ShortCircuit291

Wed, Nov 01, 2023 10:16AM 1:15:03

SUMMARY KEYWORDS

case, court, statute, question, government, justice, issue, argument, state, supreme court, hypotheticals, strike, justices, clinic, dubin, petitions, years, law, term, actor

SPEAKERS

Jeffery Fisher, Recording of Justice Sotomayor, Anya Bidwell, Recording of Justice Jackson, Recording of Vivek Suri, Recording of Justice Thomas, Easha Anand

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A **Anya Bidwell** 00:24

Hello and welcome to a very special edition of the Short Circuit podcast. We are recording before the Supreme Court's long conference, scheduled for September 26. On the topic of "What the heck is Supreme Court" update. This includes the last term and the upcoming term. Our guests are Easha Anand and Jeff Fisher, of the Stanford Supreme Court Litigation Clinic, who are best qualified to answer this question. And other questions such as "how in the world does your clinic end up arguing so many cases each term?" Easha and Jeff need no introduction. Easha has appeared on this podcast before. She's an assistant professor and co-director of the Clinic. Prior to joining Stanford a year ago, she was a Supreme Court and appellate counsel at the MacArthur Justice Center, which is a frequent partner and collaborator of IJ's on issues such as qualified immunity. Easha clerked for Justice Sonia Sotomayor on the United States Supreme Court and for Judge Paul Watford on the Ninth Circuit Court of Appeals. Hey, Easha!

E **Easha Anand** 01:25

Hi Anya, it's so good to be back on the podcast.

A **Anya Bidwell** 01:27

Welcome back. Jeff is a professor of law at Stanford, a co-director of the Clinic, and special counsel at O'Melveny and Myers. He personally argued 46 cases before the United States Supreme Court, including Dubin versus United States from the last term which he will discuss today. Jeff clerked for Justice John Paul Stevens on the United States Supreme Court and for Stephen Reinhardt on the Ninth Circuit Court of Appeals. Hi, Jeff.

J **Jeffery Fisher** 01:54

Hi. It's great to be here.

A Anya Bidwell 01:56

So I'd like to get us started by talking about the clinic. And we can then transition to all the stuff you guys did at the Supreme Court last term, and will be doing this term. Jeff, can you tell us more about the clinic, how you operate, what's your record at the Supreme Court - all that kind of stuff?

J Jeffery Fisher 02:12

Okay, I'll do my best. So the clinic, amazingly enough, is almost two decades old now. It started as a pilot project with the idea of doing really two things. One is expanding Stanford's clinical program from an educational perspective, giving students another another way to research and write legal briefs and understand what it means to represent clients in real cases. Just so happened to be cases in front of the US Supreme Court.

A Anya Bidwell 02:41

"Just so happens to be."

J Jeffery Fisher 02:41

Instead of other tribunals or agencies or the like. And the other piece of it is the lawyering piece, which I think is probably best described as designed to level the playing field of representation in the Supreme Court. Particularly when we started, often governmental entities and corporations were particularly well represented in the court, and the same level of resources and expertise was not necessarily on the other side of the "V". So the idea for the clinic was to provide pro-bono co-counseling representation to level up the representation, if nothing else on a resource standpoint, on the other side of the "V". And so that's kind of our core mission. And that's really what we still primarily do, we do about half criminal cases, where we represent criminal defendants, and about half civil cases, primarily representing plaintiffs, but not always, but a variety of issues that we cover on that side. Everything from civil rights to consumer protection. And, you know, employment cases and lots of other things.

A Anya Bidwell 02:48

Easha, how do you guys go about selecting cases? How do you think about that? How do you approach it?

E Easha Anand 03:54

So, I think we've got to kind of a little bit of a sliding scale between the two considerations that Jeff listed the kind of pedagogical piece in our public service mission. So, on the public service

front, as Jeff said, we care about bringing resources to the less resource side of the "V," right? The immigrant, the criminal defendant, the individual facing off against a corporation or the government. Because we aren't representing a client at the Court of Appeals, we also have the luxury of thinking about public service kind of writ large. So not just is it a good idea for this client to go to the Supreme Court? But is it a good idea for the community of non-citizens writ large or the community of criminal defendants writ large for this case to go to the court? So you might have a situation where, you know, six circuits are siding with criminal defendants, one circuit is going the other direction. And actually kind of looking at the current court composition, it's pretty unlikely this court is going to rule in favor of the criminal defendant. Someone whose sole interest is in that criminal defendant might well decide "we should petition." Right? Good chance the Supreme Court grants cert because there's a circuit conflict. Some chance the criminal defendant is going to win, they don't have other options. We may not take that case, because there's some likelihood that cert gets granted and we end up making bad law not just for this one person, but for everyone else around the country that previously kind of had the benefit of the good law. So that's the kind of first piece, the kind of public service piece. The second piece is the pedagogy piece. And a lot of this honestly boils down to logistics, right? We want cases that are timed such that students can really take the lead. We want a mix of civil and criminal, of petitions and briefs and opposition, of merit stage and cert stage work, and most of all, we want co-counsel from whom our students can really learn and grow.

A Anya Bidwell 05:39

So, what is, if you were to break it down generally, how many petitions versus BIOs versus getting involved straight up at the merit stage?

E Easha Anand 05:53

It's a good question. I think that our balance between petitions and briefs in oppositions has really shifted in recent years. That is, given the kinds of clients the Clinic represents, we find ourselves more and more often trying to protect wins in the circuit courts from the Supreme Court.

A Anya Bidwell 06:09

So, basically saying "don't take this case." There's no circuit split.

E Easha Anand 06:12

Exactly, exactly. So we wind up doing a lot more of that work. And you can imagine, you can perhaps think about why that is, given the current composition of the court. But I'd say last year, we did two merits cases. And probably I don't know, what would you say, Jeff? Maybe eight or 10 projects that were at the petition stage and mix of of bios and, and petitions?

J Jeffery Fisher 06:36

Yeah, that's probably about right. I would say over the over the sweep of the years, I think that for a long time, I would have said we did about two thirds petitions and 1/3 briefs in opposition in the search stage. And that's gotten to be much closer to half and half now, if not maybe even tilted the last year or two in the in the BIO direction. And then we've averaged over the years, I think, five, four to six merits cases a term. But there's an ebb and flow to that, you know, when you do a lot of merits work, you don't have as much time to do new petitions.

E Easha Anand 07:07

Right, right.

J Jeffery Fisher 07:08

And so and then when you do those new petitions, you tend to often, if you're successful, you get a lot of merits work. So there's a little bit of a up and down as that goes, you know, semester by semester, year by year.

A Anya Bidwell 07:19

How many if you are respondent in the Supreme Court? And it's kind of it goes to this idea of it's good to be a petitioner because you know, they granted and chances are they want to reverse - what is your record when you are a petitioner versus when you are a respondent?

J Jeffery Fisher 07:35

That's a great question that I do not know the answer to off the top of my head. We keep some records. And so I know that in the cases we've handled on the merits, we've won over 60% of those cases, somewhere between 60% and two thirds of those cases. I don't know though, how that breaks down between petitioner and respondent off the top my head.

A Anya Bidwell 07:58

One more question. And that kind of is about the clinic and how it's different from other Supreme Court clinics. There was, I think, one time where you, or maybe several times when you went against the another Supreme Court clinic like a Texas Supreme Court clinic, right? But how different are you from those clinics? Because they are proliferating now. And how similar are you to those clinics?

