Peter M. Shane: Welcome to Discussions from Drinko Hall. This is our Supreme Court review series. I'm a law professor at Moritz College of Law. We've have a really blockbuster term though the Supreme Court decided only 68 cases on merits, there are countless that were blockbuster cases. We'll focus on a set of 6 of these cases today. We are excited to have that and to have my colleagues joining us talk about each case.

The Ohio Bar has approved this seminar for CLE credit. There are polls you have to fill out. There is a right answer, but it doesn't matter if you get the correct answer for CLE credit. But indicate an answer so it is logged that you participated.

We'll spend 12-13 minutes on each case with each of our area experts and we'll have the expert explain the case a little bit and then we'll have some Q&A along those lines. If you have questions, feel free to go to the Q&A button at the bottom and add your question or comment there and I'll weave that into the discussion.

A Title 7 discrimination case based on gender identity or sexual orientation is the first case. Marc will talk about this case. He's the Isadore and Ida Topper professor of law at the University. He writes about intersection of law and culture. I'll turn it over to Marc. There are three cases consolidated into one opinion about Title 7.

Marc Spindelman: Let me start with a quick thank you to Amy putting the event together. Thank you to all. I'll call this talk Bostock v. [Inaudible.]

[Inaudible.] This has become famous as a textualist decision. I sketch Bostock text
pointing to nonstatutory grounds. First textualism. Two from Title 7 get Bostock going. One is conservative biological definition of the term "sucks." The second is Title 7 "because of" as in because of sex. This opinion claims statutory text as authority but it really relies on Supreme Court gloss when announcing "because of" really means traditional but for causation. These are rudiments for Title 7 doctrine which Bostock applies to anti-discrimination claims. But for a gay man's sex makes him a man rather than a woman and wouldn't suffer from sexual orientation discrimination. A trans woman wouldn't either. Bostock reasons it's impossible for discriminating against a person without discriminating against these individuals based on sex.

This account rounds the bases without departing too much from Title 7. Bostock is textualist in this. Still this is a mechanical textualism that refuses to indulge Title 7's original meaning. As the Bostock dissents note, understanding doesn't accord with Title 7 meaning from 1964 so it's wrong. Agree or not, Bostock feels thin about the public explanation about the court claiming this discrimination is protected by Title 7. If the text made into doctrine by the court gets Bostock to the plate, it doesn't direct the direction of the swing. Anti gay, anti trans discrimination. Bostock conclusion is a judicial choice Bostock meets [Inaudible.] Moments of confident deflection aside, there are moments of engagement of significance. After posing rhetorical questions that challenge normative underpinnings, Bostock reaches concerns about neutrality in unexpected applications of statutory terms. Zeroing in on disfavored groups is odd because Bostock insists Title 7 is about individuals. It launches into the ADA. On the other side of this discussion, Bostock is applicable to the case at hand.

[Reading quickly.]

It would tilt the scales of justice in favor of the strong and popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

This is Bostock explaining its interpretation of Title 7, telling us why it included lesbian
women, gay men and trans people. Bostock is lady justice finding balance with her scales. This is lovely but disorienting. Bostock temporary gives up the textualist hunt and leaves it open to attacks of saying fake textualism and legislating from the bench.

They are found in cases Bostock doesn't invoke but supply the deep legal justification it says it's up to. Saying this is to speak about the Supreme Court pro-lesbian and pro-gay rights which until Bostock only protected trans people. Bostock says it's included in the law now. This body of case law makes it an authoritative legal statement that says that Bostock does, all these people are entitled to equal treatment of the law and Title 7 should be read that way. Bostock emerges to deep values of Constitution law, Bostock's Constitutionalism.

The statutory textualism of the Bostock dissents, are legally misguided. They give authoritative interpretive [Inaudible.] As a rule, the Supreme Court pro LGBTQ rights jurisprudence says those forms of discrimination shouldn't be given operative [Inaudible.]

Bostock dissents claim infidelity but it disserves and weakens the statute by offering a [Inaudible.] A legislature would be hard pressed to defend. How can a government cut out LGBTQ of applicable anti-discrimination rules?

