Leah Litman:

Question that arose for me is, how do I get on Justice Sotomayor's email blast? Curious and would like to know.

Kate Shaw:

I suspect Melissa is already on them, although I don't think she's going to tell us if she is. She's just being conspicuously silent. Her face is giving nothing away.

Speaker 3:

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 back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We are your hosts. I'm Kate Shaw.

Leah Litman:

I'm Leah Litman.

Melissa Murray:

And I'm Melissa Murray. We have a great show for you today. So let me just give you the brief rundown. We'll start off as always with breaking news. And then we're going to recap some of the opinions that just came down as well as a recap of the oral arguments from the December sitting. And then finally, we're going to do some court culture, which is going to be more news from the Supreme Court. So this is going to sate all of your appetites for the court before we go on a holiday hiatus.

Leah Litman:

So the first thing we wanted to cover is some breaking news, although it's not so breaking at this point, and that is the wrap-up of the election law cases that made their way to the Supreme Court. In particular, the Supreme Court denied Texas leave to file the original jurisdiction case that Texas had filed against Pennsylvania, Michigan, Wisconsin, and Georgia. The Court issued this cursory explanation for the denial. "The state of Texas' motion for leave to file a bill of complaint is denied for lack of standing. Texas has not demonstrated a judicially cognizable interest in the manner in which another state conducts its elections."

Leah Litman:

That reasoning of course is what Elie Mystal flagged as the most deficient in their complaint, and a part of me imagine the Court standing over a soup counter shouting, "No coup for you," while issuing this short denial, but maybe that was just me. That's even was more than the court usually says when it denies leave to file an original jurisdiction case. In February when it denied in Arizona versus California, it just said, "The motion for leave to file a bill of complaint is denied." And it just seemed like an important signal from the court that this kind of case is not how you try to overturn an election.

Kate Shaw:

Yeah. You would hope that that message is going to land. We will see. And if some of the court was announcing no coup for you, maybe, maybe Justice Alito and Justice Thomas disagreed a little bit with that message. It wasn't totally clear. So they issued a separate statement. Their statement said, "In my view..." This is Alito's statement actually, but Thomas joined him. "In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue." So a couple of interesting things about this. One, it wasn't captioned as a dissent, which I thought was pretty interesting. It was a statement.

Kate Shaw:

Now, Thomas and Alito have actually both previously taken the position that the court has to at least allow states to file their complaints in original jurisdiction cases. It's not discretionary. And when they've done that, I haven't checked all the instances, but when they did that in the Arizona versus California case earlier this year, they captioned it as a dissent. So I thought it was interesting that they didn't do so here. And they said, and maybe didn't have to say that they wouldn't grant any other relief. So I think it was possible to read that as siding with, in some sense, the majority or the rest of the court's view, that there was no relief that could appropriately be granted in this case.

Kate Shaw:

There were some dissenters from that view in the commentariat who said, "Well, no, they were just talking about the specific relief with respect to the electoral college and with respect to electors, that they wouldn't grant on an emergency basis, but they weren't signaling any agreement with what the rest of the court seemed to be saying." And the fact that they said, "I express no view on any other issue," I think was seized upon by those who wish to see some support in the Alito and Thomas statement for this ill-fated mission that the state of Texas and a lot of other states and a majority of the Republican representatives in the House seem to be on.

Leah Litman:

It was like a little chicken coup for their souls.

Melissa Murray:

I thought maybe this was just preserving a position on the scope of original jurisdiction for the future. They have said before that they don't think that the court has broad discretion to deny or to dismiss a claim brought under its original jurisdiction and I thought they were just simply preserving that. But it did raise a lot of eyebrows across the commentariat. I think maybe some people thought that they were throwing a bone to everyone trying to please all sides, but these two are not the two who seem interested in pleasing all sides at all. So I think this was just their deal and maybe just preserving that one position.

Leah Litman:

I think that's probably right.

Melissa Murray:

All right. So after this case came down, predictably, the right wing media ecosystem had a meltdown and some people started saying some pretty extreme things. For example, Alan West, the chairman of

the Texas Republican Party issued a statement where he appeared to suggest that quote unquote, "Perhaps law abiding states should bond together and form a union of states that will abide by the constitution." That sounds remarkably like creating a confederacy. Have we seen that before?

Leah Litman:

This is all new to me. Not ringing any bells.

Kate Shaw:

Yeah. I mean it was when the Pennsylvania filing this case used the term seditious to describe what Texas trying to do here, and that's strong language, but I don't think it was uncalled for, and some of the reaction after the court denied leave to file I think just vindicated the Pennsylvania and other states' position to take this very seriously and to suggest that it walked up to the line of posing an existential threat to the union, because some of the rhetoric like this Texas rhetoric coming out of it was really consistent with that expansive reading of what it is Texas was trying to do here. Some of the eye-rolling about how unlikely this case was to succeed seemed to echo some of the rhetoric surrounding the Texas versus California challenge to the Affordable Care Act, which is to say, well, this is a obviously doomed effort and no one should take it seriously.

Kate Shaw:

And I just think like when states are walking into the Supreme Court and asking for specific relief, we all have to take it pretty seriously. And I think it was right of Pennsylvania and the other states not to just dismiss or give the back of the hand to this kind of effort but to take it really seriously to suggest that it was dangerous and seditious.

Melissa Murray:

Well, when you can't succeed, you should think about seceding.

Leah Litman:

I thought you were going to say you should coup, coup, coup again, but that doesn't really work.

Melissa Murray:

Nothing secedes like a lack of success.

Leah Litman:

Related to the meltdown, we should also mention a rumor circulating on social media that a source in the Supreme Court allegedly reported a screaming match in the Supreme Court conference room with Chief Justice Roberts browbeating his colleagues into denying leave to file the Texas case. According to the source-

Speaker 5:

The justice, as they always do, went into a closed room to discuss cases they're taking and debate. But when the Texas case was brought up, he said he heard screaming through the walls as Justice Roberts and the other liberal justices were insisting that this case not be taken up. And the reason, the words that were heard through the wall when Justice Thomas and Justice Alito were citing Bush versus Gore,

from John Roberts were, "I don't give a, about that case. I don't want to hear about it. At that time. We didn't have riots."

Leah Litman:

I don't know where to start with that rumor. To begin with, the justices are not meeting in person, so this is literally impossible. And of all the justices, the chief is not the one who has heard screaming through the walls, so it just has zero ring of plausibility to it. That being said, if it did happen and anyone has audio, I would love to use it as my ring tone.

Melissa Murray:

We should also talk about some of the commentary about this decision. So there was a lot of commentary about how the system had actually worked. And we've heard so much over the course of the last couple of years about the failure of norms and the breakdown of different codes of conduct, but that we could really always count on these systems, including the courts to be fail-safes. And many people were saying that's exactly what happened in this particular instance. What do you think of this, Leah? I know you have some views.

Leah Litman:

I just think that's really bonkers to say, "Well, the courts did not throw out the results of a democratic election and install the loser." Therefore, rah-rah-rah, courts. I mean, goodness, like how low is the bar? And I realize it's gotten lower and lower, but we shouldn't jump to the conclusion that all is well in the courts and they are here for the preservation of our democracy, again, just because they were unwilling to throw out the results of a margin proof victory through litigation.

Melissa Murray:

And a number of other commentators echoed that. So Elie Mystal in a piece in The Nation and J. Willis in the Atlantic and Linda Greenhouse in the New York Times all said that this was a victory, but this was not a shout it from the rooftops kind of moment for democracy. This was just so egregious that if it had actually worked, that would have been more shocking. This worked exactly as it should have, but that alone was not reason for cheering.

Kate Shaw:

Yeah. And I mean that in some ways it's just dumb luck that there were four states and not one state. That at least three states would need to be flipped in order to change the outcome of the election. This is the point that Elie made, "If just one state were in the mix, I think things would have looked potentially quite different." I also think it's dumb luck to move away from courts for a minute that Brad Raffensperger and not Kris Kobach was the secretary of state in Georgia overseeing these efforts to do all kinds of undemocratic post-election things. And so, no, this was not some great victory. I think we all managed to... Democracy lives to fight another day, just I think by sheer dumb luck in many ways.

Leah Litman:

Dodging bullets. When you have a majority of the Republicans in the House signing onto a brief urging courts to throw out the results of an election, it is really hard for me to walk away from that saying, "Yes, everything was working and all is well."