E Easha Anand 08:22

It's a full time job. So I can say one kind of major difference between our clinic and I think almost every other clinic is we have the luxury of getting our students full time. So they're spending 40 or 50 hours a week on the drafting process. And so it's not only that we have truly

incredible students that throw themselves into cases, they have no other commitments the quarter they're with us. And so we really are able to create an entirely student led process, right? It's a full time job, that's right. And you know, people find it unbelievable. I found it unbelievable before I got here, that second and third year law students would write every single word of a brief that gets filed at the United States Supreme Court. But because we have the luxury of getting them full time, we're able to come up with a drafting process that enables them to do that. And I think we're unique among clinics for being able to have students without any other classes or commitments.

J Jeffery Fisher 09:15

Yeah, I think that's one thing. And then the related thing, and I - forgive us for doing a little bit of infomercial for Stanford - but the other thing is the by way of faculty resources were different than the other clinics. Stanford has invested in three full-time faculty members now to be co-directors running the clinic. I think most other law schools have at most one, and they tend to be much more driven by outside law firms helping, you know, in various ways with those clinics. And so it's just a different model. And one thing about that is allows us to be a little freer in choosing our cases, and in the way we resource them. And to circle back to your other question: yes, we have had a few cases over the years against other clinics. I think at least one against Texas, one against Penn.

A Anya Bidwell 10:06

Involving Fane Lozman if I remember correctly.

10:08

Right, right. That was that was the floating home case. Years ago, we did a case, I believe, against the Penn clinic when now Judge Bibas was running that. And I think we had, more recently, a case against the Yale clinic: a First Amendment question. And so we've had a few of those. And, you know, they're fun, I suppose. And you can kind of laugh about maybe a budding rivalry there. But really, it's just about representing the clients. And, you know, that's just another instance of having really good opposing counsel on the other side.

A Anya Bidwell 10:44

Yeah, yeah. Let's now then transition from the infomercial part of it, although just a little bit still on that. Jeff, tell us what you have coming up this year. What's on the docket?

J Jeffery Fisher 10:58

Okay well, Easha make sure I don't forget anything. So I guess most immediately, we have four merits cases. So far, this term.

A Anya Bidwell 11:07

Four merits cases - just let it sink in. All for this fall. Half term.

J Jeffery Fisher 11:14

I told you there's an ebb and a flow. So the very first one is going to be in the October sitting. Where Easha's in the lead in a case called "Murray v. UBS Securities" that involves the whistleblower protections in the Sarbanes-Oxley Act.

A Anya Bidwell 11:31

Yeah, the stuff that in law school, they basically say, "don't bother with that it's too complicated."

11:36

Hmm, I don't know about that. Our story is pretty easy.

11:40

But important financial regulation and employee rights at stake. Then in the second sitting of the term, we have a case called "O'Connor-Ratcliff v. Garnier", where we represent the respondents in that case. The Supreme Court is going to consider whether public officials - who have their own Twitter or Facebook or other social media accounts that are in one sense, private, but in another sense, branded as their official sites, as in their in their public capacities - are subject to constitutional restraints. In other words, whether or not they are state actors when they run those social media sites. And so our colleague, Pam Carlin is going to be arguing that case. Then we have two cases that we understand will be scheduled for the December sitting. One is called "Jackson against United States" and involves the Armed Career Criminal Act, otherwise known as the "full employment act", for the Supreme Court. They seem to have one or two of those cases every term. But it's another one of these cases about whether certain prior convictions qualify for the big mandatory minimum sentence that kicks in for repeat offenders.

A Anya Bidwell 11:41

Are you petitioner or respondent in that case?

E Easha Anand 11:41

I think it's very simple!

J Jeffery Fisher 12:27

We represent petitioner in that case, Mr. Jackson.

A Anya Bidwell 12:54

So two petitioner cases, one respondent, and then what's the fourth one?

J Jeffery Fisher 12:55

The last one will even things back out. So we'll go back to the respondent side, "Garland v. Singh", which is a case - an immigration case again - Easha's in the lead for us in that case. And it involves reopening immigration proceedings when a removal order was issued, after somebody failed to appear. Did that I get that generally right?

E Easha Anand 13:21

That's exactly right, yeah.

J Jeffery Fisher 13:22

Okay. So the rules for getting those reopened.

A Anya Bidwell 13:24

And Jackson, it's the case where the government said that the petition should be granted too, right?

J Jeffery Fisher 13:29

Yes. Yeah.

A Anya Bidwell 13:29

So that's interesting, where they are writing not a BIO, but they're writing a...?

J Jeffery Fisher 13:35

Right, well there's two flavors of the government acquiescing to cert. One is sometimes the government comes in and says "we think we think the defendant is wrong, or the other side is wrong. But we agree that the US Supreme Court should resolve this issue, because there's a conflict across the country. And we just want to know what the what the rule is." Sometimes

the government goes a step further and says "we acquiesce to cert because we think the other side is right and we actually agree that decision below was wrong.' We have another project later in the clinic, this term of cert petition where that's the situation but in Jackson, it's just the first situation where the government agreed that the issue was cert worthy, even though they're on the other side of us on the issue itself.

A Anya Bidwell 14:18

Do you kind of have an inkling that that's coming when you file the petition?

J Jeffery Fisher 14:25

Sometimes yeah. Sometimes, if the split is really clear the government, as an institutional matter, will agree with you. And so we've had that happen a variety of, you know, a handful of times over the years. We've also had a couple times big corporations, or other entities acquiesce to cert just when they, when they're national, have a national perspective and just want to know the answer to a question. And then to round out the rest of our work, and I won't go through this in as much detail, but we'll also be doing a few new cert petitions and at least one brief in opposition this fall as well, and a variety of cases.

A Anya Bidwell 14:59

Yes, and we're gonna mention one of them that you guys already filed.

E Easha Anand 15:03

Where we're collaborating with the fabulous folks at the Institute for Justice!

A Anya Bidwell 15:08

Say more about those guys. Well, let's then now talk about the Supreme Court. It's often the cases that it has in general and your particular cases. Easha, let's briefly talk about last term, because you know, there have been 1000 podcasts on what happened last term. So we don't want to spend too much time on that. But one thing that I'm really interested in is your perspective on Justice Jackson, because that's one thing that was very different from other terms. We had a new Justice, and she was very active. So tell us, kind of, your opinion of how she did and highlight a couple of things for us.

E Easha Anand 15:47

Sure. So how did she do? I think incredibly, right? I think, you know, she spoke more at oral argument than any other Justice, which is kind of quite the feat for the most junior Justice. And I think some of the questions she posed at argument had a pretty seismic impact on the outcome of cases, right. I'm thinking in particular of her questioning in the "Allen v. Milligan"

voting rights case. Her hypotheticals in the affirmative action case about how colleges are to handle essay questions. Hypotheticals to which, you know, I think the Chief Justice is responding to almost directly and kind of the closing page of his opinion.

A Anya Bidwell 16:22

That's what the universities are now doing, right? They're saying "okay, we can maybe do this through essays for example." And that's directly from Justice Jackson to Chief Justice Roberts.

E Easha Anand 16:33

That's exactly right.

A Anya Bidwell 16:33

To now the actual policy.

E Easha Anand 16:34

Yeah, yeah, I think that's right. And, you know, I could kind of go on. I mean, I think she's had a big impact in oral argument. She's been really unafraid to stake her own position, right. So Adam Liptak writes that it took the Chief more than 15 years to write a civil dissent. Justice Jackson has written three already in her first term. And she was equally full-throated in the kind of quote unquote "shadow docket" and speaking on behalf of capital defendants. So she's definitely got a big voice on the court. And so maybe I'll highlight three things that I think make her voice really unique. So the first one, I'll highlight her kind of like burgeoning, like libertarian-ish alliances with Justice Gorsuch, right. So we see a lot of cases where the two of them are kind of out on a limb together. So in "Bittner", this was a case about the Bank Secrecy Act. "Tyler" - case about the Takings Clause - we saw the pair of them kind of writing with no other justices joining them. So in the Bank Secrecy Act case, they were the only justices who would apply the rule of lenity, which is the kind of canon of construction we typically think of as applying to criminal statutes, to the civil penalties in that case. And in the Takings Clause case, they were the only two justices who thought that the Eighth Amendment's excessive fines clause should come into play. So we see this sort of like shared suspicion of the government's power to wield punitive sanctions against individuals, and particularly the skepticism when the government tries to label those sanctions as something other than punitive. So one is this kind of like libertarian streak. Second, she's kind of consistently taken her colleagues to task for their kind of selective originalism that kind of ignores the second founding, that kind of post Civil War reconstruction era.

