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SPEAKERS

Andrew Hessick, Anthony Sanders, Justin Pearson

A **Anthony Sanders** 00:24

Hello and welcome to Short Circuit. Yes, this is our sixth annual Short Circuit. Live at the University of North Carolina, School of Law. We are so happy to be back in Chapel Hill, where we're here again for the sixth time in a row to talk about the upcoming Supreme Court term. That's OT 22 what's new in OT 22 what we're going to learn from a couple of our great panelists who are here today. They're the same panelists we've had a couple years before. They have shown their prowess in Supreme Court trivia, which I'm going to test them with again today. For those listening who aren't familiar with the podcast, my name is Anthony Sanders. I am the director of the Center for Judicial Engagement at the Institute for Justice, and here alongside me is my colleague, Justin Pearson. Justin is the Managing Attorney of our Florida office in Miami, Florida, and he is the leader of our economic liberty work at IJ. And otherwise he is a proud Floridian and a leader in his legal community. But you know who else is in a legal community of sorts that is this law school is Professor Andrew Hessick. Professor Hessick is the Judge John J. Parker Distinguished Professor of Law and Associate Dean for strategy and planning here at UNC. And he's always a good sport to sit down and be grilled by some of my trivia questions. So we're going to go like this, we're going to have a few rounds of trivia. We're going to alternate who gets a question, but if the person gets it wrong, it goes to the other contestants, and then they can take that point. We're going to do a few rounds of that. How many? I'm not going to tell you. And then when we're done, and we have a winner or no winner, because no one gets anything right, we'll just go on. So Are you two ready?

J **Justin Pearson** 02:26

As ready as I'm going to be, exactly.

A **Anthony Sanders** 02:30

Well. I have a list of questions. Now. when Justin does this. we do this at another school that I

will not name, that is not recorded. Justin pulls questions out of a bag in a true random simulation. I myself didn't do that, and I couldn't afford a 10 sided die, so instead, I have a random number generator here on Google that we're going to use to produce the questions. And the first question is question number nine, and the first question goes to Justin, United States vs.Texas, which is on the Supreme Court's docket for this this term is the latest in a series of fights about immigration. These were going on even before President Obama announced the Deferred Action for Childhood Arrivals program a number of years ago, but they've definitely intensified after that. It seems like one ongoing, just United States v. Texas, and I can't tell even what they're litigating about anymore, but since the DACA program was adopted, how many Texas solicitor generals has the state gone through which all of which lead these cases?

J Justin Pearson 03:50

I'll guess four.

A Anthony Sanders 03:53

That is correct. I'm gonna give a bonus. We'll go to Professor Hessick for his own question. I'm going to give a bonus to Professor Hessick if he can name all four.

A Andrew Hessick 04:06

How about no, I cannot.

A Anthony Sanders 04:09

It was total luck. Question number one, now, Sackett v. EPA is a another long running case. It was last at the Supreme Court in 2012 over where, whether this family, the Sacketts, who are just trying to build a structure on their property in Idaho, could even appeal an order that find them with potentially ruinous fines by by the EPA. Now Justice Scalia wrote the opinion for the court in 2012 and he said that the the Sacketts, yes, could appeal. That order, how many votes, including Justice Scalia's, were against the EPA in that ruling? They were Jonathan Mitchell, Scott Keller, Kyle Hawkings, and Judd Stone. So we have Justin with one. And now on to our next question.

A Andrew Hessick 04:20

I'm gonna go with five.

A Anthony Sanders 04:20

The answer. Well, Justin, do you know the answer?

J Justin Pearson 04:20

I'm gonna go with seven.

A Anthony Sanders 04:20

The answer is nine. Nine-zero against the Obama Administration, which was not unusual in those days, because nobody thought that if you were threatened with potentially ruinous millions of dollars of fines that you can't even appeal that. So we have still just one for Justin. So far, few more questions here. We're going to move on to the next round. Justin gets this one in 303 Creative LLC v. Elenis, the Tenth Circuit ruled that the anti discrimination law at issue in Colorado was constitutional under the First Amendment because it furthest furthered, what governmental interest. Be a little specific here.

J Justin Pearson 06:08

Equal access to publicly offered services.

A Anthony Sanders 06:10

Professor Hessick, can you give me a better answer?

A Andrew Hessick 06:13

How about no discrimination in public accommodations?

