Speaker 1:

Chief Justice may please the court. It's a 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 elegantly with unmistakable clarity. She said, "I asked no favor for my sex. All I asked of our brethren is that they take their feet off our necks."

Leah Litman:

Hello, and welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We've been pretty heavy on the Supreme Court part of that bit as the term is winding down, but don't worry, we have a lot of great court culture material in the hopper and scheduled for this summer. We are your hosts, I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw and we're coming to you now as Leah previewed with yet another quick hit emergency episode that's recorded just hours after the court hands down opinions, so the usual caveats apply. We reserve the right to refine and add to our takes. We usually have at least a few days to mold these opinions over before we share them with you, but we're skipping over that step. So today we're going to be covering the opinions we got on a Friday. It's unusual that we get opinions on a Friday. I actually can't remember the last time the court added a Friday to its opinion calendar. It seems less typical, but justices and all of us are ordinarily taking Friday's off, not responding to opinion handouts.

Leah Litman:

Maybe Justice Alito or the Chief were blaring Rebecca Black's classic, "Friday, Friday, got to get down on Friday," so they just channeled that vibe and started releasing opinions. I don't know. Maybe Justice Alito needed to wash away that Pete Wentz/Fall Out Boy energy. He's been stewing in for the last few weeks just to cleanse the palate.

Kate Shaw:

Good theory.

Leah Litman:

So a few quick pieces of news before we get to the opinions. One thing is that the Biden administration announced that it is extending until the end of July the Center for Disease Control eviction moratorium which was set to expire on June 30th. This change is potentially significant because, as we noted on Monday's episode, the court has to forward an application to prevent the CDC from enforcing the eviction moratorium. A district court had invalidated the moratorium but stayed that ruling, that is didn't have its ruling go into effect. And a group of Alabama realtors went to the Supreme Court asking them to basically overturn that stay, allow the district court's decision to go into effect and prevent the CDC from enforcing the eviction moratorium.

Leah Litman:

When the moratorium was set to end of June, the moratorium would have had like basically two weeks left by the time briefing was completed at the court and that might have been a reason for the court just

to let the moratorium expire and do nothing. Now that's less of an option with the moratorium being extended for another month. I still think the court shouldn't disturb this day for reasons we talked about, namely, the district court invalidated the moratorium but still concluded after balancing the equities, that that ruling shouldn't immediately go into effect. But I think extending the moratorium changes the calculus and perhaps puts on the table the option for the court to vacate the rulings below and direct the district court to take another look at it now that moratorium has longer time horizon.

Kate Shaw:

And the second piece of news we wanted to flag was that just before we started recording, Attorney General Merrick Garland announced that the Department of Justice is bringing a lawsuit against Georgia's voter restrictions, the ones that were passed in the wake of the 2020 election as a violation of the Voting Rights Act. So it is actually enforcing the Voting Rights Act. Interesting that-

Leah Litman:

At least while it can.

Kate Shaw:

Well, because it's Friday and Brnovich is going to come down next week because we didn't get it today. That's the big section to a case out of Arizona. So yeah, just under the wire, going to get this announcement. We don't actually really know what shape the lawsuit will take, but it is interesting that they announced today that they would be bringing the suit.

Leah Litman:

Right and then Brnovich will return us to the good old days where diluting the Voting Rights Act is what's necessary to enforce the Voting Rights Act, so there you go.

Kate Shaw:

Exactly.

Leah Litman:

Now to the opinions we actually did get today. The first is TransUnion versus Ramirez. When we were debating whether or not to do a quick hit, once TransUnion came down, that was an immediate reason to do the quick hit emergency episode because this is an important class action and standing justiciability case. It's also the case in which noted squish Justice Thomas continues his further drift left. Again, this is a joke. He is not drifting left, but this does now make two opinions this week where he has joined the courts three liberal members in dissent against a five-justice conservative majority. This also makes it the second example this week where the shift from the five-four conservative courts to the six-three conservative Court made a difference. Justice Thomas voted with the liberals. While Justice Ginsburg was still on the court, they would have had a five-four majority rather than being in dissent.

Kate Shaw:

So I definitely agree that Justice Thomas is not drifting left, but honestly, I feel like I'm ready to say that something is up with him. Theories include maybe he has a very persuasive sensible pragmatist among his law clerks this term. Maybe he is finding the ostentatiousness of this new crop of justices as the standard bearers of textualism and originalism a little off putting. I am not sure, but between him

writing in Arthrex to say he was crazy to conceive of these administrative patent judges as principal officers, his argument in Collins that an impermissible removal restriction doesn't necessarily render government action invalid, this opinion which we'll talk about. I feel like something is up. I'm not ready to commit to a theory about what, but one or two data points I was willing to write off. But after today, I think that there's something afoot with Justice Thomas.

Leah Litman:

Probably something afoot, not enough to start calling him Comrade Thomas. So this case TransUnion concerns the interaction of two doctrines or procedures, the class action device and Article III standing, though I think it ended up being more significant as a standing case. The case concerns a class action lawsuit, a lawsuit you bring on behalf of yourself and others like you for violations of the Fair Credit Reporting Act. The plaintiff, Mr. Ramirez, argued that his credit reporting agency, TransUnion, failed to use reasonable procedures to ensure the accuracy of his credit file, leading to an erroneous report that he was on an OFAC list as a national security threat and it is unlawful to transact business with people on the Treasury Department's specially designated nationals list.

