

What Roman Mars Can Learn About Con Law The Administrative State

Roman Mars [00:00:00] So we are recording on Thursday, January 27th. It's 2:00 in the afternoon. And what are we going to talk about this time?

Elizabeth Joh [00:00:07] All right. Well, the Supreme Court Justices appeared in person earlier this month for an unusual oral argument. And there are two strange things about it. One, Justice Gorsuch was the only Justice there who didn't wear a mask. And two, Justice Sotomayor wasn't there at all. And according to reporting from NPR, Chief Justice Roberts knew that Justice Sotomayor didn't feel comfortable near people without masks because she is a diabetic, and that means she's at high risk for COVID complications if she were to get sick. And the Chief Justice reportedly asked, quote, "in some form for the other Justices to wear masks." And Gorsuch chose not to. And because Gorsuch wouldn't wear a mask, Sotomayor stayed away, and she's been remote. She usually sits next to Gorsuch at oral argument. Now, after that reporting, Sotomayor and Gorsuch issued a statement--an unusual one. The two stated that they were warm colleagues and friends, and she said she didn't ask them to wear a mask. And that's kind of weird because nobody was reporting that she asked him to wear a mask. And then the Chief Justice issued a statement saying he didn't ask Gorsuch to wear a mask on the bench. So, I guess it boils down to who are you going to believe--the Chief Justice of the Supreme Court of the United States or NPR?

Roman Mars [00:01:34] Right.

Elizabeth Joh [00:01:37] But I think the story is sort of funny because it's beside the point, right? Why won't Justice Gorsuch wear a mask? Shouldn't you do that for a warm colleague and friend? And if he won't wear a mask, why does he get to show up? And why does Sotomayor have to stay away? So, this whole mask episode happened during arguments over vaccine mandates. So, it's time for us to talk about Gorsuch, vaccine mandates, and did I mention that Justice Breyer is going to retire?

Roman Mars [00:02:11] I'm so excited. Let's do it. This is What Roman Mars Can Learn About Con Law--new name, same show--an ongoing series of indeterminate length, where we take the maelstrom of current events in the world of government and politics, reeling from COVID, extremism, and Trumpism, and use it to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm the person who is never graduating from con law 101, Roman Mars.

Elizabeth Joh [00:03:03] So, Roman, why don't we talk about what happened to the Biden administration's COVID vaccine mandate? But before we get to what the Supreme Court said, we need to talk about some background. So, let's start with the idea that a big reason that we have clean air and water, safe food, low risk airline travel, and worker and consumer protection is regulation--and specifically federal regulation. You don't want to leave any of that unregulated. You know, a good example is food. If you go back to 19th century America, you weren't always getting the product that you thought you were buying. So, if you bought milk, you might have had the cream skimmed off and then maybe chalk would have been added to give it a white color. Your flour might be part-ground clay. Coffee might be half sawdust. And people often got sick from what was sometimes called "embalmed beef"--and embalmed because they literally put formaldehyde in it. So, the reason we don't see nearly so many of these horrible products today is because of federal

regulation. And in 1906, Congress passed the Pure Food and Drug Act. And that law was the first time the federal government had the power to regulate the safety of food and drugs. That same law led to the creation of the Food and Drug Administration. The FDA, of course, everybody knows, is a federal agency. And the FDA is just one of the dozens and dozens of agencies that exist today. If you put them all together, you have what people call the "administrative state." So, here's the policy idea behind the administrative state. The world today is just filled with so many complicated topics, and there's just so many of them that Congress just doesn't have the time, or the energy, or the expertise to deal with it--to regulate it piece by piece. So, think about all the different kinds of questions there are--like how much particulate matter can be in the air and you can still safely breathe it, or how much non-food matter can be in your breakfast cereal and have it still be edible. Things like that. So, the answer in terms of policy is administrative agencies. They fill all of these little gaps with regulations, which are guided by expertise. So, the administrative state--that fancy word--is really just a way of referring to all of those three letter agencies that you've heard about: the EPA, the FCC, and, of course, the CDC. But as a constitutional matter, these agencies are just a little bit strange. So, Congress--which, of course, is the legislative branch--creates them by statute. Congress tells these agencies what powers they have and what they're supposed to regulate. But most of these agencies live in the executive branch. And most of their employees are not appointed by the president, or confirmed by the Senate, or elected by anybody. Now, these agencies often have a whole lot of power. They issue rules that have to be followed. And some of these agencies have the power to go after rule violators. And then some other agencies also have the power to make decisions about whether someone or some entity violated these rules. So, you can imagine, if you're a real stickler about separation of powers, then the very idea of what administrative agencies do kind of doesn't sit well with you. And if you're a big business or a corporation, you hate the administrative state, too, right? More regulations mean more costs, and nobody wants more costs. But practically speaking, we just can't have modern government without these agencies. If you say, like, "Well, they didn't exist in 1789," well, you can respond by saying, "We didn't have planes, industrial food production, or the Internet then either." So, we need a different way of regulating. And that's what the administrative state's all about.

