Intro Recording:

Chief Justice, and may it please the Court. It's no joke. What are your man orders against two beautiful ladies like this, they're going to have last word. She spoke elegantly with unmistakable clarity. She said, I asked no favor for myself. All I asked about of our brethren is that they take their feet off our neck.

Kate Shaw:

Welcome back to strict scrutiny your podcast about the Supreme Court and the legal culture that surrounds it. We are your hosts today. I'm Kate Shaw.

Leah Litman:

And I'm Leah Litman.

Kate Shaw:

So we're going to start off today with some big news in grants and opinions, move on to argument recaps and end with a brief court culture segment.

Leah Litman:

And in the middle of that all is going to be a big, we called it a segment.

Kate Shaw:

Basically this show is going to be a long victory lap. So just buckle in. Okay, so Leah, do you want to start us off with the grants?

Leah Litman:

Sure. So we got some really big grants this week. The first and arguably most important one was in New York State Rifle and Pistol Association, aka NY SRAPA part two vs corlette. So this case involves New York's requirement that applications for license to carry concealed handguns show proper cause. New York courts have construed that requirements to me in a special need for self protection distinguishable from that of the general community or of persons engaged in the same profession. In other words, the requirement that you show good cause particular to you as to why you need to carry a concealed weapon.

Leah Litman:

The challengers argue that this scheme violates the Second Amendment and the court will both resolve the constitutionality of New York's and similar laws. And in the course of that, tell us, for the first time since Heller how State and Federal Firearms regulations will be reviewed under the Second Amendment.

Kate Shaw:

Everyone is expecting that this case will tell us something about the scope of Heller. And in particular, to what extent it might apply outside the home, since of course, it involves licenses to carry concealed weapons. The core of the right that is protected in Heller is pretty clear, right? It protects the right to keep a usable handgun in the home for self defense. But what else Heller may or may not protect. Put differently, what types of gun regulations Heller might invalidate just isn't clear. And this really will be the court's first pronouncement on that question since Heller, over a dozen years ago.

Kate Shaw:

Petitioners in this case are represented by Paul Clement and Aaron Murphy. I think that's the same team that did NYSRPA but one which was dismissed as moot just about a year ago. So they explicitly framed the case as about Second Amendment rights outside the home broadly. But the court then reformulated and somewhat narrowed the question presented to omit that kind of guns outside framework, rather, just to ask whether the New York licensing scheme right specific to concealed carry interferes with the Second Amendment right to self defense.

Leah Litman:

So several states have these kinds of restrictions, including California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and some other states have variations on them. There's an important empirical study that law professors John Donahue and Abhay Aneja, as well as Kyle Weber put together, and they found that so called must issue laws, laws that don't allow officials to deny concealed carry permits, or that don't impose some sort of heightened showing to obtain one are associated with a 13 to 15% higher aggregate violent crime rate 10 years after the adoption of those laws. So the study was published in the Journal of empirical Legal Studies in 2019.

Kate Shaw:

So this seems really important, of course, query, whether anybody in the majority on this court is going to care about the impact on the ground of a ruling that would essentially require states to adopt functional must-issue regimes. So there's that new empirical work. There's also a lot of important historical work that has been done in the 13 years since Heller. And I think it mostly makes really clear just how heavily regulated firearms have been throughout American history. Even setting aside what you make of Heller on its own terms, Heller very much prescribed a very historically focused mode of analysis in evaluating future gun regulations. And it seems to me that if you look closely at the history, there's a lot of support for the permissibility of these kinds of regulations.

Kate Shaw:

So historian Saul Cornell has a good piece up in slate today that I wanted to flag that basically argues that if the avowed originalist on the court really do care about historically grounded method, they're going to have to sustain New York's regulation, right? So here, this kind of methodological commitment, and their preferred gun rights protective outcome are going to be across purposes, and they're going to have to choose between them. It's sort of anybody's guess, which of these two competing imperatives is going to prevail, as we were texting when the courts grants came out earlier this week. We said something like, "I think the court is saying they're not scared of Biden's commission. They're just ready to dive right in after taking it a little slow for a couple of months." What do you think Leah?

Leah Litman:

Yeah. We will have more to say about this case down the road. But I think it is almost certain that the court is going to invalidate this restriction. I mean, you have had several justices openly calling for the courts to basically discard the standard that the lower courts have used to uphold restrictions like this. So Justice Thomas, Justice Alito, and Justice Gorsuch have all suggested that the standard used to uphold laws like New York's is not the correct standard. I also have little doubt about where Justice Barrett and justice Kavanaugh sit on this issue, given their writings when they were accorded the appeals judges. So I think the outcome is a foregone conclusion. And the only question is how broadly this opinion is written.

Kate Shaw:

But yes, we will definitely have much more to say about it. Okay, so a couple other things on the grant list. What else?

Leah Litman:

The second grant was in the United States versus Abu Zubaydah. This case is about the scope of the state secrets privilege, and whether the Ninth Circuit was wrong to reject a claim of state secrets privilege in a case against former CIA contractor. So the plaintiffs in the case sought information about CIA detention and interrogation programs in the wake of September 11. And they are hoping to use that information in a criminal proceeding in Poland against Pols, officials, and also in the European Court of Human Rights. This petition was filed in December of 2020. So under the Trump administration, and I guess we will wait to see what change in position or change an argument, if any, we will see from the Biden administration on the state secrets privilege.

Kate Shaw:

Yeah, there's obviously been a lot of continuity between Democratic and Republican administrations on the state secrets privilege, not perfect continuity. The Obama administration early on, did review and revise its approach to the assertion of the state secrets privilege, but, but I'd be surprised if we see like a 180 show here. Although there could be some refinements in position.

Kate Shaw:

And the last of the grants we saw was in a case called Houston community system versus Wilson. So this is a First Amendment case about an elected body's ability to issue a censure resolution in response to a member's speech. So here you have the Houston Community College Board of Trustees, and it centered one of the trustees David Wilson, for among other things, filing lawsuits against this community college allegedly leaking confidential information, publicly denigrating the school's anti discrimination policy, orchestrating negative robo calls to other members constituents. So he received a censure from the board in response to all of this, and he filed a First Amendment challenge. And the Fifth Circuit found that he had a valid First Amendment claim for damages against the board for it censure of him, and then actually in an eight-eight tie, the Fifth Circuit declined to rehear the case on bonk, and the board represented by the Stanford Supreme Court clinic has now successfully petitioned for cert.

Kate Shaw:

This seems like a fascinating case to me. And I'm sort of eager to dive into it. I feel like there are in this trustees first amendment indignation. It feels to me like there are echoes of former President Trump's first amendment defense to his impeachment trial, and somehow that kind of perversion of the First Amendment as not a bulwark against government overreach, an additional tool that government officials can wield against other entities in government seems so bizarre to me. And yet, I have a feeling that the idiosyncratic vision of the First Amendment as often a tool to further empower the powerful is one that there's a lot of sympathy for in some corners on the court, and I think this trustee is going to get a receptive hearing. Although I don't yet have a sense of how it's likely to play. But I do think it'll be a really interesting case.

