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SPEAKERS

Justin Pearson, Ben Field, Andy Hessick, Audience member

J **Justin Pearson** 00:13

Hello Carolina law! [Cheers]. That's right. We're back here in Chapel Hill for the Eighth Annual IJ / UNC FedSoc SCOTUS Term Preview. I'm so happy to say that we're back here for the eighth year in a row, like I just mentioned. And you know, this event is up to six law schools, where we now hold this event at top law schools around the nation. But UNC was the first. This is the granddaddy of them all, as far as this event is concerned. So this is always the one that we record for our Short Circuit podcast. And I'm joined by two distinguished panelists today. First, as always, going back to year one, one of the panelists is Professor Andy Hessick. Professor Hessick went to Yale Law School. He clerked for Judge Raggi on the Second Circuit, Judge Randolph on the DC Circuit. He's also an Associate Dean here at UNC. He's done all sorts of impressive things before coming to UNC and as a professor and Associate Dean here at UNC. But mostly what I want to talk about is UNC's Supreme Court program, including the tremendous victory you all had last term, and my skill in predicting that victory. [Laughter]. So Professor Hessick, can you talk a little about the program and how smart I am?

A **Andy Hessick** 01:25

Congratulations. [Applause]. Yeah, thanks, Justin, thanks for having me on again. So the Supreme Court program is a clinic-like program at UNC, where students work with me and my co-director of the program on cases before the US Supreme Court. We seek out cases, we file petitions, we file briefs in opposition, and then we pursue merits cases, if we're so lucky to get a petition granted. And last term, we had a petition granted in in the McElrath case, which was a double jeopardy case, and a student found that case, the students wrote the petition, students wrote the merits brief, and then my colleague argued the case, and we won nine-zero. Thank you.

J **Justin Pearson** 01:41

I mean, that's something that I'm sure the students will never forget.

A Andy Hessick 02:04

It was fantastic. Yes, I'm sure, I'm sure that's true.

J Justin Pearson 02:20

Well, welcome, and I'm sure you'll do as well in the trivia as you always do, as the defending reigning champion, Ben—my colleague, Ben Field—you have your work cut out for you, but I should give you a proper introduction. You also went to Yale Law School. You clerked for Judge O'Scannlain on the Ninth Circuit, Judge Jordan on the Third Circuit. But I think what's really cool about your experience at IJ, Ben, is you've litigated in every one of IJ's pillars. And so whether it's free speech, economic liberty, educational choice, property rights, or our Project on Immunity and Accountability—if IJ has that type of case, Ben has won that type of case. And so Ben, I want to ask you, do you think the breadth of your litigation experience will give you an advantage during Supreme Court term trivia?

B Ben Field 03:03

Absolutely, though I do have to say, my one educational choice case I did lose unanimously at the Supreme Court.

J Justin Pearson 03:07

Oh alright. I don't think there are any trivia questions about ed choice, but good to know. I appreciate your honesty. And by the way, before we get to the event itself, I do want to tell you a little bit about IJ, where Ben and I both work. The Institute for Justice is the national law firm for liberty. We're the nation's largest philosophically libertarian—so just small l libertarian—public interest law firm. And so I do mean we're just philosophically libertarian. We sue Republicans as often as Democrats. We don't care about the political affiliation of our clients at all. Ben and I are among the lawyers, the small number of lawyers in legal profession who have the rare luxury of being allowed to operate solely out of principle. And so what we basically do is we go around the country providing free representation to people whose constitutional rights have been violated, usually to get judges to throw out unconstitutional laws. It's a lot of fun. And IJ really has become quite large. We're up to over 160 employees spread out across our six offices. Our headquarters are in Arlington, Virginia. We also have, obviously, an office in Miami, where I am, as well as Austin, Phoenix, Seattle, and our clinic at the University of Chicago. And one reason why we've become so large because IJ has had a tremendous amount of success. We've had 12 US Supreme Court cases, and we've won 10 of them, including two last term. And so you know, not only do we win these Supreme Court cases, but we win really cool cases, even cooler than most Supreme Court cases: the cases that you study in law school. So for example, if you've studied eminent domain abuse, you probably studied the notorious eminent domain case, Kelo v. New London with Suzette Kelo's little pink house. That was an IJ case. Unfortunately, it's one of the two we lost, but it was an IJ case. Or, if you studied the Dormant Commerce Clause, you probably studied the Granholm direct wine shipment case, or maybe

