Melissa Murray:

First, let me just ask, do we know why it's such a light week in terms of cases?

Kate Shaw:

I think the court just really trying to stay under the radar because either they don't like conversations about court reform or court packing. And so they're like, "Let's just not decide much and no one will notice that we're here."

Intro:

There's an old joke, [inaudible 00:00:18] of men argues against two beautiful ladies like this, [inaudible 00:00:21] going to have last words.

Intro:

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

Leah Litman:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. Today, we are delighted to be doing a live, via Zoom of course, show at Rutgers Law School. And that means that this is also a crossover episode with the Rutgers Law Podcast, the Power of Attorney, and we are joined by none other than the Dean of Rutgers Camden Law School, and the Host of Power of attorney, Kim Mutcherson. Welcome, Kim.

Kim Mutcherson:

Thank you so much. It is such a thrill to be here with all of you.

Melissa Murray:

And we are super excited to be doing this episode with you, particularly since we have the Supreme Court's order/non-decision in FDA versus ACOG to discuss this week. So, just a brief rundown of the show. First, we're going to discuss some court news and court adjacent news. There is a lot of it. We will also do a preview of one of the cases to be argued this week and a recap of one of the cases that was argued this past week. And then we will close with some discussions about impeachment and insurrection, which are unfortunately still topical. So, for the breaking news, the Supreme Court granted a bunch of new cases, exactly 14 of them. Although, a number of them will be consolidated together. These were not necessarily grants in high profile cases, but there were nonetheless some very important cases, including one that we've talked about before on the podcast. So, Kate, do you want to tell us about the first one?

Kate Shaw:

Definitely. So, the first grant we wanted to highlight is part of a Koch brothers back to efforts specifically here, it's a challenge to a California state disclosure requirement of non-profit donor lists. Senator Sheldon Whitehouse, for those of you who had a chance to listen to our special episode with him, flagged these set of issues as important to watch when he was on our December show. And as he warned, these cases threatened to undo a bunch of disclosure and transparency requirements, which would make it much easier for dark money interest to do their shadowy work. To paraphrase in our

Whitehouse, from that episode, "The court that dark money built will now find a constitutional right to dark or undisclosed money." So, these cases are Americans for Prosperity Foundation versus Becerra and the Thomas Moore Law Center versus Becerra. And they can serve specifically the California Attorney General's offices requirement.

Kate Shaw:

That charities disclose the names and addresses of major donors, as amicus, the federal government supported cert in this case. So, just a quick recap of something we talked about with Senator Whitehouse in Citizens United, eight justices actually said that generally speaking campaign finance disclosure requirements are perfectly constitutional. This case is about disclosures of donors to charities rather than political campaigns, but the line between the two is fuzzier now than ever. And whatever the court says here about the permissibility of this kind of disclosure requirement is shorter reverberate in the context of political money.

Kate Shaw:

So, this is a very big and important grant. One thing that I couldn't help, but note was just the asymmetry of amicus filings at the cert stage in this case. So as we said, the United States supported the cert petition, but there were like 20 amicus briefs in support of cert, California was all alone on the other side in defense of its disclosure requirements. So, amicus brief writers get on this, now that the case has been granted it is hugely important. And right now it looks there's just one side of the argument that is really speaking kind of at full volume to the justices.

Leah Litman:

I'd like to hope part of that is just because amicus briefs against certiorari are kind of rare and in some ways can detract from your cause. But definitely amicus brief writer is up, please jump into this case. I also wanted to note that this particular case and this particular issue about transparency and disclosure requirements is particularly topical. Now, given what is going on, it's been reported that the 501(c)(4) arm of the Republican Attorneys General Association, the Rule of Law Defense Fund helped organize the protest that proceeded the deadly January 6th attack on the Capitol. And RAGA appeared in a list of groups participating in the Court march to save America. And we know some of the significant funding sources to RAGA because of transparency and disclosure requirements. And those include Koch Industries, the Judicial Crisis Network and the NRA. So, it's this kind of knowledge that is potentially at stake in this case.

Melissa Murray:

Another case that was granted is Mahona Area School District versus BL. And this is kind of my favorite grant so far because it is a case about one ninth grade cheerleaders incredibly bad day. I was a former high school cheerleader, so I can relate to this.

Kate Shaw:

Did we notice?

Leah Litman:

Can we see your spirit fingers? Only the people at Rutgers will be able to see this, our listeners won't, but come on, Melissa, show us your spirit fingers.

Melissa Murray:

You won't tell anybody.

Kate Shaw:

We should say also teenage jeopardy star, right? So, like that we have to pull that into the story, but go on, Melissa, we need to hear more.

Melissa Murray:

The two are unrelated because I was forced to quit the cheerleading squad for lack of commitment, because I went to do an Odyssey of the Mind Tournament. That ended my career as a high school cheerleader. But in any event, this particular high school cheerleader, BL, was having a very bad day because she tried out and did not make the varsity cheer squad. And she expressed her frustration on social media sending to 250 of her closest friends a message that included an image of her and another friend with their middle fingers raised along with a text expressing a similar sentiment. She said that she wanted to F school, F softball, F cheer, F everything. And when she was dismissed from the cheerleading squad, the third circuit said that the dismissal violated her First Amendment rights. And who hasn't wanted to just say F everything at some point. So, I feel her, and I'm going to be watching that case.

Leah Litman:

As all current and former cheerleaders and First Amendment aficionados will be. There were also a number of additional significant grants. There's a case about eligibility for re-sentencing under the First Step Act. Terry, there's a case about Alaska Native Corporations eligibility for federal COVID relief. There's a case about whether a TPS temporary protected status recipients are eligible for LPR lawful permanent resident status. There is a CIRCLA cleanup case involving Guam and a case about the Encore Criminal Act sentencing and air review.

Kate Shaw:

This is your cheerleading.

Leah Litman:

Exactly, I am the ACCA cheer squad. And this particular set of issues is about the scope of review for plain air for so-called re-half errors. So, as we said, there were 14 grants. That would mean there are 28 attorneys in these cases, one for the petitioner, one for the respondent. But it's actually 33, since some of the cases had multiple parties. So, let's play a fun little game called guess how many women were counsel of record in these cases? So, 14 attorneys had their cases granted, how many women were among the counsels of record?