The Bostock dissents have the authority to dissent away but they do so at expense of principled understanding of subtle constitutional rules. In this respect, if the dissents are right on textualism, this is because textualism can vindicate [Inaudible.] This makes it both a textualist reading and not.

Thank you.

Chris Walker: Audience, feel free to jump in with questions. I have one question lined up from a former student Jonathon.
Was the doctrine of textualism exposed when three judges concluded for different reasons? I'm skeptical that textualism represents a higher form of . . . [Continuing to read question in Q&A.]

Marc Spindelman: Is that the full question?

Chris Walker: There's more. Aren't all judges focusing on what they want to, in order to get the desired outcome they want?

Marc Spindelman: Thank you for the question. I think there are ways in which one can say about Bostock opinion overall that they prove the point that textualism as interpretive method is indeterminant or underdeterminant and it's the real reason for judicial decisions.

Here it's interesting -- that point has been noted but not yet been enough attention paid to Justice's [Name?] opinion. That's remarkable. There were other moments of text where he really struggles to justify his decision. In places he shifts the burden of justification. "I don't have to explain why I'm ruling that lesbian women, gay men and trans are . . . " But for people who want public accounting whose world views are at stake we think they have right to public justification. It's interesting to look here about justification.

Chris Walker: One other question. How if at all does Bostock get reconciled with the Hoosier [Inaudible] that allowed discrimination?

Marc Spindelman: There's an interesting passage toward the end where he brackets issues saying this case is not deciding. Important among what Justice Gorsuch is saying is the role of religious liberty in relation to some anti-discrimination claims. One thing the opinion suggests is problems with the religious freedom restoration act. One
thing that I think is interesting and important to point out is as a statutory constraint on
the operation of another statute, if it is in fact the case that Bostock justification is
deeper set of constitutional values, the configuration of arguments of statute against
constitutional claims, etc. are what the clashes are really about. We have to wait and
see what the meaning and scope is from the end of the decision. But I think we can
assume some limits placed on the meaning and scope of the ruling but the limits might
not be as broad as some people fear.

Chris Walker: One fascinating thing to me about the decision is that it was a 6-3
decision with Roberts joining. I would want to talk more about that if we had another
hour. [Laughing.]

Marc Spindelman: It preserves the precedence since [this case] is keeping with lots of
rule of law coming from the court this last term.

Chris Walker: Next case is Little Sisters of the Poor, about contraceptives. We have L.
Camille Hebert to talk about this. Hebert is a national expert about discrimination, etc.
She's published widely. She will walk us through the Little Sisters of the Poor.

L. Camille Hebert: Trump administration broadens [this.] The majority opinion written
by Thomas, Roberts, etc. Alito wrote concurrent opinion and Kagan wrote an opinion.
[Inaudible.] This case was 7-2 vote. I suggest 5-2-2 is more accurate. This case has
tortured history. The original regulations from health resources administration define
contraceptive services as preventive care for women but adopted religious exemption.

These regulations provided accommodations. Self certification to self-care issuer or
administration who would provide the services directly to beneficiaries.

Religious nonprofits challenged the self-certification as violation of religious freedom
and restoration act which provides law that burdens exercise of religion must serve a
compelling government interest and must be least restrictive of that. The claim was rejected by lower court and was [Inaudible] cert.

In another case Hobby Lobby, contraceptive mandate violated [Inaudible] rights of corporations. [Inaudible.]

In 2016 the government attempted to find a way to accommodate religious beliefs of employers and ensure beneficiaries to group health care plans but couldn't.

2017 government issues regulations avoiding the conflict by broadening religious exemption to any employer for providing contraceptives and others who had moral objection. The employers weren't required to comply with [this.]

Challenged by [Inaudible] Pennsylvania. The district court agreed.

Final regulations were issued. Expanded exemption is the best way to deal with the [Inaudible.] Pennsylvania challenged the final rules and the district court issued injunction. Federal Court appealed and the sisters did too. The Supreme Court court of appeals affirmed district court holding the government lacked the power to craft the exemptions. Supreme Court granted cert.

What the court decided and did. Trump administration [Inaudible] were procedurally valid. The government had statutory authority to issue the exemptions. The court didn't say the exemptions violated Remfra [sp?]