Leah Litman:

No, I think so, too. And I mean, you mentioned how this has echoes of Trump's impeachment trial. This also has echoes with kind of ongoing, let's say, censure proceedings against like representative Marjorie Taylor Green for what she said about Democrats or previous Democratic administrations. And so this could be quite significant. And I guess we'll talk more about this case next time when it's actually argued and briefed. But what do you think the over under is on Sam Alito bringing up canceled culture at argument in this case, like...

Kate Shaw:

Or Thomas writing an opinion that gratuitously invoke section 230.

Leah Litman:

Right.

Kate Shaw:

Right?

Leah Litman:

Either of these things seem like there's more than a 50% chance that one of them happens.

Kate Shaw:

North of 50. Even both happening are close to fifty. Yes, it does feel like it has intersections with a lot of currents that are out there in the ether, even if not directly implicated. And so I think it's going to be a really interesting case for that reason.

Leah Litman:

Yes.

Kate Shaw:

Okay, so let's move on to opinion recaps or just recap, right? We just got one opinion this week. It is now the time of year, when on opinion announcement day. I don't know about you Leah, but I am like fully adrenalized sitting at my computer obsessively refreshing because the Supreme Court loads at 10 in theory, but really 10:01 or 10:02, right now.

Leah Litman:

Yes. I get so annoyed because I'm ready to go at 9:55. Once that clock strikes 10, I'm like, "Where are my opinions?"

Kate Shaw:

So I guess I have thought that in April, we were unlikely to get the Affordable Care Act case or Fulton versus Philadelphia, but that was May hits and where they are next week, I think it's a live possibility.

Leah Litman:

Yeah, I mean, those cases were argued in November.

Kate Shaw:

Yeah.

Leah Litman:

I feel like we're going to get at least one of them in May.

Kate Shaw:

I totally agree. So but we only got one opinion this week. So what was it?

Leah Litman:

It was niz-Chavez versus Garland? Also, how weird is it that Merrick Garland is now a case caption name and will be for a bunch of Supreme Court opinions. I kept doing kind of a double take.

Kate Shaw:

Me too, because this is the first one and there will be many and I'm like, I guess maybe he's been subbed in some filings? But yes, opinions. This is the first one and there will be many that bear his name. So not the way you know, we once thought his name would be associated with this institution, but an obviously important meaningful way nonetheless. Okay, so what is his maiden voyage on the the wrong end of the V in a Supreme Court case?

Leah Litman:

This particular case involves a somewhat technical question of immigration law, which is when the so called stop time rule is triggered by a notice of removal. Under immigration law, there are certain kinds of immigration relief in particular cancellation of removal that are available to persons who have maintained a continuous presence in the United States for a certain period of time. And under IIRIRA, The Immigration Reform and Responsibility Act, continuous presence shall be deemed to end when the quote alien is served a notice to appear. So this case is a follow on to Pereira versus sessions. Opinion by Justice Sotomayor, that held that a notice to appear that did not include the information required by the statute did not trigger the stop time rule and end the period of continuous presence.

Leah Litman:

In this case, the court said, "The notice to appear that triggers the stop time rule and ends a period of continuous presence must be a single document with all of the required information, not multiple documents in separate mailings with information aggregated together. That is not notice of charges in one document or one mailing and a hearing date and time in another."

Kate Shaw:

Okay, so this was a super weird lineup. So it was a 6:3 majority, Gorsuch the author... So okay, that's a little familiar. We say Gorsuch, maybe we throw in Roberts and Kavanaugh and the liberals, and we get to six, no. This was Gorsuch and Thomas, which made me do a triple take, and Breyer, Sotomayor, Kagan and Barrett. And none of them wrote separately. So they all agreed on the opinion. It doesn't mean they all agreed on every word, but no one saw the need to state their divergence from this Gorsuch opinion, which is really quite an accomplishment with that group of six. It's a very Gorsuch opinion in all kinds of ways.

Leah Litman:

Yeah, his schtick just comes through, in this opinion several times over. On some level, I wonder if ever since he was in law school, he kept a journal of phrases about textualism and statutory interpretation. And every night before he goes to bed he'd write some of them down. And he has an infinite supply to be drawing from for the next several decades. Because he used a few in this opinion,

Kate Shaw:

Oh, my God, the statutory interpretation zinger journal that he had had on his bedside table.

Leah Litman:

It's like he's burn book for purposivism

Kate Shaw:

I think we got our show title earlier. So yeah, he definitely was able to draw pretty extensively on this burn book. So he really leans on the word, A, write the indefinite article, saying that means one thing. So maybe we could read from fortunately opinion, he says, "Admittedly a lot here turns on a small word. In the view of some too much the dissent urges us to overlook the fact that Congress placed the singular article a outside the defined term in Section 1229 A1. And its view, we should read the statute as if the article came inside the defined term. But that's not how the law is written and the dissent never explains what authority might allow us to undertake the statutory rearranging it advocates. So what else we highlight from this opinion Leah?

Leah Litman:

Some interesting turns of phrases at argument. In this case, as well as some others, he has brought up the idea that men must turn square corners when they deal with the government. And that line and a variation on the idea made its way into the opinion. So he said, "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." A part of me wondered if Justice Ginsburg was still on the court, if she would have dropped a footnote that said, "I joined all but this sentence of the opinion, which is not gender neutral language, but that's [inaudible 00:15:40]."

Kate Shaw:

Yeah, because he's quoting a home's opinion, but he does not actually placing the language in quotations. So he is certainly at liberty to update the gender pronouns being used here and does feel like a considered choice that no one really objected to or called him out on and I'm sure you're right that Ginsburg would not have abided. But this very kind of austere textualist mode in this instance, does help the immigration plaintiffs in the case by disallowing the government's argument that it can provide notice in a succession of separate mailings, as opposed to in a singular one.

Kate Shaw:

There is definitely some fairly testy exchange between Gorsuch in the majority and Kavanaugh in the dissent. Kavanaugh insists that judges interpreting statutes should follow ordinary meaning, not literal meaning, which I think is basically the same accusation that he leveled in his bostock dissent, there were several. Gorsuch just can't help himself from responding. She says, "Look, at one level, today's dispute

may seem semantic focused on a single word, a small one at that. But words are how the law constrains power." That was one of the lines that was in his book.

Leah Litman:

Exactly, words, or how the law constrains power. He's just been waiting to break that one out.

Kate Shaw:

I just feel like I can see Kagan's eye rolling on the page. She must be at some of this, right?

Leah Litman:

I'm trying to imagine what would happen if Justice Kagan were still Dean or professor Kagan, and some law student handed in a paper with that sentence in it...

Kate Shaw:

Yeah.

Leah Litman:

I jus-

Kate Shaw:

She just has to enthusiastically join. Right. You circulate a join memo.

Leah Litman:

This is great, Neil. Great, italics.

