Short Circuit | Episode 149

Supreme Court Preview for Tar Heels

ANTHONY: Hello and welcome to *Short Circuit*, your podcast on the Federal Courts of Appeals. I'm your host Anthony Sanders Director of the Center for Judicial Engagement at the Institute for Justice. Well, as I'll explain this week, I'm not really your host. On Monday, October 5th, 2020 is first Monday, which means as all Supreme Court Watchers know it's the start of the court's new term, and what better way to get ready for this term than through IJ's annual Supreme Court preview. Once again, this year, we teamed up with the University of North Carolina's Federalist Society chapter. And on Thursday, October 1st had a preview for UNC students. This year, as you might expect, it was via zoom, but we recorded the event and you'll hear it momentarily. Your moderator is my colleague, Justin Pearson, the managing attorney for our Florida office.

I'll turn it over to Justin and his panelists in a moment. But before I go, I want to give a shout out to our sister podcast *Bound by Oath* whose second season will premiere later this fall. The focus this year is on governmental accountability, and our first episode, we're concerned a case that is before the Supreme court, this term, and will be argued on November 9th. It's *Brownback v King* and as my colleague, Erica Smith will explain in our preview, it's a case of ours at the Institute for Justice. In the case, the Sixth Circuit ruled that our client James King overcame qualified immunity, a term regular Supreme Court listeners are very familiar with, but now it's at this point Supreme Court on whether the Federal Tort Claims Act nevertheless, bars, justice for our client, James, please be sure to queue up *Bound by Oath* for when our season begins. And in the meantime, on any podcast platform, you can listen to season one. Which was on the 14th Amendment.

And enough of me, I'll hand it over to Justin with a reminder that all of you get engaged.

JUSTIN: Hello everybody and welcome to the fourth edition of the IJ UNC Fed Soc Supreme Court term preview. My name is Justin Pearson--I'm the Florida office managing attorney at the Institute for Justice and I love this event. I've been a part of it in the last two years in a row both times as a panelist and now I get to be the moderator. And I am joined by two of my friends. U first, we have professor Andy Hessick, he was a member of the panel last year as well.

Professor Hessick is the Judge John J. Parker Distinguished Professor of Law and Associate Dean for, for Strategy at the University of North Carolina School of Law. He teaches and writes about fed courts, administrative law and criminal sentencing. One interesting fact about Professor Hessick is he clerked for two different federal appellate judges on two different circuits, the Second and DC circuits. And like I said, he was a panelist last year for this event, he did a great job, and so we're excited to have him back.

The other panelist is my colleague Erica Smith. Erica is a senior attorney with me at the Institute for Justice. She's had a terrific career; she's won a bunch of cool cases. Most notably, she was Co-lead counsel during IJ's recent US Supreme court victory in *Espinosa v. Montana Department of Revenue*. I should also point out that Erica has, like I do, has ties to the great state of North Carolina back before she joined IJ. She clerked for Judge Terrence Boyle of the US District Court for the Eastern District of North Carolina. So, I know, Erica shows my shares, my disappointment that we're doing this via zoom instead of in person cause we both enjoy visiting North Carolina. Before we move forward, I do have two

announcements I need to make and they're both directed. To law students, if you are a 1-L or 2-L interested in constitutional law, which you likely are, if you're listening to this podcast, you should take a look at IJ's, incredible summer clerkship program. We call it the Dave Kennedy Fellows, if you talk to anyone who's done it, they will give it rave reviews. And for good reason, it is a fantastic program. The application web page goes live every year around the end of October, so be on the lookout for that. The other announcement is that if you're interested in these topics, you should also check out a webinar that IJ is putting on next Wednesday, four o'clock, it's called Judicial Engagement for Law Students. And you can find out all the details about that event on our website, IJ.org.

Now that that's out of the way we can get down to business. We're going to do this event kind of the same way we have in years past when it was in person, we're going to start with trivia. And then after that, Professor Hessick and Erica will each talk about a case from the Court's upcoming docket that they find particularly interesting. After that they'll do the same thing for interesting cert petitions and then when it's all done, we will have a Q&A session. Since this is via zoom for the UNC law students watching this, or what you can do as you can type in your question, and then I'll read them at the end and our panelists will answer them.

