Speaker 1:

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

Speaker 2:

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

Melissa Murray:

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

Leah Litman:

And I'm Leah Litman, back from the woods.

Melissa Murray:

So Leah's back from the woods but I just have to say, we are throwing this episode together. At least we're just recording this episode because it's less than an hour after the court released its opinions and we had some scheduling constraints on our part, so we're just doing this on the fly. So I just want to put that out there as a star footnote or just a general caveat for this entire episode. Do not hold us responsible for anything. Anything could happen. We are literally broadcasting, podcasting without a net. Is that fair?

Leah Litman:

Yes, no. That's fair. Our only net is Melody Rowell and she is unable to fix any substantive quickies that we might omit or run through.

Melissa Murray:

She's literally the safety net. So Melody, come through girl, come through. So Leah's back from her time in Northern Michigan, so we'll get a chance to expand on our discussion of California versus Texas, the ACA case because the fear of missing out was absolutely killing Leah, so we want her to get in on that. And then we have some court culture for you later on as well. So Leah, why don't you kick us off with the news?

Leah Litman:

So I just wanted to highlight on the news, what is happening with the stay request in the case involving the Center for Disease Control eviction moratorium. This case is Alabama Association of Realtors. The Supreme Court requested a response on June 10th, a reply came in on June 14th. The moratorium expires at the end of the month. We don't have any action on this and none of us thought the court was going to disturb the stay and actually prevent the CDC from enforcing the eviction moratorium through the end of June, but it is curious to me that nothing has come of it yet, given this closing window. So I want to know what's going on there.

Melissa Murray:

Do you think they're just running out the clock, just?

Leah Litman:

It's possible. It's also possible someone is writing something given that they don't want to suggest that the eviction moratorium is valid, which the DC circuit appeared to do so when they declined to disturb the lower court's ruling, so that's another possibility.

Melissa Murray:

Well let's stay tuned on that one, but here's what you came for. We have some recaps on some opinions that came down this Monday. So we're going to run through these opinions very quickly and then we're going to give Leah a chance to weigh in on some of the meaty opinions we got last Thursday. But don't worry, we are going to come back to these opinions for more when Kate joins us. So Leah, why don't you kick us off with Goldman Sachs versus Arkansas Teacher Retirement Systems?

Leah Litman:

Sure. So this case is about the mechanics of securities law class actions. As we've said before, when a plaintiff wants to file a securities law class action, a case on behalf of themselves and other investors like them, the Supreme Court has established the basic ink framework to guide courts decisions about whether to certify class actions. The underlying securities law claim in these cases is that a company made a misstatement and that the plaintiff relied on that statement to their detriment. And in basic, the court held that if a statement is material you can presume that a plaintiff relied on it. That framework obviously makes it easier to certify class actions against publicly traded companies because if you had to show that every individual plaintiff specifically relied on a statement while there's hard to show a commonality among the plaintiffs, but if you need only show that the statements are material then it's easier to certify it class.

Leah Litman:

But that also makes the merits of these cases overlap with issues that are relevant to class certification even though those two are supposed to be separate inquiries. And this case is part of a line of cases that sought to make sense of that overlap and ensure a proper division between court's assessment about whether a case should proceed as a class and their assessment of the merits. And the case doesn't break a ton of new ground on that score. Instead it reaffirms that materiality is something a plaintiff must show on the merits, not a class certification. And a class certification a plaintiff need only show a public statement by a company traded in an efficient market that coincided with or effected some change in stock price.

Leah Litman:

Justice Barrett wrote the majority and the two issues the court decided were first, whether the generic nature of a statement is relevant to price impact. That is can a defendant say the super generic statement is so generic it didn't affect price? On this issue the court was 8-1. In fact, it's really unanimous except for the remedy. The parties had largely agreed on this issue by the time it got to the court. So they had agreed that courts can consider the genericness of a statement to determine if the statement had an effect on price. Justice Sotomayor however wouldn't have vacated the case and sent it back to the Second Circuit because she believed that the court had actually considered the genericness of the statement in the Court of Appeals.

