief justice's concurrence is going to be a part of the lower courts focus on the meaning of this case. So, Kate, do you want to remind our listeners how the chief justice departed from the Hellerstedt framework or the Breyer one?

Kate Shaw:

Sure. I mean, I think I'm still puzzling it through myself, honestly. So, it purports to reject Hellerstedt and particularly, the benefit burden balancing that Hellerstedt engages in, and that the plurality opinion by Justice Breyer, in this case to a degree engages in as well. So, he says, we actually don't ask about benefits and burdens, we return to what Casey set forth, in Planned Parenthood versus Casey, the 1992

opinion of the court, which reaffirms the core holding of role that the constitution does protect to some degree, a right to terminate a pregnancy. But that restrictions on that right, should be evaluated using the undue burden standard.

Kate Shaw:

That Casey elaborates, right? So, what is an undue burden? Something that has a state regulation, that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion. So, he says we really focus on obstacles, on the degree of an obstacle. And I think there is a real question about whether, I guess, this will all be litigated, but how different that really is from what the majority in the Whole Women's Health case, the Texas case, and the plurality opinion here do. So, on the face of it, there is a real difference, right?

Kate Shaw:

So, Breyer, in both cases says there is no medical benefit to these laws. These laws are purportedly enacted to promote and protect women's health. And after careful review of the evidence in the district court, in both cases, district court judges concluded that in fact, there was no evidence that these laws promoted or protected health. That in this case in particular, there was this rationale offered that these admitting privileges laws served a credentialing function for doctors. And that made sure that the doctors who are going to perform abortions were better, more reputable doctors. That in fact, there was no evidence that supported the claim that the law advanced that interest.

Kate Shaw:

But, so when he shifts to burdens, he seems to agree, Roberts does with what the plurality holds, which is that the burdens here are substantial, right? The burdens would involve reducing the number of abortion providers because it's so difficult or impossible to get admitting privileges to one or potentially two physicians in the State of Louisiana. And I guess, it's just to me, it's hard to know how much of a difference it will make that there is not going to be an analysis of benefits. And I guess, I'm not sure how much the chief is suggesting that courts reviewing these restrictions, just credit facially the justifications offered by legislatures for these restrictions.

Kate Shaw:

And in some ways I'm not sure how much it matters, if in fact the burdens are always going to be the closing of clinics, at least in cases like this one involving what we refer to as a TRAP laws, targeted regulation of abortion providers. So, I guess that's me saying, I'm not sure I know what the chief does and how different it is from the plurality opinion, but I'd love to hear what Julie, your take on the space between the two having had now a few days to sit with the opinion.

Julie Rikelman:

Yes, absolutely. So, I think again, speaking from my framework as a litigator and somebody who's going to be now using this opinion in cases beginning next week, I think really from our point of view, all of the same arguments that we have been making in our cases in federal court last week, we'll be able to make next week. So, a few things that I think are really important about the concurrence and really don't change where things stand. The concurring opinion makes clear that a variety of burdens count. So, that was one of the key issues that was actually litigated in Whole Woman's Health, and came up again in this case, what kind of burdens matter? Is the only thing that matters that a person is outright

prevented from obtaining an abortion? Does it have to be nearly impossible? That's the standard that Louisiana was putting forward in this case. And the polarity in the concurrence, it seems to reject that.

Julie Rikelman:

So, Chief Justice Roberts goes through burdens like delay, crowding, increased medical risks from those delays, increased travel distances, all of those matter. And I think it's really important to take a step back and remember that the opinion that the Fifth Circuit issued in Whole Women's Health, the underlying opinion in that case, said none of those burdens made any difference. The Fifth Circuit's only concern in upholding the Texas law, was that there would remain a handful of clinics in the state, in the major metropolitan areas. And it didn't matter if people from all around the state were going to have to travel hundreds of miles, have increased delays, have all of these different types of burdens. And this opinion does not agree with the Fifth Circuit on those points. So that's, I think really important, the types of burdens that are going to count as something we're going to litigate, and I think we'll be able to make all the same arguments.

Julie Rikelman:

And the second big point I would make is, what the chief justice said in his opinion is that he disagreed with the idea that benefits would be weighed against burdens. That's the language he used. And then what he said was, that read in isolation from Casey, that framing would suggest a grand balancing tests, which he doesn't agree with. But then he went on to write that Casey treated benefits as part of a threshold requirement that states still had to satisfy. And that threshold requirement means that the law has a type of valid purpose and that what the law does has to be reasonably related to that purpose.

Julie Rikelman:

So, in our view, when Casey did that analysis of the restrictions, that issue in that case, it still did some analysis of fit. And so, we think that there is still a big role to see if there is some fit between what the state claims is doing and what the law actually does. So, in those ways, those two big ways, I think, as I said, the big takeaway is we're going to be able to make all the same arguments in federal court that we've been making up to now.

Kate Shaw:

Julie, one quick follow up. So, you all think there is a reading of the language about the scrutiny of the asserted benefits that is something a little bit more searching than just a rational basis review. It's not like the legislature has to offer any justification and then the court reviewing the restriction is supposed to move just immediately to an evaluation of the burdens. There's some meaningful scrutiny at the threshold of purpose.

Julie Rikelman:

Absolutely. We believe that there is. And in fact, the chief justice in his opinion talked about the credentialing function that Louisiana claimed this law served and said it didn't serve that function, that the evidence in the district court made clear that it wouldn't actually help to provide better doctors in the state. And related to that, both Justice Breyer's opinion, and the chief justice opinion, made clear that facts matter. And that the court actually gets to look at the facts, that there isn't this complete deference to the legislature. There was a trial in this case, and this law was struck down because the district court's findings about what this law did prevailed, not what the legislature said the law was going to do.

Kate Shaw:

So, Leah, you obviously, both, when we talked about the case right after it came down in on op-ed, you wrote about it, are very concerned about maybe not what arguments that Julie's colleagues are making the lower courts, or even how the lower courts will receive those arguments, but how this Supreme Court might decide the next case with this as the most recent abortion precedent.

Leah Litman:

I guess, part of my concern just comes from the fact that we know who the five justices on the Supreme Court are, who are inclined to cut back on abortion rights. Part of the concern is that the chief justice was flirting with an interpretation of Casey or Hellerstedt that states had advanced who were trying to restrict access to abortion.