Kate Shaw:

And we should see, so a couple of big deadlines have passed, right? The safe harbor deadline, the actual casting of the electro ballots in the states on December 14th. The next big date to keep our eye on is January 6th when Congress actually opens and counts the votes. And I'm not sure what potential shenanigans the Republicans in Congress might have in store for us, but I think we should figure out if it makes sense for us to convene something to talk about it, depending on what it looks like going up in the run-up to the 6th, because that could be another stress test, I think. I'm not really worried about it, but I also don't think that it's necessarily smooth sailing from here until January 20th.

Melissa Murray:

Well, on January 6th, though, for anything to happen that would be consequential, you'd need both houses of Congress to take up the matter. And as long as there's divided control, that seems like there's a fail-safe there.

Kate Shaw:

Well, a fail-safe in terms of actually handing the election to Trump

Melissa Murray:

Right. But not in terms of making this -

Kate Shaw:

Absolutely. But in terms of actually drawing out the process and creating a lot of just high drama, as long as you have a single senator who's willing to go along with that effort, I think that they could really at least delay the kind of finalization, maybe not for more than a number of hours, potentially days, but I'm not worried about anything that could actually change the outcome of the election happening on January 6th.

Melissa Murray:

Do you remember that book, Kate, like Llama Llama Bedtime Drama, or whatever. Do you remember, did you read that book to your kids ever?

Kate Shaw:

There's Llama Llama Holiday Drama, there's Llama Llama Red Pajama is the original and there's a lot of spin-offs.

Melissa Murray:

Yes, that's it. But it's like when the mom says, "Please stop all your llama drama and be patient with your mama," that's our deal, yeah. Stop all your llama drama.

Kate Shaw:

But I think that there might be more llama drama in store is the problem.

Leah Litman:

In actual good for democracy news, Attorney General William Barr announced he is resigning as attorney general.

Melissa Murray:

What do you think happened? It was a letter, and I have to say this letter was a whole vibe. So first it starts off with, "I appreciate the opportunity to update you this afternoon on the department's review of voter fraud allegations. At a time when the country is so deeply divided, it is incumbent on all levels of government, and all agencies acting within their purview to do all we can to assure the integrity of elections and promote public confidence in their outcome." Was this snark or was this sycophancy? I don't know.

Leah Litman:

I took it as sycophantic. He is legitimating the efforts to question what happened in the election. That's how I took the opening paragraph.

Melissa Murray:

But he previously said that there was no evidence of voting fraud.

Kate Shaw:

But he's emboldening people to continue searching for something that isn't there and asking this question to cast it out on the election, when again we know there just wasn't that problem.

Kate Shaw:

I actually viewed it as a little bit more ambiguous, or at least that's cryptic, that paragraph.

Melissa Murray:

I thought so too.

Kate Shaw:

Because later in the letter, he goes on to praise in very explicit terms, the president's efforts in a number of other spheres, but doesn't actually endorse the fraud allegations at the top of the letter. Just says, "It was great to talk to you about the allegations." Doesn't tell us what the conversation entailed, us, the readers.

Leah Litman:

Why say anything?

Kate Shaw:

Yeah. I found it so puzzling.

Melissa Murray:

Maybe it was snarky. I thought that might have been snark, because the rest of it is extravagant in its praise. "Your record is all the more historic because you accomplished it in the face of relentless implacable resistance. Your 2016 victory speech in which you reached out to your opponents and called

for working together for the benefit of the American people was immediately met by a partisan onslaught against you, which no tactic, no matter how abusive and deceitful was out of bounds."

Kate Shaw:

See, I'm so mad this letter came after you guys did the special episode where [crosstalk 00:14:57] we couldn't do a dramatic reading of the whole thing. That was wrong.

Melissa Murray:

I know. This would have been an amazing dramatic reading. Obviously, I'm still working out my own feelings about it. But yeah, this is a lot. This is a whole mood. But why do you think he resigned? Do you think he was forced out?

Kate Shaw:

It's certainly possible. The president has obviously soured on him and is displeased with his failure to manufacture actual fraud evidence that would embolden the president in his efforts. And so, yeah, maybe that was the last straw. It's possible. It's interesting that if so, the president didn't say so. Although the president doesn't actually relish firing people to their faces, as we've now all learned. He does like to claim credit for departures and he allowed Barr to tell the story, but more time with his family over the holidays. I don't know, I think it's entirely possible to me that Barr wanted out before this pardon Palooza that we seem to be in the early stages of. And if Trump is very seriously considering a self pardon, I think it's possible that Barr wanted out before that happened. So yeah, I think that's a real possibility.

Melissa Murray:

I also like the possibility that Bill Barr is going to take his family on a Clark Griswold style vacation across the United States this Christmas. And they're going to be in a [crosstalk 00:16:16]. Holiday road, just the whole thing. That's what I think.

Kate Shaw:

Whatever he does next, a tenure that began with his preposterous and fawning letter. Do you remember that audition letter?

Kate Shaw:

Oh, yeah.

Melissa Murray:

Will end with a preposterous and fawning letter.

Kate Shaw:

So should we move on to opinions and argument recaps?

Leah Litman:

Yes. So the first joint opinion and argument recap we wanted to cover because the court issued a decision so quickly in the case is Trump versus New York, the census case. This is the challenge to the

presidential memo directing the secretary of commerce to prepare a report excluding non-citizens from the population base that will be used for apportionment among other things. And it was issued after the big Supreme Court loss over the citizenship question in Department of Commerce versus New York which invalidated Commerce Department's effort to add a citizenship question to the census. Commerce had maintained it did so to enforce the Voting Rights Act, when everybody knew they did so in order to enable apportionment that would exclude non-citizens, and the court again invalidated the citizenship question.

Leah Litman:

So case was argued November 30th and on an expedited schedule because the memo called for the secretary to deliver the report to the president by December 31st. And then after that day, the president must submit a report to Congress within seven days of the beginning of Congress' term, which will be January 10th or 11th. And then the clerk of the House must within two weeks and certificates to each of the states notifying them about how many seats in Congress each state can get.

Melissa Murray:

And on December 18th, which was a Friday morning, we got an opinion in the case. So again, very quick turnaround on this. We know that the court was moving quickly because they added an extra opinion announcement date to the calendar at the last minute. And as Leah and I predicted when we covered this case in the term preview, the court's conservatives ended up punting the case finding that it was not justiciable. And specifically, they said that the challenge wasn't right because it was not yet clear what the plaintiff's injury would be, or whether they would even be injured at all. So again, this is a per curium opinion, so we don't have an identified author here. But it's worth noting that the administration's memo, as you'll recall, directs the secretary of commerce and the Census Bureau to exclude all undocumented persons from the census count to the extent lawful and feasible.

Melissa Murray:

And the government argued, and the court here agreed that we don't really know how many or which undocumented individuals are actually going to be feasibly excluded. So would it be persons in ICE detention? Unclear. Persons subject to final orders of removal? Don't know. Persons denied parole in the United States? We don't know. And since we don't know, we don't know if there will be an impact on the apportionment of congressional seats or federal monies or anything like that. So we don't actually know if anyone's going to be injured by this. And the court also pointed out that the memo qualified the directive, quote unquote, "by providing that the secretary should gather information to the extent practicable, and that alien should be excluded to the extent feasible." Any prediction about how the executive branch might eventually implement this is really no more than conjecture at this time, the court said. And that we don't know basically how many persons the government is actually going to determine it's feasible to exclude.

Melissa Murray:

And so according to the court, everyone agrees by now that the government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status. And that in turn raises some concerns about the remedy. An injunction would prohibit the secretary from informing the president in the 141 (b) report of the number of aliens without lawful status. And in addition to implicating the president's authority under the Opinions Clause, the injunction reveals that a source of

any injury to the plaintiffs is the action that the secretary or president might take in the future to exclude unspecified individuals from the apportionate base, not the policy itself in the abstract.

Kate Shaw:

This is just like a little aside, but I did think it was a very weird for the court to invoke the Opinions Clause in its short opinion. It wasn't an issue, and the Opinions Clause didn't come up in the oral argument, it was barely in the briefs. I'm not sure what nefarious groundwork is being laid here, but it felt like something.

