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TRANSCRIPT

U.S. Supreme Court Roundup: The Impact of This Term's Decisions and IJ's Victory

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Melanie Hildreth (MH): Good afternoon, everyone and welcome to IJ's LIVE call reviewing the recently completed Supreme Court term. We'll be talking about IJ's cases before the Court, as well as a few other noteworthy decisions that have come down over the last few months. I'm Melanie Hildreth. I'm here today with IJ President and General Counsel, Scott Bullock, who will be hosting our conversation.

[00:00:23] We're joined today by our special guests, IJ Senior Vice President and Litigation Director, Dana Berliner, and IJ Senior Attorney, Bob McNamara. We'll take your questions live later in the call, so if you do have a question for Scott or the attorneys, you can press star on your phone anytime, and we will add you to the queue. With that, Scott, take it away.

[00:00:45] **Scott Bullock (SB):** Well, thank you very much, Melanie. We've got a lot to talk about in the Supreme Court's latest term and not a whole lot of time, so we're just going to dive right in. We're going to talk about what the Court did in many of its decisions during these last several months; some of the most important and impactful decisions for individual liberty.

[00:01:07] We're going to start off the discussion with an IJ case and an IJ victory that many listeners are going to be familiar with—the *Espinoza* decision. Then we're going to turn to some cases that addressed constitutional limits on government power, in particular limits on the executive branch of government. And then we're going to end with a discussion of qualified immunity and IJ's Project on Immunity and Accountability, an issue that has really risen to the fore in the past several months.

[00:01:39] We'll kick it off with the discussion of *Espinoza* and IJ's case. There's not been a single day in IJ history where we were not in court defending an educational choice program somewhere in the country. That was true on the first day of IJ and it's true today. There's been a number of decisions involving numerous legal issues over the years. One of the most important was the decision that we won in 2002, where the Supreme Court removed the largest federal obstacle to educational choice when the Court ruled that it was not a violation of the Establishment Clause to have religious schools participate in a choice program so long as those choices were freely available to those parents to choose a school, religious or nonreligious, that best met the needs of their kids.

[00:02:34] With that kind of federal issue put to bed, the opponents of choice use their next favorite weapon, which were so called "Blaine Amendments," which existed in over 30 state constitutions. And as many listeners know, they were kind of the product of anti-Catholic bias from the 19th century but were unfortunately then enshrined in many state constitutions.

[00:02:57] This is a case that arose in Montana. And in 2015, the Montana legislature passed a program that provided a tax break to Montana residents, basically a tax credit, if they contributed to a charitable organization that provided scholarships for children. This is just like any sort of tax break

that you would get if you gave to a scholarship program, the American Red Cross, or to a group like the Institute for Justice. The program allowed families to use these scholarships at really any private school in Montana, religious or nonreligious. But the Montana department of revenue interpreted the state constitution to forbid the participation of religious schools. This is something the department just did on its own and contrary to the wording of the tax credit legislation. So we sued, and we actually won the case at the trial court, and then lost the case at the Montana State Supreme Court, which struck down the program under its state's Blaine Amendment. And then we got the issue before the U.S. Supreme Court. And then let's turn to Dana and talk a little bit about what the Court did in *Espinoza*.

[00:04:15] **Dana Berliner (DB):** The Montana Supreme Court said that since the program did allow aid to religious schools as well as nonreligious schools, it violated the state Blaine Amendment and they struck down the program entirely. After that, there was no tax credit program for anybody. The U.S. Supreme Court said that applying the Montana Blaine Amendment to say that there could be no aid whatsoever to people going to religious schools as distinct from nonreligious schools violated the free exercise clause. And that the free exercise clause requires that any government program that gives money to, in this case, individuals to use at the school of their choice cannot discriminate between whether they're using it at a religious school or a nonreligious school. And by doing that discrimination, the Montana Supreme Court, and of course the department of revenue, but in this case, really, the Court violated the free exercise clause.