Leah Litman:

Mr. Ramirez discovered this fact when that information was shared with a third party, the car dealership, where he sought to purchase a car, but other people didn't have the mistaken OFAC alert delivered to a third party. They just received it themselves. After Mr. Ramirez received this alert, he requested information from TransUnion. The first mailing he received said there were no alerts on his account and contained a summary of rights. The second mailing, however, alerted him that his name was a match to names on the OFAC list. After that, Mr. Ramirez brings the suit on behalf of all people to whom TransUnion sent a mailing like the second one, their name matches the name on the OFAC list and doesn't contain a summary of rights.

Leah Litman:

He argued that the credit reporting agency had violated the Fair Credit Reporting Act in three ways. First, by failing to follow reasonable procedures, ensuring the accuracy of the information. Second, by failing to disclose all information when making a disclosure to a consumer. And third, by not sending a summary of rights together with third mailing that contained the disclosure. Some people in the class like Mr. Ramirez had false credit information reported to third parties, but others did not. And the bottom line in the court's opinion is that only those people who had false credit information shared with third parties has standing. The original overall class had 8,000 or so members. The court finds that only the subset of about 2,000 has standing.

Kate Shaw:

And to understand the significance of this opinion, a quick word about standing and causes of action. So standing doctrine, as we talked about in the context of the Affordable Care Act case, California versus Texas, is just the idea that only plaintiffs who are injured by some challenged action can bring a lawsuit in federal court. Now in previous cases, the Court has said that it is easier for plaintiffs to establish an injury in fact if Congress by statute gave them some statutory right and authorize them to sue for a violation of that right. Basically, even if you weren't injured in the absence of a statute, you could be injured once Congress created a right of action.

Kate Shaw:

The idea is in part that when Congress authorizes you to sue and gives you a right, that's Congress's judgment that you're injured. The question is where the court might get off saying that you're not injured.

Leah Litman:

So in a bunch of cases, the court has struggled to draw the line and say, "When, if ever, Congress giving you some right and a right to sue still means you don't have standing." In Lujan versus Defenders of Wildlife, the court said, "The so-called citizen suit provision of the Endangered Species Act didn't give a point of standing, but the citizen suit provision was odd and that it literally authorized any person to sue, it didn't actually create a right in any particular class of people." Then the court took a bunch of cases that might have decided the issue of when Congress does create a right in a particular class of people when that nonetheless isn't sufficient for standing.

Leah Litman:

But the court never actually came to an ultimate resolution in those cases. It dismissed as improvidently granted the first effort in First American vs. Edwards. It ended up vacating and remanding lower court decisions in Spokeo versus Robins and Frank versus Gaos. And in those cases, the court only said that, "Well look, there has to be some concrete injury in addition to particularity," but it didn't actually say, "The right Congress has created here," or in those cases wasn't sufficiently concrete.

Leah Litman:

Today's opinion in TransUnion represents the first occasion where the court definitively held that the violation of a statutory right particular to the plaintiffs that a plaintiff had asserted did not give rise to standing and that could have significant consequences and a bunch of other cases as we'll discuss. And the court also made some other noteworthy conclusions that we'll go over as well. So what is new in this decision? The court first reinforces the rule that all class members must have standing, or put another way, you can only get damages on behalf of class members with standing. And this is another device, of course, for limiting the potency of class actions, which of course, the Roberts Court has been quite hostile to. The court has went out of its way and decisions like Jennings versus Rodriguez, to raise questions about whether cases should proceed as class actions even when that issue isn't raised. It's also imposed additional limits on class actions like Walmart versus Dukes, the massive sex discrimination lawsuit against Walmart.

Leah Litman:

The more important point in the court's ruling in TransUnion, however, is about what kinds of injuries count for purposes of standing and when it congressionally created or recognized injury does not give rise to standing. This is a big deal beyond class actions. Again, it concerns when a violation of a statute for which Congress has authorized someone to sue isn't sufficient to give rise to standing. Instead, what the court says is the plaintiff has to show a concrete harm and basically convince the court that they've suffered an actual or real injury.

Leah Litman:

The majority emphasizes that courts should assess whether the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts, that is whether plaintiffs have identified a close historical or common law analog for their asserted injury. Yes, another excellent efforts to find clarity in common law analogues and history. I cannot wait for this

to go well. First, the court rejects the idea that a credit reporting agencies failure to follow reasonable procedures leading to false information about the plaintiffs is an injury if the person who receives that false information is the plaintiff themselves.

Leah Litman:

The court says that's too different than the common law tort of defamation which requires publication and that's why if the false information is distributed to a third party you have standing, but you don't have standing if it's not. Then the court has to address the plaintiffs' argument that they experienced an injury because they suffered a material risk of harm. That is, with the false information in their credit report, there was a material risk that that information would be disclosed to third parties, which of course, is what credit reports are for. The court says that doesn't work because here the plaintiffs sought damages, not injunctive relief.

Leah Litman:

You can think of this move as kind of a reverse Lyons' rule that says you can't establish standing to recover damages based on a future risk of harm. Lyons, of course, was the case that said a plaintiff seeking an injunction had to show a risk of future injury. You couldn't get an injunction just because you had established previous or past injury. Here, the court says a plaintiff seeking damages has to show a past injury, that it's not enough to show a risk of future injury, at least until the exposure to a risk of future harm creates a separate or independently concrete harm.