So, let's get started with some trivia. Professor Hessick, I know the scoring last year was a bit unorthodox, but I think it's fair to say that you are the returning champion. I think you should get the first question. Now, just so everyone understands the ground rules, it's not gonna be crazy scoring. It's one point per question and everything is fair game. It's not going to be limited by geography either. Some questions will be easy, some will be hard and let's get started.

So, Professor Hessick, my first question is about *Torres v. Madrid.* Police officers shot Roxanne Torres twice, but the 10th circuit held that there was no seizure because she did what after she was shot?

HESSICK: Was able to get away.

JUSTIN: Yeah, that's right, she drove away. She drove to the hospital as one might do after they get shot twice in the back. She drove to the hospital and was not apprehended until later. And the 10th Circuit held that because she temporarily got away, there was no seizure of her person, and so therefore, she could not pursue her case for a necessary force. There's a circuit split as there is in many US Supreme Court cases and that split will be resolved shortly.

Erica, now it's your turn.

ERICA: That was an easy one, does that mean I'm going to get a hard one now?

JUSTIN: You know, I can do these out of order if you're going to mess with me, Erica.

ERICA: Okay, give it to me.

JUSTIN: Alright, here you go. Okay, your question is two foreign governments will appear before the court this term in cases involving questions of international comedy. One of these countries is Germany. Can you name the other?

ERICA: Hungary.

JUSTIN: Hungary, that's right. Both Germany and Hungary will be appearing before the US Supreme Court this year. Basically, both cases involved property that was taken in the years either leading up to World War II or during World War II. And both countries claim that people should have to avail themselves of remedies in those countries instead of filing suit here.

Alright, Professor, it's going to go a little harder. Here's your next question.

ERICA: Those were the warmups.

JUSTIN: Getting cocky, huh Erica? Alright, Obamacare is back on the docket, Professor. The oral argument is going to be split four ways. On one side we'll have the red states splitting their time with the US Solicitor General. My question is about the other side, along with the blue states, who else will be arguing to defend Obamacare?

HESSICK: I only know the states, I'm sorry. Yeah, I, yeah, I only knew California. Yeah.

JUSTIN: All right, well then you got that one wrong. Erica, do you know the answer?

ERICA: Is it people participating in the Affordable Healthcare?

JUSTIN: I don't need to know the name of the attorney. I'm looking for the entity who is going to be represented during oral argument in addition to the attorney for the blue states.

ERICA: I don't know.

JUSTIN: It is the US House of Representatives. You both got that one wrong. Yeah, so it's going to be the red states and the Solicitor General against the blue states and the House--should be interesting. Alright, so you both got that one wrong. See, they're not all easy, I told you. but now it's is Erica’s turn.

ERICA: Oh boy.

JUSTIN: Yup. All right, Erica, here's another moderately hard one, so we'll see. *Tanzin v. Tanvir* is a fascinating case, in my opinion. It's about someone who was allegedly wrongfully placed on the no-fly list for refusing to become a government informant. This case has so many interesting aspects that even the case style is interesting. If you look at the case style, one of the party's names is listed as FNU Tanzin, but FNU is not actually Tanzin's first name. Do you know what FNU stands for?

ERICA: I don't.

JUSTIN: All right, Professor, do you know?

HESSICK: Federal Name Unknown? I have no idea.

JUSTIN: Well, that was really close. That was really, do you want to take one more crack at it?

HESSICK: No, I suspect, I'm guessing it has something to do with federal because I didn't think the person would be a federal employee, but then--

JUSTIN: Now you're going down the wrong trap, you were so close. It's first name unknown.

HESSICK: Oh, first name unknown.

JUSTIN: But it's because Tanzin is actually FBI Special Agent Tanzin. And so because of the, the, the way this case worked out, Special Agent Tanzin was a defendant when the case was filed. The person who allegedly was wrongly placed on the no-fly list did not know Special Agent Tanzin's first name. So, he's listed in the case style as FNU Tanzin, FNU is for first name unknown.

ERICA: You were so close.

JUSTIN: Yeah, really close, Professor, but not close enough. All right. Now, it is Professor Hessick's turn again. Professor, Brito v. Barr involves the burden to disprove that a misdemeanor is a crime of moral

turpitude under the Immigration and Nationality Act. The challenger was living in the United States for over 20 years before he allegedly committed a misdemeanor and is at risk of being deported. Do you know which US state he was living in?

HESSICK: We'll go with Arkansas.

JUSTIN: No, that's not correct. Erica, do you know?

ERICA: Nebraska?