A Anthony Sanders 06:17

You guys were both basically right? So I'm going to give you both a point, but really the answer was that it overcome the monopoly power of artists about their own artwork. So what the Tenth Circuit said was that this woman who has websites for weddings, and she refuses to do websites for for same sex weddings, that her own artwork, which by definition, is done by her, is a monopoly because no one else is her, and therefore, to overcome that monopoly power, she had to offer these websites to same sex couples. It's a bit of a stretch, little bit of a stretch, but we'll see what the Supreme Court says that reasoning probably does not survive. Okay, next, next question, which is for Professor Hessick, is Mallory v. Norfolk Southern Railway concerns, among other things, the applicability of a 1945 case, International Shoe v. Washington, and it's about contacts that the state has and when you can sue in a state. Now international shoes salesman at issue in that case worked in Washington State, hence the case name. But where was its principal place of business?

A Andrew Hessick 07:40

It was in St Louis, right in Missouri.

A Anthony Sanders 07:44

Missouri is correct. That's right. It was, it was registered, as they all are, in Delaware, but its principal place business was in Missouri. Okay, so at the end of this round, we have a Justin with just one. Well, Justin with two, and Professor Hessick with two. So it is very close. Let's see if they can break the log jam. Justin this case on the October term 22 docket will be famous for 15 minutes.

J Justin Pearson 08:16

That's the Andy Warhol Foundation case about the photograph of the musician Prince and whether Andy Warhol transformed it.

A Anthony Sanders 08:25

Right, Andy Warhol Foundation v. Goldsmith. Of course, he famously say, said, everyone will be famous for 15 minutes today, it might be more like 15 seconds if you spend time on Twitter, but that is going to be an interesting case for him for intellectual property. Okay, we're going to do another question here, and this one goes to Professor Hessick, who might know a little bit about these cases. I'm going to talk about Harvard and the University of North Carolina are defending discrimination lawsuits at the Supreme Court this term. Now, the case, these cases largely rely on a precedent called Bakke. What school did Mr. Bakke want to attend in that famous case?

A Andrew Hessick 09:12

That's a good question. I'm just going to throw one out. Is it UCLA?

A Anthony Sanders 09:18

It is not that school that is, for some reason, joining the big 10. Justin?

J Justin Pearson 09:29

Was it the University of Michigan?

A Anthony Sanders 09:31

It's not. It is UC Davis Medical School, so Professor Hessick was close, but not close enough.

A Andrew Hessick 09:38

Well, yeah.

A Anthony Sanders 09:40

By my count, we're we're now with three with Justin, two of Professor Hessick. I think we're going to call it a day, but I think they don't both did a very good job with what your questions were, not exactly about the cases this term, but we're close enough. So thank you, and let's give them a round of applause. Now they're gonna know a little bit more, I hope, about these cases, which they're gonna preview for the term. So Justin, let's start with you. What do you wanna talk to our students about?

J Justin Pearson 10:14

So I'm going to talk about National Pork Producers Council v. Ross and one of the reasons I picked this case was because it gives me an opportunity to talk about the Dormant Commerce Clause, which is near and dear to my heart, because IJ has actually won two US Supreme Court cases based on Dormant Commerce Clause arguments, including one of my favorite cases ever, the Granholm case, where states were only allowing direct to consumer shipments of alcohol for in state producers. And that case went a long way towards opening up the types of clubs that I like to be a membership in where you get like, you know, craft beer of the month or something like that. And so that that that case is one of my favorites. But cases like that typically and Dormant Commerce Clause cases generally deal with that type of situation where it is a state government favoring in-state producers and discriminating against out of state producers. But every now and then, and it's pretty rare, there's another type of Dormant Commerce Clause case, and that's what this National Pork Producers Council case is about. It's primarily it's got a couple issues, but the one I'm interested in is this idea of extra-territoriality, and what that basically means is that a state legislature can only pass laws governing conduct for its own state. It can't regulate conduct going on and other states well. And that sounds simple enough in theory, but it can actually get quite complicated, and that complication is added to by the fact that there are only a few US Supreme Court cases applying the doctrine of extraterritoriality. And so we know that this idea exists. We know it's part of the Dormant Commerce Clause jurisprudence, but it hasn't really been fleshed out very well. And so this case will be an opportunity for the Supreme Court to talk more about it. And basically what happened there is, it's actually interesting also for another reason, which is that I hate trade associations. And this was a situation where a trade association is subject to a law that it doesn't like. But despite that fact, I think that they're probably right here. And the reason why I dislike trade association so much is I spend all of my time representing small business owners. And I think sometimes people think that the way it works is it's the government going against big business. But that's not really what I see. What I see is big business weaponizing big government to hurt the little guy. Then I come in representing the little guy challenging the law that big business was able to get passed, and the giant trade associations will often intervene to help the government defend against my challenge, or they'll at the very least file an amicus brief asking the court to rule against my clients. And so I just have this well earned dislike of trade associations. And so on some level, this situation made me smile, because what happened here was California has very few pork producers, and so the National Pork Producers Council didn't have the type of power with the state legislature in California as they do in some