A Anya Bidwell 18:15

Talevski. I'm thinking the oral argument there, right? She specifically talked about 14th amendment originalism post-Civil War.

R Recording of Justice Jackson 18:22

"Look at the actual history of 1983. That was precisely what Congress was doing. It was a part in 1983, of the Ku Klux Klan act, where Congress had looked at the situation of states not giving forum, not giving a cause of action to people who were being terrorized. And instead of adopting and incorporating those principles and saying, here's this new law, and we're going to incorporate the common law of excluding you from the court. In fact, Congress created the right in order to allow people to go to court."

E Easha Anand 18:22

Exactly Exactly, yeah, that's exactly right. So she's really focused on this period of history that I think she sees her colleagues overlooking in their, kind of, historical analysis. And I think that's been a really powerful thing to have on the court. And then I guess the final thing is, you know, I'll highlight her dissent in "Jones v. Hendrix", which was the habeas case about whether folks who were actually innocent of a crime can file a second habeas petition. She has this kind of interesting approach to statutory interpretation that I'm not sure I've seen somewhere else. It's sort of somewhere between the kind of, you know, Justice Kagan "we're all textualists now" mode and the Justice Breyer, you know, "texts schmexts". She sort of says in that dissent, she says, "look the majority is putting all this weight on these three words, but it turns out this part of the statute, it was passed in the aftermath of the Oklahoma City bombing, it was rushed and emotionally charged." It's pretty obvious that this particular phrase was like a bad copy-paste job, right? Like the Congress was trying to copy-paste another portion of the statute, they forgot to change it for this context.

A Anya Bidwell 20:07

A little bit of a reality check.

E Easha Anand 20:09

Right.

A Anya Bidwell 20:09

Like we can't forget that.

E Easha Anand 20:11

Right. And I think you know, that there's some intuitive force to this idea that like, depending on whether the words of the process of, you know, came as a result of sort of haggling and legislative compromise and careful thought versus rushed, emotionally-charged, copy-paste job. Like maybe that should change the amount of weight that we put on those particular

words. So I think that's really interesting. And I don't think I can think of another justice who has a sort of similar model or approach on the court. The four most interesting cases that are coming up this term.

A Anya Bidwell 20:36

Yeah, it'll be interesting to see what she does with this then this term. Jeff, can you highlight for us cases that are interesting that are coming up, in addition to the four that you have? And maybe opportunity there for the Gorsuch-Jackson collaboration?

J Jeffery Fisher 21:00

Yeah. Well, I would just say first, real quick, I love that last point Easha made about Justice Jackson's approach to statutory interpretation, it's really interesting. And the court itself is, seems to be just getting more and more methodologically interesting and just atuned, like, self aware of it's methodology lately. And in our clinic, I can't tell you how many statutory cases we've had over the years where the students going through the process, you know, really most of them the first time of really doing a real case and a real issue. And instead of, kind of, the debate in the classroom, we'll pause in the clinic and say "Okay, wait a minute. Does anyone actually think Congress considered this question for one second?" And they all say no, you know, no matter what their perspective on statutory interpretation was, or is. They all, sort of, the light bulb goes off. Now, "what do you do about that?" is a whole different set of things. But I love that point.

A Anya Bidwell 21:58

Yeah. And we will talk a little bit more about this when you talk about Dubin.

J Jeffery Fisher 22:01

Sure!

A Anya Bidwell 22:02

Because that's a statutory interpretation case. And it reads very much like, does Congress really think about the meaning of the word in relation to?

J Jeffery Fisher 22:11

Right. Yeah, that's a great point. So we'll get to that. But so this term, you know, the court has about half of its docket set right now. With plenty of big cases already on the docket, and more perhaps, to come. And so there's a lot one could talk about. I'll highlight two things, two substantive areas. So the first is big social media. I think the court took a case, took actually a

pair of cases last term, to take its first hard look at big tech. I mean, we're sitting here in Silicon Valley. So it seems an appropriate thing to talk about. And basically kind of punted. They were going to consider the scope of what's known as Section 230 immunity for tech companies.

A Anya Bidwell 22:56

And you would know about it because Justice Alito asked you specifically about Section 230 during the oral argument.

J Jeffery Fisher 23:02

It's like, no fair. So they were going to consider the scope of tech companies. Section 230, immunity from publishing - you know, via their platforms - comments that other people make. And the basic argument there is, look, we're not the content creator here. We're just the the technological platform on which it's being spoken, so we shouldn't be held liable. Now, as I said, the court basically decided, as a predicate matter that the cause of action was faulty in those cases, and so didn't get to the immunity from the cause of action. But now the court is poised to take up, I'll call it two cases it's really two issues, this term. Now, neither of them are officially on the docket yet, but I think one if not both, are very highly likely to be. So one is a pair of laws from Texas and Florida, that require social media and tech platforms to to refrain from, I think, what the law views as censoring conservative speech on issues of public concern. And the 11th and Fifth Circuit's have split on whether those laws are constitutional or not. The government agrees. The federal government, which the court somewhat curiously asked for its perspective, agreed that the court should grant cert and decide the case. So that's going to be a big deal. And then also, we have just in recent days, this case coming out of the Fifth Circuit, restraining the Biden administration from interacting or maybe negotiating with tech platforms about content about things like COVID policy and the like and misinformation. So you have this wave of I think this conservative critique that the platform's tilt left and are censoring conservative speech. And the interesting thing is this comes to the court is not just that, you know, these are more and more than mediums of our lives and society and democracy. So that's a big deal. But also the tech companies argument in these cases is going to be kind of the inverse, what they said last term. They're going to be like "we're publishers here. We're entitled The First Amendment protection. You can't tell us what we put and put on our website." Now, you know, there are ways to thread that needle, but it's going to be kind of the upside down story getting given to the court. And so how the justices react to just the business behavior and the importance of this and these platforms in our society right now. And the constitutional implications I think are going to be big and interesting. The other case I'll mention is the Rahimi case that I'm sure listeners, for the most part are already aware of. But this is the court's newest foray back into the Second Amendment. This case is already on the docket, it will be argued in November. And the question is whether the federal law restricting the possession of firearms from people who have domestic violence restraining orders is constitutional.

A Anya Bidwell 25:58

How about drug users?

J Jeffery Fisher 26:00

Well, that's maybe for another day. But the thing that's, you know, I find the Second Amendment issue really, I mean, writ large, really interesting. You know, with with "Roe v. Wade" falling by the wayside, you know. That was sort of the target for the conservative movement for a generation or two generations with the courts. And so the Left hasn't really galvanized around a single issue that it feels is a target, you know, on the other, going the other direction where democratic choices are being restrained by the Supreme Court's interpretation of the Constitution. And if the court takes this next step in Second Amendment to say not just so-called law abiding citizens, you know, who have no mental illness or the rest can possess guns, but also people with domestic violence restraining orders that might be more of a threat to society. I wonder if at some point, that there's sort of a galvanizing that occurs around that issue. Now, there's a lot of "ifs" baked into that, what the court doesn't on the issue in the first place, and then political judgments that I'm not equipped to make. But I do think it's a really, really potentially explosive case for the Supreme Court.