Kate Shaw:

So he responds in a couple of other places to the dissent. I think I spotted another one of these burn book excerpts. So the dissent is making arguments about the kind of costs and benefits of the rule the majority adopts. And he responds indignantly, but that kind of raw consequentialist calculation plays no role in our decision. Instead, when it comes to the policy arguments championed by the parties in the dissent are like, our points are simple. As usual, there are at least two sides to the policy questions before us. A rational Congress could reach the policy judgment, the statutory text suggests it did. And no amount of policy talk can overcome a plain statutory command. He was so pleased to get to write that last part.

Leah Litman:

Exactly. Now our listeners are going to know to look for these burn book lines, but he's just been work shopping for decades.

Kate Shaw:

Absolutely.

Leah Litman:

So I guess, some interesting trends and or notes about the opinion. As you said, it does seem like this is in some ways, like a re iteration of the debate from Boston, like literal meaning versus ordinary meaning where Justice Kavanaugh says, "Textualism is you go to a cocktail party, you give someone the words of the statute, and you ask them, what do you think it means? And that's textualism, like ordinary meaning." And for justice Gorsuch, that's not textualism. It's like literal meaning. It's like the science that Justice Alito kind of decried in his like Facebook versus of Degree of concurrence. It's like, "I will look at the dictionary, I will apply these formulas, and then I will arrive at the answer. And like, that's what textualism is."

Leah Litman:

So, perhaps interesting, even though that lineup seems strange, perhaps this is a recurring lineup that we will see where you get the justices who believe that textualism is more literalism on one side, and the justices who believe textualism is more ordinary meaning like Kavanaugh or Alito although I don't think of Justice Alito is anything really like a textualist. So maybe this division will reoccur in other cases in the future. I don't know.

Kate Shaw:

Yeah. No, it's interesting. And it's also like, yes he pulls up dictionaries. But of course, he also offers a number of examples to illustrate his point. And those examples come from a linguistic universe that he inhabits that is the same thing as a cocktail bar. He is pulling from the cocktail party in his mind...

Leah Litman:

But it's his like little textureless cocktail party where like everyone has the burn book on [inaudible 00:20:07] and all of their canons memorized. And so they are all doing all the rules.

Kate Shaw:

And like dictionaries as coasters... I think that's a good way to think about it, actually. But it is nevertheless a cocktail party, right?

Leah Litman:

Oh, yeah.

Kate Shaw:

And it just denies that that's what it is. Which tells me crazy.

Leah Litman:

Absolutely. And like then he tried to impose some order on the cocktail party. But after listing all of the examples of words, followed by A. He's like, "Well, you only use A when you're talking about countable and divisible categories rather than indivisible ones. So that's how I know you know, this notice refers to like a singular document that could be multiple ones. And it's just like, "Oh, my God."

Kate Shaw:

I do think it's interesting that we have now seen that Barrett seems more interested in Gorsuch's cocktail party than the Kavanaugh cocktail party. At least in this opinion, we will see if this is, as you said, a lineup that recurs. But it was definitely interesting.

Leah Litman:

This case now marks for opinions that Justice Thomas has assigned this term, which is an important shift, given that he's assigned, I believe, fewer than 10 cases over the last decade. So when you're thinking about the changing dynamics on the court, or the ideological direction of the court, I think that is an important indication,.

Kate Shaw:

In some ways is it's really sad that Thomas was in the majority here, because you could have if you just had five, Breyer could have gotten to assign this. And instead, Thomas crashes the cocktail party, and he decides to give it Gorsuch. Man, Breyer can't catch a break.

Leah Litman:

Poor Steve. Poor Steve.

Kate Shaw:

In theory, he could do some assigning right now. But there's just not a lot of cases breaking where it's the liberals plus two of the new justices. It's not inconceivable that that could happen. I don't think we've seen it yet.

Leah Litman:

Yeah. So one interesting question that might follow on this case is what effect this decision might have on unlawful reentry prosecutions under Section 1326 D. So that statute specifies limitations on an ability by a defendant to collaterally attack the underlying deportation order that they were subject to. And I think this opinion raises the question of, "Well, can you collaterally attack the underlying deportation order if the notice to appear in that case was defective? Would that fall within one of the statutory exemptions under 1326 D, which allows you to raise a challenge where the deportation proceedings at which the order was issued improperly."

Kate Shaw:

Oh, that's really interesting. All right, so we'll stay tuned. And just in terms of as we keep our eye on what else is coming down the pike because as we said, there was just one opinion this week. This was argued in November, right? And I feel like you always keep a good eye on what remains from the different sittings. So both Fulton and the Affordable Care Act case, were also argued in November. So who has yet to write and I feel like I don't want to put you on the spot, but do you have predictions about who has one of the big opinions?

Leah Litman:

Yeah, so the Chief Justice Alito, Justice Breyer and Justice Kagan have yet to write in November. And there are three outstanding opinions the Affordable Care Act One, Fulton, thet Religious Liberty Adoption, LGBTQ equality case, as well as board in the armed career criminal act. I think Justice Breyer might be the justice who's not writing of that group, just because he had two opinions from October. I think it's likely the chief would keep the Affordable Care Act opinion for himself. I think that probably means Justice Alito has Fulton, the day he has been training for ever since Obergefell and Windsor.

Kate Shaw:

He's got a burn book of his own.

Leah Litman:

Oh, yeah.

Kate Shaw:

A lot of that content is out there. We saw tons of it in the Fed soc speech.

Leah Litman:

He's been posting drafts of it for a while now.

Kate Shaw:

This is like the full novel.

Leah Litman:

Yeah. Right. I think after the argument in Fulton, we had been wondering whether we weren't going to get a full overruling of Smith, but instead of narrowing where you were dealing with in Justice Kavanagh's views a situation where the burdens on individuals who would be subject to discrimination wouldn't be so great because they could find an alternative service provider. I'm not sure the Justice Alito wants to write that opinion. I think he wants to write a 'Employment division versus Smith is an anathema.' But we'll see.

Kate Shaw:

Wen the court basically said in the most recent California COVID case, that government regulations are not neutral when they treat any comparable secular activity more favorably than religious exercise. That did feel like a pretty clear indication they're overruling it outright, I think yeah. If even if they thought they might be taking a more modest path coming out of the argument in Fulton, that no longer seems very likely to me I might agree. Yeah. Okay, so but I think that we may not have to wait until the end of June. It's a light year, they are presumably at home writing these opinions, I think that we're probably going to get a lot in May. And they could well... I remember last year, they went into July, but it was such a strange year with everything having shifted online.

Kate Shaw:

I feel like they're everything. Everyone is now kind of in the work at home groove. I guess they're back conferencing in person, but not, going to oral arguments, obviously, in person. And so. So I think there's a decent chance they get their workload kind of wrapped even earlier than the end of June this year.

Leah Litman:

Yeah. Let's do argument recaps. And we will start with our victory lap, which occurred in Americans for Prosperity Foundation versus Bonta. This is the case about California's reporting requirement that required nonprofit organizations to turn over information that they give to the federal government about their major donors to the state as well. And the formal legal question in the case is what is the legal standard in cases involving First Amendment associational rights? Is it exacting scrutiny? Or is it instead strict scrutiny? And does a legal test include a requirement that the state use the least restrictive alternative possible.