other states. And as a result, some animal rights groups were able to get a very strict law passed that they bragged about as being the strictest in the world, and that would cause all of the pork producers everywhere in the US to have to change the way they do things, even the best, smallest, organic, all natural Pork Producers still wouldn't meet this new law and still would have To change and but there were a few pork producers in California. Depending on which stats you look at, it's either 99.8 or 99.9% of pork production happens outside of the state of California, but there are a couple pork producers in California. And so what California said was, hey, we have some pork producers in our state, so we can regulate them, and for the people who produce pork in other states and want to sell in California, well, a condition of selling in California is that you have to follow these laws, these ridiculous they don't think it's ridiculous, but these extremely strict laws. And so then this becomes complicated, right? Because A, they do have at least a tiny number of pork producers in California and b What they're saying is, well, we're not really regulating conduct in other states. We're regulating conduct of people selling in our state, even if that conduct happened in other states. I think this is the type of case where the Supreme Court granted it in order to reverse the Ninth Circuit which is often true when the Supreme Court grants cert for Ninth Circuit cases. And I think that despite my dislike of trade associations, I think the Pork Producers Council is going to win here, and I should be happy about that, right like it's important in today's society to remember that the precedent that's created for your friend one day is going to be used for someone else the next day. Too often we just. Want to respect the constitutional rights of our friends, and we forget about the impact of the precedent. And so despite despite my dislike of trade associations, I'm telling myself that I'm happy that the Pork Producers Council is probably going to win because that I think that's the right way for the precedent to go, and at the very least, we are going to get some much needed guidance from the Supreme Court about this doctrine of extraterritoriality, because, like I said, there haven't been that many cases, and so it'll be great to kind of hear some more about it from the Supreme Court.

A Anthony Sanders 15:29

Justin, if I could ask a question, do you think the court is gonna rule on extra territoriality grounds, or more, on an effects grounds? Either that it's the effect is so huge it constitutes discrimination, or even under the kind of the lower standard the Supreme Court sometimes has called pike balancing, that this is just so over the top that it's unconstitutional.

J Justin Pearson 15:51

The thing with pike balancing is it's a pretty deferential test. Sometimes we litigate pike balancing cases at IJ, and it's, you know, a stronger burden than, like, a rational basis case, but it is still pretty deferential. And so you're right, Anthony, they could rule on pike balancing grounds, although under pike balancing I'm not so sure it's unconstitutional. I wish it would be. I wish the pike balancing test were stronger than it is, but I think they're probably going to go with extraterritoriality, but I could be wrong. I hope I'm right, though, because we really need much more guidance about that issue that has been litigated so rarely at the Supreme Court.

A Anthony Sanders 16:31

Okay? And now we're gonna go on to Professor Hessick and his preview.

A Andrew Hessick 16:37

Thank you. So I'm going to do a North Carolina case, of course, and it's Moore v. Harper, and this is the latest case before the court on the issue of partisan gerrymandering. So under Article One, Section Four of the Constitution, there's a provision that says that the manner of holding elections for Senators and House of Representative members shall be prescribed in each state by the legislature. So this is the clause that lets the states divide themselves into different congressional districts to determine how they're going to elect members of the House. Now, of course, the ability to draw the maps though, into these districts, it raises the threat of gerrymandering and and that happens all over the place, right? It's happened in North Carolina. It's happened in other states. So challenges are frequently made and saying, this, this map favors to one party too much, right? It favors Republicans or it favors Democrats too much, and it's gone before the Supreme Court. And the Supreme Court has said, under the federal Constitution, we we're not going to strike this down. We think that there's no manageable standard for evaluating whether or not a map is too partisan, and so it's a political question, right? They hinted at it in pluralities for a long time, and finally, in 2019 in this case Rucho, they said it's a political question. So what does that mean? It means that you go to the states, right? You go to the state courts and raise state constitutional challenges in order to to challenge partisan gerrymandering and and that's what's happened here in North Carolina. Some Democrats who don't like the map that favors Republicans. They've raised a North Carolina constitutional challenge, arguing that the that the districting violates the free elections clause and other clauses of the North Carolina constitution, and the North Carolina courts, in particular, North Carolina Supreme Court, agreed, and it struck down the map, and then it, there was some back and forth, and eventually, the North Carolina courts, they adopted a map that differs from the map that was put forward by the legislature. And they did it pursuant to a provision. There's a statute that says if the legislature doesn't put forward a map, eventually that's lawful, then eventually the courts can adopt their own interim map, and, and that's what's happened here. But now there's a federal question, and this is the big question for the Supreme Court, and that's, can the North Carolina courts do that? Because remember Article One, it said that the manner of setting these elections, that's for the legislature and and the courts, not the legislature, right? So the court, it not only struck down a map right, it rejected a map. It also adopted a map that differs from what the legislature said. So, that's the argument says they're not allowed to do this. And then sort of the argument on the other side is, well, the Constitution says that the legislature gets to set the manner of determining these districts and and the court. It just followed that manner. It sort of implemented that manner, right? It didn't just draw a new map out of nowhere, right? There's a statute that says that prescribes the procedures for making a new map. It says the legislature gets to do it, and if the legislature messes up, then the courts come in and the courts can replace, replace it with an interim map. So the argument is, well, they didn't prescribe a new manner. They just sort of like implemented the manner that was put forward by the by the state legislature. So the issue is interesting. It's complicated. There are actually a lot of federalism questions that are going to come up in it, because they're going to be questions about whether North Carolina Court followed North Carolina constitution? Or is it sort of compelled by the North Carolina constitution, or they sort of start recognizing new things under the North Carolina Constitution? Because if you do that, one could say, well, maybe they're sort of acting like a legislature. The response to that is, of course, under federalism, Erie, you should just sort of defer to the North Carolina courts on North Carolina law, but, but still, one might say, well, we could defer, but it's still sort of legislative in nature. It's really unclear what's going to happen in this case. I think, I mean, the granted cert, which is an indicator that it's going to go more towards saying the