Roman Mars [00:06:58] You need a layer of executive power built on expertise.

Elizabeth Joh [00:07:01] Exactly. That's the idea.

Roman Mars [00:07:02] Because the president can't be the expert of all things, and neither can Congress.

Elizabeth Joh [00:07:07] And neither can Congress; they can barely do what they're supposed to do.

Roman Mars [00:07:11] Right. So how does Congress tell a certain agency what to do?

Elizabeth Joh [00:07:16] So that's pretty interesting. So, they have a federal law, and the federal law will give the agency its powers and tell them its mission. So, for instance, here's the mission that Congress gives to the EPA. The head of the EPA is supposed to regulate air quality in a way that is, quote, "requisite to protect the public health."

Roman Mars [00:07:37] Okay.

Elizabeth Joh [00:07:39] It's kind of vague, right?

Roman Mars [00:07:40] It's pretty vague, but it also, like, you know... It's understandable at least.

Elizabeth Joh [00:07:46] Totally makes sense. It's supposed to protect the public, but it's not that specific. And again, the idea is they can't be that specific. That's why the agency exists in the first place--to have that expertise. Now, there's another important fact here. Since the 1980s, the Supreme Court has said that courts are supposed to be deferential to an agency in how they interpret what Congress has told them to do. Now, deferential here just means that courts aren't supposed to take a really hard look or second guess too much about how the agency interprets its job, you know, within reason. So, the federal agency that's in charge of workplace safety is OSHA--the Occupational Safety and Health Administration. Now, just like the EPA, OSHA has a very broad mission. OSHA was created by statute in 1970. And until 1970, there were no national standards for workplace safety. And, of course, you know, now it's a well-established agency. And now we're in the middle of a pandemic. Does a pandemic make a workplace an unsafe place to be, and can the federal government do anything about it? Well, Biden's answer to that was "yes." Last September, Biden announced two big COVID measures. One was a broad workplace vaccine requirement. And another measure required vaccines for health care workers. So, the first one--for the workplace--was a really big deal. It required vaccines that would cover more than 84 million people in the United States. Now, both of these measures were challenged in Court, and the Supreme Court agreed to hear both. The parties in these cases had a really simple argument, and that is these federal agencies that created these rules--they don't have the power to issue these vaccine mandates. So, Roman, why don't we give this a try? You can work out this hypo with me.

Roman Mars [00:09:40] Okay.

Elizabeth Joh [00:09:40] So remember the basic idea here, right? Think about the power Congress gives to the agency. And don't forget, there's this very basic principle that courts are supposed to be deferential to what agencies do. So, when Congress creates OSHA, it told the agency to make rules that are, quote, "reasonably necessary or appropriate to provide safe or healthful employment." Got it?

Roman Mars [00:10:04] Okay.

Elizabeth Joh [00:10:05] Okay. So last November, OSHA issues an emergency rule that if you're a company with 100 or more employees, you have to make your employees get vaccines or you have weekly testing. And if you didn't comply, you could be fined thousands of dollars for every violation. OSHA estimated that this rule alone would prevent 250,000 people from being hospitalized and more than 6500 people from dying from COVID. So, with that in mind, do you think that's something that OSHA has the power to do?

Roman Mars [00:10:35] Well, my interpretation of reasonable falls within that. I think those are reasonable concerns. That's a reasonable thing to ask and a reasonable way to make a workplace safe.

Elizabeth Joh [00:10:47] Okay. Well, the people who brought the lawsuit didn't agree.

Roman Mars [00:10:51] What do you know?

