Intro:

Mr. Chief Justice, may it please the court. It's an old joke, but 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 asked no favor for my sex, all I ask of our brethren is that they take their feet off our necks.

Melissa Murray:

Welcome back. This is Strict Scrutiny, a podcast so fierce it's fatal in fact. I'm Melissa Murray.

Leah Litman:

And I am Leah Litman or perhaps Leah of Deacon or of Thomas.

Melissa Murray:

Of Dan. Of Dan.

Leah Litman:

Of Dan. So it's a blessed day, Melissa. And we are of course, going to be recapping the Supreme Court's opinion in Little Sisters of the Poor versus Pennsylvania, the Affordable Care Act contraception mandate case.

Melissa Murray:

Under his eye.

Leah Litman:

Lots of Handmaid's Tale puns, for reasons that will become clear.

Melissa Murray:

Let's first start off with this case probably did not get the attention that it deserved throughout this term. I think everyone was focused on June Medical Services, no one seemed to give a damn about this case, when arguably, it probably is as meaningful, maybe more meaningful to the women of the United States, in a real and material way. So a provocative statement to start off with.

Leah Litman:

Yes. And that's part of why we wanted to do this episode, to ensure that this case did not get lost in the shuffle. I think part of the lack of attention to this case, though, was also a sense of how inevitable the result was given the change in the court's personnel, as well as the courts two prior cases in which it addressed the ACA's contraception mandate. So maybe we should provide some background on the contraception mandate, just because, again, this case has not gotten some of the attention that the others have.

Leah Litman:

So the case involves what is called a challenge to the Affordable Care Act's contraception mandate; the Affordable Care Act statute requires minimum essential coverage to be offered. And part of that minimum essential coverage that has to be offered through employer sponsored health plans is, "Preventative care and screenings without any cost sharing requirements." Now immediately after the ACA was enacted, the Obama administration started promulgating regulations indicating its view that preventative care and screenings included access to contraception and counseling.

Leah Litman:

Once it indicated its intent to extend the minimum essential coverage required under the Affordable Care Act to include contraception, there were, even at the outset, these religious liberty challenges, arguing that-

Melissa Murray:

We should also back up and say, there were also included in the ACA specifically contemplated exemptions for religious institutions. So churches, temples, and Mosques were not required to comply with the contraceptive mandate. Religiously affiliated institutions, so parochial schools, for example, or charities that are affiliated with religious institutions were not automatically blanketly exempted from this, but they could participate in an accommodation process whereby they notified the insurer that they had these religious objections, they could not provide the coverage and the insurer then took it upon themselves to provide the coverage directly to the employee.

Leah Litman:

Right. So as initially promulgated, there was the church exemption, which is required by statute and otherwise, but then the Obama administration's plan was what was known as the, "Self-certification exemption." An employer who had religious objections to providing contraception coverage would notify their health insurance administrator or plan that they had those objections and then that third party administrator or health insurance plan would provide coverage to the employees at either the federal government or the plan's third party administrator's expenses, but not the employers. And so prior challenges argued that even that exemption was not sufficient to protect the religious objections to contraception access.

Leah Litman:

Now fast forward to the Trump administration, instead of that self-certification exemption, they promulgate a new regulation that says, "Any entity with religious or moral objections..."

Melissa Murray:

And that's huge. I mean, that's a massive expansion of the exemption to not simply be about religion, but any kind of moral objection to the provision of contraception.

Leah Litman:

Yes. And those employers who have either religious or moral objections, not only don't have to provide coverage, but don't have to engage in any certification process, such that the insurance providers offer contraception coverage as well. So those employers can just opt out of their employees having access to health insurance coverage for contraception. And that is the regulation that was challenged in this litigation that the Supreme court upheld in a pretty fractured decision, it's essentially five with the five

conservatives in the five written by Justice Thomas and then two Justice Kagan and Justice Breyer agreeing with the conclusion, but not all of the reasoning and leaving some wiggle room for future challenges and then a dissent by Justice Ginsburg and Justice Sotomayor.