Leah Litman:

But it turned out that a second issue in the case, which I think is likely to be as important if not more important is when courts should entertain and as applied versus a facial challenge? So quick explainer on what they are? A facial challenge is an argument that a statute or regulation cannot be applied to anyone. And as applied challenge is where you argue that the statute or regulation cannot be applied to you. The point is here made both challenges and the Solicitor General and the justices appointed by democratic presidents were open to an as applied challenge, but the plaintiffs are pushing for a facial one. So what is the standard for a facial challenge? In some prior cases, the Court has said, "You have to prove something like there is no set of facts under which the law or policy would be constitutional." In First Amendment cases, the court has described it as you have to show the laws unconstitutional in a substantial number of cases.

Kate Shaw:

And in reality, and in a number of areas of law, the court has not adhered strictly to this very strong articulation of a standard for facial relief in which basically no constitutional application is possible. Think about, for example, abortion cases in which an abortion restriction may not represent an undue burden for all women seeking abortions. Defenders of abortion regulations with like the standard to be that the regulation cannot constitutionally be applied to anyone. But so far at least, the court has not adopted that reading. But has generally required some showing of unconstitutionality in a substantial number of cases and suggested that if that is not the case, then as applied relief is preferable.

Leah Litman:

Richard Fallon, who's a professor at Harvard Law has a wonderful article about this fact and fiction about facial challenges that the court itself has cited. And in that article, he shows that the court has invalidated statutes on commerce clause, section five, suspension clause, presentment clause, 10th amendment, supremacy, and privileges and immunities clause of Article four grounds without adhering to the most strict articulation of the facial challenge standard. So here is Justice Kagan, explaining the essential difference between as applied versus facial challenges.

Justice Kagan:

I mean, I guess I thought that a facial challenge, you need to show that some significant number of people in the world actually have this concern, and otherwise, you should bring an as applied challenge. I thought that that was the whole point of the distinction between the two.

Leah Litman:

And then, in her questioning of the American for Prosperity Foundation lawyer, she basically laid out the set of facts that would seem to suggest that a facial challenge... Again, if you assume that a facial challenge has to involve some showing that there is unconstitutionality in a large number or a significant number of cases just wouldn't be appropriate here. And this exchange also involved her doing a typical law professor thing where the oralist is fighting the hypothetical,

Justice Kagan:

Mr. Schaefer, I'd like you to assume a set of facts with me. And there this; that there are some donors to some charities, who are genuinely concerned about public disclosure for fear of harassment or threats. But then a very substantial majority of donors in a very substantial majority of charities are not

concerned about that, in fact, they'd rather like public disclosure of their generosity. If that's so, could you win a facial challenge?

Mr Schaefer:

Yes, Justice Kagan. For two reasons. One is that in the First Amendment context, we need only show a substantial number of instances.

Justice Kagan:

The great majority are not concerned about this.

Mr Schaefer:

What respectfully I would question, your honors premise.

Justice Kagan:

Excuse me, Mr. Schaefer, my premise is supported by a lot of facts. Most charities disclose their donors and impact, in fact, it's part of their strategy, that the more disclosure there is, the more fundraising and association there is. So anyway, let's just take my facts as a given.

Kate Shaw:

Yeah, I thought Leah it was really interesting just how much of the argument was consumed with this discussion of the distinction between facial and as applied relief, even getting really kind of in the weeds as to how as applied challenges in this area would proceed, how they would work. So there was a suggestion that potentially California could devise some administrative procedure to allow the reasoning of these as applied challenges as an internal matter, as opposed to requiring challengers to go to federal court, although, as the acting Solicitor General, sort of underscored... Going to court to bring these as applied challenge is, is something that has been done in a lot of related areas for many years. Courts are perfectly competent to adjudicate these as applied challenges.

Kate Shaw:

So there was no suggestion that there is, at present any administrative mechanism in California for raising these as applied challenges. So it was an odd discussion, and that it proved the adequacy of a non existent state mechanism. There could be some interesting way, if California is nervous about the outcome in the case. I could well see some attempt to craft some such system. I'm not sure if you would then try to move the case because of it, but prospectively to allow some fast track mechanism for as applied challenges. Because the chief did seem concerned, but this case has been going on for seven years, right? Is this the only way to get relief?

Leah Litman:

Yeah. So now, the moment we have been waiting for.

Kate Shaw:

So patiently,

Leah Litman:

We wanted to follow up with the most important issue that was raised on last week's episode. We now have definitive proof that Sam Alito listens to strict scrutiny. Or at a minimum that we perfectly understand what is happening in Sam Alito's mind. Call us the Alito whisperers, if you will. So let's play a clip of you Kate predicting what might happen at this oral argument.

Kate Shaw:

I mean, I'm 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 will want to talk about it.

Kate Shaw:

I don't know. I was just spit balling. Seemed like something that could happen. And then what happened when we all sat down to listen to the oral argument?

Leah Litman:

Sam, take it away.

Sam Alito:

So let me ask you about your position with respect to this particular case, because I found it a bit puzzling. You say that the case should be remanded so the Ninth Circuit can consider house significant, the harm would be to petitioners contributors if their identities became publicly known. You know what the record here shows. The district court conducted a trial, and it found ample evidence that the contributors to petitioners would be harassed. And the briefs filed by the American Civil Liberties Union and the NAACP, Legal Defense Funds and other groups says, "Petitioners have shown that people publicly affiliated with their organizations have been subjected to threats, harassment or economic reprisals in the past and are likely to be chilled."

Leah Litman:

Not to be outdone. I raised the stakes and explicitly challenged him: "Sam, if you can read my mind, bring up the NAACP LDF brief at argument. I'll know you're listening. And sure enough, he did it again."

Sam Alito:

All right. The brief filed by the ACLU and the NAACP Legal Defense Fund says that we should regard your system as a system de facto public disclosure because there have been such massive confidentiality breaches in California.

Kate Shaw:

Why was that so satisfying Leah, what do you think it was?

Leah Litman:

I have a lot of different theories. I'm just going to offer one, you might have some other ones I don't know if you'd be willing to share. But, I love doing this podcast. I love doing Supreme Court commentary. I enjoy it. I feel it's valuable in some ways. But it's also true that, I don't know if you feel this way, but I feel I personally get a fair amount of pushback just because I'm poking fun at Neil Gorsuch's burn book on purposivism or, how consistent the justices are in their methodology and sometimes get, derided as, not being able to, engage the arguments or, take it seriously.

Leah Litman:

And it's, well, actually, I do think, right, I understand what is happening in these cases. And even though this was, a very, I don't know, silly prediction, right? It was a correct prediction, you can understand what is happening at the court, even when you are making light of it and kind of mocking it.

Kate Shaw:

First, let me just say it's ridiculous if anybody out there is challenging the quality or substance of Supreme Court commentary that you do, Leah. But I think that's basically what it is to, in that I think we do try to do both the substance and the doctrine, but also have some fun with it. And we do have insight into what makes these justices tick, not perfectly. They surprise us all the time. I don't really want to live inside any of their heads. [crosstalk 00:36:15]. But I agree, it was... it felt like a certain validation of the way that we are engaging with this material, but I'm sorry, it is substantive.

