Speaker 1:

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

Speaker 2:

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

Leah Litman:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We're your hosts, I'm Leah Litman.

Melissa Murray:

And I'm Melissa Murray.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

And today we've got some news, including a very big opinion. We have some brief notes on arguments from this past week and some previews into next week's sitting.

Kate Shaw:

So starting with breaking news. To flag the hearing list for the sitting, which is something that we didn't flag in our last episode because it came out after we recorded our episode with the Appellate Project, there are 30 advocates arguing in total and seven are women. So still abysmally small numbers, but actually slowly ...

Melissa Murray:

Getting better.

Kate Shaw:

... Slow but steady improvement over the course of the last couple of sittings.

Melissa Murray:

I think we have to give cheers for that.

Leah Litman:

I was about to say, a big part of the improvement is the fact that we now have an acting solicitor general who is a woman, and hopefully we will have a permanent solicitor general who is a woman very soon as well.

Kate Shaw:

Perhaps that same woman.

Leah Litman:

Perhaps the same person, yes, hint, hint, wink, wink, nudge, nudge.

Melissa Murray:

Slow but steady progress. Also in breaking news, the Supreme Court released three opinions this week, in Carl v. Saul, AMG Capital Management v. FTC, and Jones v. Mississippi. Carr v. Saul was written by Justice Sotomayor, and it held that litigants could raise challenges to the constitutionality of the appointments process for Social Security Administration administrative law judges, even if those concerns had not been raised before the agency itself. The opinion was unanimous, though different justices joined different parts of the opinion giving different reasons for why there was not an exhaustion requirement here.

Kate Shaw:

The second opinion we got was in AMG Capital Management v. FTC, written by Justice Breyer. So that opinion held that the Federal Trade Commission doesn't have the authority to seek restitution and other forms of equitable relief under section 13B of the FTC Act. This decision was also unanimous. We talked about this case and this issue previously, and I think this holding will pretty clearly and pretty dramatically limit the FTC's ability to remedy privacy and other kinds of consumer rights violations.

Leah Litman:

Then there was Jones v. Mississippi. This is the case about juvenile sentences for life without parole. By way of background, in Miller v. Alabama the court had invalidated Alabama's sentencing scheme that imposed mandatory terms of life without parole on juveniles who were convicted of homicide offenses. And the court explained that life without parole was appropriate only for the rarest of juvenile offenders, given their transient immaturity. Then, equally importantly, Montgomery v. Louisiana held that the rule in Miller was retroactive and applied to cases that had already become final because the rule was substantive in that it prohibited the imposition of life without parole on juveniles who were not permanently incorrigible.

Leah Litman:

And the question in this case is basically, what kind of sentencing system can states set up that would comply with Miller and Montgomery? The defendant had argued that there had to be either an explicit finding or some discussion on the sentencing record that is trained at determining whether a juvenile is permanently incorrigible. The state had argued that discretionary sentencing schemes, under which a state has the option of imposing life without parole or some other sentence, and under which sentencers were permitted to consider an offender's youth, were sufficient to remedy a Miller or Montgomery violation. And the court agreed with the state.

Melissa Murray:

So notable portions and passages of different opinions in Jones v. Mississippi. So first out of the gate let's talk about Justice Sotomayor's dissent here, where she underscored that the majority was bringing some big "stare decisis is for suckers" energy. She noted that, "This court's respect for stare decisis has sunk low. Not long ago that doctrine was recognized as a pillar of the rule of law critical to keep the

scale of justice even and steady, and not liable to waver with every new judge's opinion." Notably, she cited to the person who had written the majority opinion in Jones v. Mississippi and had offered this paean to stare decisis in an early case, Ramos, and that, of course, was Justice Kavanaugh.

Melissa Murray:

And her dissent was basically a greatest hits of Justice Kavanaugh weighing in on the importance of stare decisis, and she kind of let him have it with his own words. If you hear any squeaking in the background, that is called bichpoo squeaking.

Leah Litman:

When I read this dissent, which I was extremely here for, it called to mind her earlier statement that she was dissenting respectfully for now. And I'm always wondering whether we are past or when we will know if we're past the "for now." Because she really did not hold back in this dissent, which I think is one of the more powerful dissents that has come from the court recently.

Kate Shaw:

Yeah, I think we're definitely past respectfully for now, definitely.

Melissa Murray:

And just in case you missed the big "stare decisis is for suckers" energy in the majority opinion, Justice Thomas highlighted it in footnote 2 of his concurrence, in which he mentioned abortion, which was not an issue. Specifically he suggested that the dissent was super concerned for what he called juvenile murderers and their status as children, but could not muster the same energy for the unborn. He concluded the footnote by noting that, "It is curious how the court's view of maturity of minors ebbs and flows depending on the issue." And again, I think we are going to be seeing more and more of Justice Thomas weighing in, bringing abortion in perhaps where it's not even on the table. But again, very big "stare decisis is for suckers" energy, and reminiscent of his concurrence in Gamble and also his concurrence in Box v. Planned Parenthood.

Leah Litman:

One other thing about the Thomas concurrence specifically, obviously the majority and the dissent went back and forth on whether they were being faithful to the court's prior decisions in Miller as well as Montgomery, with both sides pointing to statements in the opinion. And Justice Thomas, even though he agreed with the majority's bottom line in that Mississippi's sentencing scheme complied with the eighth amendment, appeared to agree with the dissent that the majority's reading of Miller and Montgomery just wasn't tenable. So he said, "But in reaching this result the majority adopts a strained reading of Montgomery v. Louisiana instead of outright admitting that it's irreconcilable with the court's previous decision in Miller." And so he said he would have overruled Montgomery, and while he didn't say he would overrule Miller, his objection to Montgomery is that it's rooted in this body of eighth amendment doctrine, with which Miller is as well. So he agreed that the majority's reading of those decisions, particularly Montgomery, was super strained, but he still would have upheld Mississippi's sentencing scheme.