Melissa Murray:

We should also mention the parties briefly. Obviously the Trump administration is one party to this, they want to maintain their regulations, which allow for these broad accommodations, the other parties include the States who are challenging. So Pennsylvania is one of the States challenging this and the State's argument is basically if the religious employers or the employers with moral objections, don't provide this coverage and don't have to have any accommodation, then it then falls to the state to provide these protections to females within their jurisdiction. So the state absorbs the employer's objections and the cost of the employers objections.

Melissa Murray:

And then, intervening on behalf of the Trump administration is a group of nuns, the Little Sisters of the Poor that are actually kind of repeat players at the court, at this point. they were also one of the groups challenging the accommodation process back in 2016, when the Supreme court, during that Scalia's death interregnum didn't have a full complement of nine, and they could not reach a conclusion in this case and they actually just sent it back to the lower courts to try and get both the religious order and the government to work out some kind of accommodation that would be amenable to both sides. And obviously that did not happen. And so here, the Little Sisters of the Poor have intervened on behalf of the Trump administration.

Melissa Murray:

And I just raised the Little Sisters in part because it's a very sort of telling statement about how much of this kind of litigation is really about optics and aesthetics. I mean, you could not get a better intervener than the "Little Sisters of the Poor." And...

Leah Litman:

And that allowed for a better caption instead of Donald J. Trump versus Pennsylvania. Trump taking away all of the contraception coverage, it is Little Sisters of the Poor versus Pennsylvania.

Melissa Murray:

It's just very canny. The groups who are sort of fronting this litigation, like the Beckett Foundation, the ADF and whatnot, they're very canny, I think, about selecting their plaintiffs. So well-played sirs, that was a stroke of genius.

Leah Litman:

Yes. And I think it's important to note how the court describes the objections to contraception because we previously talked about, or you've previously talked about Justice Thomas writing about the so-called origins in eugenics of both the contraception and abortion movements, and here the court notes that the objections to contraception are essentially the same as the objections to abortion. Namely, the religious objections to providing contraception is that the challenged methods of contraception also cause the death of a human embryo because human life begins at conception before implantation.

Melissa Murray:

And to be clear, there're some disputed views about that among the scientific community, if contraception is actually an abortifacient. So there are, I think, some dispute about that particular proposition.

Leah Litman:

Yeah. But what is science to get in the way of stripping women of health care, Melissa? Again, under his eye.

Melissa Murray:

Wait, wait, here comes my husband, you got my robe from the dry cleaner, my red robe is back. Excellent.

Leah Litman:

Great.

Melissa Murray:

I'm ready for today.

Leah Litman:

Great. Unfortunately I do not yet have one, but...

Melissa Murray:

You will.

Leah Litman:

Right, exactly. I will order one quickly. So the precise statutory question that the court answered along with some other questions that we can discuss is whether the Affordable Care Act authorized the agency here to exempt these particular employers from providing this particular kind of health insurance coverage. A provision of the Affordable Care Act empowers an agency to determine which services should be included as preventative care and screenings and the argument was that that provision did not authorize the agency to determine which entities could be exempt from those provisions. That is, the agency could say, "This kind of health insurance coverage has to be offered, but not these groups of people are exempt from providing that health insurance coverage." And by a vote of seven to two, Justice Kagan and Justice Breyer agree with the majority's bottom line conclusion, but not its reasoning, the court concludes that, "No, the statute does in fact authorize the agency to determine not only what services are covered, but also who is required to cover them and who is not."

Leah Litman:

Now the difference between the reasoning in the Thomas opinion and Kagan opinion is, I think, reflective of two competing visions of the administrative state. The majority...

Melissa Murray:

What's that?

Leah Litman:

Right.

Melissa Murray:

We might not have that.