Leah Litman:

But part of the concern is also, I think, just in comparison to the fact that the chief justice joined Justice Breyer's opinion, rejecting the arguments against third party standing, to the fact that he was unwilling to join Justice Breyer's opinion on the actual merits. And I think that there is additional power and force to the chief justice joining a full throated defense of the court's prior decision in Hellerstedt, instead of writing something that says, "Well, look, I think I was right in Hellerstedt when I dissented, but I'm bound to give precedential force to that decision." But then leaving some ambiguity about what exactly he's giving precedential force to. Is it the legal framework from Hellerstedt? Is it parts of the legal framework from Hellerstedt? Is that the fact that these are the same laws that were challenged? Is that the fact that the burdens are similar? And that ambiguity, I fear could be weaponized or just used by states as reason to further explore other restrictions on abortion. So, I think that's some of why I was concerned.

Kate Shaw:

Yeah. And I was concerned about a lot of the language in the concurrence as well. I mean, some of the characterization of Casey that we talked about previously is just so different from the way, we are accustomed to thinking about Casey as a complicated, a very much mixed bag. But that the decision to strike down one of the Pennsylvania laws at issue is a critical component of Casey. And it almost feels in the chief's gloss on Casey is though really what mattered in Casey, was that most of the Pennsylvania provisions survived. And so, there at least, there are different kinds of restrictions, so a record keeping requirement.

Kate Shaw:

So, is he signaling that those future record keeping requirements will stand? Yes. And I'm not sure that's where the action is going to be in future cases anyway. But things like the parental notification requirement that is upheld, although subject to a judicial bypass, a waiting period, right? So, there does seem to be this gratuitous blessing of the upholding of those kinds of restrictions in Casey, that sent a signal about how restrictions like that I think would fair with this court. So, this is the first time, I don't think we've said this on air, that John Roberts has voted to strike down an abortion restriction, right?

Leah Litman:

Yes.

Kate Shaw:

So, that is significant. This is maybe a weird parallel, but in the campaign finance realm, right? Roberts, does not like campaign finance laws. He strikes them down. But the one campaign finance restriction he's ever voted to uphold is in Williams Yulee, this Florida case where there's a restriction on what judges can do by way of soliciting campaign contributions directly. And somehow it's because it's about judges. I think people think maybe he cast a vote in a different direction.

Kate Shaw:

Is there an explanation that this case too is sui generous in that it is about protecting the supremacy of the Supreme Court as the sole arbiter of the meaning of its precedence? And really what Roberts is doing at least in part, is chastising both that litigation strategy that served him up in identical cases, the one the court had in the Texas case, but also the Fifth Circuit for essentially usurping the court's role in deciding if it will decide to do that, to overturn its own cases, because that's what the Fifth Circuit does here with the Whole Woman's Health decision. And if that's the case, that it is like, this is a ticket that is good for one ride only unless somebody is going to bring them an identical law.

Julie Rikelman:

Just to go back to what you talked about before in terms of concern. I think it is important for people to recognize that there is a lot to be concerned about in this opinion. So, just to say, first, this obviously was a really big victory because we live to fight another day. It was a really big victory for people in Louisiana, because there is already terrible access to abortion in Louisiana. And if this law had taken effect, it would have reduced that limited access even further, which would have been devastating. So, this was really important. But at the same time, some of the things that you said, I think are really important to lift up because we know based on this opinion, that five justices would not have struck down the Texas law.

Julie Rikelman:

If that case had come to them a new right now, they would have upheld the Texas admitting privileges law. And that Chief Justice Roberts voted to strike down Louisiana's law only because of stare decisis. And that's concerning for a whole host of reasons. But one of them is that the Texas law shut down half of the clinics in that state. Those clinics have for the most part have not reopened. And everyone agreed that law had nothing to do with health and safety, did nothing for patients. So, it's very concerning that five justices if ruling on a clean slate, could've upheld that law.

Julie Rikelman:

I think the other thing to be really concerned about from this opinion is the dissents. Really a number of the dissents went even further than the Fifth Circuit did in its opinion below. They would have taken away third party standing. They actually suggested that there was a real health and safety benefit to this law. And I think it's critical for your listeners to know that even the Fifth Circuit agreed that there was at best a minimal benefit to this particular Louisiana law.

Julie Rikelman:

So, the dissents are very, very concerning. And I don't want to minimize that. And I do really want to emphasize for people that if you care about abortion access, you have to be concerned and you have to remain vigilant, because we have to fight incredibly hard just to preserve the status quo. And we only

preserved it by a five-four vote. And the status quo is not good enough. It's not good enough for people around the country. It's especially not good enough for people of color and people who are struggling to make ends meet. So, for people who care about expanding access and making it meaningful there's lots of reasons to be concerned.

Julie Rikelman:

Though, again, if I may just say one more thing, I do think it was really critical for us as litigators, and a lot of gratitude to our clients, to be willing to fight. After the Fifth Circuit opinion came out, a lot of people said we could never win this case. And if we had stopped after the Fifth Circuit ruled, this law would have taken effect two years ago and devastated access. So, it's up to us, at least in our corner of the litigation world to really be brave and bold and to continue fighting, even if it seems like the odds might be against us.

Leah Litman:

Yes. But it's also a painful and important reminder how precarious the state of abortion access is and how much the anti choice movement has won, that it is a huge victory to, as you say, preserve a win you obtained four years ago and preserve the status quo.

Julie Rikelman:

By a vote of five to four on an identical case, a case that as a lawyer who's been litigating for 23 years, it's hard to think of two cases that could be more alike than-

Leah Litman:

Right. A case that you should have won just by filing papers that said, "See Whole Women's Health versus Hellerstedt," and instead you've got four dissents that said, "Well, we would either overrule Roe versus Wade. We would overrule Whole Women's Health versus Hellerstedt. Or we would overrule all of third party standing or maybe all of the above."

Julie Rikelman:

Exactly. That's exactly right.

Kate Shaw:

Yeah, that's right. I remember Leah, when we first talked about this case, we were like, what obviously should happen is a summary reversal of the Fifth Circuit. There's no need for briefing and argument in the Supreme Court. But obviously, that's not what happened. And that's not what this merits opinion is at all, but that's what should have happened.

Julie Rikelman:

And that's what we asked for, Kate, if you recall. We had asked for some of the reversal.

Kate Shaw:

And you were right.