North Carolina courts couldn't do this, but earlier on, back in March, there was a denial of a stay, and three justices, Alito, Thomas, and Gorsuch, indicated that they think that there's a real problem here with the courts doing it. But the other justices haven't, sort of tipped their hand yet, but at least one other did join to grant cert. So so I'm not quite sure what's going to happen, though, and I wouldn't be surprised with either outcome.

A Anthony Sanders 22:12

Professor Hessick again, I'll have a moderators prerogative question here. So one, this is a fascinating case in all kinds of issues going on. One question that I would want to ask the proponents of this doctrine, the independent state legislature doctrine that are are such as the North Carolina officials in this case, is i It seems like they're argued some of the time they're just arguing the Supreme Court. North Carolina Supreme Court was way out of line. And there's these really vague wording in the North Carolina constitution that they kind of latched onto and did essentially judicial activism on steroids. But then the logic, if you take that logic, it doesn't seem like there's a stopping ground between that and something really strong, like the North Carolina constitution actually lays out exactly how you do redistricting, and the legislature can just totally ignore that, because it has this like superpower that the federal constitution gives it and insulates itself from the Sovereign People of the State creating their own constitution, which does not sound like something that James Madison and Alexander Hamilton would have been into. So, where do you think like the, to borrow a phrase from a number of years ago, where is the logical stopping point, where is the principle that could be drawn there or does it seem like that side has come up with a principle yet because I can't find one.

A Andrew Hessick 23:50

Yeah, I can come up with one, but I'm just, like, making one up. But I think it's probably going to be a know it when you see it. I guess you could say, oh, well, if it's, if it's something that's not in the text, and then you're sort of inferring it somehow, then then that's, that's different in kind, because it's the courts making up law. And we're gonna say that's legislative in nature, but I don't think that's a particularly defensible test, but I could imagine someone saying something like that.

A Anthony Sanders 24:20

Then the phrase I was looking for was limiting principle, of course. Okay, so that now we're gonna go to the cert petition stage of the show. Now many you know this, but some one else might not know that how almost all cases these days get to the Supreme Court is through a cert petition, a petition for certiori, and very few of those are granted. I think it's 1% and then if you take out pro se ones, where usually it's prisoners have written them themselves, it's only as high as like 2% and they're going to talk about a couple cert petitions, though they hope are. Much higher than that 2% and that are also quite interesting, and that hopefully the court will be addressing. So Justin, let's start with you.

J Justin Pearson 25:10

I'm going to talk about one of Us clients. This is a cert petition that's pending right now out of