Leah Litman:

So the Opinions Clause didn't come up specifically, but several justices liken the injunction to something like a gag order on the president's aides to the president, and I took that to be gesturing in this direction. And my concern is this is going to end up being some kind of subterfuge e-attack on the ability of courts to enjoin the president's subordinate officers as a way of effectively enjoining the president, because given the courts expansive interpretation of the First Amendment and what speech is, they could say, "Well, all of these injunctions are effectively like cabining speech, are effectively gag orders and that implicates the Opinions Clause." Because what lower courts have done is issue injunctions against the president's subordinate officers in order to avoid having to issue an injunction against the president, which they don't know whoever is permissible.

Kate Shaw:

No, I think that's a great point. And yeah, for sure, Underwood kept getting pressed on this question. Well, is this a gag order really? And she said, "No, it's not." But the clause itself didn't come up, but I think that's definitely right, whether, however you want to frame the constitutional infirmity with one of these injunctions, whether it's like a First Amendment grounded or Opinions Clause grounded or some intersection of the two kind of concern, I think that that's a very astute observation, and maybe that's why it made me so uncomfortable to see its gratuitous invocation in this per curium opinion that didn't require it at all. They're talking about the speculativeness of the count, and thus the harm that flows from it and so there's really no need to say anything about this provision at all.

Kate Shaw:

Well, why not speculate about some possible constitutional infirmities with a remedy? Why not? Why not just shoot the shit? Hey-

Melissa Murray:

Friday.

Leah Litman:

Yeah, Friday, December 18th.

Kate Shaw:

One, I think critical takeaway that's important to understand is that the Supreme Court in no way made a determination that this memo is lawful. If it is the case that the president even tries to do something along these lines, which is a big question because it's not at all clear what specific information the Census Bureau is going to be able to provide about undocumented individuals in different categories in

time. But if that does happen and if the president tries to make adjustments to the report he sends to Congress in reliance on that data, there will absolutely be additional litigation.

Melissa Murray:

But, Kate, if there is additional litigation, there's still this open question of whether you can actually intervene later after the memo is transmitted to the president. And this is all again, part of what Leah just mentioned which is this whole issue of whether you can actually enjoin the president.

Kate Shaw:

So post-apportionment litigation, I think that there would have to be a challenge. I mean, there's a couple of things. One, I think it's the case that I think it's an open question whether a court can enjoin a president. The Supreme Court has studiously avoided giving a direct answer to that question. The Solicitor General for New York Barbara Underwood seem to strangely to concede or at least to suggest that there was a very good chance that it was outside of the court's authority to do so. I think that probably was a little bit more of a concession that she needed to make. But in any event, she basically said, "Look, it's irrelevant because what courts do is direct..." This is Talia's point, "Direct subordinates to the president declare what the law is and assume that the president will abide by the law." And that that's efficient essentially to achieve the same objectives as enjoining the president directly.

Kate Shaw:

I think it's right that because this would be post-apportionment, there would be a question of to whom or against whom the injunction would be directed. But Franklin versus Massachusetts, which is the big census case from the '90s did involve a post-apportionment challenge. Now, there, the court didn't invalidate what the president had done, but it's certainly the case, at least that courts can entertain post-apportionment challenges to census determination. So that I think is clear.

Melissa Murray:

This is the whole question that Jeff Wall was talking about in the oral argument, the whole unscrambling of the egg once the apportionment process had been undertaken after the transmittal of the memo. So this is, again, part of the issue and would still be a part of the issue even if this were litigated again.

Kate Shaw:

With respect to unscrambling the egg, I think it's right, that if the litigation took months and months such that these numbers had already gone to the states, then I think it'd be very difficult to unscramble the egg, but so long as the House is still in the process of making its calculations with respect to how many seats each state is entitled to, then I think it's not at all too late, and certainly it remains the case that the numbers need to be generated in a fashion that doesn't violate the constitution or statutes.

Kate Shaw:

And we should also know there are doubts about whether President Trump is going to have the information in hand by the deadlines, the memorandum requests, and also doubts about whether he will even have the information in hand by the time he leaves office. In which case it will be quite easy for the Biden administration to reverse it. If however, President Trump does get the information, it will be harder, but not impossible for President Elect Biden to reverse this. Some leaked documents suggest that the earliest release dates are somewhere end of January, maybe even beginning of February, and

this of course is going to span the transition period. And so it's just not clear exactly when this information will be available.

Kate Shaw:

Yeah. I mean, I just, I've been wondering for weeks, I'm sure you guys too, what exactly the dynamic inside the Census Bureau is right now. So Wall said repeatedly to the justices they're working feverishly to try to generate the reports that we are requesting. And are they? I mean, I think pretty clearly lawless directory, and I think that these conscientious hardworking officials inside the Census Bureau who already were pressed into service of this unlawful mission with respect to the citizenship question and raised real questions we know from the district court litigation about the directives that they were receiving, I imagine those same dynamics are at play right now.

Kate Shaw:

So now, do I think that they are outright refusing to abide by the request to compile this data? No, of course not. But I imagine that they're raising the same kinds of concerns that they raised during the citizenship proceedings. And all of that internal friction, I think makes me at least think that the administration is not likely to be able to generate much in the way of data that would be usable even if they were able to get, say the numbers of detained individuals in ICE custody or with orders of removal.

Kate Shaw:

But I think that's probably it. Even the DACA population, I'm not sure because it's not just individuals who are in DACA status, but it's matching those individuals with census respondents, and that seems to be a major undertaking.

Leah Litman:

So I guess that maybe transitions to what do we think of the court's reasoning? Justice Breyer filed a dissent in which Justice Sotomayor and Justice Kagan joined and he managed to get this drafted in like two weeks with everything still remote. So good on Justice Breyer and good on Justice Breyer's law clerks. I also think they're just right here. The government did not at all back away from the idea that it was pursuing the maximum possible enforcement of this memorandum. The stated goal of the memo is to diminish political influence and congressional representation of states where undocumented individuals live.

Leah Litman:

The president announced that they were gathering this information more than a year ago and they've spent over a year collecting records. And, Melissa, you noted the court stated that the government had disavowed trying to exclude all undocumented individuals, and I just don't think that that is correct as Justice Breyer noted. So we're going to play actually three clips from argument in which both the Chief Justice and Justice Gorsuch asked the government if it was still possible that they would exclude all undocumented individuals and the government just refused to disavow that.

Chief Justice:

General, just very quickly, should we assume that we're not going to be talking about illegal aliens in the country but some subset, some uncertain subset like the ones in ICE detention?

Acting SG Wall:

I think it is very fair to say, Mr. Chief Justice, that the president has not made a determination yet because we don't know what's feasible.

Justice Gorsuch:

It seems like the one common ground is that the 10,000 or whatever number it is currently in ICE detention to something you think will happen. Beyond that, can you give us any sense of the difficulties or likelihoods?

Acting SG Wall:

I can't, Justice Gorsuch. The bureau is working very hard, but as I say, until they actually do the comparison, we just won't know how many identifications we're able to make and whether that stands to effect the apportionment.

Justice Gorsuch:

So is it a reasonable prospect to think that it would be limited to the number of persons currently in ICE detention?

Acting SG Wall:

I think that's possible, but it is also very possible that they will be able to do more. As I say, we just, we don't know at this point.

Kate Shaw:

There was all this tension in the government's position that really came out at the oral arguments which just made the SG's arguments really weird I thought. They didn't disavow an effort to maximally implement the executive order. But they said, "Look, we don't know what we can do. Maybe we can only do very little, maybe we won't be able to even do enough to change a single congressional seat or any federal funds and so that's why the case isn't right. But also that we want you to reach out and decide in the abstract that the president can do this we think clearly unlawful thing." Right? That's obviously not with SG thinks but that's what we think, that he really wants to do but maybe can't even do to the fullest extent of his desires. It was just such a strange position that the government was in throughout. And it did seem like Breyer really captured that in his dissent.

Leah litman:

Also in the dissent, Justice Breyer mentioned some other exchanges from oral argument in which both Justice Sotomayor am Justice Kagan emphasize that the government has quite a lot of information on undocumented individuals. Even though it might not have the matching in place, it has these records for a super long time, which might make matching easier.

NY SG Underwood:

You're saying, well, yes, there's this small category of ICE detainees that seems pretty feasible, but that's just tens of thousands of people. So how about a few others? As I understand, there are almost 200,000 persons who were subject to final orders of removal. With the bureau be able to report on those?

Acting SG Wall:

It is working very hard to try to report on that subset, yes.

NY SG Underwood:

Okay. There are 700,000 DACA recipients. Will the bureau be able to report on those?