Leah Litman:

The second issue that the court decided is who bears the burden of persuasion. The court confirmed that basic puts the burden of persuasion on defendants at class certification to show that a statement did not affect price. So defendants can disprove price impact and therefore defeat class certification. On that issue, the court was 6-3 with Justices Gorsuch, Alito and Thomas dissenting.

Melissa Murray:

So moving along to NCAA versus Alston. So this was a very important case for people who care about sports, and us too.

Leah Litman:

And you know cares about sports?

Melissa Murray:

I do know who cares about sports. You're getting ahead of yourself Leah, hold on. All right, so this is the case where student athletes challenged several of the NCAA's restrictions on student compensation. In the courts below they succeeded on some of these challenges and the district court enjoined the NCAA from enforcing some of the restrictions on providing certain education related benefits to student athletes, like prohibiting graduate or vocational school scholarships, but it kept in place the rules limiting undergraduate athlete scholarships and other compensation related to athletic performance i.e. compensation that is unrelated to education. And in this case, the Supreme Court unanimously affirmed the injunction and agreed that these NCAA restrictions violate federal antitrust laws against restricting competition.

Melissa Murray:

Justice Neil Gorsuch wrote the majority. As he wrote, the NCAA, "seeks immunity from the normal operation of the antitrust laws." But the court declined the NCAA's requests, noting that, "this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control. And to the extent it means to propose these sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports and money. We cannot agree. This court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that the restraints of trade serve uniquely important social objectives beyond enhancing competition."

Melissa Murray:

So again, this case involves certain fringe benefits that were ancillary, not specifically compensation, like whether college athletes should be compensated with a paycheck but things like whether a college could use the promise of a laptop or other kinds of benefits to recruit a star athlete. And so the court unanimously said that the NCAA doesn't win on this ground. So this is a real blow to the Conference, but I think what is the meatier part of this case comes from the concurrence which was authored by none other than Justice Brett "basketball" Kavanaugh who literally injected basketball into so many cases this term. Much was made in his confirmation hearings about the fact that he coached his daughter's basketball team. So we already knew that he was very into basketball.

Leah Litman:

And he brought it up in oral argument in Mahanoy, the free speech case.

Melissa Murray:

Mahanoy and Terry, he brought up Len bias and I'm like, "Dude, we get it. You liked basketball. You really like basketball," but he really found a way to channel his big basketball energy into something quite meaningful. So in this concurrence, he basically invited plaintiffs in other cases to challenge the other NCAA restrictions on student compensation. So as he said in the concurrence, "But this case involves only a narrow subset of the NCAA's compensation rules, namely the rules restricting the education related benefits. I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws." So dun dun dah, Brett Kavanaugh invites you to the last dance because he wants to get there.

Leah Litman:

The NCAA, you are on notice.

Melissa Murray:

Buckle up, get a lawyer. Boom lawyer, you need to be because stuff is coming. And I thought this was really interesting because at oral arguments, the court definitely seemed to understand that there were some real issues here, but they also seemed I think, at least from oral arguments, to be at pains to keep things as settled as possible.

Leah Litman:

Yes.

Melissa Murray:

So the fact of this unanimous opinion is actually quite striking.

Leah Litman:

Yes. They definitely wanted to keep it settled in that the really most they said in this opinion is that settled antitrust laws apply to the NCAA. Justice Gorsuch went out of his way to note all of the times the NCAA wasn't pressing certain arguments or points on which they agreed and so really what this case just stands for is normal antitrust rules apply to the NCAA. Now that's a problem for the NCAA, given that-

Melissa Murray:

Yes.

Leah Litman:

... they have largely operated under the assumption that they can engage in all of this anti-competitive behavior because sports, college sports, amateurism and the court clearly junks that as a justification. But we are very unsure exactly how far these antitrust principles go as far as invalidating other NCAA rules and that's a question that Justice Kavanaugh, big basketball energy, is eager to address.

Melissa Murray:

There is a point that Kavitha Davidson, who is a writer for The Athletic made and I just wanted to highlight it. So she noted that to really understand the import of this case you have to look beyond the traditional revenue generating sports like basketball or football, which is what everyone is thinking of-

Leah Litman:

Yes.