A Anya Bidwell 26:28

Right. It really helped them organize. We talked about this case, onShort Circuit. We had a live panel specifically on this. And the reasoning there, it's this idea that you're looking at, you know, the Second Amendment at the time of the founding, and what the restrictions were at the time, right? And it's just you can't help but when you read it to, it's kind of like Justice Stevens, you know, dissent in "Heller", right? Where the you can muster arguments on both sides. So the methodology is very complicated when you're thinking, you know, here's an argument on one side, here's an argument on the other side, pick the one that you find, like, you know, the government provided five different originalist arguments in "Rahimi" in the Fifth Circuit. And the panel did not like any one of the five and provided its own for the other side. So it would be interesting to see if the court would try to maybe have a little bit more constraint on how this method actually works, because Rahimi seems to be an illustration of how it actually doesn't.

J Jeffery Fisher 28:18

Right, right. And that brings us back to methodology. I mean, I think the defenders of "Heller" in that line of cases would say, well, they're completely different than "Roe", even though they're both explosive, ideological issues, you know, this is grounded in the in the text of the Constitution, unlike "Roe" is. But it doesn't take very long, even if you accept, you know, "Heller" itself, obviously was a matter of a lot of debate about the text of the Second Amendment. But even if you get past that, the methodology of history and tradition that the court says is so easily, you know, at least cabins judicial discretion, very quickly runs out. And so just in the "Rahimi" case, just a glance at the briefs, gives you one example, which is that the defendant in that case says "well you can't restrict my possession of a firearm because there weren't even domestic violence laws at the time of the founding. So how on earth could I be restricted from possessing a gun based on a domestic violence restraining order that didn't even exist? Those didn't even exist at the time of the founding?" And the government comes back and says "well, wait a minute. If if you're going to look at history that carefully," or maybe I should say, you know that specifically "all the guns you want to own weren't in creation at the time of the founding either."

A Anya Bidwell 29:26

Right, right. Their were muskets.

J Jeffery Fisher 29:26

Yeah, exactly. So there are, let's just say limitations on the constitutional methodology there that will be interesting to see how the Court deals with.

A Anya Bidwell 29:35

Yeah. And Easha, to your point about Justice Jackson and kind of her originalism. It'll be interesting to see what she brings to this discussion, and how she would approach the question.

E Easha Anand 29:44

Yeah, absolutely. I think that's right. I think that she's got her eye trained on a broader sweep of history and so it'll be interesting to see what she entered.

A Anya Bidwell 29:50

All right. Let's now get to the meat of this podcast recording and that's the two cases that you guys argued last term. Easha, let's start with "Glacier." Tell us what the case is all about, and how did it turn out?

E Easha Anand 30:08

Sure. So we represented a union that had organized concrete truck drivers to strike for better wages and working conditions. So drivers go on strike, there are no drivers to deliver the concrete, the concrete hardens as it is sort of want to do. The employer then turns around and sues the union, under state tort law, for the value of that hardened concrete. And the state court, you know, applies this, nearly decades old precedent "Garmin", to do kind of exactly what state courts are supposed to do in these sorts of cases which is say "no, the right to strike is federally protected." You can't turn to state courts try to gouge the union for exercising that right. So state court does that, says we don't want to hear this case. But the employer petitions the Supreme Court, gets the court to grant cert. Now, just for some context, this "Garmin" rule is kind of an integral part of the right to strike, right? Getting rid of Garmin, allowing state court litigation over the value of a product that's damaged because workers stop working. That would kind of functionally gut the right to strike, right? Imagine, you know, farm worker strikes, can they be sued for the value of the crop that goes fallow in the field or grocery store employees strike, sued for the value of the milk that spoils because there's no one to shelve it. If unions can be sued for the value of the product that spoiled, it's impossible to strike, or at least it's impossible strike at a time that would actually impact the employer. So the union, the Supreme

Court sides eight to one against the union. We think that ruling was wrong for all sorts of reasons I'm happy to get into. But a kind of important silver lining here is that the court did not, despite calls from three of the justices, did not change that Garmin framework, right? Did not. It still said, you know, you can't sue someone just for stopping work, that would gut the right to strike. Instead it said on these facts, there was not, there's sort of enough to conclude that the union didn't obey some of the rules around striking. And so it was a loss and a lot of ways, but a much narrower one than I think some of the justices would have wanted, and that maybe was a fear going in.

A Anya Bidwell 32:17

Do you think that they adopted the government's position in the case? So they were basically, there were three parties arguing the case. Right? You had Noel Francisco representing the company. Then you had Solicitor General's office, Vivek Suri, without the notes. And then, you guys. So and, you know, at some point, Justice Sotomayor basically told Mr. Suri, you know, tell us how to write this opinion.

R Recording of Justice Sotomayor 32:49

"Tell me how to write this decision."

R Recording of Vivek Suri 32:53

"I'd suggest copying our brief Your Honor."

A Anya Bidwell 32:57

Right. And he kind of summarized what he thinks, you know, the government's position is. So, did they take that position? Or was it even closer to what you wanted them?

E Easha Anand 33:09

So I think that they in many respects, adopted the government's position. And there was a funny moment in argument where he says "I think you should just paste in our summary of the argument."

R Recording of Justice Sotomayor 33:21

"Give it to me in two paragraphs. Summary of the argument."

E Easha Anand 33:30

And that's in two respects. The first is they left it open, this kind of procedural question, which

is, you know, by the time this case is getting started in state court, the NLRB which is the federal agency, tasked with kind of adjudicating these sorts of employer union disputes, had also started proceedings. And so the government sort of asked them to stay out of the question of how that impacts everything, right? Regardless of whether state courts should step aside in a case in the abstract that's sort of within the jurisdiction of the NLRB. Surely, if you've got parallel proceedings going, there's even more of a reason for the state court to step out of the fray. And so we thought that was an easy question we wanted the court to weigh in on. The government sort of said "stay out of that question court," and they stayed out of it. And then the second way in which they sort of adopted the government's position is sort of narrowing in on kind of the specific facts of this case. But it was really striking to me in listening to the argument, you know, the court hasn't had a right to strike case in basically a generation, right?

A Anya Bidwell 34:31

Right.

E Easha Anand 34:32

And it kind of shows. Like, I think even some of the liberal justices weren't as attuned to the stakes here as they might be in other economic justice cases. Right. So, you know, some signal they'd be open to a rule that distinguish between an ordinary strike and a strike that quote, intends to destroy an employer's property. Which sounds good but in actuality, the line between "I intend to strike at a moment where if the employer does not come to the bargaining table, it will lose property because that's how I use the strike to have leverage" and "I intend to strike so the employer will lose property." That's a kind of razor-thin line and requiring unions to fight over that line on pain of being liable for all the property destroyed would have a substantial chilling effect on the right to strike. And I think as we sort of see this resurgence in the labor movement, right? Writers, actors, auto workers out on strike right now exercising their right to stop work. We're seeing a resurgence in union membership after basically a generation of unions in decline. I hope that we see some of that trickle back into the law and to, kind of, courts awareness of how work stoppages actually function.

A Anya Bidwell 35:42

They also seem to be just the presence of all things though, right? The NLRB, like the essentially this suspiciousness of the administrative state, right? Or like the federal jurisdiction, like that federal courts should be like looking at it after reviewing the decision of the Administrative Board. And on the other side, you have state courts, right. And this idea of Justice Gorsuch is a big fan of like, "why don't we just," you know, "let it all happen in state courts." And it seems like in that sense so, strike aspect of it was novel, but some of the debates seem to be kind of very much old.