Tennessee Wine and Spirits. Those were both IJ cases. Or if you studied the Eighth Amendment, you probably studied Timbs v. Indiana, which is when the Supreme Court incorporated the Excessive Fines Clause. That was an IJ case. And so I gotta tell you, it's so cool when, you know, some random lawyer friend or relative will come up to me and tell me about an interesting case they were reading about and I'm like, yeah, that's my case, or that's my colleague Ben's case. And so if you want to have that feeling like we do, you're in luck, because IJ has all sorts of openings available, including for summer clerks. Our summer clerk program is called the Dave Kennedy Fellows Program. It is a paid program. Although we're a nonprofit, we're very well funded, and so we pay our summer clerks, and you get to spend a whole summer working on actual IJ cases, actual constitutional cases with constitutional lawyers. If you speak to anyone who's gone through the program, they will rave about it, because it really is as cool as it sounds. If you can't wait till next summer to spend more time with IJ lawyers, we also have one-day seminars on a Saturday every now and then, they're called our Legal Intensives. We basically spend a whole day learning from IJ lawyers how to win, like how to win a rational basis case, which is something your professor might tell you can't be done. We do it. And so the next one of those is at Pepperdine Law School in November, in Malibu, and we also have one in January at IJ's headquarters in Arlington, Virginia. And IJ will pay your travel expenses to travel to these events to learn how to win constitutional cases. And if you're a 3L, don't worry. We have programs for you as well. We're constantly expanding, which means we do have attorney positions available. We also have two year post graduate litigation fellowships. And if you're planning to do judicial clerkships and you have a gap year, either a gap year before your clerkship starts, or maybe a gap year between two clerkships, we have something called the Bingham Fellowship, which is specifically designed to fill that gap year with constitutional litigation at IJ. If you have any questions about any of these programs, go on IJ's website. It's very easy to remember it's ij.org and there's info about all of them on there. So please go on ij.org and learn about these great opportunities, and you can come and sue the government like we do. Now, with that being said, let's turn to the actual event today. For those of you who have attended in the past, you probably remember. We'll start with some Supreme Court term trivia to break the ice. After that, both Professor Hessick and Ben will present a case from this docket that they would like to talk more about. Then they will each present a pending cert petition. And then after that, I'll make sure to reserve time for my favorite part, which is audience, Q and A. So as everyone's talking, if you have any questions, please kind of store them in the back of your brain and be ready to ask them at the end during the Q and A section. So now, with that said, are you guys ready for some trivia?

B Ben Field 05:27

Absolutely.

A Andy Hessick 05:29

Yeah. That's not possible.

J Justin Pearson 07:48

All right, fantastic. So as the audience can see, I have a clear Ziploc bag here with the trivia question, so we have literal transparency. We will do three rounds of trivia, and I actually have a tie breaker question this time if there's a tie, as has happened sometimes in the past. Now,

Professor Hessick, I think you've won every single year, unless I'm mistaken. Well, I think, I think it's not only possible, but true. So as the reigning champion, I'll let you pick. Would you rather go first or second?

A **Andy Hessick** 08:16

I will go second.

J **Justin Pearson** 08:17

Okay, so Ben, that means you're up first.

A **Andy Hessick** 08:20

That's my strategy.

J **Justin Pearson** 08:23

All right. Ben, are you ready?

B **Ben Field** 08:24

I am.