Leah Litman:

Another part of Justice Sotomayor's opinion that we wanted to highlight is she drew attention to who will bear the consequences of this decision. There are currently around 1,500 people in the United States who were sentenced to life without parole for crimes committed as juveniles, and this decision allows that practice to continue. And of course the United States' practice of sentencing juveniles to life without parole is really an aberration vis-a-vis other countries. And Justice Sotomayor said that by giving sentencers discretion, by saying discretionary sentencing schemes are perfectly valid, the majority's decision might actually worsen the disparities. So she noted that 70% of all youths who were sentenced to life without parole are children of color, and actually that the trend has worsened since the court's decision in Miller v. Alabama, which invalidated mandatory life without parole schemes.

Kate Shaw:

Before Miller 61% of children who were sentenced to life without parole were black children, whereas after Miller 72% of children sentenced to life without parole were black children. She also highlighted how Brett Jones and other people who have been sentenced to life without parole have been rehabilitated, have rehabilitated themselves despite the sentencers' determination that they needed to be imprisoned for life and die in prison. And she also wrote in this extremely powerful passage about how their actions to rehabilitate themselves still matter, notwithstanding what the court has said.

Melissa Murray:

All right. There's a lot of bad stuff in this opinion that we should highlight as well. So one thing to note is that Miller and really Montgomery had pushed states to change sentencing policies and procedures regarding life without parole for juveniles. So 10 years ago only 10 states banned juvenile life without parole, now at least 31 states ban the practice or have no juveniles serving life without parole sentences. As the different opinions note, Pennsylvania's resentencing, which has adopted the procedures that the court had said aren't required, has resulted in many fewer individuals being sentenced to life without parole. So this sets up the problem by which, some have referred to it as justice by geography. The sentences that people will get will really depend on the jurisdiction in which the crime occurs and in which they are sentenced. So there will be wildly disparate outcomes depending on jurisdiction.

Kate Shaw:

Right. But of course, to spin it in a potentially positive light, not the opinion but the possibilities of different paths forward or paths to relief for individuals in this category, so remember, this case is the case the court heard because Lee Malvo's case was originally presenting the same question but Virginia then changed its scheme to automatically allow juvenile defendants' sentence to life to get a parole hearing, or at least to become eligible for parole after 20 years. And so he no longer presented the same question, so Virginia and a number of other states have changed their schemes of sentencing individuals who commit their crimes as juveniles. And obviously nothing in this opinion prevents states from adopting those kinds of procedures or from banning any kind of life without parole for juveniles altogether.

Kate Shaw:

This is something that I know, Leah, you reminded everyone that we talked about, I think last summer with Josie Duffy Rice. The action is going to shift to the states in terms of how they address this issue of sentences and either eliminating or dramatically restricting the possibility of life without parole for people who commit their crimes as children. The court also very much did not overturn Miller or

Montgomery, at least explicitly and facially. It affirmed that judges have to have the opportunity to consider youth before imposing sentences. The opinion didn't change that this idea of permanent incorrigibility is the substantive constitutional standard. The eighth amendment still prohibits the imposition of life without parole on juveniles who are not found to be permanently incorrigible. So certainly it seems like as-applied challenges to particular sentences remain available under these opinions. So that, I think, maybe is some very small silver lining for advocates who are working on this issue.

Kate Shaw:

To my mind, I had a couple of tactical questions. One is, I totally agree, Leah, that Sotomayor's dissent was incredibly powerful. I wonder tactically about the decision to characterize what the majority is doing as effectively gutting, as she says, Miller and Montgomery. Because of course if you're going to continue to argue that those opinions have teeth, is there a chance that the Sotomayor language gives some cover to lower courts that want not to read in their fullest possible way Miller and Montgomery? Maybe. I do think when you are thinking about how to dissent there's the "minimize what the majority has done" strategy of dissent, which I think maybe Kagan more often does, and there's the "I'm furious and I'm going to call the majority out," and that I think, the latter, very much characterizes what Sotomayor is doing here.

Kate Shaw:

So it made me think two things. One, is there some reflection in this dissent of what else is coming down the pike in terms of what the court is going to do? Because she is just like, there's just a lot of rage in that writing that I felt certainly justified, I think, on just the facts and treatment of law in this case, standing alone but maybe reflected some other dynamics inside the court. Whether continuing to call the court out on its excesses is something that, for purposes of broader public debate about the Supreme Court and structural reform questions, is something that could have some utility. It just made me think about the decision to go as hard as she did in light of those dynamics. I don't know if you guys have any thoughts about it.

Melissa Murray:

I definitely think that she's not leaving any wiggle room. In characterizing it as the most excessive thing that the court could have done, I think her goal is to engage the public in this debate, to get the public thinking about the court exceeding its charge. And I also think it's not just about this particular case but also about June Medical Services, where the court effectively gutted whole women's health with that lone concurrence from the Chief Justice without ever saying, "And now I'm gutting whole women's health." And he didn't have to say it because all of these lower federal courts have essentially assumed that that's what's happened and have applied it in that way.

Melissa Murray:

And so I think part of it is, maybe it's not particularly strategic but I think it is very clear-eyed about what the landscape looks like. And for a six-three supermajority, they don't have to be restrained and there's no point in her trying to strategize with them, because they don't have the votes.