Leah Litman:

I hate this. I obviously think Lyons is wrong. If you're interested in Lyons, we actually discussed that in our separate podcast, Irrational Basis Review. That's an introduction to constitutional law,

Kate Shaw:

Someone who had been subjected to an unconstitutional chokehold, but couldn't convince the court that he was likely to, again, suffer an unconstitutional chokehold and thus could not proceed in federal court. I know Leah is shaking her head.

Leah Litman:

Like scratching my face.

Kate Shaw:

I think it's interesting way to think about this case as animated by similar and similarly misguided logic.

Leah Litman:

And again, it is unnecessarily formal once you conceive of it through the lens of Article III and the court's definition of injury. Here again in TransUnion, the court has said, "Well, what you need is a concrete injury, right? Something that's real." Well, if your risk of future harm is sufficiently real and concrete to allow you to sue, then who the F cares what kind of remedy you're seeking for that concrete real risk of future harm? Why can't you just seek damages for having been exposed to a risk of concrete harm? It drives me bonkers. Justice Kagan, at oral argument, brought out how this division was artificial and just it makes sense in a world in which you were conceding that there was a substantial risk of harm that

would have allowed the plaintiffs to seek injunctive relief during the period in which they faced that risk of harm, so let's play that clip here.

Justice Kagan:

Mr. Clement, suppose that there's a carcinogen which when it is in your drinking water, you have a 50% chance of getting cancer. And suppose Congress passes a law that everybody exposed to that carcinogen can sue and obtain statutory damages. And suppose that there's a class action of people exposed to that carcinogen. Does that satisfy Article III?

Mr. Clement:

I think that probably would, Justice Kagan, but if this were a weird carcinogen that worked in such a way that a year later, you could tell whether you were in the 50% risk or the 50%, safe category and then you sued for statutory damages retrospectively on behalf of the people who averted the risk, I think you might have a different result.

Justice Kagan:

That's interesting, Mr. Clement, because that takes us back to the question that you and the Chief Justice were talking about. Now, in my hypothetical, unlike with the Chief Justice's question, you agree that retrospectively, there is standing, right? So if you just ... You're within a five year period, let's say, nobody knows who's going to get cancer, you're agreeing that everybody could be in that class action and that they would be standing. Correct?

Leah Litman:

So again, her point is, once you're conceding that there is or was a sufficiently real concrete, actual injury suffered by plaintiffs who faced this risk of harm, that's the end for standing. There is a case or controversy that federal courts can hear. Maybe because this distinction is so strange and artificial, the court actually goes out of its way, not only to say that the plaintiff sought the wrong kind of relief for future risk injuries, that as they sought damages for a risk of future harm, but also that maybe there wasn't even a sufficient risk of their false credit reports being disclosed to third parties.

Leah Litman:

So the court says, "Even apart from that fundamental problem, the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing. I think this is just insane. Again, what are credit reports for? They're not prepared, so they just sit there in isolation and an individual just admires their credit score in the abstract. Like the credit score and credit report is created, so that you can do deals with third parties. And here, the plaintiff sought damages for a period that was 46 months long, that's almost four years, and really, you're saying there wasn't a sufficient risk that their credit reports during that period would ever have been disclosed to a third party. What universe are you living in?

Kate Shaw:

And incorrectly containing this really damaging information that lists people as-

Leah Litman:

Terrorists.

Kate Shaw:

Essentially terrorist watch list. So this is a nontrivial harm for probably the majority of this class members who will have these credit reports accessed. Could there have been some different showing made at trial about the likelihood of access, I don't know the record well enough to say, but it certainly seems from the perspective of common sense is though the risk was very real for the entire class.

Leah Litman:

Yeah, you can imagine a universe where after this opinion, maybe plaintiff's attorneys introduced additional evidence about the likelihood that a credit report is disclosed during any period. Again though, it's unclear like what evidence the court would say is sufficient to give rise to a sufficient risk. This is just like my bad place. I feel like I am at the valley that mirrors the peak of Borden. This is an opinion by Justice Kavanaugh restricting access to federal court based on a theory that I argued was wrong in my very first law review article. It's just, "Thanks. I hate it." And again, it's just like slobbery and conclusory in places.

Leah Litman:

So we talked about that conclusion about the plaintiff not facing a risk that their credit report was disclosed. He also says, "Moreover, the plaintiffs did not present any evidence that the 6,000 class members even knew there were OFAC alerts in their credit files, but the class that was certified was for people who received a second mailing like Mr. Ramirez had, who received a mailing letting them know that their name matched the name on the OFAC list." And the majority's only response to this is like, "Well, maybe they didn't open the letters."

Leah Litman:

Again, it's just very strange what they are saying is plausible and isn't plausible and I think it's a real failure to empathize with people who might be in a different financial situation or socioeconomic status as you. When I got credit reports right after college or material from a credit card company or a credit reporting agency, I opened them immediately because they were a big deal. They're still a big deal but not as much of a like a day to day, going to affect my life thing and I just, again, not caring for any of this. So thankfully, my girl, Elena, had a response in a dissent, though it's not the principal dissent, and she argued that the majority's theory actually inverts standing doctrine which could have been and used to be a doctrine that insulated the lawmaking branches from judicial review. It basically functioned as a shield for the lawmaking branches against the courts.

