Speaker 1:

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

Speaker 2:

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."

Kate Shaw:

Hello, and welcome to the November mid sitting episode of Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. Now, a project with The Appeal. We are your hosts today, I'm Kate Shaw

Leah Litman:

And I'm Leah Litman. And we are obviously super well rested after this past week. But we still wanted to keep you up to speed with what's been going on at the Court.

Leah Litman:

So today we're going to cover Supreme Court news and recap the arguments that happened this past week and do a quick court culture segment on some talk about the court and election related litigation. This coming week, of course the Court is hearing some big cases among them, the Affordable Care Act challenge, but we'll focus on that case after the argument happens in our episode next week.

Kate Shaw:

Right. So all this to say the election is obviously front of mind for us, for all of you. We're going to try to put it on the back burner just for a few minutes and stay focused on the Court and its business this week, but do not worry, we will come back to the election and potential intersection for the court at the end of the episode.

Kate Shaw:

So first let's maybe start with some news on the orders list. We had some developments on the orders list. That is the shadow docket, on a couple of cases that we previously flagged on earlier episodes. The first seemed pretty significant to me. So this was Mckesson v. Doe which was the lawsuit against civil rights and Black Lives Matter organizer, DeRay McKesson. The backstory here is at an individual at a rally that was organized by McKesson threw a piece of concrete at a police officer.

Kate Shaw:

And despite the fact that McKesson clearly never advocated for, or spoke out in favor of any violence, the Fifth Circuit nevertheless held that he could be held liable on the theory that he had negligently staged the protest which led to the assault. This was even though the Court had previously said in NAACP v. Claiborne Hardware that States cannot impose liability for speech related activity that negligently causes violence, unless the defendant specifically intended to produce the violence.

Kate Shaw:

So instead of reversing the Fifth Circuit the court vacated the opinion and directed the Fifth Circuit to certify a question to the Louisiana Supreme Court specifically about whether Louisiana's law of negligence even permits recovery under these circumstances. So this seemed significant, right? It did not let stand this clearly erroneous Fifth Circuit decision, but it's sent back for this intermediate development at this state law question that will hopefully be resolved in a way that does not permit this lawsuit to go forward. So I thought that was a significant and good development. What did you think, Leah?

Leah Litman:

Yeah, no, I think it's definitely good. Justice Thomas dissented. He did not offer a written opinion or explanation for why he dissented. But I guess I hope and expect that the Louisiana Supreme Court would say that liability does not exist under these circumstances, given that if it did, it would clearly violate Claiborne Hardware.

Kate Shaw:

So hopefully we will. That's the last the Supreme Court we'll have in terms of encounters with this case. But we'll keep our eye on it.

Leah Litman:

Yes. And the second case that there was some action on, and the shadow docket is a qualified immunity petition that we had previously highlighted Taylor v. Riojas that was filed by some amazing lawyers at Orrick, including Tiffany Wright, who we had on the podcast over the summer, as well as Kelsey Corcoran and Elizabeth Cruikshank, together with a fabulous new organization Rights Behind Bars that litigates on behalf of people in prison.

Leah Litman:

The facts of the case were egregious. Taylor was kept for six full days in a pair of shockingly unsanitary cells that included massive amounts of feces in the water faucet and windows. He did not eat or drink for four days, fearing that the food or water could be contaminated. He tried to hold his bladder for as long as he could. And when he eventually involuntary relieved himself, the drain overflowed and raw sewage spilled across the floor. The Fifth Circuit said that holding him in those conditions probably violates the Eighth Amendment's prohibition on cruel and unusual punishment, but the officers could not be liable because they were entitled to qualified immunity.

Leah Litman:

Specifically, the Fifth Circuit said that the right was not clearly established for purposes of qualified immunity, because there was no case saying that holding a prisoner for six days in a feces filled cell was unconstitutional. There was a case saying that it would be unconstitutional after 10 to 15 days. But Fifth Circuit said that's not sufficiently similar.

Leah Litman:

The Supreme Court disagreed saying that even if that's true that no such case exists, no reasonable correctional officer could have concluded that under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions. Therefore the officers were not entitled to qualify immunity. This is a huge win. It is huge to get a qualified immunity

win at the Supreme Court, bigger to get it by summary reversal and to get it where there is concededly no direct case on point is significant too, because it revives Stevens' opinion Hope v. Pelzer that have kind of fallen out of favor at the Court. Again, Justice Thomas dissented, again, without writing an opinion.

Kate Shaw:

So hugely important, it would have been shocking, but the court does many shocking things in the qualified immunity realm for the Court to do anything other than this. But I think the deeper point you're making is that to the extent that there is sometimes this ridiculous exercise of perfect fact matching that attaches to the qualified immunity analysis, one would hope that lower courts take away, not just the specific finding in this case, but something methodological, which is like, no, you don't need perfect identity of facts.

Leah Litman:

Justice Alito, concurred and he raised some concerns, but those concerns were not that the Court had maybe raised the bar too high in order to overcome qualified immunity. Instead in peak Alito fashion, he questioned whether the Court's intervention was truly necessary since the case did not qualify under the Court's usual rules for certiorari, since it involved error correction, of course, he never says this when the Court reverses denials of qualified immunity or grants of habeas corpus, but neither here nor there for the time being.

Kate Shaw:

Okay. And a couple of final notes before we get to the arguments from the week. One, the Court has rescheduled and I think this is maybe for the fifth time, a case involving a challenge to Mississippi's ban on abortion after 15 weeks of pregnancy.