E Easha Anand 36:32

That's right. I mean, the ironic part, though, right, is that the state court here is the one that said we don't want this case. We don't have the expertise to adjudicate it.

A Anya Bidwell 36:39

And they're reversing it. Yes. And so it's sort of funny forum for that battle to take place. But I think you're right, the three justices that concur - Justice Thomas, Justice Gorsuch, and Justice Alito - did very much view this as the lens, not just of kind of, you know, labor versus employer, which was one overlay, but also administrative state, state versus federal, all these other themes. Kind of, even though this kind of "Garmin" rule we've described has been a sort of stable accommodation that actually, you know, like the Chamber of Commerce short of brief saying, like, "please don't touch Garmin," like it's kept a labor peace, don't bring us back to the battle days of strikes and open warfare like. So even though this accommodation has proven really, really workable. I think you're right that at least for a couple of the justices, this triggered a few sore spots. And it's interesting, because a lot has been said about footnote battle between Jackson and Thomas in the affirmative action case. But you kind of have a footnote battle here too, right? So the majority, which is interesting to me does not respond to Jackson's dissent at all. And they don't see too many cases where they just pretend the dissent is not happening. But then Thomas and Jackson kind of talk to each other. Oh, and Alito talks to Jackson too, in a footnote. But Justice Jackson, she basically tells Thomas to leave the "Garmin" hiatus alone.

E Easha Anand 38:08

That's right. Yeah. And there is a lot, there's a some kind of dialogue happening is also some sort of dialogue happening between the court and the Washington Supreme Court. Right, Justice Alito, has a footnote where he sort of says "you adopt Justice Jackson's view on remand? I think we should grant again," which is sort of something I haven't seen, seen very often.

A Anya Bidwell 38:25

Yes. It's a bit of a threat, though. I'm not sure he has the votes. But that was interesting. Yes. Yeah. So there's definitely a lot of stuff going on in the background. But talk a little bit more about Justice Jackson, because essentially, she's going alone. Right. And very forcefully, it's a long dissent, you know, laying out the reasoning. It's amazing that, you know, she, she is equipped to do this kind of stuff this early in her career. So discuss it a little bit.

E Easha Anand 38:58

Yeah. So I thought the dissent was terrific. And not just because it pulls a lot of themes and reasoning directly from our brief. But also because she really kind of gets the stakes and I think lays them out really effectively. I think two things that are notable about this particular dissent. The first is she's sort of shows her administrative law chops, right. She's, you know, Justice Breyer's, heir apparent in a lot of different ways. But one way she's sort of, one thing she kind of brings to this dissent is this kind of historical perspective. You know, at the time that the statute was passed, there were these doctrines around what's called 'primary jurisdiction.' There were these kind of rules about routing things through administrative agencies that have kind of withered on the vine since then. But because this statute was passed in an era where that was a sort of standard model of being a traffic cop between state courts and frankly,

federal courts and administrative agencies. She talks about how that historical perspective should inform our understanding of the statute. Which again, is sort of an administrative law deep dive. Admin law scholars don't know a ton about that doctrine. We had to do some real digging when we kind of put it into our brief. And I guess the second thing I'll just say about her dissent is she's not afraid to talk about the kind of human and political stakes as well as the kind of, you know she can kind of play on the majority's turf. She does texts, she does history, she does precedent. But she also has a kind of little bit of a rhetorical flourish that I think is really remarkable for a justice so junior in her career,

A Anya Bidwell 40:36

Right. And I was looking for Alito's footnotes where he engages with Jackson's dissent. And he says the court wisely declines to address the argument on which Justice Jackson realized regarding the effect of the complaint before the NLRB on this litigation. If the state courts on remand, dismiss this case on that ground, the decision in my judgment would be a good candidate for a quick return trip here.

E Easha Anand 41:03

Well, it's one justices judgment, and my judgment only.

A Anya Bidwell 41:08

All right, well, we'll see if there will be more union cases going on before the Supreme Court, that'll be really, really interesting given the current environment. Let's talk now about Dubin, the case that you, Jeff, personally argued last term. And how did it shake out for you?

J Jeffery Fisher 41:28

Happily. So this case was about the federal aggravated identity theft statute, which makes it a crime, and I'll just read the words here. So it's titled aggravated identity theft, but the actual words of the statute are "it's a crime to knowingly transfer possess or use without lawful authority, a means of identification of another person. In the commission a of enumerated felony." The statute lists a variety of felonies. And it's an automatic two years in prison for what you can think of as a mandatory minimum two years.

A Anya Bidwell 42:01

Its a pretty powerful tool for prosecutors, right?

J Jeffery Fisher 42:03

Which is an extra pop, especially, you know, there are obviously, are various crimes in the federal code that are punishable by a lot more than that. But this particular offense is usually

coupled with felony fraud charges that themselves don't require any time in prison. So the two years is quite meaningful for plea bargaining and for ultimate sentencing. And so Dubin's case is a good example of that. So David Dubin, who we represented in the case, worked with his dad in a small health care company that provides psychological services. The government indicted David and his dad for, in essence, overbilling. And on the one particular account on which he was convicted, he was found guilty by a jury of charging about $500 for a psychological evaluation for somebody for which should have charged $380 or something like that, so it's a little over $100. Claiming that it was performed by a person with higher credentials than then, in fact, was the case is what the jury found. So he was convicted of health care fraud for that violation. And nobody's disputing that. What the case was about was the additional charge attached to that health care fraud violation, which was a charge of aggravated identity theft.

A Anya Bidwell 43:26

Which is hard to kind of wrap your head around in this textual scenario.

J Jeffery Fisher 43:30

So most of us have a intuitive conception of identity theft. It's when somebody gets our credit card number and goes out, you know, unbeknownst to us, goes out in the world and pretends to be us and buys themselves a new flat screen TV, and then we get a call. I've been through it, probably other people have. And so, so that's the standard case. But again, if you go to that language, it just talks about using someone's means of identification in relation to the commission of a felony. And so the government read those words very broadly and said "well, when David Dubin submitted these health care bills to the government, they had a person's name on it, the patient, so he used the patient's name in the commission of this felony in relation to the felony, and therefore also committed aggravated identity theft." And we said "well, wait a minute, no, that can't be right." This was his patient. It was he had permission to use this person's name for billing, he didn't steal anything, he didn't steal the identity. And the government responded to that by saying "well, no, he didn't have the permission to use her name in that way." And so that's kind of the case that went up to the court. In essence, How broad is this statute and how broad are the words used in relation to. And happily for us and our clients, as you suggested, we got a nine zero decision from the court reading the statute narrowly and saying to use someone's name in the commission of a felony and thereby commit aggravated identity theft there has to be a tight connection between the use of the name and the felony itself. And so it has to be sort of the crux of the crime is the misuse of the name, not just sort of an incidental use of a name while you're committing a felony. And I think there's two interesting things about that decision once you get out of the, you know...

A Anya Bidwell 45:14

The weeds?

J Jeffery Fisher 45:15

The dictionaries and all the rest. So there's, so one is just we talked a little bit already a couple

times about methodology at the court and textualism, which is the ascendant methodology at the court. Dubin is the latest in a line of cases where I think the court is reading criminal statutes perhaps a little differently than it reads other statutes. And more particularly with a thumb on the scale towards reading them narrowly. The court says again, and again and again, the plain text, the ordinary meaning of words is what controls statutory interpretation. But in Dubin, a case a couple of years ago we handled called Van Buren, various cases involving the mail and wire fraud statutes, and maybe most, most notoriously a case called Yates involving the words 'tangible object' and the Sarbanes-Oxley Act as applied to red snapper caught in the Gulf of Mexico. The court has again and again not given the literal meaning of these big flabby words in criminal statutes, but has read them narrowly.