Melissa Murray:

... and certainly Brett Kavanaugh is thinking of. And she said this is really important for the athletes in the non-revenue generating sports.

Leah Litman:

Oh yeah.

Melissa Murray:

So rowing, fencing and more importantly, women's sports which aren't always understood to be revenue generating because this lays the groundwork for a college athlete who for example, has a gymnastics routine that goes viral to actually monetize that in some way, either through social media or some other thing and in a way that any ordinary student could do, but a college athlete could not because of these restrictions. And so there's a way in which there's an interesting equality dimension, especially for women's sports that underlays this decision. The court of course makes no mention of that nor do they make any mention of the fact that when this case was being argued there was that huge flap around the college basketball tournament where the women athletes got markedly different and disadvantageous conditions relative to the male basketball players. So much to see here and Brett Kavanaugh is gearing up.

Leah Litman:

He really is. He wants us to know he's not just a regular Dad, he's a cool basketball Dad, so.... Third and final opinion that we got is Arthrex versus Smith and Nephew. This is the super important appointments clause challenge to the structure of the patent trial and appeals board, which consists of administrative patent judges. So the constitution creates two different kinds of officers, principal officers and inferior officers. Principal officers must be nominated by the President and confirmed by the Senate whereas inferior officers can be appointed by heads of departments. Administrative patent judges are appointed by the Secretary of Commerce. They hear cases that challenged the validity of patents through a structure known as inter partes review. So because administrative patent judges are appointed by someone who's a head of a department, their appointment is constitutional only if they're inferior officers rather than principal ones. In this case, the court decided two issues.

Leah Litman:

First, whether PTAB judges are inferior or principal officers and second, if they are inferior officers, what is the remedy? The Chief Justice wrote the court's opinion for different majorities on both issues and both issues are very important and also quite interesting. On the first issue, whether PTAB judges are inferior versus principal, the Chief Justice wrote for a majority of five that included Justices Alito, Gorsuch, Kavanaugh and Barrett. Obviously one of the conservative justices is missing from that list and that would be noted squish, Clarence Thomas. That's a joke. Anyways, he was missing, but he's not a

squish. Anyways, this group of five concludes that PTAB judges are principal officers given how they currently function. Importantly, the court leans heavily on the legal test for inferior officers that the court had articulated in Edmund vs United States, an opinion by Justice Scalia.

Leah Litman:

The court says the starting point for the analysis is the opinion in Edmond and in that case the court had said whether one is an inferior depends on whether he has a superior and here an inferior must be directed and supervised at some level by others who were appointed by Presidential nomination. That test is a little bit different than the legal test the court had used in Morrison versus Olson, the opinion upholding the appointment of the independent counsel. In Morrison the court used more of a multi-factor test that depend on several different things rather than just whether an officer was supervised by someone directly above them.

Leah Litman:

Here however, the court says PTAB judges lack the key feature of an inferior officer, review by a superior executive officer. The decision as I noted is 5-4. Justice Thomas wrote one of the dissents, really the main dissent in which he said that even adopting Edmond as the legal test to differentiate principal from inferior officers, PTAB judges could be inferior officers given that the PTO Director exercises a variety of ways of controlling and influencing PTAB determinations. Justice Briar also wrote a separate, though much shorter descent that more directly challenged the idea that Edmund is the governing law, or at least the version of Edmund that the court articulated here.

Leah Litman:

He said true to form that courts owe more deference to Congress and how Congress chooses to structure the executive branch and that court should take a more functional approach to determine what their various appointment structures are constitutional. But the majority in Arthrex did say it was not reporting to establish an exclusive test for who's an inferior officer. That is, basically preserving the Morrison versus Olson multifactor test for possible use in a future case. Now the reason why this case and this issue is significant is a lot of adjudication happens in the executive branch. Think about Social Security Act benefits or immigration or any other manner of things. And you might think that, well that adjudication, maybe Congress might have a reason to make it look more like adjudication that happens in the federal courts by independent bodies or independent judges who are expert in a particular field. And here what the court appears to be saying is, Congress can't do that. Any adjudication that happens in the executive branch has to conform with the court's vision of the unitary executive.