The court first said the government had the statutory authority to issues exemptions. The court looked to 42 USC [reading] which provided that with women and group health care, should provide additional care and screenings.

The argument of the states was Pennsylvania and New Jersey that the provision gave
for the mandate but not for the exemptions.

The court accepted the department's "as provided for" gave authority for both mandate and exemptions.

The court rejected the contention that the court wasn't allowed to . . . Rifra . . . instructed the departments.

[Reading/transcriber summary:

. . . basically the court said no . . . required by APA. Court rejected that regulations were not valid . . . particularly given . . . changed . . .

The court rejected open mindedness test . . . provides procedural arguments that must be followed . . . this is all the requirement.]

This is all the court decided. A different administration might take a different approach and the court would uphold that greater restriction. The court could decide the new administration hadn't shown justification for changing position but that would be hypocritical given the Trump administration approach.

I think I'm running out of time. The implications of the decision.

[Reading/summary:

The Trump administration has authority to issue regulations but doesn't decide they might not be struck down on other grounds. Kagan provides a roadmap for explaining how the lower courts might reach that conclusion.

Broad range of employers . . . means that -- without self certification . . . given the court
didn't decide the Rifra issue and since they have the opportunity to, I assume they didn't have the vote to. Possibility of if there's a new administration, that question is still open.

Court couldn't decide the issue in 2016, not in 2020. The issue still might come up again.

Chris Walker: That was my question of what's -- this case has been reported as 7-2 but I view it almost as 5-4. Like you said, Kagan, gives a roadmap in concurrence about what the lower courts could do if they wanted to strike it down as arbitrary and capricious.

What are your thoughts? Do you think reversing course will be a priority in a Biden administration?

L. Camille Hebert: Yes. I think the preventative care was significant part of the Affordable Care Act and contraceptives significant. It's possible that the religious exemption would stay in effect, maybe the self-certification requirement would go into effect. I wouldn't be surprised to see the moral [word?] eliminated.

Chris Walker: Any questions from the audience or panelists? Let's answer this one.

[Reading Q&A question.] At what point would rules become arbitrary and capricious?

L. Camille Hebert: I have seen instances which the court has said that the change without sufficient explanation could be arbitrary and capricious. It would seem to me to be odd -- a Biden administration or others reimplemented rules, it would be odd to say "you changed your rules so we won't give authority," given really big changes from Obama to Trump administration.

Chris Walker: Traditionally when we think of arbitrary and capricious, we imagine with
change in administrations agencies can shift in different directions. The key is they do that by going through the process and check the boxes. I think that's changing a little bit. We might talk about that a little bit with the next case. I think Roberts and Kagan cared more about reliance interest than reliance in the past.

Another question. [Reading question from Q&A.] Do you think this is because we have arbitrary and capricious administration or does the court . . . more generally?

[Laughing.] You have 30 seconds to answer that.

L. Camille Hebert: The interesting thing is the court didn't decide that issues because it wasn't directly in front of them. I do think Kagan's concurrence sets forth explicitly why this one might really be arbitrary and capricious. I don't think I can answer for that. But I do think it's interesting the court didn't address that issue. So cases will go back down on that issue.

Chris Walker: We'll get back to that with the case of Brown and DACA.

Thank you for joining us.

We'll switch gears to hear from Joshua Dressler at Moritz. He will talk about the Kohler [sp?] v. Kansas and whether there's Constitution guarantee about insanity.

Dressler is one of the leading scholars in criminal law and procedure. So excited for him to join us.

Joshua Dressler: The most important case in my field was Koller [sp?] have Kansas and whether that violates due process, etc. The court 6-3 held that Kansas statutory scheme doesn't violate the due process clause. But the court didn't say it's constitutional to abolish insanity defense. It defined it very peculiar and improper way.
This wasn't a great case to bring to the Supreme Court to show how wrong it is to punish mental ill people because Kahler wasn't mentally ill. This was a case with facts all too common. He and his estranged wife were in custody battle. She moved out into her mom's home. He broke into that home and murdered his wife, daughter, mother-in-law but let his son leave unscathed.

This was a man with anger management problems with a gun. Nothing more. Yes, Kahler attorney came up with an expert that said Kahler had severe depression so much so that he lost control of his faculties. But he could distinguish between his son and others, but okay.

