

Leah Litman:

Do we want to take a quick picture before we get started?

Melissa Murray:

Sure, let me adjust my lighting so it's not terrifying.

Leah Litman:

Find your light. Ready?

Melissa Murray:

Find your light bitches.

Leah Litman:

Exactly. One, two, three.

Intro:

There'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 ask no favor for my sex, all I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Hello and welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We're your hosts, I'm Melissa Murray.

Leah Litman:

And I'm Leah Litman.

Melissa Murray:

And today we have an episode that will preview the arguments the court will hear in the first week of the December sitting, and we also thought we would use the Court Culture segment to speculate about potential nominees in the Biden/Harris administration, specifically nominees to various posts within the Department of Justice. We'll also offer the Biden/Harris administration some unsolicited, free, but really awesome advice on potential nominees at DOJ, so stay tuned for that. And for those of you who need a little signposting, we will start off with breaking news, as we always do, and then we'll preview the sitting, and then we will shift to Court Culture. So Leah, do you want to kick us off with the breaking news?

Leah Litman:

Sure, so first and foremost, Robert Mueller/Mueller Investigation on ice. The court took off the calendar the oral argument in DOJ v. House Committee on judiciary, about Congress' access to secret materials from the Mueller Investigation. The Committee told the justices that once a new Congress and President

Elect Biden take office they will have to determine whether to continue Congress' efforts to obtain the redacted portions of the Mueller Report and the materials on which it relied. I guess they didn't get the memo that all of the election was a fraud and the case leading the President Trump to be installed at the White House is about to be decided any day, argued by Rudy Giuliani anyways.

Melissa Murray:

Mueller on ice, what to say. Yeah, we'll stay tuned for that and see how that develops. We had a really interesting development in the 11th circuit around the question of conversion therapy, so a case called *Otto v. City of Boca Raton*, which is very close and near to my heart because I grew up in South Florida, and Boca was where all of the really cosmopolitan happenings happened when I was a child, so I was like, Boca Raton, my ears perked up. In any event, both Palm Beach County and the City of Boca Raton prohibit conversion therapy, and the plaintiffs here, Otto and Hamilton are state-licensed marriage and family therapists who want to be able to perform conversion therapy on patients.

Melissa Murray:

They filed suit to permanently enjoin the enforcement of the ordinances, arguing that the ordinances are content-based speech restrictions that evince viewpoint discrimination, thereby violating their first amendment rights to free speech. The county and the city argue that the ordinances are permissible regulations on professional conduct and thus are not entitled to the most rigorous first amendment protections. In a two-to-one decision by Trump appointees Barbara Lagoa and Britt Grant, the 11th circuit concluded that the therapists had satisfied the standard for a preliminary injunction, and there's a little snippet of the opinion which I thought was really interesting. They concede that the decision allows speech that many find concerning and even dangerous, but consider the alternative, if speech restrictions in these ordinances can stand, then so can their inverse.

Melissa Murray:

Local communities could prevent therapists from validating a client's same-sex attractions if the City Council deemed that message harmful, and the same goes for gender transition. Counseling supporting a client's gender identification could be banned. So again, they're sort of doing this kind of both sides and what if, like slippery slope kind of first amendment parade of horrors. Interestingly, Judge Beverly Martin who's an Obama appointee filed a dissenting opinion here. So I think that's something that will surely be appealed to the Supreme Court and that would be a really interesting case to provide sort of again, another gloss on how the first amendment is being used in lots of different ways, and in ways that I think are really important for the broader question of civil rights, and specifically rights of the LGBTQ community.

Leah Litman:

Yeah, Anna Belkin and Sejal Singh have a wonderful post on this opinion and its implications on the Take Care blog, and the reasoning of the 11th circuit basically strongly suggests, if not holds, that any regulation of any kind of talk therapy is subject to strict scrutiny given that it is just words. I take the majority's point that if you allow states and localities to regulate professional speech, sometimes they will do it in ways you don't like, but what I think that the passage you read fails to acknowledge is, of course, the Court's prior decisions have said that discrimination on the basis of sexual orientation triggers heightened scrutiny, so if you are mandating discrimination against those communities, you're already going to run afoul-

Melissa Murray:

Right.

Leah Litman:

Of other constitutional prohibitions, and that's ... put nothing to the side of all of the evidence in this case is about how harmful conversion therapy is. Conversion therapy, which I guess we didn't explain, is basically trying to convince gays, lesbians, bisexuals that they are not in fact gay, lesbian, or bisexual-

Melissa Murray:

Yeah.

Leah Litman:

And transgender individuals, that they're not transgender, and there's a bunch of, again, like scientific evidence about the consequences of those therapies. Whereas again, the reverse rule where the state attempts to prohibit counselors from supporting gays and lesbians or transgender individuals would both not be based in evidence and also discriminate on the basis of protected characteristics.

Melissa Murray:

Right. So we'll stay tuned for that one as well, I mean another, again, really interesting decision. All female panel, so that was kind of exciting on the 11th circuit. But again, Barbara Lagoa who was in the running for the seat that ultimately went to Justice Amy Coney-Barret, and Britt Grant, so both Trump appointees, and I think Judge Grant is actually very young and for-

Leah Litman:

She was appointed when she was 40.

Melissa Murray:

Yeah.

Leah Litman:

She clerked for Judge Kavanaugh on the DC circuit, so-

Melissa Murray:

Yeah.

Melissa Murray:

Yeah, she is quite young.

Melissa Murray:

So again that-

Leah Litman:

So look forward to decades after decades of these decisions.

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Leah Litman:

Good times. Okay,

Leah Litman:

Speaking of the not-so-young-

Melissa Murray:

Oh, okay I felt that. Don't do that. Don't do that.

Melissa Murray:

It's been a hard weekend for the 40 and up crowd because Jennifer Lopez dropped that new album in the morning where she's featured on the cover in all of her over ... is she like 50 or something? She's 50 I think.

Leah Litman:

Okay I was about to say it's a great weekend for the over 40 crowd, given that how J.Lo-

Melissa Murray:

It's a good weekend if you're over 40 and you're J.Lo, it's not a great weekend if you're like, over 40 and me. It was like ... again, J.LO, Kate, and me are the poster children for the Age Discrimination in Employment Act. But yeah, that was crazy, like that was ... she is slaying that album cover. And she has a Peloton.

Leah Litman:

She does.

Melissa Murray:

Is that what's doing it?

Leah Litman:

Yeah.

Melissa Murray:

Because I have a Peloton, too, and I'm not doing that. That's not happening.