JUSTIN: Nebraska is correct, Erica takes the lead. Okay, I'm turning to the next question, this is for Erica. Erica, *Carney v. Adams* involves an interesting state constitutional provision regarding judges' political affiliations. Do you know the challenger's current political affiliation?

ERICA: Independent.

JUSTIN: That is correct. He is a registered Independent. Yeah, he was a registered Democrat until relatively recently, shortly before for filing the challenge, he switched to registered Independent, a cool case, Democrat, excuse me, this former Democrat now independent is challenging the state constitutional provision in the Delaware Constitution that really dictates which parties the judges can be members of. It's to supposedly create balance, and so, for example, for certain courts, you can only have a bare majority of one party or the other. But doesn't really set aside any spots for Independents, and so, the Supreme Court is going to review that challenge this year. Alright.

ERICA: Clearly unconstitutional.

JUSTIN: I think you're probably right. I think you're probably right. And it's going to be an interesting \ It's going to be an interesting case, right? Because not only setting aside the actual ruling in the merits, it's going to give the court an opportunity to talk about the role of judges and whether they're policy makers. And with some of the justices we have right now, you know, that they will not miss that opportunity to do so, so I'm looking forward to that opinion.

ERICA: Very good point, I didn't think about that.

JUSTIN: Yeah. So, that was a question for Erica. So now we're back to Professor Hessick. We'll just do two more questions: one more for Professor Hessick; one more for Erica.

Professor, *Van Buren v. US* involves a conviction under the Computer Fraud and Abuse Act. At the time the crime allegedly took place, what was Mr. Van Buren's job?

HESSICK: He was a sergeant, I think.

JUSTIN: That is exactly correct. He was a sergeant in the Cumming, Georgia Police Department. Well done, Professor.

So, if my count is correct, we're heading into the final question. Erica has a one-point lead, and this is a question for Erica. So here we go, are you ready, Erica?

ERICA: We should go into a lightning round after this. I am ready.

JUSTIN: You do seem ready, but here we go. In *Fulton v. City of Philadelphia*, one of the questions presented is whether the court should revisit its precedent from which peyote-related case?

ERICA: *Smith*. That is correct--*Employment Division v. Smith*.

JUSTIN: Sorry, Professor, you beat me last time, but I think Erica bested you this time.

HESSICK: Well done.

JUSTIN: Well done, Erica. And with that being said, it's time to turn.

ERICA: Where are the opponents—

JUSTIN: You both did really well. Congratulations to both of you. Now it's time to turn to the presentations of the interesting cases from this upcoming term, who would like to go first?

HESSICK: Go ahead.

JUSTIN: Erica, would you like to go first?

ERICA: Sure. Well, I would like to present the Institute for Justice's latest Supreme court case, and that is *Brownback v. King*. This case involves qualified immunity, which students may have heard about this doctrine and perhaps for the first time, during the Black Lives Matter movement that you may see a lot of protest signs saying, end qualified immunity now.

So, what is qualified immunity? This is a common law doctrine that severely restricts government liability if they do something wrong. As you can imagine, this doctrine comes up a lot in police brutality cases. So, let's say you have a police officer who violated your constitutional rights. You cannot get any damages against that officer, unless you prove that your right that was violated is clearly established under court precedent.

So, what does that mean, clearly established?

Well, courts have helped that for a right to be clearly established, there needs to be directly on point precedent--so a case with pretty much exactly the same facts as what you have. As you all know, as budding attorneys, it's very difficult to find a case with the same facts as you have. We liked it instead, analogize to the facts. That's what lawyers do.

But for qualified immunity, it's not good enough. Making matters worse, you need to find precedent in the right court. So, let's say you sue in the Eastern district of North Carolina, right here in Raleigh. You're going to need to find a case from either the US Supreme Court, the Fourth Circuit, or the North Carolina Supreme Court. So, this is a very high bar. As a result, it is almost impossible to get the government to pay up even for truly egregious and unconstitutional conduct.

So just so you don't think I'm exaggerating, I'm going to give you one example of a case decided last year by the 11th Circuit, and then I'll get into our case at the Supreme Court. So *Corbitt vs Vickers* was a police shooting case. What happened was that the police were trying to find a fugitive, who they are thought was hiding in a suburban area. So, the cops went up to just a random home; there was a bunch of kids playing out front. A lot of the kids were three years old, there was one who was 10 years old, and the cops came in and they said, get down on the ground. So, they had all of these kids laid down on the ground with their hands over their heads because the police thought that, yeah, it might be a fugitive nearby. And they thought that maybe these kids knew something about it.