A Anya Bidwell 45:15

They explicitly say this, right? They say we cannot construe a criminal statute on the assumption that the government will use it responsibly. So they're kind of gesturing to this, like criminal statute. And that gets to the really interesting thing. I mean, there's a strong libertarian flavor to that statement, right? Which is, "we're not going to give the words that ordinary meaning because of just some level of, you know, unwillingness to trust the government all the way down the line." And so that brings me to the second thing. Well, many, many listeners may be thinking myself, well, we've always had this rule. It's called the rule of lenity, which is if you have an ambiguous criminal statute, because of the importance of doing fair notice to people about what is criminal and what isn't. We're going to construe them narrowly in any sort of ambiguous situation. But the court has expressly renounced the rule of lenity as a whole. Now Justice Gorsuch and Justice Sotomayorespecially, have argued the court ought to be invoking the rule of lenity. But the court says "no, no, we're not doing that." And Justice Kavanaugh has been even more specific in writing saying "absolutely, I reject the rule of lenity in all but the most, you know, the most narrow of situations." But in practice, it seems like that's sort of what the government - I'm sorry, the government - what the Court is doing. And so, you know, we can ask ourselves why the court is fighting over those labels. But writ large, I think what you're seeing is a real trend, a meaningful trend over the last decade, maybe two, where the court is confronted again and again, with broadly worded federal criminal statutes that read literally could have, as a court has said, sometimes breathtaking scope. And again, and again, the court says "no, we're not going to give it the broadest possible, meaning we're going to, we're going to narrow them up." Yeah. What is it?Justice Gorsuch tried to concur and he said "whoever among you is not an aggravated identity thief, let him cast the first stone."

J Jeffery Fisher 48:15

You can imagine discussions we had in the clinic, and with others that helped us prepare for the argument. Coming up with all the hypotheticals and imagining how broad the government's rule would really apply. And this, you know, if I can be so bold as to give the little pointer to the field, this seems to be the thing that court responds to again and, again, is not so much pounding away at Westlaw to write a legal brief, but actually sitting back and thinking about the implications of the government's reading of a criminal statute. And if you can come up with implications that trouble the court and seem like overreach or just simply, you know, unfair punishment. The court seems to respond to that.

A Anya Bidwell 48:55

During the oral argument. The government was asked about, like, one of the hypotheticals and it was very much like rounding up, you know, a billable hour kind of thing. Right, and basically said, would that fall within the statute? And, you know, Vivek Suri said "yes, very comfortably." And I think it was Justice Thomas, who basically said "well, that just, you know, that sounds wrong and bad" and you know, the response is like, well, maybe it does, but that's what the text of the statute requires. And it did seem like the court balked at it.

R Recording of Justice Thomas 49:31

"I'd like to see how far you will go with us. Let's say the only allegation here involved the rounding up from 2.5 hours to three hours, would that be sufficient to violate this provision?"

R Recording of Vivek Suri 49:53

"Yes, Justice Thomas, and I appreciate that that may seem an unattractive result."

R Recording of Justice Thomas 49:57

"Well, I think unattractive is an understatement."

R Recording of Vivek Suri 50:00

"It is nevertheless the correct reading of the statute."

J Jeffery Fisher 50:05

Right. And the contrast, to my mind, is how often that kind of response flies in other sorts of cases where you say the plain text of the statute is what it is. And usually Justice Gorsuch is the one leading that charge. And here he's taking, in a sense, the opposite position, because he really sees the criminal cases as different is what it seems to me.

A Anya Bidwell 50:22

And what is Gorsuch's position here, because he writes separately?

J Jeffery Fisher 50:27

Well, I will say that, that I love justice Gorsuch's concurrence, at least, you know, at least in tone and atmosphere, because he says I would declare the statute unconstitutionally vague, because it's so hard to make sense of the text. And as somebody who had to go through the

pain of preparing for oral argument, in that case, and imagining all the different hypotheticals that could arise, there's a great deal of sympathy I have for Justice Gorsuch's position. And I'm not sure at the end of the day, it isn't going to win out. You know, we mentioned the armed career criminal act earlier. And Justice Scalia started out as a lone voice in the wilderness saying "we're never gonna be able to make sense of this thing." And the court tried and tried and tried for a decade, and finally threw up it's hands and said it's unconstitutionally vague. Now, I'm not sure if the aggravated identity theft statute is going to be invoked as often and be at the court's docket as often as ACA. But I do think there's maybe a similar arc that is out there to take place. So I'd say stay tuned on Justice Gorsuch's perspective.

A Anya Bidwell 51:27

Yeah, Justice Sotomayor kind of responds to him, I love this, "adrift in a blizzard of its own hypotheticals, the concurrent believes that it's essentially vague." But then she says it's kind of our job, you know, to like, look at the text. And I'm doing it here. And it makes sense, the way I'm doing it. And, you know, everybody who's interested in the analysis of statutes, like should read this opinion? Yeah, it's a clear signal that they shouldn't be overusing it. And they specifically mentioned the power of prosecutors to use the statute to strong arm somebody. You mentioned oral arguments several times. So I'd like you briefly tell us about your prep for this particular case? Because you're right, they came at you with hypotheticals immediately. So how was the prep like? And did it, you know, did you feel sufficiently prepared for this case after that?

J Jeffery Fisher 51:50

Well, I think the last thing I'll say is that I think what it really comes down to then is prosecutorial discretion. And is the government going to bring these more questionable edge cases? And if they do, then maybe the court's gonna have, you know, a muscular response? If they don't, then maybe, you know, then maybe the court has a different response. And so I think a lot of it, a lot of its going to be decided by the behavior of local US Attorney offices, and how aggressively they use the statute for charging and plea bargaining. I don't know if I ever feel sufficiently prepared. Just what happens is the morning of oral argument comes, and you show up in a suit and and you do it. So you do your best to prepare. And this was a challenging case. I mean, the court always likes to ask hypotheticals of testing, you know, the broader rule that either side is proposing. And this case, as I suggested, was just really a challenge to sort through all the different permutations where somebody's name can be used while committing a crime, just the mind goes in all kinds of different directions. So that made this a real challenge, I think. But one thing I do is I remind myself, Well, hey, it's a challenge for both sides. So something that's always nice about oral argument day, once you get over the nerves, and all the rest is, for most people, the preparation of a week or two leading up to argument is all about having to face up to all the shortcomings and difficulties of their own arguments. And at the end of the day, you don't have to have a perfect argument. You just had to have a better argument than the other side. And I think that's what we achieved in Dubin. So it was really rewarding. We had, the students are remarkable in helping us prepare and in my in my personal system, as I always do at least two Moots to push myself through just articulating my position and being ready to answer the hard questions. So everybody got me ready. And maybe, you know, I'll just say I think this was a case where the courts new format for oral argument really might have made a difference, because we had a few different lines of

approach in this case. And we didn't actually get to the argument that ultimately carried the day on the on the nitty gritty text of the statute until very near the end of my time at the podium.

A Anya Bidwell 53:47

The Michael case, right?

J Jeffery Fisher 54:24

Yes. Well, well, you know, just yes. And the focus on the word use in a particular way. And but because they have this new one by one questioning that kicks in after the 25 or so minutes, we had another 20 or 25 minutes, I can't remember exactly how long I was up there, to explore that argument and to lay it out. And I wonder whether if I hadn't had that extra time, whether, you know, the justices, you know, might have gone in a different direction or might have thought about the case differently. And I think it was a great example why I think a lot of advocates really like this new system the court has, this hybrid system, as I call it from from the pre-COVID days and the COVID days, and why the court itself I think, benefits from it.