J **Justin Pearson** 08:25

I believe you. Here we go. All right, Ben. Feliciano v. Department of Transportation asked whether a federal civilian called to active duty during a national emergency is still entitled to increase pay, even if the duty is not actually connected to the national emergency. Here's my question to which country was Mr. Feliciano deployed?

B **Ben Field** 08:48

Ummm. I don't know. This could be old or it could be new. I'm going to say...Syria.

J **Justin Pearson** 09:01

Syria is not correct. Professor, Hessick, you want to steal this one?

A **Andy Hessick** 09:10

Sure. Iraq?

J Justin Pearson 09:11

Unfortunately, you're both wrong. It was somewhat of a trick question. The answer was, the United States. [Laughter]. He was deployed to Charleston, South Carolina. Now, Professor Hessick you were kind of the closest to having the right answer, because he was activated during Operation Iraqi Freedom, but he wasn't sent to Iraq. He was sent to Charleston, which is not a bad place to end up. And so the question becomes, though, even though he was deployed to Charleston, South Carolina, does he still get the increased pay because he was activated during wartime? And so we'll see what Supreme Court has to say. So wow, guys, after all that hype, we're not really off to a great start.

A Andy Hessick 09:11

Excellent.

B Ben Field 09:41

Well, people do refer to Charleston as the Busra of South Carolina. [Laughter].

J Justin Pearson 09:45

Soeaking as someone who's been to Charleston, I don't think that's true.

A Andy Hessick 09:48

They do now. [Laughter]. Exactly, exactly. All right, so no point for the first question. Let's see if the next one's any better. By the way, I'm so happy, because there have been years where every question has been answered correctly, and I have vowed to make them a little trickier, and it looks like I'm suceeding, so kudos to me. All right, Professor, are you ready to take the lead? Let's go. Here we go. This question is about Williams v. Washington. Ever since a famous US Supreme Court case over 40 years ago named Patsy v. Board of Regents, challengers bringing section 1983 claims have not typically been required to exhaust administrative remedies. But the Alabama Supreme Court said that Patsy did not apply in this case. Why not? Uhh...because it doesn't employ to—apply to these employment claims.

J Justin Pearson 10:46

Ooh, you're gonna have to be more specific. That's close, but it's not really the right answer. Hmm, I'll give you one more crack at it.

A Andy Hessick 10:55

Because it was limited to the particular type of claim in Patsy and it didn't apply to this type of claim, which happened to involve...

J Justin Pearson 11:03

I'm gonna cut you off, because unfortunately, that's not going down the right path. Thanks for trying. Ben, can you steal the point?

B Ben Field 11:09

Yes, I can. It's because they argued that it does not apply in state court, because that would be commandeering the state court.

J Justin Pearson 11:16

That, yeah, is correct, that is correct. Now, so Ben, you get the point. Well done. Yeah, and honestly, as someone who brings 1983 claims, that makes no sense to me, right? I mean, whether you're bringing the claim in federal court or state court, if it's a 1983 claim, you should be entitled to fees. And there's, there are really important reasons why you should be entitled to fees if you prevail. And so I'm gonna make one of my famous predictions that the Alabama Supreme Court is going to get reversed, but we'll see. We'll see if I'm right as usual.

A Andy Hessick 11:43

I thought you were gonna say that Ben is going to win trivia.

J Justin Pearson 11:46

Oh, I'm not. I could be mistaken, professor, but I really think you've either won or tied to win every time. But, yeah, but Ben's, uh, Ben's making a run at it. Here we go. Ben, round two. Are you ready?

B Ben Field 11:57

Yes.

J Justin Pearson 11:58

Wait because, Professor, you went second, right? Okay. Here we go. All right, Ben, let's see if you can build on your lead. My next question is on Garland v. VanDerStok, which is the huge battle between federal law enforcement agencies and the makers and buyers of gun parts kits.