Elizabeth Joh [00:10:51] The Supreme Court said, "Look, okay, well, here are these cases." And they took a really unusual step of having oral argument on an emergency request about this vaccine mandate in large workplaces. This took place on Friday, January 7th. Now, remember, this is the same case which was about a vaccine mandate in the workplace, which had Sotomayor participating remotely as her warm colleague would not wear a mask. I'll also note here that one of the lawyers representing the Republican states against the vaccine mandate also participated remotely because he was recovering from COVID.

Roman Mars [00:11:26] Of course.

Elizabeth Joh [00:11:27] Ironies abound here, right? The Supreme Court heard oral argument on the case, and about a week later, a majority of the Supreme Court disagreed with you, Roman. They said, "No, no, the Biden administration's vaccine mandate could not go forward." The case was called National Federation of Independent Business versus OSHA. So, for the majority, this was the key question. Is the vaccine requirement a workplace safety rule? "No," they said, "requiring people to get vaccinated during a pandemic is really a public health rule, not a workplace safety rule." The majority said, "Look, getting a vaccine isn't like requiring face protection, so you don't get injured by chemicals at work. It's just not the same kind of rule." Instead, the six conservatives on the court said that COVID is what they called a "universal risk." It's kind of like crime, or air pollution, or just like getting a cold; you just face it everywhere. So, if that's true, then OSHA--this is the agency--doesn't have the power to regulate what the Court said, in its words, were "the hazards of daily life"--not unless Congress gave them the specific power to do that, and Congress didn't. So, the majority in the OSHA case did say, "Look, there could be specific jobs where COVID is very much a workplace safety issue." So, if you're a researcher in a lab who works with the virus or you work in a really very overcrowded workplace, then that could be a workplace safety issue. But for the majority on the Supreme Court, the problem here was that OSHA's emergency rule was just too broad. The agency was trying to regulate every kind of big employer, no matter what. That made the rule, as a majority said, a blunt instrument. But now I want to go back to Gorsuch, the Maskless Justice.

Roman Mars [00:13:21] Okay.

Elizabeth Joh [00:13:22] So Gorsuch writes a concurrence. In other words, he writes his own separate opinion, adding on. So, for Gorsuch, what this really boils down to is not about COVID or even public health--but who's in charge here? Who gets to decide? So, for Gorsuch, upholding the vaccine mandate would mean that administrative agencies could--and these are his words--"regulate the daily lives and liberties of millions of Americans." So, for him, to reject this vaccine mandate is really about preventing what he called "government by bureaucracy supplanting government by the people." So, in other words, for him, this is really a decision not just about people not dying of COVID, but it's a decision about the federal government, federalism, and the federal government not overstepping its bounds--or "federalism" is another short way of putting it. COVID? Not his problem.

Roman Mars [00:14:21] Is there indications in this concurrence that show how Gorsuch feels about formaldehyde in meat or...?

Elizabeth Joh [00:14:33] I'm not sure that he does. But I'm pretty sure that he thinks if it's specific and narrow and it's really, you know, within a narrow interpretation of what an

agency can do, then it's okay. But once you start to do something that looks like the federal government can regulate everything, that's what makes him nervous--or at least if that's what you think is going on with the vaccine mandate.

Roman Mars [00:14:53] Right.

Elizabeth Joh [00:14:54] So the concurrence here, written by Gorsuch, really makes clear the fundamental difference between the majority and the three dissenters in this case. And here's the difference--is a vaccine mandate case about unchecked power in a government bureaucracy? Or is this a case about relying on the expertise of a federal agency that was created for worker protection in the first place, when you know that you might get COVID from your coworkers? So, for the three so-called liberal Justices, the answer is pretty clear. When you create a federal agency that's supposed to protect workers and they issue a rule to do that, then you leave them alone; that's what they're supposed to do. The dissenters say, "Look. OSHA rules exist to protect workers against the dangers that are in their workplaces. Why does it matter if those same dangers are also outside of their workplaces?" The dissenters say, "It doesn't matter at all."

Roman Mars [00:15:49] It doesn't make any sense to me because it's like saying, "You have to wear a hardhat because you're on a construction site and things might fall and hit you on the head." And it seems like the conservative Justices are saying, "Hey, head trauma happens everywhere. We can't regulate this. Head trauma's head trauma." And it isn't the head trauma that's the issue. It's the fact that you could get a hammer on your head. And that seems to happen a little more likely in a tight workplace when it comes to COVID--as I'm continuing this metaphor.