Leah Litman:

Right. It is.

Kate Shaw:

But it was fun and satisfying, in part, because it was actually the argument on the substance was going I think, not wow, for California. And so I was at least able to derive a degree of satisfaction from us having predicted that properly. Yes. Okay. So that was Alito. He's either actually listening or more likely, we have just got his number. And, but Justice Thomas was sort of doing something similar.

Leah Litman:

Yeah, Justice Thomas's questions in the case seem to be taking a similar tack that Melissa has observed and actually wrote a fantastic article about in cases involving contraception and abortion in those cases we recall Justice Thomas has insisted that states could regulate contraception and abortion, because contraception and abortion and the court's cases, protecting them originated as or are used as a way of minimizing black lives. And so a similar, concern seem to be animating his questions in this case, and skepticism of the reporting requirement. Why don't we play those clips here?

Justice Thomas:

Thank you, Mr. Chief Justice. Council, I'm interested in your discussion of the non public disclosure laws. The fact that you would have this internally and not disclose it to the general public, but throughout at least recent history, or not so recent history, the Japanese internment cases that census data was used to locate them the Council on American Islamic Relations in their brief, in this case, say lives that the US government uses data to locate American Muslims. And the civil rights cases like the NAACP case, the local government, state governments wanted data in order to target the NAACP. So how can we say that there is a difference in public disclosure versus non public disclosures?

Kate Shaw:

He's very much deploying race and accusations of racism in service of a larger jurisprudential project.

Justice Thomas:

In this year, there seems to be quite a bit of loose accusations about organizations. For example, an organization that has certain views might be accused of being a white supremacist organization or racist or homophobic, or something like that, and, as a result become quite controversial.

Kate Shaw:

We should also just flag that Thomas has been the most protective in a number of cases of these associational privacy interests. So, citizens united and several other cases are 8:1 in favor of disclosure requirements. But he was alone in dissent in those cases. And I suspect he's going to have some company in his position in this case when it's ultimately decided.

Leah Litman:

So Justice Breyer was keen during argument on figuring out what the difference was between this case, which involves anonymity and donating to charities and future case involving campaign contributions and anonymity and political speech.

Justice Breyer:

If you win in this case, I think the court will, in some form held that the interest of the donors in maintaining privacy of their giving to a charity, interest of the charity in receiving those money here at least outweighs the interest of the state in having a law on the books that even if it never is actually enforced, frightens people into behaving properly. Okay, something like that. What if we hold that? Can we distinguish campaign finance laws? Where the interest is even stronger in people being able to give anonymously? Can we distinguish laws that require them to disclose their givers? How would you distinguish that? If you would.

Kate Shaw:

Okay, so maybe let's offer some few closing observations. So one, I will say it was clear to me coming out of this argument very much in the same way, it was in Cedar Point, another case involving California. But the challengers here are using this case as one step in a long deregulatory journey, right that if they win, in this case, they will challenge the analogous federal requirement. The lawyer for Americans for Prosperity, didn't even really disavow any intention to do so. So that there might be different justifications for the federal law. But that would be another very significant step right to take aim at the IRS's requirement that charities submit confidential information about their donors.

Kate Shaw:

And yet it seemed very possible to me based on this argument, absolutely. If the court announces any kind of ratcheted up scrutiny in this context, that will be the next second use to attack compulsory disclosure in the campaign finance realm of political contributor information. So this very much did not feel to me like a standalone case, but as an opening salvo, and maybe one other thing I'll observe, which is that I thought acting Solicitor General Elizabeth Preloger was superb. And she was arguing that the case should be sent back down that these associational privacy interests are serious that they should get another close look, but just that As-applied relief, as opposed to facial relief is appropriate.

Kate Shaw:

And she underscored that the United States wasn't taking a position on the ultimate outcome of the As-applied challenge and sort of seem to be signaling to the justices that the United States would be

perfectly happy if it were a six, if the As-applied challenge were sustained here. And so I thought she got some traction, and her responses were just incredibly daft. But if she's successful, and the case goes back down for As-applied review, that would be an enormous win for California. But that's I think, by far the best California can hope for, and much more likely, I think, is facial invalidation. And I guess then the next best thing California in general and proponents of some kind of regulation in the sphere can hope for is that the court just restates the standard it has used in other cases, and finds California hasn't demonstrated a sufficiently weighty interest here to justify the serious burden on the associational privacy interests.

Leah Litman:

Yeah.

Kate Shaw:

Did you notice this, so the Becket Fund filed a brief just resting on the assembly right as opposed to this associational privacy right. And I'm sure there was a long game there. And I just don't know what it is, but Kavanaugh seemed sort of fixated on this assembly right. And the Becket Funds brief was really about the right to assemble and religious assembly in particular. And so I feel clearly there's something to watch in that space. I just don't know exactly what yet.

Leah Litman:

Yeah, I think it arguably could be relevant to this As-applied versus facial standards, since it came up in questions that some of the justices thought the typical more demanding standard for facial relief didn't apply where you were dealing with "A direct infringement of a right that's actually protected in the First Amendment." And I think part of the argument here was, well, maybe this case does involve a direct infringement of a right actually protected in the First Amendment, whether that right is the associational right, that Justice Thomas thinks is protecting the First Amendment rather than something that is necessary to the enjoyment of other first amendment rights. And maybe this part of assembly, but I think that is one way it could be potentially relevant to this case. In addition to laying groundwork.

Kate Shaw:

Yeah, that's really interesting and that sounds right to me. Okay, so let's move on to the next case, we wanted to debrief Mahanoy Area School District versus BL. So this is the case about the cheerleader who was punished after writing and sharing a snapshot that said, "F cheer" after she did not make the varsity cheerleading squad and said F a few other things, including F school, F softball, F everything. And that snap was screenshotted, shared with a coach, which then led to her suspension for a year from the cheerleading squad entirely. So the question is, "What kind of speech are schools permitted to punish students for?" And does the answer to that question turn on whether the speech happens inside or outside of school?

Kate Shaw:

So the school district was arguing for the application of Tinker, at least where there's a Nexus to the school in the students' speech. So in Tinker, the court said that schools could regulate students speech if the speech created a substantial disruption, even if the regulation involved the content of the speech, but Tinker squarely rejected the idea that students have no speech rights at school at all. And the student here is arguing that schools cannot punish students for speech outside of school at Tinker. The expressive conduct in question was the wearing of black armbands inside school. The student here is

saying that it's fundamentally different from this speech, which occurred outside of school. And she says that's essentially off limits to school disciplinary authorities, unless the speech falls into a narrow category of unprotected speech, something like true threats.

Leah Litman:

So from the argument, which took an insane hour and 50 plus minutes, I don't think we are going to get an opinion that announces a broad or major principle of constitutional law, I think we are more likely to get a narrower opinion saying that whatever the standard is, or assuming Tinker applies, the discipline went too far here. And I think that is completely right, and could perhaps help in curbing some of the watering down of the Tinker standard that has occurred in the decades since in the lower courts. So Justice Breyer summed up this position as follows.