Kate Shaw:

I don't know, they might take that case and they may just be waiting to do it. So we'll know I think in the next few weeks. And then the second, the court just got a couple of petitions challenging the Trump administration's Title 10 regulations. We talked about this a few months ago when the administration promulgated the regulation basically it prohibits recipients of Title X family planning funds from even making referrals upon request to abortion providers or abortion services. This is a regulation, so like the border wall and the Remain in Mexico policy cases we mentioned last week, the court did grant petitions in both of those cases. This Title X challenge too could be mooted if the Biden administration decided to rescind that regulation as again, I assume that it would. So these would be significant grants if the Court took these cases, but they may not ultimately be decided on the merits.

Leah Litman:

Last Friday when we were recording our episode at UVA for Alabama Supreme Court justices urged the court to overrule Roe and Casey at the earliest opportunity. This particular case involved a wrongful death lawsuit against an abortion clinic by a would-be father for an abortion that occurred at six weeks of pregnancy. So in addition to the Mississippi petition that the court is holding for some time it appears that several States and many government officials are somewhat chomping at the bit for the Court to if not outright overrule those cases substantially whittle them down.

Leah Litman:

On that cheerful note perhaps we will go to the sitting itself which was the first sitting with Justice Barrett participating. And one of the cases that we wanted to focus on is the argument in Fulton v. City of Philadelphia which the Court heard the day after the election. This is the case we've previewed extensively about whether the city can as a condition for entering into a contract with an agency that allows an agency to certify whether foster parents meet the city statutory criteria for being foster parents, require the agency not to discriminate against same-sex couples. The argument was quite revealing on a few different fronts. One is it shows how significant it is that the Chief Justice is no longer the median justice on the court that instead of a 5-4 conservative court, we now have a 6-3 conservative court in which the Chief Justice's vote isn't necessary for the conservatives to prevail.

Leah Litman:

Second is about the direction that this Court is likely to take on certain issues of religious liberty. And third is about the newest justice, Justice Barrett, who perhaps revealed more in this argument than she did in all of her Senate confirmation hearings. So maybe let's talk about these things in order. Okay. So first the argument, I think, revealed how it's already consequential that the Chief Justice is no longer the median justice on the Court because the Chief Justice's opening questions to the challengers, the agency, indicated that he was very sympathetic to, what I think, is the best argument for the city, namely that the city gets to impose conditions on its contractors, even if it could not impose those conditions as a regulation with the force of law. That is, no one doubts that the city, if it was certifying foster parents itself could say, and I think must say, that we do not discriminate against same-sex couples. And the entire question is when the city delegates that very narrow function to private contractors, can it say, if you want to be a contractor, you have to agree not to discriminate.

Kate Shaw:

This idea of drawing this distinction between government as sovereign regulator and government as either providing services directly or contracting with a private party to stand in the shoes of government to provide those services has strong grounding in the court's existing First Amendment doctrine. When government is say hiring employees it has a lot of control over those employees, including controlling the policy positions taken by those employees. You have to do basically what we ask of you. You have to adhere to our policy preferences, including say non-discrimination views or beliefs. And it's not understood that that violates or infringes upon government employee or government contractors' speech, again, states require government employees to adhere to non-discrimination principles. It's so interesting because the Chief still gets to go first. So he still gets to frame an argument.

Kate Shaw:

But I think you're right. You can sort of see as an argument unfolds that he doesn't really substantively control the line that the other justices are going to pursue. And in particular, because of this format where they're not all jumping in, in a way that would permit him to kind of try to steer debate back in the direction that he might want to, they just proceed sequentially. And so that no one else on the right of the Court seemed particularly interested in pursuing this line that the Chief started with.

Leah Litman:

Yeah. I also think this case previews where the Court is going to go on religious liberty. At least to my mind, it's not entirely clear how the court is going to rule for the challengers, the agency, but after the argument, I have little doubt that it would and a few possibilities came out at argument for how it could reach that decision. All of which would represent a move toward greater exemptions from government

rules. For again, in my view, largely white Christian religious groups, and a great entitlement to government funds for again white Christian religious groups that engage in discrimination.

Kate Shaw:

And as we said when we previewed the case, it sort of sits at the intersection of Espinosa and Masterpiece Cakeshop. Those are two important recent decisions of the court, but probably the most important president. And the one that came up the most in the argument is Employment Division v. Smith which basically says that a neutral law of general applicability where it doesn't target religion or particular religions out of hostility is generally constitutional. The question of how Smith applies here and whether Smith should be reconsidered at all sort of permeated the argument. The Court could say, we don't have to grapple with the future of Smith because this case isn't controlled by Smith at all, because this isn't a generally applicable law. Is that a reasonable ground for the decision in this case do you think Leah?

Leah Litman:

As a statement of the law it's true that if a laws in generally applicable you're not in Smith world but the reasons why they would say this particular condition is not generally applicable could mean that a lot of laws, particularly non-discrimination laws are not generally applicable. The challengers say it has an exemption, but the city says that exemption has never been granted to allow discrimination on the basis of sexual orientation. The challengers also say it's not generally applicable because this is a core religious beliefs of theirs, but that is just simply to restate that the law has a disparate effect on their religious beliefs, which does not make a law not generally applicable.

Kate Shaw:

The Court could say, slightly different cut of this, is that enforcement of this condition was driven by religious animus. The evidence of this seems incredibly thin. Much of what the challengers point to as this evidence is essentially the city explaining why it would continue to grant contracts to perform other foster care services even if it would not grant them a contract to perform this specific narrow service of certifying, whether foster care parents meet the statutory criteria for being foster care parents.

Kate Shaw:

It's also possible that the Court will carve out some kind of exemption. This is something that Justice Kavanaugh seemed to potentially be getting at. That basically says where the consequences of an exemption of relatively small, the government has to grant an exemption. This I think was... so Kavanaugh seemed quite focused on this. It appeared that no same-sex couples had ever sought and been denied certification by Catholic Social Services. And also that there were other social service agencies that did contract with the city that were happy to certify same-sex couples. And so this kind of de minimis impact sort of exemption seemed to be what he wanted to kind of write into the law.