Kate Shaw:

Surely, seven, right?

Leah Litman:

Yeah, right. Gender parity. We have achieved parity. No, that would be two, two women out of the 14 counsels of record that were granted. So, let's play a similar game for the counsels of record who were respondents. So here, there were actually 19 attorneys had their cases granted, when they argued against certiorari, how many women do we think are here?

Melissa Murray:

I'm going to go with at least nine.

Kim Mutcherson:

Wow, I was going to go with three. I'm being super facetious.

Leah Litman:

Kim is closer, still too high. Again, two. Technically, maybe you could say there were four since two of the women actually were respondent in two of the cases, but those were also consolidated cases. So I don't think it really counts. But if you really want to feel great about gender parody at the Supreme Court, a fun thing to keep in mind is that there were actually more men named Jeff who had their cases denied than women who had their cases granted. Welcome to 2021 ladies at the Supreme Court.

Kate Shaw:

Paul's out [inaudible 00:09:14].

Melissa Murray:

So, the change in the air. Here we go. So, when there are nine to go for many different uses at the court. Anyway the court also released the hearing list for the January sitting after we recorded our last episode and it's a light sitting with only 13 advocates appearing. How many women do you think appeared in that batch, Leah?

Leah Litman:

When there are nine, right?

Melissa Murray:

Oh, Leah, you rosy cheeked, optimist. Only three women, but that is actually better than they have done before. So, baby steps for SCOTUS. Good job. How many women do you think are arguing from the solicitor General's office.

Leah Litman:

Given how committed to gender equity this administration has been, I don't know, three, four.

Melissa Murray:

Oh my God. There were zero women arguing from the solicitor General's office, which also means that there are zero women of color arguing from the solicitor General's office. But also just generally there are no women of color in the sitting. And how many lawyers of color do you think are appearing in that sitting?

Kim Mutcherson:

I'm not going to answer because it just hurt my feelings.

Melissa Murray:

So, we think it's probably about three. Is that fair to say? So again, progress is slow, but we can definitely do better than this. Right?

Leah Litman:

Yes, okay. So Law students who are listening and this is a call to our women law students, and this is what you should be angling for because there's lots of space for women here.

Melissa Murray:

Lots of room for growth.

Kim Mutcherson:

Absolutely.

Melissa Murray:

And we want the court to have a growth mindset.

Kim Mutcherson:

Yeah. Look at it like a woman who has kids in elementary school.

Melissa Murray:

So, we've already alluded to this case once, but we did want to cover the court's decision on Tuesday evening in FDA versus American College of Obstetricians and Gynecologists. In that case, the courts stayed a lower court opinion that had enjoined the in-person requirement to obtain one of the abortion pills over to sense by the three liberals. So the Food and Drug Administration requires women obtaining the pills that is used in the medication abortion to obtain the drug in person at a medical facility, a hospital clinic or office and to sign a disclosure form when they do so. This is a different protocol then for the 20,000 or so FDA approved drugs that can be picked up over the counter or that you can order to be filled for pickup. In light of the coronavirus, the FDA had actually waived the in-person requirements on other drugs, including some controlled substances opioids. But to no one's surprise, the Trump administration decided to keep the in-person requirement on the abortion pill. So women seeking medication abortions have to go to a medical facility during the coronavirus pandemic.

Melissa Murray:

A Maryland district court enjoined this requirement finding that it unconstitutionally burdened women's access to medication abortion during the pandemic. So for example, the side effects of the pill were similar to the risks of over the counter drugs like aspirin, for example. And he also noted that you can only have a medication abortion during the first 10 weeks of pregnancy. So again this was a very contained period and justice Sotomayor, in the opinion, she dissented, highlighted that the mortality rates from COVID are much higher for African-American and Latino individuals. And these individuals are also more likely to live in intergenerational housing, thus posing the risk of infecting elderly grandparents or parents or other family members if they do leave the house in order to seek this care. And some places have also stopped offering services or have reduced availability during the pandemic. So, this is compromised, but it is already a limited access situation for getting these kinds of drugs and services?

Kate Shaw:

Yeah. So, brief procedural history and then let's talk substance. So the district court issued the injunction in July. The government initially sought a stay in August. And then in October, as the Amy Coney Barrett hearings were underway, the court did this sort of odd punt basically saying it would defer consideration of the case until the parties asked the district court to dissolve the injunction. The parties then did that. The district court denied that request. The government then filed the new state application in December, briefing was completed before Christmas and then on January 12th it issues this decision.

Kate Shaw:

And on some level, the decision might not seem that significant, particularly if the Biden administration opts to rescind this in-person requirement immediately just as the Trump FDA has done with respect to a number of other types of medication. But it clearly could have broader ramifications. So, Leah had a great piece in slate about this yesterday. Kim, I am sure has thoughts on this. So, is this a small case or does this bode something much more serious about the potential near-term future direction of our abortion jurisprudence.

Leah Litman:

I'd to hear from Kim. So, she is the editor of feminist judgments about this one first.

Kim Mutcherson:

Everybody has their eye on what's going to happen because there are a bunch of abortion cases that are potentially going to go up to the court. And I think that there's a really strong expectation that losing RVG and having her replaced with Justice Barrett, who I will never refer to you as ACB means that we're going to lose RO. And so I think that part of what we're looking at here is trying to read some tea leaves about what's coming the pike. We also had that sort of weird, I wouldn't call it weird, but Justice Roberts weighed in on this one as well. And I think there's been some thought that he would be a boat to protect RO, but it's actually not going to matter at this point.

Kim Mutcherson:

So, everything that's happening here is exactly what we would expect to happen. This country has long treated abortion as exceptional. So, there's nothing surprising about that. There's nothing surprising about in particular targeting a rule that has pernicious impacts on women of color and low income women. And it's particularly offensive in a world in which telemedicine has become the norm. All of us are seeing our doctors on screens, not in their facilities. So there's nothing shocking about it, but it continues to be appalling. And I think we're going to continue to see cases this and what we're going to end up with is a world in which we have this total patchwork if RO falls. And I'm thinking about places New Jersey, which happens to be where I live that are anticipating the fall of RO and actually passing statutes now to try to protect the right to access to abortion. So, it seems like that's the direction that states should be moving in if they actually want pregnant people in their jurisdictions to be able to terminate pregnancies.