Elizabeth Joh [00:16:20] Yeah, that's exactly right. I mean, it couldn't be more clear that people definitely do get COVID in the workplace because they're in the workplace. And they also get it elsewhere, but that shouldn't detract from the agency's ability to protect you. And OSHA is not trying to make you do something at home. They're trying to do something for you in the workplace. But really, again, this is about that fundamental difference--how to frame the question. So, for the dissenters, they say, "Look, why are you so upset, conservative majority, about the decision-making power of OSHA? What about what you guys just did right?" Or in the dissenters' more eloquent words, they say, "Who's supposed to decide here--an agency with expertise in workplace health and safety, acting as Congress and the president authorized, or a Court lacking any knowledge of how to safeguard workplaces and insulated from responsibility for any damage COVID-19 causes?" So that's a pretty pointed critique right there.

Roman Mars [00:17:20] Wow. It's funny that they're just, like, reflecting it right back at them. It's like a schoolyard fight. That's so hilarious. So, like, what does this ruling mean for the vaccine mandate going forward?

Elizabeth Joh [00:17:31] So, you know, if you look at just the decision by itself, in theory, this was just a response to an emergency request. The challengers wanted to stop the mandate from going into effect. And so, technically, the Supreme Court's decision stayed or paused that rule from going forward. But, you know, even if you technically think of it as an interim decision, the conservatives were not going to change their mind in a final decision either. And so, reading the tea leaves, OSHA on January 25th formally withdrew its vaccine or test rule. So that rule is gone. So, OSHA could come back with a very narrow rule saying that you need to get a vaccine in these specific industries. But again, that would defeat the very purpose of the original rule, which was to have a huge vaccine

mandate to try and get millions and millions of people vaccinated. Now, Congress could specify that OSHA specifically has the power to do what the Biden administration tried to do, but that's not going to happen. So really, your question is about, you know, is there going to be a sweeping vaccine mandate for the country? And the answer is no. That was pretty much the end of a national solution in a pandemic that has killed, at this point, almost 900,000 Americans. But it's over.

Roman Mars [00:18:49] Yeah. I mean, could, for example, one of those other three letter agencies--the FAA--say that you have to have a vaccine to fly on a plane? Are there other ways to, like, divide out the population and say, "For the safety of others and underneath our administrative purview, a vaccine is required?"

Elizabeth Joh [00:19:10] Sure. I mean, you could break it up that way. And, you know, certainly many people have raised the question of why isn't that a requirement to get on a plane? But I think for many political reasons, that's not going to happen.

Roman Mars [00:19:20] Yeah. Yeah. So, like, OSHA was kind of the best shot at this.

Elizabeth Joh [00:19:23] It was the best shot. It was to try and have this nationwide policy because so many of us work. We have to go to a workplace. And then there's the other case. The very same day that the Supreme Court shut down the vaccine mandate for workplaces, it upheld another vaccine mandate for healthcare workers. This is also a case about agency power but a different agency. The secretary of Health and Human Services is in charge of the federal Medicare and Medicaid programs. And these are federal programs that give health insurance to the elderly, the disabled, and the poor. So, if you're a hospital or you're some other health care provider and you want to bill Medicare or Medicaid for your services, you have to comply with a lot of rules about how you provided that care. This is a pretty complicated business. So, to do this--to administer this--Congress created an agency called the Centers for Medicare and Medicaid Services, or CMS. It's part of the Department of Health and Human Services. So, Roman, let's take that quiz again. So, remember, we look at the power Congress gave to the agency. And then remember we're kind of working against this pretty deferential background. We usually allow agencies to do what they're supposed to do. So, with the CMS, Congress gave them the power to make rules that are, quote, "necessary in the interest of the health and safety of individuals who are furnished services." So last fall, they issued a rule--you want to be reimbursed, get your doctors, and nurses, and healthcare aides vaccinated. So, do you think a vaccine mandate falls within their mission?

Roman Mars [00:21:00] I would definitely think so.

Elizabeth Joh [00:21:03] So this time the Supreme Court agreed with you. In a 5-4 decision, the Supreme Court said, "Yes. This agency does have the power to impose a vaccine mandate for health care workers." So, you know, in this case, the majority said that "Well, healthcare workers have always had to comply with rules about safely providing care. And they've had vaccine requirements, too--not just for COVID, but for other kinds of transmissible diseases. So, for the majority, this particular mandate was okay." But actually, it was just barely a majority.

Roman Mars [00:21:34] Yeah. It's surprisingly close. That's weird.