Leah Litman:

Yeah, which approach you pick will depend a little bit on whether you think the lower federal courts would adopt a narrower interpretation of the majority opinion. If Justice Sotomayor didn't write that

dissent, I think given the composition of particularly the court of appeals right now, that's not particularly likely. And also whether you think this court, the Supreme Court, would adopt a narrower interpretation of Jones in a subsequent case if she held back. But also, I don't think it's particularly plausible, and so then I do think she is doing a public service, because we saw the fallout last term and in previous terms from what happens when you get people like Justice Kagan or Justice Breyer concurring in the judgment in Little Sisters of the Poor v. Pennsylvania, or Our Lady of Guadalupe. You have people saying, "Well, this Supreme Court isn't so revolutionary. They're not doing any of these significant things. They are writing opinions in which Democratic appointees are joining."

Leah Litman:

Or you saw this in the wake of June Medical, where you got a lot of commentators saying, "Well, actually the Chief Justice didn't overrule whole women's health. Actually, the standard might be more protective of abortion rights." And so I just think that there is enough good reason to write dissents like this that are, as Melissa was saying, very clear-eyed about what is happening given the extent of public conversations about federal courts, the Supreme Court that are happening right now.

Melissa Murray:

Let me also say, and this is not about your remarks, Kate, but just generally, there is a sort of narrative in the way people talk about the justices and how they work with each other, where I think Justice Kagan is framed as incredibly canny and tactical and strategic and Justice Sotomayor is emotional and visceral in the way she writes. And I don't know if people mean to do it in that way, but I do think it plays into weird racial and gender stereotypes that I think we just ought to interrogate. I think for her, Justice Sotomayor, it is worth being emotional. She, I think, very much understands herself to be reflecting a particular point of view on the court that otherwise would go unrepresented. And this is a big deal for communities of color.

Melissa Murray:

As she says in the opinion, the children of color are going to be the ones who are disproportionately impacted by this. And she could strategize, but it's pointless, and instead her best shot lies in getting the public galvanized around this. And I think that is an incredibly strategic thing to have done.

Kate Shaw:

So the audience being a future court, not this court in five years but a court some time down the road, and the public broadly.

Melissa Murray:

Yes.

Kate Shaw:

I think that's probably right, those are the audiences that she's talking to.

Leah Litman:

And it's also not like she's saying these things to the exclusion of noting how the majority is making nonsense of what Montgomery said. So she's worked all through the doctrine and said, "Okay, you seize on this one line, but that literally makes no sense given our entire corpus of retroactivity jurisprudence,

which Justice Kavanaugh has this extremely confusing footnote about that just can't really explain Montgomery." And so she's doing everything she can, and I think that's the right approach here.

Kate Shaw:

One other thing I was going to note was, Roberts is in the majority in Montgomery and then of course joins the majority here, and I just wondered whether he did that in order to control the assignment so that Thomas wouldn't ... He gave it to Kavanaugh, and presumably that's a choice that I presume Thomas would have kept the opinion for himself and tried to get a majority to overrule Miller and Montgomery if he had it.

Kate Shaw:

That's interesting. Yeah, maybe. Again, I think we've talked about this before, his authority, not necessarily his symbolic authority but just his strategic authority in negotiating these things within the court, has been diminished with the advent of a sixth conservative justice. So maybe this is one of those times where he does get to, I think, wield a little strategic power in this. That's a good point.

Melissa Murray:

We should move on, though, to some other important cases. Let's do some recaps of arguments. Some of the cases were ones that we previewed last week, so the court heard arguments in a number of cases, Sanchez v. Mayorkas, Yellen v. Confederated Tribes of the Chehalis Reservation, and Greer and Gary. So Kate, do you want to kick us off with Yellen?

Kate Shaw:

Sure. Well, actually, just wanted to note something, a procedural wrinkle in that case. So there's a story that came out about the selection of advocates to actually argue in Yellen right after we recorded our episode with the Appellate Project. So remember, this is the case about whether Alaska native corporations, or ANCs, formed under the Alaska Native Claim Settlement Act, are eligible for funds that may be given to Indian tribes under the CARES Act. So in that case there were two sets of briefs on behalf of the tribe, so opposing the disbursement of these funds to the ANCs. One brief, which we highlighted, represented 16 tribes. The other brief, which I had actually just failed to notice before we previewed the case, represented a single tribe, the Ute tribe. So the Ute tribe actually filed a motion requesting divided arguments so that they could argue in addition to the lawyer for the 16 other tribes.

Kate Shaw:

The court denied that motion. Usually in those circumstances counsel just works out who will argue, but at least according to Marcia Coyles' reporting the Ute tribe's position was that they would not consent to the other lawyer arguing.

Leah Litman:

So in those circumstances what does the court do? As Marcia Coyle reported, the court literally draws a name out of a hat to decide who argues the case. And here-

Melissa Murray:

So fancy, so fancy.

Leah Litman:

Right. They don't even bother doing an automated spreadsheet like you do for Instagram giveaways. Just a hat.

Kate Shaw:

In some states, literally if there's a tie ... In the Virginia legislative election two or four years ago maybe, they literally tossed a coin when there was an actual tie. So weirdly, this stuff does happen.

Leah Litman:

So here, because the one lawyer represented 16 respondents and the lawyer for the Ute tribe represented one, there was a 16 out of 17 chance that they'd draw the name of the lawyer for the consolidated brief. But they drew the name of the lawyer for the Ute tribe, and so that's who argued the case. I should say as a disclosure that I know, or at least have met the lawyer for the other 16 tribes, Riyaz Kanji. Our listeners might know him as the lawyer who argued on behalf of the tribes and won in McGirt v. Oklahoma, a major, hugely significant federal Indian law case. And that is who the tribes could have had arguing the case. But that is not what happened, and I think the argument was much poorer for it.

Leah Litman:

You all talked last week with Professor Matthew Fletcher about how this is, I think, a hard case. And it's hard because I think assessing the implications of the case requires an understanding of Indian law and how contracts and decision making authority are allocated under or as a result of the Indian Self-Determination Act, the statute incorporated into the CARES Act. And here the justices seem to be thinking about the consequences for the CARES Act alone, that is, what if you don't give money to ANCs? And just thinking about the case in those terms is a mistake because the case will also determine whether ANCs would be given decision making authority and veto power over contracts as a result of being recognized as tribes for purposes of ISDA, and that could be really huge since if they are recognized as tribes you could have multiple and potentially conflicting veto authority in separate organizations within Alaska between the ANCs and the federally recognized tribes.