Leah Litman:

Yeah, so I think that that is also kind of misguided in part, because even though there was not evidence that CSS had itself denied certification to same-sex couples, there was evidence that another organization had denied certification for a same-sex couple, for the same reasons that CSS is now offering. In fact, CSS is intention is they don't want to certify same-sex couples. So it's hard to imagine a line of reasoning that says, well, that's never going to happen. In addition to that, the burden on the agencies is basically, nil, even if you are assuming that the burden on same-sex couples is nil, since all

the agencies are being asked to do is certify whether an individual or individuals meet the secular statutory criteria for being foster care parents, which doesn't even require them to be married, as Justice Breyer noted they can just write in the margins if they want, we do not approve of their marriage and nothing kind of follows from that.

Leah Litman:

And more deeply, I just don't think we know the burden on the couples since we don't know how many agencies would refuse to certify same-sex couples and it minimizes stigmatic harm, and it would just turn the Court's First Amendment jurisprudence into something of a mess since it would boil down to, well, how many agencies are there and how many of those agencies would serve same-sex couples. And so you would have different First Amendment exemptions that depend on how many agencies or service providers there are in a given locality. And that just defeats, I think one of the core purposes of Smith, which was, this is a rule it's a clear rule that courts can apply in all settings.

Kate Shaw:

Yeah, no, definitely. In addition to the kind of there's the general harm that stigma creates, regardless of how many couples are actually affirmatively turned away. And then if we are going to kind of get into the weeds of sort of what the record shows, it just seems the Kavanaugh line just kind of missed the possibility that because there are other agencies same-sex couples aware of this policy are not going to pursue certification with Catholic Social Services.

Kate Shaw:

So this fact that no couple had been denied, which the lawyer for the agency return to a number of times didn't seem to establish a whole lot. Right. So the Court should be providing broader guidance here, right. And so there were all these shades of Masterpiece Cakeshop, I think, in what you saw in the clear desire to find some factual hook in the record that they could use to sort of avoid any broad pronouncements. And look I can't imagine that they would do good with these broad pronouncements, which would clearly seem, I think, if they're going to be deciding this case in broad terms, it does seem as though religious liberty would prevail over these anti-discrimination principles.

Kate Shaw:

And so I suppose an off-ramp would be better. But the effort felt really disingenuous to me and actually pretty inconsistent with what the District Court found. And there were sort of these efforts by the lawyer for the agency to kind of spin as legal findings, what seemed clearly to be factual findings. But that's sort of kind of par for the course in some of these cases, if the Court is able to find on the record, something that can twist. And I think that was actually true about Masterpiece Cakeshop as well with at least the overemphasis of the significance of these kinds of fleeting statements in the record that all of a sudden the whole case ended up turning on. So it did feel a little déjà vu esque in terms of the similarities to Masterpiece Cakeshop.

Leah Litman:

Yeah, absolutely. And then we noted how the possible routes that the Court might take could have broader implications for First Amendment jurisprudence. I think it's also worth flagging another implication, which is what other kinds of exemptions might Fulton and those various lines of reasonings require.

Leah Litman:

So the challengers and the justices who were sympathetic to the challengers, the agency, were quite clear that they believed no entity could claim a religious exemption that would entitle them to engage in racial discrimination. What's way less clear is why that is. Justice Alito offered the argument that that is because there are no honorable or reasonable bases for engaging in racial discrimination, whereas there are, the implication is, honorable or reasonable basis for engaging in sexual orientation discrimination.

Kate Shaw:

Yeah. And there it was clear that some of the language in Obergefell loomed really large, right. The Court in that passage near the end of Obergefell kind of credits the position that religiously rooted opposition to same-sex marriage is decent and honorable.

Kate Shaw:

And I remember, and I'm sure you do too, when the decision came down, just really trying to figure out how much work that language would do. And here we see it is significant that it's clearly dicta. It has nothing to do with deciding the case in Obergefell, but it was the basis on which Justice Alito made this line of argument that it is honorable and decent. And the Supreme Court has agreed that it is honorable, a majority of the Supreme Court, including all the liberals. Right. Nobody took issue with that language, but and so just felt like throwing it back in their faces to say, look you all signed onto this language, it's honorable and decent. And that is just a clear distinction between this kind of discrimination and racial discrimination.

Leah Litman:

Yeah. And throwing it back to their faces. We got a little troll-Alito after some peak-Alito, he's really bringing it on strong, our boy, Sam.

Kate Shaw:

He's feeling this new court, he really is.

Leah Litman:

Yeah. But even granting him this premise, that there are honorable and reasonable bases to engage in sexual orientation discrimination, but not racial discrimination, which I would not, but even granting it. I think it's incoherent to say that it follows that there are therefore greater First Amendment protections that entitle people to exemptions from prohibitions on sexual orientation discrimination. Because First Amendment protections for speech and religious liberty do not depend on whether society or government or government officials like Justice Alito believe your speech or your religious beliefs are good or bad. They're supposed to protect all manners of speech and all manners of religious belief.

Kate Shaw:

Yeah. That's a great point.

Leah Litman:

Another indication about the implications of the challengers' position was an exchange with the federal government and the federal government is supporting the agency. And they argued that the reason why

there are no exemptions from non-discrimination provisions regarding racial discrimination is because the government has a compelling interest in ending racial discrimination.