[00:05:34] There were two really important things that came out of this. One is that state governments cannot have programs that discriminate between religious and nonreligious recipients. And the other was that if a state, in this case, court, applies its state Blaine Amendment in a way that violates the federal constitution and wipes out a program completely, the people still have standing to challenge it. And that was important because Montana was saying like, "Wow. Hey, the program's gone. So nobody gets to use it."

[00:06:20] **SB:** No discrimination then, right?

[00:06:22] **DB:** Right, no discrimination. Because no one is using it. But the U.S. Supreme Court said the only reason there's no program is that there was a violation of the free exercise clause.

[00:06:33] **SB:** Right.

[00:06:34] **DB:** And because of that, they can still challenge it.

[00:06:37] **SB:** Right. And I also think it's important to note, Dana, what the Court did not say in *Espinoza*, cause you heard some of the breathless commentary from the other side that say, "This means that now government must fund religious education." Talk about that a little bit.

[00:06:55] **DB:** Absolutely. What the Court said is that if a state government is going to come up with a program that funds private education, then it cannot do this in a way that discriminates between religious and nonreligious schools, but it doesn't require any state to provide any funding to private education or to people going to private schools or anything related to private schools at all. It's only if the state chooses to do some kind of program to pay either individuals or schools or something, it cannot discriminate.

[00:07:40] **SB:** Right. And that also goes to our point that we've always made in our educational choice cases, that this is about not really about religious schools, but parents and their right to choose

a school that best meets the needs of their kids, religious, nonreligious, secular, whatever it might be. And the Court really upheld that principle in the *Espinoza* case.

[00:08:05] Jim from North Carolina asked us about whether we were disappointed to see that it was a five to four win. We always liked the opinions to be more than that, but this is an area that the lines have been pretty carefully drawn and have been for a number of years. It wasn't very surprising that the justices came down the way they did. It's unlike a lot of other IJ issues though, where we oftentimes get votes from across the ideological spectrum on the Court, like our *Timbs* case from 2018, where we got a unanimous opinion from the Court. And that was of course, very encouraging to see, but we'll take the victories when and where we can get them.

[00:08:45] Dana, before we turn to some other issues, if you could just talk briefly about what's next in the legal fight for ed choice.

[00:08:53] **DB:** Absolutely, now there really is going to be very little argument about whether state Blaine Amendments can prohibit school choice programs. They can't after this decision. Opponents of choice are probably going to begin relying on other state constitutional provisions. IJ came out with a report within one week of *Espinoza* explaining what the decision means for each state and what the future of educational choice programs can be in each state. That's going to vary state by state, but the main things that are going to get litigated are state constitutions and possibly an issue that was left open in *Espinoza*. Which is whether if a state, it would have to be statute probably, discriminates against the use of money for religious purposes, as opposed to discrimination against someone because of their religious status, if that makes any difference.

[00:10:07] That's not really a question with Blaine Amendments because they all say no aid to sectarian schools or people using them at sectarian schools and that's going to be status. So, it would have to be a situation where a state statute tried to only apply to religious use. I don't think it'll work. It's not a very strong argument after *Espinoza*, but that could be something that will be attempted.

[00:10:40] **SB:** All right. Well, let's turn to some other cases that were handed down and we're gonna talk in particular about some cases involving the exercise of executive power. And then we're also going to turn to this question that maybe many listeners have heard of if they've been following the Supreme Court's term, the use of textualism by the Supreme Court to reach some of the results that they did in these decisions.

[00:11:07] So, let's first talk about a decision that I think a lot of listeners are probably familiar with or heard of from the Supreme Court term. That's a case involving the Homeland Security Administration's rescission of the Deferred Action for Childhood Arrivals, a program initiated by the Obama administration that just about everybody knows as DACA. And let's talk to Bob. Bob, tell us what the Court did in the DACA case.

[00:11:36] **Bob McNamara (BM):** Sure. What DACA was, was an Obama administration program where the Obama administration said, look, as to people who arrived in this country as minors, illegal immigrants who came here as children brought by their parents through no volitional act of their own, we think it's unfair to enforce immigration laws against them. And we're going to exercise our prosecutorial discretion not to enforce the laws against them. And we are going to take it a step further. We're not just not going to prosecute them. We'll have a whole program, and you can apply to the program, and if you haven't been convicted of a crime and you meet certain other criteria, you can actually get permission to work. And we'll put you on sort of an even, stable, legal footing.