Leah Litman:

It's also hard because it involves a lot of complex interlocking statutes and competing canons. Would reading ANCs out of ISDA render it superfluous? It depends on your reading about whether Congress thought ANCs might qualify for recognition. Also depends a little bit on your understanding about what ANCs are and what recognition is supposed to serve. And the argument was just a disaster. Justice Sotomayor told the lawyer for the Ute tribe that it was going around in a circle. At one point the advocate conceded he was "having trouble communicating" the dilemma that would be created under the government's determination. Justice Barrett said the case was about only what piece of the pie goes where. And so this to me, just not great.

Leah Litman:

And I'm not sure how the court's procedures or practices regarding divided argument help or hurt this. If they always grant divided argument or don't consolidate cases, maybe you don't have an incentive to agree to someone else arguing the case. On the other hand, this doesn't seem great either since it effectively gave a holdout considerable power to potentially torpedo a case in the process.

Melissa Murray:

So Leah, I totally get the point here, that he really did not come out guns blazing in the best way on this one. But it's my understanding that this might have been his first outing before the court. And we have been talking about giving people opportunities to argue this, but maybe I think what you're saying here is that in a situation like this where the majority's interests, 16 of the 17 tribes are represented by one person, that perhaps allowing this single person to represent everyone's interests is a little more problematic. But generally we are in favor of diversifying the core of those who argue before the court.

Leah Litman:

Absolutely. There was a separately weird moment at oral argument that involved a hypothetical drawn from Paul Clement's brief, and so we'll just play that clip here.

Speaker 6:

But you do agree that they have that authority, Congress has the authority to recognize them? In other words, this goldfish can bark.

Melissa Murray:

Do with that what you may. But can this goldfish walk on a leash? That's what I want to know. Anyway ...

Leah Litman:

Is the goldfish potty trained?

Melissa Murray:

Another case that was argued last week is that set of cases involving so-called Rehaif errors, Gary and Greer. So the question here was whether a federal defendant who has been convicted under the Armed Career Criminals Act, also known as ACCA, whether they have to show that they knew they had a prior felony conviction that made it unlawful for them to possess a firearm. And if that is the case, how does that get calculated in terms of retrial or resentencing, when the government hasn't actually submitted proof of this at trial? So the government argued for the position that appellate courts can consider evidence outside of the trial record in order to conclude that a federal defendant knew that they had a qualifying felony conviction. And in this case the evidence outside of the trial record was in the larger district court record, namely in the sentencing report, the pre-sentencing report.

Melissa Murray:

Leah, I think you're hoping that the court won't go any further than this, that is, that they won't say that any or all evidence outside the trial record can be considered, but limit it to just the pre-sentencing report. Is that right?

Leah Litman:

Yeah, because I just think it would be really difficult for courts to be asking, "Well, could this evidence that's outside the trial record and never was admitted be admitted in some admissible form such that the government could have proven that the individual knew they had a qualifying felony conviction?" Some more personal grievances from arguments, so case involves ACCA and resentencing, and I really took it personally that it seemed like a core quantum of the justices just were not interested in the case at all. So here's the end of the federal government's argument.

Chief Justice:

Thank you, Mr. Ellis. Justice Gorsuch?

Justice Gorsuch:

No questions at this time.

Chief Justice:

Justice Kavanaugh?

Justice Kavanaugh:

Additional questions.

Chief Justice:

Justice Barrett?

Justice Barrett:

None from me either.

Chief Justice:

A minute to wrap up, Mr. Ellis.

Leah Litman:

Look, I just think if you're not interested in Armed Career Criminal Act cases, you don't have a ton of business and maybe no business at all serving on the federal courts, given the significant percentage of the docket on federal courts that are ACCA and federal criminal law cases. But maybe that's just me.

Melissa Murray:

I'm just thinking of that Michael Jordan meme, "And I took that personally."

Leah Litman:

I take all of this personally. My partner actually got me to watch the Michael Jordan documentary ...

Melissa Murray:

Oh, it was so good, it was so good.

Leah Litman:

... By telling me that I would "relate" to a lot of Michael Jordan's personality, and he was right. He was right. Speaking of bad things at arguments, this seems to be our trend in the argument recaps, court heard Sanchez v. Mayorkas. Also did not seem to be that the case was going great for the petitioner, the applicant for lawful permanent resident status. It appears that the temporary protected status holders are going to lose, and they also seem maybe likely to lose in a way that would prevent the Biden administration from changing positions. So the court seemed inclined to say that the statute unambiguously does not include TPS recipients as being admitted for purposes of applying for lawful

permanent resident status. If the court were instead to say that the statute is ambiguous about whether they are admitted but that the government's position that they are not admitted is reasonable, then the government could adopt a new or different interpretation saying TPS recipients are admitted and can apply for lawful permanent resident status. But that won't be possible if the court says the statute unambiguously treats them as unadmitted.

Leah Litman:

Now, I say it doesn't look like the case is going to go well for the applicant. The lawyer arguing for the applicant, Amy Mason Saharia, did great. And so that's not at all a reflection on her, it's just this court.

Kate Shaw:

And one comment on your prediction, Leah, which I think is sound, or at least that there's a real possibility, it would be incredibly aggressive for the court to hold that this is what the statute unambiguously says, in particular because the federal government is not only not asking for it, but short of disclaiming any interest in having the court find that several times in the Chief Justice's colloquy with the federal government's lawyer, the federal government's lawyer said, "We don't think you have to say what it means unambiguously. All we're asking you to say is this reading is reasonable." Which I wish they weren't arguing at all, but they are certainly not arguing for the court to bind their hands in terms of future discretion. So it would be the court giving the federal government significantly more than it is requesting for it to hold on those grounds. So I hope that general considerations of judicial modesty will play in the justices' decision about how, if these TPS holders are going to lose, they do lose.