Leah Litman:

But it does not have a compelling interest in eradicating discrimination on the basis of sexual orientation. But again, we are left wondering why is that? And I think there were also real questions that followed from this position because in an exchange with Justice Kagan, the federal government refused to say that governments also have a compelling interest in eradicating discrimination on the basis of sex. And that would mean the agency and the federal government's view is that there could very well be a religious exemption that entitles people and institutions to engage in discrimination on the basis of sex, in addition to discrimination on the basis of sexual orientation.

Kate Shaw:

Another thing to flag and another way in which the agency's position could have significant implications is just the sheer number of arrangements in which the government provides services through contractors, right? Governments provide healthcare through contractors. They run prisons through contractors, education through contractors. Their contractors are employers of lots of employees. So imagine if all of those groups, again, healthcare providers in prisons and schools are free to discriminate on the basis of sexual orientation and sex. And the cities and states that have these contracts cannot as conditions of these contracts require them to not discriminate, prohibit them from discriminating. The consequences could be pretty staggering if you think about it. But I think that is the kind of logical end point of the argument that this agency and the federal government are making here.

Leah Litman:

Yeah. This argument also gave us a window into the newest justice, Justice Barrett. And as I suggested when we were doing kind of the opening to the segment she revealed more in this argument than she did in her confirmation hearings. And none of it was surprising, at least for us Cassandras. So in her first questioning period, she wanted to know.

Justice Barrett.:

What would you replace this with? Would you just want to return to Sherbert v. Verner?

Leah Litman:

To me, this signaled her interest, or at least curiosity in getting rid of Smith. And there are already four justices on this current court who have called for Smith to be overruled. This would seem like confirmation that there are now five.

Kate Shaw:

Didn't she then follow up and say, "Oh, look we don't usually decide constitutional questions if we don't need to." Am I recalling what she did?

Leah Litman:

Oh yeah, no. But I don't think she thinks nor do I think any of the other justices think this particular case is the case to use to get rid of Smith, but the fact that she is interested in this and as some of her later

questions indicated very interested in this signals that in a future case, again, this would be where the fifth vote is.

Kate Shaw:

Yeah. And it is kind of a bold move, you're just coming out of the gate as this new justice and you have this really well-settled even if controversial in some quarters, precedent to just say, imagine a world without Smith, what should we replace it with? She did that, there was this eagerness.

Leah Litman:

Let's go.

Kate Shaw:

Yeah. That I don't want to overread, but like did seem to signal something. And I think maybe not just about Smith, but about precedent at large, maybe.

Leah Litman:

Right. Another revealing moment was her question for the city, which was.

Justice Barrett.:

Let's imagine that the state takes over all hospitals and says from now on we are going to be responsible for hospitals, but we will contract with private entities to actually run them. And so there's a Catholic hospital and gets the contract with the city to run it. In fact, it's a Catholic hospital that's in existence before the state adopts this policy. And it's contracts with the state provides that there are, and the contract the state, gives everyone is that you can get some exceptions for some medical procedures, but every hospital has to perform abortion.

Leah Litman:

So I just don't even know what to say about this aside from just a further indication about where her sympathies lie. I think you can often tell what a Justice is thinking about when they press on, well the implications of this side's position would get us to this terrible point and the terrible points are what they are worried about. And that is where their sympathies lie.

Kate Shaw:

This was the horror show that she conjured up, right. Hospitals having to provide abortions to women who need them.

Leah Litman:

Exactly. Right. Not the horror shows that we were just discussing as far as a city or a government's inability to require its contractors not to engage in discrimination. So her other question for the challengers was I think another Smith related question which was as follows.

Justice Barrett.:

I have a question about something that somebody's amicus brief brought up, which is this third-party harm principle. The principle that religious belief can never give a believer the right to harm a third

party, even slightly. I'm wondering if you agree with that. And if so, if you could tell me where in law the principle comes from.

Leah Litman:

The reason why I think this is significant is because it would mean that no matter the consequence of religious exemptions, you are entitled to a religious exemption. Again if there was any doubt about where her inclinations lie, I think these questions kind of more than made that clear.

Kate Shaw:

Yeah. So our sort of fearless predictions are probably somewhat evident from this conversation, but bottom line, what do you think coming out of the argument that the Court is likely to do here?

Leah Litman:

Yeah, I don't think the Court is going to use this case to overrule Smith. But I think the challenger, the agency is going to win and I think they'll probably write the opinion in a somewhat nonsensical way that suggests the consequences of this exemption are very small and the burdens on the agency are severe. And therefore they're entitled to an exemption, reason, reason, reason that doesn't really make sense of the facts.

Kate Shaw:

Right. But which will be frustrating analytically. But I'm sure that some of the language will be troubling, but certainly maybe better than a big broad statement that sort of supports a religiously grounded right to engage in discrimination for by any organization that does work with the government. Right. That would be worse. So I guess we take some kind of bad faith sloppiness in opinion-crafting over really that ball.

Leah Litman:

As a win. Welcome to the new world.

Kate Shaw:

Oh my God. I mean, these are going to be the choices I think that we're stuck with.

Leah Litman:

Yes.

Kate Shaw:

All right. So in maybe a similar vein actually on to Jones v. Mississippi which may reveal the Court again, inclined to take a similar stare decisis is for suckers, but we won't come out and say that, which you know, so that would be their treatment of Smith in Fulton. That may be what they do with Miller and Montgomery in Jones v. Mississippi. This again is a case about whether the Eighth Amendment requires sentencing courts to determine whether a juvenile is permanently incorrigible before sentencing that juvenile to life without parole. And just one more quick refresher, right in Miller v. Alabama, the Court invalidated statutes that required juveniles to be sentenced to life without parole. And then in Montgomery, it held that the Miller rule was a substantive rule that applied retroactively, so to cases that had already become final. The big question in the case is sort of what Miller and Montgomery mean

and stand for, and how much of the reasoning in those cases controls here. And so what did you make of the Court's treatment of its precedents in this case?