Melissa Murray:

Other jurisdictions are actually doing the reverse and putting trigger laws in place that would automatically foreclose the prospect of state level abortion accessibility if RO does fall. So, I mean, there's a real divide here and what will likely happen is you'll probably have the kind of parentheses

across the country where abortion is available across the Northeast and then on the West Coast and then there's broad swath in the middle and the South where it's not.

Kim Mutcherson:

That's right. And it's interesting to kind of think about what the world will look if it comes to that. So, you think about places where people don't have access to abortion services, and I'm just thinking about women on waves, right? I mean, people who are literally finding ways to get access to abortion, to people in countries where you can't have access to it. And what might that look in the United States, right? I mean, are we going to see people, and you can already do this, you can order pills to self abort in your home, are we going to see women arrested? Are we going to see women being convicted? Are we going to see women spending time in prison? So, there's a little fear of the dystopia that potentially comes once we're in a world where there are very few places where you can legally access abortion in the United States.

Leah Litman:

And so the court provided no explanation for why it allowed the FDA to enforce this requirements. So, we're left guessing a little bit about why it did so. It's very possible that a majority of the conservative justices adopted a very watered down version of the undue burden standard because of course, to uphold this requirement, which impedes access to a very safe medication balance against the risk of a pandemic, seems like, well, if the government can enforce that they can probably enforce a bunch of other restrictions as well. But the only justice that explained their vote to allow the FDA to enforce this requirement is, as Kim mentioned, the chief justice who wrote separately to say he was relying on his concurrence from South Bay Pentecostal, which said that courts owe deference to politically accountable entities on how they handle matters of public health. But it's just as Sotomayor noted in her dissent, there wasn't actually a public health determination here.

Leah Litman:

There's no reasoned decision by any agency head or expert explaining why medication abortion should be, or was treated differently than any other drugs for which the FDA had weighed the in-person requirement. And also the chief justice is not exactly a big fan of deference to federal administrative officials in particular. He's questioned that in other areas. And so the fact that no other justice joined that opinion coupled with the fact that this principle doesn't truly seem generally applicable to federal administrative officials leads me to think that perhaps this is a sign of a water down undue burden standard. And you contrast this decision with the court's previous decision in Roman Catholic Diocese, in which the court said that it would no longer defer to public health officials when constitutional rights were allegedly burdened. And I just think this is a very ominous sign of things to come.

Kim Mutcherson:

Absolutely. I mean, the other thing that Sotomayor said that I thought was really important just in terms of thinking about how an undue burden test might play out is she pointed out that if you make it harder for people to access abortion early in their pregnancies, then you're pushing it to later in the pregnancy, which means surgical abortion, which means greater physical risk and also more expense in order for people to be able to do that. So if you were doing a real undue burden analysis and undue burden is garbage anyway, but if you were really doing an undue burden analysis, one would think that that kind of thing would clearly be a problem. And yet I'm a little worried that that's not the direction that we're going in.

Melissa Murray:

So, I kind of took the chief justice's reference to South Bay Pentecostal sort of trying to make that happen again. I mean, he'd sort of been smacked down with that in Roman Catholic Diocese. And I wonder if that was an opportunity to just sort of "This is still out here, we need to sort of think about this." And again maybe this says more about the dynamics among the justices with the introduction of Amy Coney Barrett and the sort of diminution of the chief's power, but I thought it was an interesting moment and a sort of tell, I guess from the chief justice. Can we also say that we told everyone this would happen?

Leah Litman:

I'm fine saying that. I mean, I realized this is kind of a rinse and repeat theme on this podcast, but-

Melissa Murray:

Some political developments may change the dynamics of this. So, the Biden administration will come in a few days. And it could be the case that the Biden administration will rescind this rule. But again, I think the point remains that this case still signals that the court's composition is really different with regard to abortion. I mean, if it was vaguely hostile before, it's much more hostile now, and this perhaps is an invitation to other states, red states, for example, to bring cases to the court that will give them an opportunity to say a little bit more about how hostile they might be. Kim, you noted that Justice Sotomayor filed a dissent here and she was joined by Justice Kagan.

Melissa Murray:

And this was interesting to me because I think this is her first Reaper rights dissent. Maybe even her first Reaper rights writing, she usually joins justice Ginsburg's opinions on these things, but she's never actually written one of her own. And this one, she sort of seemed to be calling the spirit of justice Ginsburg in some really interesting ways. And she specifically concluded the opinion by citing justice Ginsburg's dissent in Gonzalez versus Carhart, "Women's ability to realize their full potential is intimately connected to their ability to control their reproductive lives." Do you think that she's sort of assuming the mantle, like the baton has been passed and she's now going to play that role on the court?

Kim Mutcherson:

I hope so. I mean, there's something very powerful about the Ginsburg dissents, although unfortunately, she had to write into sense so much. But I think we need that voice. I mean, we need somebody who sort of reminds us that these things are a little cyclical. And if Biden ends up packing the court, maybe the cycle will turn really quickly.

Kate Shaw:

Tiny little question about the Sotomayor dissent. Well, I guess a couple questions. One, the very last line of the dissent says, "For now, I respectfully dissent." Was she just saying, "I have a lot more to say on this topic?" And this is a pretty short writing, it was an incredible dissent and she really does bring this intersectional lens to it regicides Ginsburg, but she talks much more about race and income than I think that this Ginsburg version of the same dissent with no disrespect to justice Ginsburg intended, would have done. It's a great piece, but I think I just couldn't tell, for now, what is she foreshadowing?

Melissa Murray:

Just reminds me of like when you've done something wrong and your mom calls you and she hasn't come home from work yet. And she's like, "What are you doing?" You're like, "I just set fire to the kitchen." "For now, you're fine. But when I get home," It was like valid, it's coming, release the crackin. Do you think that's what she's doing.

Kate Shaw:

These sort of cracking is.