Leah Litman:

There's some oddity about who assigned this opinion, given that the chief justice voted to reverse the Fifth Circuit, the chief justice would have been the senior most justice to assign the opinion. And it looks like he might have assigned the opinion to Justice Breyer, given that Justice Breyer had only had the plurality, but also didn't have any other opinion assignment in February, yet the chief justice didn't join Justice Breyer's opinion. And I wonder if that was ever a possibility of him joining the opinion or if Justice Breyer who was just unwilling to write a version of the opinion that the chief would have joined. But I think that that detail is also worth the listeners pausing over when they were thinking about the kind of state of abortion precedent going forward and what the chief justice his vision of it might be.

Leah Litman:

And then second is just, again, to invite our listeners to think about some of the reasons why the chief voted this way. Kate mentioned some of them, which is just respect for precedent and the institution of the court. Given that four years ago, the court invalidated this exact same law. And while we say that courts can distinguish precedent in all sorts of ways, there is a difference between distinguishing a case based on facts that shouldn't matter and distinguishing a case when there are no differences between the underlying laws at all. Of course, some of the dissenters also accused the chief of playing politics as they did in both the DACA case and the Title VII case and bending to electoral pressure.

Leah Litman:

I think some Supreme Court commentators have also wondered whether the chief might have been influenced by the fact that the courts institutional role has come under increasing pressure, given popular attention to the possibility of court packing or other forms of court reform. And so, those are just, again, some things to think about when we were thinking about what this case is going to mean, going forward.

Kate Shaw:

Yeah. Again, the assigning pieces is so interesting. I mean, yes, I presume the chief did assign it to Breyer. And I mean, Breyer played it really straight in his opinion. So, if the chief wasn't going to join this, he was never going to join. And so, but maybe he just said, "Well, let me just see." I'm not sure what more Breyer could have done to bring the chief into a full joint if the chief wasn't willing to do so here.

Kate Shaw:

The other possibility I suppose, is that the chief tried to write something himself and that really changed the standard and that the four more liberal justices said that we can't join any of this. And so, what would have been, so Breyer started writing separately and that became the plurality opinion. I think that, I guess is the other possibility.

Leah Litman:

So, one thing I did want to get your thoughts on Julie is, we had this past week on the Supreme Court's order list, directions to remand two cases to the Seventh Circuit court of appeals in light of the Supreme Court's decision in June Medical. And specifically, the court asks the Seventh Circuit to revisit in light of June two decisions that had invalidated Indiana's restrictions on abortion. One was a law that required ultrasounds 18 hours before women have abortions. And the second was a challenge to a law that required miners to notify their parents, that they had had an abortion, unless there was a judicial finding.

Leah Litman:

So, I was just curious to hear your thoughts about how the chief's framework might apply to those cases. Again, knowing that burdens short of the closure of actual clinics might matter, what might we expect from the Seventh Circuit to do, applying the chief's framework in those cases?

Julie Rikelman:

Right. So, of course we would have preferred if cert had just been denied in those cases. And I'll just be honest, you have both been on the court and I have as a clerk. So, it's hard for me to know what something like this really means, is this just the only way that the right number of justices were able to agree on an outcome in these particular cases, because there's no real direction to the lower court about what to do here other than to apply June Medical.

Julie Rikelman:

And I think these cases have strong factual records. They do have strong showings of burdens. So, I'm hopeful that on remand the laws will continue to be blocked. But it would have been great to just get a cert denial on these, the way that the court denied cert on some of those cases that had the third party standing issues in them. So, going back to what you were saying at the beginning. And one of the things that I have said is the fact that there were fractured opinions here, does end up creating more litigation rather than less around these issues. And I think this is really an example of that, right? These cases should have just been over, but instead they're going back for further proceedings.

Leah Litman:

Yeah. It would have been a strong signal from the court that nothing about this opinion undermines Hellerstedt whatsoever, if the court just denied cert in those cases. And instead we get this ambiguous invitation to revisit that I think causes my skin to crawl in particular, when I think, again, about some of the ambiguities that the chief created by not joining Justice Breyer's opinion. Anything else?

Kate Shaw:

Julie, I think we'll let you go since you're going to be busy briefing all of these cases in the next week or so. So, no rest for the weary. But thank you so much for taking the time to break the opinion down with us a little bit, and huge congrats to you and the team again on your victory.

Julie Rikelman:

Thank you so much. I really appreciate it. It's great to be here with you.

Kate Shaw:

So, before we move on from June Medical, so and without Julie, for this part of the conversation, it's impossible, I think to reflect on what this opinion means and does without thinking about the election that is four months away, right? So, there's been some suggestion that another possible explanation, I think we maybe talked about this earlier in the week, is that the chief is in part motivated by partisan considerations that he's, actually this outcome is a much better one electorally for the Republican Party, both from the perspective of the presidential election and in some states that have tight Senate races. That this opinion preserves the status quo. as Julie was saying, in some ways at least. And that is good news potentially for the Republican Party.

Leah Litman:

Yeah. Although, I think that at least Sara Gideon, who is Senator Collins likely challenger in the main election, did a pretty good job about capitalizing on the fact that Justice Kavanaugh, who Senator Collins had voted to confirm, had voted not only to allow the Louisiana law to remain in effect, but also to overturn Whole Woman's Health versus Hellerstedt.

Leah Litman:

So, I do take that as a small encouraging sign that perhaps some democratic politicians are learning how to think about talking about the importance of the court and trying to do so to their constituents. But I think that's exactly right, the outcome in this case, like the outcome in the DACA case, or like the outcome and the Title VII, case was in some ways, a huge boon to Republicans in the 2020 election, who now are not in the position of being saddled with a nationally, politically unpopular position.

Kate Shaw:

Right. Okay. So, we have a lot of other cases to cover. So, let's briefly first talk about the Agency for International Development versus Alliance for Open Society case. And at issue in that case is a 2003 law called the Leadership Act, which basically provides hundreds of billions of dollars in federal funds to fight HIV AIDS around the world. And then attaches as a condition to those federal funds, a requirement that organizations have a policy explicitly opposing prostitution and sex trafficking.

Kate Shaw:

And so, actually back in 2013, the court decided a case that was brought by some US organizations who received these funds, who argue that this requirement violated the First Amendment. And they actually had this very practical argument about the impact of this restriction, which is that it made it very hard for them to do some of this aid work, which required them to work with communities, including sex workers. And then in fact, there's lots of really good work at HIV AIDS prevention that they could do with those populations, but that they were prevented from doing so by having to take this public position of opposition to prostitution.