[00:12:18] When the Trump administration came in, the Trump administration said that's illegal. You can have prosecutorial discretion, but you can't turn prosecutorial discretion into this whole program that gives people a formal recognition. We're going to end the DACA program. We're going to wind it down.

[00:12:35] They were sued by a number of people. The people who ended up in the Supreme Court were the Regents of the University of California. But there were a number of lawsuits, all essentially challenging this under what's called the Administrative Procedure Act, which says that when the executive branch is going to do something, it has to explain why. And they said, look, when you said you that you were winding down DACA, you didn't explain why you were doing it this way instead of that way, why you weren't keeping it in place for longer. You can't do that. You can't just exercise as your power willy-nilly. And the government said, "But we think the program's illegal we have to be able to end it."

[00:13:13] And what the Supreme Court said through an opinion by Chief Justice Roberts was, "Well, no, like you didn't say it's illegal, so we have to stop it immediately. You said it's illegal, and so we're going to exercise our discretion to wind it down over a period of time. If that's what you're doing, that's a decision you have to justify. And this memo you wrote doesn't actually explain any other alternatives that you considered that, you know, were right there in front of you and why you're doing this instead of that, and what evidence you have, to think this is a good idea."

[00:13:44] The interesting thing, particularly from an IJ perspective, is that the descending opinions really lean on later memos. What happened in this case is there was this initial kind of spare memo that said, "we're winding down DACA. Here's the schedule. Don't ask me questions.' And then Homeland Security later on kind of realizes that that's not going to fly and publishes deeper analysis of why we're doing it this way and not that way. The defense says, "Look, if you're not having their justification, just look at these later memos." And Chief Justice Roberts says, "I don't have to look at the later memos. What matters is the justification they had at the time that they took the action that was being challenged."

[00:14:22] That matters, especially for IJ because it's actually astonishingly common for exactly that to happen. You know, the government offers one justification for its actions. And that seems like it's a little wobbly, so they offer another one. They've come into court with sort of a whole bag of tricks and take them out one by one. You know, these are my principles, your honor. And if you don't like 'em, I've got others. Having a court decision saying "no, no, no. What matters is what you actually said the justification was," is important in terms of holding the government to kind of do its actual homework.

[00:14:56] **SB:** Right. Exactly. Let's talk about, a couple of other cases, again, that I think a lot of listeners are familiar with and what the Court did. And those are the two subpoena cases. One was from the Manhattan district attorney and the other one from the House of Representatives, a subpoena to the President. And what did the Court do? And why is it meaningful?

[00:15:21] **BM:** Again, we have two opinions from Chief Justice Roberts, and the most important thing about the cases is what they reject. The executive in both cases had said, "No, no, the President is just absolutely immune from subpoenas in this context." What the Court said in both cases is, "No, no, the President isn't above the law. The law absolutely still applies to the President. We maybe need to tread a little carefully when we're talking about congressional subpoenas aimed at the executive. There are separations of powers concerns that you have to weigh carefully there. But when we're talking about a subpoena from a criminal prosecutor who's, you know, making an investigation that

isn’t necessarily about the President, but touches on the President, you can’t order the state prosecutor to just not to subpoena relevant documents."

[00:16:12] I think this is characteristic of an approach that the chief justice frequently takes, which is a willingness to draw a line in the sand and say that the courts do have a role to play. You kind of see the same thing in the DACA case where the chief is saying, "No, no, the courts get to look at this. The courts have some power here. You can’t just do whatever you want." I think the chief is frequently frustrating to libertarians because he doesn’t always do this in a way that is grounded in principle.

[00:16:43] **SB:** Exactly. Yep.