Kim Mutcherson:

Yeah.

Leah Litman:

Here is her dissent.

Kate Shaw:

Right. Yeah, unfortunately, that's the limit right now if that's all she can give us, but fierce dissent and clear roadmaps of sort of a better way. And she's writing for the future obviously.

Kim Mutcherson:

Exactly. "For now, this is respectful, but just wait."

Kate Shaw:

But Breyer, as you noted, Leah, Briar sort of conspicuously doesn't join this Sotomayor dissent, Kagan does, what is that about?

Leah Litman:

He noted he would deny the application. So, he did dissent from the court's determination. In my mind, I wondered is he too busy preparing his retirement announcement to read through the very methodical Sotomayor dissent in time, or is the fact that he didn't join a sign that maybe he should retire? Unclear, I don't know. Maybe it's one of these things, maybe it's not. And those were just some thoughts that I had.

Kate Shaw:

Okay. Well, I guess we will sort of see if any of that is borne out in the coming weeks or months.

Melisas Murray:

I'm here for this big unrespectful dissent energy though.

Kim Mutcherson:

Me too.

Melissa Murray:

What is that going to look like?

Leah Litman:

Yeah. Like, "Let it fly, Sonya." Right, here for it.

Melissa Murray:

It's like when you have a job where you can't get fired. Like this one.

Kim Mutcherson:

Whatever you want to, absolutely.

Kate Shaw:

When she releases the crack in, Kim, will you come back and talk to us.

Kim Mutcherson:

Absolutely.

Kate Shaw:

Awesome. Okay, so maybe let's shift gears and talk about the sort of rest of our agenda. So one, the court released an opinion yesterday, and that's Thursday in city of Chicago vs Fulton, which is a case we previewed on an earlier episode. Justice Alito wrote the opinion for unanimous court of the issue just as a reminder, was whether the filing of a bankruptcy petition triggers a creditor's obligation to return real property like a car in this case to the debtor. So, the specific property in this case arose from the city of Chicago's policy of seizing cars for unpaid traffic tickets or fines. They used to do it by sticking this boot on your car, which they called booting. But here, it seems they actually take the car to a pound.

Kate Shaw:

I think the practice has changed since I left Chicago, but the Chicago authorities are incredibly active at doing this, at seizing cars when tickets pile up and it's not even that many tickets. So, the consequences are really serious for people who are filing bankruptcy and trying to get on back on their feet financially, if they don't have access to vehicles. But here the court held that the specific provision that was relied on by the debtor in this case and by the court below did not require the city to return the property.

Kate Shaw:

So, it was unanimous, but in a separate concurrence, Justice Sotomayor channeling sort of similar energy, I would say to her ACOG dissent, though she was concurring here, she emphasized that the court was not deciding whether other provisions of the bankruptcy code might obligate the city to return the property. She highlighted the disastrous effects that refusing to return property cars can have on a debtor, like I said, particularly people who need a car to get to work and she encouraged the advisory committee on rules of bankruptcy procedure and Congress to consider how to address this issue. So, she went along with a bottom line disposition but basically said that that does not cut off all potential recourse for individuals the debtor in this case.

Melissa Murray:

That is a very Ginsburg and move too to sort of issue an invitation to an actor outside of the courts to do something. I'm liking this energy.

Kate Shaw:

Yeah, a very, Ledbetter dissent.

Leah Litman:

Yeah.

Kate Shaw:

She's bringing a lot of RBG energy this week, I agree.

Kim Mutcherson:

She's RBG plus them.

Leah Litman:

Yes.

Kim Mutcherson:

I mean, it's an intersectional RBG.

Kate Shaw:

Totally.

Kim Mutcherson:

And that I think is such a wonderful thing to have on the court.

Kate Shaw:

Yeah.

Melissa Murray:

So, the court in other news also permitted the execution of two additional federal prisoners. Again, there has been a spate of federal executions during the waning days of this administration. These two executions however one involved Lisa Montgomery, who is the first woman executed by the federal government since 1953, two federal appeals courts, the Eighth Circuit and the DC Circuit had issue stays of execution, but the court lifted those states, again, without explanation and over dissents from justices, Briar, Kagan and Sotomayor.

Leah Litman:

And there were also challenges to the execution protocol. As that protocol is applied to prisoners who have, or had COVID. So, late Thursday evening, the court permitted that the execution of Corey Johnson who had COVID and sought to postpone the execution until he could recover. He also argued that his intellectual disability rendered him ineligible for the death penalty. The court denied his stay request over dissents by three on the COVID claim, Justice Sotomayor and Justice Kagan on his other claim, and he was executed Thursday evening. He is the 12th federal prisoner executed over the last six months in this sprint to execute federal prisoners in the last days of the Trump administration, before someone

who has committed to not longer carrying out the federal death penalty assumes the office, there was another execution scheduled for Friday evening. And of course we're recording the podcast on Friday.

Melissa Murray:

So, now let's turn to recapping the upcoming week in sittings at the court, and it's a light week. So, first let me just ask, do we know why it's such a light week in terms of cases?

Kate Shaw:

I think the court just really trying to stay under the radar because either they don't conversations about court reform or court packing. And so they're like, "Let's just not decide much and no one will notice that we're here."

Melissa Murray:

Well, I mean, this week's grants will certainly rectify that. I mean, there will be busier sittings later on. But it seems odd that it wasn't more evenly distributed. This one seems really light. And if you think about the fact that the chief justice may be crossing the street again to present-

Kate Shaw:

Maybe they knew they needed to leave the 20th open just in case another impeachment trial was starting. They had a premonition.

Melissa Murray:

They're not in-person submissions at the court until after the inauguration because of concerns about public safety. I mean, maybe that's part of it too. No one's there, but it just seems odd in any event. We wanted to-

Leah Litman:

I think it's a combination of they had to push some cases from the previous term to this term in light of the delayed and postponed sittings and then also now is when they would be hearing cases that were kind of granted last spring when they were probably unsure how this was all going to play out. So, they might also have just delayed or not granted as many when faced with that uncertainty.