I'm going to talk about one of IJ's clients. This is a cert petition that's pending right now out of the Eleventh Circuit. Our client is a diet coach in Florida named Heather Kokesch Del Castillo, and the question presented, is an interesting one where there's a circuit split, and it's a question of whether someone who talks for a living is speaking or engaged in economic conduct. And this is an issue that, not that long ago, was considered pretty well settled at the circuit level as being conduct. There was something created at the circuit level called the professional speech doctrine that basically said, if you were a professional getting paid for your speech, it wasn't really speech anymore. Now at IJ, we realize that that doesn't make sense, right? That's not how your First Amendment rights work in any other context. I mean, could you imagine courts telling the New York Times that it wasn't protected by its First Amendment rights because it charges for its newspapers like that's not how your is a corporation, right? And so, our colleagues at IJ realized years ago that the whole professional speech doctrine was just wrong. And so IJ started bringing cases showing this some of the most famous examples involved tour guides. My particular favorite one was in Savannah, where our client gave ghost tours, but the city said that he had to take a bunch of tests before he could tell people ghost stories. And so we were described as being crazy. In fact, Dean Post, the dean of Yale Law School actually wrote a larger article, saying how wrong we were, but we knew we were right, and we stuck with it, and we started winning these cases at the circuit level. And then in 2018 in a case called NIFLA that has to do with pregnancy centers in California, it wasn't an IJ case, but we were completely vindicated. The Supreme Court entirely adopted our approach and said the professional speech doctrine wasn't a thing. It was never a thing. The circuit courts were wrong. You don't lose your First Amendment protections when someone pays you for your speech, and that's great for many reasons, one of them being we had multiple cases going on around the country, about that very question, and then we could go to either the district court or the circuit court, and say, Hey, see, we were right. And usually it worked. In several instances, the courts realized that the precedent had changed, that it had been abrogated by the Supreme Court's decision in NIFLA. So, for example, we had a case in Texas at the Fifth Circuit representing a veterinarian who gave advice over the internet, and all of a sudden, the Fifth Circuit said, our precedent is wrong. We had a case in the Ninth Circuit representing someone who was teaching people how to put horseshoes on horses, and the same thing the Ninth Circuit said, Oh, it turns out IJ was right, after all, according to the Supreme Court. But then there was one circuit court that went in a different direction, and that was the Eleventh Circuit in this case, on behalf of of our diet coach client. Now it's undisputed that everything she does is talk, right? She's telling people, you should eat healthier, show me your food journal and things like that. It's undisputed that what she's doing is speech. And what the Eleventh Circuit said, well it's true that the professional speech doctrine is no longer a thing, but we're still going to rule against her, and the way we're going to do that is through something called the incidental speech doctrine. And so for those who don't know, that's the idea that if the underlying conduct is illegal, then speech kind of furthering that conduct can also be regulated, and it's not really a speech restriction. For example, one of the most famous examples is if an employer puts up a sign that says minorities need not apply for this job, well, what's really going on is they're breaking the law in their discriminating hiring practices. And so the fact that that sign is also illegal is it's an incidental restriction. It's not really a speech restriction, according to the Supreme Court, and what the Eleventh Circuit did was they took that incidental speech doctrine and stretched it further than I've ever seen before. What they basically said was that even though everything she does is speech, the regulation restricting her speech is part of a larger regulation involving occupational licensing, and some of those regulations involve conduct. And so this is an incidental restriction, and the First Amendment doesn't apply. Like in my view. I know I'm biased, but that's just indefensible from a doctrinal standpoint. It also creates a circuit split, where the other circuits I talked about, who all recognize that IJ was right, after all, which is usually the right decision. And so now, we've got a

circuit split. We've got an interesting First Amendment question that affects people across the country, it has many of the criteria that the US from court looks like when it decides whether to take a case. And on top of that, the Court recently ordered the state of Florida to respond to our cert petition. And so because, because cert petitions are so rarely granted, and also. Because there's no penalty for waiving your response. What experienced Supreme Court litigators do when they're defending a cert petition is nothing. They waive their response, because then what happens is, most of the time, the cert petition gets rejected by the Supreme Court, and even if the Supreme Court is interested, then at that point, the Supreme Court will call for a response, and all that's happened is now the person opposing the cert petition got basically a free extension of time, so there's no penalty. And also, because of that, the experienced practitioners realized that if you actually answered the cert petition without waiting to see whether they call for a response, you come across as looking overly defensive. And so our opposing counsel correctly understood that they might as well waive their response. But the other day, at least one of the justices or one of their clerks called for response, so now they have to respond. It doesn't mean our cert petition is going to be granted, but it does mean we have a chance and and perhaps way more than a 2% chance, although still less than 50/50, but, but whether it's this case on behalf of someone who's purely just talking to people about their diets or some other speech case. There is a circuit split now, so the supreme court's going to need to weigh in eventually, and hopefully they will say, hey, we meant what we said in NIFLA, and you can't get around our holding just by mischaracterizing it as incidental speech.

A Anthony Sanders 31:13

And there's another weird case that kind of didn't ignore that precedent from the Ninth Circuit recently, and we're going to be hearing about that case next week on Short Circuit, live from David Lat, who is going to be joining us at Short Circuit live at Columbia. So speech and speech two weeks in a row. That'll be that'll be great. Let's go to Professor Hessick now for his 2% chance.