Leah Litman:

Here, however, the majority is using standing doctrine as a sword for the courts to use against Congress basically saying, "Even though Congress has created this right and authorized people to sue, that's not good enough." She says, "The court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement."

Kate Shaw:

I think that Kagan dissent really captures this maddening quality of the majority opinion which is both its maximalism and its minimalism, right? So it's like this power grab as against Congress which is identifying problems and creating rights and expecting courts to allow individuals to enforce those rights and basically telling Congress like, "Sorry, you thought you did a thing. You know you didn't do it. You

didn't do it right or you don't have the power to do it and so we're not going to hear these claims." And it's also minimalist in terms of the access to the court's permission, right? "So we're going to assert our power as against Congress and we're going to say, 'We get to decide whether you can create a right and we're going to sort of slam the doors to court.'"

Kate Shaw:

It felt like, as I was reading this, it's like this City of Boerne versus Flores meets Iqbal, right? Like judicial supremacy and then denial of access to court, so all of the pathologies of multiple lines of supreme court cases in one neat package.

Leah Litman:

In one little bowl of horrors. It's funny that you say minimalism, right? Because this is minimalist in the sense that it minimizes the number of cases that can be brought in federal court, but it's just, "Oh, urgh," anyways. Then the court has to proceed to address the second and third theories of injury that the credit reporting agency didn't disclose all of the information in the credit file in the first mailing and that it didn't provide a summary of rights in conjunction with the second mailing that did contain an OFAC alert. The court says these aren't injuries because, "The plaintiffs have not demonstrated that the format of the mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."

Leah Litman:

A quick note that this analysis is two pages which obviously contains a super extensive and thorough examination of all the things at common law that could have possibly provided, an analogue for the suit, but it also just frustrates me because the majority obviously thinks that the publication difference, the fact that this isn't shared with third parties, is a key difference between this claim, the Fair Credit Reporting Act claim and the common law tort of defamation. And it's like, "Well, why? Which differences do you think are significant?" The court also rejected the theory that this, the second and third theories of injury constituted what is called an informational injury.

Leah Litman:

In a line of cases, the court had said, "Where Congress provides a right to information in people, that's an injury in fact," and the court says, "Well, it's not that they failed to receive any information, it's just that they received it in the wrong format." Justice Thomas, who wrote the principle dissent, we'll get to in a second, he's really not a big fan of this opinion or this analysis in particular. And he says, "Look, even assuming that this court should be second guessing," standing in so-called private rights cases, which we'll explain in a second, "this is a rather odd case to say Congress went too far. TransUnion's misconduct here is exactly the sort of thing that has long merited legal redress."

Leah Litman:

And he notes that the jury found the defendant failed to clearly and accurately disclose information and willfully failed to provide a written disclosure, a summary of the rights with the written disclosure. I would not be so quick as to re characterize these jury findings as mere formatting errors. And again, I think this gets back to this point I was making earlier, which is, for people for whom the credit score really matters, the accuracy of the information really matters. You're creating a lot of potentially additional work for them to clarify, "Well, where do my rights apply? To what alerts? In what contexts?" and just-

Kate Shaw:

Should we talk about the Thomas dissent?

Leah Litman:

Yeah.

Kate Shaw:

It's, again, a surprisingly reasonable sensible correct dissent. I found myself nodding. It was a strange feeling.

Leah Litman:

Justice Thomas has previously embraced a theory of public versus private rights. The specific line he drew is that suits for violations of public rights, rights held by particular individuals but not duties owed broadly to the community, necessarily fall within the core of common law-type cases that federal courts can hear and often these private rights cases will be between private parties because a private party owes an obligation to another private party, usually only because of a narrow relationship between them. Interestingly, Justice Thomas has floated this theory before including last year in a concurrence in Thole, another bad standing opinion by Justice Kavanaugh on.

Leah Litman:

But in that concurrence in Thole, Justice Thomas was joined by Justice Gorsuch, who I guess rethought his join or something, he didn't bother to explain why he thought the Thomas opinion was right before but isn't right now or why this case isn't a private right. Whatever, Neil. And here, because TransUnion violated duties owed to particular customers, Justice Thomas would say, "They're standing again because it's a duty to particular parties, rights held by particular individuals." As he notes, "Were there any doubt that consumer reporting agencies owe these duties to specific individuals and not the larger community, Congress created a cause of action providing that any person who willfully fails to comply with a federal requirement with respect to any consumer is liable to that consumer?

Kate Shaw:

I think it's actually worth reading a couple of excerpts from the Thomas dissent because they're just really clear and I think very persuasive. He calls the majority's approach remarkable in both its novelty and effects. He says, "Never before has this court declared that legal injury is inherently insufficient to support standing and never before has this court declared that legislators are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the federal judiciary attention. In the name of protecting the separation of powers, this court has relieved the legislature of its power to create and define rights." Go on, Justice Thomas. That is so good. He ends ... Can I just read the end?

Leah Litman:

No, but-

Kate Shaw:

we're not going too long-

Leah Litman:

It's not an Elena Kagan level burn, but it's still very soothing to my soul.

Kate Shaw:

The end almost is actually, so he closes with this. So he says basically, "The majority asks a single rhetorical question, 'Who could possibly think that a person is harmed when he requests and dissent an incomplete credit report or assent a suspicious notice informing him that he may be a designated drug trafficker or terrorist or is not sent anything informing him of how to remove this inaccurate red flag?' The answer is, of course, Legion, Congress, the President, the jury, the district court, the Ninth Circuit and four members of this court, I respectfully dissent." It's pretty five-y.