Leah Litman:

It was like a race among the conservatives to find various ways to limit Miller and Montgomery in the most dramatic fashion, if not just offer reasons for outright discarding them or disregarding them.

Leah Litman:

So the Chief wanted to know what specifically the defendant sought, if not an explicit finding that a defendant was incorrigible, which those cases had disavowed. Justice Thomas asked them if they would even have an argument without Montgomery, which of course he dissented in. Justice Alito offered up his view that the holdings of those cases, as opposed to their reasonings don't require ruling for the defendant. Justice Kavanaugh wanted to know aren't discretionary sentencing schemes always fine. Discretionary sentencing schemes to permit judges to consider basically any factor like youth that would mean all sentences are constitutional. Justice Alito said something along the lines of wouldn't you agree our Eighth Amendment cases are wildly out of step with the original understandings of the Constitution, which of course he doesn't care about at all and has mocked in other cases.

Leah Litman:

I don't actually know how to characterize that persona. It's not really troll-Alito since he's not mocking originalism. It's not peak-Alito because he's not finding a procedural ruling in order to rule against a defendant. But it's a different brand of Sam. When he is gesturing toward an interpretive methodology, which he has explicitly disavowed in order to ensure that he has enough votes to rule against the defendant.

Kate Shaw:

Okay, we need a name for this particular persona.

Leah Litman:

Listeners we invite you. We invite you to submit a name for this persona. But it was just very sad to me to listen to this argument as particularly the more liberal Justices clearly pointed out the problems with the State's argument which the federal government is of course supporting. And knowing that again these sane, logical, rational arguments are just not going to matter.

Leah Litman:

So Justice Kagan made the observation that you know I'm struggling with, which is on the state's theory, how could we have labeled Miller's substantive rule? I mean, that's completely correct, given that all of the court's retroactivity cases say mere consideration of a factor, a decision requiring mere consideration of a factor is not retroactive so Miller has to mean something more than that.

Leah Litman:

And then Justice Sotomayor asked the Mississippi Solicitor General, how her position made sense of all of the Court's prior statements about the importance of distinguishing between youths with transient immaturity and youths who were permanently incorrigible. And the Mississippi Solicitor General's response was something like, well, we understand all the statements simply to describe a crime, the

circumstances of which make a life without parole sentence grossly disproportionate, but that's not about youth at all. It's about the crime and the severity of it.

Leah Litman:

And since we know these cases involve homicide, we know how that will play out. And it was just extremely excruciating for me to listen to these arguments. Two particularly cringe-worthy moments for me, one is again, our boy, Sam, sorry, we keep going back to him, he just gave us a lot of material this week. He asked the following question.

Justice Alito:

Yeah, I think you are, I mean, this is fascinating. You want to take us and you want us to take the courts of this country into very deep theological and psychological waters. Do you think that there are any human beings who are not capable of redemption?

Leah Litman:

I listened to this and I just think he thinks this is a got you question for the defendants. When in reality it proves their point, which is that Mississippi's scheme, which allows juveniles to regularly be sentenced to life without parole is grossly out of step with our understanding, and the Court's understanding that most use are redeemable. And this is something that Josie Duffy Rice had flagged in our episode with her this summer, just about the oddity of this entire structure and superimposing on courts this framework of well are youths permanently incorrigible or not.

Kate Shaw:

And it revealed that not only is he skeptical about Miller and Montgomery, but still not convinced by Roper, I think.

Leah Litman:

Right, yeah.

Kate Shaw:

Just think this, and an...God, I mean it just-

Leah Litman:

Roper is the decision that said juveniles cannot be sentenced to the death penalty.

Kate Shaw:

Right. Yeah, so that was a really important decision, right? So that categorically individuals who commit their crimes as juveniles cannot be sentenced to death consistent with the Constitution. And then so Miller and Montgomery in a way build off of Roper, but evidenced this kind of skepticism, or even sort of contempt for this mode of reasoning that suggests that that there is something profoundly different about children, which was the predicate of the Court's decision again, first and Roper. And then these follow on cases was chilling, honestly.

Leah Litman:

Yeah.

Kate Shaw:

It was chilling.

Leah Litman:

Again it was really stunning to me that he thought this was a got you question for the defendant. Because he could only think that as you just said, if you reject all of the premises of all of the Court's Eighth Amendment cases involving juveniles. Another moment for me that I did not enjoy was a very unclear question by Justice Barrett that just kind of grated me because it indicated either confusion or just lack of understanding about the mechanics of collateral review and habeas corpus, which constitutes a significant portion of the Court's docket. And I think it's very important to understanding this case given the rules about retroactivity.

Justice Barrett:

But let me just interrupt you then if it's clear in the cases, or if we make clear in this case that it violates the Eighth Amendment to sentence a juvenile to life without parole, if that juvenile is not permanently incorrigible, then the law is clear. And I guess I still don't understand, or let's talk about collateral review. If this goes to federal court on 2254 and there is no factual finding for the federal court to defer to, and the law has been misapplied, What about that? Then can you get relief on collateral review?

Leah Litman:

It's possible she just lost her train of thought or was nervous, this is her first sitting. But this case isn't on collateral review. On top of that, the Supreme Court has the power to review state court judgments on collateral review by so-called direct collateral review appeal from the State Supreme Court. And also the text of the relevant statute 2254, the Antiterrorism and Effective Death Penalty Act ,says that if the state court articulated the wrong legal standard, then there is de novo review.