A Andrew Hessick 31:37

So I'm going to talk about Moses v. United States, another case out of North Carolina. So it's a criminal law case, but really it's an administrative law case. So Lenair Moses was caught dealing crack in Raleigh. He pleads guilty. Now the offense, it carries a sentence of two years. So he goes sentencing and carries sentence around two years, but then the court looked to his criminal history and and saw that Moses had two prior felony convictions, and that makes him a career offender under the guidelines, and that bumps his sentence to 12 to 15 years, right? And that's obviously a huge difference. So Moses, he says, Well, look, one of these two priors, it shouldn't count. In particular, he said, In 2013 right? The second of the priors, it was for for distributing cocaine and and it just shouldn't count. And his theory is this, he's like, look under the guidelines, conduct can either be considered part of my current offense, the thing that you are sentencing more me for right now, or part of my prior offense, right? It can't be both right. The guidelines say that, and he says his 2013 conviction, it's part of his 2018 conviction, the one that he's that he's being sentenced for right now. And he does that because there's this other part of the guidelines that says, when you're looking at the offense of conviction, so your 2018 conviction, you have to look at all relevant conduct, and that includes anything that's part of the same course of conduct, or the same scheme or same plan. And he's like my 2013 dealing, that's like part of my 2018 dealing ideal, right? And and so it should be counted as part

of the 2018 and not part of the 2013 if it's not 2013 then that's not a prior felony can't work against me. And the Fourth Circuit's like, well, that's plausible. That might even be that might even be unambiguously correct under the guidelines, right? They say that it's totally possible, but they say we're still going to count the 2013 as a separate prior felony conviction. And the reason is that even if the guidelines, if we read the guidelines in your way. There is guideline commentary, right? There is separate commentary to the guidelines that says, No, if you've been sentenced based on some facts in the past, those facts will go towards your prior it's not going to be considered relevant conduct to the current offense. So are you saying there's guidelines for guidelines? There are guidelines for guidelines? Yes, exactly, yeah. So the commentary is this official description explanation that accompanies the sentencing guidelines, and the commentary is published by the Sentencing Commission, right? So and so the Fourth Circuit's like, okay, so we have the guidelines go one way the commentary go the other way. We follow the commentary. And you're like, Well, why? And that's because, back in 1993 the Supreme Court in this case Stinson versus the United States, they said commentary is binding and and they say that even when the the guidelines are unambiguous, you should. Follow the commentary because it sort of explains to you how you're supposed to apply it. You're like, why is the commentary binding? And there's the admin part. It's based on an analogy to this. This doctrine called our deference, right? So in administrative law, there are two major forms of binding deference. The first one is so you have a statute, and when an agency writes a regulation that interprets that statute, that interpretation can be binding under something called Chevron deference. Then Auer deference occurs when the agency's own regulations are ambiguous, and then the agency interprets its own regulations. That interpretation, the agency's interpretation of its own regulations, that's binding under this Auer deference and the court said, Look, guy like commentary is just like interpretations of regulations in the show it should be binding. It's just, we're going to go a little bit further and say and say that it applies even when the guidelines unambiguous. And so the question before the court this petition, Moses petition is like, No, right? You should follow the guidelines, right? You should follow the guidelines instead of the commentary. And his theory is, more recently, there's this case called Kisor that limited Auer deference, and it said, it said, Look, Auer deference really shouldn't apply unless there's a true ambiguity, and only if there's a true ambiguity should you be deferring to the agency's interpretation. He's like, Well, that's not this, right? You drew an analogy to Auer and Auer has now been limited, so you should no longer follow that logic. And it's generated a circuit split. Some circuits go this way, some circuits go that way, and other circuits go a third way, and and so that's attractive, obviously, for the court. But I think there's another reason, there at least two other reasons I can think of why it might be attractive. One of them is that there's a sense that the courts looking to cut back on deference here. And there's maybe Chevron deference gets attacked some. And Auer deference definitely got limited in Kisor and if you're going to limit deference, it seems like a good place to do it would be, would be here, given that you're in the realm of criminal law, right? And there's deference is sort of more rare, let's say, in criminal law and the guidelines, they're strange. There's no notice and comment. They just get to make these guidelines, and they have the force of law, and then, and then there's deference to it. And since there's no notice and comment, there's sort of, there's more worries about giving deference. And the third thing is just that the guidelines are in a really weird place right now. Stinson was decided back when the guidelines were binding and they were law, they're no longer binding. They're still law, but they're less law-y and so I don't even know how Auer deference plays out with respect to that. Maybe it doesn't matter, but I could also generate an argument being like well that I totally changes everything, and so we shouldn't give anything the force of law when we're looking at the guidelines.