Leah Litman:

Well, just give it a little time, I mean, you got yours pretty recently. So ...

Melissa Murray:

She's had hers for like 150 years, that's why she has those results.

Leah Litman:

I digress.

Melissa Murray:

Hats off to you, Jennifer Lopez, hats off to you.

Leah Litman:

Speaking of older workers. Dianne Feinstein announced ... Dianne Feinstein is the senator from California, she announced that she will not be seeking the ranking member post on the Senate Judiciary Committee. This, of course, follows from a bunch of outrage over her conduct at the Barrett hearings, the Kavanaugh hearings, and in general, being dismissive of climate activists, hugging Lindsay Graham in a maskless just absurd way and publicly congratulating him on a set of terrific hearings. But, given her announcement, there's now a question about who's going to replace her. Dick Durbin, who is the WHIP, announced he will seek the position, but since he is already the WHIP the caucus would have to vote and decide whether it's permissible to have both the powerful WHIP position and this plum committee leadership post.

Leah Litman:

Senator Sheldon Whitehouse of Rhode Island indicated he would look forward to the Democratic Caucus voting on who the replacement would be, seemingly signaling that this is up for discussion and also he has a potential interest in the post.

Melissa Murray:

Well, I think he's very definitely interested given ... I mean, he had that big whiteboard energy at the Barrett confirmation where he tried to explain to the public the sort of lengths between judicial nominations and some of these other conservative money groups. I think it's very clear he's interested in doing this.

Leah Litman:

I want that big whiteboard energy. Chairing one day and at least ranking member on the Senate Judiciary Committee. Anyways, that's my personal preference to the extent you care, Democratic Senate Caucus.

Melissa Murray:

That's the first of our unsolicited pro-bono advice to the Democratic Caucus. The first of Leah's hot takes.

Leah Litman:

Yeah, which ought to be helpful.

Melissa Murray:

We try, we try very hard. Is there anyone else who could be challenging Durbin for the position?

Leah Litman:

I mean, it's possible, but no one else has kind of issued any statements or weighed in signaling potential interest. But there are other great members of the committee who are pretty skilled questioners, who I think could be effective leaders. If you-

Melissa Murray:

And you don't have to be a lawyer to chair-

Leah Litman:

No.

Melissa Murray:

This committee. At all. Or to even be on the committee for that matter. So you can imagine a whole range of people, very high profile people being interested perhaps in this.

Melissa Murray:

So another really important cert grant that we want to talk about is Cedar Point Nursery v. Hassid. We mentioned this very briefly, I think you guys mentioned it in the live show at Duke. But to just be very quick about it, the Supreme Court will hear challenge to a California regulation that allows union organizers access to agricultural workers at employer work sites. So brief entry to the work site to speak to farm workers, for example, before work or after work or while workers are on a break or eating lunch. And the regulation was the product of a campaign by Cesar Chavez and the United Farm Workers to force agri businesses to permit organizing and bargaining by agricultural workers.

Melissa Murray:

And so, again, I think the take on this is that allowing the organizers into the workplace is constituting a taking, I think that's the claim that's basically being made here, so a taking of property. Which I'm just going to say makes me a little uncomfortable, like the idea that access to your workers constitutes a taking sort of creates the idea that the workers themselves are-

Leah Litman:

Well, now-

Melissa Murray:

Property.

Leah Litman:

Is allowing health inspectors onto a property now a taking, or ... OSHA, like all of it-

Melissa Murray:

It's really ... So, I mean, one it's sort of ... thinking about any of these things as takings sort of expands the kind of challenges you could make to ordinary regulations that many businesses are subject to, like as you say, health regulations, OSHA, whatnot. But then I'm just thinking in a more fundamental way, like the farm workers are among some of the most important workers in California's economy, and work under the most difficult conditions. I think it's fair to say. And sort of to say that having access to them is a kind of property that this government regulation takes is like kind of gross.

Leah Litman:

Yeah.

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Melissa Murray:

Anyway, so ... just the idea of people as property, not surprisingly I'm uncomfortable with. Not surprisingly.

Leah Litman:

More free advice to the court. Or wait, can we just note, we're alone together, and-

Leah Litman:

Yeah.

Melissa Murray:

This almost never happens.

Leah Litman:

This is when trouble happens. Kate was supposed to be recording with us, but she had an emergency.

Melissa Murray:

She had-

Leah Litman:

And she left us to our own devices, so really when you think about it, it's kind of her fault.

Melissa Murray:

Blame it on Kate. Okay.

Leah Litman:

So we're recording this the day after Thanksgiving. And some turkeys were pardoned. The president pardoned Corn the turkey and also some guy named Michael Flynn, the unregistered agent of turkey who was an unregistered agent while he was National Security Advisor.

Melissa Murray:

I think this is not the first set of pardons we're going to see as this lame duck president continues to pardon turkeys.

Leah Litman:

No.

Melissa Murray:

No.

Leah Litman:

I agree. I think the question is just who else is he going to pardon.

Melissa Murray:

Well, I mean, not to use any poultry puns but I think he has rather unfeathered discretion. I'm sorry, we're high on tryptophan.

Melissa Murray:

Unfeathered discretion, a free range president in the pardon area. Uncaged. Pardoning foul play all over the place.

Leah Litman:

Everyone's just going to be gobbling up all those pardons. Good times.

Leah Litman:

Okay.

Melissa Murray:

Okay. That was fun.

Melissa Murray:

So now until January 20th we're on the pardon express. On the eve of Thanksgiving, when all through the house not a creature was stirring except SCOTUS mouse. There were some really important developments at the court on Thanksgiving eve. So in a five to four decision in Roman Catholic diocese v. Cuomo, with several justices writing, the court effectively enjoined New York's 10 and 25 person limits on gatherings. And there were serious questions about whether or not this particular dispute was moot, and whether it was proper for the court to issue this disposition because the Cuomo administration hasn't actually enforced it. Right, so they said they were-

Melissa Murray:

Yeah, well-

Leah Litman:

Not enforcing it.

Leah Litman:

Right, right, so the challenged executive order limits religious services to 10 persons in red zones and 25 persons in orange zones, so by the time adjudicated this dispute the congregations and synagogues who brought the challenge-

Leah Litman:

Right.

Leah Litman:

Were not actually in red or orange zones and so they could have services with up to 50% capacity. And the court was like, "Let's just do it and be legends and enjoy it anyway." So that was fun.

Leah Litman:

So that was interesting, so there was this whole question of did the court even need to speak on this question, and I think that was the chief justice's opinion-

Melissa Murray:

Right.