Leah Litman:

Right, exactly. According to the majority opinion, the administrative state might not be long for this world. Specifically the majority says the statute's plain language, just its best interpretation, means that the agency has this authority to determine which services are offered and who is exempt from those requirements. Justice Kagan, however, relies on a doctrine that has undergone a bit of a hit and is kind of the doctrine that shall not be named, chevron deference, the idea that agencies get to interpret ambiguities in the statutes they administer. And she says, "look, I don't know what the best reading of this statute is and whether it allows the agency to exempt entities from providing certain kinds of coverage, but I think that the agency's conclusion that it can is at least reasonable given that this was the position of not only the Trump administration, but the Obama administration and just make sense of this statutory scheme."

Melissa Murray:

I think that's a brilliant summation of it. She also notes that this question about whether the regulations are properly promulgated under the APA is still a live issue in the lower courts and so she sort of makes clear, and I think part of this opinion is to bracket that actually has not been decided here. And so she notes that for the record, the APA may actually save us again some more. The APA is doing a yeoman's job with this court.

Leah Litman:

It really is. And I kind of view her opinion, Justice Kagan's separate writing, as like an ad law professor's roadmap to bringing Administrative Procedure Act challenges to this regulation in the future. The court rejects two of the procedural challenges to the regulation that had already been brought in this litigation, namely that the agency had failed to issue a notice of proposed rulemaking and also that it had adopted the final rule through a process in which it had a closed mind and the court says, "We reject those challenges." But Justice Kagan says, "Look, there are still these other arbitrary and capricious challenges on the table, namely that there's a mismatch between the scope of the exemption and the problem that the agency set out to address. Also some of the scope of the rule is pretty sweeping in light of its justifications. In some ways, it's not clear that the agency grappled with all of the consequences of its rule and the scope of the rule." And so those challenges live to see another day, though, I have to say snowball's chance in hell that this court would uphold any of them.

Melissa Murray:

Two things to say about that. One, I think she is pointing to the idea that religious freedom is one thing and, obviously, within the scope of the government's constitutional duty under the first amendment, but the idea of moral objections is another thing entirely. I mean, moral objection is just like, "I am morally opposed to wearing pink," or, "I am morally opposed to eating meat," and suddenly your employer...

Leah Litman:

How about, "I am morally opposed to allowing employers to opt out of providing contraception coverage." Like why can't I bring that moral objection claim?

Melissa Murray:

So I think that's part of her point too, religious Liberty, on the one hand, is a completely different entity and you may quibble about whether this particular court has weaponized the first amendment such as to make religious liberty preeminent among all values. But her point is that moral objections are not in the constitution and that still lives to be determined at the lower courts. And I also think the second point is a more subtle point, but it is about electoral politics. Like the questions about these rules and rulemaking are questions that originate from the executive branch and the administrative state, but under a differently headed executive branch, maybe we wouldn't have this at all. So kicking this down the road past November, for example, might eliminate all of these problems entirely, if the Trump administration is no longer the one promulgating these rules.

Leah Litman:

Yes. That is certainly right and maybe will help me sleep tonight. Although we will be anxiously awaiting the end of the court's term, so maybe not. I did want to note two things about the Thomas majority because I mentioned that Justice Kagan had relied on chevron deference. One is that the Thomas majority notes that no party had brought a non-delegation challenge to the Affordable Care Act grant of authority to agencies to determine what are essential health care services that have to be covered. And that is important because, of course, that is the doctrine that could undo, in Justice Kagan's words, much of government today.

Melissa Murray:

That goes back to her opinion in Gundy.

Leah Litman:

Right.

Melissa Murray:

And again, that non-delegation principle that Thomas is invoking is that the intelligible principle, like whether in delegating its authority to the administrative agency, Congress has provided clear guidelines for the agency to use. And so Thomas's point is Congress, in passing ACA, never specifically denominated contraceptive coverage as part of those preventative services. Although one might note contraception, to prevent having a child...

Leah Litman:

Is a preventative service.

Melissa Murray:

Is a preventative service.