Kate Shaw:

And they won in the Supreme Court, six-two, actually in a Robert's opinion. And with Kagan recused as she was in this case, found that that requirement did violate the First Amendment. So, fast forward to this case seven years later, here you have foreign affiliates of US-based organizations. And it's the US organizations themselves arguing that this restriction can't be enforced against their foreign affiliates. And they won in the Second Circuit, which just applied the logic of this 2013 case.

Kate Shaw:

But here in a five-three opinion, Kagan again is recused. Kavanaugh, writes for the majority reversing the Second Circuit and upholding this funding restriction. And this is a very short opinion. It's eight pages long with some extremely complicated content. And sometimes short opinions can be great, but this felt like oversimplification of some complicated legal concepts. So, he says the case gets decided by two key principles, right? One that it's long settled as a matter of American constitutional law that foreign citizens outside US territory do not possess rights under the US Constitution.

Leah Litman:

Let's just stop there. He just says that, he says, it's obviously true and long settled that foreign citizens outside the United States do not possess rights under the US constitution. And in some ways this is consistent with a trend from this term, we talked about the court's opinion in Department of Homeland Security versus Thuraissigiam on expedited removals, or Hernandez versus Mesa, and the availability of remedies against federal officials for injuries that occurred outside of the United States. But as a more general matter, it's a lot more complicated than that very broad declaration pretends.

Leah Litman:

So, for example, he cites Boumediene versus Bush for this proposition. Guantanamo Bay is not within the United States territory, and yet in that case, the court said that foreign citizens at Guantanamo Bay had constitutional rights under the suspension clause. So-

Kate Shaw:

And it is somewhat complicated, right? Because Guantanamo is US military base. And so, in some ways there is this logic that it is an extension of. But that's a hard and fact specific question.

Leah Litman:

Exactly.

Kate Shaw:

And to go back to Hernandez, and I obviously don't need to tell you about Hernandez because you worked on the case. But the threshold question of whether Bivens, even was available is really what the court decides the case based on. Had it decided the case the other way, there would have been these hard questions about whether constitutional rights did exist right on the other side, because there are a few different lines of cases that seem to point in different directions about when non-US persons may have some kinds of constitutional rights, not all constitutional rights are created equal. The analysis will be different depending on the right at issue.

Kate Shaw:

So, for him to like paint it with this crazy broad brush just, again, felt like elegant brevity, but just like bizarre oversimplification of, and also like broad statements that could be used in very different contexts. And these now are statements of a majority of the court that are totally unnecessary to resolve this very narrow question before him. So, that was this long settled, but actually not so long settled matter of American law that was proposition one.

Kate Shaw:

And second, he says it's long settled. That separately incorporated organizations are separate legal units with distinct legal rights and obligations. And again, that I think is a real oversimplification of complicated law.

Leah Litman:

Exactly. Because in, for example, some of the corporate right cases, the court has suggested that maybe these differences in corporate form between closely held corporations or larger ones, don't make a difference when we are thinking about whether those entities possess constitutional rights. And this is Justice Breyer's point, when he says, "Our First Amendment cases that you all are all gung-ho about by

the way, leave no doubt that corporate formalities have little to say about the issue now before us." And so, again, it was just, as you were saying, this weird oversimplification and brazen over broad claims that just suggested, they either don't care about either of these complexities. They are just going to refashion the law as they would like. But extremely odd and concerning I think.

Kate Shaw:

And I have to believe that they're just so pressed for time with all these opinions outstanding, that the other folks on that side, who voted with Kavanaugh, just decided not to object. They just didn't have time to push. Because it's just irresponsible to make such sweeping claims in a case that doesn't require them. And for no one to have really objected, even on that side of the case, struck me as really peculiar. But I think is probably attributable to the kind of mad dash at the end of the term, whenever that is.

Leah Litman:

Oh, that's interesting. I would have attributed it to the fact that I think those five actually do think that foreign citizens outside the United States possess no constitutional rights, and that is reflective of their views, even though it doesn't capture the court's prior cases. And as we'll talk about in Espinoza and Sale a Law, sometimes they will just say, "Well, these are our views and that's where the law is going." And so, I took at least that first statement as a reflection of that. The second one I think is way more complicated.

Kate Shaw:

And I'm sure in the right case, they would object to that characterization. Right? If they decided that corporate form was irrelevant to some broad vision of the way the First Amendment protected, whatever right possessors.

Leah Litman:

So, what if, for example, in Alexandria Ocasio-Cortez administration, the United States started imposing funding conditions on foreign organizations. That the organizations say that they have a policy that supports choosing whether to have an abortion or carry a pregnancy to term. I just think that there is little doubt that those five would say that United States affiliates, even if they are distinct legal entities, would view that as complicity or wrongful association in violation of their First Amendment rights. And again, they wouldn't necessarily be wrong bracketing this one case that these formalities and corporate forms shouldn't be deciding the question.

Kate Shaw:

Yeah. I did feel like the subject matter at issue here was very much driving their reasoning.

Leah Litman:

Yes. So, let's move on to Espinoza, which was another major case that the Supreme Court decided. So, noted liberal/turncoat lefty, Chief Justice Roberts authored this five-four decision, joined by the conservatives in which he essentially invalidated Montana's no aid provision in its state constitution as a basis for the Montana state courts to strike down the Montana Legislature Scholarship Program.

Leah Litman:

So, a brief, just background about how those projects work. So, the Montana legislature tried to get around the Montana state constitutional provision that bans aid to religious schools or parochial schools. And they tried to get around that state constitutional provision by creating a tax credit program for parents who donate scholarship money, that can then be used to fund students attendance at private schools. The Montana Supreme Court strikes down that tax credit program on the ground that some of the tax credits fund scholarships that go to religious schools. But the Montana Supreme Court invalidated the scholarship program as to any school, religious or not.

Leah Litman:

The chief justice says that application of the no aid provision violates the free exercise clause of the United States Constitution. And essentially, his reasoning was encapsulated in these short sentences that declared, "Once a state decides to subsidize private education, it cannot disqualify some private schools solely because they are religious."

Leah Litman:

So, that I think represents a possibly significant shift, though how significant remains to be unclear, in the courts establishment clause doctrine. Previously, the establishment clause the court held, actually prohibited states from offering some forms of public subsidy to private religious schools, specifically subsidies in the form of textbooks or in the 1960s, paying teacher salaries, even when those teachers taught secular subjects.

Leah Litman:

Now, the court is saying you can't disqualify aid to private schools simply because they are religious. Now, the uncertainty is whether the free exercise clause requires states to fund not only religious schools, but potentially religious uses of money in those schools, such as for example, religious instruction or training ministers.