Leah Litman:

This is the premise of the Court's foundational case interpreting 2254, Terry Williams v. Taylor. So I just, I don't understand what was happening here. And again, it's frustrating to me given that one important way, the important way you can understand why the state is wrong here is you have to understand the mechanics of habeas, which is Miller wouldn't be retroactive unless it's a substantive rule. And if you don't understand the mechanics of collateral review, that's just going to go over your head.

Justice Barrett.:

Yeah. Okay. So I grant you that. I mean, look, we're not all going to be Leah Litman habeas geniuses. But that's seems like a weird oversight.

Leah Litman:

Right. If you're in a position to be deciding the fate of juveniles in the United States and again, their lives and whether they are going to be eligible for parole, I would hope that you get an understanding about the structure of the area of law that is relevant to understanding what the Court's prior decision mean.

Justice Barrett.:

And it's not like there's no habeas cases in the Seventh Circuit. I feel there are kinds of issues you don't encounter in every coming from the DC Circuit. There certain kinds of issues you don't get, or you have overrepresented, but every federal Appeals Court has a lot of habeas cases on its docket.

Leah Litman:

She's written in habeas cases. One of her habeas cases was the case that refused to overturn a criminal conviction when the state refused to disclose to the defendant that it had obtained a confession by way of hypnosis of the witness. And so she has been deciding habeas cases as a Court of Appeals judge. So this is not some new area to her.

Kate Shaw:

So Farrell's predictions, this is not, this doesn't feel like. I mean, it's still hard because it all gets a little technical in terms of retroactivity doctrine. But the kind of core, even the core of the substantive question here is how the legal system accounts for the acts of children. And it feels to me as though the court will likely leave, it's going to leave Miller and Montgomery intact to basically say, States have free reign to implement the rules, however they choose.

Kate Shaw:

And when you see what States do, it can be basically nothing, literally a sentencing judge can say, let's consider youth and proceed from there. And it seems there are easily five. I don't know, maybe six people on the Court who would say, no, that's basically fine. We're not going to require anything more thorough than that, which essentially guts those really important decisions. It doesn't mean that States cannot do much more. I think some will, but write out a more robust, constitutional floor, lots of them are going to be very happy to do nothing to actually implement this requirement that they consider youth at the sentencing stage.

Leah Litman:

Yeah. Okay. So another case that we briefly preview that I wanted to know is Borden v. the United States which is the Armed Career Criminal Act case about whether crimes, for which a defendant is merely reckless about causing harm to another person can trigger the ACCA's 15 year mandatory minimum for certain gun crimes, particularly unlawful possession.

Leah Litman:

The government's interpretation, that crimes where a defendant is merely reckless about causing harm to another person would mean that crimes like driving under the influence or speeding would qualify as ACCA predicates to give you some sense about the breadth of the government's position.

Leah Litman:

I really found it difficult to get a sense of where the justices were in this argument. I think this new format contributes to that, but I'm not super optimistic. And I'm always struck by the fact that these allegedly pro-Second Amendment justices are totally fine stacking on at least five additional years of prison for people possessing firearms. And here it would be people possessing firearms if they've had, again a DUI or other crimes that aren't exactly about taking a firearm and using it to hurt another person. I felt extremely personally attacked by Justice Alito in this argument, which is perhaps why I have devoted so much time on this episode to unpacking his position. So let's play that clip.

Justice Alito:

Well. It's always a pleasure to have another case involving the Armed Career Criminal Act. It is real favorite.

Leah Litman:

He actually said something similar in an ACCA case from last term, Shular v. United States.

Justice Alito:

I look forward to every new ACCA case because the distance between the law and the reality gets bigger and bigger.

Leah Litman:

I just...ugh. This just irritates me because, it's such a jerk move because I'm so sorry that he is called upon as part of his job with lifetime tenure to interpret this horribly confusing federal statute that has massive consequences for people's lives. And I'm sorry, you'd prefer to spend your time exempting people from non-discrimination protections and suppressing votes. You seem to have plenty of time to do that too.

Kate Shaw:

Yeah, no, but I mean, the sentence is we've I think noticed before, but these are savagely long sentences that ACCA will trigger, right? So the stakes are incredibly high and it's also a very widely used federal statute. So this is something that is deciding these cases and there are a lot of them, but because it is complicated and badly written and there's this constantly bewildering interplay between the federal standard and the underlying state statutes. And so yeah, they need to provide guidance yeah, as you point out kind of the job.

Leah Litman:

Right. On a happier note, I did want to say thank you to Kannon Shanmugan, who was arguing for Mr. Borden, who brought up the amicus brief in support of the petitioner that I helped put together with Mololamken, particularly Jennifer Fischell on behalf of several law professors. Our brief argued among other things that the Government's interpretation of the force clause could lead to vagueness problems. Given that the state criminal statutes often blur the line between negligence, criminal negligence, gross negligence, and recklessness. So a judicial effort to develop a test to separate these things from one another could prove susceptible to inconsistent results and charges of arbitrariness, which is the heart of the vagueness problem.

Kate Shaw:

Didn't Justice Barrett even ask the government about that possibility in her line of questioning. And do you think she read your brief?

Leah Litman:

Yeah. So she said one of the amicii argues that your interpretation would generate vagueness problems and the government unconvincingly attempted to explain why it would not.

Kate Shaw:

So even if she's not sort of making her way around the nuances of 2254, she's skimming the most important amicus briefs. Nice work Justice Barrett's law clerks. And that's not a knock on Justice Barrett's law clerks, always sort of first time in amicus briefs. That's like extremely settled practice.

Kate Shaw:

Those are the big cases from this week. Let's transition and talk about the election a bit before we wrap up for today. So this has been a week that has felt a year. And look we talked a lot about this before the election, right? That given the reality of this huge expansion of mail-in voting, the fact that a lot of critical states didn't change their counting rules to allow for those ballots to be opened or counted prior to Election Day, it was always going to take some time to tabulate the results of the election.