Elizabeth Joh [00:21:38] Extremely close. Justices Thomas, Alito, Maskless Gorsuch and Barrett disagreed. So, for these conservatives, they said the government was trying to

exercise what, in their words, was "virtually unlimited vaccination power over millions of healthcare workers."

Roman Mars [00:21:57] Okay. I think I have a grasp on this, but can you explain to me the difference between these two decisions?

Elizabeth Joh [00:22:05] So that's a tricky question. On the surface, they seem to be almost the same thing. One agency is saying, "Get a vaccine," and the other agency is saying, "Get a vaccine." Why is it the one decision goes in Biden's favor and the other one does it? So as a legal matter, I suppose they are different. You could say that the healthcare worker vaccine requirement was upheld because there's been a long history of the agency that covers them saying, "Look, you have to have rules to make sure that you don't give diseases to the people that you treat." And you could say that the OSHA rule is different because COVID is clearly a high risk for some workplaces, but maybe not in every single workplace. And the Court interpreted OSHA's agency power pretty narrowly. But again, go back to what you observed, and that is even the healthcare mandate case was 5-4, right? So, it just barely was okay.

Roman Mars [00:22:58] Yeah, yeah, yeah.

Elizabeth Joh [00:22:59] So another way of thinking about these two cases is that we could also say that a conservative majority was just one vote away from a completely successful assault on the administrative state, which is how a lot of government is run today. So, remember, businesses have always hated administrative agency rules. It's too much regulation; it's too costly. But there's another important part of the puzzle here, and that is there is also a long-standing conservative philosophy against the administrative state. It used to be kind of a fringy view on the right, but it's not any longer. So even Steve Bannon, Trump's strategist, has talked a lot about what he calls "the deconstruction of the administrative state." It's basically getting rid of these agencies. So how do you do that? You starve them of funds, you slow roll appointments to head the agencies when there are vacancies, when you appoint people, you make sure you pick people who don't want the agencies to do very much, and you also promote judicial picks who feel the same way. So, there was once a federal appeals court judge who gave a speech before some law students in 2016. He told these students that the administrative state, quote, "poses a grave threat to our values of personal liberty, fair notice, and equal protection." That very same year, the same judge wrote a judicial opinion that said, "Permitting executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way seems more than a little difficult to square with the Constitution of the Framers' design. Maybe the time has come to face the behemoth." That judge's name was Neil Gorsuch. And the very next year, of course, he would become an Associate Justice of the Supreme Court of the United States. He was, of course, nominated by President Trump. So, Gorsuch has been extremely vocal about his hostility to administrative agencies. So, remember, in these two vaccine mandate cases, he voted to say neither vaccine requirement was lawful. But the vaccine mandate cases make it clear that he isn't alone. So, when you think about the issue, you could say that these two cases are, of course, about the pandemic and what the government can do in a pandemic. But they're also about something else. You know, the opposing sides on this issue aren't really having the same conversation. Gorsuch and the other conservative Justices think that the administrative state poses an essential threat to people's liberties. And the other side, including a pretty big portion of the public, says, "Well, we like clean air and water, regulated financial markets, unpoisoned food, and safe workplaces. We want someone to take care of that." So, these two cases that we've heard about are so much more than

about vaccines. I think they're a pretty big warning sign about how this six-person majority on the Supreme Court might make future decisions about how much federal agencies can continue to do their jobs in a way that is undisturbed or mostly undisturbed.

Roman Mars [00:26:10] Yeah. Yeah. This reminds me of Ruth Bader Ginsburg saying that we're throwing away our umbrella just because we're not getting wet. And it's like Gorsuch is throwing away the administrative state because he hasn't eaten tainted meat in a long time. I mean, that's a person who--probably it would do him some good to eat some tainted meat.

Elizabeth Joh [00:26:35] I'm not sure about that. He certainly has a hostility. He has an absolute hostility to, you know, what he thinks of as a pretty fundamental part of what government means today. I mean, if we were to take that argument all the way to its logical end, it would be getting rid of all of this rulemaking that kind of props up our basic assumptions that the food we buy is safe, and the toys--products--we buy are safe, we get on a plane and they're not going to crash. All these sort of basic necessities that we need to live an anxiety free life--we need regulations for that.

Roman Mars [00:27:08] So these are two federal cases. So, does this mean that no state can issue a vaccine requirement? Or we're just talking about the federal government at this point?