He couldn't introduce this weak evidence about insanity. But Kansas applies mens rea that is a defendant can raise mental illness evidence only to disprove the mens rea definition in the crime.

This didn't help Kahler because he intended to kill his family. He's recorded saying "Oh shit. I'm going to kill her. God dammit." All elements of capital murder were easy to prove.

Under Kansas law, Kahler was entitled to introduce mental illness evidence in sentencing. He failed and was sentenced to death.

Now I'll talk about what the court said. Kagan said "within broad limits, doctrines of criminal responsibility remain the province of the states. Anyone seeking to use the due process clause for compelling a legislator to adopt a rule of criminal liability must surmount a high bar" namely the question was whether a single conical formulation of legal insanity is so deeply entrenched that the due process clause compels the state of Kansas to adopt it.
Note the issue was supposed to be whether the due process clause imposes on the state that they recognize "an" insanity defense, not whether it's a single formulation of the defense. Ask the wrong question and you get the wrong answer.

There's more. I want to quote directly. The majority conceded that Kahler is right. For 100s of years jurists and judges recognize insanity as relieving . . . for a crime.

How can the majority concede that for 100s of years that insanity has been recognized as relieving responsibility for a crime and yet still find Kansas which abolished the defense is acting constitutionally?

Kagan's answer for the court. Low and behold, Kansas has an insanity defense because it allows the defendant to introduce mental illness evidence . . . Kansas has insanity defense.

Wait a minute. Imagine a defendant is charged with failure to obey a police order and defense is he was deaf. Under ordinary criminal law rules, the defense would have to prove he was deaf and didn't hear the order. But we don't say the law enacted a deafness defense. We would say the government has to prove the crime beyond reasonable doubt whether that crime involves deafness or mental illness. But a defendant who introduces mental illness is thereby raising an insanity defense is to extinguish affirmative defense . . . casting doubt . . .

Every justice understands this distinction. Who did they think they were fooling? And then to suggest if a person was convicted but can introduce evidence for a more lenient sentence, that this is an insanity defense is everyone more preposterous.

Where does this leave us? Kansas learned that they do have an insanity defense. The real issue remains. What if a state abolishes the true insanity defense and also bars mental health illness . . . no state has gone that far so that issue remains up in the air.
Thank you.

Chris Walker: This is fascinating. I could listen to you all day. I'm curious. Surprised to see this as 6-3 decision with Kagan writing the majority decision. Any thoughts on why that's the case?

Joshua Dressler: I thought it would go 7-2. I was surprised Justice [Name?] wrote the decision. Kagan isn't friendly to the criminal defense side or in this case substantive criminal law. Yes she mostly votes liberal rather than government side. But she doubts 4th amendment exclusionary rule and things that make her a plus with conservatives.

Chris Walker: Is this classic move to try to get a narrower decision?

Joshua Dressler: I thought this would be 7-2. Go to the Warren court in the 60s, activists for criminal procedure areas. Back then the Supreme Court was very conservative about substantive criminal law. Marshall made it clear that states can do whatever they want with defenses and how they define crimes. If that was true back then, it's not surprising it happens now.

Chris Walker: I have another question. What is the practical impact of this? Will states think they have the green light to start getting rid of it?

Joshua Dressler: Yes, I think so. But right now they would have to allow mental illness evidence during trial for mens rea purposes. I don't think a state would say mental health evidence could not be used for anything at all. I think if any state went that far, I think the court would shoot that down.

Chris Walker: In the sentence phase in the capital phase, I have a hard time seeing how the court could get there.
Joshua Dressler: Right. But what in non-death penalty cases?

Chris Walker: Right. This has been so much fun. Thank you for joining us. I would say the other interesting case is Ramos v. Louisiana. We can talk about that another day.

We'll go back to administration law. Not just because I organized the panel. We have a special guest Justice Yvette McGee Brown. She's partner here in Columbus. Before that she served on the Franklin County court [Name?] for 10 years before joining the Ohio Supreme Court in 2011. We are very proud of her being a double alum here at Ohio State. Thank you Justice Brown for your tireless service to this state and all people you inspire to our students. I'm proud to count you among our amazing alums.