A Anya Bidwell 55:21

Yeah. And the oral argument, essentially, you ran out of time, and then it started the the seriatum questioning, right? And it's Justice Roberts who asks you the first question, and you almost like may finish, because your time is, essentially, the original time is out. And he's like, of course, of course, go ahead, you know, very much with this idea of like, we actually have all the time in the world now for, you know, for you to answer questions that every one of the justices will have.

J Jeffery Fisher 55:46

Yeah, and it just shows us, it's heartening because it shows that oral argument can really be productive and meaningful in the court. You know, I'm not trying to pat myself on the back in this case, but in general, I think this new system is sort of best designed to help the court.

A Anya Bidwell 56:00

Help think through.

J Jeffery Fisher 56:01

Help them think through it and help each justice really get his or her questions answered as best they can. And from the abacus perspective, that's all you can ask for is that kind of engagement. And I think it makes argument maybe even marginally more important in the current court, or at least more of a possibility where you can move the ball. And you know, that

stands in contrast, when I was a law clerk and Chief Justice Rehnquist was presiding the joke was that he'd interrupt a lawyer in the middle of the word "the" when you're when your red light went on, so. So this new system, I think, is working really well, as long as the court doesn't go, probably, you know, too open-ended on the one by one questioning, but I think it's been useful for the court.

A Anya Bidwell 56:44

Yeah, that's a very interesting and useful perspective. Yeah, an opportunity for court to actually think through it rather than oral argument being a merely performative thing. You know, it's kind of like, Justice Thomas used to say the reason he's not asking questions is because he just wants to give an advocate like spotlight, you know, 20 minutes or 30 minutes to like, get it out of their system and sit down, you know. But now, it's not that now, it's actually I'm thinking through this, can you help me?

J Jeffery Fisher 57:11

Right, and just my own perspective is I don't want to give a 20 or 30 minute speech? I mean, I've done that in my brief. So I want the questions. But I also want time to answer them. And I want them to have time to follow up if my answer doesn't quite satisfy them. That's what the new system gives you is a real opportunity for actual engagement. Rather than getting a question that's really hard getting two sentences out, and then you're interrupted from somebody else, and you never get back to it.

A Anya Bidwell 57:35

Yeah. And then "your time is up counsel."Yeah. Speaking of prosecutors, Easha, let's now transition to a petition that you guys filed. And tell us more about that prosecutor case.

E Easha Anand 57:51

Sure. So this is the case I alluded to at the top of this podcast where we're collaborating with the Institute for Justice. It's a case called "Chiaverini vs. City of Napoleon" and this one's near and dear to my heart, because in my prior role at the MacArthur Justice Center, I often was involved in cases where the police lied about my client committing a crime. And because of that lie, my client was harmed, right? They were arrested, they were kept in jail, their property was seized. The question in Chiaverini is this: let's say, the police are telling the truth about some crimes that my client committed, but not about all of them. Right. And this matters because you know, frankly, there are so many criminal laws in this day and age that almost all of us are constantly committing crimes of some sort. Right?

A Anya Bidwell 58:37

Jaywalking, favorite example of everyone's. Yeah, so let's say the police say right, this guy, he jaywalked and he tried to kill a police officer. They're telling the truth about the jaywalking. They're lying about the attempted murder. In most circuits, you can still sue the police. They

They're lying about the attempted murder. In most circuits, you can still sue the police. They lied about the attempted murder. Who cares if they're telling the truth about the jaywalking? On the Sixth Circuit, so long as they're not lying about the jaywalking, you can't sue for the fact that they made up the attempted murder. So, in this case, our client Jasha Chiaverini, he owns a jewelry store. He buys some jewelry that turns out to be stolen. And the police officers have a little bit of a vendetta against him, right? Among other things, one of the police officers in this case owns a rival jewelry store. They're kind of furious because Mr. Chiaverini you know, wants to consult a lawyer before he hands over this jewelry to the police. So they swear on a probable cause affidavit that leads to a warrant where they claim he violated a licensing requirement, right, that's an infraction. He received stolen property, that's a misdemeanor, and that he committed money laundering, which is a serious felony. And they're able to arrest him, jail him, confiscate tons of store property, including jewelry. And because of that kind of that money laundering charge, which actually winds up to have no basis in fact or law, much more serious than the other two, his reputation which is really critical if you're a jeweler, right? Brokers have to entrust you with diamonds and gems, his reputation is totally ruined. But the Sixth Circuit says "who cares?" There's cause to believe that he committed you know that licensing violation, that minor infraction. So it doesn't matter if the cops were lying about the money laundering charge, the massive felony. So we're asking the Supreme Court to grant cert, not just because this is terrible policy and kind of contrary to all sorts of common sense notions of justice. It's also inconsistent with the kind of historical law of tort, which is the backdrop to these sorts of civil rights questions. So as Chief Judge William Pryor, who is the Chief Judge of the 11th circuit, no kind of liberal squish when it comes to policing issues. He wrote an opinion where he sort of lays out the history and explains, like at common law, the backdrop against which section 1983 was passed. That was never the way it works, it was not enough to say there's probable cause it defaults to one offense, it doesn't matter if he lied about others. And again, we're proud to have the support from you know, no lesser lights than the folks at the Institute of Justice on this one supporting us and asking the court to take up this issue.

E Easha Anand 58:41

I shout out to Marie Miller, who wrote the brief. So you mentioned at the beginning of the podcast that you are very judicious about what issues to petition on. Right. So what is it about this case that made you think you know, what this is worth? Yeah, so I think that there are two things for us. The first is frankly, the Chief Judge Pryor opinion, you know, if anyone is gonna have scorched the historical record and made sure that it's on one side of an issue, its Chief Judge Bill Pryor. And so when he wrote this opinion, kind of laying out that history, we sort of thought to ourselves "well, okay, this is the sort of ascended methodology at the court and we've got one of the foremost practitioners saying this is the way it works." And the second is, you know, how everyone we've talked to, no matter their political priors, when you tell them that right jaywalking, attempted murders, long as you got the jaywalking doesn't matter about the attempted murder. There's just this intuition like that can't possibly be right. And so for the reasons that Jeff was talking about with the Dubin case, I actually think that intuition, regardless of the kind of methodology that the court is engaging in, I think that intuition often carries some force.

A Anya Bidwell 1:02:17

Yeah, and Dubin and Chiaverini, how do you say Chiaverini, Dubin and Chiaverini. They really do have that same theme. And also this idea of prosecutors having these tools that they can use that, you know, are very problematic. Alright, and the last thing that we want to talk about

use that, you know, are very problematic. Alright, and the last thing that we want to talk about today is the merits case that you guys will be arguing and you said Pam Carlin will be doing the oral argument in that case. So can you tell us about Garnier?