Leah Litman:

That was basically his point, like judicial modesty is a thing, judicial restraint is a thing, we actually don't need to weigh into this question because it's not actually a question that's teed up right now.

Melissa Murray:

You thought that the court's delay in acting on this application weakened the case for relief, can you say more about this, Leah?

Leah Litman:

Yeah, well, they've been sitting on it now for over two weeks, and again, a traditional factor that is supposed to entitle you to a stay or an injunction is imminent risk of-

Melissa Murray:

Of harm.

Leah Litman:

Harm, and partly because the regulations were no longer in effect, partly because the court just sat on this for two weeks, it just didn't seem like there was a powerful showing of imminent risk of harm here.

Melissa Murray:

But that didn't really matter when it came-

Leah Litman:

Oh, yeah.

Melissa Murray:

Right down to it. So this is a decision that again I think ... We have said that a decision like this was coming, so it marks, I think, a very consequential shift in the court's receptivity to claims of religious liberty. So the court came to the conclusion that the order was not neutral with respect to religion, and therefore required heightened scrutiny and possible signals that there are going to be a lot of government regulations that will likely be invalidated for the same reasons. Like they have an impact on religious institutions, even though the intent of the regulation is to be broadly applicable to a range of different institutions. So-

Leah Litman:

Yeah.

Melissa Murray:

Tell me a little bit, Leah, about some of the statements that the court thought evinced that kind of hostility to religion.

Leah Litman:

Yeah, so in addition to the effect on religious practices, the court seemed to identify two other bases for thinking that this discriminated on the basis of religion, and one of those reasons were statements by Andrew Cuomo, governor of New York, about the origins of the rule and its applications to religious organizations, and specifically Governor Cuomo had noted the prevalence of coronavirus in certain Orthodox Jewish communities.

Melissa Murray:

And large gatherings-

Leah Litman:

Yes.

Melissa Murray:

Associated with large gatherings that continued to happen. So this is a big deal in New York City, and it's not just Cuomo who is sort of under fire for this from religious communities, but Bill de Blasio also got a lot of blow back about this as well. So those statements, I think, were sort of targeted as part of the hostility toward religion.

Melissa Murray:

And the court itself said that the rule was not neutral with regard to religion because it singled out places of worship for especially harsh treatment. And as an example of that, they noted that quote, unquote, "essential businesses" that were not subject to the cap included things like acupuncture facilities, campgrounds, garages, and whatnot. And so it seemed, at least to them, that religious institutions were being unfairly singled out. But not everyone on the court thought that.

Leah Litman:

Yeah, so Justice Sotomayor's dissent took issue with both of these bases for concluding that there was religious discrimination and Justice Breyer's dissent took issue with some of them. And in particular, Justice Sotomayor's dissent said just a few terms ago this court declined to apply heightened scrutiny to a presidential proclamation limiting immigration from a Muslim majority country, even though President Trump had described the proclamation as a Muslim ban. So if the president's statements didn't show that the challenged restrictions violate the minimum requirements of neutrality, hard to see how Governor Cuomo's do, and-

Melissa Murray:

I kind of love this, this is like Justice Sotomayor being like, "Hello, I keep receipts in my bag."

Leah Litman:

Yeah.

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Melissa Murray:

All the time, like a big ole CVS receipt for you, here it is.

Leah Litman:

I thought this was a really great effective dissent by her, in part by drawing out this hypocrisy. And I was also extremely pleased that Justice Kagan joined her.

Melissa Murray:

Joined her. Why did-

Leah Litman:

In this dissent.

Melissa Murray:

But so, this is a strategic question, tell me what your thoughts are. Why didn't the three liberal dissenters just join this dissent? Like why did Breyer write separately?

Leah Litman:

I mean, Justice Breyer's going to Breyer, he wants to go into all of the amicus briefs reciting like the scientific evidence-

Melissa Murray:

They had statistics.

Leah Litman:

And the

Melissa Murray:

I wanted to talk about the statistics.

Leah Litman:

Exactly. He wanted to talk about like the spittle and the singing being particularly-

Melissa Murray:

Yeah.

Leah Litman:

High risks. This is a very-

Melissa Murray:

Breyeresque-

Leah Litman:

Topic of interest. Exactly. Exactly.

Melissa Murray:

I do think it would've been more effective if all three of them had joined Justice Sotomayor's dissent. Which was I think the more forceful and clear in its thinking in terms of the dissents.

Leah Litman:

I agree. It's a little spicier than Elena usually orders, but glad she's getting on board.

Leah Litman:

The other basis for finding discrimination was the idea that religious organizations were not treated similarly to similarly situated organizations.

Melissa Murray:

Right.

Leah Litman:

And then of course there's the question about well, what is a similarly situated organization and service? And Justice Gorsuch's separate writing really drilled down on this question, suggesting that bicycle repair shops, signage companies, accountants, lawyers, and insurance agents are essential, and then he poses this question, like so according to the governor it may be unsafe to go to church, but it's always fine to pick up another bottle of wine, shop for a new bike. And it's like-

Melissa Murray:

Well, this I thought was kind of east coast elitism, like firing at this kind of idea of the east coast elites. Because he talks about it's always find to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Like have we ever talked about acupuncture in a SCOTUS opinion? Like this might've been a first.

Leah Litman:

Yeah. I mean, it is, but it's just ... The confidence with which he was able to assert that these things are just so obviously similar when I think at least the shopping for a new bike and the picking up another bottle of wine, like those oftentimes happen in conjunction with essential services like grocery stores-

Melissa Murray:

Yeah.

Leah Litman:

Which you surely can't close and of course you're not talking with other people for long periods of time.

Melissa Murray:

What was even more interesting was the spiciness between the chief and Justice Gorsuch. So what's going on here?

Leah Litman:

So the chief and Justice Gorsuch were sniping at one another in the concurrences they each wrote separately. Justice Gorsuch had a whole section on the Chief Justice's concurrence in an earlier stay application decision dealing with a coronavirus response, South Bay Pentecostal. Justice Gorsuch had said that concurrence reached back 100 years in the US reports, didn't realize that would be so offensive to originalists, side note. And then has this line, "We may not shelter in place when the Constitution is under attack." The Chief Justice was not having this.

Melissa Murray:

Well, I mean, it wasn't ... Like the Constitution can take a holiday from the pandemic, but it cannot take a sabbatical. I feel injured by that comment. What do you think a sabbatical is? Like what is happening on sabbatical? Like this sabbatical that I'm on right now is like a wash in edits and Zoom school and like writing a bunch of stuff, and like I am not kicking back on this sabbatical at all.