Brown will talk about DACA which is the deferred action case, the Trump administration to rescind this program.

Yvette McGee Brown: Thank you. I have to say I'm an undergrad Ohio University so I want to acknowledge them. It's great to be with you. I never imagined I would spend this much time learning about the administration procedures act but this case is important. Focuses on that act and the amount of focus on reliance interest. It involved over 700,000 people that Justice Roberts talked so much about reliance interest.

Background. This is the DACA case out of 2012. Obama's deferred action for childhood arrivals program. He had DHS issue a instruction to ICE. You'll see lots of acronyms in this area of law. But basically the memo to ICE instructed two things. One was they were to exercise prosecutorial on an individual bases by deferring . . . accept applications to determine whether these individuals qualify for work deferral.

The decision rests on forbearance and the provision of benefits. In 2014, DHS issued second memorandum expanding eligibility. Created Deferred Action for Parents . . .
It would have granted DACA like rights for 4.3 million parents of citizens. Texas and 25 other states barred the DACA expansion. The 5th Circuit upheld that concluding the program violated immigration nationality act. It was on this basis and new policy priorities that the Trump administration in 2017 rescinded DACA.

June 18th, 5-4 decision the Supreme Court ruled the administration attempt to rescind didn't comply with the act. Justice Thomas is aggressive in dissent saying it didn't need to because it was never subject to rule making in the first place. The court also found respondents didn't . . .

Administration procedures act establishes assumption of judicial review for one suffering a legal wrong because of agency action. This can be rebutted showing the agency action is committed to agency discretion by law. Includes agency decision not to prosecute or enforce . . . general nonenforcement program. Court rejected the argument finding DACA . . . was reviewable under the act.

The court also finds that DHS failed in looking at the administration procedures act to account for serious reliance . . . interest . . . if agency fails to do that . . . actions arbitrary and capricious.

Roberts . . . DACA . . . required. The program was unlawful so decisions about arbitrary and unlawful shouldn't have been reached . . . altered immigration law by unilaterally conferring eligibility for lawful presence. And DHS didn't engage in administration rule process implementing DACA so didn't have to preserve forbearance provision.

Thomas . . . DACA . . . because it wasn't subject to administration rulemaking it was unlawful when implemented. Justice Alito wrote concurring opinion criticizing judiciary role . . . Trump administration . . . without ruling on whether the program was legal and basically telling DHS to try again.
Kavanaugh criticized majority for not considering subsequent justification that Secretary Nielsen . . . the decision would have little impact given that DHS could simply do it again. And Chris informed me that DHS today has issued a new DACA recission policy. We'll see where they go with that.

Equal protection challenge. The decision to eliminate DACA was motivated by animus . . . respondents didn't raise . . . motivating factor. He said the way to accomplish this was by showing evidence of three things. Disparate impact on a particular group, departure from normal agency procedures and contemporary statements made by decisionmakers of the body.

Justice Sotomayor . . . shouldn't minimize impact on Latinos and bypassed the context surrounding the abrupt change in DHS DACA policy . . .

What does this mean going forward? Today there is a new memo that will attempt to rescind the program. To the broader point, it also is interesting that as Congress remains gridlock in substantive issues, the power of agencies increases with use of APA or executive orders. This decision could mean that presidents on the way out of office will invoke lots of executive orders that would be hard to overturn.

In *New York Times* John You wrote the torture memos in the Bush administration. Suggested to president Trump he could do whatever he wants and it couldn't be overturned.

Most scholars think DACA decision is so narrow it precludes confident generalization . . . but we'll see.

Chris? You are on mute.

Chris Walker: This is an interesting decision. As you noted and Biscock [sp?] is doing
this series for CNN. She has lots of leaks at the Supreme Court. But she noted that there was the big push not to have a separate decision from the majority. Justice Sotomayor wanted to make it clear there was enough there on the equal protection case. I thought that was interesting.

Yvette McGee Brown: Legally this case feels dubious. I will concede I'm not as smart as the 5-person majority but to say a program not subject to administration rulemaking has to be considered under the administration rulemaking procedures act seems disingenuous to me. But you are the expert on that! [Laughing.]