[00:16:46] **BM:** He frequently does not believe that the hurdles the government has to jump over in order to do stuff to you are particularly high. But where he is really consistent is that he believes the hurdles are there. He may believe the hurdles are relatively easy to step over. But attempts to blow through the hurdles to say the executive can just do whatever it wants, and there’s no role for the courts to play here, always run aground in the chief’s chambers. For all that, there are plenty of opinions that I’ve been very frustrated with him, I think that kind of commitment to the important role of the Court’s, you know, even as a libertarian, it’s something I have to give him credit for. He’s been consistent on that. And the Obama administration, when it made people on the left really angry and he’s doing honestly exactly the same thing in the Trump administration where it’s making some people on the right really angry, but just consistently saying we’re not going to be a rubber stamp. The government doesn’t have carte blanche. It may have an awful lot of room to color outside the lines. But the lines are actually there. And exactly how stark those lines are, is going to be a job for IJ in the future.

[00:17:57] **SB:** That’s right. Well, let’s turn to another one. Moving along on this. And, Dana, if you could talk a little bit about the Supreme Court’s decision in another case that I think a lot of people are familiar with, where the Court held that title seven of the 1964 Civil Rights Act prohibits discrimination against LGBTQ employees, and the Court took a textualist approach to that decision. Talk a little bit about what the Court did and what that means.

[00:18:36] **DB:** The past couple of decades have seen the rise of textualism at the U.S. Supreme Court. And textualism basically is the Court looks at the meaning of the words in the statutory or constitutional provision, and it focuses almost entirely on the text of the provision at issue. Only if there is an ambiguity in some word or phrase in that text does the Court look outside of just the words on the page to other sources like legislative intent or something else.

This was a case very much about what textualism is and how you apply it. What Justice Gorsuch did, writing for the majority, and he joined with the four liberals on the Court, to say that the title seven forbids "discrimination based on sex." And he then asked, okay, well was the decision to fire this person, would it be the same decision if the person was the other sex? Answer: No. In the case of, because if the person was the other sex, then it would have been that no one would have been upset that they either were attracted to whoever they were attracted to, or if they were displaying characteristics of a particular gender.

[00:20:25] So Gorsuch broke it down into, like, what does discrimination mean? What does, because of mean? What does sex mean? And then used that to reach a conclusion purely based on the text of title seven. And it was interesting because they’re really, in the dissents—some of which we’re quite heated—Justice Alito said that they should be looking at the text, but in a social context. And that in 1964, no one would have thought that sex discrimination based on sex included sexual orientation or gender identity. And then Justice Kavanaugh didn’t really try to do social context, but he instead said

you should look at what the entire phrase meant at the time. And it was a, it's a real debate about how exactly you apply textualism because constitutional and statutory provisions frequently encompass something that people weren't thinking about at the time. Like nobody would've thought that free speech included computer programming in the 1700s, or even that equal protection would apply to women. But then at the same time, it can't be too far from what the phrase would have meant then. And so, this struggle to understand how to apply textualism is something that we see in many opinions and it was particularly pronounced in this one.

[00:22:14] **SB:** Great. And just real quick, Dana, before we turn to the immunity discussion and get to the listeners' questions, Justice Gorsuch who's been taking this very independent and interesting streak on a number of issues did a similar textualist analysis in a case involving an Indian reservation in Oklahoma. Can you just very briefly say what the Court did there?

[00:22:41] **DB:** Absolutely. And this is by the way, all these cases are similar, right? The DACA decision is like this, the title seven one, and also the Indian country one. In the *McGirt* case, Gorsuch, again joining with the liberals on the Court, said that the law says that within Indian reservations, the prosecutions have to either occur in federal court or in Indian court, and not in state court. And the question was whether much of Oklahoma is still an Indian reservation. And the statute said that it was, and no statute had been passed since, or I guess the treaty said that it was. No subsequent statute said that it was not a reservation. And so, Gorsuch was like, well, treaty said it was, no statute passed saying it's not, we're done.

[00:23:41] **All:** (Laughs)

[00:23:43] **DB:** And interestingly, the dissent in this case, again, wanted to look at surrounding circumstances. It wanted to look at later events. And it was the same kind of fight about, do we just look at what the statutes say and the language, or do we look at things that happened later or outside circumstances? And again, in this case, Gorsuch rejected all attempts to use later and outside sources and just went with a very straight forward: Here's the language, here's what's passed, here's what wasn't passed. We're done.