Kate Shaw:

And there's a big precedent in the mix here, which is Locke versus Davey, a case in which the court held that a state could exclude public funding for religious education, right? For training people to be ministers, specifically. And Espinoza does preserve that narrow holding basically on the grounds that there is this tradition that stretches back quite a long ways of a refusal to provide state funding directly to subsidize the training of ministers, and that no analogous tradition prohibits the use of some state funds to families to pay or to offset some tuition at private or parochial schools. But it's a pretty, clear that decision does feel like it's hanging by a thread.

Kate Shaw:

And another important precedent here, is a much more recent case, Trinity Lutheran, in which the court finds that a state program that denied funds for very clearly non-religious uses to religious schools and other institutions was unconstitutional. And the program at issue there literally provided for repaving playgrounds. And you had a religious school that applied for, was denied these funds. And the court found that in fact they were eligible for those funds.

Kate Shaw:

But here, tuition dollars at parochial institutions is quite a different kind of use of state funds and one certainly that decades ago would have run a foul of the establishment clause. And even Trinity Lutheran was a bit of an extension because to find that the constitution and the free exercise clause requires state funds be given to the religious institutions like this, was already a break from establishment clause precedent.

Kate Shaw:

But you can see both the reasoning of that opinion and this one are quite different. That opinion really purports to reserve any kind of harder questions about direct aid for other kinds of uses. And remembering Trinity Lutheran, I can't remember now if they joined, I think they concurred separately. But Breyer and Kagan certainly joined in the result in that case.

Leah Litman:

So, Justice Kagan joined in full, and she joined in particular, the footnote you were alluding to, where the court said, this case involves express discrimination based on religious identity, "With respect to playground resurfacing. We do not address other forms of discrimination." And of course, obviously the case was never going to be just limited to playground resurfacing. But I think the question was whether it would extend to let's say broader or less cabined forms of public aid as well, that is forms of public aid that weren't specifically limited to non-religious uses of funds like playground resurfacing. Or whether instead the free exercise clause requires access to generally applicable or interchangeable funds like the scholarship money here that could be used for some entirely non-religious purposes, like playground resurfacing or some that probably will. And I think the court makes clear that they understand they will be used for some religious uses as well, like religious instruction and whatnot.

Kate Shaw:

And I think the fact that this one is five-four as compared to the seven-two in result opinion in Trinity Lutheran is evidence, if more evidence were needed that this case goes much further. And in fact, the language that you started by quoting, I think made clear that to the extent that there was a developing narrative of John Roberts as a hero of the left over the course of the last week and a half or so. There was a real record screech stop with this opinion, which is not just in its result but in its reasoning, what feels like potentially a real expansion of free exercise clause rights. Potentially, a real collapsing of these long honored divisions between state funds and religious institutions.

Kate Shaw:

And you can see from some of the concurrences in this case that even the big sweeping Robert's opinion doesn't go as far as his fellow travelers on the conservative side would have gone in this case. So, Thomas has long said, which is still no matter how many times he says it, I still find it shocking that states can establish religions. Now, we know Gorsuch agrees. Did we know that before? I'm not sure we did.

Kate Shaw:

So, let's just leave that there.

Leah Litman:

Yeah. We'll just leave that one hanging out there. And then you have Justice Alito writing this long and passionate dissent about the history of anti-Catholic discrimination and how that factored into the no aid provision in the state's constitution. Sam, as ever, maybe this is an indication of wokelito, right? Being extremely attuned to discrimination. But in any case on the spectrum of Sam Alito's emotional register, this is very much a stay mad, Sam opinion.

Kate Shaw:

What do you make of his citation to Ramos. So, he had to work to get around his position that this racist history of these non-unanimous jury requirements in the Ramos case was irrelevant. And yet, this anti-Catholic history, which like for sure exists with respect to some of these so called Blaine amendments, but that in fact it was relevant here. So, he says, "Yeah, yeah, okay. So, fine. In Ramos, I didn't think it mattered." But he says, "I lost and Ramos is now precedent." So, if the original motivation for the laws mattered there, per end I didn't think it did, because per end, it certainly matters here.

Kate Shaw:

So, it's a very opportunistic, performative humility, right? "I lost that case and I'm bound to apply its reasoning here," which is not the way, I don't think Sam Alito thinks about the law or his role in it.

Leah Litman:

No, I mean, I think maybe his new nickname should be Trollito. Right? It's like he essentially was trolling the court at argument in Ramos, where he announced that, "Well some justices really lectured us about the importance of precedent." So, that was the oral argument in Ramos. Now, he's saying, "Well, since you guys said that the original intentions of the enactment matter, I'm going to be forced to do that here since I respect precedent so much." You could of course insert a sentence, "I lost and Blank is now precedent into June Medical Services," into a two-sentence opinion reversing the Fifth Circuit. And yet he does not feel compelled to do so there.

Kate Shaw:

Conspicuously, no. Yeah. I like Trollito. Trollito also is like a genuine portmanteau. So yeah, I think we maybe start doing it. Rolls off the tongue better .

Leah Litman:

Right, arguably more fitting too.

Kate Shaw:

It does.

Leah Litman:

So, three separate dissents in this case, one by Justice Ginsburg joined by Justice Kagan, saying there was no free exercise violation here because Montana ended aid to all private schools, whether they were religious or not. This claim I think is interesting because of an interaction with a case that I don't remember, whether we have previously discussed on this particular issue before, but Palmer versus Thompson, which was a case where the court reviewed Mississippi's decision to close all of its public pools when faced with an order to integrate them. And the state defended itself against unequal protection clause challenge on the ground that it closed all of its pools to everyone, and therefore there

was no equal protection violation. And the court agreed with that argument in Palmer, though, Justice Ginsburg and Justice Kagan, don't cite it here.

Leah Litman:

Justice Breyer dissents. And in as Justice Breyer method as possible, says he would adopt a flexible context, specific approach to examine free exercise clause and establishment clause violations. And he says, because there's no dispute that religious schools here seek generally to inspire religious faith. He thinks the case is controlled by luck for that reason.

Leah Litman:

And I think that Justice Sotomayor, adopted a similar approach in some respects where she said, there's play between the joints of the free exercise clause and establishment clause. And she would give states the latitude to figure out how exactly to balance the considerations between them.