The government argues that the gun kits are too similar to actual guns and to certain actual gun parts, and therefore make it too easy for people to build their own guns that don't have serial numbers on them, which are otherwise known as ghost guns. But here's my question, this case presents two questions to the Supreme Court. Of these two QPs, how many are based on the Second Amendment?

A Andy Hessick 12:03

Yeah, I went second.

B Ben Field 12:05

Zero.

J Justin Pearson 12:26

Zero is correct! Ben, you are on fire. Yeah. And so you know, as this case gets argued, you're undoubtedly going to see a bunch of media coverage talking about gun rights and the Second Amendment and things like that. This case is not about any of them. It's about statutory construction. It's about whether these gun parts kits meet the statutory definition of a gun or of a firearm, and it's about whether these gun part kits meet the definitions for certain parts of guns, so that the statute also defines certain parts of guns, and that's it. It's just about statutory construction, but because it has to do with the statute about guns, I'm sure the the media attention will be understated, as always, so we'll see. But you all will know better. All right, Ben, you have now gone up to a two-nothing lead. But Professor, you haven't had your second question yet. So let's see if you can start to chip away at it. Here we go. Professor, prosecutors seem to love charging people with mail fraud and wire fraud. Every now and then, the Supreme Court reins them back in, only for the feds to find another rationale for their view that almost every crime also constitutes mail and wire fraud. The latest example is in Kousisis v. United States. And here's my question in this case: what was the underlying allegedly fraudulent scheme that supposedly resulted in mail and wire fraud?

A Andy Hessick 14:00

It was that the Kousisises said that they would use a disadvantaged business, and they didn't end up using a disadvantaged business.

J Justin Pearson 14:10

Yeah, that's exactly correct. They actually used, kind of a middle man who was historically disadvantaged, who then used other subcontractors who weren't to kind of do an end run around the system. That's not a good thing to do, like they should not have done that. But then it comes back to this issue of well, if that's also mail and wire fraud, then what misdeed isn't mail and wire fraud? And so, since I'm in the predicting mood, I'll say that the court is gonna

say that's not mail or wire fraud, but we'll see. I'm not 100% sure on that one. So well done, professor, you've cut the lead in half with only one round to go. The score is Ben: 2, Professor Hessick: 1, which means Ben, you could clinch it here.

B Ben Field 14:49

Yes, but if I get it wrong, then he can get two points in this round.

J Justin Pearson 14:52

Yes, this one is not over. I'd love to use my tiebreaker question, and I want to point out for the audience, if I don't need to use my tiebreaker question, then at the very end of this event, after audience Q and A, I'll ask it to the crowd if you'd like to hear it. Here we go. Ben, for the win. Ben, this question is about a little known case that might receive some attention named United States v. Skrmetti. That was a joke, by the way. This is the one about Tennessee law that bans puberty blockers from being given to minors seeking what is known as gender affirming care, even if their parents want their kids to receive the treatments. After the lawsuit was filed, the United States intervened as a party to help challenge the law alongside the people who were originally challenging it, which is why the case is now named United States v. Skrmetti The United States was able to do this because of 42 U.S. Code §2000h-2, but in reality, what was it about this case? What is the criteria in that law that allowed the Attorney General to have the United States intervene?

B Ben Field 15:54

It allows the United States to enforce constitutional rights?

J Justin Pearson 15:58

That is not correct. Professor, can you steal the point?

A Andy Hessick 16:02

Um, as I remember it, I think the government said that the government can intervene in an equal protection claim that involves a question of important public interest.

J Justin Pearson 16:13

Yeah, that is correct. That is correct. It allows the United States to intervene if the Attorney General decides it's an equal protection claim of general public importance. That is definitely close enough to what you said. You get the point, which means we are now tied, right? Yeah, we're tied with one question to go. Professor, are you ready to win again?

A Andy Hessick 16:35

I feel like Seabiscuit. [Laughter].