Justice Breyer:

She used swear words off campus that caused the material and substantial disruption? I don't see much evidence it did and if swearing off campus. Did I mean, my goodness, every school in the country would be doing nothing but punishing. And it certainly didn't help others. I mean, disrupt others, it didn't hurt others. As far as I'm aware. As far as I can see, in the record.

Kate Shaw:

Kavanaugh was interesting in this argument, he seemed really torn up about discipline.

Justice Kavanaugh:

But as a judge, and maybe as a coach and a parent too it seems like maybe a bit of overreaction by the coach, obviously, think it's unfortunate this spiraled this case, the way it did completely understand the young woman's reaction to being upset with the decision. As I mentioned, to Miss Blatt, I think that's entirely typical, and widespread for decades and decades when kids are disappointed by something like that.

Kate Shaw:

So he was, really concerned about the severity of the punishment. And actually, you could see that on display in a number of the justices questions that they were a little frustrated that the case was in front of them at all, because had this just been, a verbal reprimand or a one week suspension or something, it's very hard to see the possibility of a major first amendment case growing out of it. But the school district really did, potentially overreach. This was a severe consequence based on speech that only by happenstance even came to the school authorities attention at all and so you got the feeling that they wish that they didn't have the case in front of them at all.

Leah Litman:

And it seemed like Justice Kavanaugh's questions at one point he actually explicitly said that he was coming at this case as a coach or a former coach, which I think is notable in part because we sometimes assume or are told to assume that the justices prior life experiences have nothing to do with how they view cases. This is obviously a lie and sometimes it seems as though this is a lie only when you're dealing with justices who are women or justices of color, but obviously, that's not true either. Right? And here he's making it quite explicit, and yet, no one thinks this was somehow unjudicial or horrible, in fact, it's

probably good that someone understands how bonkers and insane this punishment was for this particular set of statements.

Kate Shaw:

It's such a great point, you have to think of Justice Sotomayor making an analogous point drawing on personal experience, and it would have made news and it's just completely unremarkable when Justice Kavanaugh says "Look, as a former, high school athlete, and a parent and a coach. I get it, this stuff is serious." And yet it goes totally unremarked. I think it's such a great point.

Leah Litman:

And then Justice Breyer dropped this bomb in which he shared his innermost fears.

Justice Breyer:

There are dozens of areas that didn't use to be thought of as within the purview of the public school today, in many places they are. Now add to that the internet and the internet, not just listening to teachers, but also doing homework, and also writing papers sometimes vaguely defined, and sometimes in sometimes, how do I get a standard out of that? I'm frightened to death of writing a Stanford and a Tinker, after all, doesn't really write a standard. It just says you can't regulate school, unless it substantially disrupts or hurt somebody else. It doesn't say if it does that you can do anything you want.

Leah Litman:

He literally says he is, "Frightened to death of writing a standard to decide this case", he actually said something a little similar in the securities law class action we talked about previously, where he said, "The less the court writes, the better." I have a solution. If he wants to write fewer opinions, or he doesn't want to have to announce legal standards, I have some ideas for how he can spend his time. Just going to put that out there.

Kate Shaw:

So the Chief Justice wanted to know about political speech directed at the school about, school policy or school funding, etc. But that happens outside of school.

Leah Litman:

Justice Alito then asked about a slight variation on what is a real case from the Sixth Circuit. Although the Sixth Circuit case involved a teacher rather than a student.

Justice Alito:

A student believes that someone who is biologically male is a male. And there is a student who is biologically male, but identifies as a woman has adopted a female name, but the student who has the objection refers to this person by the person's prior male name and uses male pronouns. Can the school do something about that?

Leah Litman:

All of this is to say, I think the fact that the justices were struggling with so many hypotheticals and drawing the lines is just another indication that we are not going to get an opinion that announces a broad principle, and instead a narrower opinion that says, this particular case goes too far.

Kate Shaw:

This isn't a victory lap exactly. But I will flag that in a Lisa Blatt answer. She made reference to Michael Jordan, which made me wonder whether she watched the documentary that you and Melissa talked about in our last episode, although I will confess I have not seen it.

Leah Litman:

It's so good.

Kate Shaw:

Yeah, Chris, my husband said the same thing. But also, if she didn't, maybe it was on the brain because she listened to our podcast episode, referencing it.

Lisa Blatt:

I understand that Michael Jordan was upset, but at some point, presumably, he was respectful to his coaches. And there's a line that coaches always have to... coaches have to know their team and know what works.

Kate Shaw:

Seems, marginally more likely that Sam Alito was listening.

Leah Litman:

Yeah, probably true. But like this particular statement, there's no way she's watched the Michael Jordan documentary given that Michael Jordan, he was not respectful to coaches and other players repeatedly and to management he did so publicly. So it's just interesting, I don't know, observation.

Kate Shaw:

Alright. So she clearly hasn't seen it based on that. Got it. Since having not seen it myself. I didn't even catch that. So then clearly, she did have him on the brain because of the pod.

Leah Litman:

There we go, definitive proof. So just stepping back, probably going to get a narrow opinion saying that the school's discipline went too far. And as I said, I think that could be a good thing, because it could curb the kind of loosening of the Tinker standard. And in one question, Justice Kagan brought out how limited the Tinker protections have become in light of decisions from the lower courts.

Justice Kagan:

But I'll just give you two cases. One where there was a ban on shirts saying "We are not criminals" to protest an immigration bill, another shirt saying "Homosexuality is a sin." And in both cases, the court said Tinker allows the school to say that you shouldn't wear those kinds of things to school. Do you think that's clearly wrong?

Leah Litman:

So I think that opinion, holding that, assuming Tinker applies or even a lesser version of Tinker applies, the discipline goes too far could counteract this trend. And it to me call to mind this line that David Cole,

who was arguing on behalf of the student from the ACLU said, which is he expressed a concern that students would carry the schoolhouse with them wherever they went, and how concerning that would be if Tinker is in fact, so watered down.

Kate Shaw:

And having now come off of a full year of my kids, literally carrying school with them, because their iPads when they've been in remote school have been their school that actually really resonated. And as I think we said, last week, we previewed this case, that there is something concerning about saying schools are powerless in the face of certain kinds of destructive or harmful speech. But it is also really troubling to imagine school authorities, right, being able to basically travel with students as they conduct their largely online lives, and discipline, are the things they say that have, at best a tenuous connection to school. So I totally agree with where you started, Leah, which is that this case is unlikely to make big new law, I do think they're likely to say that they're not going to cut off Tinker completely with this on campus off campus distinction is not a useful one.