Acting SG Wall:

It is working on that too. We can't be certain at this point, and we don't know what the president will decide to do with respect to that said. [crosstalk 00:31:16]-

NY SG Underwood:

I mean, obviously you have papers, all kinds of records on those people, so I would think that that sounds pretty feasible to me.

Leah Litman:

Another thing I just wanted to note about the prior dissent is he took it up a notch. He brought some heat. He made it a little spicy.

Melissa Murray:

Sriracha Steve. I got hot sauce in my bag.

Leah Litman:

So I think a very pointed remark in the dissent was, whereas here the government acknowledges it is working to achieve an allegedly illegal goal, this court should not decline to resolve the case simply because the government speculates that it might not fully succeed.

Kate Shaw:

That captured the exact tension that so permeated the arguments.

Leah Litman:

It also captured perfectly like the malevolence incompetence thread that has permeated this administration, which is, they are clearly trying to do malevolent illegal things. They're just doing so so incompetently that it might save them and us, but that shouldn't work to their benefit here.

Kate Shaw:

Such a great point.

Leah Litman:

At the end of the opinion, he also mentioned how dangerous it is to the democracy to mess with the census. So I also thought that that closing was notable.

Kate Shaw:

Since we didn't get to actually to recap the oral argument, which was actually a very eventful oral argument, there's just a couple of things that we wanted to highlight before letting them get totally overtaken by the opinion itself.

Leah Litman:

One is that Strict Scrutiny guest and low-key star of the fight, Dale Ho argued-

Melissa Murray:

Dale "F Them Up" Ho.

Kate Shaw:

That's right. I forgot his street name.

Melissa Murray:

Say his name.

Leah Litman:

Dale "Fuck Them Up" Ho argued and was just truly spectacular. The amount of knowledge he has about this entire process really came through and he was just able to answer everything very well and very efficiently. Second-

Melissa Murray:

As we noted in our episode with Alexandra Petri, this was the oral argument where Justice Alito actually interrupted one of the other justices, Justice Sotomayor. The Chief Justice had tried to end Justice Alito's questioning period by calling on Justice Sotomayor, but justice Alito kept going.

Chief Justice:

Justice Sotomayor.

Justice Alito:

If I can move on to my second point-

Melissa Murray:

And then he finally gets him to stop by asking him, again, twice to discontinue.

NY SG Underwood:

That person is a resident like any other undocumented person.

Chief Justice:

Justice Sotomayor? Justice Sotomayor?

Melissa Murray:

So, Leah, it's possible that Justice Alito didn't hear the chief justice asking him to stop multiple times, but I think it's important to contrast this with an earlier episode where Justice Breyer was wrongfully cut off, cut off by mistake, and he actually apologized for being injured in this way.

Leah Litman:

He apologized and then he agreed to forgo the questioning time that the Chief Justice gave back to him. Whereas Justice Alito, I think he tried to keep going because after the Chief says, "Justice Sotomayor," Justice Alito says, "Chief," as if to try to plead his case again. So I think he heard it. I think he heard it.

Kate Shaw:

I mean, he also was like, "I have six more questions and I only got to ask three of them?" It's one thing to slip one little follow on question, and this was ridiculous.

Leah Litman:

Yeah. There did seem to be a lot of frustration with the questioning format in this particular argument that also came out in Justice Kavanaugh's questioning of Dale Ho when he used the first moments of his questions to Dale to actually direct questions to the solicitor general that he wanted the SG to answer. In an unstructured format, he could have asked this questions during the SG's questioning when they came to him, but apparently they came up afterwards. And in this new format, you can't ask questions in the rebuttal.

Kate Shaw:

I actually thought that was smart of Kavanaugh because it did get Wall to address his question during the short rebuttal. So it's actually a clever way, I think, to slip in one additional round of questioning if something comes up and you don't get to directly respond to it. One tiny little catty point, I mentioned Barbara Underwood before. A lot of the time this court calls state solicitor general, general ex, she was just called Ms. Underwood. Barrett called Jeff Wall, the acting solicitor general General Wall at the beginning of the argument and then didn't actually call her anything. Gorsuch called her Ms. Underwood, although I think he sometimes just uses for state SGs.

Kate Shaw:

But look, she has been the SG of New York for 13 years. She was a deputy SG and then acting SG in the SG's office and the federal government at the end of the Clinton administration. The Texas solicitor general Kyle Hawkins has been a lawyer for like 10 years and Barrett definitely called him General Hawkins when he was before the court, so we need to show Underwood the same respect, at the very least.

Melissa Murray:

Put some respect on her name.

Kate Shaw:

Exactly.

Melissa Murray:

Do we want to go on to the next case? This one was also really spicy and prompted a lot of commentary in the Twitter verse. So this was Nestle versus Doe, a challenge to the Alien Tort Statute involving child slavery.

Leah Litman:

So this is a case about whether a corporation can be sued for violations of international law obligations under the Alien Tort Statute. And here the corporation is being sued on the theory that it aided and abetted child slavery by buying cocoa from and otherwise supporting plantations that used child slavery. Arguing on behalf of the corporation is Neal Katyal who has become something of a resistance hero for his role in the travel ban case and appearances on news media. And this precipitated a long dialogue on social media and elsewhere about whether it's fair to criticize lawyers for the positions they argue for. A point I hope we'll return to leader we briefly alluded to before in talking about the election litigation, but we just have too much to cover today. In the case, there were some brutal questioning for Katyal's position, particularly from Justice Kagan.

Justice Kagan:

Child slavery, not aiding and abetting it, but the offense itself, is that a violation of a specific universal and obligatory norm?

Neal Katyal:

Yes. I think we're not challenging that here. It's just the [crosstalk 00:37:20]-

Justice Kagan:

Okay. So if that's right, could a former child slave bring a suit against an individual slave holder under the ATS?

Neal Katyal:

If it weren't extra territorial and it wasn't a corporate [inaudible 00:37:32]. Yeah.

Justice Kagan:

Yeah, no problem extra territorial, no problem aiding and abetting, just a straight claim about slavery.

Neal Katyal:

Correct.

Justice Kagan:

And could this same former child slave in the same circumstances bring a suit against 10 slaveholders?

Neal Katyal:

If they'd met the requirements under the law, yeah, sure. I mean, if it was possible [crosstalk 00:37:54]-

Justice Kagan:

So if you could bring a suit against 10 slave holders, when those 10 slave holders form a corporation, why can't you bring a suit against the corporation?

Neal Katyal:

Because the corporation requires an individual form of liability under a norm, a specific norm under international law, which doesn't exist here. I think [crosstalk 00:38:14]-

Justice Kagan:

I guess what I'm asking is like, what sense does this make? This goes back to Justice Breyer's question. What sense does this make?

Leah Litman:

Just illustrates the absurdity of his position, but of course, that position is essentially what the court took for foreign corporations in the companion case. So as absurd as that seems, it's not clear that that absurdity will land on at least five members of the court.

Kate Shaw:

As Leah was just saying, the court in the Jesner case already held that foreign corporations can't be sued under the Alien Tort Statute for this kind of conduct. The question is just whether they will extend that to hold that US corporations like Nestle or Cargill can't be sued under the Alien Tort Statute either. Yeah. So what do we think based on the oral argument the court is likely to do here?

Leah Litman:

I still think there are five votes to say the suit can proceed. I'm not exactly clear what the basis for the decision will be, but in that Jesner case as we mentioned, in the preview Justice Gorsuch had expressed a view that there's actually no jurisdiction over these kinds of lawsuits if they don't raise federal questions. And I just don't know how the plaintiffs will get five votes with him already ruled out. And I think there are justices possibly sharing a similar position.

Kate Shaw:

He definitely did right to say that in Jesner, but he did also seem skeptical, Gorsuch that is, in the oral argument, and that there's nothing in the text of the Alien Tort Statute that specifically exempts corporations at all, that maybe foreign corporations raise different questions, but that if you know US individual persons can be sued under the tort statute, maybe US corporations can as well since there's no distinction in the statute. I read him to be a little bit in play, but I'm not at all sure.

Leah Litman:

Unless it was a diversity jurisdiction suit, there wouldn't be federal question jurisdiction under his theory and so I just don't know how that would play out right here.

Kate Shaw:

All right. We got a lot of cases to cover. So should we move on to Van Buren versus United States? You guys preview that one pretty extensively, and it's a very interesting case. Melissa, you want to take this one?