Leah Litman:

Whoa. I see what you did there. One other thing that was notable to me in the Thomas majority was just it's bottom line conclusion that Congress essentially limited the agency's discretion in no way at all. And its conclusion that Congress gave the agency such sweeping deregulatory authority to exempt people from otherwise applicable requirements. And part of why that's notable to me is, one, how convenient the conservatives on the court conclude that a statute granted a conservative administration sweeping authority to do what they wanted. But second is I think it sits uncomfortably with Justice Thomas' position, in particular in the DACA case, where he concluded that immigration statutes didn't give the attorney general or the president at all the ability to develop enforcement guidelines for how immigration law would be enforced.

Leah Litman:

One other issue that was in the case, though not decided, was the relevance of the Religious Freedom Restoration Act. That's a statute that the Trump administration was arguing actually required them to exempt entities from the contraception mandate. The court, the Thomas majority, does not decide that issue, but two very enthusiastic fellows chose to go ahead and do so specifically our friend #staymad Sam Alito and Neil Gorsuch would have held that the Religious Freedom Restoration Act required the agency to exempt entities from not only a contraception mandate, but from any accommodation process that had existed to date.

Melissa Murray:

Which is actually, I think, really interesting. So one, if you're like, "RFRA, that sounds familiar?" It does sound familiar because we talked about it when we talked about the Title VII cases and the decision that was handed down written by Neil Gorsuch. Neil Gorsuch was the one who wrote that RFRA functioned as a sort of "super statute" that perhaps could answer all questions about religious employers and their requirements to comply with the terms of Title VII and, particularly, the fact that Title VII now extends to sexual orientation discrimination and gender identity discrimination. So again, a kind of redux here or that RFRA is sort of a way out for religious employers as to the Title VII cases and here as well. So that's one point that's interesting.

Melissa Murray:

To Justice Alito's point about RFRA providing an exemption to even the accommodation process for employers that seems to sit uncomfortably with his decision in 2014 for Burwell versus Hobby Lobby, where he said that closely held corporations under RFRA were not required to provide the contraceptive coverage themselves, but could be included in that accommodation process that was available for religiously affiliated employers. And if I recall correctly, I think Justice Ginsburg and possibly Justice Sotomayor was just sort of like, "That's a slippery slope." And it seems like they were exactly right, it is a slippery slope because he seems to have reneged on that.

Leah Litman:

Welcome to the Cassandra Club ladies. It's a big tent, right?

Melissa Murray:

Yes. You're destined to know the truth and not be believed. Everyone gets their own Trojan horse upon entering the membership.

Leah Litman:

Yes. So I think we should probably talk about the Ginsburg Sotomayor dissent because it is in that dissent that the women finally become visible. She not only explains a number of women who would lose access to contraception, but also how significant contraception is to women's lives and not only improves health outcomes, prevents unintended pregnancies, it also provides important medical benefits for women with underlying medical conditions.

Melissa Murray:

I think this is sort of a recurring theme in Ginsburg's jurisprudence. I'm reminded of the Redding case, that Fourth Amendment search case where the court upheld a search of a 13 year old girl in a school. And Ginsburg at the time was the only woman on the court, this was during that period between 2005, when Sandra Day O'Connor retired from the court and 2009 when Justice Sotomayor joined. And she said like, "It seems like none of you all have ever been a 13 year old girl in middle school," and they had not. She was like, "It's incredibly embarrassing and an assault to your dignity as a girl to be strip-searched in this way."

Melissa Murray:

And I think she's making that same kind of claim here. I'm not just talking about contraception as this isn't just about preventing pregnancy, some women will use it for really severe acne, people will use it for endometriosis, like serious cramps, all of this.

Leah Litman:

Polycystic ovaries.