J Jeffery Fisher 1:02:52

Right, so Garnier is actually one of two cases the court has granted to explore how the state action doctrine applies to public officials who have their own Facebook or I'll say Twitter, I know it's X, but I'm just gonna say Twitter accounts, and the like. And so, so we represent a couple from from the San Diego area who were going on the website, or the social media accounts of two school board officials, who are elected public officials. And I'll talk about the two of them as if they're one just to make things simpler. But there are things like the official seal of the of their position and the official Facebook site of, you know, representative so and so. And for the listeners, this might sound like a familiar setup, if it makes it easy for you to conceptualize this, you know, our former President Donald Trump had his own Twitter account, that became the subject of a First Amendment lawsuit while he was in office. The Second Circuit held that his his use of that account, in fact, was state action. But by the time the case went to the US Supreme Court, he was no longer the president. And so the Court essentially dismissed the case. And so this is, you know, from the president now to the local school board official, in some sense, is the same issue. You know, if you're using your personal account, but while you're doing your job and interacting with your constituents, are you a state actor, and thereby subject most immediately to the First Amendment and any other constitutional restriction that might come into play? And the Ninth Circuit in this case held yes, they were state actors, and they violated the First Amendment by blocking the Garniers from their website, because because they had a right just like any other constituent to post comments and feedback you know about policy issues on the on the website. So the arguments as they go to the court are from the school or from the officials, they say "unless we are under a duty to have these sites unless we're doing it, you know, as as literally part of our job description, that we are required to run these kind of social media platforms, we are not state actors, and therefore we can do anything we want these sites." You know, we say no, the test shouldn't be that strict, it you shouldn't be under a duty to be doing social media, as long as you in effect are doing your job by interacting your constituents in this manner, this modern way in which in which political office officers interact with their constituents, you are a state actor. And so there's a couple of interesting things maybe to watch here. I mean, this is another case where I anticipate the arguments going to be like a blizzard of hypotheticals. You know, the other side says well, what if you're having a backyard barbecue, and you happen to be talking about your job? Does that mean that you can't exclude anybody from your backyard? And we say, no, no, that's private property. That's, you know, that's in all likelihood is going to be different. This is a public facing, open to all platform, you know, for interaction. So it's more like a town hall meeting with everybody invited, and no more can you cancel particular constituents and you could say, you know, no black people are allowed to come or no Jewish people are allowed to come or whatever else, because that would, that would transgress other constitutional boundaries. And the other thing that's interesting about the case, is that for all the Court's decisions over the years about the line of the state actor doctrine, who is a state actor, they're virtually all about private individuals being transformed into state actors.

A Anya Bidwell 1:06:59

Like private prisons, for example.

J Jeffery Fisher 1:07:01

For example, yes. Or others who contract with the government to carry out governmental services of all kinds, you know, when do they become state actors?

A Anya Bidwell 1:07:09

Blackwater.

J Jeffery Fisher 1:07:10

This is the inverse. This is somebody who is unquestionably a public official, arguing that because I'm acting in my private capacity, somehow, in my personal capacity, I'm no longer a state actor. And again, we don't dispute that if somebody has their own private page to say, here's my grandkids birthday party. Here's our trip to Hawaii last week. Obviously, they don't have a First Amendment constraints on that activity. But they do have constraints that kick in when they're, as we put it, doing their job of interacting with constituents, soliciting views on policy issues, posting safety protocols for the schools, as they were doing in this case, for example, all those sorts of things under the auspices of saying this is the official site of me as a of a school board official. So we think that makes things different.

A Anya Bidwell 1:08:01

Yeah, you brought up Donald Trump. So I'm gonna bring up Mark Meadows. So a big, big thing with Mark Meadows is he's making a similar argument about why the case should be removed to federal court, right? Where he's basically saying, I was not campaigning as a chief- when we were talking about Georgia electors, right, I was actually working as a Chief of Staff, when we're talking about Georgia electors. And the same thing here, when they're saying we were, you know, we also using this account, to campaign and not just to do our jobs. So, you know, therefore, we actually are not engaging in it as officials, and he's arguing the opposite he actually wants to. So could you comment a little bit on that to kind of bring the relevance?

J Jeffery Fisher 1:08:46

Well, I'm not deep in the weeds of the Meadows situation. But I think you're right in what you describe, certainly in this case, the other side is saying, campaigning is private activity, and some of what we were doing was campaigning. To some degree that probably comes down to a factual question of just looking at the content of these accounts.And I think it's probably right that campaigning, certainly before you hold office, and maybe even when you hold office, in some ways can be thought of as personal activity. But we don't think that's really what's going on here, insofar as you can distinguish one from the other when it comes to a elected official.

A Anya Bidwell 1:09:28

Is there a circuit split on this issue?

J Jeffery Fisher 1:09:30

Well, they said yes, in the petition. We said maybe not so much in our brief in opposition. The court took the case in a sense, it doesn't matter anymore whether there's a circuit split, but it's fair to say there's at least been different legal tests that have been announced by different courts. And whether they cash out to different results was debated at the cert stage. And it may not matter so much anymore, but the difference between the tests being given to the court right now, are that the other side says unless your job requires you to have this Facebook account and Twitter account, and to do you know, to say certain things on it, then you're not a state actor in any way, shape, or form. The last thing that we say is that, in some ways, it's kind of an odd way for the court to dip its toes into this area, because I don't think anyone disputes, and we're having this conversation right now, it doesn't take very long that you start to have hard questions in your head about where lines should be drawn. But the real question is, are those First Amendment questions? Or are those state action questions? And for us the state action question should be pretty easy. As I said, the court has never held that a public official doing their job is not a state actor. And that's just all that's going on here. Now, you can debate the First Amendment rules that ought to apply in this situation, you know, certainly a disruptive, you could have disruptive, expletive-laden posts might be able to be deleted certain circumstances, perhaps, you know, perhaps, there are other time, place and matter restrictions that could be imposed. Those are all First Amendment questions, but none of the questions are in front of the court, only the state action question.

A Anya Bidwell 1:11:13

Yeah. And you make that argument that essentially, it's a pig in a poke a little bit what they did, which is they've asked cert to be granted on the threshold question, and now they're arguing these other complicated First Amendment questions. Right. And the sort of the question is whether the court should even reach those questions, rather than simply answer the threshold question.

J Jeffery Fisher 1:11:39

Right. And I don't want to characterize the other side's intent at all, and much, not even their arguments necessarily. I think that what I would just say about our view is the court should answer the state action question alone, because that's the only issue in front of it, the only legal issue in front of it, and insofar as the other side makes arguments that, you know, if they're state actors, then they're unable to do all these things with their platforms and all the rest, you know, that doesn't necessarily follow. It skips over the First Amendment question or whatever other constitutional question would be there as a substantive matter. And that could be where the real action is. If you're troubled by any of those hypotheticals the other side gives.

A Anya Bidwell 1:12:18

Let me just ask you one last question. And it's related to a case that IJ had, and it's about the state action part of it not First Amendment part of it. We had this county engineer who didn't like a truck company, and decided to essentially retaliate against them. And he did it by using his company truck, and acting as a cop, not as a county engineer and stopping them on a highway. And there's several questions. One question is actually whether qualified immunity should be granted to somebody who is acting outside of the scope of their employment. But the other question is that whether it's a state action in the first place, because he is not acting, he's not acting as a county engineer. He's not acting as what his job tells him to do. But he is still using the power of the state and stops the trucks, essentially, as a cop. So how would you think through that kind of a problem in light of what you're arguing in this case?

J Jeffery Fisher 1:13:31

Well, the court has always said that, that somebody's using the power of their public position to to act on the citizenry, whether it be by arresting somebody, or harassing them, or whatever else, is still a state actor. So it's never been a defense all the way back to the "Screws" decision almost 100 years ago, to say, you know, that sheriff was acting beyond his responsibilities. If he was using the power of his office to do what he did, and his badge and his authority and whatever else, then he's a state actor. And that's, that's just core section 1983 law. And we think it helps answer the question here again, which is when the other side says was the person required by their job to do this, like, so what, it just it doesn't matter. It just matters, whether they're putting themselves out there and interacting with the public as the public official.

A Anya Bidwell 1:14:24

Well, that's a great point of agreement to end on.

J Jeffery Fisher 1:14:28

Always happy to support your arguments.

A Anya Bidwell 1:14:31

Best of luck with all that you have going on. We'll be watching, and maybe we'll do this again, at some point in the future. And when you have seven petitions, and you know, 17 cases before the court. Thanks so much, Jeff. And thank you Easha, for being here. And thank you for listening.

J Jeffery Fisher 1:14:49

Thanks so much.