Chris Walker: The first challenge to DACA was that it has to go through rulemaking. Everyone changed hats. [Laughing.] Like Texas was on one side before and now California and Hawaii are leading the charge now. That's one interesting wrinkle here. I think you are right that the way Roberts wrote this opinion in some ways make it good for this day only.

On the flip side, there's a lot to these reliance interests and also as you said the idea of considering alternatives short to the breadth here.

I have a question from the audience. [Reading question.] With this case do you think administration law litigation going forward will focus more on procedural arbitrariness and capricious or more substantive issues of law?

Yvette McGee Brown: I don't know. With this decision, it depends on how much traction the reliance interest gets. Now, representing private clients it's frustrating to be subject to executive order policy decisions suddenly and those that change with every administration. I think it depends like here. What do you do with 700,000 people relying on an executive order that they can stay in this country if they file? If significant reliance interest, I think it's easier for the court to find arbitrariness if there's not a lot of consideration given to an alternative pathway.
Chris Walker: I agree. We will see what is good for one administration or bad will be same on the other side in some ways. I think this case will have more legs than just good for this day only because of that reliance you pointed out.

Thank you for joining us and for your service.

We switch to another case about administrative law. Two related blockbuster cases, separation of powers and whether the President's financial records can be subpoenaed.

Peter M. Shane is second chair here at Moritz. He's leading scholar on presidential power and separation of power. He has to talk about two cases in 8 minutes. But this is subpoena power of the president.

Peter M. Shane: This is not as much fun as seeing each other in person, you're right.

I hope you all are safe and healthy and in good spirits during these stressful times.

The two subpoena cases are Trump v. Vance and Mizar [sp?] First is tax records and Mizar dealt with four congressional committee subpoenas for financial records, not his tax records, involving himself or his family or businesses of which he's affiliated.

These cases were decided amid some expectations of great drama. The decision came very late. I think some people thought perhaps the court might force the immediate release of some bombshell documents just as the presidential campaign was heating up and others might anticipate a victory for the president enabling him to resist oversight by criminal law or Congress. We didn't get either drama.

There was no immediate release of any documents. There was also no vindication of the President's legal decision. Roberts wrote both opinions, showing his skill protecting
the court of appearing unduly politicized, adhering to what he calls normal separation of powers principles. He is clear about what he considered normal and I think there's good reason -- he was on descent ground with his opinion.

This is a travel ban case that Roberts writing for majority of 5 in [this] case insisted on normal principles to the President's advantage. Insisted the court shouldn't intensify . . . despite the. President's irregular remarks on the subject of immigration. Here, being normal, worked against the president because Roberts and the majority wouldn't expand presidential immunity to private records.

Each case in turn. Vance [sp?] court rejected proposition that presidents had immunity from criminal subpoenas. The [word?] opinion was written by Roberts and four liberal blocks. Expressly discounted arguments that president made for immunity. These were having to respond to these subpoenas being subject of grand jury investigation would divert his attention from official duties and destabilize the executive branch. The justice department didn't make that argument on his behalf. Last argument was it would open potential harassment of the president by prosecutors.

Here again you see normalcy emerging because what normally happens is prosecutors get presumption of good faith and regularity.

The majority rejected idea that state grand jury subpoena had to satisfy heightened need standard, that they had intense need for documents they requested. They found the subpoena didn't threaten any impairment of functions as president.

Anyone faced with subpoena in a state or local grand jury proceeding has capacity to raise issues or defenses under state law. The president could too. Questions about scope, whether the subpoena posed undue burden. And the president could raise those issues in a New York court. These wouldn't be issues for federal law.
7-2. Kavanaugh wrote separately. When they departed from the majority it was in their view that the ordinary standard in executive privilege case, the Supreme Court demonstrated specific need should be the constitutional standard when going after the President's personal records.

Roberts made the point that it wasn't clear to him. Kavanaugh said it wasn't clear the standard he was arguing for . . . the majority opinion.

There's no special need standard that applies when a grand jury seeks personal records of the president when executive privilege . . .

Separate of powers, more federalism case is Mizar [sp?] consolidated with Trump v. [Name?] There were four subpoenas involving the president, his children and businesses. Each committee when defending subpoenas claimed the information sought was relevant to legislative matters in their jurisdiction.