Melissa Murray:

There's a whole world of which you know nothing and you can't know unless you choose to educate yourself about it and that seems to be her point here. I will also note that when this case was heard, this was during those telephonic arguments, Justice Ginsburg was in a hospital bed being treated for her gallbladder issues. And even then... I mean, she might've been a little salty because she just had gallbladder surgery, but she also just seemed genuinely pissed to be back here. I think her whole mood was like, "I literally can't believe we're talking about this shit again. Seriously?"

Melissa Murray:

And I remember she was just sort of pontificating, like all those soliloquies and then at the end of her soliloquy, there'd be like a little uptick in her voice to make it a question, but it was like, "So this is some shit. Right?"

Leah Litman:

And, "What would you say about those women you're screwing over? Right?"

Melissa Murray:

I think this dissent could have been lifted from her dislike her dissent in Gonzales versus Carhart, Anything that she has written about contraception in the past. I mean this whole idea about women's equality and their ability to participate in public life, the marketplace, what not, being linked to their ability to control their reproductive capacities. I mean, it's all here in this opinion and she's like, stay mad Ruth and I'm here for that too, #staymadRuth.

Leah Litman:

I am too. And it's important, I think, to underscore that the access to equal social and economic opportunities arises not only from the ability to control whether you become pregnant and when, but also your ability to manage the underlying health conditions that contraception often can do. It is a way of managing women's pain, it is a way of managing a variety of medical conditions. And so again, you are impeding women's access to this health care that not only prevents unintended pregnancies, but also addresses a variety of other health conditions.

Melissa Murray:

So I'll just say this. I was looking at the New York Times, Adam Liptak had a story up about this case, but also included in it was sort of some polling data about how Americans actually viewed this issue. And so interestingly, this is viewed very differently, I think, from abortion rights. I think even among Democrats, there is some skepticism that employers should be made to cover contraception. And there's this kind of sense those are private decisions that should not be subsidized by employers at all. If you want to use contraception, it is your private choice and you should privately manage it.

Melissa Murray:

Maybe it's not altogether different from abortion in terms of like public funding of abortion, maybe it's completely in sync with that. But to me, it's actually really of a peace with this moment we are in, in the pandemic, where everything has sort of retreated to the home. And we're seeing all of these stories, I think Florida State University sent this ridiculous letter to their employees saying that they had to verify that their children were in childcare and not at home once regular operations resumed because the university felt that caring for your children was a dent on productivity. And they're not wrong, like it's really hard to be productive when you have children running around, but there aren't other childcare options available right now. Or if they are they're imperfect, if you have preexisting conditions that make you immunocompromised or more susceptible to getting COVID. And it just seems like anything involving family matters, generally, are private decisions that cannot be publicly accommodated in any way.

Melissa Murray:

And I find this really interesting because this decision to me is of a peace with that and it comes from this conservative wing of the court, which is always the sort of wing talking about family values. Part of family values is being able to manage your family.

Leah Litman:

I mean, I think that's totally right. And it's also consistent in my view with another piece of the pandemic too, which is the paucity of employer sponsored health care and health benefits.

Melissa Murray:

Yeah.

Leah Litman:

We are seeing that system come up short in the pandemic, we are also seeing it come up short here. If you don't like private employers subsidizing healthcare that allows people to participate in the

workforce, there's an option it's called public funding. These are the choices, either this patchwork scheme of enlisting private employers to provide health insurance or the option is public insurance.

Melissa Murray:

The bottom line, I think, and sort of the underlying theme of all of this is maybe women shouldn't work? Maybe? If you can't work because you have cramps, maybe you shouldn't be in the workplace. If you need your employer to give you birth control to manage your acne or to prevent yourself from becoming pregnant, maybe you shouldn't be working. And that I think is the bottom line. So of Dan, I don't know what to say, but I'm changing my name to either Cassandra or of Josh. What do you think? Which sounds better?

Leah Litman:

Do we get a second name in Handmaid's tale? Like, can your nickname be Cassandra and you're just of Josh? Or...

Melissa Murray:

I thought you were going like could you have two ofs? I'm like that would be polyamory. Definitely not allowed in Gilliad.