Kate Shaw:

There will be lots of implications of this decision, I think in other areas of law, both free exercise clause and establishment clause, jurisprudence. There's Guadalupe, which is a case that is still to be decided regarding the scope of the ministerial exception. There are questions raised in the Fulton case on deck next term. There are the outstanding questions that Bostock leaves open about religious accommodation. If employers purport to declined to hire LGBTQ individuals, citing religious beliefs, how the law will accommodate those objections. And so, I think that this opinion does suggest that we're going to have the kind of expansionist free exercise clause vision, is very much alive and well at least for five members of the court. And so, I think there is reason to be concerned about all of those areas of law as well.

Leah Litman:

Yes, I think for that's right.

Kate Shaw:

Okay. So, let's talk about Seila Law versus the CFPB. Another big blockbuster case, although obviously less headline grabbing than June Medical.

Leah Litman:

Where secret liberal John Roberts joins a five-four opinion. I'm just kidding.

Kate Shaw:

No. This one you called absolutely. I was like, I just, I thought at argument and I continue to think when I read Kagan's dissent, like this is an easy case and yet-

Leah Litman:

Well, yes, of course.

Kate Shaw:

...majority of the court doesn't agree with us.

Leah Litman:

Right. One wonders reading the Kagan's dissent, why it is a dissent at all.

Kate Shaw:

Oh my God, yeah.

Leah Litman:

But, again, I love how your faith in the capacity of legal arguments to generate right results leads you to think that the court is going to do that.

Kate Shaw:

It has done that more in the last couple of weeks. Some just thought of it, we had moments thoughts. So, but obviously-

Leah Litman:

Your optimism paid off in some cases. And my pessimism did in others.

Kate Shaw:

Totally. So, this one is yours, all you. So, briefly at issue here is the constitutionality of the structure of the Consumer Financial Protection Bureau, which is headed by a single director who enjoys four cause removal protections, which means that the director can only be removed by the president for inefficiency, neglect of duty or malfeasance in office. That's the statutory language. And in a five-four opinion, as we just alluded to, the chief justice finds that this structure violates a separation of powers. And Kagan pens a masterful dissent that we will talk about.

Kate Shaw:

But importantly, Roberts for the court finds that that provision of Dodd-Frank, the provision creating the single director structure of the Consumer Financial Protection Bureau is separable from the parts of the statute that just create the CFPB. And so, in fact, the agency's revived the director is just now removable at will by the president.

Leah Litman:

So, we mentioned when we covered this case previously that there were several off-ramps for the court to take, not to decide the merits, the court rejected all of those. And honestly, I think rightly, I think that this was under the courts standing cases properly conceived a dispute that was for the courts resolution. And then as to whether the removal restriction is constitutional, I would summarize the chief's opinion as something like, I will take either the principle that the constitution requires the unitary executive theory, or I'm going to leave a bunch of blood and teeth all over 1 First Street. Because his opinion, I think recast all of the courts precedent and the last 200 years of historical practice around the idea that the constitution adapts the unitary executive theory and requires precedents to have control over any officer exercising substantial executive power, unless in the chief's words, too narrow exceptions apply.

Leah Litman:

And those narrow exceptions of course are going to be the hope of any removal restriction going forward. One of those exceptions, the chief said was the exception represented by the court's prior decision in Humphrey's Executor versus United States, which upheld the structure of the Federal Trade Commission, which was a multi-member commission in which the commissioners were removable only for cause. And then the second narrow exception was the exception that is represented by Morrison versus Olson, which upheld the removal restrictions on the independent counsel, who was appointed to investigate executive branch officials.

Leah Litman:

And so, then the key questions are, well, what falls within those exceptions? What does the Humphrey's Executor exception actually represent?

Kate Shaw:

Yeah. So, I do think that it is important that the court preserves both of those, because there were like sneaky footnotes in the SG's brief and then lots of amicus briefs, asking the court to potentially overrule Humphrey's Executor. The court, definitely declines to do that all. I think you're absolutely right. The scope of what is covered by Humphrey's is left very much open in this opinion.

Leah Litman:

And Justice Thomas and justice Gorsuch would have overruled Humphrey's Executor.

Kate Shaw:

And Thomas says, "That's what you do without saying it because you have so narrowed it that there's not much left to it," but that's wrong. There is plenty left to it. I think it's just that it appears to be limited to multi-member agencies. I mean, I think basically what... So, Kagan to skip ahead for a second to her dissent, basically says this narrative is undermined by text structure, history precedent. But the narrative that you are offering a chief justice is this kind of default of absolute presidential removal power, and then these two narrow exceptions that you identified. And those are gerrymandered to exclude this case.

Kate Shaw:

And in fact, none of the principles that would underlie exceptions from an absolute or near absolute presidential removal power could justify excluding the limitation in this case and including in the other cases. But the majority seems to think, and there is other cases have very much agreed with this, that the fact that a body is multi-member is a salient distinction and somehow allows consistent with the separation of powers, the president to have some limitations placed on his removal power.

Kate Shaw:

Kagan says, that doesn't really make any sense. If the idea is for the president to retain a degree of control, the president would retain a more control over an individual director, even with these statutory protections, than over a group of five or seven individuals with the same statutory removal protections. And I think the logic that the chief would respond with was, would be, well, this is all about avoiding too much concentrated power. Well, except in the president, that's fine. But in these multi-member bodies, they check each other. And so, that a little bit replaces that presidential checking function that would

otherwise exist. But it also, the majority opinion does seem to want to make really clear that the federal reserve survives and that of course is a multi-member body.

Kate Shaw:

And I think that Thomas and Gorsuch would be fine with that. I think they have to be based on what they've written with an opinion that says that the federal reserve, the members of the fed are removable at will by the president, which is a pretty crazy proposition. But I don't think that there are more than two votes for that. And so, they have to basically reaffirm something of Humphrey's Executor.

Kate Shaw:

And then Morrison vs Olson, his opinion upholding the independent counsel statute is recharacterized as importantly involving an inferior officer because the independent counsel, right? Was answerable to the attorney general in that case. And Kagan says, "That's not at all, what's front and center about Morrison." But it also, I think is important that the court doesn't, there's no frontal assault on Morrison. And so, that the constitutionality of, potentially if the court, if Congress ever wanted to reenact an independent counsel statute, I think it's very much an open question of whether the court would uphold it, but at least Morrison as precedent is not explicitly questioned in the majority opinion.