As you can imagine, the kids were terrified. They were crying hysterically. They had no idea what, what was going on. And, and while this is happening, the family dog wanders over it didn't act aggressively, but the cop goes to shoot at it. He misses. He shoots again. And this time he hits a 10-year-old child laying on the ground, even though this kid was only 18 inches is from the police officer. So, as you can imagine, the parents sued, and they said this was excessive force in violation of the Fourth Amendment.

Did they win? Well, I think, you know, the answer--they did not win because the court found the cop was protected by qualified immunity, even though everyone agreed this cop screwed up. Even the court was reprimanding the cop. It is not enough for them parents to get damages for their child. Even though the parents had a strong claim for excessive force under the Fourth Amendment, it wasn't enough

because the court was not able to find a quote “materially similar” end quote case, that said that shooting a child when you're trying to shoot a dog violates the child's rights.

So, the family didn't get a dime, not even to cover hospital bills and basic expenses. So, this is, it's not an isolated incident. This happens all the time. There's obviously something seriously wrong with the qualified immunity doctrine.

And that's why at the Institute for Justice, we're trying to fix it. And that brings us to our case *Brownback v. King* that's currently at the Supreme Court. So, this is another case that just has egregious facts. James King was a college student. He was walking on a beautiful summer day going between one summer job to another but all of a sudden, these two men came up to him, asked him his name, and one of the men took his wallet right out of his pocket. So, James thinks he's getting mugged and he tries to run away. And these men brutally beat him and choke him unconscious.

So, you may have what actually happened. It turns out these were not muggers; these were cops in plain clothes and they were looking for another kid who's wanted just for petty theft. They were just trying to find something kid that had stolen some alcohol and even though James didn't look anything like this kid, these cops thought it was him and they beat him up.

So again, this is a situation where everyone agrees, the cops screwed up--that's not in dispute. The only question is whether they are liable for damages. Can James actually get them to pay for what happened to him?

This case is unusual because the Sixth Circuit actually found the government was liable under qualified immunity, but the government is still trying to get out of it. If we win this case, we hope it will make it a lot harder for government officials, including police officers, to avoid accountability for wrongful acts. So, we'll see. The argument is on November 9th, we're very hopeful. The argument will be done by on phones, so you are encouraged to listen in.

JUSTIN: Thank you, Erica. Yeah, I know everyone at IJ is excited about that one. We have a pretty good track record when it comes to Supreme Court cases. I believe we won seven out of eight after your, your team’s win last year. So hopefully we can keep that, that going.

Professor Hessick, which case would you like to discuss?

HESSICK: I would like to talk about the *Uzuegbunam v. Preczewski* case, which I worry on mispronouncing, but, but it's a great case, so it's worth the risk. So yeah, this case is about mootness, but to get there, let me tell you what happened.

So, the plaintiff, one of the plaintiffs, he was distributing religious literature on campus at, at the Georgia Gwinnette College--it's a, it's a state, it's a state school. And the campus police stop him saying, you're not allowed to distribute this literature here. There are designated areas where you're allowed to distribute, distribute stuff. So, he says, okay. And he goes, and he, and he reserves a spot in one of the designated areas. And then, and then while he's in that spot, he gets stopped again by the police

because he's told that he's doing sort of this open air talking, speaking out loud and he doesn't have the right kind of reservation or permit. He's violating a different school policy. So, so he stops.

So then, he files suit, challenging these policies and he seeks three different forms of remedies. It's a 1983 action, right? Saying it violates the First Amendment. Three, but he's seeks three remedies. He seeks a declaratory judgment that they, a declaration that they violate the Constitution. [He] seeks an injunction, barring the enforcement of these policies. And then the third is he seeks nominal damages.

Nominal damages are, those are appropriate remedies where your rights have been violated, but you haven't suffered any real harm from that violation and so, you're not entitled to any compensation. So, while his suit is pending, school changes its policies. And so, his claim for a declaratory judgment and injunction they're now moot. There's nothing, there's nothing that the court can do for him there. You know, they've already changed the policies.

But this leaves the nominal damages claim and the court concludes that the nominal damages claim, even though it's a claim for damages, it's also not enough to stave off mootness. And the idea is this, they say, look, mootness, mootness is when the controversies surrounding a case has disappeared, right? That when, when the injury that gives rise to standing, the injury that makes it so that there's something for the court to do, has gone away. And a claim for nominal damages in particular, they say is you are seeking, you're seeking damages, but you're not seeking any real compensation.