Melissa Murray:

So here's a question that all of these cases strike for me. How does the theory of the unitary executive map on to the antipathy for the administrative state that the conservative justices seem to have? Because once there is this interest in a quite muscular administrative state that is completely channeled through the President, but then there's also incredible skepticism of the administrative state. So how do those two match up?

Leah Litman:

That's an issue that I hope we will get to discuss on a special episode that we are attempting to schedule/coordinate for this summer. I won't spoil what it will be, but I view the two as related in the following sense. It's kind of a legal fiction that courts just started describing administrative agencies as

part of the executive branch and within the executive branch. And so I think that that is the fiction that the hostility to the administrative state is pushing on. Even if you make these officers subject to Presidential removal or control by a higher level executive officer, it just isn't the case that the President is really going to be able to control all of these adjudications or all of these decisions. And so the partial remedy that unitary executive theorists and unitary executive judges impose on that is to require more Presidential control.

Leah Litman:

But the reality is that given the scope of the executive branch and administrative agencies, there's not going to be enough Presidential control or higher level executive officer control to actually mean all of these officers are instituting the will of the President is how I see it. So then we get to the second issue, which is the more theoretically or perhaps jurisprudentially interesting issue and that is what is the remedy given that a majority of the court concludes that as currently structured PTAB judges are principal officers? Here, the Chief Justice writes for a different majority that includes Justices Alito, Kavanaugh, Breyer, Sotomayor, Kagan and Barrett. Arthrex had wanted the court to hold that the entire regime of patent inter partes review was unconstitutional. Instead, the court says the remedy is to enjoin the enforcement of a statutory provision that says, "Each inter partes review shall be heard by at least three members of the PTAB and that only the PTAB may grant re-hearings."

Leah Litman:

And the court then says, "Well look, without that restriction, that is if we say that restriction can't be enforced, then the PTO Director can review PTAB decisions and issue decisions himself on behalf of the board." Now the reason why I think that's really interesting is of course no provision in the statute actually says that, that is absent that restriction that the court enjoins. It's not like there's another provision in the statute that gives the PTO Director the ability to review PTAB decisions. So instead the court just seems to graft its own principle about how to structure these PTAB proceedings onto the statute. It is using severability questions about what the proper remedy is to essentially rewrite the statute based on functional considerations about how the executive branch should be structured.

Leah Litman:

That obviously doesn't sound like a super limited principle or decision although I think that this remedy was in some ways the most limited remedy available to the court, given that again, it didn't require the courts to declare the whole inter partes review and PTAB system unconstitutional, which is what Justice Gorsuch would have done nor did it require the courts to say that any officer who is protected by removal protections, that is any officer who can't be removed for cause by a higher level executive officer is necessarily a principal officer. So in some ways the court avoided a broader ruling, but in the process, again imposed its own structure under the guise of severability and remedy on this entire statutory skein.

Melissa Murray:

Can I ask another question, Leah?

Leah Litman:

Yeah.

Melissa Murray:

This is a decision authored by the Chief justice in the majority. What does that mean for the voting rights case, which was also argued in the sitting. He's not writing that then.

Leah Litman:

Right. He's not writing it, but because so few cases were argued that sitting, it's hard to know who exactly will be writing given that several justices actually won't have a majority or opinion from that sitting. So the options are Justices Breyer, Thomas, Alito, Kagan or Kavanaugh. And one possibility is the Chief assigns that to Justice Kagan in an effort to make it look less political and write the narrowest possible opinion, preserving some vote dilutions claims or claims under Section Two of the Voting Rights Act, but hard to say exactly what might happen there.