Leah Litman:

One question I had going forward is what other distinctions between other agencies and the FTC that was an issue in Humphrey's Executor, might the court find notable in the future? If the distinction between a single director agency and a multi-member commission is sufficient to say this case does not fall within the exception of Humphrey's Executor, what other possible distinctions between other agencies in the FTC might mean that those cases are also not covered by the Humphreys executor exception? Is the scope of a commission's powers? Is what kinds of powers they have? Is it subject matter? We just don't know. And I think part of the force of this opinion is just making all of these agencies potentially vulnerable to litigation.

Kate Shaw:

And pointing at a few different points to different salient features about both Humphrey's Executor and Morrison versus Olson in ways that I think are just fodder for challenges. As you said, to all of these other agencies, you can, I'm sure point to distinctions and who knows based on this majority opinion, whether the court is going to find those salient ones. I mean, there were a few things about the majority opinion just to highlight. One is, and I think this is the point that Jed Sugarman has made in a few places. There's this very sneaky use of selective quotations from Article II, in which the majority opinion keeps saying, under our constitution, the executive power, all of it, all of the executive power is vested in a president. And the all of it, and the all are not direct quotes from the constitution. There'll be like the executive power in quotes, quote at all of it, and then, open up again, is vested in the president. It's the constitution doesn't say all or all of it. And this move is made a number of times in the majority opinion.

Kate Shaw:

And one other thing to flag, which anticipates a little bit what we're going to talk about at the end of the show, is that this idea that the president is unique in our constitutional structure by virtue of being the only official who is directly democratically accountable to the whole country, does a lot of work, right? In this opinion. Because he's the one who's democratically accountable, the buck has to stop with him.

And so, the court needs to be very sparing in allowing any kind of independent sources of power within the executive branch, right outside of presidential control.

Kate Shaw:

And it is just so hard to square that, that principal does so much work in our law and administrative law and separation of powers cases. When the court seems totally unwilling to act, to protect the ability of individuals to participate in the selection of the president, it's just this fiction that the president is popularly elected. If states can do anything they want to thwart the ability of the population to... I mean, and that's not even talk, that's putting to the side, the electoral college. I'm just saying, but even in the system that we have, it's just lip service, if a court isn't going to protect meaningful participation in the selection of the president.

Kate Shaw:

And so, I just, I found it so hard to reflect on what happened last night, which we'll talk about in a minute, in light of the court seeming to take so seriously this principle of direct accountability of the president and using it to do all this work, including striking down the structures of agencies that Congress has created. I just, I find it that inconsistency just totally maddening.

Kate Shaw:

The Kagan dissent, which we have mentioned in the CFPB case is masterful. She's a former administrative law professor. She's a scholar. She cites herself and her-

Leah Litman:

And she cites herself by saying, "See, well, me."

Kate Shaw:

Well, I love that. Yeah. So, she's got this famous and deservedly famous article presidential administration. And at one point, yeah, she makes some point and she says that people have argued. The president's engagement can be really useful in certain ways, see, well, come up, Kagan presidential administration. I will say, and she cites, she engages with a lot of scholarship, which as law professors, we really like.

Kate Shaw:

My one beef with her citations to scholarship was that she did not, and it's really annoying me, cite your excellent debunking anti-novelty article. Justice Kagan, next time, there's an extremely on point citation from the Duke Law Journal, which you should think about. Because one of her big points is, the framers gave the political branches lots of flexibility in devising structure. Congress has used the flexibility that the constitution gives it to devise all kinds of different agencies. And you might find that argument, the regular of your article.

Leah Litman:

Well, I appreciate that. Elena, happy to send you a copy if you would like. But the dissent is just peppered with all of the rhetorical flourishes, that we've come to expect from Kagan, whether it's spoiler alert which she uses when she says the constitution says nothing at all about removal, or she elsewhere says, "I'm tempted at this point just to say colon, no." Which I also appreciate. But yes, so I

think that this decision accelerates and marks a significant trend in the courts, removal, restriction and separation of powers jurisprudence in requiring more presidential removal.

Kate Shaw:

So, we're running long, but let's try to touch a few core culture and recent developments issues before we break for the day. We're in July, we've still got eight opinions to go. So, it's going to be a busy few days after the holiday. I think probably everything will come down next week, but I don't know. What do you think?

Leah Litman:

I mean, eight opinions is definitely a number of opinions that the court can release in one week. On the other hand, they are likely to be divided opinions. These cases were argued a mere six weeks ago. Some of them involve extremely complicated historical records like the faithless electors cases. Others are extremely consequential separation of powers cases that I don't really want to see resolved in a six to eight page opinion like Thole or an Alliance for Open Society. I'm thinking of the presidential immunity cases, unless of course, the New York grand jury case just says, see United States versus Nixon, I would be fine with that.

Kate Shaw:

We would be okay with that. No problem.

Leah Litman:

So, yeah, I think it's possible that the court finishes up this week. But just hard to say, given that we don't have any really expectations or instructions about what might be happening.

Kate Shaw:

So, last week there were definitely some rumors in conservative media of a potentially imminent Alito retirement. Did you hear this? What did you make of it?

Leah Litman:

Yeah. So, Hugh Hewitt, apparently said on his radio show that he has heard from several leading conservatives that Justice Alito is considering retirement, and that the Alito family is ready to leave Washington DC. I guess, we have talked about how Justice Thomas, seems increasingly happy at his job. Justice Alito has seemed angry, but again, that's not that a typical for Justice Alito. And so, I don't know what to make of this rumor. It would be slightly odd for a justice to voluntarily retire in an election year. I think that would be quite different from what we have seen in the past. I think maybe the last time that happened was maybe during the Warren court. But so, I don't know what to make of this rumor. Obviously, Sam is not texting me with his innermost thoughts.

Kate Shaw:

It doesn't feel... Unless there's a family issue, right? Those are the X factors we never really know about. But I'm sure his job satisfaction is still pretty good, a few recent losses not withstanding. And he's 70. It doesn't feel likely to me, but we shall see.

Leah Litman:

Yes. So, we also received a media report in the New York Times actually about another media outlet, The Washington Post. And this story was about how Bob Woodward, who is of course the famous reporter from Watergate and all the president's men. And it was about how the Washington Post decided not to run a Bob Woodward story that Justice Kavanaugh had written a letter to The Post denying a story about the Ken Starr investigation, that he, Justice Kavanaugh had been the source for the story that he was now writing a public denial about.