Melissa Murray:

Mm-hmm (affirmative). Okay.

Leah Litman:

Yeah, the humanitarian considerations and concerns of the case were just entirely absent from the argument. And so I just don't know that that element of judicial modesty is even on the court's mind.

Kate Shaw:

Yeah.

Melissa Murray:

And I think some of the other cases from this sitting suggest that judicial modesty just looks really different.

Leah Litman:

Yeah, again, Brett Kavanaugh came down really hard for the proposition that anything you do as a minor can be held against you permanently.

Melissa Murray:

All right, let's go to previews. Okay. So there's a number of really-

Leah Litman:

Wait, can I make a confession before we go to previews?

Melissa Murray:

Sure, okay.

Leah Litman:

Okay. I sometimes do moots for Supreme Court cases. I'm not going to say what case this is about or which side, but I did a moot for a case. And sometimes when you're preparing for a moot you try to channel a particular justice. This wasn't one of those times. I was just reading the briefs and trying to prepare questions that I thought this side's presentation arguably raised. So I did that, we did the moot, and then I went and checked the transcript for the argument. Guess which justice asked the question that I came up with?

Kate Shaw:

Was it Alito?

Leah Litman:

It was. And I just-

Kate Shaw:

I'm not surprised. You know why? Alito asks really fucking good questions, and so do you. So I'm actually not that surprised. It's the one thing we have to give him credit for. And I just started swearing because ..... But yeah.

Leah Litman:

This really caused some reflection. And I was like, "Is the universe hurtling toward a world in which I am in a mind meld with Sam Alito? Is this some weird consequence of the pandemic, 2021?"

Kate Shaw:

It's two things.

Leah Litman:

It prompted some thoughts.

Kate Shaw:

It's that he's just a really good questioner and so are you, and it also is, you want to ask the meanest, worst version of a Supreme Court question to prepare the advocate, and that also is going to be the place that Alito goes to when he's thinking about questions to ask. But that's really funny. It was verbatim?

Leah Litman:

Yeah, it was the question.

Kate Shaw:

Wow.

Leah Litman:

And I felt the need to confess this. Again, it made me feel strange.

Kate Shaw:

Oh my God, I love it. I like it.

Melissa Murray:

okay, on to previews. I'm just going to leave that where it is, Leah. Kate, there are some big cases coming up in the next sitting, so do you want to kick us off with Americans for Prosperity?

Kate Shaw:

Okay, so let's do that. And we have talked about this case a couple of times, including with Senator Whitehouse, so we'll be relatively brief. But basically this is the case involving the California donor disclosure requirement, so at issue is the constitutionality of California's requirement that tax exempt charities that solicit within the state submit a copy of the schedule B form that they file annually with the IRS anyway to the state government. So in a way, even though I just described this as a disclosure case, it's really kind of a reporting case. So these are about confidential submissions to the state government, not disclosures to the public. So several charities, including the Koch Brothers, Americans for Prosperity Foundation, have challenged this requirement, arguing that it violates the first amendment freedom of association. The argument is basically that if donors to these organizations can't remain anonymous, that will inhibit their ability to associate with and donate to the organizations because they will fear harassment and reprisal.

Kate Shaw:

So we noted some amicus asymmetry at the cert stage. We had waited to see if that would balance out at the merits stage, and the answer is not so much. So there were around 43 amicus briefs filed in support of Americans for Prosperity, a lot of folks you would expect, Cato and Beckett and Judicial Watch and ALEC, the American Legislative Exchange Council, and the Chamber of Commerce. But actually a few parties that I was surprised to see also on that side of the case. So CAIR, the Council on American Islamic Relations, the Electronic Frontier Foundation, and the ACLU and the NAACP LDF. So our former guest and real icon, Sherrilyn Ifill, is on the brief on the side of Americans for Prosperity.

Kate Shaw:

So it's got some interesting ideologically cross-cutting support. Basically the ACLU and LDF take the position that the right to associate for expressive purposes is a core first amendment right, I think that's clearly true, but also they take the position that I don't think I'm willing to go with them to, that a right to confidentiality in those associations must exist absent compelling reasons, and that California, largely because it inadvertently disclosed some of these forms historically, hasn't shown sufficiently compelling reasons.

Melissa Murray:

Wait, wait, time out. I was a California state employee for a long time, and I think it's just a massive bureaucracy. So it was not unusual to get emails like, "Hey, California pension holder, your Social

Security number has been disclosed to the broader public." So is that a reason to completely put the kibosh on reporting requirements? I don't know. Because it's a big bureaucracy.

Kate Shaw:

Yeah, and some of these disclosures were, there was a trial, and yes, definitely some of these forms were inadvertently posted. But then also there was an expert who basically was able to, by typing in different URL combinations, get access to these records that were non-public but accessible if you found the right address. But there was no evidence of anybody in the public, aside from this person who was explicitly trying to get access to these forms did so. But look, California concedes it was not using top-of-the-line security protocols, which it says it has now fixed. But yeah, can a constitutional question turn on those disclosures historically? It seems crazy that it would. And in some ways Americans for Prosperity's sliding between whether it's making a facial or as-applied challenge and how significant these inadvertent disclosures really are. So I do think, I am going to make a prediction now since we're talking about Sam Alito, that he is definitely going to ask about Sherrilyn's brief. Definitely going to want to talk about it.

Leah Litman:

This has woke 'Lito just .

Kate Shaw:

That's a wokelito. But no, I think it's troll Alito.