Melissa Murray:

Yes. It's a very dishy case, as I said before. This was the case about whether accessing information for an unauthorized purpose violates the Computer Fraud and Abuse Act. And as we noted in the preview, the case involves some juicy facts. A police officer, Nathan Van Buren, ran a license check for a friend who said he wanted Van Buren to check out the information of this exotic dancer that the friend was interested in dating. And so Van Buren runs the background check on her, but it was actually part of an FBI sting operation and he was charged with violating the Computer Fraud and Abuse Act. At oral

argument, again, there was a ton of debate about the actual reach of the statute and what Congress had actually intended the statute to encompass. And Justice Kagan, for example, wanted to know if checking sports scores is really the same thing as obtaining information under the spirit of the statute. Yes, since the information is obtaining under the statute.

Melissa Murray:

The government also offered up a limit it had previously disavowed, namely that the statute applies only to "authorization based systems" where individual users are specifically trusted. Leah, you noted a really interesting part of the oral argument that seemed like things were looking up for the defendant perhaps.

Leah Litman:

So I thought the argument was maybe less skewed toward the defendant than I thought it would be when we were discussing the preview. I thought Justice Gorsuch and Justice Sotomayor were clearly in the defendant's camp, but I still think there will be a reversal. And the government's change in position that you just noted, I think suggests that it realizes it has to offer some limiting principle for this statute because without one, it potentially applies to anything. And we also know that the court doesn't think defendants have to point to actual prosecutions demonstrating like the full, most expansive reach of a statute in order to adopt a more narrowing interpretation. That's what we've seen in prior cases like Yates or Bond or whatever the example is that we want to give.

Melissa Murray:

Another theme that seemed to be running through this. And again, this, I think goes to the question of what limiting principle would exist with was that the justices seem to be grappling with how expansive the scope of this might be in an age where there are all kinds of authorized users who have access to unprecedented amounts of personal information. And there was this one question from Justice Thomas in which he posed basically a scenario in which someone working at a car rental shop had access to a GPS, but rather than using it to take on the location of a car, they used it for something else.

Justice Thomas:

But why can't you have the exact same thing on the other end? That is, that you have authority to access information but you are limited, that authorization is limited as to what you can do with it. For example, you work for a car rental and there you have the access to the GPS, but rather than use it to determine the location of a car that may be missing, you use it to follow a spouse, or as in this case, the use of the information is a problem. So I don't understand why you make the distinction between these two levels or ways that you can have or not have authorization.

Melissa Murray:

Do you think it's weird that Justice Thomas wants to know if someone can actually use their authorized information to track down a spouse? It seems like a very specific question.

Kate Shaw:

Well, it was just like, the facts here were fodder for so many fun hypos. So Jeff Fisher who was representing the defendant suggested that if you did accept the government's argument, you opened up the possibility of all manner of unbounded criminal exposure. So employees who check Instagram at

work, if that's an unauthorized use, individuals who misrepresent aspects of themselves like shave 10 pounds off their weight on their dating profiles, like that, maybe because you were trying to obtain interest from potential dating matches in an unauthorized way because you've misrepresented something about yourself, all of that could potentially give rise to criminal charges. And Gorsuch, as Leah said, seemed pretty sympathetic to the defendant in this case.

Kate Shaw:

And he didn't respond specifically to those hypos, but he definitely seemed concerned about the breadth of the government's reading. And he did situate this case in a line of other cases in which the government seemed to be seeking pretty expansive readings of federal criminal statutes, and the court has often unanimously invalidated those efforts. He didn't actually mention the Kelly Bridgegate case, which we talked about a lot and also involved faking trying-

Melissa Murray:

We talked about it when we previewed this case.

Kate Shaw:

Yeah, yeah. But the court didn't, at least Gorsuch didn't in this colloquy, but maybe let's play this one as well.

Justice Gorsuch:

I guess I'm curious about a bigger picture question and that is, this case does seem to be the latest as the petitioners point out. In a rather long line of cases in recent years in which the government has consistently sought to expand federal criminal jurisdiction in pretty significantly contestable ways that this court has rejected, whether we're talking about Marinello or McDonald or Yates or Bond, you pick your favorite recent example. And I'm just curious why we're back here again on a rather small state crime that is prosecutable under state law and perhaps under other federal laws to try and address conduct that would be rather remarkable, perhaps making a federal criminal of us all.

Melissa Murray:

They all seem to be shadowboxing with the prospect that we just live so much more of our lives on line than we ever did. And there's just so much more, I guess, capacity for individuals to, one, be authorized users, and then also put this information to use aren't necessarily authorized. And what does that mean?

Kate Shaw:

Yeah. So this conversation has like, again, made me think that the defendant is definitely going to prevail in this case. Although I think you're right, Leah, that it wasn't as lopsided as like the argument and say Kelly was, but I'm just not sure exactly how or by how many votes.

Leah Litman:

Right. But that might also partially just be a reflection of this new format when it's a little bit harder to tell where the justices are leaning.

Kate Shaw:

Definitely.

Leah Litman:

So another case that we wanted to recap that we had previewed is Edwards versus Vannoy. This is a case about the retroactivity of Ramos versus Louisiana. From argument, it seemed like justice Gorsuch, Justice Sotomayor, and maybe Stephen Breyer, think the rule is retroactive. First two aren't surprising, of course, Justice Gorsuch had said Ramos was not a new rule in Ramos itself. But Justice Breyer, you continue to surprise and delight. So, please don't change your vote. It was a little bit harder to tell where the Chief and Justice Kagan were and I think that they are the other justices who are potentially in play here. The Chief focused on how the rule from Schriro which Melissa and I discussed in the preview was not retroactive. Schriro of course, held that defendants have the right to have a jury find all of the elements of an offense. That rule was not retroactive. And the Chief says, "Well, this is a subordinate right to a jury trial, a right to a unanimous jury. And if the greater right isn't retroactive, how could the lesser be?"

Leah Litman:

I'm not sure that reasoning is quite right. A right to a jury might not be retroactive, but a rule that you can't discriminate on the basis of race or sex and jury selection could very well be. And the Chief seemed to recognize this later when he suggested that unanimity might ensure accuracy in a way that jury versus judge might not. Justice Kagan at one point said it was a steep climb to establish retro activity. She also said the empirics were sparse on whether this affected conviction, but I'm not actually sure that's true. I just think the defendant's lawyer, Andre Belanger, did a pretty bad job bringing that out. You have innocence project briefs essentially going through all of the exonerations and finding that so many of them involve non unanimous juries. So we know that the likelihood of convicting an innocent person often involves non unanimous jury verdicts. But she had also said that Ramos says you haven't been convicted by unanimous jury, you really haven't been convicted at all. And maybe that means it's retroactive. So it was just harder to tell where the two of them were leaning.

Melissa Murray:

Do you think this is an opportunity for her to, I don't know, reestablish her, I guess, progressive bone a few days after Ramos? Because, remember, after Ramos, there was a lot of teeth gnashing about her decision to join the Chief and Alito and refusing to strike down Apodaca and invalidate the non unanimous jury rule. Is this, do you think, an opportunity for her to maybe reclaim some of that space?

Leah Litman:

I don't think she really cares that much about establishing her bone a few days to progresses. That being said, the fact that she joined the portion of the Alito dissent in Ramos that suggested the majority had devolved into ad hominem attack and that was essentially anti anti-racism will just never cease to amaze me. She could have at least joined other portions of it.

Melissa Murray:

I told you what I thought about that. I just think like maybe there was... Her vote was inconsequential in Ramos, whereas here it actually could be incredibly consequential. I wonder if she'll take that opportunity.

Kate Shaw:

One thing too since we're talking, obviously Ramos is really central to this case. Gorsuch has clearly still not reconciled to the fact that he couldn't convince a majority of the court that Apodaca wasn't a precedent at all in Ramos. But it's weird to be relitigating that here, but also obviously whether Apodaca was a precedent bears on the question of whether Ramos made new laws. So it's a relevant issue here, but also, he didn't succeed there. But it made me wonder whether... I don't know what you guys made of this, but this idea that now, Apodaca is sweet, generous, because it's this single justice's vote that-

Melissa Murray:

Like Bakke?