Leah Litman:

Yeah.

Melissa Murray:

Sabbaticals are work.

Leah Litman:

Yes.

Melissa Murray:

So if the Constitution ... Maybe the Constitution should take a sabbatical and work. Get the work on.

Leah Litman:

Right.

Melissa Murray:

So I thought that was interesting.

Leah Litman:

Yes. So the Chief was not amused. And notes that while Jacobson occupies three pages of today's concurrence, it warranted one sentence in South Bay and that sentence was completely unobjectionable, just that states primarily regulate safety and health. And the Chief then says, "The concurrence speculates that there is so much more to the sentence than meets the eye. But the actual proposition asserted should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for."

Melissa Murray:

All right, so let's boil this down. All right, we've had a number of these COVID restriction cases that have come up before the court to resolve on a very quick basis. And they came out the other way. That of

course was prior to Friday, September 18th, 2020 when Justice Ginsburg passed away. And so again I think we're seeing the consequences of her seat being filled by a conservative member.

Leah Litman:

Amy COVID-Barrett.

Melissa Murray:

By a conservative member of the court. And we predicted this, so I just want to point out-

Leah Litman:

Yeah.

Melissa Murray:

That the ladies of Strict Scrutiny were ... We had this down on September 19th. And we said this, like we were going to see a kind of diminution of the Chief Justice's authority to sort of corral and control the conservative block of the court, and I think that's right. It's been speculated that this opinion, though unsigned, is probably Justice Barrett's creation. Do you think that's right?

Leah Litman:

I think it's her or Justice Thomas. Justice Gorsuch and Justice Kavanaugh each wrote separate concurrences, so it seems unlikely to be them. It also did not read like Justice Alito's style to me, so-

Melissa Murray:

It's very mild, it was a mild and measured opinion.

Leah Litman:

Yeah. So yeah, I don't ... anyways, I don't know between those two.

Melissa Murray:

I'm just going to point out that we've been saying this, which is why I on November 25th, when reading the paper, I was reading the LA Times online and there was an op ed from Aaron Tang, who's a law professor at UC Davis, and basically the top line of the op ed was that the court is sort of staking out a kind of centrist position.

Leah Litman:

Yeah.

Melissa Murray:

And as evidence for this, Aaron, who is our friend and we like him very much, looked to the court's signals that they were sending, he said, at oral argument, particularly in *Fulton v. City of Philadelphia* and some of these other cases where it seemed like they were trying to sort of thread the needle and come out with these sort of narrow ways to resolve these very controversial cases. And Aaron thought this indicated that despite the addition of a sixth conservative justice, the court was actually seeking to be more centrist in its disposition of really important issues. That literally lasted seven hours. Like that

op ed came out and then this opinion dropped, I guess at like 7:00 in the evening or something. And it just kind of blew up the rosy vision of centrist compromise that Aaron had crafted.

Melissa Murray:

But we never thought that that was going to happen in the first place, we were never on this compromise bus, we never saw that as an option.

Leah Litman:

No, and I remain firmly on that bus. But I think it's possible of course that the court could've written this opinion in more absurd far reaching ways, right, like announcing, "We overturned Jacobson, we overturned employment division v. Smith," and all of these things. But that shouldn't be the measure by which you assess whether the court is moderate or centrist. Instead you have to look at how is the law changing and the implications of the court's reasoning. Because again, if Cuomo's statements evince hostility to religion, well that gives courts a ton of latitude to say a bunch of generally applicable laws and policies discriminate on the basis of religion. And if the court maintains the ability to say that religious organizations are not similarly situated to the essential businesses that were allowed to continue to operate under this order, like that too gives courts a substantial power and a lot of discretion to say, "Well, this rule isn't truly generally applicable because it doesn't treat churches similarly to similarly situated secular institutions."

Melissa Murray:

Anyways, like that wasn't the only op ed worth talking about. The Pope came out with an op ed. Who would've thunk it? Right, so the Pope had an op ed in the New York Times that came out shortly after this decision dropped, and basically the Pope was like, "I'm with Sonia."

Leah Litman:

So specifically the New York Times op ed said with some exceptions governments have made great efforts to put the wellbeing of their people first, and the exceptions he notes are the governments that have not adopted restrictive measures in response to the coronavirus pandemic. And he also says, "It is all too easy for some to take an idea, in this case for example personal freedom, and turn it into an ideology creating a prism through which they judge everything."

Melissa Murray:

Again, that was like some very hot tea from ... Papal tea.

Leah Litman:

Exactly. But if we added the Pope to the court the decision still would've been five, five. We would've been at five, five.

Melissa Murray:

Five, five, a tie.

Leah Litman:

Great.

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Melissa Murray:

So like there's a lot going on.

Leah Litman:

Yeah.

Melissa Murray:

The Pope basically like ... Let me show you a pro-life take. It was basically the bottom line of this op ed.

Leah Litman:

Yes. And like let me show you what it means to again like think about other people, right, and like regard ourselves as like part of a community.

Leah Litman:

One final note on this, which is I took this decision as a pretty powerful indication that we should take Justice Alito's federalist society rant seriously and literally. Because of course in that rant he went out of his way to criticize government's responses to the coronavirus, said religious liberty is under attack, and criticized the decision that Justice Gorsuch criticized the Chief for relying on, *Jacobson v. Massachusetts*. We are going to break down that speech in a special episode, we have a very special guest lined up, but I did want to-

Melissa Murray:

We can't do it without Kate either, or our special guest-

Leah Litman:

Yes.

Melissa Murray:

So Kate would be very mad if we talked about it here, and actually we're not allowed to talk about it by ourselves.

Leah Litman:

Right.

Melissa Murray:

Let's shift gears. All of that happened, so much stuff happened in like the space of literally three days. Right, it was just a lot of court and court adjacent news. But guess what? The court's getting back to work in the first week of December, and they've got a lot of hot button cases. So one case that I know is near and dear to Leah's heart because it is necessary for enforcing the Voting Rights Act, is *Trump v. New York*. So Leah, what is going on in *Trump v. New York*, again, some more?

Leah Litman:

So this is the case challenging Trump's memorandum instructing Secretary of Commerce, voting rights hero and art connoisseur-

Melissa Murray:

Yes-

Leah Litman:

Wilbur Ross.

Melissa Murray:

Art connoisseur. Wilbur Ross apparently has like a 50 million dollar art collection. That's necessary to enforce the Voting Right Act, of course, but back to the case.