Kate Shaw:

And yet all that set I think that intellectually knowing about the likelihood of delay did not equal emotional preparation for it. It was definitely true for me. I think that was true for a lot of people. So I do think that there needs to be more sort of systems change if we're going to continue to conduct federal elections this way. Because this has been brutal. I don't know if any of us can go through it again. But anyway so that I think just a background fact to observe. So where are we in and sort of what are the legal questions right now that we want to flag Leah?

Leah Litman:

Yeah. So as the counting continued it became clear that Donald Trump was not going to win a majority of the votes in Pennsylvania, Wisconsin, and Michigan, and potentially other states too. We see you Georgia and hello to Stacey Abrams and very much Stacey Abrams. When that became clear his campaign floated another strategy. Specifically they followed through on the President's earlier hints at essentially asking the Supreme Court to somehow intervene and expecting that the Court and particularly the justices appointed by President Trump to hand him the election so.

Kate Shaw:

The first signal this was when the President came out at 2:00 AM on, I guess early Wednesday morning and buried within his rambling remarks were some promises we're going to go to the Supreme Court. We want them to stop the voting. I think he meant the counting. I'm not sure what he meant by that either, but yeah. So he invoked the Supreme Court in his first public remarks late on election night and there's been more.

Leah Litman:

So one of his legal advisors then said on Fox on Thursday, we're waiting for the United States Supreme Court of which the President has nominated three justices to step in and do something. And hopefully Amy Coney Barrett will come through.

Kate Shaw:

This is not somebody who's a staff member, I think on an outside advisor, but clearly somebody that campaign is sending as a surrogate to put on television. So I think they're stuck with the remarks she made. And in a shocking week that was really shocking. Hopefully Justice Amy Coney Barrett will come through, my god. But fortunately there doesn't even seem to be a case that they could possibly bring to the Supreme Court to test the proposition that Amy Coney Barrett will come through.

Leah Litman:

Right. The margin of Biden's popular winds in all of the States seems to be sufficiently large, that the challenged ballots in various States won't make a difference and the legal challenges they are raising which in several States have been that their challengers aren't being allowed to observe the counting have no basis in fact, and wouldn't change the votes or throw out any votes.

Leah Litman:

There was this insane exchange in the Pennsylvania case where the judge says are your observers in the counting room. And the Trump campaign lawyer said, "There's a non-zero number of people in the room." And the judge who's very much not amused says, "I am asking you as a member of the bar of this court, are people representing the Donald J. Trump for President representing the plaintiffs in that room?" And the campaign lawyer says, "Yes." And the judge responds, "What's your problem?"

Leah Litman:

Or in the Nevada case, there've been a bunch of these cases that the campaign has tried to file. The campaign tried to enjoin the machine that matches signatures. And in this truly other worldly exchange, the judge asked the campaign lawyer what evidence they had, that the program matching signatures was the problem. And the campaign lawyer literally said there was no evidence, it was the problem, but that it was nonetheless "unlawful generally." That is not how any of this works though. "Unlawful generally" is maybe going to be my new moniker when anyone says anything I don't like. I'm sorry, that's unlawful generally.

Kate Shaw:

Hopefully Justice Amy Coney Barrett will come through on that argument.

Leah Litman:

Right.

Kate Shaw:

The election is unlawful generally. I mean, that is basically what the President has been saying publicly.

Leah Litman:

Yes.

Kate Shaw:

But this specific claims filed in states like Michigan and Pennsylvania and Nevada and Georgia are just borderline frivolous to frivolous. And they wouldn't even matter. So it's not as though you're making ridiculous arguments that could, if accepted by a crazy enough judge make a difference. They're terrible arguments and they don't matter. So what is the purpose of this, right? I mean, clearly it is to kind of create this, and it's working a little bit, this narrative of the battle has shifted to the courts. But if you actually take a look at what is happening in the courts, it is nothing, there was nothing happening in the courts except for really bad complaints being filed and being dismissed in a day or two. And so yes, there is action in the courts, but none of it matters. So I think that is an important takeaway.

Leah Litman:

Yeah. I think that's totally right as to all of the suits that have been filed this cycle. The concern for me is that in the future, not all elections might involve a popular vote margin that is bigger than a number of challenged votes like ballots received after Election Day or received after a certain number of days after Election Day. And not all campaigns or officials will be so brazen as to go on television and say, we expect Republican appointed justices to throw the election to us, Republicans. So in ten years or four years, or even two years when we are facing the prospect of Supreme Court intervention in an election where again, the margins and turn out are not sufficiently large to make irrelevant any court intervention

Leah Litman:

And when officials are not so idiotic as to be transparently broadcasting, the sense that Republican appointed justices will rule in ways that help Republicans win elections, will we remember this? And will people be as energized and mobilized to say how inappropriate that judicial intervention would be? And I just worry that this will somehow become a distant memory, or people will think that we shouldn't be discussing how this was all out in the open. And everyone understood why they really wanted to get six Republican appointed justices on the Court for this very possibility, maybe not in 2020, but those justices are going to be on the court for a bunch of future elections too.

Kate Shaw:

And we all also should say we have been making light of the claims have been filed in the last couple of days, I think correctly. But there is this the one case that is still hanging out in Supreme Court deserves somewhat more serious discussion than these, ballot watcher, and machine challenge kind of joke lawsuits that have been filed. And so this is the case that we have talked about previously, the Pennsylvania Republicans challenged the Pennsylvania Supreme Court ruling that had found under state law that a ballot was timely and could be counted if it was mailed by Election Day and arrived by Friday. So three days after the election. So the Supreme Court people will probably remember divided by 4-4 about whether to stay that ruling.