Leah Litman:

Okay.

Kate Shaw:

It could be either one, I suppose.

Leah Litman:

Yeah, I think it depends how he frames the question. If the question is, "I, Sam Alito, am really concerned about the NAACP LDF's ability to maintain their associational rights," then it would be woke 'Lito. I don't know. I don't know, is that wokelito, trolllito?

Kate Shaw:

It's too trolly.

Leah Litman:

These things blur together.

Kate Shaw:

So I do think that California's lawyer is going to have her work cut out for her. So this is Amy Feinberg, who is one of the deputy solicitor generals in California, who is making her first argument before the court. I think we should give props to the California solicitor general, Mike Mongan, who is, full disclosure, a friend of mine, but he is not hogging all of the really good arguments this term. So she, I

think, is the second person in that office who is doing her first argument this term. He's already done a couple, others are getting the opportunity to do those too. But I think it's going to be a tricky argument, I think, because of this messy historical record. And I think there's going to be probably a lot of discussion of those facts. And then there are also these really broad questions that we have talked about, about whether the court might actually ratchet up the constitutional scrutiny that it has typically brought, some kind of intermediate scrutiny when evaluating these compelled disclosure requirements, or even these kinds of reporting requirements.

Kate Shaw:

There are definitely some amici who are seeking a real strict scrutiny. I don't really view ... I think Americans for Prosperity is asking for some kind of very exacting intermediate scrutiny, something at the high end of intermediate scrutiny, which it seems to view as not a strict scrutiny standard.

Melissa Murray:

An exceedingly persuasive gesture.

Kate Shaw:

Right, so maybe they're seeking some new, yeah, something along those lines. "Overwhelming need" is a formulation that they use in the brief for the evidence. And look, California says, "We're trying to deter fraud and make sure that charities are actually doing what they are telling their donors they are doing." These are real and serious interests, and in genuine intermediate scrutiny land seeking confidential reports that help then serve that interest seems obviously to satisfy that kind of scrutiny. And yet I think it's very possible that the court will say that something more is required that could have implications for the IRS's ability to regulate nonprofits, for the whole world of political information disclosure that we've talked about previously.

Kate Shaw:

So I think that this case is both really messy on some of the facts and detail and potentially hugely consequential, and so I don't really know what to expect but I think it'll be a big and important argument.

Leah Litman:

Yeah. And speaking of amicus participation, the federal government is arguing as amicus in the case. They are arguing for vacatur after initially supporting the cert petition filed by Americans for Prosperity. The federal government rejects the idea that strict scrutiny should apply, and they especially reject the idea that the government shows that reporting's the least restrictive alternative. But they also say that the California requirement is different from the federal requirement to disclose the same information, since the federal requirement isn't a requirement so much as a condition on a federal subsidy, i.e., a tax exemption. And it suggests that remand is required to address as-applied challenges, that is, that the California law isn't invalid on its face or in its entirety, but instead they need to consider whether particular donors might face particular fears of reprisal.

Melissa Murray:

Right. There's also some very big whiteboard energy in the amicus corps. Sheldon "Whiteboard" Whitehouse, a former guest at Strict Scrutiny along with his colleagues Leahy, Durbin, Klobuchar,

Merkley, Coons, Blumenthal, Hirono, Booker, Warren, van Holland, and Duckworth, have all weighed in in an amicus brief that goes on about the dangers of dark money. And related to that, Senator Whitehouse along with Senator Blumenthal of Connecticut have also filed a letter urging that just as Amy Coney Barrett recused herself in this particular case, because Americans for Prosperity, a sister organization to the Americans for Prosperity Foundation, which is the litigant here, gave at least $1 million to fund a national campaign in support of her confirmation. And now this case is before a court that includes her.

Melissa Murray:

So the letter cites to the Supreme Court's opinion in Caperton v. Massey, which held that the Constitution's due process requirement required a West Virginia state Supreme Court justice to recuse himself from a case involving a jury award against a coal company's CEO because the CEO had spent $3 million to secure the election for that justice. SCOTUS said that the situation presented a serious risk of actual bias, and that decision was a five-four decision written by Justice Kennedy.

Melissa Muray:

Yeah, so super interesting letter. I think important letter in part because it highlights, Kate, something you've talked about on this issue, which is, the dividing line between charitable organizations and actual political disclosure requirements is actually pretty thin when you start digging into the details, as the relationship between Americans for Prosperity Foundation and Americans for Prosperity illustrates on this case. We mentioned that there are only a few amicus briefs coming in on California's case, but the briefs that did come in I think were quite effective. So you had a brief from Legal Historians, which gave what I would have thought would be unnecessary historical context to NAACP v. Alabama, the case in which the court said Alabama couldn't disclose or require public disclosure of membership in the NAACP because of the pervasive private and public violence against black Americans.

Leah Litman:

Second is Campaign Legal Center, which really talks about how this issue is related to campaign finance reform. And then the state's amicus brief and the Nonprofit Scholars amicus brief I thought were really great at talking about the practical difficulties of saying, "Well, subpoena power would be a sufficient substitute for this reporting requirement." They noted that the California attorney general supervises over 100,000 charities with like a dozen full-time attorneys doing this. And they also give specific examples about how donor oversight allowed California to specifically detect fraud, given that a bunch of organizations that had presented themselves and advertised themselves as credit counseling charitable entities were in fact funded by creditors. And that gave the California attorney general a clue that maybe this organization wasn't doing exactly what they said they were for the reasons they said they were doing it, and that turned out to be correct. And there are other examples of that phenomenon as well.