Instead, the reason for bringing your nominal damages case is you're trying to change the policy. You're not actually trying to get money, instead, you're trying to get a judgment that forces the other side to do something different, right? Resolves your rights.

So, they said, functionally, that's just like an injunction or declaratory judgment. And so since the school has changed his policy, there's no reason to go forward with the nominal damages claim. So we are also going to say that, that that claim is moot.

So, the issue before the court is they're a nominal damages claim like that staves off mootness, whether it keeps the case alive, it's a real life case in controversy.

The case is actually sort of a follow on to a few different cases that the court has been hearing in the standing area. The *Spokeo* case in particular, where they said that in order to have standing to, in order to be able to get into the court, you have to have some real injury. They call a factual injury or an injury in fact. It's not enough just to have your rights violated. S

o, one could say here, this is sort of similar in that the claim is that he has not suffered any factual harm. Instead, it's more that he's just claimed a violation of his rights and so, it shouldn't, it'd be enough to keep a case alive. But it's pretty complicated because *Spokeo* didn't fully clean up that area and so there, they said that maybe a lot of rights violations could imply a factual harm. And so, we might, we might fall into that category.

I think that it could be very interesting though, because the court is going to have another opportunity to sort of spin out what exactly gives a court jurisdiction, Article, Article III court jurisdiction. What makes for a live case or controversy? Is it the violation of a right? Is it a factual injury? And what, how much do you need for a case to stay alive?

JUSTIN: Terrific. No, that's super interesting. Erica and I both know how important the ability to bring a nominal damages claim can be. Oftentimes, we fight with the government about mootness when you know, the government will forcefully enforce these laws against people not represented by lawyers. Then IJ comes to town, and all of a sudden, they want to make everything go away. And so, I know we're watching that claim in case very, very closely.

In a moment, we are going to turn to interesting cert petitions, before I do, I just want to remind the audience again, that if you have any questions, please type them into the Q&A box. When we're done with the cert petition section then we will be reading those questions and answering them.

All right, Erica, which cert petition would you like to discuss?

ERICA: Oh, I would like to present what we call it, The Institute for Justice, our Lake Chelan cert petition. We have been working on this case for many years as being litigated by my colleague and friend Michael Bendis. I'm very hopeful they're going to take this up. And this case involves the meaning of the privileges or immunities clause in the 14th Amendment. And as a refresher to the law students here—this clause says that no state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States.

So, the question is what are the privileges or immunities? What right is this clause actually protecting?

As the legal nerds in the audience know, there it's been a lot of scholarly debate about this. Some argue this clause is designed to protect a whole variety of rights, including the right to Economic Liberty. And when I say Economic Liberty, I'm talking about, about the right to own a business, the right to have a job, make contracts, even own property. And there's a lot of historical evidence to support that that's exactly what this clause was designed to protect.

But the Supreme Court disagreed in notorious Slaughterhouse cases, which were decided all the way back in 1873. And there, in a five to four decisions, the court, pretty much gutted the Privileges and Immunities clause.

The court held the clause, had nothing to do with Economic Liberty, It just protected very few and somewhat obscure rights. And one of these was the right to use the navigable waters of the United States. So that takes us to the present. And that takes us to our case.

There are two brothers in Washington state, their names are Jim and Cliff. And these brothers live in a small community, surrounded by a lake, Lake Chelan. And you can only get to this community by boat or plane and it is very, very hard to do so. There's only a few boats operating a few fairies and they're operating very limited hours. So, it makes it very hard for people to get in and out of this community, community.

Jim and Cliff actually have a ranch that operates as a hotel and they like to bring guests to stay at their ranch and they want to make it easier for their guests to actually get to the ranch. So, they want to be able to boat people into, across the lake, into, to their ranch.

The problem is, is that state law says they cannot use their boat to bring their guests to their ranch unless, they get permission from the existing ferry services. So, this is a law that's, it's almost like saying

that McDonald's, before you can open, you have to get permission from your competitor Burger King. It's, it sounds absurd, but unfortunately, we see these laws all the time. There are protectionist laws that are trying to protect existing businesses from competition and it's terrible.