[00:24:25] **SB:** Right. And this is something where the dissents also went on and on about the consequences of this and "what does this mean?" and this is going to cause a lot of problems with the administration of criminal law. And Gorsuch said, I'm going with what I think the law is. And he is not afraid, as we saw in some decisions last year as well, as the team up with some of the more liberal justices, especially on some of these criminal procedural issues, if he thinks that's what the Constitution and law demands.

[00:24:53] Bob, let's turn to another issue, of course, that really got a lot of prominence this year, and we thought was going to get a lot of prominence at the Court. It's directly related to IJ's Project on Immunity and Accountability that we just launched in January. And this issue, of course, has really risen to public prominence in the wake of the killing of George Floyd. And in particular, the issue of qualified immunity, an issue that we started litigating with our Shaniz West petition that we did this term. And the Court had 13 qualified immunity petitions pending. This issue was on the mind of the public. The cases were outrageous. It looked like everything was ready to go. And the Supreme Court with these 13 cases did...

[00:25:44] **BM:** Argh, I should have brought my sad trombone. They did nothing. They did nothing! They denied all of the cases, over a dissent from Justice Thomas who made clear that he continues to believe that the Court needs to reexamine qualified immunity. It was a disappointing end to a term where really it seemed like the Court was gearing up to do something about qualified immunity. And

it's always hard to say why the Court denies cases. They don't have to explain themselves and they don't explain themselves.

[00:26:13] I think the best theory I've heard, honestly, given the drum beat and all of the kind of furor in the lower courts about qualified immunity, and I can't take credit for this, this comes from a long-standing Supreme Court reporter, floated this to me while the cases were still pending. But his theory was that, the moment was actually too good. That in the wake of the murder of George Floyd, there was all of this tumult and all of this debate about qualified immunity and all of this public pressure. And there were bills introduced in Congress. And the Court wasn't going to want to seem like it was responding to that instead of just sort of soberly doing what the law required. And I can't say that's true, but it was ... you know, he said this to me when the Shaniz West petition was still pending, so I didn't want to believe it was true. But it was persuasive. It may well explain what happened. But the fact that they denied these cases just means that they decided that the time to take a qualified immunity case was not now. It doesn't mean they've decided not to take a qualified immunity case.

[00:27:22] And indeed, I don't think they can avoid taking a qualified immunity case because the pressure to resolve qualified immunity isn't just coming from IJ. It isn't just coming from groups like Cato and the ACLU. It's coming actually from sitting federal judges who keep writing opinions. And in one case, writing an op-ed in the Washington Post saying, this doctrine is nonsense. I don't know what I'm doing. This has nothing to do with justice. And I need you guys to step in and clarify it. And the Court can only turn a deaf ear to those voices, especially the voices of active federal judges, for so long.

[00:27:58] **SB:** That's right. And I think it's also important to point out too, is that even though it was very disappointing that the Court didn't do anything about this, that doesn't mean the issue is dead. That just means it's going to be a longer slog, and there's going to be some circuits where the law on qualified immunity is better, and other circuits where it's still going to be terrible. And the courts are just going to have to decide this one case at a time through litigation from IJ and other groups with the hope that—hopefully relatively soon—that they decide to step in and do something about this.

[00:28:31] **BM:** Yeah. I mean, it wouldn't be an IJ issue if it didn't take years of fighting for us to bring it to a head.

[00:28:35] **SB:** Yeah, that's exactly right. This is a long-term effort on this issue and so many others.

[00:28:41] And before we get to the questions, Dana, if you could just very briefly mention the case that's going to be before the Supreme Court next term. An IJ case, that doesn't touch directly, certainly on the issue of qualified immunity, but our project is called immunity and accountability because these issues are much larger than just the issue of qualified immunity. It's about holding government officials accountable in every context. And this is a case that was on the front cover of one of our latest newsletters, the case involving James King. And if you could just say, real briefly, something about that. And as I said, this is going to be the subject of a future IJ LIVE call once this case gets up and argued before the Supreme Court next term.