The lower courts in both cases upheld the subpoenas by split panel. Each lower court thought the relevant committees said enough about relevance of what they asked for to their legislative function for the committee subpoena to be enforced. But the Supreme Court disagreed on that.

The chief justice writing in majority faulted to lower courts for not adequately . . . principles at stake. This is almost metaphysical because on one hand he said, again we aren't applying heightened standard here but we expect lower court to inquire carefully. He said this isn't an exclusive list and the courts should ask if there is more information that could be supplied to Congress . . . whether they identified their aims and explained how the President's information will advance those. And whether they carefully assessed whether the records . . . burden on the president. That last one should be easy in this case.
Thomas dissent advanced theory that former clerk had advanced in dissent on Mazar's case that Congress shouldn't be able to look at personal records of an individual in law enforcement context . . . no other justice on the court adopted that but Justice Alito said -- again, if I understand this opinion, which wasn't entirely clear but he would have provided some heightened standard. He was clear what he saw in the records wouldn't meet those standards.

The lower courts have a clear framework for analysis. The President's records won't be made public before the election is clear. Congress has won a victory about investigative authority which the majority said was as broad as its legislative authority.

Chris Walker: My first question was, are we going to see any financial records before the election and your answer was "no way." [Laughing.]

Peter M. Shane: I don't think so. A judgment doesn't go forth in the Supreme Court until 20-25 days after the opinion. The house asked the judgment to be issued earlier and the Supreme Court denied that motion. The wheels of transparency are going to move slowly in this case.

Chris Walker: No October election surprise then? [Laughing.]

I am curious. If Congress wants to do this again, I don't understand the lessons from the majority decision about what Congress has to do differently to get records in another try at this.

Peter M. Shane: I think this is another Robert's [square corners?] opinions. There are things you can do but you can't cut corners and the corner the chief justice doesn't want cut is a detailed explanation. And I take it this opinion, he said what he means and he would uphold these subpoenas if the courts and Congress had offered analysis within the framework he offered.
To editorialize something, I think you would agree with this Chris, I think the house lawyering was awful. One opinion that -- one question that the lawyer absolutely flubbed is if we take your point of view and accept your argument, give me some example of some presidential document that wouldn't be discoverable by Congress? He completely had no answer. It really was a disastrous performance.

Chris Walker: Yes, I think that was a real turning point in the case. I wonder, the attorney of one of my mentors [Laughing.]

Peter M. Shane: I didn't mean to put you on the spot.

Chris Walker: I wonder if that was strategic, deciding not to put a limiting principle on it. If it was strategic, I think it was a bad strategy. [Laughing.]

Peter M. Shane: He says the President's records can't be sought as a case study to a general problem. We are interested in whether people who went to college in Pennsylvania, you know are more likely to have some problem with interstate commerce, for example. Oh, President Trump went there so . . . that can't be.

Chris Walker: This was an obvious question so it shouldn't have been a surprise to anyone.

Thank you for joining us. We are moving to the last case. If there are any questions, chime in and we can answer those offline as well.

We are turning to faithless electors case. Ned Foley is Charles W. Ebersold . . . he also directs our nationally leading . . . he wrote the book Ballot Battles in 2016 about disputed elections and Presidential Elections and Majority Rule, his next book, just came out.
Ned Foley: Thank you and it's great to be with all you. The most recent book has history that's relevant to their discussion. The faithless elector case has virtue of being unanimous those there was a separate opinion. Not the most divisive opinion. It's important for what it could signal potentially going into November. A little bit of background and then the implications.

As lawyers we don't get to vote for presidents. We get to vote for these electors. And the electors as human beings are kind of a vestige of history. You could think of it as the appendix of the Constitution. It has a function but it doesn't have a function anymore and the court is worried that maybe the appendix will cause appendicitis and how can we avoid a disaster with this vestigial instrument?

In most elections in America there might have been a faithless elector. This can be a controversial term. Sometimes called Hamiltonian electors, description of electors having the right to be deliberative and make their own independent choice. But they are called faithless electors because of the historical development and expectation they will vote the way the popular vote in the state goes.