So, we represented the brothers and we sued, and we argued well, what do you think we argued? We argued that this violate the right to use the navigable waters in the United States. Exactly what the Supreme Court has already said is protected by the Privileges and Immunities Clause. And it's undisputed that this lake is a federally designated navigable body of water. So, it should be covered under this clause.

But the Ninth Circuit heard this case and they said, no, it's not protected the brother's rights were not violated here. And what the Ninth Circuit did is they limited the clause even more than it was already limited by the Slaughterhouse cases.

They said, this clause only covers activities in interstate commerce and because the brothers wanted, we're just operating in the state of Washington, they're not covered, their rights are not protected. And the Ninth Circuit also said that you cannot use this clause to sue your own state. So, it does not protect residents from abuse from their own state government. This is despite the fact that the clause itself says that no state shall abridge.

So, the Ninth Circuit's interpretation of this clause not only seems just technically textually false, but it also is writing this clause out of existence, the Slaughterhouse cases, a case narrowed the clause, but the Ninth Circuit opinion just writes it right off the map. So, we hope the Supreme Court will take this case and breathe some life back into this clause. This clause could be very important and protect some meaningful rights. And we hope the Supreme Court takes this opportunity and grants cert. And we may hear as soon as October 19th, whether they will do, so, so, fingers crossed.

JUSTIN: Yeah, fingers crossed indeed as you all know that the Supreme Court only grants about 1% of the cert petitions that are filed, but, but like you Erica, obviously really hope that's one of them. So we will see.

Professor, which cert petition would you like to talk about?

HESSICK: So, I wanted to talk about a group of cert petitions. They all involve this company Arthrex, but it's the *United States v. Arthrex* and *Arthrex v. Smith & Nephew*. So this, these bunch of cases, they, they, they're the latest in the kind of ongoing saga, challenging inter partes review. And inter partes review is a way for people to challenge patents that have been previously awarded. Someone can come in and say, oh, that that patent was wrongfully awarded, please take it away.

There've been a bunch of challenges to it because the system was established only in 2012, so it's new. The Supreme Court has heard a number of cases over the last few years that's resolving sort of the contours, the constitutionality, et cetera about this review.

So, the way these challenges work are you bring the challenge in the patent and trademark office and a panel of three judges resolves the dispute. Now there's a big possible, there's a big pool of possible

judges. They include the director of the patent office and they, and some other officers in there, but the vast majority of the pool are these administrative patent judges—there are 250, 260 of them.

And so, the challenge, the big issue in this case is the authority of these administrative patent judges to hear these kinds of cases, these inter partes cases. And here's, here's the problem. These administrative judges, they are appointed by the Secretary of Commerce. But Arthrex it says that that's not okay because they say these patent judges are actually principle officers of the United States. And in the Constitution, it says that principle officers need to be appointed by the President with Senate confirmation. It's only inferior officers that are allowed to be appointed by someone else, like heads of departments, like the Secretary of Commerce.

So that's, that's the major dispute here is, are these judges, are they principal officers or they just inferior officers?

The Federal Circuit, it, it said that they are principal officers. And the way they got to that conclusion is they said, well, basically to be an inferior officer, it means that someone's over you, someone has supervisory authority over you. And that's just not the case with these, with these patent judges/ They, they make significant decisions that can result in the revocation of patents and, and the court noted, it said, look, there's no one in the patent office that has direct review power of those decisions. There is no appeal to someone else in the patent office, the decision and the decisions can be appealed to courts, but not the courts don't have supervisory power over these, over these judges' decisions. So, they said the judges, they sort of have the ultimate decision authority.

And then also the court said, look, these patent judges, they can only be removed for cause. So the director of the patent office, he might be assigning cases and have some authority over these patent judges, but he can't fire them. He can't except for cause. And so, he has very limited authority over these patent judges. So, the combination of those two things by the Federal Circuit to say, we think these patent officers, these patent judges are actually principle officers. They had to be appointed by the president. There needed to be Senate confirmation. And because that didn't happen, the decisions by the patent judges are no good.

And so, they vacated the decision by the, by the panel that had ruled in this case. Now, that's one really interesting issue that's before the court and the United States is the one that has petitioned, and Arthrex has acquiesced in the petition. Ordinarily when someone petitions for review by the court, the other side will oppose because they won below, and they don't want the court to resolve the issue. Very rarely you will see the opposing party acquiesce in the petition for review, and the reason they do it is they would, they agree that there's just really an unclear issue of law that the court needs to step in and resolve. So Arthrex says, yes, we think you should come in. You should review. But Arthrex still of course says that it thinks they are principal officers and, and so, and the United States doesn't, doesn't want them to be principal officers.