J Justin Pearson 16:37

Here we go. Here we go. Professor, so if you get this point, you win. If you don't and Ben steals it, he wins. If you both get it wrong, we'll bring out the tie-breaker question. Here you go, Professor. In Lackey v. Stinnie, the challenger brought a successful section 1983 challenge against a Virginia law that required driver's licenses to be suspended because of certain types of unpaid debts. The challenger obtained an injunction, and as a direct result of the injunction, the law was repealed. But the government contends that the challenger should not be awarded fees because the Challenger did not do what?

A Andy Hessick 17:13

Uh, didn't prevail in a relevant sense, and so they are not entitled to fees under 1988.

J Justin Pearson 17:19

Can you be a little bit more specific, how did they not prevail? What didn't they get? That is correct. That is absolutely correct. Yeah. So the professor wins again, yeah. And I can tell you as someone who brings 1983 cases and sometimes gets temporary injunctions, like if you get a preliminary injunction and it leads to the law being repealed, you got everything you wanted.

A Andy Hessick 17:23

They didn't get a permanent injunction. They got a preliminary injunction. That is a win.

J Justin Pearson 17:43

That is a win, exactly. And so the government's position, I think, is a little bit ridiculous. I'm hoping the court agrees with me. I'm not sure. We'll see. But you both did great. You really did. Professor, you won again. But Ben, you did quite well also. So one more round of applause for the panelists, please. Great job, both of you. Now you're each going to present a case that's already on the docket for this term. Who would like to go first? Okay, go ahead Ben.

B Ben Field 18:08

So we're going to talk about Free Speech Coalition v. Paxton. This is a case about pornography. The Free Speech Coalition is actually the clever name for the trade association that represents adult businesses. And so if you're following the news, you probably know that a bunch of states have passed laws to try to prevent children from getting access to online pornography, and this one involves Texas' law, which says if a website has more than a third of its content that would

be obscene as to minors, then the entire website has to do age verification. So they either have to check a government ID or they have to use a reasonable, commercially available age verification system for everybody, which means that it's sweeping in both adults and children, and it doesn't draw a distinction. So like something could be obscene as to a five year old, and that's gonna obviously be very different from something that's obscene as to a 17 year old. But the law sweeps in all of it. And so the Free Speech Coalition, which, as I said, is the trade group for adult websites and adult businesses generally, brought a challenge to this. And they were successful in the District Court, but then the Fifth Circuit, in a split decision, the majority said, we should actually analogize this to a case from the 60s called Ginsburg, which was a guy who sold a "girlie magazine" to a 17 year old or 16 year old. And I don't use "girlie" because I'm old fashioned, that's what Justice Brennan referred to the magazines as in his opinion. And so what the court said, is it's fine for New York to criminalize that because it's not limiting adult access. The state can have different standards for children versus adults and it's okay to define obscenity differently, so that's fine. And the Fifth Circuit said, Well, this case is exactly like that, just a digital version of it, and so we're going to uphold it. But Judge Higginbotham, in his dissent said, Well, you're kind of missing sort of the intervening 50 years of Supreme Court case law. And so there was a quartet of cases from the late 80s to the early 2000s which you know, in Judge Higginbotham's view, are directly on point. So starting with a case called Sable Communications v. FCC. This now sounds kind of quaint, but apparently there was a product in the 80s called dial-a-porn where you could call a number and you would get, you know, pornographic voices on the other side. The federal government banned that, and the Supreme Court said that that ban is unconstitutional because it's restricting adult access to this material. In 1997, we had Reno v. ACLU, which was essentially the Communications Decency Act of 1996 essentially banned all indecent online materials that could be sent to under-18 year olds. And the Supreme Court said that is just way too capacious. That's unconstitutional. In 2000 there was a case with United States v. Playboy Entertainment, which involved a federal law that required, essentially, adult pornography channels to scramble their signal or to only broadcast between 10pm and 6am and the Supreme Court said, No, that's again, you're burdening adult speech too much, and struck it down. And then in 2004 there was Ashcroft v. ACLU, which is, in many respects, exactly like the Texas law at issue. So it struck down the act called COPA, the Children Online Protection Act, which was a federal law, and it was essentially the exact same definition of indecency and obscenity as the Texas law at issue here, the only difference is that age verification was an affirmative defense rather than a mandate, and that was struck down five to four by the Supreme Court in all of these cases, the court applied strict scrutiny, which means that the government had to show that it had a compelling interest. Pretty much everybody has always conceded that protecting kids from indecent material satisfies that. I'm not sure that every human being would, but the industry has never challenged that. And so it's always been about tailoring. And the court has consistently in all these cases said no, there are alternatives. And specifically in the Ashcroft case, promoting things like filtering software so that the user and their parents are the ones who are filtering, that's a better alternative. But the majority found ways to distinguish all of these, and then the Free Speech Coalition successfully sought certiorari, so that case will be up at the Supreme Court, and it's on the formal question of whether strict scrutiny applies or rational basis applies, so that's the narrow question. So conceivably it'll be decided without actually deciding whether the Texas law is constitutional or unconstitutional, but it'll sort of be the big test case for how this applies. So IJ actually filed an amicus brief in this case where we sort of take the position that the parties have been missing one of the key issues here.