Kate Shaw:

Like Bakke, or I think about June Medical Services actually, a lot in this context. It's not a single sort of... If you say it's an idiosyncratic vote for a fifth justice and only writing for himself, I actually don't think he's talking exactly or shadowboxing exactly with June here. I just wonder whether this trying to entrench the idea that certain precedents are, in fact, not precedents at all is a project that he is engaged in and I worry about it. Again, it may be limited to these idiosyncratic circumstances and a few others like Bakke and June Medical Services. But if it's a broader idea that there are some set of criteria that allow you to circumvent a stare decisis analysis because you have decided that a decision, if the court is not in fact a precedent at all strikes me as a dangerous road to go down.

Leah Litman:

Neil "Danger" Gorsuch at it again. So we also wanted to recap some of the cases we didn't preview because they were argued in the second week of the December sitting really quickly. There's a super interesting tax remedies case, CIC versus IRS.

Kate Shaw:

I love Leah saying the sentence is "super interesting tax remedies case." It actually is.

Leah Litman:

Yeah. It implicates Henry Hart's dialogue about jurisdiction and the federal courts and when federal courts need to have jurisdiction to review the legality of government action that might be unlawful.

Melissa Murray:

Oh, my God, inject this into my veins.

Kate Shaw:

Twice.

Leah Litman:

Okay. You asked, I will comply.

Leah Litman:

It's about the interaction.

Kate Shaw:

We do want to hear about it. Go.

Leah Litman:

I know you don't but I'll tell you anyway, quickly. It's about the interaction between the Anti-Injunction Act which prohibits suits instituted to prevent the assessment or collection of any tax and the Administrative Procedure Act, which makes judicial review generally available. And in earlier cases, the court had said general administrative law principles apply to tax cases involving the IRS rejecting tax exceptionalism. So the first question is whether reporting requirements that are antecedent to tax collections fall within the scope of the Anti-Injunction Act, like where the government is asking for information that might subsequently lead to tax collections. And the second is whether because of future penalty for violating the provision in question is discretionary it is in fact the suit to enjoin the tax which is generally not discretionary.

Leah Litman:

And the interesting Henry Hart angle is the is subject to the guideline, had this constitutional argument about whether you need a judicial remedy short of violating the law and defending against an enforcement proceeded. So Henry Hart for the win in your veins, Melissa.

Melissa Murray:

I just want to note that Leah teaches remedies and I've never actually seen her so happy before. She was literally in her element. She's glowing.

Leah Litman:

I thought this was interesting because during this oral argument, there was perhaps a little bit of a telephonic hiccup.

Speaker 14:

If there were no penalties, there would be nothing for petitioner to sue about because it arguably would not even have [inaudible 00:53:25].

Leah Litman:

Unclear if it was screaming, barking, if it was a-

Melissa Murray:

You thought it was a dog. You thought it was a dog?

Leah Litman:

I don't know if it was on Justice Kagan's line or someone else's. We need Ashley Feinberg on the case again.

Melissa Murray:

It's not quite as disruptive as a flushing toilet, but I was intrigued. It got my attention.

Kate Shaw:

So the next case we wanted to briefly touch on is Republic of Hungary versus Simon. This case arises out of a group of Holocaust victims who sued Hungary to recover the value of property lost in Hungary during World War II. it presents two legal questions. The first is whether a district court can invoke international comedy as grounds to abstain. That is not to decide the case. Basically or largely on the grounds that the plaintiffs did not first try to bring suit in Hungary on the basis of Hungarian law, but maybe just as a more general discretionary abstention doctrine. The plaintiffs argue that allowing courts to invoke this kind of comedy doctrine would basically return courts to the pre-foreign sovereign immunities act world in which immunity decisions by courts were made case by case and in a pretty standardless way.

Kate Shaw:

They argue that of comedy might apply in some cases, it applies only where the executive branch expressly requests that a case be dismissed based on specific foreign policy concerns. And here, despite numerous opportunities to say it would be problematic from the perspective of foreign policy for a court to decide this case, the federal government has declined to do so, that included in this argument. So the SG has basically taken the position in this case that international comedy based abstention is a thing, that it does survive the enactment of the FSIA, but then just refused to take a position as to whether abstention is appropriate in this case.

Melissa Murray:

Jeff, stop trying to make international comedy base abstention happen.

Kate Shaw:

So at one point, the Chief Justice appeared to get audibly annoyed at the government for not being able to specify the alleged foreign relations implications that justify abstention.

Chief Justice:

This question will not surprise you. You emphasize the significance of the international relations context as a reason for international comedy, but your client, the United States, has scrupulously avoided taking a position on what the court should do given the international relations context. This is the perfect time for you to fill that void. Why hasn't the government told the courts what the foreign relations impact on the United States is?

Mr. Snyder:

Well, your honor, the United States doesn't feel that it has sufficient information about how the proceedings would unfold in Hungary to take-

Chief Justice:

How long has the case been going on that you haven't gotten that information yet?

Mr. Snyder:

Your honor, the case has been going on for quite some time, I forget when exactly the complaint was filed in the case. We have the same information that the court has in terms of the party presentation and the expert declarations submitted in the case.

Chief Justice:

Well, I'm sure that's true, but you also have other resources like our embassies, other communications between the two countries at the executive level.

Mr. Snyder:

That's true, your honor. The state department simply doesn't feel that it has sufficient information to provide the court with [crosstalk 00:56:50]-

Chief Justice:

Mr. Snyder, surely they have as much information as they need to make a decision, they just don't want to make a decision.

Mr. Snyder:

Your honor, they have informed us that they don't have sufficient information to make a decision about that. Our interest in this case, though, is that more broadly, we think about the implications of the court of appeal's decision would be detrimental to US policy, and as much as the court of appeal said that courts may never abstain on international comedy grounds.

Kate Shaw:

And then the second question in the case is actually the heart of a related case that the court granted and also heard, and that second question is whether a foreign sovereign's taking property of its own citizens falls within an exemption to the Foreign Sovereign Immunities Act. The FSIA says foreign governments are not immune, one, quote rights and property are taken in violation of international law. And in the related case, Federal Republic of Germany versus Philip, Germany and the United States are arguing that this exemption does not apply to so-called domestic takings, i.e. to a country's takings of its own citizens or nationals' property, even one that taking is in violation of international law. Plaintiffs argue that it does and that the exemption applies whenever property rights are taken in violation of international law. And the plaintiffs are arguing here that it was the taking was an act of genocide.

Melissa Murray:

Sarah Harrington, of Goldstein Russell argued the Hungary case and was as always very impressive. And I think she was actually exceptionally impressive in this outing even for her. So if you are looking for a potential SG prospect, Biden administration, or deputy SG, we're not making any real recommendations, but this is like a sideline recommendation. She would be fantastic. So just wanted to highlight that. I will also highlight that this case is part of a number of different holocaust reclamation cases that have come up before the court before. And in fact, if you're looking for something to watch during your holiday break, there's actually a movie starring Helen Mirren and Ryan Russells, which we have previously highlighted on one of our SCOTUS Goes to the Movies shows called the Woman in Gold, and it also chronicles Holocaust survivors' efforts to reclaim a Gustav Klimt painting that was taken from her family during the Holocaust.

Kate Shaw:

I feel like you've pitched this movie before and I still have not seen it. Maybe this break I will actually watch it.

Melissa Murray:

It's a great... I mean, Helen Mirren is glorious.

Kate Shaw:

Always, of course.

Melissa Murray:

Ryan Reynolds is very attractive. It's a good movie.

Kate Shaw:

All right. I promise to try to check it out, Melissa.

Melissa Murray:

And that woman from Orphan Black is in it too, Tatiana.

Leah Litman:

I love her.

Melissa Murray:

She's great. She's in too. She's Helen Mirren as a younger woman.

Kate Shaw:

I don't know if folks had predictions about how this case is likely to come out. I mean, I actually thought that Sarah was so good and the SG's wheeziness was so problematic that I actually thought these plaintiffs had a very good chance of prevailing on one of their theories, maybe more likely the second. The first theory that they were pushing is that this international comedy based abstention is actually no longer a real doctrine post FSIA. So even if they don't win on that theory, I can see the court finding that if this doctrine does exist, it's narrow and can only be used when the political branches in some way ask courts to abstain, and here they just haven't. So I don't know if winning on the second theory requires a remand. It seems like it probably does. But either way, I felt good about their chances coming out of the argument.