Leah Litman:

Yeah. No, that was not where I was going. Well, it has again been a blessed day in Gilliad listeners, thank you as always for tuning in and listening in under his eye. And we'll...

Melissa Murray:

You realize when Gilliad comes, you and I are going to be sent to the colonies.

Leah Litman:

Oh yeah. Most definitely. But that's why we're doing podcasts now.

Melissa Murray:

All right, listeners. Thanks for listening to this. Again, we tried to tell you, we really did. We tried to tell you like 150 times. So when you were all wokelito, Chief Justice Roberts... Oh, we didn't even talk about Chief Roberts...

Leah Litman:

Feminist hero.

Melissa Murray:

We didn't even talk about his fall.

Leah Litman:

Oh no, we did not. So yes...

Melissa Murray:

Court culture, court culture.

Leah Litman:

Court culture, quick court culture segment news broke late last night that the Chief Justice had been hospitalized and stayed overnight in the hospital after a fall at his country club in late June that required sutures and stitches, and this news broke late last night.

Melissa Murray:

And his head was covered in blood.

Leah Litman:

Yes.

Melissa Murray:

That was what one of these... So this is interesting on a number of levels. So one, the court's statement obviously came a month late about it and left out a lot of details like that he was at the Chevy Chase country club, where also a member is one Justice Brett Kavanaugh And we only know that because the disclosures about the joining fee for the country club were discussed when Justice Kavanaugh was nominated to the court. So they're both members of this country club.

Melissa Murray:

The court statement said only that he was walking outside of his home for exercise, as any of us would do, but he was walking at a country club. And it seemed like they say it was because of dehydration and he took this fall. They didn't talk about the severity of the fall and they note that he's now recovered and is fine, but apparently eye witnesses tipped off the Washington Post that it was kind of serious in that he was covered in blood and...

Leah Litman:

Covered in blood.

Melissa Murray:

So, here's my question, anytime anything happens to Justice Ginsburg, we find out immediately and the whole nation goes into candle lighting vigils for her. How did we not hear about this until a month later?

Leah Litman:

Well, there's usually some delay with Justice Ginsburg, even. Here, maybe there was a little bit more, but no, I... Yeah.

Melissa Murray:

28 days later, I mean, that's like a zombie movie.

Leah Litman:

Yeah. That's fair. Well, I don't know. He was too busy preparing for the Women's March that he's no longer invited to, I don't know. I have no great explanation for this, but...

Melissa Murray:

I think it's really interesting, again sort of questions of transparency. I do wonder what the president will do with this, every time Justice Ginsburg gets sick, there's always this sort of flurry from him, like some tweets about how she shouldn't be on the court. I haven't seen anything from him about this. Maybe he's redeemed himself today with these decisions, but yeah. So we're glad the Chief Justice has made a swimming recovery, good for him. That's great. I really do have questions just generally about transparency. And I don't think every sort of health emergency needs to be reported in great detail, but I do think it is telling and just weird that this didn't come out for a month. That just seems weird.

Leah Litman:

Yes. Yes. And also that, even when it did, there were even some people questioning whether we had a right to know about this; though, there are not often similar questions when, say, Justice Ginsburg is hospitalized or treated for cancer.

Melissa Murray:

Yeah.

Leah Litman:

But again, maybe women just shouldn't be working. So there we go.

Melissa Murray:

Stay at home and then you can keep your private life private.

Leah Litman:

Yes.

Melissa Murray:

Anyway, Leah, this has been, as usual, sobering, but kind of fun.

Leah Litman:

Yeah. Kind of fun.

Melissa Murray:

We're wringing whatever joy we can out of these last moments of reproductive freedom.

Leah Litman:

Exactly. So there's that.

Melissa Murray:

There's that.

Leah Litman:

Thank you listeners for joining us and thank you Melody for producing this episode.

Melissa Murray:

And to the majority, all we can say is, "Well played, sirs. Well played."