A Anthony Sanders 38:10

Where's that in the cert process?

A Andrew Hessick 38:15

Petitions been filed, responses waived, but then the court called for a response. So we're, I think we're on, like, maybe first extension.

A Anthony Sanders 38:25

We'll epeat the question for the benefit of podcast listeners. Great question right there, Justin.

J Justin Pearson 38:30

It is a great question that I'm happy to answer. And the question is, I'm going to paraphrase, but basically it's whether being in a post Dobbs world is going to impact the US Supreme Court while it is deciding the National Pork Producers Council case and the Dormant Commerce Clause case. Because as hopefully, many of you know, what's going on now is there all these discussions at the state legislative level about whether they can criminalize people like traveling out of state to get abortions and come back? I think that definitely will be to answer the question. I think that definitely will be in the minds of the justices. What's interesting is the Justices themselves seem to just assume, at least, if you look at like Kavanaugh, concurrence in Dobbs, they seem to assume that everyone recognizes that those types of laws would be unconstitutional. I don't know if that's a safe assumption, but what it does indicate is kind of where the Supreme Court's coming from, and so it's possible that the Supreme Court might just think that those cases won't make it to the Supreme Court, and so they won't have to engage with them too much. Now, of course, if a circuit court goes the wrong way, I think they would take it, but if the circuit court kind of reads the Kavanaugh concurrence and thinks it through and rules in a way the Supreme Court likes, I think the Supreme Court would just deny cert and so maybe they're hoping that they just won't have to deal with it, and that way they won't really have to bear it in mind too much when writing the Dormant Commerce Clause opinion in the National Pork Producers Council case. But these are smart people. They know there's at least a risk that some circuit, like the Fifth Circuit or something, might might rule the way that the Supreme Court thinks is wrong, and they might have to take it. And so yeah, they're going to be very careful. I mean, they're always careful, but at least some of them are going to have that thought in their mind. So it's very observant of you to ask that question, and they're going to make sure they don't paint themselves into a corner. Absolutely.

A Andrew Hessick 40:24

It's genius.

A Anthony Sanders 40:28

All right, so we're going to go to the next question. Well, look who's here. It's professor Carissa

All right, so we're going to go to the next question. Well, look who's here. It's professor Carissa Hessick from UNC Law, who has joined us today. What is your question, Professor?

J **Justin Pearson** 40:42

So the question is, what can I say now that will come back to haunt me later? No. More specifically, it points out correctly that sometimes there are very legitimate health and safety interests at play, even when regulating speech and the speech of professionals in particular. And so I'd like to start off by pointing out that just because something because something is speech doesn't mean it can't be regulated, right? And so the key case we tend to look at for this speech versus conduct distinction is a case called Holder v. Humanitarian Law Project, where I don't want to go off too far on a tangent, but basically it was lawyers giving advice to groups on a terrorist that basically were terrorist organizations, but not about the terrorist activities.

A **Anthony Sanders** 41:24

Not as not as scary as people eating food, right? It's still pretty bad, right?

J **Justin Pearson** 41:27

And to make a long story short, the US Supreme Court said that that advice that these lawyers wanted to give was still speech, even though their lawyers, however, the safety concerns were compelling enough that the law was still upheld. And so to me, that's the limiting principle. It's you can't get around the doctrinal analysis by saying that speech is not speech. What you have to do is analyze it under the First Amendment protections to see whether it's still constitutional or not under the free speech analysis. And I think that's how it should be. The second part of my answer is, I wanted to kind of hopefully relieve your concerns a little bit. The type of diet speech that our client Heather was giving in Florida was legal in most states. In fact, she was a military spouse, and she lived in California before moving to Florida when her husband got transferred, and what she was doing was perfectly legal in California and became illegal when she moved to Florida. Like if you have a regulation in your state that doesn't exist in California, you're doing something wrong, and no one. There's no evidence at all that in the majority of states where this is unregulated, anyone's been hurt, you know? And in fact, you could think about it this way if she had written the exact same things in a book that she told people face to face, that also would have been okay, even in Florida. And so I think sometimes, sometimes we were too quick to kind of think of worst case scenarios and fall for the parade of horribles. I could tell you, in all of IJs cases, we would never represent someone who's actually hurting people who or who is like defrauding people. And so I think a lot of the practical concerns that do seem reasonable at first end up not to hold water when you look at the evidence. And so that's really a two part answer. The limiting principle is, if it's speech, it's speech, and you have to look at it under the Free Speech principles, and maybe it's constitutional, maybe it's not. But the second thing is, I just want to get on the record. Want to get on the record that, like, when Heather was in California, no one was hurt. There are lots of other people in California and other states doing what she wants to do in Florida, and no one's being hurt by that. Just because there's some hypothetical situation where someone could, in theory, be hurt, doesn't mean that government involvement makes the world safer.