A Andy Hessick 19:17

That happens.

B Ben Field 22:38

Yes, and our point is that, like this law is actually quite distinct from Ginsburg and quite distinct from a lot of these laws, in that it's directly burdening speech based on its content. And so it says, if you are a website and you have speech of a particular content you need to take this burdensome action of doing age verification. And our basic point is that the Supreme Court in the 80s had this case called Ward v Rock Against Racism, which had to do with noise amplification. It was a very standard, traditional time, place and manner restriction. But there was sort of this throwaway line in it that said, well, strict scrutiny doesn't apply if the government can justify its regulation without respect to the content involved. And courts sort of ran with that since then, in saying, well, as long as there's some content neutral justification, then it doesn't matter if the law is content based in its operation. In the last several years, the Supreme Court has really gone back on that and said, No, if you look at the face of the statute and it's content based, then strict scrutiny should apply. And our basic point is, this statute says, if you have this type of content on your website, then you have to do these things. Therefore it's content based, therefore strict scrutiny should apply. Which is different from Ginsburg, where the New York law at issue didn't place any direct requirements on the business. It just said it's illegal to sell to a minor. And that might also have First Amendment implications if the government is doing something that, incidentally, burdens speech in that way. It might have a First Amendment implication, but our basic point is that this law just directly burdened speech based on content, therefore strict scrutiny applies. But I think that what will be interesting to see is that, you know, the court has, like really changed since 2004 and that was a five four decision with sort of an unusual lineup in that Ashcroft case. So the majority was Kennedy, you know, sort of a free speech, strong absolutist kind of guy, with Stevens, Souter, Thomas and Ginsburg. So obviously Thomas is the only one left from that majority. There was a three justice dissent written by Justice Breyer with Rehnquist and O'Connor, which was a very Breyerian "I agree strict scrutiny applies, but I trust that Congress made the right balance here," and sort of this technocratic view that it's fine what they did. And then Justice Scalia, wrote the sole descent, he's the only one who agreed with the Fifth Circuit's position, which is that rational basis applies. And he didn't even, like use this Ginsburg analogy. He just essentially said, like, smut is not protected by the First Amendment, and therefore it doesn't apply. So it'll be interesting to see. You know, through the tour of this case law, you've sort of seen that there's, like, in each generation, there's like a fun new moral panic about whatever the issue is. It'll be interesting to see if the court has shifted in the last 20 years on on kids and pornography.