Melissa Murray:

All right, let's get into the final case, the one that I've been waiting for from the upcoming sitting, and that is Mahanoy Area School District v. BL, otherwise known as the salty cheerleader case. This is a case that is about a first amendment challenge to a school's decision to sanction a student for a Snapchat that read, "Fuck cheer" when she unsuccessfully auditioned for the varsity cheerleading squad. I have little people around right now. Technically the cheerleader was not being particularly restrained. She had a field full of Fs and she was not afraid to use them. So in addition to, "Fuck cheer" she also wanted

to "Fuck school, fuck softball, fuck cheer, fuck everything." And the cheerleading coaches suspended her for an entire year.

Melissa Murray:

The case raises questions about the scope of first amendment protections for student communications that don't occur at school, and there are a bevy of prior Supreme Court cases that are potentially relevant here, including Tinker v. Des Moines, the canonical case which said schools can discipline students for speech at school that leads to or might lead to a "substantial disruption," even if the disruption is caused because some people object to the content or viewpoint of the speech. Also implicated here are Bethel School District Number 43 v. Frasier, Hazelwood School District v. Kuhlmeier, Morse v. Frederick, which is the famous "Bong hits for Jesus" case. And let me just say, if you don't know about these cases, would like to know more about these cases, Justin Driver, who's a Yale law professor, has a book called The Schoolhouse Gate, which discusses all of these cases and is a terrific resource for those who are interested in SCOTUS and schools and the way that SCOTUS has protected or not protected student rights at school.

Kate Shaw:

So the case raises questions about what legal test and what legal protections apply for student speech that happens outside of school or a classroom setting but in a universe where it's kind of hard to separate them, since given online media stuff that happens outside of school affects what happens in school, can be seen in school, et cetera. So basically one way to think about it is whether the Tinker test applies or whether instead schools just can't sanction students for speech outside of school, but what the boundaries of that line or what the limit would be.

Leah Litman:

So I don't know what you all think, but it's a hard case for me. On one hand it seems straightforward that there should be greater first amendment protections that students enjoy outside of the classroom when classroom control and whatnot aren't implicated. But it also doesn't seem right that there can't be any first amendment protections, or that schools have no interest in regulating what happens outside of the classroom. So here's a hypothetical not too far from the real world. Imagine a professor or a teacher who speaks publicly in ways that are quite dismissive of the intellect of students of color. I don't think the school is powerless to do nothing about that professor's speech, even though it's not happening in the classroom. It's happening outside of it. Because what people do and say outside of the classroom can have potentially powerful effects on students' experience in the classroom, and the same is probably the case for student speech. What if students are engaged in horrible discrimination or harassment on the basis of sex or race outside the classroom? I think the school could do something.

Leah Litman:

But also, given the frequency with which people use social media, this could make basically everything students say or do outside of the school, which is often captured on social media, subject to school discipline. The ACLU brief tries to address this as follows, by saying schools can punish off-campus student speech that threatens the security of the school or its members by looking at the true threats doctrine. But again, it just seems to me that that doesn't really capture all of the set of circumstances in which behavior outside of school would really have a substantial and deleterious effect on school itself. I don't know.

Kate Shaw:

Yeah, I have to confess I haven't gone through all the amicus briefs in the case so I'm not sure if anybody proposes this distinction, but it seems to me that some kind of third party harm principle might distinguish the kinds of cases that you're worried about, where the speech might actually impose a tangible harm, short of a true threat but real harm, on the students who would be objects of that discriminatory, say, or hateful speech, versus the kind of speech that ... I don't really view cheerleading as being harmed in the same way through this speech as the kind of harm that you're describing. So I can well see disallowing the punishment here but allowing a punishment in the set of circumstances that you're talking about. I'd have to revisit.

Kate Shaw:

Stevens has a great dissent in the Morse v. Frederick, the "Bong hits for Jesus" case. And there it's like, what the student is doing is, it seems like it's a very hard-to-parse marijuana advocacy, but why Jesus is in there is never totally clear. Maybe the student, it seems like, was trying to throw some kind of first amendment clearly protected speech into the mix by invoking Jesus. I feel like I've always assumed that was the case, but it might just be gibberish. But either way, he reads it as advocating legalization, and Stevens signals his sympathy for marijuana legalization, compares our current drug war on Prohibition from when he was a boy. It's actually an amazing opinion.

Kate Shaw:

So I feel like I side with him on that case and in this case too I feel like the discipline is inappropriate, but I don't think that means it would never be in the kinds of circumstances that you're envisioning, Leah.

Melissa Murray:

Well, so Kate said something about the third party harm. I think that's an interesting way to draw a distinction here. I don't know that this is the court that necessarily would be receptive to that. If you look at Hobby Lobby, for example, where lots of people talked about the third party harm to individuals, the court seemed to not have any Fs to give about that.

Kate Shaw:

Oh yeah, I'm not saying that it's a winning argument, but I'm saying it would be a principled place to draw one.

Melissa Murray:

I just think it's unlikely in this case, particularly in the context of the first amendment. In any event, we saw a really rare last-minute substitution of counsel in this case. It is now going to be argued by David Cole of the ACLU, and on the other side is Lisa Blatt. And again, are we going to have any bleeps on the audio for this? People whispering?

Kate Shaw:

I'm predicting no. They never do. They say "the F-word," or they maybe spell it out.

Melissa Murray:

I know it when I hear it. Okay. All fine.

Leah Litman:

The advocates have to know that the justices don't particularly want people up there swearing at court arguments. On the other hand, a lot of the line-drawing examples and hypotheticals from the briefs do involve swear words. And if you're interested in hypotheticals and where the line is, it does seem like in this case it would be part of it, but who knows?

Kate Shaw:

I love the idea of having to slap a warning label on the audio files of the oral arguments.

Leah Litman:

Yeah.