A Anthony Sanders 43:41

We have time for a couple more questions. There's one back here.

A Andrew Hessick 43:47

So the question is, if the if the court agrees that the commentary is not binding, then what happens to all the people who have been sentenced before under the commentary? So under the binding commentary do all their sentences have to get reviewed, etc? And it's a good question. It's a question that breaks into two categories. There's one category, or the group of people whose convictions aren't final, in the sense that they still have appeals going on. And the new law would apply to those people because their convictions aren't yet final. And so the sort of the court that's next up the chain can can apply the new law and say, Oh, the commentary is not binding. Remand sort of fix this problem. Different group of people, the group think you're concerned about, are those who whose convictions are final. They've been in prison for a few years, or something like that, and then they now file a habeas petition, or the equivalent under the federal system. So for those people, we have rules against retroactivity. That says we're not going to apply these. If things weren't, and it sort of breaks in half, it's sort of things that were deemed to be criminal and now are deemed not to be criminal, like we messed up on what is criminal, those people can have their conviction sentences reviewed, but when it's just sort of other types of changes, they tend not to allow retroactive review, because otherwise, you're right, it might cause all sorts of problems. Now Congress can authorize those things, maybe, but outside of that right, then we typically don't allow that kind of review.

A Anthony Sanders 45:44

Anyone else in the back? That will be our last question.

A Andrew Hessick 45:48

First, we should probably repeat the question. Yeah. I'll just repeat the question. The question is, if the court holds in the UNC and Harvard cases that race can no longer be considered in admissions then what can be done in order to achieve admissions goals?

J Justin Pearson 46:10

I think one of the things that was most interesting to me in the briefs, speaking as a first generation lawyer, was how the petitioners pointed out that if you got rid of legacy acceptances, you would have just as much as diversity in the student population, without needing to do these things that are being challenged now, of course, schools hate getting rid of legacy applications because they get a lot of donations and things like and so they don't want to do the right thing, And they're fighting tooth and nail to find a way to get to the same result without having to get rid of the whole legacy program. But one thing they could do, if they wanted to, was just get rid of legacies, and they would have even more diversity than they do today, and even if the Challenge program went away. So that's one thing they could do. And

then I think your question also asked about enforcement, but it's actually not quite as hard to see what's really going on as you might think because of like, Freedom of Information Act requests and discovery litigation. I think one of the interesting things that came out in this litigation was that the Supreme Court has been warning schools that this was kind of a temporary approach, and that they needed to start kind of weaning themselves off affirmative action and take like steps towards that. And in the discovery in these cases, it came out that the schools were making no effort whatsoever to do anything that Supreme Court was telling them to do. And it's all public. It's all in emails and memos and stuff. They they were not following Supreme Court's directions, and that might come back to haunt them in this argument and in a future case, let's say, for sake of argument, you know, the Supreme Court rules the way that we think they probably will. In a future case, you could also get all that information in discovery and in FOIAs. Now it doesn't mean that certain sophisticated actors won't make sure to say things verbally so there's no record. But the way academic bureaucracy works like there's only so much that can be hidden that way, at the end of the day, it's all going to be discoverable.

A Andrew Hessick 48:06

Yeah, I think that I agree with everything that that Justin said, as much as I know about it, but I will say one thing that, one thing that we see is that in order to satisfy the tests that the courts laid out in the past. They have to come up. They have to examine non racial alternatives, to see other ways of doing admissions and and UNC and Harvard right? They they've done those things and and they don't achieve the goals quite as much as you know the considerations of race as well, but they achieve them pretty well, right? And so you can get a lot of the way there through these alternative means. And then you could imagine other things that they could do, like outreach programs, etc, which they've talked about. And they do some, and there's always, like, room for doing more, and so. And so, it looks like it one of the questions before the court is like, how close can we get through these alternative means? And like, is it, can you get really close, or is it still pretty far away? And that's part of the dispute. But no one should think that you can't get at least kind of close. And so then things will just change and they'll sort of deal with it from there. But we shouldn't think that diversity can no longer be achieved if the if race is taken off the table.

A Anthony Sanders 49:35

I'd like to thank all of you for coming. I'd like to thank the UNC Federalist Society chapter for hosting us again six years in a row, this has been a fabulous partnership. Our panelists for their erudition, and I hope that everyone gets engaged.