Melissa Murray:

All right, so stay tuned for Wednesday, Friday or beyond when maybe we'll get that decision in the voting rights cases, Brnovich et all. So we just want to quickly flag these, I know there are a number of you who tweeted at us about Nestle vs DOE and we didn't do it last week because we wanted to wait for Leah and so she's back. So we're going to briefly do this because I know Leah, you definitely have some thoughts about the ACA case that you want to share. But for those of you who are not falling Nestle versus DOE, this was the case where the court was going to decide whether domestic corporations can be liable for human rights violations under the alien tort statute.

Melissa Murray:

It had previously taking two other cases Kiobel and Jesner to answer that question, but it didn't actually answer those questions in those cases and it didn't really explicitly do that here either. Although five justices signaled perhaps that they are responsive and interested in the question of making sure that domestic corporations can be held liable for human rights violations, so that was something. So do you want to say a little bit about the case, Leah?

Leah Litman:

Sure. So again, want to put a pin in a court culture segment that is related to this case, which is whether and when it might be fair to say that the court's decision in this case or the arguments in this case defended child slavery or immunized a corporation from claims of child slavery, which is what the company Nestle was accused of doing in this case, continuing to work with cocoa farms that it knew or had reason to know engaged in child slavery. Again, we'll discuss that later, a lot happening at the end of the term. So instead of resolving the question of corporate liability, a majority of the court in an 8-1 decision from Justice Thomas ends up saying that essentially the allegations in this case were an impermissible, extra territorial application of the alien tort statute given that the allegations did not concern any specific conduct except for general corporate decision-making that happened in the United States and therefore that the allegations lacked a nexus to the United States.

Leah Litman:

Again, we'll come back to this but part of what was notable for me in that ruling is that instead of applying the touch and concern test that the court had previously, seemingly adopted in KIBO for ATS claims, the court seems to adopt instead a two step framework for assessing presumption of extraterritoriality claims that it had announced in the previous decision RJR Nabisco. And what that test had said is you examine the geographic scope of the statute and whether the case involves a domestic application of the statute by considering the statute's focus. And here the court says the conduct that

this statute focused on, the plaintiff's allegations all concern activity outside of the United States. Now you mentioned that in some of the separate writings in this case and there were a bunch, some of the justices did take positions on whether domestic corporations could be sued under the alien tort statute. Justice Sotomayor, Breyer and Kagan said they could.

Leah Litman:

And then in a separate concurrence by Justice Gorsuch, which was joined in relevant part by Justice Alito, they also said there was no basis for limiting the ETS cause of action to natural persons. And specifically said corporate liability exists to the same extent it would be available against a natural person. Again, we'll come back to this because I actually think that the presumption of extraterritoriality tests that the court adopts will in a lot of ways effectively immunize corporations from ETS suits, but a lot going on including the court culture segment and seriously, I have been stewing over the ACA opinion in Northern Michigan for four days. I need to talk about it now and so that's what we're going to do.

Melissa Murray:

Again, listeners who tweeted us, we are trying to be responsive to you but Leah has needs and we are going to sate her ACA thirst right now, okay?

Leah Litman:

It is happening.

Melissa Murray:

All right, so Leah, again to recap, the ACA was "saved by the court" last Thursday? Discuss.

Leah Litman:

Not the proper framing, anyways okay. So as I mentioned, I've been stewing over this opinion for four days. Obviously that makes it impossible for me to match the emotional register of Sam Alito, who has clearly been stewing and really inwardly raging about these opinions since November. So he's had a seven month jumpstart on me, but I will try my best, anyways.

Melissa Murray:

I think you can catch up.

Leah Litman:

I will try. And the opinion that I really wanted to focus on was Justice Alito's descent on surprisingly, we might need a full summer episode about this because it is truly unreal. And I want to start by discussing this-

Melissa Murray:

It's longer than the majority.

Leah Litman:

Oh, of course.

Melissa Murray:

It's twice the length of the majority.

Leah Litman:

He is emoting all over the US reports. I don't know whether to call this like emo Alito, emotion-Alito, I'm working on the portmanteau.

Melissa Murray:

He caught some feelings.