Melissa Murray:

We had talked about this before the election. We thought the more limited grants early on were to sort of make sure that there was enough room to handle election related disputes as they came up. So, maybe this is the residue of that. In any event, we wanted to talk about one case that was argued this past week that we didn't preview, but then we'll talk about a case that's going to be argued this week. So, Leah, do you want to kick us off with the case from last week?

Leah Litman:

Yes. The case that was argued this past week, that we didn't preview is AMG Capital Management versus FTC. And this is a major remedies case with significant implications for what the federal trade commission has the power to do in cases of unfair or deceptive practices. And the question in the case is whether section 13,(B) of the Federal Trade Commission Act, which authorizes the FTC to pursue

injunctions also authorizes the FTC to seek monetary relief such as restitution, and whether there are limits or requirements for such relief.

Kate Shaw:

Okay. So, this case has us a little bit on this stare decisis for suckers watch. And that's because of two cases Mitchell vs Robert Demario Jewelry from 1960 and Porter versus Porter Holding Company from 1946. So in Porter, the court interpreted a section of the emergency price control act of 1942 that provided for issuance of a permanent or temporary injunction, restraining order or other order. And the court there indicated that an order for recovery and restitution of illegal rents may be considered as an equitable adjunct to an injunction decree. It also emphasized the essential connection between restitution and injunction. And nothing's more clearly part of the subject matter of a suit for an injunction then the recovery of that, which has been illegally acquired and which has given rise to the necessity for injunctive relief. That language is pretty clear.

Kate Shaw:

Second, in Mitchell vs Robert Demario Jewelry, the court reviewed a suit by the secretary of labor to enjoin violations of the Fair Labor Standards Act forbidding a retaliatory firing or discrimination against employees who complained under the FLSA. That act confers on district courts the power to restrain violations of the relevant section and the court there rejected the lower court's conclusion that it lacked the power to award lost wages. So, these cases had already been decided and had been on the books for decades when section 13(B) was enacted in 1973. And we usually presume that when Congress legislates, it does that against the backdrop of settled law. And the settled law at the time was that a federal agencies statutory authority to seek injunctive relief included all the inherent equitable powers of the district court, including the power to order compensatory redress. So, do those cases live to fight another day, or is the court just going to sort of discard them as it has been wanting to do? Melissa, what do you think?

Melissa Murray:

So, I think there's one level in which this case is about the courts fidelity to pass decisions, but at bottom, it's actually a really big case for consumers who have been injured because of unfair or deceptive practices and want to get their money back. I mean, there's sort of the wonky part for us with Porter and Robert Demario Jewelry, but there's also the sort of basic level of just consumer redress that I think we ought to be cognizant of too.

Kate Shaw:

Totally.

Leah Litman:

And it's a remedies case, which means it's [crosstalk 00:33:27] cool.

Kate Shaw:

I think one thing that I think actually makes it automatically cool is that here at the federal government, it's one of those rare cases where the federal government isn't represented by the solicitor General's office or the FTC has independent litigating authority. So, the case was briefed and argued by lawyers in that office rather than the solicitor General's office.

Leah Litman:

But to answer the question about what we think might happen at the argument, it seems a majority of the justices doubted the FTC's power to seek restitution in these cases and were inclined to jettison the Porter Mitchell presumption, or just limit it, again, starry decisis is for suckers. Apparently, that includes statutory starry decisis, which is supposed to be especially strong.

Melissa Murray:

Except when it's not.

Leah Litman:

I don't care. Do you? But Justice Breyer seem to think that this case didn't fall within the Porter clear statement rule because he identified some legislative history indicating that the remedies provision was a result of a compromise with the business community. Justice Alito also invoked a similar legislative history that would be noted textualist justice Alito, who was the Keynote speaker at the Federalist Society. I did, however, just want to note that in the immediate aftermath of this provisions and act meant the FTC routinely sought restitution. So contemporaneously, it seemed people understood that the statute did indeed confer that power on the FTC.

Leah Litman:

But what's a snippet of legislative history in the face of established practice. Justice Kagan and justice Gorsuch or you that giving the FTC this remedial power under section 13 would render superfluous or just obviate the limit that Congress had placed on specific kinds of retrospective relief in another section, section 19. Again, not to split hairs, but I don't know if that's the right way to read that section, either given the context that provision was added to the act in response to a court decision that said the FTC lacked authority to redress violations for cease and desist orders. So, it's not necessarily just about retrospective relief in general. And then one other kind of note from the argument, it's just that justice Kavanaugh invoked his executive brand's experience to depict the FTC as kind of an agency gone wild.

Speaker 3:

I worked in the executive branch for many years. So I understand how this happens when you're in the executive branch or an independent agency, you want to do good things and prevent or punish bad things. And sometimes your statutory authority is borderline, and it could be war policy or immigration or environmental, or what have you, but with good intentions the agency pushes the envelope and stretches the statutory language to do the good or prevent the bad. The problem is this results in a transfer of power from Congress to the executive branch to decide whether to exercise this new authority. That's a particular concern, at least for me with independent agencies. So, now why isn't the answer here for the agency to seek this new authority for Congress for us to maintain the principle that separation of powers that the agency should stick to the authority in the text and not go beyond that.

Leah Litman:

I thought this was interesting because we're usually left speculating about how the justices prior work experience or experience in government informs their perspective on cases and here he was making it quite explicit. I also just thought it was quite ridiculous.

Melissa Murray:

Not that you're holding back.

Leah Litman:

Let me in coach. So again, that's one important case that was heard last week. There's another case being heard in the upcoming week. And this one is also, I think kind of a sleeper hit. It doesn't look it's going to be super interesting on its face because it's about jurisdiction, but when it takes off, it's cardigan, it's actually amazing and awesome because it's a major climate case and it involves an amicus brief from none other than Strict Scrutiny fan Senator Sheldon Whitehouse. And he draws attention to the anti-climate strategy that's behind this nominally dry and wonky issue. And this case he argues could be a harbinger of how the courts will move forward in addressing governmental responses to climate change. So it is vitally important. So the case is called BPPLC versus mayor and city council of Baltimore.

Leah Litman:

Also, I just wanted to note for those of you not in the Rutgers live audience, when Melissa was saying when you throw off the guardian, she revealed her phenomenal woman shirt which is also the shirt that Kim is wearing.