There's one other issue that's lurking in there that's really important also, and that's, and that's the appropriate remedy. The way the Federal Circuit resolved, remedied the problem is they said, okay, we are going to excise the removal restrictions. We're just chop that out. And if we strike that down, then it's going to make it so that the patent judges can be fired at any time by the director--he has plenary power to terminate. And if we do that, it's going to make them not principal officers.

Now that may or may not be true, that's a hard issue. But I do think that it raises some weird remedy questions and that's, that's because how you remedy a problem like this depends an awful lot on what Congress wanted.

So, it may be that Congress wanted the patent judges to be exactly as they are, and they would have preferred that they be principal officers and it'd be appointed by the president with Senate confirmation.

And it's also possible that Congress did want them to be inferior officers. They want them to be able to be appointed by the Secretary of Commerce, but they would prefer that the way of fixing that problem is to give more direct supervisory authority over those patent judges--maybe, maybe an internal review process and appeals process.

But removing the removal protections is sort of an odd way of going about it because if the one thing that's for certain is these guys are judges and judges are supposed to be impartial. And job protection is one of the major ways of securing impartiality. And so, removing that, that, that employment protection sort of compromises one of their major functions. So, it's not the most obvious remedy. And so, it's unclear that the federal circuits are handled it the right way.

Anyway, there are a lot of issues going on here. I, I mean, there's never a guarantee that a case will be granted cert, but this is an important case and both sides have asked the court to grant review. So, you know, if I were to put money on a case, this is a pretty good one for a grant.

JUSTIN: So, what would you say even if the average cert petition, it has about a 1% chance and both sides have asked for review, how high do you think that raises the chances?

HESSICK: I mean, it's, it's both sides have asked for review, they're both like really well represented, and it involved like a serious manipulation of a major administrative scheme. I'd put it at like better than 50%.

JUSTIN: That's, that’s something for cert petition, absolutely. Well, thank you very much, Professor. I will keep our eyes on that one as well.

We do have some questions from the students watching. What we'll do is because of we're doing it through zoom. Yeah. We've typed them in, I'll read them aloud and then the panelists can answer them, I may chime in as well.

The first question--Shanna, thank you for your question--she asks, does IJ have any cases other than the Lake Chelan case moving through the circuits that you think SCOTUS might grant cert to in the future. I have some ideas, but I'll let Erica go for it.

ERICA: Well we have filed a number of Amicus briefs, asking the court to accept cert on certain cases. We have a couple very good, very interesting free speech cases that we're hoping that they're going to

take up, a Fourth Amendment case. As to our own cases, I think it is too early to tell what do you think, Justin?

JUSTIN: Yeah, I mean, you know, it's always dangerous to predict that cert might be granted unless you have that rare situation the professor pointed out where both sides, don't oppose, cert. I will point out there's at least one IJ case I know of where that happened, where both sides did not oppose cert, and it was still denied, which was in our, Louisiana monks case, Louisiana caskets case. That was a, a rational basis victory, a rare federal rational basis victory against a protectionist law. So, it can still happen, but I'm still rooting for it, Professor.

For me, you know, I do a lot of work representing small business owners at IJ. And I noticed I can't help but notice that we have a bunch of cases all at the same time, right now dealing with occupational speech and they're all kind of percolating at different circuit courts, we have some tour guide cases. Basically for those who don't know occupational speech is, as it sounds like it's, it's when you talk as part of your job and, and not that long ago, the Supreme Court held in *NIFLA v. Becerra* that, you know, the First Amendment still applies, you know, that the so called Professional Speech Doctrine that some circuits had come up with based on a concurrence a long time ago, that, that was not a thing. And so now we have all these cases addressing the First Amendment in the occupational context. Some with tour guides, veterinarians, some with diet coaches, some with, with people who use computer programs to compile maps. And, and I hope one of them makes it to the Supreme Court. We'll see. But you know, each one is probably a long shot on its own, but when you look at all these cases, all at the circuit level, all across the country, maybe one I'll make it up, you know, we'll see.

Well, thank you. This has been a, like I said, the fourth annual IJ UNC Fed Soc Supreme Court term preview. Hopefully we'll be back again next year, and we won't have to do it over zoom. Thank you everybody.