Kate Shaw:

And it's actually kind of a meaningless construct now anyway, with students and student speech. But, if they don't give a ton of guidance, beyond sort of a Tinker, substantially disruptive standard, I think there's going to have to be discretion on the part of school officials regardless. And so that kind of reaffirmation is going to, leave school administrators in a position of exercising judgment and discretion, and sometimes they will go too far as in this case, they probably won't always respond sufficiently seriously in other cases. But if the choice of school principals and administrators versus this Supreme Court, I'm actually more comfortable leaving more discretion in the hands of those who run schools on a daily basis, yeah.

Leah Litman:

Yeah, no, I would also be very happy with a narrower opinion, given I think this stuff is always going to be somewhat context dependent. So better to leave it to more of a facts specific in fact, non-application.

Kate Shaw:

Wait, do you think there's going to be cancel culture references in this opinion? In some concurrences?

Leah Litman:

I don't know.

Kate Shaw:

Yeah, no, maybe not?

Leah Litman:

I don't think so. Okay, just based on the argument that honestly seem to be more of a looming presence in the Americans for Prosperity foundation argument with Justice Thomas's questions than in this one

Kate Shaw:

Yeah. But maybe there's, they'll just shoot the moon every single opinion.

Leah Litman:

I'm going to say some of those burn book lines, but future opinions [inaudible]

Kate Shaw:

That's true. But these are pretty long burn books. They got a lot of material to get through. We're going to preview just one case, I think, right?

Leah Litman:

Yes. So we get to preview this case, because this case was moved a bit later, out of April sitting and into this week after the court appointed an amicus to defend the decision below after the Biden administration switched positions. So this case is Terry versus United States, and it involves an important question about re-sentencing under the recently enacted First Step Act. We've mentioned before that the court appointed Adam Mortara to defend the decision below. This is as we said, Mortara's third Amicus appointment. And second argument as part of an amicus appointments since one of those invitations was withdrawn when the state of Georgia switched positions again.

Leah Litman:

The issue in this case is who is eligible for resentencing under the First Step Act, and because it's a complicated statutory interpretation case, I am going to rattle off a bunch of history and terms so brace yourselves, but this case is just super interesting. To me. It's resentencing guidelines, mandatory minimums, elements of defense, it's everything I love in one package. So anyways, many of our listeners are probably familiar with the former 100:1 crack cocaine ratio that was enacted in the Anti Drug Abuse Act. Basically, the minimum quantity of crack or powder cocaine that triggered certain penalties and specifically mandatory minimums differed substantially between crack and powder cocaine. The Fair Sentencing Act of 2010 reduced the disparity from 100:1 to 18:1 by altering the minimum quantities of crack that triggered certain penalties or mandatory minimums for cocaine offenses.

Leah Litman:

And then the more recently enacted First Step Act provided for some resentencings, including for people sentenced under the Pre Fair Sentencing Act provisions. The relevant provisions to this case are section 404 B, which provides that a court that imposed a sentence for a covered offense may impose a reduced sentence as if sections two and three of the Fair Sentencing Act were in effect at the time the covered offense was committed. And the key provision is section 404. A, which defines a covered offense to mean a violation of a federal criminal statute, the statutory penalties for which were modified by the Fair Sentencing Act. Okay, so the question here is whether a covered offense includes section 841 B1C, the Federal Criminal Code, what is 841B1C? Well, 841B1 provides the graduated set of penalties for different drug offenses.

Leah Litman:

And the different penalties apply, as I said, based on the amount of particular drugs, so 841 B1A provides penalties for people with more than 280 grams of crack. 841 B1B provides penalties for people with more than 28 grams of crack, and 841B1C is for everyone else. Okay. So, again, the Fair Sentencing Act of 2010 increased those minimum quantities that triggered the mandatory minimums under B1A and B1B. And the question is, if you were sentenced under 841 B1C, the generic provision dealing with the possession of crack cocaine, can you get resentenced under the First Step Act. Petitioners argument

is that to reduce the ratio, the Fair Sentencing Act raised the crack quantities that trigger the enhanced penalties.

Leah Litman:

And by raising the crack quantity, it altered the scope of the default provision under 841 B1C, because that provision now applies to anyone who possessed an unspecified amount of crack or anyone who possessed less than 28 grams. So they say, by raising the crack quantities for the enhanced statutory penalties, it modified those penalty provisions and accordingly modified the default penalty provision. So that is their argument. And the increased penalty provisions are incorporated into the default one because it says except as provided in those increase penalty provisions, 841 B1C applies. Now the court appointed Amicus comes along and says "No, the Federal Criminal Statute that has to be modified is the elements of the offense." Because when you talk about a covered offense and violations of a statute, and the offense means violating a statute, and that just refers to the elements of the offense. And because the Fair Sentencing Act didn't modify the elements of 841 B1C, those persons aren't eligible for resentencing.

Leah Litman:

But it did modify the elements of 841 B1B and 841B1A because it modified the quantity of drugs, which are an element of the offense. So the lower courts had framed the question as whether, the modifying clause, the statutory penalties for which were modified by the Fair Sentencing Act modifies either Federal Criminal Statute violation of a criminal statute, although that's not really how the parties are framing the case. And it's really about what statutory penalties and violation of a federal criminal statute mean. And I think it's a super fascinating case, because, on one hand, I actually found the government's brief, or at least their reply brief, a little bit frustrating. They included a bunch of diagrams that were concentric circles, underscoring the point that, these Fair Sentencing Act Amendments alter the scope of the provisions, and okay, everyone gets that. But tell me why, as a textual matter, covered offense doesn't refer to the elements of the offense, which is what the court appointed Amicus is arguing and, again, if you're steeped in this world, elements of the offense, just has some intuitive appeal as a legal term of art that gets used in these statutes.

Leah Litman:

And so I wanted more engagement with that issue. I thought that the FPD petitioner brief did a better job of engaging with that, and they were saying no, when they are talking about, the violation of federal criminal statute, they're talking about, a penalty statute, and this is a specific statute. That's a penalty statute because, part of the elements are, described in other provisions. So, I just found that, a little bit frustrating and I've been doing this case, probably for over 24 hours, and I just don't know, what I think about it, and that's just super frustrating for me. I certainly, mapped out the statutory terms. Well, what does covered offense and violation of federal criminals statute mean and basically, can you have an argument for why, 841B1A and B offenders are re-sentenced.

Leah Litman:

And you can because, court appointed Amicus says elements of the offense are covered. And then I just, I wanted more. So I'm super curious about this argument. I should note that the court appointed amicus brief goes for broke, court appointed amici can sometimes do this, since they are not actually representing a client, Adam Mortara has done this before. So I actually, first encountered Adam Mortara, when he was court appointed amicus and beckles. And I had written these, law review articles

about the sentencing issue and beckles. And he addressed them in a footnote in which he called me an armchair critic of the Sentencing Commission.

Kate Shaw:

Oh, I remember there was history. I didn't remember he actually had a footnote about you. Yeah. Okay. Yeah.

Leah Litman:

So, just to give you some flavor of the court appointed Amicus brief, he says, "No amount of the government's or anyone else's evidence, free speculation can change this." And, next sentence is equally unhelpful as an amicus brief from a few retired federal judges who forgot to mention the impact or relevance of the retroactive guidelines amendment. That is an actual line from the Supreme Court that you just do not often see.