Leah Litman:

No, you're right. Maybe it is worth just stepping back a second and thinking about like the implications of this theory. It could possibly have major implications for the enforcement of a variety of federal statutes, statutes that create privacy harms which might be difficult to quantify or might be difficult to identify like a precise common law analog, again, particularly in a universe in which privacy now encompasses a bunch of data and other more abstract information about us than it did a common law. Another question is, of course, going to be, how close does the common law analogue have to be? How about the old Fair Housing Act case that the court decided under the previous era of standing in which it held that so-called testers, that is people who didn't actually want to purchase a home but went around soliciting information about buying a home did have standing to raise a housing discrimination claim and violation of the Fair Housing Act just because they, again, were denied information or given incorrect information that Congress had said they were entitled to?

Leah Litman:

Or how about a company releasing a toxin that creates less than a 50% risk of disease? All of these things, I think, are now called into question in a way that just hadn't been true before. The other thing I would flag is that nominal damages cases, which the court had basically greenlit in Uzuegbunam versus Preczewski. Now, this case, I think, has a real potential to limit the availability of nominal damages because plaintiffs now have to convince courts, not only that their legal rights were violated, but were violated in a way that is sufficiently real or concrete such that judges think they were harmed.

Kate Shaw:

So before we leave this case, maybe let's flag one other thing or maybe two other things. So Justice Thomas, as we've been saying, wrote the lead dissent. He was joined by Justices Breyer, Sotomayor and Kagan. Kagan then also wrote a very short separate to dissent, joined by Breyer and Sotomayor and she basically seems to agree with Thomas, sticks out maybe just two divergences, one suggesting that the dividing line may not be the public-private rights distinction, just that the harm needs to be concrete, which might encompass some of what Justice Thomas would call duties broadly and shared to the community. But then also seeming not to even go quite as far, Thomas seems to say categorically that Congress can create these rights enforceable in federal courts, full stop.

Kate Shaw:

And she seems to suggest that, yes, courts should give deference to congressional judgments, but that sometimes it might be appropriate for courts to override those judgments to authorize lawsuits. And I'm

not sure that Thomas agrees with that. So I don't go quite as far as the radical leftist Thomas one in his opinion, but then the other thing is a stylistic point I wanted to make, which is that it's notable that she and the other liberals are joining Thomas and so you could imagine her separate writing saying, "I joined the very fine dissent of Justice Thomas and I just add a couple of thoughts," in the same way that, remember Kavanaugh in the Lynch case we talked about a couple days ago, Roberts' thorough thoughtful separate writing.

Kate Shaw:

And she just says, "Don't do that," right? She's voting with him. That speaks for itself, but there's no need to gild the lily there or to even draw attention to it, right? She just writes a couple of separate pages and then she raps. Anyway, I just wanted to flag that. That's, I think, definitely a better way to do it.

Leah Litman:

It's definitely a better way to do it and especially when compared to her concurring in the judgment and the Collins versus Yellen case in which she wrote a separate concurrence, to say, "Well, I'm not going to join that crazy shit that Alito wrote, even if I agree with this bottom line."

Kate Shaw:

Totally.

Leah Litman:

This is still a compliment, even though it's not over the top and overwrought.

Kate Shaw:

Exactly. That's how Kagan does compliments.

Leah Litman:

Exactly.

Kate Shaw:

"My presence itself is a blessing. I'm on your opinion."

Leah Litman:

Two small things, one is an implication of this case that Justice Thomas noted in a footnote is that perhaps these cases, even though they cannot be brought in federal court, could be brought in state court, given that state courts are not bound by the same Article III justiciability limits as federal courts are. He does, however, note, something of an oddity that this creates state courts as the sole forum for federal law claims, but again, that implication is worth noting. I think it possibly could lead to parallel litigation in some otherwise unified class cases where you get defendants seeking the dismissal of some plaintiffs and then those points have to proceed in state court, but the plaintiffs with standing can proceed in federal court, good for, I guess, class action defense lawyers, maybe not so good for class plaintiffs.

Leah Litman:

The other thing we wanted to say is shout out to recent Strict Scrutiny guest, Rachel Bayefsky, who was cited in the majority opinion. Her article, Constitutional Injury and Tangibility in the William and Mary Law Review was cited by the majority opinion in TransUnion.

Kate Shaw:

And she hasn't even started her tenure track, a law teaching job, so nice work, Rachel.

Leah Litman:

One quick note about the odds of opinion assignments that this creates. So this was a March sitting case, TransUnion, but there were only six cases in the March sitting and six cases in February which makes it a little bit harder to guess who's writing what, but Justice Alito has not written in either March or February yet. The only outstanding February case is Brnovich. The other justices who haven't yet written in February include Justice Kavanaugh, but Justice Kavanaugh has now had six opinions, whereas Justice Alito has only had four. Justice Thomas has had seven opinions. He hasn't written yet in February and I think that rules him out, right? Why would he get eight opinions and Justice Alito has four or five?

Kate Shaw:

Wait a second. So Alito could have both Brnovich and Bonta, the California disclosure case, American for Prosperity versus Bonta.

Leah Litman:

I was just about to raise that.