Kim Mutcherson:

I was wearing it first.

Leah Litman:

That's true, Kim.

Melissa Murray:

I did change so I could twin with you. Why are you got to call someone out like that?

Melissa Murray:

Where is the sisterhood?

Kate Shaw:

All right. So, back to BP versus mayor and city council of Baltimore. The mention of Senator Whitehouse, both here and earlier in the show is making me think that he may need to get an invitation to sort of join the Cassandra Club as an honorary member. I don't know the fleet we've actually explicitly invited him, but I think he deserves it. A lot of what this case presents was previewed in our conversation with him, but sort of the specific issue here is a federal statute 28 USC Section 1447(D) which generally precludes appellate review of orders remanding removed cases to state court. So let's explain that a little bit. So, when a plaintiff files a case in state court, the defendant has the option to remove the case to a federal court if the case could have been filed in federal court initially.

Kate Shaw:

So, what section 1447(D) is about is what happens on appeal when a federal district court finds that a case was wrongfully removed to federal court. So, it should be sent back to state court where it was initially filed, but the defendant still wants to be in federal court. So, the provision basically says those remand orders generally can't be appealed. So you're out of luck. You're stuck in state court for the most part, but it does have a couple of exceptions. It expressly provides that an order remanding a case

removed pursuant to the federal officer removal statute, which is 28 USC Section 1442, or the Civil Rights Removal Statute, 28 USC Section 1443 shall be reviewable by appeal or otherwise.

Leah Litman:

The question here is whether section 1447(D) permits a court of appeals to review any issue, and specifically other issues encompassed in a district courts order remanding removed case to state court, where the removing defendant premise removal impart on the federal officer removal statute 1442, or the civil rights removal statute 1443?

Melissa Murray:

That brings us to this case. The city here filed suit against BP and other companies seeking damages for harms from climate change, which they say are attributable to the company's actions. There are actually 19 cases pending in federal court. I'll present with you question, whether claims similar to respondents are removable from state court. So, the city filed suit in state court based on allegedly the Petitioner's Decades Long campaigns to promote fossil fuel products while concealing their impacts. The defendants have removed the case to federal court among other grounds.

Melissa Murray:

Petitioner's contended that removal was warranted under the federal officer removal statute because respondent's complaint encompassed petitioner's exploration for and production of fossil fuels at the direction of federal officers and petitioners also asserted that respondent's claims necessarily and exclusively arise under federal common law, which would mean that the district court had jurisdiction under a federal question jurisdiction. The district court remanded the case to state court, essentially saying that the case was not removable on any ground they asserted. And the oil companies appealed. The court of appeals affirmed saying that the only ground for removal that it could review on appeal was a federal officer removal ground not be federal question ground about whether the claims arise under federal common law.

Leah Litman:

Except the heart of this dispute is the meaning of the word order for purposes of section 1447, the relevant clause in 1447(D) states that an order remanding a case to state court that was removed pursuant to the federal officer or civil rights removal statute is reviewable by appeal or otherwise. Petitioners are also making a policy argument though that plenary review of remand orders in such cases advanced Congress's goals, because cases in which the defendant has a colorable, but ultimately unsuccessful argument for federal officer or civil rights removal may implicate similar federal interests, where the defendant has one or more meritorious grounds for removal.

Kate Shaw:

All right. So, we just wanted to briefly highlight an amicus brief that Senator Sheldon Whiteboard Whitehouse filed in this case, it does not disappoint. It argues as follows, the fossil fuel petitioners seek to broaden what may be reviewed on remand beyond what Congress has specifically allowed under 28 USC Section 1447(D). We see this gambit joined by fossil fuel connected Amiki as part of a continuing effort to block progress on addressing climate change. The fossil fuel industry has tried to close every door, local, state, federal, legal, legislative, administrative to a solution to the climate crisis. Here, they invite this court to help them, and it goes on from there. But it's good, it's righteous. And I love that despite having been singled out for personal attack by Justice Alito in his Federalist Society speech, he's

not being cowed in the sort of the language in his amicus briefs. He's like, "If anything," I think he's dialing it up a little bit.

Leah Litman:

He's well past for now, he's fully on releasing the kraken.

Kate Shaw:

Yeah.

Melissa Murray:

All right. That's the upcoming sitting. Now, it's time for us to dig into a little court culture and there is in a lot going on much of it related to what's been going on outside of the court, just across the street at the Capitol, where on January 6th, as many of we had an attempted insurrection to prevent Congress from certifying the results of the duly conducted election of 2020. So last week, we all know that Twitter, Facebook, Instagram, Twitch, Pinterest, and other social media platforms suspended @realdonaldtrump. I will note that former president Barack Obama has a presence on all of these platforms.

Kate Shaw:

And president elect Biden is building his official account. He needs more followers, I think, but he's getting there.

Kim Mutcherson:

A great week for people to understand what the First Amendment actually says.

Kate Shaw:

Yeah, no, there were all these ... Oh not, there was a lot of really pretty terrible legal commentary out there. The one thing is, I think, without even meaning to some of the instinct that underlies the formally, clearly incorrect claim that violates the First Amendment for Twitter to kick them off the platform, there is a kernel of something kind of correct or insightful there, which is that we don't necessarily want. The people who happened to have stumbled across this sort of development of this technology to sort of be the arbiters of debate. I think it's possible to hold the view, both that it was completely right to kick Trump off these platforms, but also have healthy degree of skepticism about the governance schemes at places Twitter and sort of a desire to have some kind of democratic input in the kind of rules of the road and rules of engagement. But yeah, most of the legal commentary following the suspension and then actual termination was lacking.

Melissa Murray:

It also, I think raises a question about how these particular platforms function. They are private entities, but to some degree they have expanded to such a degree that they're almost functioning as public utilities. And this may just be a case where technology has outpaced regulation and there's a gap. And I think we saw some evidence of that gap being addressed last summer when they had all of those hearings like when Jack Dorsey appeared before Congress with that huge beard that looked he was about to cure the SARS hemophiliac son after the hearing. We're on the road to thinking about that, but

we're not there yet. And I think part of the first amendment questions are wrapped in that our public understanding of these platforms is that they're very public. And in fact, they're still private entities.