Leah Litman:

It challenges the memorandum instruction Wilbur Ross to repair a report that would enable the president to exclude non citizens from the base population number used to apportion seats in the House of Representatives and allocate federal funds. Every court that has decided whether the memo is illegal has to date declared it unlawful. It's not clear that the Supreme Court will agree on the day before Thanksgiving, the three judge panel with two Trump appointed judges in the majority concluded the challenges to the memo were not yet ripe, that is it was not yet time for the courts to decide whether the memo was lawful.

Leah Litman:

The case involves statutory challenges to the memo, constitutional challenges to the memo, and the arguments about whether the dispute is ripe and justiciable. So we will go through each.

Leah Litman:

As a threshold matter, there are questions about whether the court will say it is proper to reach the merits at all. The Trump administration has challenged whether the suit is justiciable, mostly on standing grounds, the sum of their arguments relate more to ripeness, I think.

Melissa Murray:

To be clear, standing and ripeness often can be confusing to distinguish because they all sort of are animated from this article three requirement that the federal courts only hear cases or controversy. So sometimes it could be about the particular litigants, they're not the right litigants, or in the case of ripeness or mootness, it's not the right time to hear it, or the time has elapsed to hear it. So they're inextricably intertwined because of the article three requirement, and sometimes it's hard to distinguish.

Leah Litman:

Yeah.

Melissa Murray:

What's the standing ripeness argument for the plaintiffs here?

Leah Litman:

So the plaintiffs who are both states and organizations and citizens based in particular states say that certain states are at imminent risk of losing House seats or funding if the administration did apportion representatives or funding while excluding non citizens from the base apportionment number.

Melissa Murray:

But the memo actually says that this is going to happen.

Leah Litman:

Right. The memo itself refers to one state, which the administration concedes is California, as counting so many undocumented individuals that it would lose at least one House seat.

Melissa Murray:

So can just step back and like sort of take a 360 view of this and maybe bring in some of the cases we've talked about before? So when we first started the podcast one of the first cases we talked about was *Rucho v. Common Cause*, which was the gerrymandering case. And it seems totally separate from the whole question of the commerce case about including a question on the census, but they're really actually related because one of the reasons you want to include a question on the census asking about citizenship status is because you don't want to count undocumented persons because counting undocumented persons might inflate the numbers of certain states, and so what you want to do is be able to shift at some point from a population based model of districting to a citizenship based model of districting, which would put more power into the hands of those states where you just don't have the same population, the same immigrant communities or populations.

Melissa Murray:

And so they're actually inextricably intertwined, and the Republicans won on the gerrymandering issue because the court held that it was a non justiciable political question. They lost on the census question, but now they are coming back with this question of just like let's just figure out who the undocumented persons are and exclude them entirely. So it is kind of a backdoor way to get the win that would then compliment the win in *Rucho v. Common Cause*.

Leah Litman:

Yeah, and it's also related to this census case you were mentioning in other respects as well. I mean, one is it confirms the majority was correct that asking about citizenship was never-

Melissa Murray:

Yes.

Leah Litman:

About enforcing the Voting Rights Act as the challengers always maintained. I know, mind blown, this is shocking news. Now the administration is trying to do with citizenship information what it maintained it was not trying to do-

Melissa Murray:

Was not going to do, exactly.

Leah Litman:

Exactly. Draw federal districts and apportion federal funds on the basis of citizens rather than persons. That's how this case kind of arose. And again, the claims of injury are these states are going to lose funds, seats from that apportionment. In addition to the memo itself predicting this, there were also expert analyses confirming this projection that went largely uncontested.

Leah Litman:

The second claim of injury relates less to future harm and more to past harm, and this is something you flagged on our very first episode that we recorded, namely that the administration announcing this memo and saying they were going to exclude non citizens from the apportionment, that announcement and the very existence of the memo depressed census-

Melissa Murray:

Yes.

Leah Litman:

Turnout, because certain populations were concerned that while the administration is really trying to suss out citizenship information. And so the states and the plaintiffs are arguing that that depressed census turnout, effected the accuracy of the census, under counted certain groups, and now that the census count has finished, while that might mean the dispute is moot, they argue it falls under an exception to mootness allowing a court to adjudicate it because the time for a census count is so short, like eight or so months, no court could possibly adjudicate the lawfulness of an entire case in that timeline, and therefore the dispute is what's known as capable of repetition, yet evading review because it's such a short timeline, a court couldn't review its lawfulness, but it's likely to reoccur given that, again, like the census happens every 10 years and this memo is in place.

Leah Litman:

The arguments against justiciability, that the administration is making sound to me more like ripeness rather than standing. Again, given that the memo itself announced that states were likely to lose seats and given that the court's prior decision in *Department of Commerce v. New York* said that the states had standing because they showed it was sufficiently likely they would lose seats if a citizenship information was included on the census, so the claims of likelihood of injury seem pretty clear and powerful to me. But the administration is arguing that the suit is not justiciable because it's not ripe given that we're not sure whether or how the administration is actually going to be able to implement this policy, namely preparing a memo that excludes non citizens from the base apportionment, like they don't know whether it's feasible for the administration to actually do this.

Melissa Murray:

What about prudential standing ... or sort of prudential questions, like we've been talking mostly about constitutional justiciability, but what about the whole question of like should the court even be here even if it is permitted to do so under the Constitution?

Leah Litman:

Yeah, so I think even if you get into prudential ripeness, the challengers have pretty strong arguments, because prudential ripeness is supposed to be whether a dispute is fit for judicial resolution, and here it

is a purely legal question, does this memo violate the relevant statutes and Constitution? And also the hardship to the parties about delaying the dispute. And if you delayed resolution of this dispute, you push it to a world in which you possibly have initial numbers of apportionment, and then states try to undergo redistricting, and the federal government wants to allocate funds. And then what are you going to do? Like hold up the redistricting and allocation of the federal funds while you sort this out? So it just seems to me like the injury claims are pretty clear, and the ripeness factors that are more prudential don't really counsel in favor of waiting, but ... yeah.

Leah Litman:

It's also insane to me that the court would enjoin New York's restrictions that are no longer in effect, and then say, "Well, we're actually going to decide the legality of this memo."

Melissa Murray:

Well and that's a great question, like how does the court's disposition of the Cuomo case shadow oral arguments in this particular case? Like sort of like the whole question of judicial restraint.

Leah Litman:

I mean, they are ostensibly like formally different given that at least in New York restrictions were at one point in effect, whereas this memo is out there but the administration's view is we don't know whether it will be actually implemented. But even there you have the challenger's point that that memo already caused them injury, and so the court should decide its legality. And I think they're right.