[00:29:31] **DB:** Sure. This case is a police brutality case where a college kid was mistaken for someone else and was severely beaten. He then attempted to sue about it, and he raised a whole bunch of different claims because, frankly, you never know which claim is going to work. And he didn't even know that some of the people were employed by the state and some by the feds. The government raised a huge raft of procedural objections and really tried to create a shell game where whatever argument he made; it should have been something else. And in this case, the government's arguing that if you bring a claim under the Federal Tort Claims Act, which is an attempt to get compensation

for a tort done against you by someone in the federal government, then you cannot bring any other claim. And even if a court later says, "Actually you didn't have a claim under the Federal Tort Claims Act, you should have brought a completely different kind of claim," you aren't allowed to—at least that's what the government is saying. It's saying if you try to bring this kind of claim, then it precludes you from any other sort of claim.

[00:30:52] That lost in the sixth circuit and the federal government appealed, and we're going to the U.S. Supreme Court then to argue that people can in fact try to seek accountability when they are injured and they can try to do it in several ways and see which one the Court accepts.

[00:31:17] **MH:** Thank you so much, Dana and Scott and Bob. We have just a few minutes that we'd like to get to questions from our listeners. For anyone on the line who wanted to ask a question, all you have to do is press star on your phone and you'll be added to the queue.

[00:31:33] While we give people a minute to do that, I wanted to start with a question that was submitted in advance that actually does touch on the immunity and accountability issue. Bonnie in Minnesota asks, how does the U.S. House vote related to qualified immunity and the updated police laws from states like Colorado help or hurt what you're trying to do with your qualified immunity cases?

[00:31:55] **SB:** Well, I'll take the one involving Congress. It is encouraging to see Congress starting to talk about this issue. Legislation has been introduced and they're trying to build support for it. That adds public awareness to it. But I think there's very little chance that Congress, especially during this election year, is going to do anything about this issue. And all the more reason why the courts, the Supreme Court eventually, but certainly the lower courts need to be very actively involved in this space. But frankly, there's already congressional statute that addresses this, section 1983, which by the way, says absolutely nothing about immunity. And that's one of the reasons why people like Justice Thomas are so upset about this, because this is just something that the judiciary has just added on its own. And there's nothing in the text of section 1983, that's been around for over a hundred years, that says anything about gift granting government officials immunity.

[00:32:59] And Bob, if you just want to say something real quick about the Colorado statute.

[00:33:03] **BM:** I do think all of that is right. And it's hard not to worry that the sort of introduction of bills in the House factored into the Court's hesitancy to take up one of those cert petitions that was pending. They wanted to see what was going to happen with legislation. But the interesting thing that happened in Colorado is that Colorado on its own steam, the legislature abolished qualified immunity, for the Colorado constitution. But they did it in an interesting two-step way. The Colorado legislation gets rid of qualified immunity, but separately it mandates that, for example, a police department is required to indemnify its employees. If a Colorado police officer is sued for violating the Colorado constitution, he can't be forced to pay that judgment. The police department that he works for has to pay that judgment, which will give that police department the financial incentive to make sure that its officers are abiding by the Colorado constitution while also making sure that kind of individual employees don't have to worry that a lawsuit is going to bankrupt them. The responsibility is really being placed on the entity that has the best ability to avoid constitutional violations, which is an entity that does the hiring and the firing and the training and sets out the use of force guidelines.

[00:34:20] **MH:** We have a question from Roger in Massachusetts. Roger, you are live. What is your question?

[00:34:27] **Roger:** Yes. Thank you so much. My question is about your discussion about the Gorsuch ruling in the employment discrimination based upon that the reading of the legal term, sex. I believe that he was criticized for that by other justices, as well as some in the media for changing the fundamental definition of sex in this law, therefore many others, from a biological determination and definition to something more broadly and more currently, um, you know, culturally defined. I believe that he denied that and said that his ruling was narrowly focused on discrimination as you described it. I'm wondering what your thoughts are on whether he actually, by doing this, changed the definition of sex as biologically determined in a much broader way.