Leah Litman:

And I think that this story was significant for a number of reasons. The Washington Post story would have run as Justice Kavanaugh's nomination was under increasing pressure in light of the allegations of attempted or actual sexual assault. And his integrity was being questioned. And so, The Post deciding not to run this story was significant, in that it did not add to those developments in his nomination. But I know you are much more of a journalist than I am. So, there were questions about what the journalistic thing to do in this circumstance was?

Kate Shaw:

I genuinely don't know what the right move here was. I think that there was a lawyerly inclination to use a privilege analogy. You can't use privilege as both a sword and a shield. You can't selectively leak advantageous information, and then continue to claim the shield of some privilege, if information would be harmful, right? Or disadvantageous to you. That just feels opportunistic and wrong.

Kate Shaw:

And yet I think in journalistic ethics, it's actually pretty common that you talk to a source and they give you some information and they go out and say something different publicly. And now, maybe that should mean that there's some kind of loss of confidentiality or privilege when that happens. But I do think that folks who cultivate sources like at the White House, day in and day out, like here one version of the truth behind the scenes and off the record, and then see people go in front of cameras and say something completely different. And I think they have decided that the bargain is worth it to them to continue to stay silent about the contradictions, if it means a continued access to information, but query whether that is appropriate.

Kate Shaw:

And I do think the fact that Woodward himself, who is obviously like steeped in a source based style of journalism for many decades, if he felt like under these circumstances, it was appropriate to come forward. And maybe because you have a life tenure position, maybe hanging in the balance that scales get tipped in a different way. I take that very seriously. But I do think that there are weighty competing interests here.

Leah Litman:

Yeah. And I think it's also fair to say that that model of journalism, that access journalism has come under increasing pressure in the Trump administration in particular, where you have all of these wild stories from anonymous sources within the administration about the crazy things that are happening. And then, you have these on the record denials from the administration officials who some of whom have to be the sources for these stories.

Kate Shaw:

Absolutely, yeah.

Kate Shaw:

So, maybe it is time to jettison those that old norm, but obviously that old norm was what led The Washington Post editors to prevent this Woodward piece from being published in time, to potentially affect the confirmation battle. Okay. So, last thing we wanted to flag was one very recent development, and then maybe a quick broader conversation about the November election.

Kate Shaw:

So, we are four months out. There is going to be a ton of litigation around cases that involve access to voting and the mechanics of the election process in this election year and this pandemic year. And last night, so we're recording on Friday, so last night the Supreme Court voted five-four to stay a district court injunction that would have made it easier to vote absentee in Alabama during their upcoming primary runoff, which is in the middle of July. And Yulia and Sherrilyn Ifill and others, when the Supreme Court stepped in April to block a lower court decision that would have facilitated absentee voting in Wisconsin to terrible effect, right? For folks who remember the way that the lines looked on election day in Wisconsin, because people just had not gotten their absentee ballots and the Supreme Court stopped the district court relief that would have provided broader access to absentee ballots.

Kate Shaw:

You said, this is a harbinger of really scary things to come when we're talking about the Supreme Court and the process of democracy. And I think we saw that play out last night, which is at a district court opinion, loosened very slightly the absentee voting restrictions in the State of Alabama for voters who are over 65 or have some disability.

Leah Litman:

Well, in advance of the election.

Kate Shaw:

So, it was a month out and we don't know why. So, Supreme Court five-four stays the lower court injunction. So, presumably, there'll be potentially some litigation in the 11th Circuit. But it seems to me that this election in mid July, we'll go forward under the old pre-COVID restrictive absentee voting rules that will obviously prevent from voting or seriously endanger these vulnerable plaintiffs who brought this challenge and who, again, just sought a kind of relief that Alabama already gives to lots of other people when it comes to absentee voting.

Kate Shaw:

So, they were asking for nothing new when it comes to the kind of mechanics of election administration, just basically a relief from these notary or two signature requirements when you're getting an absentee ballot and access to what they described as curbside voting. District court in a very long and powerful opinion allowed all of that. And the Supreme Court stepped in and blocked it.

Kate Shaw:

And as you said, it's a month off from the election. I mean, at Wisconsin which we thought an egregiously wrong opinion, but at least had a certain logic to it, which is that the Supreme Court has long

said that federal courts shouldn't change the mechanics of elections on the eve of an election. And that was only about a week out from an election, but this was a month. And so, without any explanation, we don't know quite what the opinion stands for, but it does. I think potentially really alarmingly suggested this idea, this Purcell Principle of noninterference with elections, might be growing in terms of when federal courts can step in to protect the constitutional rights of voters on the eve of an election when sometimes the conditions that require intervention don't arise until rather close to an election. So, I found it bewildering and really upsetting development.

Leah Litman:

No, I mean, I did as well. And I just think the application of the Purcell Principle here, although the court did not explain this decision, that was an argument that Alabama had made. Is particularly troubling given that the argument is essentially, well, we don't want to confuse voters in the windup to the election, but voters are confused about what to do now in the midst of the pandemic, given that many of them are trying to avail themselves of the absentee procedures, which are being overtaxed, given the burdensome requirements in Alabama, places on them. You mentioned the great district court opinion that was written in this Alabama case. It was actually written by Judge Abdul Kallon, who had been nominated by to the 11th Circuit by President Obama. That was one of the vacancies and nominations that Mitch McConnell stonewalled in the Senate.

Leah Litman:

And Judge Kallon, would have been the first black judge to sit on the 11th Circuit [in Alabama]. And now that seat has been filled by judges who have been challenged on the ground that they have worked to suppress the vote and justify state restrictions on the franchise.

Kate Shaw:

Judges matter, everybody, judges matter. Judges matter so much. There's going to be a lot more litigation in the election vein. And we're going to keep a really close eye on it because this matters a lot, including the things that are percolating in the lower courts. So, this summer, I expect we'll spend some time talking about some of those cases. So, for now I think we should ramp.

Leah Litman:

Okay. So, thanks everyone for listening to a barnstormer of an episode. Hope we didn't make you too mad, Sam. Thanks to Melody Raul, our producer. Thanks to Eddie Cooper, for making our music. Thanks to Julie Rikelman, for joining us and getting the chief justice to vote, to strike down an abortion restriction. Thanks everyone for listening. You can support the show via our Glow Campaign at glow.fm/strictscrutiny. This past week, we had another virtual happy hour for our Glow subscribers. That was a lot of fun. And we got to discuss some of the more nitty gritty about this term and also look ahead to the following term. You can also support the show by picking up some summer swag on our website, strictscrutinypodcast.com.

Kate Shaw:

See you next time, everybody.