Melissa Murray:

All right, so let's switch to the merits. Like you think the court should get to this, like this is not a non justiciable issue, so what are the merits questions here and how are they shaking out?

Leah Litman:

Yeah, so there's actually one I think interesting remedial question, which is if the court accepts the plaintiff's argument that they were injured because the existence of the memo depressed turnout, does that make enjoining the memo going forward proper, given that the harm already occurred and so the remedy seems like-

Melissa Murray:

Yeah.

Leah Litman:

A little bit disconnected to that. The merits however I think are super easy. Like if the court actually reaches the merits, it's obvious that this is unlawful on both statutory and constitutional grounds. The Census Act requires counting of quote, "the whole number of persons". Later provisions in the 1929 Census Act likewise require counting total population, and those amendments were enacted after and during a period of intense immigration restriction, so Congress knew how to write statutes excluding non citizens. The government is like well, sometimes we count citizens who aren't physically present in the United States and so physical presence can't be the whole story, and it's like okay, well, but it's still a minimum that is sufficient to be counted. So it might not be necessary, but if you're physically present here there's just nothing that suggests the executive branch has the discretion to exclude people.

Leah Litman:

So those are the statutory challenges, constitutional challenges also related given that the Constitution likewise refers to whole number of persons and requires apportionment to be based on quote, "numbers determined by actual enumeration."

Melissa Murray:

So how do you think this is going to shake out? So we now have this six to three majority, conservative super majority. We've already seen the impact of that super majority in one really important case, the Cuomo case. How do you think this shakes out?

Leah Litman:

I think if I had to guess, they'll say it's not ripe. Or that their remedy doesn't track the claim of injury that they established, namely harm from depressed turnout. That was how the three judge district court in DC decided it with two Trump appointees on it and the great Judge Cooper dissenting, and I think that's just what they're going to say.

Melissa Murray:

Again, to sort of lay out the timing of this, if they are to say that this is just not yet justiciable and it gets punted for a while, with change of administration it's the case that this may just kind of go away.

Leah Litman:

Right.

Melissa Murray:

And they're never going to have to resolve the sort of merits based question that is more thorny and might sort of, again, raise a lot of questions for the public about these kinds of issues and the court's disposition of them.

Leah Litman:

Yeah. And I think the prospect of a change in administration makes the not ripe, not justiciable finding a lot less concerning or troublesome given that I expect-

Melissa Murray:

Right.

Leah Litman:

The Biden administration will say, "Okay, that's a nice memo, I'd like to prepare a memo that's actually consistent with the statues and the Constitution, so ... "

Melissa Murray:

Let's file this memo in the circular file.

Leah Litman:

Right.

Melissa Murray:

All right, so for the December sitting, Leah, you predict that a lot of the action are going to be on these questions about justiciability, so let's stay tuned and see if that's the case.

Melissa Murray:

Another case that's being argued in December is Edwards v. Vannoy, and I know, Leah, this is another case that's near and dear to your heart. Because it's a question that deals with this whole issue of remedies, and what should happen in the wake of a significant Supreme Court decision, so tee this one up for us.

Leah Litman:

So this is a case about whether the Supreme Court's decision from last term, Ramos versus Louisiana, applies retroactively to criminal cases that have become final. Ramos, of course, is the decision that held it was unconstitutional for states to convict persons using non unanimous juries. It overruled a 1972 decision that had permitted them. In so doing, the court specifically referenced the racist origins of the non unanimous jury rule.

Leah Litman:

As a general rule, most decisions of constitutional criminal procedure don't apply to cases that have become final. Cases where your appeals and time to file a petition at the court have ended. But under the-

Melissa Murray:

But there are exceptions.

Leah Litman:

Yes, there are exceptions. Under Teague v. Lane, so called old rules that are dictated by precedent, as well as watershed new rules that implicate fundamental fairness and accuracy in criminal trials, do apply retroactively. There's one other category of rules that applies retroactively, but that's not implicated here. So ...

Melissa Murray:

So the defendant is arguing, in the first instance, that Ramos did not create a new rule, that it simply reaffirmed an old rule that was logically dictated by extant precedent. So they're basically what Ramos did was bring the Supreme Court's jurisprudence in line with its other sixth amendment jurisprudence, and again, this goes back to the language in Ramos that talks about Apadoca being a constitutional outlier, like they're sort of like weird anomalies and this particular decision is going to bring them back into alignment.

Melissa Murray:

And so in that particular case, Ramos would apply retroactively because all it does is reaffirm the old rule that should apply in all cases. So that's one of the arguments the defendants are making.

Leah Litman:

The defendants are also arguing that Ramos is a watershed rule of criminal procedure. That argument, which I am very sympathetic to, is quite difficult to pull off in light of the court's current doctrine, because the court has basically said there aren't any such watershed rules of criminal procedure that haven't already been announced in cases like Warden, or Schriro or Tyler. And the court ruled in Schriro specifically that the Supreme Court's decision in Apprendi v. New Jersey, which required juries, not judges, to find all elements of an offense beyond a reasonable doubt was not a watershed rule of criminal procedure.

Leah Litman:

As I alluded to, I think under a proper understanding of what watershed rules are, this could be a watershed rule, but getting there would require a court who thinks that their prior statements about watershed rules are wrong, over broad, and possibly that Schriro was wrongly decided.

Melissa Murray:

Just to state about the watershed rules and the idea that there have been no watershed rules, I was clerking when Apprendi was decided, and it felt like a watershed rule.

Leah Litman:

Yeah.

Melissa Murray:

Because like we basically had to go back-

Leah Litman:

Yeah.

Melissa Murray:

And redo all kinds of things.

Leah Litman:

Right.

Melissa Murray:

After Apprendi, and again, so if that is not a watershed rule, I don't know what would be.

Leah Litman:

Right.

Melissa Murray:

And so I think you're right, that is going to be a hard argument.

Melissa Murray:

The argument that Ramos didn't introduce a new rule but merely ratified existing doctrine is compelling, given the majority's arguments in Ramos, but I just want to sort of point out that, again, one of the

things that the briefs in this particular case continually refer back to is this idea that what Ramos is trying to do is root out a policy that had racist origins, and they keep sort of hammering down, like there's a brief from the NAACP Legal Defense Fund, brief from the centers on race and the law, including the NYU Center on Race and Inequality. And I take the point, I get it, but I think in continually hammering this idea that Ramos is a decision that is intended to correct a racial injustice, they are just laying the foundation for race to be used to interrogate other existing precedents, including *Roe v. Wade*. So I'm just like go easy on this for a minute, people. Like there are other cases in the offing here.