Leah Litman:

Yeah. Sam, I get it. It was in the after show Q&A from our live show at Yale ACS, which never made it into our full episode because have to save something for the live audience. I described this podcast as me working out my feelings from my SCOTUS clerkship, which was during the term that the court decided NFIB versus Sebelius. So again, I get it Sam, you have feelings you need to work out. He's doing it on the US reports, I'm doing it over the podcast airwaves. Anyway, back to that Sam Alito dissent. Again, I want to start by discussing this dissent against the backdrop of what we were told would happen in this case, which is numerous high profile legal conservatives and commentators assured us that the theory for invalidating the ACA in this case was so insane it would get zero votes, maybe one. Well guess what? The only justices who addressed the merits both went full hog on that insane theory and it wasn't just our boy, Sam.

Melissa Murray:

No.

Leah Litman:

It was-

Melissa Murray:

He had a sidekick.

Leah Litman:

It was textualist fucking hero, Neil Gorsuch. And if there is one thing that that Lido dissent is not, it's not textualist. Let me give you a flavor or an example of what I mean. So he said the 2017 act, the tax cuts and jobs act, which reduced the tax penalty to zero dollars would not have passed the House without the votes of the members who had voted to scrap the ACA just a few months earlier. I'm going to pause, let that sink in. Apparently textualism is now considering the reasons that representatives had for voting for a bill that never became the law. That's not textualism. I'm squinting hard, that ain't it. And honestly, that's not even the dumbest thing, the most insane thing in this dissent. He invokes the descent from NFIB vs Sibelius. Again, the case that he's still clearly working his feelings out about and the government's representations in that case and the ACA findings as it was originally enacted for the proposition that the Affordable Care Act's major provisions, including the protections for people with pre-existing conditions, aren't severable from the mandate.

Leah Litman:

So again, his presumptive framework is the NFIB dissent and to explain why he can use that as the framework he says, "Nothing has changed since that decision." "Um, what?" He says, "Nothing that has happened since that decision calls for a different conclusion now." Something changed Sam. The amendments that you say made the amendment now unconstitutional and he acknowledges this by saying that yes, the 2017 repeal the tax or penalty, but Congress, "left the chips to fall as they might." How plausible Sam that Congress eliminated the penalty, left the law intact after fighting about it for months with the McCain thumbs down. And it was like yep, really meant to blow the whole thing up. And indeed at the end of the same paragraph in which he says, "Nothing has changed," he says "The zeroing out the penalty 'fundamentally changed the operation of the scheme Congress adopted.'"

Leah Litman:

And because it's an Alito opinion, it ends with the allegation that it is the majority that is engaged in political hackery and impermissible political decision-making rather than this deranged descent. He says, no one can fail to be impressed by the lengths to which this court has been willing to go to defend the ACA. Fans of judicial inventiveness will applaud once again.

Melissa Murray:

So I took that whole thing as just like he and the Chief Justice just have some serious beef that's getting hashed out. Also, I thought of the portmanteau for you, Al-emo.

Leah Litman:

Oh, I like it.

Melissa Murray:

It's good.

Leah Litman:

I like it, yeah.

Melissa Murray:

It's pithy-

Leah Litman:

Yes.

Melissa Murray:

... but evocative.

Leah Litman:

Yes.

Melissa Murray:

I don't think any of this is wrong. What do you think explains the Gorsuch join here? How is textualist fan boy Neil Gorsuch signing onto this dissent? Leaving aside the whole question of why are two justices of

the Supreme Court taking away health insurance in the middle of a global public health crisis, completely separate.

Leah Litman:

That is in a lot of ways the part that really concerns me, that Justice Gorsuch joined this dissent because on one hand I expected this from Alito. As we've said, we've kind of got his number, but it wasn't just Alito doing this hackery, it was Neil Gorsuch who holds him out as the one to textualist and textualism as one true methodology that constraints judicial decision-making and textualism now means I will do what the Republican caucus wished they could do, but didn't have the votes for. And so it's that that really makes me nervous about the future ACA litigation that you and Kate alluded to on the last episode. There are already pending cases challenging not just the contraception coverage, but preventative service coverage, prep coverage and a whole lot more. And again, the fact that Neil Gorsuch was willing to sign on to an anti textualist opinion, that just truly was all over the place with rage, quite concerning to me.