Kate Shaw:

I hadn't clocked that whole-

Leah Litman:

Buckle up, my friends. Now, of course, again, it's possible Justice Kavanaugh gets the Brnovich assignment. It's possible Breyer does, but again, both Kavanaugh and Breyer have six opinions at this point. Justice Alito only has four. I think he needs two more opinions. And again, he hasn't written any opinion in February or March. Brnovich is the only possibility for a case he could write in that sitting. Other remaining opinions include Americans for Prosperity, the California disclosure law case. So I think it's more likely the Chief would keep Americans for Prosperity and he hasn't written an opinion in April, so I'm not as high on the possibility that Alito would have Americans for Prosperity, but I do think the odds of Alito having Brnovich increased.

Kate Shaw:

That's really bad. Well, we will leave TransUnion there. What should we talk about next?

Leah Litman:

Second opinion is HollyFrontier Cheyenne Refining versus Renewable Fuels Association. This case involves the Renewable Fuel Standard Program which requires entities importing or producing gasoline to blend renewable fuels into transportation fuels. The EPA establishes what the mix in the blend has to be and Congress has created an exemption from these requirements for small refineries. The first exemption it created was a general one that was available to all small refineries through 2011. The

second exemption was a case-by-case exemption that allowed a refinery to petition for an extension of that general exemption "at any time."

Leah Litman:

The full statutory phrase is, "A small refinery may, at any time, petition the administrator for an extension of the exemption under subparagraph A." So the question here was whether the EPA could grant an exemption under that individualized exemption provision after the automatic extension period that lasted through 2011 had expired. That is, "Do refineries need a continuous exemption to be eligible for an extension?" In a six-three opinion by Justice Gorsuch, the court said, "Refineries can get individualized exemptions even if the original exemption period had expired." The opinion is six-three with all of the women in dissent.

Leah Litman:

It had happened previously under previous compositions of the court that you had a majority of men versus a dissenting group of all women in Utah versus Strieff. That was a five-three case. Justice Barrett wrote the dissent here, "The majority focused on the language 'at any time' saying that basically allows an entity to seek an exemption at any time. The dissent, however, focused more on the common sense meaning of the word extension as well as the phrase extension of the exemption under subparagraph A." They both, of course, insist that the plain meaning of the statute resolves this. So justice Gorsuch, for his part, invokes a usage of the word extension that he thinks suggest this. He says, "Think of the forgetful student who asked for an extension for a term paper after the deadline has passed, the tenant who does the same after overstaying his lease or parties who negotiate an extension of a contract after its expiration."

Leah Litman:

He also notes other federal laws that seem to use the phrase extension after an initial period has expired. Justice Barrett, for her apart, uses other examples and says, "One would not normally ask to extend a newspaper subscription long after it expired or request after child number two to extend the parental leave period completed after child number one." So that's a dispute.

Kate Shaw:

I don't have too much important to say about it except like every single one of these cases is being fought on these artificially circumscribed textualist grounds right now and it's making my head explode in particular in the Yellen versus Confederated Tribes of the Chehalis Reservation case, which I think maybe we'll shift to now. So that's the third case that we got today and the case is about the proper interpretation of a very recent federal statute. The CARES Act or the Coronavirus Aid Relief and Economic Security Act which was passed in the spring of 2020. In that law, Congress provided a lot of coronavirus-related aid including giving the Treasury Secretary $8 billion in relief funds to disperse to tribal governments.

Kate Shaw:

So the statute defines tribal governments as the recognized governing body of an Indian tribe, as Indian tribes was used in the Indian Self-Determination and Education Assistance Act, which the opinion refers to as ISDA. ISDA defines Indian tribe to mean and this language is important, any Indian tribe, band, nation or other organized group or community including an Alaskan Native village or regional or village corporation, as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is

recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Kate Shaw:

So the Interior Department administers ISDA Treasury pursuant to the CARES Act as interior whether Alaska Native corporations or ANCs meet the ISDA definition. Interior said, "Yes," and Treasury then gave the ANCs $500 million in CARES Act funds. So then this challenge arose because a number of federally recognized Indian tribes have challenged the eligibility of these ANCs for these CARES Act funds, essentially arguing that they are not in fact Indian tribes under ISDA and thus are not eligible for CARES Act funds. Here, the court in an opinion by Justice Sotomayor joined by the Chief Justice and Justices Breyer, Kavanaugh, Barrett and Alito in part concludes that the ANCs were eligible for these CARES Act funds.

Kate Shaw:

So the court spends some time walking through the unique history and legal framework that surrounds Alaska and its indigenous population. The big federal statute here is the Alaska Native Claims Settlement Act or ANCSA, which was passed in 1971, just like a decade or so after Alaska was admitted as a state. The statute was designed to settle Native land claims and one of the things it did was to create these ANCs, right? These regional or village corporations that were the ways Congress was going to deliver the benefits of land claims settlements to Alaska Natives. So four years after ANCSA Congress passes ISDA. ISDA is designed to decentralize federal Indian benefit provision, move it away from the federal government and toward Native American and Alaska Native organizations.