Melissa Murray:

But again, some very interesting amicus briefs in this case. The MacArthur Justice Center brief, this was written by Devi Rao pointing out that Louisiana and other states would not be bound by retroactivity determination since the states can decide to apply retroactively rules that they're not required to do, and urging the court to avoid reaching this particular question.

Melissa Murray:

There's also a brief from the Promise of Justice Initiative that argues that about 1600 cases would be affected by this particular decision, and then there are a number of briefs sort of emphasizing the racial dimensions of this particular ruling. And the idea that some of the people who have been convicted under these non unanimous jury rules are African American defendants who might have been ... who might not have been convicted-

Leah Litman:

Right.

Melissa Murray:

Otherwise, if unanimity had been required. So lots of interesting briefs here.

Leah Litman:

Yeah. Two other cases we wanted to preview.

Melissa Murray:

Well, so there's a great case I thought was really interesting, it's a really good little nugget, *Van Buren v. United States*, and it concerns the Computer Fraud and Abuse Act, CFAA, which makes it a federal crime to either access a computer without authorization, or to exceed that user's authorized access and obtain information. So it seems like a pretty straightforward statute, but here's the question, what happens if you're someone who is authorized to access information on a computer for certain purposes, but you actually use it for other, non-authorized purposes? Does use of the computer by an authorized person for an unauthorized use constitute a violation of the CFAA?

Melissa Murray:

And I'll just say the facts here are super salacious and interesting. So Andrew Albo asked Van Buren, who is the defendant here, to run a computer search for a license plate number that supposedly belonged to a local exotic dancer. Unbeknownst to Van Buren, this was all part of an FBI investigation with which Albo was cooperating. And Albo told Van Buren that he wanted the license plate run because he really

liked the dancer and wanted to investigate her to make sure that she wasn't an undercover police officer before he called her up and asked her for a date or something.

Melissa Murray:

And Van Buren, who had requested a loan from Albo, and Albo seemed to make all of this contingent on him giving the loan, said that he would do it for Albo, again, for this loan, and so he runs the license plate search, Albo gives him \$6,000 and then the FBI shows up.

Leah Litman:

Right.

Melissa Murray:

And nails him. All right, so-

Leah Litman:

And he serves 18 months in prison.

Melissa Murray:

18 months in prison. So the impact of this case goes beyond these shady facts. As the defendant's brief notes, if the CFAA's language is interpreted to include as violations improper uses by authorized users. It could render violations of anodyne computer use regulations and policies, like for example, employers' computer use policies, websites, terms of service, and third party restrictions on certain websites like inflating your height on a dating website or checking sports scores at work. All of these could be rendered federal crimes under the CFAA if this particular interpretation was used.

Melissa Murray:

And so Van Buren is fighting for his life here, he's been charged with violating the CFAA and has been convicted and sentenced to 18 months imprisonment as Leah notes. The US Court of Appeals for the 11th Circuit upheld his conviction and rejected his argument that he could not have violated the CFAA because he had permission to access the databases. The CFAA defines exceeds authorized access as to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled, so to obtain or alter.

Melissa Murray:

The natural reading of that particular text would seem to exclude misuse or misappropriation. The statutory language doesn't say anything about the purpose for which you're doing this. And indeed, it was conceived of as an anti-hacking law, so again, one of the defendant's arguments here is that to interpret it in this way, to apply to authorized users who are using it for improper uses, would really expand the scope of the statute far beyond its legislative purpose.

Melissa Murray:

So I think this is going to be a really fun and interesting case, straight up statutory interpretation. I think we're going to see a lot of discussions of textualism versus purposivism here, and I wonder if our resident favorite textualist, Justice Gorsuch, will have lots to say here.

Leah Litman:

I am cautiously optimistic for the defendant in this case. I think for the reasons you gave, I think the defendant has a pretty strong textual argument. I also think that the fears about how this statute could be used that you noted could really resonate with justices who have expressed concerns about the broad scope and far reaching implications about statutes like these, whether it's the Chief Justice or Justice Gorsuch. And it reminds me of cases where these similar concerns have, again, like carried the day. Whether that's Cali, the anti-corruption case we talked about, or earlier cases like Yates and Bond, the defendant kind of lists all of these and situates this case as of a piece with those in the opening part of the brief. The defendant is represented by Jeff Fisher and the Stanford Supreme Court Litigation Clinic, so great lawyering, great arguments, and again, I'm just cautiously optimistic.

Melissa Murray:

So look for that one, that'll be interesting, we'll see if it's like Bridgegate.

Melissa Murray:

Another case that's coming up in this December sitting is Cargill v. Doe, also being argued in tandem with Nestle v. Doe. And this case is about whether the Alien Tort statute applies to allegations that a US company conducted oversight of foreign operations at headquarters. And whether a domestic corporation can be sued under the Alien Tort statute. So one case here, the one involving Nestle, involves six former child slaves who were trafficked from Mali to work on cocoa farms in the Ivory Coast. They maintain that the US corporations have supported and maintained a system of child slavery and forced labor, and they allege that the corporation continued to provide financial and technical assistance to plantations, despite knowing that they relied on slavery. So for farming supplies, training and capacity building, advanced payments, financial spending money to obtain loyalty for suppliers, all of these were forms of the support that the corporation offered to the plantations even though the plantations were using these highly questionable labor practices.

Melissa Murray:

So a note here, a case called Kiobel announced a quote, unquote, "touch and concern test". And again, Jesner v. Arab Bank has held that foreign corporations cannot be sued, so this would all seem to weigh in favor of a sort of broad insulation of corporate interests from the Alien Tort statute, but of course the question here is what happens when you have a company that actually has domestic ties, or touches and concerns domestic operations? So that will be a really interesting question. Really interesting, I think, for whether or not this sort of pro-business block of the court will want to see the Alien Tort statute apply in this particular context as well. I doubt it's likely.

Leah Litman:

Yeah, I am not optimistic. And Justice Gorsuch has written separately in these cases to embrace a theory that suggests the federal courts actually lack jurisdiction over these cases because they don't even involve federal questions, they involve international law, which is not-

Melissa Murray:

Right.

Leah Litman:

A federal law. And I just ... it's difficult for me to count to five for the plaintiffs in these cases, which I think is deeply unfortunate.

Melissa Murray:

And so we will be right there with them, listening alongside as again, these particular arguments will be live streamed via audio platforms. So you can check it out on CPAN or whatever else when that happens.

Melissa Murray:

Do you want to some Court Culture, Leah?