Elizabeth Joh [00:27:18] We're just talking about the federal government. So, this is really about, you know, as I said, in a larger sense, the Supreme Court's conservative majority being very, very hostile to the idea of an expansive federal power. It's not at all about what states can do. And in fact, one of the things that you see in cases like the vaccine mandate cases is that they always contrast what the federal government can do--limited--with what the states can do--a lot. So, you know, it's been a while, but we talked about the vaccine mandate at Indiana University, which was a state public institution. And so, in that case, everybody at the university--faculty, staff, and students--were supposed to be vaccinated. And a group of students filed the lawsuit; they said the vaccine violated their constitutional rights. And the challengers even asked the Supreme Court to step in, but in August, they said, "No, we're not going to do it." Now, the Supreme Court deciding not to interfere in that case--the Indiana case--but definitely getting involved in the federal case makes a lot of sense because when conservative judges talk about federalism, they don't mean it in a neutral way. What they mean is they're making sure that the federal government doesn't overstep its bounds. So, they often talk about states having very broad powers to regulate what happens within their borders. So, the Indiana case is about the exercise of state power. So very, very different than a federal OSHA rule.

Roman Mars [00:28:40] Interesting. So, they're sort of enforcing a type of federalism that, you know, heretofore I haven't been, like, a huge fan of, but where each state could maybe have the power to be even more broad in its ability to have people be vaccinated. And then the Supreme Court presumably wouldn't step in at all.

Elizabeth Joh [00:29:02] Yeah. Or, well, it depends, right? So even that has a caveat or a warning, and that is this Court or this conservative majority has made it clear that they're very sensitive to some things. And if a state's rules--even if it's about making sure COVID doesn't spread too much--tends to or possibly infringes on someone's religious liberties, then they will definitely get involved. But that's been kind of the extent of it. And what you really see is that's true. Every state is kind of on its own. But when you have--not just a national--a global problem, like a pandemic, it kind of doesn't make sense to say, "Well,

every state should be on its own." Maybe it makes sense for things that ought to be done on a state-by-state basis. That could be matters from, you know, how a particular state wants to have its education organized or anything like that. But a pandemic doesn't respect borders at all. And if anything, this is kind of the one time when you really do need a national policy.

Roman Mars [00:30:02] Yeah. Yeah. Or even a global one. Yeah. So, you have some updates for us on other things we've talked about.

Elizabeth Joh [00:30:11] Yeah, remember the House January 6th committee last August asked for records about Trump's movements and meetings in the days leading up to the insurrection. And remember, Trump sued to keep those records secret. The big problem for Trump was that Biden--the current guy in the office--said that he wasn't going to invoke any claim of secrecy over these records. Now, a former president like Trump can make a claim of what we've talked about called "executive privilege." But what about a case like this when we're talking about January 6th? Well, according to the courts, no, Trump doesn't have that right. First, the federal district court ruled against him. Then the federal appeals court ruled against him. And on January 19th, the Supreme Court ruled against him, too. See, Trump had asked the Supreme Court to block the release of these records. And in an unsigned order, the Supreme Court refused. They said, "Look, the appeals court already said, 'This doesn't turn on the fact that you're a former president. It turns on the fact that what we do in these cases is look at your need for secrecy and how important disclosure is.' And in this case, it's really important for us to find out what exactly happened before January 6th." So, in the words of the appellate court, "January 6th exposed the fragility of these democratic institutions and traditions that we had perhaps come to take for granted." So that's some pretty lofty language that Trump couldn't find anything to counter with. So, within hours of the Supreme Court's decision not to get involved, the national archive began to turn over hundreds and hundreds of pages to the committee. Now, the other case that has some news in it is the Texas abortion case. You remember the one that banned nearly every abortion in the state and allowed private persons to sue for violations of the law? Now, we talked about before that the Supreme Court decided to take up the case at an early stage; they didn't want to talk about whether the law itself was unconstitutional, but they really focused on procedure. Are these the right people to be sued in this case? Because of the strange mechanism of the case--you know, you have this kind of bounty hunting system, essentially--it wasn't clear who you could sue to get the law stopped. So, the Supreme Court decided that, yes, the case could go forward, at least in part. The abortion providers who brought the lawsuit could sue the Texas officials responsible for medical licensing. But the majority also refused to put a stop to the Texas law during the lawsuit. So that means nobody gets to have a legal abortion in the state. And then you had that unusual dissent of Justices Breyer, Sotomayor, and Kagan--joined by the Chief Justice. And the dissent here was notable because they said, "Look, this is a constitutional right at stake. And the district court should resolve this litigation and enter appropriate relief without delay." So, the message is, "Hurry up! Get this over with." Well, not so fast. The state of Texas said, "Well, these defendants--these state officials--are they really the right defendants? Do they really enforce this abortion law? We're not really sure. And maybe that's a matter of state law interpretation." There's not an easy answer to this. So sometimes when there's a state law question in a federal court case, a federal court might ask the state's Supreme Court to weigh in. And that's exactly what Texas asked the federal appeals court to do. And the court said, sure. So, the abortion providers said, "Wait a minute, let's go back to the Supreme Court to stop the federal appeals court from doing this. This is just delaying and delaying the case. Why do we have to do this?" On January 20th, the Supreme Court said, "No. We're not going to step in." And the three liberal