Melissa Murray:

I think you're right. And again, all of the commentary suggesting that the ACA has been saved, that it is safe, that this is baked in. All of this is really premature and it may be the case and Kate and I talked about this last week. It may be the case that there aren't going to be any more of these colossal, cataclysmic, frontal challenges to the ACA, but you could totally dismantle this piecemeal if you wanted to and they are certainly setting up the prospect of that going forward. It was always fore ordained that the contraceptive mandate would continue to have a bunch of challenges toward it, but again, I don't think that's the only place where a piecemeal challenge might be lodged. So don't get super attached just yet, we are not in the clear on this.

Leah Litman:

Two other questions I just wanted to plant that maybe we can come back to in our end of term recaps. One is what do we think this ACA case and Fulton, which we won't have a chance to talk more about today, mean for a possible Breyer retirement? Was this opinion assignment a retirement gift from the Chief? Will Justice Breyer take the opinion and Fulton as a sign that he and only he can save the court from itself and moderate the court's impulses?

Melissa Murray:

Or is it just example setting?

Leah Litman:

Yes.

Melissa Murray:

We are capable of cohesion and compromise and now that you've seen that mic drop, Steve out, maybe?

Leah Litman:

Yes, another possibility.

Melissa Murray:

You're looking at me like I'm completely delusional.

Leah Litman:

I don't pretend to know. Whereas in 2018, when Justice Kennedy released his opinions in the travel ban case and his concurrence in NIF law, I said like, "He's retiring based on those statements." I don't have the same intuition one way or another about Justice Breyer, so we will have to wait to see as we have been.

Melissa Murray:

He is certainly more enigmatic than-

Leah Litman:

Yes.

Melissa Murray:

... your Justice was. Corey Robin, take note, maybe there's another enigma worth probing at the court.

Leah Litman:

Speaking of the enigma Stephen Breyer, does he have a little troll in him? He was really going out of his way to cite Justice Alito's opinion in clapper in his ACA, no standing case. CF clapper, clapper, clapper and that was the opinion in which Justice Alito wrote the majority, finding that plaintiffs didn't have standing to challenge the government surveillance system. Justice Breyer wrote the dissent and it made me wonder.

Melissa Murray:

Oh, the clapper clap back was for real. I think that was totally intentional. And yes, it reminded me of, do you remember, did you ever see Steel Magnolias?

Leah Litman:

Oh yeah.

Melissa Murray:

Do you remember when, I think it's Clary, the woman who is played by Olympia Dukakis is like, "If you don't have anything nice to say, come sit by me." I think that's Breyer, he's the Clary of this term. So listeners, that's all that we have time for. Again, this was a really fast, emergency, quick thoughts episode and we will have more for you. Stay tuned, we're not done and of course all this summer we're going to have special episodes. So don't worry, your thirst for all things Supreme Court related will be quenched, but just stay tuned and we will come back with more on these cases and hopefully some new opinions during this week.

Leah Litman:

Yes, definitely. And hopefully I will be able to work my way up to the emotional register of Sam Alito. I feel like I was getting going but needed a little bit more time and I need it to happen. I might need Taylor

to release Taylor's version of All Too Well in order for me to really channel the inner emo of Sam Alito, but-

Melissa Murray:

I don't think Taylor's, I think this is really kind of Fallout Boy, kind of-

Leah Litman:

Oh.

Melissa Murray:

He's our Fallout Boy.

Leah Litman:

Oh my gosh, I can totally see Sam Alito with headphones in listening to Fallout Boy, writing those lines directed at the Chief Justice who he has been stewing about for almost a day, that's the vibe.

Melissa Murray:

It was like a big lock of hair covering one eye, just like like Pete Wentz.

Leah Litman:

On that note, thank you listeners for tuning in to this quick hit. We will, as Melissa said, have more this week including about some of the opinions we got out today. Thanks to our producer, Melody Rowell for putting this together. Thanks to Eddie Cooper for making our music and thanks to our intern Liam Bendickson And thanks as always to all of you.