[00:35:31] **DB:** Certainly the opinion itself says absolutely nothing about current norms or anything like that. And it relies on the definition of sex as biological. What's interesting though, is the way that he asked the question was: if the person behaved as this person behaved, but was a different biological sex, would they have been fired?

[00:36:09] And that was the way that he approached it. So, he didn't change the definition to not be biological sex, but that wasn't the way that the other textualists were asking the question. They didn't think the question was: would that person have been fired if that individual was a different sex but acted the same?

[00:36:38] They thought the question was: was the reason for the firing the biological sex independent of the way that the person was acting? So, everybody agrees that it means biological sex, but they still don't agree on how to apply the test.

[00:37:01] **MH:** We have a question from Bruce in Virginia. Bruce, you are live. What is your question?

[00:37:12] **Bruce:** Am I supposed to repeat the question?

[00:37:17] **MH:** Yep. Just give it straight to the straight to the attorneys.

[00:37:20] **Bruce:** Okay. Sorry. Regarding qualified immunity, as I understand that the major problem is the way the lower courts have interpreted clearly established law over time to make it require almost exactly similar circumstances, which I don't think is the right way to interpret that line. And I'm wondering, as a tactical matter, do you find to try to oppose that in the lower courts? Or is there some other tactical approach that you see coming in the future?

[00:37:58] **BM:** I think you're exactly right. That is exactly the problem with qualified immunity—there is this sort of weird fixation on the clearly established test, meaning exactly the same thing must have happened in exactly the same circumstances. And that is what we are focused on. I think that is the point where we need to focus our leverage. We are right now actively searching through every district court opinion and every circuit court opinion, that gets handed down to make sure that we're in the best position to put that question to the Court. That tactically, we really want to be able to say to the Court look lower courts don't know you mean when you say "clearly established." They applied different tests. And so you need to take up a case and tell us what you mean by "clearly established" and not for nothing, but what you mean by "clearly established" should be something that actually makes sense as a matter of basic law and morality.

[00:38:53] **MH:** We have time for one more question from Don in Montana. Don, if you're there, you're on the line.

[00:39:00] **Don:** Hello? Hi guys. I was just wondering, lately there seems to have been some attacks on charter schools by means of forcing a certain curriculum choice on the charter school. And I was wondering if that, can be combated on a First Amendment basis?

[00:39:22] **SB:** Potentially, it could be depending on what they do. You know, charter schools, even though we think they're a good idea, they're still public schools. And school districts typically have pretty broad sway in determining the content of the curriculum. That's one of the big points of controversy as to what public schools are teaching. And then it becomes kind of the zero-sum game where people we'll just try to get their vision imposed into the curriculum.

[00:39:53] And it's a great argument for choice. And the fact that yes, you can go to the public schools if you wanted. And hopefully those, those public schools will have as much choice as possible, including charter schools and more independent schools, magnet schools, and the rest of it. But there's also a broader choice and that you can then send your kids to a private school then, religious or secular. If you think that best meets the needs of the of the family. And then you can match kind of the values and what the curriculum might be to the to the family's values and curriculum. I think it might be tough in, in the charter school context to raise a first amendment challenge to it.

[00:40:38] But charter schools are something that should be encouraged. There is some opposition to them, even among some teachers' unions and other political officials, even though they have pretty broad-based public support across the ideological spectrum. And we are ones that, we let many flowers bloom when it comes to education reform. Charter schools, yes, but even more robust attempts at choice whether that's education savings accounts, tax credits, or vouchers.

[00:41:10] **MH:** Thank you, Scott. And with that we're out of time. Bob and Dana, thanks for joining us and to everyone on the phone.

If you missed any part of this conversation, we will have links to an audio recording and a transcript next week on our website. If you have questions or comments that we weren't able to get to, please just stay on the line and you can leave us a message. You're also welcome to email me directly at melanie@ij.org, and we can get back to you that way.

Thank you again and have a great evening.