Kim Mutcherson:

There's something interesting about thinking about how issues this can create these strange bedfellows, or this incredible disconnect. I mean, there's something amazing about listening to people who in a normal set of circumstances are super pro-business and super pro-private industry who are saying, well, let's nationalize Twitter, and let's nationalize Facebook, which is sort of antithetical to what they're talking about in most other realms. And what would that even look to sort of take over these private entities in order to be able to control who they control. So, we'll see what happens.

Leah Litman:

And are we even seeing a political realignment on the state action doctrine itself, just a few terms ago, Justice Kavanaugh described the state action doctrine in Manhattan community access as kind of this important principle of ensuring limited government and an important principle of conservatism. And now you have Josh Hawley and other Republicans attacking the state action doctrine and saying, "No, actually the First Amendment should apply to these platforms that have the kind of power Twitter," and other social media company too.

Kate Shaw:

Yeah. I think we could see a realignment and I think it'll be interesting to observe. So, other, obviously big news from this week, the president was impeached again.

Melissa Murray:

I just feel like ground hog year, we were just doing this time last year.

Kate Shaw:

So, my Cardozo colleague Bec Ingber had a very funny tweet about just having put away last season's impeach materials. And I was embarrassed to admit that, but I will now admit it, my home office, "Papers sometimes linger for a while." So, I literally had pitched into the recycling a lot of papers from the last impeachment, maybe two weeks earlier.

Leah Litman:

Too soon.

Kate Shaw:

Yeah, I know. And it was some of the specific Ukraine stuff, obviously I didn't need, but some of the ... I had print outs of excerpts from relevant Federalist papers and constitutional convention debates. And I really would all that back, but this is a simple impeachment argument, I think actually, and certainly there's isn't a time for it.

Leah Litman:

Although, there are some complications now given the tightening.

Kate Shaw:

Totally. Yeah, people are, I'm sure aware of this, but just in case anybody has been under a rock for the last week, the president was impeached with a little bit more GOP support in the house than the last impeachment. So, last time he had no Republican votes for impeachment, this time, 10 dead end, and some from very, very red districts. So, I thought the number 10 was better than zero, dishearteningly low, still in light of the conduct at issue. But that is done. And then the question is what is going to happen next? So, obviously, when the house holds the power of impeachment, the Senate has the power to try impeachments. There's not a lot of time left until president Trump is former president Trump. And well, really, Mitch McConnell has shown no interest in pulling the Senate back into session soon enough to actually begin a trial prior to January 20th.

Kate Shaw:

So, it seems really clear that the trial will start either on the afternoon of inauguration or the next day. I suppose it could be a little bit later than that, but it seems it's going to be at the 20th or the 21st. And there are some questions that have been percolating about whether there are any constitutional problems with holding impeachment after Trump leaves office, probably the highest profile person to not only raise doubts, but suggest that there is no way constitutionally to do this. His former appeals court judge Mike Ludwig who also, as we said in our last episode, had this kind of star turn in the letter that Mike Pence wrote the morning of the counting of the votes on January 6th. And then later in the day, of course, the storming of the Capitol. So, Mike, correctly, we think advised Pence that he had no authority to throw out any particular slate of electoral votes turned around and pendant op-eds and you couldn't try the president after January 20th, which just seems wrong based on the constitution text on the history of our impeachment practice.

Kate Shaw:

We have impeached former officials, although not former presidents and just as a matter of sort of pragmatic, workable, constitutional structure, it would be deeply problematic to allow a president to evade responsibility in the form of impeachment, just because the misconduct happened late enough in his term. So, I don't think there's a huge ... And it sounds Mitch McConnell actually is not really raising any questions about the jurisdiction of his body to hold this trial. So, I think it's going to happen, but there is a question I think about whether Trump and his team will try to get a court to weigh in on this question. I think the answer is that they shouldn't, that impeachment procedures present non justiciable political questions. But that might not stop him from trying to get a court to hold otherwise, in this case.

Melissa Murray:

Does this mean that Chief Justice, John Roberts is going to spend his 66th birthday once again in the Senate chamber drinking cold milk with the senators and celebrating hi big day?

Leah Litman:

He got a little salty last time. So, will that happen again? I don't know. I mean, they're actually questions about who should be presiding over a trial that is going to occur after the president leaves office? Specifically, will it be the chief justice or will it be vice-president Harris? I think the better understanding is that it should be the chief justice, but Melissa is intrigued.

Melissa Murray:

And can you imagine all of the amazing eyebrow action?

Leah Litman:

Yeah. When she gives the face, she gave to Mike Pence, to all of the people.

Kate Shaw:

To Rudy Giuliani.

Leah Litman:

Right, to Rudy Giuliani, John Eastman, Josh Hawley, when they are using this First Amendment protected activities, so on and so forth. Yeah, no.

Melissa Murray:

For now, was a face. That's what it'd be like.

Kate Shaw:

I hadn't thought about this. I've been thinking it should be Roberts, but in light of this conversation, I think I'm shifting my position, and I really want Harris preside over this trial.

Leah Litman:

I'm not sure that our preference to see the face that has no chill is really a valid modality of constitutional interpretation, but who knows?

Kate Shaw:

No, it's really not, it should be Roberts. But I'm not sure it much matters. The trial needs to happen. And I think that Roberts could basically decide to do it without conceding that the constitution requires, that he could just do it if the Senate asks him to. And I think that despite sort of the public's need to see the faces, I think Harris probably has other things that she should spend her first days in the white house attending to. So, it really isn't the highest and best use of her first couple of weeks in office, I'd say.

Melissa Murray:

Is this his first time going into public and performing chief justice duties? I mean, they've been on Zoom or the telephone. I mean, he's just like, "You brought me back here in the middle of the pandemic for this?"

Kate Shaw:

Well, he swore Barrett in at court.

Melissa Murray:

Yes, there was that.

Kate Shaw:

Yeah.

Melissa Murray:

I mean-

Leah Litman:
And that was less public than this would be.