Leah Litman:

I do. Because-

Melissa Murray:

Okay, let's do it.

Leah Litman:

It concerns the advent of a new administration, which cannot come soon enough. And ...

Melissa Murray:

This is the dawning of the age of Aquarius.

Leah Litman:

It's not quite like that. Kind of. With a new administration comes new nominees, and so we wanted to spend some time offering unsubstantiated speculation.

Melissa Murray:

Well, let's also note, with the old administration, we had new nominees all the time.

Leah Litman:

That's true.

Melissa Murray:

Well, they weren't even really nominees, they were just like a slew of different actings that came in since they couldn't actually send any of the people they wanted to confirm to the Senate because they were all like weird conspiracy theorists that didn't actually have any relevant expertise.

Leah Litman:

Let's talk about some of these possible administrative positions, and we should talk about DOJ specifically. So who are you thinking?

Melissa Murray:

So brief side rant before we do that, something ... this is what happens when Kate isn't here.

Leah Litman:

Kate would've cut the side rant portion.

Melissa Murray:

I was trying to cut the side rant portion, but ...

Leah Litman:

There's just something that did not rub me super well when after the media outlets called the election for Joe Biden, a bunch of people kind of took to Twitter to just offer speculation about who the nominees in the Biden administration would be, and recommending like some of their friends as being great, and I love supporting friends, I love the advent of a new administration, I love the idea of great people going to work for government offices that have been hollowed out, but something just didn't strike me as quite right when those same people who were like so excited to get in the door of an administration and like had their friends doing so, were not willing to partake in kind of doing the work to get this administration out the door, particularly as they are refusing to concede, and are trying to overthrow the election and have been enabling so many anti-Democratic norms. I just feel like if you're not willing to expend your political capital in like trying to do kind of like the right thing for our democracy, like I don't want to kind of reward that. And I just don't think that's where all of your energy should be. My opinion.

Melissa Murray:

All right, so the TLDR of the rant is don't make suggestions if you're not willing to like put some skin in the game.

Leah Litman:

Right.

Melissa Murray:

Defending the administration against claims of voter fraud and election tampering and whatnot.

Leah Litman:

Right. So with that out of the way, now for the speculation. Melissa, do you want to go first? Who do you see as possible candidates for solicitor general, or maybe principle deputy solicitor general in the new administration?

Melissa Murray:

There was a lot of speculation that the Biden/Harris nominee for solicitor general would likely be a woman, maybe even a woman of color, and that actually would be unprecedented. There has been a woman solicitor general, Justice Elena Kagan was the first. There have been to my knowledge four men of color who have served as solicitor general, so Thurgood Marshall was the first African American-

Leah Litman:

Drew Days.

Melissa Murray:

Wade McCree was the second, Drew Days was the third, and then Noel Franciso-

Leah Litman:

Noel Franciso.

Melissa Murray:

So there have been more men of color, but there haven't been any women of color, so I thought it was interesting that there was just a lot of speculation that this post was obviously likely to be filled by a woman. So who are some of the leading candidates? Well, there is Leondra Kruger, who is currently an associate justice of the California Supreme Court. She would be fantastic, she was in the solicitor general's office before being appointed to the California Supreme Court. There is of course Pam Karlan, who is a fierce and righteous advocate for civil rights, she is a law professor at Stanford Law School. She would be terrific. There's Ginger Anders, my co-clerk.

Leah Litman:

Whoa.

Melissa Murray:

And the woman who played the violin at my wedding.

Leah Litman:

Wow.

Melissa Murray:

I know, she's fantastic. She would be terrific. Also there's been discussion of Christina Swarns, Janai Nelson of the NAACP Legal Defense Fund, Lindsay Harrison, Sarah Harrington, and then some men have been included as well. Deepak Gupta, Jeff Fisher, Andy Pincus. So a wide range, and again, I have no quibbles about any of these. I actually would love to see a woman in this position, and again ... We have harped on the fact that those arguing before the Supreme Court have ... there have been precious few women, and even fewer women of color appearing before the court. This might be a really interesting way to sort of not just up that number with a woman in the position, but the fact that a woman is in a position may lead younger lawyers to think more about doing service in the solicitor general's office and maybe that would sort of expand the folks who are in those positions and have a chance to argue before the court.

Leah Litman:

Yeah. And I also think having an administration that is not going to be arguing for such outlandish propositions could itself go a way to making the office more inclusive and an attractive place to work for some people.

Leah Litman:

Some other names I would throw in there is Loren AliKhan who's the solicitor general of DC, Elizabeth Prelogar who was in the Mueller team and previously in the solicitor general's office. Catherine Carroll,

Danielle Spinelli, and Cate Stetson. So a lot of great candidates for them to choose from. And we'll see what they do.

Leah Litman:

And as you noted, having a woman in the solicitor general and deputy solicitor general position would go a long way to increasing women's representation at the court, which is so poor looking ahead to the sitting that we are discussing now, the December sitting, there are 27 advocates appearing, three are women, zero are women of color. And I think four might be men of color, but it's just appalling.

Melissa Murray:

And there are no women arguing from the solicitor general's office.

Leah Litman:

Right.

Melissa Murray:

In this December sitting, so there's that. So yeah, those are our takes. Like we think all of these people would be fantastic, so-

Leah Litman:

Yeah.

Melissa Murray:

Free advice from-

Leah Litman:

Right.

Melissa Murray:

From the Strict Scrutiny Pod. You're welcome.

Melissa Murray:

I think that's all we have time for. We've got a lot going on. We will have more for you coming up in the next couple of weeks, some really exciting developments, so stay tuned, watch this space. But until then, Leah, I'll leave it to you to close us out.

Leah Litman:

Thank you everyone for listening. You make the show possible, and if you would like to support the show consider becoming a supporter on our GLOW campaign, which you can go at GLOW.fm/strictscrutiny. Or you can get a Strict Scrutiny glow up by getting some new merchandise, including some normal scrutiny listen to the pod Rudy stylings at our website, StrictScrutinyPodcast.com. Or just rate us on iTunes if you enjoy the show.

Leah Litman:

This transcript was exported on Nov 30, 2020 - view latest version [here](#).

Thank you to our producer, Melody Rowell, who is going to have to edit out a lot of my takes that were a little bit too hot for the airwaves.

Melissa Murray:

There were some spicy takes. Like you were like Door Dash, put the spice level at high.

Leah Litman:

Right. Way spicier than even Justice Sotomayor's dissent. Thank you to Eddie Cooper who makes our music, and thank you again to all of you.

Melissa Murray:

We'll see you soon.