Kate Shaw:

The next case we wanted to preview is Collins versus Mnuchin. This is a follow-on case to the Seila Law versus CFPB case from last term in which the court held that restrictions on the president's ability to remove the director of the Consumer Financial Protection Bureau violate the separation of powers. The CFPB was a single director agency where the director had extensive powers. And so the question here is whether restrictions on removing the director of the Federal Housing Finance Agency, which is an agency that was created in 2008 to oversee the mortgage giants, Fannie Mae and Freddie Mac also violates the separation of powers.

Kate Shaw:

There's a second question in this case which is what those restrictions actually are. And particularly whether there are any restrictions that apply to an acting director of the FHFA, who has not been

confirmed by the Senate. So the regulated party here is challenging, it's actually some shareholders of Fannie and Freddie, are challenging an agreement that was entered into by an acting director of the FHFA. So there's this question about whether the acting director was removable at will by the president or instead subject to the same removal protections that apply to the director of the FHFA. The court appointed an Amicus, law professor Aaron Nielsen, who needed to be appointed like Paul Clement in Seila Law because the Trump administration side with the challengers in both cases.

Kate Shaw:

And so Nielsen was arguing that no, since the provision regarding acting directors doesn't mention removal limitations, unlike the provision regarding the director, and he relies in making that argument on super important work by friend of the pod and former guest Anne Joseph O'Connell, who has looked at this question extensively, and so Nielsen argues that there are good reasons to distinguish between actings and appointed directors for these purposes. The statute that creates the director position gives the director removal protections. The acting director by contrast serves by statute until the return of the director or the appointment of a successor. So it seems pretty clear textually to me that the same removal limitations that exist for the actual Senate confirmed director don't apply to the acting director.

Kate Shaw:

And Nielsen has a second argument which is basically that even if we say, okay, the acting director does have the same removal limitations as the real Senate confirmed director, the FHFA is still distinguishable from the CFPB, because even though it's headed by a single director, it exercises far less significant powers than the CFPB, and in particular doesn't exercise substantial executive powers. So presidential control and unlimited ability to remove at will are not constitutionally required. And I'll just say that while I was initially worried that this case would be the next domino to fall post Free Enterprise Fund and Seila Law, basically the courts seeking to narrow the universe of independence and insulation from presidential control that is allowed under the constitution inside the executive branch. I actually think that's not likely in this case, maybe because the facts are quirky and a little complicated and because it was an acting director who took the main action under review here. So I think this is not likely to be a big blockbuster administrative law case coming out of the argument.

Kate Shaw:

So I think the court is going to end up saying removal restrictions don't apply to the acting director and invoke what, Kate, you and I had previously called the Anne Joseph O'Connell doctrine or Anne Joseph O'Connell deference doctrine where the court just refers to the views of administrative law expert on actings Anne Joseph O'Connell.

Kate Shaw:

Okay. Now we should, making AJOC deference a thing, I do want to make happen. I think we can make that happen.

Kate Shaw:

Make it happen.

Melissa Murray:

I've been trying to make AJOC deference happen since 2006. So I think the three of us together can get it done.

Kate Shaw:

Look, some of these projects are long-term. Change comes slowly, but I think it's happening.

Melissa Murray:

I mean, look at Janus. We've got four cases and we'll get it done.

Kate Shaw:

There we go. Might take a trilogy of sorts.

Kate Shaw:

We need to be patient too.

Leah Litman:

Yes.

Melissa Murray:

It only took five years? We can wait that long. The court also heard Facebook Inc. versus Duguid. And the question here is another statutory interpretation question, specifically, whether the Telephone Consumer Protection Acts ban on robocalling or robotexting cell phones using an automatic telephone dialing system, includes using a device that can store and automatically dial telephone numbers without using a random or sequential number generator. And again, all of the justices seemed really flummoxed here by the prospect of a statute that hadn't really kept pace with technology. And it seemed, I thought, that they were really wishing Congress had stepped in to remedy this before it had even gotten to this point. But there was this really funny interchange between Justice Thomas and one of the advocates where Justice Thomas had a little bit to say about old school cell phone.

Justice Thomas:

Justice Sotomayor brought up the point of the ill fit between this statute from 1991 and current technology which is advanced. In '91 cell phones or quite a few of them were the size of a loaf of bread and they're not in widespread use. Lots of people had car phones instead installed in their cars. We've had in legislation quite a change. The industry's changed. The technology is far beyond anything we could have conceived up in '91.

Melissa Murray:

So I thought this was notable. He's taken it all the way back to 1991 when the statute was enacted and when I think he joined the court, was it 19... Yeah, I think it was 1991. And he notes that cell phones or quite a few of them were the size of a loaf of bread, and I can confirm that that is exactly the case. You could get a cell phone, it came in its own suitcase and you carried it around in your car in its suitcase. You kids have no idea.

Kate Shaw:

No. As a fellow older worker, I definitely remember that.

Melissa Murray:

Me you and J-Lo both had our own briefcases.

Kate Shaw:

I didn't have one, but I knew people who did.

Melissa Murray:

Who had a cell phone back in 1991? I mean, I thought you actually had to-

Kate Shaw:

No, no, a car phone in the mid '90s. I feel like I remember those although I did not [inaudible 01:06:17].

Melissa Murray:

Did you have a car phone in the late '90s?

Kate Shaw:

No.

Melissa Murray:

I feel like really rich people like moguls had car phones.

Kate Shaw:

I think I knew people who had them though. I feel like I did.

Melissa Murray:

I knew one person that had a cell phone and it actually was carried around in the suitcase, which is how I knew that.

Kate Shaw:

It plugged into the cigarette lighter.

Melissa Murray:

Yes. And it burned your whole battery down. I mean, it took the whole battery to power the cell phone.

Kate Shaw:

Oh, my God. Leah, the grandmas are telling you the car phones [.

Leah Litman:

Back in the good old days when you had to walk uphill to school, both there and back and cell phones in bags, yep.

Kate Shaw:

Justice Sotomayor also talked technology a little bit.

Justice Sotomayor:

I think you're going to have to answer me more clearly than that. You don't think that cell phone users will do what [inaudible 01:07:07]?

Brian Garner:

They won't do automated mass dialing or blitz messaging, which isn't a normal function on a cell phone.

Justice Sotomayor:

Well, I mean, I do email blasts with friends. I do all sorts of now with FaceTime and things of that nature, Zoom, we're doing basically automatic dialing, and people being, joined together by that process.

Leah Litman:

Question that arose for me is how do I get on Justice Sotomayor's email blast? [crosstalk 01:07:39] would like to know.

Kate Shaw:

I suspect Melissa is already on them, although I don't think she's going to tell us if she is. She's just being conspicuously silent. Her face is giving nothing away. We'll just draw what inferences we will.

Melissa Murray:

I'm not on the email blast.

Kate Shaw:

The court also heard once again the case of Schein versus Archer and White Sales. The question here is whether a provision in an arbitration agreement that says certain kinds of claims are not arbitrable means that an arbitrator should not decide those threshold questions about whether a claim is subject to arbitration. The case also involves question of whether incorporating the AAA rules on arbitrability events are clear and unmistakable intention to delegate questions of arbitrability to an arbitrator. The court had previously heard this case and ruled that there was no wholly groundless exception to arbitration. That is where claim to arbitration is wholly groundless, it can still be decided by an arbitrator and does not have to be decided by a court.

Kate Shaw:

We got through a lot. We got the first opinions of the term so we thought we should at least briefly touch on them. Should we just do like a sentence or two about each of these?

Leah Litman:

Yeah, a lightning round.

Kate Shaw:

Cool.

Leah Litman:

In Rutledge versus Pharmaceutical Care Management Association, this was a first opinion in an argued case unanimous by Justice Sotomayor, the court held-

Melissa Murray:

And it came in an email blast.

Leah Litman:

It did not come in an email blast. The court held that ERISA, the Employee Retirement Income Security Act does not preempt a state law that establishes price floors that pharmacy benefit managers must abide by. Boom.

Melissa Murray:

There was also an opinion in United States vs Briggs. This was a case that we also previewed. This was the one about the statute of limitations for rape prosecutions under the uniform code of military justice for conduct that occurred between 1986 and 2006. The UCMJ states that there is no statute of limitations for crimes punishable by death and the court held that this language referred not to the constitution, but to the UCMJ itself, which had during the relevant time period stated that rape could be punished by death. This is a unanimous opinion with Justice Alito writing. And we should know that this was a womp womp for our friend Steve [Letic 01:09:46]. So, sorry, Steve.

Leah Litman:

I was surprised this one was unanimous, honestly, after the argument, but whatever.