Melissa Murray:
Yeah.

Kate Shaw:
Definitely.

Leah Litman:
I think we're going to get a little bit of ... He's not going to be super happy.

Kate Shaw:
No.

Leah Litman:
I think we should send him some swag.

Melissa Murray:
I think we should too. A hat that says, "For now."

Melissa Murray:
That's our next line of merchandise. The SF inspired line, "For now, I respectfully, would you, I would." Better than a hat that says, "Daddy." Right?

Melissa Murray:
Accurate.

Leah Litman:
There are also now calls to investigate and possibly censure congressional representatives and senators who were involved in the attack on the Capitol in January 6th, specifically by participating in the rally that proceeded it and encouraging the mob. And they voted to object to the election results. And I think some of the reasons why an investigation is really important is some of the things that have come out in the aftermath of the event. There are reports that representative, Ayana Presley's panic buttons had been removed from the office. There are statements by some of the people that have been indicted that they were let in the door or encouraged by Capitol police officers. There are videos and photos of some of the people who stormed the Capitol with maps and plans. And so it seems there was coordination.

Leah Litman:
And all of that just requires an investigation to figure out how exactly this was planned, funded, organized, I think in order to prevent it from happening again. One of the more heartbreaking things that I saw about this was actually a statement by the speaker of the house, Nancy Pelosi who said about

her staff who hunkered down in their office that they knew to turn off the lights, barricade the door and hide under the table because they grew up doing those drills in school. I mean, it's just appalling to me that we are having to train and teach the next generation to survive violent mobs, because this is now a realistic possibility. Oh yeah, that was crushing too.

Kim Mutcherson:

Yeah. I think part of the response also ... I have teenagers, so that's why I'm on TikTok. So, don't]. I know you all have talked about TikTok too. I'm looking forward to when I can see you guys on TikTok. But there was a lot of talk on TikTok with young people also saying, "This is how you do it when somebody is," which is just an awful thing to think about. But also folks who were saying, "Maybe this will be the thing, that makes people in Congress really start to think about what do we have to do in order to make our country less dangerous." And we've seen that all the time. People don't care about things until they get scared. So, might be an interesting session coming up.

Melissa Murray:

So, we are winding down to the fading days of this administration, and I suspect that there's going to be some big developments going forward. We need to hear more from the Biden administration about who their picks to lead the SGs office are. So we've already gotten the AG pick and we talked about that in the last episode, but we still haven't heard who's going to be the SG or the deputy SG. And Leah, you had speculated earlier that you thought Georgia might have some bearing on who that might be and what the calculus would be.

Leah Litman:

I mean, it's possible that before the Georgia Senate races meant that Democrats could confirm someone by simply democratic votes could alter the calculus about who they could have as a solicitor general. But the position that I actually think we need to learn something about perhaps before the nominee for the SG is the principal deputy SG who given how the Federal Vacancies Reform Act works, will actually be the acting solicitor general at the outset of the administration until there is a Senate confirmed solicitor general. And I assume they don't want the holdover from the Trump administration, Jeff Wall, to be the acting SG for the first few months of the Biden administration. So, we kind of need someone now, and I'm very curious who these nominees will be.

Kate Shaw:

We got to know in the next couple of days, right? You have to imagine this weekend, we'll probably be busy on the personnel announcement front. It could be busy on the pardon front too, right? If the president wants to do more pardons, if he's going to pardon members of his family, which it seems he is clearly going to do, if he wants to pardon people Steve Bannon. And then of course the big question, is he going to pardon himself? I think he is. What do you guys think.

Melissa Murray:

That will be decided on January 20th, at 8:00 in the morning. Maximum time for climbing?

Kate Shaw:

What do you think he's going to do?

Melissa Murray:

Pardon himself? I mean, honestly, he really should have a lawyer with him deciding this because if he does self pardon that really does throw the ball back to the Biden administration to have a prosecution in order to test whether or not a self pardon is permissible. And do you want to risk that? I mean, Biden has talked about, "Let's heal," whatever. It's a big risk. So, I wonder if he will do that. Again, the family pardons are ... I think those are likely to come down probably even earlier, query whether J. Ivanka, i.e., Jared and Ivanka need pardon for forcing secret service agents to use the bathroom at the Obama's house. Is that a crime?

Leah Litman:

As we said on Bridgegate, it's petty. Is it criminally petty? I'm not sure.

Kate Shaw:

We should say, in an uncharacteristic defensive, Jared and Ivanka, the Obama's after permitting access for a while eventually after a very unfortunate incident also kicked the secret service out of their bathrooms, because-

Melissa Murray:

[crosstalk 00:59:08] Yeah, Michelle was like, "I said you could use it for now." Like, "Get yourself a bathroom, for now."

Kim Mutcherson:

"I can take away this privilege at any point."

Melissa Murray:

[crosstalk 00:59:20] That is probably all we have time for, for now. Yeah, you see what I did there. Thank you to our producer, Melody Rowell, thank you to Eddie Cooper for making our music. Thanks to our wonderful hosts at Rutgers Law and our terrific guests and co-host Dean Kim Mutcherson. Thank you also to Alianza for co-sponsoring this event and Rutgers law student and Strict Scrutiny listener, Tina Taboada for being the impetus for the show. We also wanted to give a special Strict Scrutiny shout out to Megan Stevens, the Executive Director and general counsel for the Women's Legal Education and Action Fund, who is leaving the organization and moving on to her next adventure.

Kate Shaw:

And one more quick shout out, which is a friend of the show and excellent lawyer and humane, Ruthanne Deutsch. She's making her SCOTUS debut in Prometheus Radio next week. We previewed that fascinating case in our last episode. But I totally missed that she would be arguing the case and making her debut. So, we will listen with interest next week or then.

Melissa Murray:

And a special heads up to those of you who are taking comm law or teaching comm law in this upcoming spring semester. We are releasing the kraken as of Monday. Our spinoff podcast, Irrational Basis Review, will be available to help you get a leg up on all of those important first year, second year, third year of comm law topics like standing, Marbury versus Madison Heller, it's all there. So, please check that out and we hope you'll find it as useful as we found it for preparing for class, so check it out.