Melissa Murray:

I need Tipper Gore energy. Okay, let's move on to court culture. There was a lot happening in court culture this week, but probably the biggest story came from the fact that the newest justice, Amy Coney Barrett, got a book contract for $2 million. And this sparked a lot of debate on social media, what was the book going to be about? Some suggest that it's likely to be a kind of book about how judges do their judging, and some people argue that it probably wasn't the time for her to write that book, given that she's only been on the court for about six months and had only been a federal judge for about three years before that. It doesn't seem like it's going to be a book about her life. So that, I actually would be very interested to read about her life. I genuinely want to know, how do you have seven kids and a job and manage to balance it? Because I'm dying here and I don't have seven kids. So I would have been interested in that book, but again, lots of debate around this with people on all sides weighing in about this.

Melissa Murray:

There was also some other news from the court, so what was it, Leah? What did we see from the court this week?

Leah Litman:

We got the first pictures from the court since Justice Barrett joined the band. So we got the group photo of the Supreme Court. They are all maskless, and some of the justices have some notable expressions.

Melissa Murray:

Well, so say, I posted this on Twitter as the post-COVID court. And all these people were in my mentions like, "Post-COVID, we're still in the middle of ..." And it's like, "Understood. Still wearing a mask." It's Twitter. Calm down. Literally calm down. So again, proceed, Leah.

Leah Litman:

So Justice Kagan looks like she's trying to tell us that Mississippi v. Jones was just an appetizer for what is to come. So I actually tagged myself on Twitter as Justice Kagan's inner sense of doom and dread in the photo. The entire photo has a real vibe of a failed family photo opportunity.

Kate Shaw:

They all look miserable.

Leah Litman:

Well, the comparison between the heights. She looks like she's literally an elf among these giants in the picture.

Kate Shaw:

Right, because Kagan, she's in the back row because they sit ...

Leah Litman:

Seniority, yeah.

Kate Shaw:

By seniority. Everybody more junior is in the back. So it's her and then the Trump justices. And it's like-

Leah Litman:

Justice Breyer needs to retire so she can sit down.

Kate Shaw:

Exactly.

Leah Litman:

Because that just doesn't look right.

Kate Shaw:

It really doesn't, and Kagan does not look happy right there. Although we should say, it's two minutes of a lot of photos. The one that was I think initially released that you tweeted, Melissa, was especially terrible, I think. There were a few others that, I don't know which one is going to be the official one, but Kagan is a little bit smiling in a couple of others. So if I were her, I am happy ....

Leah Litman:

But why would they let those photos get out? They're not good.

Kate Shaw:

Nope.

Leah Litman:

The Chief Justice is looking ...

Kate Shaw:

To the right?

Leah Litman:

... Off to the right. In another he's looking off to the left. It's just weird.

Melissa Murray:

Justice Sotomayor is smiling in all of them and she's like, "I'm right with Jesus. I'm good."

Leah Litman:

She crushed that photo shoot, right?

Melissa Murray:

She looks amazing every single one, yeah.

Leah Litman:

You watching America's Next Top Model, Melissa, with her?

Melissa Murray:

Smizing, smizing.

Leah Litman:

That paid off.

Melissa Murray:

Yeah.

Leah Litman:

She knows how to do it.

Melissa Murray:

She's serving face, serving face.

Kate Shaw:

I will say, let me just say briefly, I'm worried now you're going to think I'm one of the Twitter scolds, Melissa, so tell me if you think I am. I was a little not that psyched that they are all maskless, only because of course they're all vaccinated and I presume everybody in the court and the photographer as well, but there is a signaling function.

Melissa Murray:

No.

Kate Shaw:

Biden is vaccinated, Harris is vaccinated, they're still-

Melissa Murray:

I was being ironic, I was being ironic. Because the public relations office was like, "They've all been vaxxed, that's why they're ..."

Kate Shaw:

Oh, I see, okay. So you're with me.

Melissa Murray:

Yes.

Kate Shaw:

I'm not sure that they need to be like, "We're all just barefaced now." And clearly, though, the Chief was like, "We're doing this." And I can well imagine the liberal justices, even if they're uncomfortable, not wanting some weird culture war court image, half of them masked.

Melissa Murray:

Justice Sotomayor in the shield she wore to Justice Ginsburg's funeral.

Kate Shaw:

Totally, right? She had multiple masks and a shield over it, which is how they all honestly should be still, I think, proceeding until we're all vaccinated, which we're not quite there yet.

Melissa Murray:

Yeah.

Kate Shaw:

Again, I don't want to be a scold about it, but I wasn't crazy about them just being like, "We don't have any role in demonstrating that for a little bit longer most of us should still be wearing masks, even the vaccinated ones, with lots of other people around." Of course-

Melissa Murray:

It makes me wonder if they're masked at conference.

Kate Shaw:

I don't think so. I think this tells us no.

Melissa Murray:

Yeah, I think so, I think that's right.

Leah Litman:

You know who looked like they didn't have a care in the world?

Melissa Murray:

Your boy.

Kate Shaw:

Oh, my God. Why was Breyer so happy? I don't know.

Melissa Murray:

Do you have something you want to share, Steve?

Leah Litman:

No.

Melissa Murray:

You look thrilled.

Leah Litman:

No.

Melissa Murray:

He's like, "I'm good. I got pot roast in the slow cooker at home, I'm good." All right, you all, I think that's all we have time for today. Thank you for joining us. We of course will be back with more court shenanigans, and as always we are so grateful to our terrific producer, Melody Rowell, for all of her help getting us into your ear-holes and making us sound good. And we are grateful to Eddie Cooper, who does our music, and of course listeners, we are grateful for you. Thank you so much for supporting the pod. If you would like to be a more earnest supporter of the pod you can feel free to do that by joining our Glow campaign. And Leah, what's the URL for that?

Leah Litman:

Glow.fm/strictscrutiny. Sam, if you can read my mind, bring up the NAACP LDF brief at argument. I'll know you're listening. That's all we have for today. Bye, y'all.