Kate Shaw:

The Pennsylvania Secretary of State then ordered counties to segregate ballots that were received after Election Day, just out of an abundance of caution in the event some future court might say that those ballots shouldn't be counted to keep them separate from the ballots that arrived by or before Election Day. So that cert petition is still pending, right? This was the second time that case actually, the 4-4 tie was the first time. And the second time the Court unanimously decided not to intervene right on the eve of an election, but then Justice Alito for himself and Thomas and Gorsuch wrote to signal some real doubts about whether these are post-Election Day arrivals should be counted at all, and to express support for the segregation of the ballots and kind of be sort of scoldy and grumpy.

Kate Shaw:

So on Friday the Trump campaign, which actually so subsequently the Trump campaign has actually attempted to intervene in that case, which again was brought by the State GOP, not by the campaign. So that request is pending right now.

Kate Shaw:

And then subsequently the campaign asked the Court for an order directing Pennsylvania counties, to segregate ballots received after Election Day. Now, if that sounds weird because the Secretary of State

had already ordered counties to desegregate ballots received after Election Day, it was weird, right? It was, and it was the filing itself admitted that there was no evidence that ballots weren't being segregated. It suggested that they hadn't been able to confirm that every county was segregating ballots, right. Despite the fact that this request had no evidence to support it. And that the state hadn't been given an opportunity even to respond, Alito issued the order that was requested.

Kate Shaw:

And it drew, I think, a bunch of kind of conflicting responses from the legal commentary. And I'm curious Leah you thought of it. I mean, it struck me that it was totally inappropriate for Alito to issue the order that he did that relied, that sort of accepted at face value the claims made in the Trump campaign's filing without again, response from Pennsylvania and sort of took the tone that it did which was deep concern about the possibility that the order is not being complied with, again, without any evidence to support it. So I was troubled by the tone, but thought that substantively the order by Alito mattered, not one bit. What did you think?

Leah Litman:

Yeah, no. I mean, this order should not matter. Biden's lead in Pennsylvania is over 20,000. And again, that is just counting ballots that were received by Election Day. The total number of ballots received in the two days after Election Day is going to be substantially less than that. The largest county in Pennsylvania has less than 1,000 ballots. And again, Biden's lead in the state is over 20,000 and we still have yet to count many timely ballots in largely democratic districts. So they're not going to make a difference most likely. And the Secretary of State had already ordered counties to do this, but despite this an additional concern I would raise with the order, in addition to the ones you did, which is him accepting the factual allegations is true without a response. And based on a filing that admitted the order wasn't really necessary.

Leah Litman:

Sean Spicer was already using this order as a reason why networks could not call the election in Pennsylvania. Now that's completely wrong, but again, the order became a basis to say, well, there's uncertainty in Pennsylvania and we don't know what's going to happen. And therefore it would be improper to call a winner. That's all wrong, but it gave them enough ammunition to do that. And Jim Jordan did the same thing and he was retweeted by the President. And a part of me worries that this was the goal of the filing and also seeking the order.

Kate Shaw:

Right. To be able to claim victory, Justice Alito agrees with us. And I'm sure this just happened yesterday, I am sure we will see more of that today, including from the President himself, who I don't think has directly responded to it.

Kate Shaw:

I mean, they claimed in one of these ridiculous lawsuits was in Pennsylvania regarding where specifically their poll watchers could stand during the counting. And they got an order basically saying okay you can get a couple of feet closer to the counting. And they touted that as this huge legal win, which was literally the substance of the win was the furniture had to be rearranged a little bit in one counting location. So if they were able to call that a big legal victory, I am sure they're going to do the same thing with this order, which again, we think does nothing substantive. But I think to your larger point, Leah,

about the president said for potential future election purposes we could be in a world in which Pennsylvania is within a couple thousand as opposed to tens of thousands and growing.

Kate Shaw:

And we couldn't be in a place in which all the other outstanding states have broken in ways that make Pennsylvania the critical state to decide the election. And then all of this looks much more sinister. And then I think what clearly it seems to be the strategy here, which is both to sow doubts about Pennsylvania both politically and potentially legally. To later down the road suggest that somehow there has been this kind of fatal corrupting of the voting process in Pennsylvania so that some radical remedy is required. This all seems like in service of that larger project and it is weird just like it is dumb luck that it seems as though everything else is aligning such that they can't push that further along. But that I think would be the play if they had the ability to do it based on where votes stood elsewhere.

Leah Litman:

Exactly. The solution cannot be that, well, you only get to avoid Supreme Court meddling in an election when you win the electoral college by what might be 306 votes and your popular vote margins in all of these states are greater than 20,000. That is no way to run a constitutional democracy. And I think that the way things are happening now is still very concerning. Even if all of these judicial interventions are not going to end up making a difference in this particular election.

Kate Shaw:

Yeah. Agreed. So we will see. So Pennsylvania's going to respond and hopefully that'll be the end of this saga. But it just makes me think that there'll be further legal maneuvers before this is all finished.

Leah Litman:

Yeah. Also have to note the motion to intervene by the Trump campaign. And the application was filed by none other than former Assistant Attorney General for the Civil Rights Division, John Gore, who was deeply involved in the census litigation and efforts to get a citizenship question on the census. He is as devoted to enforcing the Voting Rights Act as ever it appears.

Kate Shaw:

Never change John.

Leah Litman:

So that's all for today. Thanks as always for listening. If you enjoy the show, consider signing up to be a Glow supporter at glow.fm/strictscrutiny, or rate us on iTunes. Thanks to our producer, Melody Rowell, thanks to Eddie Cooper who makes our music. Next week we'll be at Duke Law School. And until then.

Kate Shaw:

Bye, see you next week.