They became significant or potentially more significant as you remember in 2016 because there was a movement after the popular vote in November and the surprise that Donald Trump was winning the electoral college. There was some hope that by the time the electors would meet in December 2016 that enough of them might go rogue and throw the election into the House of Representatives. This is backup which we have utilized only once or twice. Back in 1800 and then in 1824 under 12th Amendment those elections went to the House. But we haven't relied on that fallback since then.

Review of history. Some of you might be familiar with this from college or high school. I think the most important thing to understand is that our electoral college isn't the original Constitution but the 12th Amendment so this is what the Supreme Court interpreted in
[Name?] v. Washington. One case out of Washington and one out of Colorado. The case arose out of 2016. The effort on the part of getting electors to be faithless in favor of going to the House of Representatives failed. Trump only lost two votes due to faithless electors. The election never went to the House. But some electors who wanted to be faithless in 2016 were punished for being faithless. In Washington the punishment was a fine. In Colorado it was to be removed as an elector. Those cases were consolidated before the Supreme Court.

The original Constitution it's fair to say that Hamilton in Federalist Papers says the concept was deliberation. The electors would exercise independent judgment and pick a consensus choice. Someone like George Washington on behalf of the nation. But the system broke down after Washington left and partisan politics developed first in 1796 and then 1800 election. If you saw Hamilton on TV or stage, you know the story. There's a tie vote between Thomas Jefferson and Burr and it's deadlocked in Congress. Hamilton broke it. Burr kills Hamilton later. But what's important from understanding the transition from the original Constitution to the 12th Amendment is it development of political parties.

Founders of the Constitution at the convention wanted to avoid that. They thought they could do that through separation of powers but that didn't happen. Founders have a schism and you have Madison and Hamilton writing the papers and they fall apart and Madison joins Jefferson in one political party and Hamilton joins Adams in another and politics became polarized.

As a consequence of this debacle, the Jeffersonians who control Congress write the 12th Amendment to say we have a new electoral college system based on majority rule recognizing there's no consensus and it's going to be political. For purposes of the faithless electors case is that Kagan writing says the text of the Constitution is on the side of allowing states to ban faithless electors and limit that and the historical development I described again is for the development of political parties and away from
the idea of discretion or deliberation.

Looking at Article 2. Kagan says the state can do that. In oral argument the principle "avoid chaos." The court thought if they allow faithless electors we might have appendicitis. Kagan's opinion is a fun read. But the thing to realize is what it doesn't say. The court says that states can stop faithless electors but it doesn't require they stop them. So we may still have chaos even if the court would like to avoid it because 18 states don't have the kind of rules that Colorado and Washington do so it might still happen.

Chris Walker: We have an audience question. Were you surprised that the decision was unanimous . . . [reading question.] Did you think there might be some dissenters here?

Ned Foley: Based on oral argument, I wasn't surprised. This case is a good lesson for all lawyers to read the oral arguments, not just the court opinion. If you read the opinion, you don't see explicit mention of this chaos principal. I think honest originalism would have grappled more with the Hamiltonian view. But to be fair to Kagan, the originalism of 12th Amendment is more complicated than the originalism of the original Constitution.

Chris Walker: We are out of time. This has been a fun 90 minutes. Thank you Ned. Go out and buy his latest book on Oxford.

I want to thank all the audience for joining us. We only covered a few cases from this term. There are lots more interesting ones. I put up links for those. Some that strike me as interesting that we didn't cover is the case about federal Indian law. We have the [Name?] law case and the consumer protection bureau. There are a number of other cases. Administerial under 1st Amendment. Check out the rest of them.
I want to thank you all for joining us and our panelists, thank you for taking the time to join us.

For those interested in the CLE credit, and answered the poll questions, you will get an evaluation form in the next 48 hours in your email that you need to fill out. You need the activity code 441443 to get CLE credit.

I thank the development staff here at Moritz and Amy for putting this together. We have amazing faculty and alum here that follow these Supreme Court cases closely. It's so great to be able to interact here on Zoom to talk about these important cases and the direction the court is going. On behalf of the college, thank you all for joining us. We'll have another one in the fall. Please join us for that as well.

Thank you so much.

[End of webinar]