Kate Shaw:

ISDA allows any Indian tribe to request the Secretary of Interior enter into a self-determination contract with a designated tribal organization and Indian tribe is defined as, maybe I'll read this language one more time, because then the opinion goes on to parse it, "So any Indian tribe and nation or other organized group or community including any Alaskan Native village or regional or village corporation is defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Kate Shaw:

So do ANCs fall within the statutory definition, right? That is really the question. So ANCs are mentioned there. So if the statute just stopped after mentioning ANCs and ANCSA, then I don't think the question really arises. But the issue is, the last clause of the statute says, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians, and the tribes were challenging the eligibility of the ANCs for these funds argue that this language doesn't apply to ANCs. ANCs are not recognized as eligible for special programs and services. They're not recognized as, what they say the language here, basically a shorthand for or a term of art for federally recognized.

Kate Shaw:

And it is pretty clear that these ANCs have not been recognized by the federal government in this sovereign political sense of recognition. So Sotomayor decides that the plain meaning of Indian tribe under ISDA does encompass ANCs. So again, this is very much styled as an opinion about the plain

meaning of the statutory language. Basically, the fact that these ANCs are eligible for benefits under ANCSA means that they are under ISDA, eligible for the special programs and services provided by the United States to Indians. "It would be strange," she says, "to list ANCs in this statute and then to exclude them from the final provision of the statute." And she says, "Even if this reading is wrong, that that kind of ANCSA benefits makes them recognized in the sense of the last part of the statute. The fact that they are separately listed in an earlier part of the statute means that they are also eligible, even if you ignore the final provision of the statute."

Leah Litman:

So that was a weird opinion structure to me. On the one hand, the court says the recognition clause does apply to ANCs. It's just that the recognition clause just means eligible for programs and services provided by the US to Indians because of their statuses Indians including the Alaska Native Claims Settlement Act, but in the alternative, the recognition clause just doesn't apply to ANCs at all. Like it can't be both, so writing an opinion that does both things is a little bit weird to me.

Kate Shaw:

It's weird in a way that, in a brief, you can obviously make these mutually inconsistent arguments in the alternative and sometimes it happens in opinions, but it sometimes works better than other times and that the tension here was a little odd and definitely in the dissent, which we will get to Gorsuch notes the tension.

Leah Litman:

You would think in our opinion would say, "This is what the statute means," especially an opinion that purports to be, "I'm interpreting the plain meaning of these words." So on the second part that is when Justice Sotomayor rejects the argument that the recognition clause applies to ANCs that is on the second ground, she invokes the recipe book to explain why this could be. She says, "Consider an example with the same syntax as Indian tribe definition. A restaurant advertises '50% off any meat, vegetable or seafood dish including ceviche which is cooked.' Say a customer order ceviche, a Peruvian specialty of raw fish marinated in citrus juice. Would you expect it to be cooked? No. Would you expect to pay full price for it? Again no. Under the reading recommended by the Series-Qualifier Canon, however, the ceviche was a red herring like it's not included at all."

Leah Litman:

Justice Gorsuch responds to this and says, "It's a colorful example but one far afield from Indian law and the technical statutory definitions before us. Even taken on its own terms, the example is a bit under done, notice the food pun there. A reasonable customer might notice some tension in the advertisement, but there are many plausible takeaways. Maybe the restaurant uses heat to cook its ceviche. Maybe the restaurant aren't meant to speak of ceviche as cooked in the sense of 'fish cooked by marinating in an acidic dressing like lime juice'" and he cites a Mark Bittman book for this. I hated this.

Kate Shaw:

I really didn't like this example.

Leah Litman:

It's just like, "Why would you think that the language conventions about ordering food at a restaurant or a restaurant describing a deal to customers apply to a statute dispersing millions of dollars and governmental authority to tribes natives and Alaska Native corporations and villages. -

Kate Shaw:

They increasingly do this in statutory interpretation cases, right? Choose these completely manufactured examples from completely unrelated domains to try to illustrate the linguistic point that they are making. And you're right, this shearing of context, the language which is what these examples invariably do, seems like a really problematic move. And even on its own terms, I think for the reasons that Gorsuch identifies it, it just doesn't super work this example. A, the idea of just heat cooked ceviche is just awful and gross and I just wish I didn't have to think about it when I read this opinion and I did, but I also think it's right that it is just confusing. Maybe we want to probe a little bit more with the restaurant, thought it was doing here, right? Not just like the language itself.

Leah Litman:

What was the purpose of the deal, right? That might be helpful.

Kate Shaw:

They had a lot of extra product to move. What kind of product were they trying to move? Did they really, were they long on ceviche or not? Well, how do they prepare ceviche, right? So of course, they're just like, "Huh, I guess we'll just never know. Maybe cooking, they might lightly poach it." We could find out some of this stuff.

Leah Litman:

What's the deal offered against the backdrop of a city crackdown in serving raw or undercooked fish, right? That would also help us figure this out.

Kate Shaw:

It'd be really helpful.

Leah Litman:

And the idea that these cases, again, cases about the dispersal of millions of dollars in federal relief and all of this significant authority under ISDA because the court's interpretation of ISDA o has implications beyond the CARES Act and will also confer authority on Alaska Native corporations to veto certain contracts or at least have authority over what contracts governments can pursue. And again, the idea that this can be resolved with reference to a hypothetical restaurant deal is just insanity.