Kate Shaw:

And Steve was great. I think [inaudible 01:09:54]. He did a great job but-

Melissa Murray:

You was robbed, Steve. Robbed, I say.

Kate Shaw:

Okay. Next case Tanzin versus Tanvir. This was another unanimous ruling, this one by Justice Thomas. The court held that money damages are available against federal officials acting in their personal capacity when those officials violate the Religious Freedom Restoration Act or RFRA. This is the case, involving three Muslim men who say they were put on the no fly list after they refused to become FBI informants.

Melissa Murray:

This was one of the ones that we had some questions about in the preview where we weren't sure if the court's commitment to religious liberty might extend to these particular circumstances. So I thought this was like a happy surprise. I was glad to see them being consistent on this.

Leah Litman:

I was also happy, though it does create an oddity that you can get damages against federal officials under RFRA but not against states for violations of [inaudible 01:10:40]. And of course, as the court appears greatly poised to expand the scope of RFRA and particularly to say it violates RFRA for federal officials to enforce anti-discrimination norms, there're also concerned about the reach of the opinion, though I still think it is right.

Kate Shaw:

As to these particular parties, this does clearly, right.

Kate Shaw:

Yes.

Melissa Murray:

There was also an opinion in an original jurisdiction case involving Texas. This one was not about an attempted coup, but rather a water dispute between Texas and New Mexico. And the court, per Justice Kavanaugh held that the river master, and this is an important note here. In these original jurisdiction cases, the court often appoints a special master to go and investigate because under the court's original jurisdiction it's actually functioning as a trial court. So the special master is actually doing fact-finding here. So there was a river master appointed, and the river master recommended that New Mexico get credit for the water that it had stored for Texas but that had later evaporated. And the court under the opinion written by Justice Kavanaugh affirmed that recommendation. Justice Alito dissented. And, Kate, you wanted to note some of the race and gender dynamics around the appointment of the river master.

Kate Shaw:

Well, only because original jurisdiction cases are just like for a brief moment on people's radar, it seems worth noting, a couple of years ago I took a look at the Supreme Court Amicus invitations. I've talked about it on the podcast before. And when I started the project, I thought it would also look at the courts' special master appointments, because there's no formal guidance as to how the court selects these special masters. It's fairly lucrative because you build the court for your time and certainly prestigious [inaudible 01:12:16] that the court hands out. And it turns out the appointment of special masters and river masters is just as cronyist and elite clubby [crosstalk 01:12:26]-

Melissa Murray:

Are you telling me that there's never been a black woman as river master, Kate? Is that what you're saying?

Kate Shaw:

I haven't updated my research in a few years. So, but I feel like if there had been one in the last couple of years, we would know that fact, and we don't. So, no, these special masters are not necessarily the same profile as these Amicus invitations, which are primarily recent white male SCOTUS clerks. That is their type for Amicus invitations, not exclusively, but very predominantly. Special masters are a little bit different. They tend to be practitioners who have some specialization in like water and-

Melissa Murray:

Riparian rights.

Kate Shaw:

So riparian experts or boundary dispute issues. It's pretty specialized. But it's like the race and gender stats on special master appointments are abysmal, even worse than their Amicus appointment stats. I don't have the race data at the ready, but as to the gender data, I remember that in 2008 was the first time the Supreme Court had ever appointed a female special master was Kristen Miles, a Munger Tolles lawyer. I think she may still be the only one, although they may have... And they've done this hundreds of times. These appointments are these kind of valuable resources that the court hands out and it can do better on diversifying the people around it. It's the law clerks, the lawyers who argue in front of it and the special master and river masters [inaudible 01:13:46].

Melissa Murray:

I love that we've actually had a black woman become vice president before becoming river master. What in the world. Any other opinions we want to highlight? I think there's one more, is it?

Kate Shaw:

Yeah. So briefly we wanted to mention Carney versus Adams, which was a challenge to the Delaware constitutional provision requiring that appointments to the state's major courts reflect partisan balance. And the Supreme Court held that the challenger lacked standing because he was not able and ready to apply for a judgeship on one of the Delaware courts subject to the partisan balance requirements. So Justice Breyer wrote for a unanimous court. I'll say, it seemed pretty clear to me that this provision of Delaware law requiring partisan balance would stand after the oral arguments. Although I couldn't tell whether that that case would be disposed off on standing or merits grounds. The court took the standing route. Leah, what'd you think of the opinion?

Leah Litman:

I didn't love it. Justice Breyer tried to cabinet saying the decision was highly fact-specific. They relied on the ambiguities in the challenger's statements that he was interested and also his failure to apply to judicial openings while a registered Democrat. And the court also noted the timing in ways that seemed to insinuate that he had become an independent and reactivated his bar status in order to bring this challenge. But I just worry that the case could cause real mischief given that it was decided at summary judgment. And so all of the inferences were supposed to be drawn against the moving party here, the state, and here are the court does seem to say, "Well, on our interpretation of the evidence, we just don't think that this plaintiff is seriously injured."

Kate Shaw:

Maybe bearing out your concern, I think the court did site Carney versus Adams in the census case, right?

Kate Shaw:

Yeah.

Kate Shaw:

That's already being deployed for problematic purposes. All right. We made it through all the opinions.

Kate Shaw:

And for our court culture segment, more opinions.

Kate Shaw:

Right. Because we have some summary reversals.

Leah Litman:

I wanted to note one summary reversal in Shinn versus Kayer. This is a Supreme Court summary reversal where the decision reversed a lower court ruling without full briefing and argument, concluding that the Ninth Circuit was wrong to find that the defendant received ineffective assistance of counsel for failing to investigate at the sentencing stage of the proceeding, the defendant was sentenced to death. Justice Breyer, Justice Kagan, and Justice Sotomayor noted their dissents. I thought the opinion was significant because it indicates something that the six-three conservative court will be able to do, like a new power that it has, which is it will find it much easier to summarily reverse lower court decisions than a five-four conservative court. By custom, summary reversals require six votes. Summary reversals are, again, cases decided without argument just on the briefs. So previously the court's conservatives would have had to find a sixth vote from a more liberal justice. Now that's no longer necessary. And I think this will operate to the further detriment of habeas petitioners, civil rights plaintiffs and litigants hoping not to be forced to arbitrate their claims.

Melissa Murray:

The court also continued to deny requests for relief or stays from defendants who have been sentenced to death, including federal defendants who are still being executed in these waning days of the lame-duck Trump administration. There is every reason to think that perhaps Joe Biden as president will reinstate the moratorium on federal executions. But again, the idea that there are continued executions during this lame-duck period is really unprecedented. And one of the executions that occurred that really garnered a lot of outsized attention was the execution of Brandon Bernard, who was 18 at the time of the crime for which he was convicted. And he was known to have a limited role in this particular crime. It was a carjacking and murder. And so there was a lot of outcry about this particular execution.

Leah Litman:

Also of note, the court also vacated lower court decisions upholding coronavirus restrictions against religious liberty challenges in Colorado, California, and New Jersey. Then in a super curious order, it left in place a sixth circuit decision upholding the Kentucky governor's school closure restrictions. A religious school had challenged them in the unsigned order. The court basically said the order was about to expire and the school term ending. And Justice Alito and Justice Gorsuch noted their dissents.

Melissa Murray:

I just also wanted to call attention to one of the briefs filed in this case. This was filed on behalf of Kentucky governor Andy Beshear, and it was filed by Joshua Matz of Kaplan, Hecker, Fink. And this was just an incredibly meticulous, detailed fact-specific brief. I think they actually cited more press releases from the governor's office than they did actual cases. And they didn't cite Jacobson at all, so I think we can query whether Jacobson versus Massachusetts is officially dead on arrival. But this may be a template for future challenges for states to really, again, focus on the facts and laying out the specific circumstances that they undertook in making these decisions about whether to close or reopen.

Kate Shaw:

Although Alito does say like, "Please, please come... All this does is defer the decision. Our doors are wide open if you guys want to come back if it turns out the governor does reopen schools after the holidays."

Leah Litman:

So this has been a long one. It's probably all we have time for. Thank you all for listening. Special thanks to our Glow supporters who make the show possible. You can sign up to support the show at glow.fm/strictscrutiny, or rate us on iTunes if you enjoy the show. Thank you to our producer, Melody Rowell, and thanks to Eddie Cooper for making our music.

Kate Shaw:

We'll see you next time. Thanks everybody.

Melissa Murray:

Thanks.