Kate Shaw:

There are weird fringy amicus briefs that make weird claims and accusations sometimes, but not in a brief of somebody who's going to actually argue before, I mean, I was not in a party brief, but he's not a party exactly. Whatever he is, he's an advocate, and he's going to have argument time. That is unusual.

Leah Litman:

Yeah. And I should note that he also accuses the government of armchair psychologizing, as well. So it's both me and the federal government that do the armchair engagement with these issues. At another point, he says, the government is now basically buying what Terry is selling, in a drug possession case. I just think that's an interesting turn of phrase. But super fascinating case. Two quick additional thoughts on Terry. One is, obviously this case is about statutory interpretation. But that's the government's brief. And I think the petitioners brief, to a lesser extent, underscores, it's also partially going to be about policy, why would Congress have allowed for re-sentencing for 841B1A and B offenders who possessed more crack than lower level offenders?

Kate Shaw:

Right and not for the people with much smaller quantities? It makes no sense.

Leah Litman:

Yeah. Right. And you would think that, since everyone thinks, and this court insists that this is a court of textualist, that wouldn't be as much a part of the briefs or the arguments. But I am not convinced that it's actually a bad strategy to put that in the briefs given that we saw in the Confederated Tribe's case involving ANCs as well, as I think, the dissent in new Chavez, the case we were just talking about, policy arguments are still front and center on many justices minds. That is just part of how they understand the text. They want to know. Does this make sense? And how would this have made sense, to the people enacting it. And so it's just this continued oddity, where a lot of the work being done in these cases, at argument and in the briefs is about these policy arguments, even though I think the final opinions are very much focused on formal textualism. But it will be kind of an interesting thing to see how the different justices possibly split in this case, given those issues.

Kate Shaw:

But your general point is that actually advocates really shouldn't discount the importance of continuing to make these policy arguments because they do resonate with some of the justices, even the really textualist ones in sort of quiet ways sometimes do actually care. And it's a disservice not to at least spend some time developing those arguments, because you've decided that the arguments from text are the only ones the justices care about.

Leah Litman:

Yeah, I think that's totally right. I mean, maybe someone like Justice Gorsuch truly doesn't care if he thinks, an interpretation serves no purpose whatsoever. But I would not put the Chief Justice, Justice Kavanaugh or Justice Alito in that category at all. And so I think given that you got to get to devise somehow, right, it would be a mistake not to include those arguments, even though the end result might not reflect them.

Kate Shaw:

Yeah, I think that's a great point.

Leah Litman:

The last thing I would say is just my friend Adam Mortara, has literally come out of retirement. He was formerly a partner at Bartlett back to argue this case and pursue his true passion of arguing that the government is being too lenient in resentencing criminal defendants. So..

Kate Shaw:

We all have our passions, Leah.

Leah Litman:

Right, exactly. His burn book is all about all those times the federal government consented to re-sentencing, and he used a bunch of those lines in the speech. So there you go.

Kate Shaw:

Totally.

Leah Litman:

Yeah, I just I don't know this case, this case bothers me. I find it super interesting. And I will be listening to the argument in real time. Definitely.

Kate Shaw:

This conversation is making me wish that the court there was some mechanism by which the court could appoint you. Even though there's two people already taking the position that I think you want to take, although I'm not sure exactly positive how to get there. But it just feels like your perspective is going to be missing from this argument. So hopefully, the justices will listen.

Leah Litman:

I think if they ever appointed me and Amicus in a sentencing case I would have a really hard time not interrupting the justices, because I get so excited about these issues that I will be, "But actually Justice Gorsuch, like I just..."

Kate Shaw:

I'd love to watch that. Listen to it, whatever it is we're doing, if that ever happens? But actually, I feel like the Sentencing Commission is a good segue to the last thing that we wanted to talk about, which is that we had our first hearings, for Biden judicial nominees. So these happened at the same time that the Mahanoy arguments, right, the cheerleader arguments were occurring. So it was this cornucopia of good audio content. So you had I don't know about you, but I literally had both screens up.

Kate Shaw:

I was toggling between them. And then there were certain senators who would ask a question, and I would just turn the sound off and go back to them, because the Mahanoy, I was gonna do Mahanoy and then switch over. But then it went so long that I started double screening, which probably meant I didn't do a great job of actually taking either in but I definitely saw and heard enough of the morning confirmation hearings of Judge Ketanji Brown Jackson, who's currently on the District Court for the District of Columbia, who has been nominated to the DC circuit, and Candice Jackson Akiwumi who has been nominated to the Seventh Circuit. And what I saw is that they were both just so smart and impressive and should be confirmed easily.

Kate Shaw:

And I don't know if Judge Jackson was asked much about sentencing, but sort of to your point that people who don't care about, say the armed career criminal act, have no business on the federal courts. I think the same is true of criminal sentencing. And I think it is so great that Judge Jackson not only has this extremely impressive record as a district court judge, but was a commissioner on the Sentencing Commission and has deep expertise of the sort that few do on the federal bench in matters of criminal sentencing. And so I just think that's another amazing attribute that she brings to the job of sitting on the DC circuit, which I hope she will soon be doing.

Leah Litman:

There were also more judicial nominations, the morning after, President Biden's address to Congress two in Washington State and one in New Jersey, two I think district courts that are reportedly extremely understaffed and in desperate need of judges. So hoping that this is, a sign of a continued commitment and interest from the administration and judicial nominees.

Kate Shaw:

And the very last thing we wanted to mention was we're recording this podcast the day after President Biden's first address to Congress. I noted, there was a lot of really great and important content in the speech. He did not mention the Supreme Court. But there was a Supreme Court representative present at the Capitol for the speech. So typically, some subset of the justices attend the State of the Union addresses. The Chief Justice was the only member of the court there, as I understand it, he was the only one invited because of the capacity limits, right. They really did implement social distancing limits. So the cabinet, for example, wasn't there at all, and only Chief Justice Roberts was, and did you catch that? I only saw the still I didn't see the moment on video. But there was a little bit of a greeting and close

conversation short, but warm seaming between President Biden and Chief Justice Roberts. What do you think they were talking about Leah?

Leah Litman:

Sam Alito's skincare routine?

Kate Shaw:

Biden's skin looks good. I mean, not Sam Alito good, but good. For Roberts, he could probably get a little bit of that cream going.

Leah Litman:

That's one possibility. Another possibility is, what's in your burn book John,I want to know.

Kate Shaw:

Yeah, I mean, it does seem like the two of them are probably aligned in certain respects with how they would prefer the new conservative majority to rule on uncertain matters. So maybe they were doing a quick strategy session, but, I think skincare is a good guess so we can go with that.

Leah Litman:

Yeah.

Outro Recording:

Thank you all for listening, thanks to our producer Melody Rao. Thanks to Eddie Cooper for making our music. Thanks to Sam Alito and Lisa Blatt for enthusiastically listening to the show. If you'd like to support the show and continue getting this show into their ear holes, you can sign up to become a glow subscriber at glow.fm/strictscrutiny.