Kate Shaw:

It's almost a little offensive actually when you frame it that way. And they do this all the time. I was remembering this Kagan in Lockhart, a statutory case from five years ago, I think it offers an example that on its own terms a little bit more successful and that she's explaining why a final qualifier doesn't invariably qualify the entire list, right? That the Series Qualifier Canon isn't an absolute rule. And she says, "Imagine you were telling a scout, right? You were looking for a new player for your baseball team, telling your scout to go look for a defensive catcher, a quick-footed shortstop or a pitcher from last year's World Champion, Kansas City Royals." And it's like, "No, probably you're talking just about the

pitcher from last year's team as opposed to also the catcher or the shortstop, right? And that too was really divorced from the context of the case, but at least it was a clear example. Ceviche, I just think is a disaster.

Leah Litman:

But obviously, this case was argued at the end of April. But my bigger problem is, again, like this case is really hard and I think resolving it turns on thinking about what Congress was doing, addressing, solving, responding to in ISDA and the CARES Act to figure out what this language actually means. It's not just a vacuous, "Oh, well, we're effectuating Congress's purpose." It's like, "No, really, in order to figure out what this means, we have to think about what was going on and what they were addressing.

Kate Shaw:

Sotomayor and the majority rejects one additional argument which the huge tribe had raised, but that the other tribes in the case hadn't supported and recall, you mentioned this, I think when we recapped the case, Leah, that it was the huge tribes council who won a blind draw to argue the case. So actually, the position of most of the federally recognized tribes in this case wasn't even presented in the oral argument. They shared some of the argument, but there was not anybody representing the tribes other than the huge tribe. So Gorsuch dissents. He's joined by Thomas and Kagan, another unusual alignment in this case. And he says that what he calls the recognition clause, right? That last clause, the statute which Sotomayor had actually referred to as the recognized as eligible clause, right? Just another indication of all of the choices, right?

Kate Shaw:

So at some point, I think we're going to talk about this great Cary Franklin article about Bostock and the new textualism on the court, but she refers to this idea of shadow decision points, right? Points at which the court decides what text to emphasize. I would even call this a similar move, how you're going to describe a phrase. It's either the recognition clause or the recognized as eligible clause really matters, right? So he says recognition, right? And he, I think, by that, thinks that it means to replicate recognition like federal recognition of tribes, but of course, the statute doesn't call this part, the recognition clause. That's his gloss on it, and so too, Sotomayor calls it as the recognized as eligible clause, which again is her formulation which reveals what she thinks is important.

Kate Shaw:

Anyway, so regardless of what we call that part of the statute, he says it definitely does apply to the ANCs, right? There's a list. The qualifier at the end has to apply to all the terms, and since ANCs are not recognized in the sense in which he believes the statute means recognized, they are, therefore, not eligible for the CARES Act funds. I don't know, maybe I'm overreading this, but he refers to the majority opinion as using a plain meaning approach and he puts plain meaning in scare quotes. And it almost felt like he was a little bit offended that she was using the phrase which he, I think, believes to be his phrase. Obviously, many justices before him have used it. It felt almost like mocking, but maybe I'm overreading it.

Kate Shaw:

But either way, he says, "Recognition here, it's a term of art and Indian law. It does mean this government to government recognition and that does not describe ANCs who have not been treated as federally recognized for other purposes." That just echoes what you said about what's frustrating about

this case, Leah, is the text just isn't clear, I don't think. I think it is a confusingly worded phrase on which hundreds of millions of dollars rest and each side claims that they're reading is clearly the better one. And it is maddening that we are in this moment in which each side pretends the text is clear. The entire fight had on that terrain.

Kate Shaw:

Each opinion I think is relatively persuasive and making its case, but it does seem like in support of the Gorsuch opinion that there are lots of very good policy reasons that you might want to give this federal aid to federally recognized tribes and not these big for-profit corporations. It also seems as though Congress created these corporations. It really likes ... It has given all kinds of benefits to these corporations. Maybe it did prefer to disperse these aid funds directly to these corporations rather than to federally recognized tribes. Congress may have wanted to do either of those things. Congress may not have actually been sure which of the two it was doing, but the fact that we can't even entertain those questions or debates, I think is just a huge problem in the way statutory cases are being debated and decided right now.

Leah Litman:

Totally agree. It's like having these fights with both of your hands tied behind your back, your eyes closed and just rolling on the floor in the dark.

Kate Shaw:

At some point, I wish that someone or some group of individuals on the court would make some of these points explicit, right? Rather than simply deciding that these are the terms of every statutory case and we're never going to even raise the question of whether we should be looking elsewhere.

Leah Litman:

I think that that's right, but there are these institutional incentives for members of the court not to do so. Because if they do that, they are calling into question like their interpretive bona fides and whether they are in fact textualist, which might minimize their credibility. And like other statutory interpretation cases, maybe that matters, maybe it doesn't, but it's not insane to me that they at least think about that. So that's all for today. We will get more opinions next week. When they will finish is unclear. Thanks to our producer Melody Rowell who has continually been on standby doing these emergency episodes, even while the court is not giving us super advanced notice about when they are releasing opinions or when they might finish. Thanks, Eddie Cooper for making our music. Thanks to Liam Bendickson, our intern for the summer.

Leah Litman:

And we'd like to invite you our listeners to submit tips on interesting non-Supreme Court writings and developments to our email address, which is strictscrutinypodcast@gmail.com. As we mentioned when we discussed the Wisconsin statutory interpretation case, that was shared with us by a listener and we'd love to cover non-Supreme Court developments as well. So please, if there's something interesting, feel free to write in. Thanks as always for listening.