Justices dissented again. Justice Sotomayor emphasized the nature of the problem here. She said, "This is a case where it is a disaster for the rule of law and a grave disservice to women in Texas, who have a right to control their own bodies." So, what happens after this? Well, the Texas Supreme Court now says, "Okay, we'll take it up." And they've just announced when they're going to take it up--the end of February. So that is a pretty ominous sign, I think, for abortion rights in the United States. It's an ominous sign because the United States Supreme Court didn't really see much point in stopping what was going on here, which was a lot of intentional delay. And during all this time, it also means that this Texas law remains in effect. It is virtually impossible to get a lawful abortion in the state of Texas. And the fact that the Court decided not to get involved at all seems like a pretty clear sign that abortion rights are indeed in jeopardy.

Roman Mars [00:35:03] Yeah. Okay. Well, I know there probably isn't much to say about this, but yesterday it was announced that Breyer finally was going to retire. And then today it was official. What are your thoughts?

Elizabeth Joh [00:35:15] It is official. He did make it official today. And he is going to stay through the end of the Supreme Court term, which usually ends in June. So that means that he's going to take part in all the decisions that are, you know, part of the Court's docket this year--and some really pretty big ones. So, we know he's sticking around. And so, the big question is: Who's going to replace him? He is the oldest Supreme Court Justice; he was appointed by Clinton in '94. Now, there's going to be a big battle about who's going to fill that scene. President Biden has already made public that he intends to put a Black woman in the seat to replace Justice Breyer. And if the Democrats want to fill that seat, they have to act pretty quickly. If they lose one Senate seat in the midterms, they lose their balance. And then the vice president can't be a tiebreaker. I guess people are relieved--Democrats are relieved--that Breyer has decided to do this now. And it's possible he's announced kind of earlyish in Biden's term because of what happened in Ginsburg's case. She decided not to step down early in Obama's presidency. And, of course, she died in September of 2020, and her replacement, of course, was picked by President Trump.

Roman Mars [00:36:36] Yeah. Yeah.

Elizabeth Joh [00:36:37] And Justice Breyer, being the former law professor and the sort of cheerful person that he is, made a set of remarks today about his retirement--or impending retirement. And it ended in a funny way. "Look, this country, " he said, "it's an experiment that's still going on. And I'll tell you something. You know who will see whether that experiment works? It's you, my friend. It's the next generation and the one after that. My grandchildren and their children. They'll determine whether the experiment still works. And of course, I am an optimist. And I'm pretty sure it will."

Roman Mars [00:37:17] Huh.

Elizabeth Joh [00:37:19] I don't know, Justice Breyer.

Roman Mars [00:37:20] That makes one of us. Well, life seems pretty good for Justice Breyer, I guess. Wow. Wow. Well, I know it's a huge relief to a lot of people who are worried that fate would intervene in these circumstances and would cause him to maybe be replaced by someone much more conservative than him. So, there we go. Well, that's fascinating. I guess the true question is: If nominated, will you--Elizabeth Joh--agree to go through and become a member of the Supreme Court?

Elizabeth Joh [00:37:55] Nah, I'd have to give up my side gig in the podcast.

Roman Mars [00:37:59] Well, I guess sacrifices have to be made. Well, this is great. Thanks so much for catching up. It was a good episode. I'm happy.

Elizabeth Joh [00:38:09] Thanks, Roman.

Roman Mars [00:38:18] This show is produced by Elizabeth Joh, Chris Berube, Jeyca Maldonado-Medina, and me, Roman Mars. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.