J Justin Pearson 26:09

Yeah, I completely agree, and it's also a very useful pro tip for any practitioners out there listening. You know, there are so many groups that they'll file amicus briefs that basically don't add any value. They just say, we just agree with this group or the other group. And frankly, in that situation, no one even reads the brief. They're just like filing a brief to say they filed a brief or something. If you actually want to file an amicus brief that gets read and that will actually help the court the way an amicus brief is supposed to, find an issue that the two sides aren't adequately briefing and brief that. That will actually help them out. Sometimes you can even end up getting oral argument time if the justices find your brief helpful enough. So just

remember out there, like don't find amicus brief just to say you agree with what's already been said, find a different angle to actually add value to the proceedings. And with that being said, Professor, what case would you like to talk about?

A Andy Hessick 26:53

Thanks. I'm going to talk about Hewitt v. the United States. And it's a statutory interpretation case. So it comes out of some convictions for bank robbery. So in 2009 several people were convicted of bank robbery, conspiracy to commit bank robbery and other separate offenses. And they had their their sentences enhanced because they used a firearm in the commission of these offenses. Now using a firearm in the commission of one of these offenses, it carries a mandatory minimum of five years. But the thing is, at least at the time under the law in 2009 if you have multiple crimes for which you are convicted that trigger this provision, then the first enhancement is five years, but subsequent enhancements are 25 years. Now, this can all happen out of one occurrence that constitutes multiple crimes. So you commit the bank robbery and the conspiracy to commit bank robbery and the other offenses that all happen at the same time, and they can each trigger that that enhancement, so that one event resulted in the defendants receiving the 25 year enhancement. And this practice is called stacking. So you can stack up the charges that all happen at once. Okay. So they got very heavy sentences. So 10 years later, these defendants, they filed a petition for writ of habeas, or it was a § 2255 action, but essentially habeas and they got some of these convictions overturned, and consequently, you know, removed the sentencing enhancement for those convictions. The habeas court, it also just decided to vacate their sentences in full, and said, You need to go back, and you need to be resentenced based on on the charges that are left and and then the sentence can be imposed, and they can look at whatever enhancements apply. But here's the thing, in the interim, so after their conviction, but before their successful collateral attack, Congress enacted the First Step Act. And one of the things that the First Step Act does is it eliminates this practice of stacking. You can't do the 25 year enhancement for crimes that happen at the same time. The 25 year enhancement now applies only if you have a prior conviction that carried the enhancement, the five year enhancement, right? So under this regime, the defendants, they wouldn't be subject to the 25 year enhancement. They would only be subject to the five year enhancement. So that makes a really big difference to them. But the Act says, Here's what the Act says, this new provision that eliminates stacking, quote "shall apply to any offense that was committed before the enactment of this act," okay, so that that includes the defendants' act here, but it's only if the sentence for the offense hasn't been imposed as of the date of enactment. And so the act, it's enacted in 2018/2019 but the sentence wasn't vacated until later. So this raises the question: the defendants, they committed the offense before the Act went into place, and they were sentenced beforehand. However, their sentence was then vacated, and they're being re sentenced, and does the vacatur of the sentence and then the re-sentencing, does this mean sentence hasn't yet been imposed because the sentence has been vacated, and that's the statutory interpretation issue. The Fifth Circuit said the Act did not apply, that the longer sentence applied, that the sentence had been imposed beforehand. The vacatur didn't reset the clock, essentially, and now it's before the before the Supreme Court. And what's interesting about this case, why I picked this case, is the government actually agrees with the defendant. It says that, yes, the vacatur, it treats the earlier judgment, the earlier sentencing, as if it's not occurred and and so the First Step Act should apply, and the Court has had to appoint an amicus to defend the judgment, right, so that happens sometimes when the two sides align, when they get before the Supreme Court, the Supreme court will appoint someone else as an amicus to defend the judgment below. Typically, it's a former clerk, and that's exactly what's happened in this case. And so it

should be interesting to see what happens, whether the government can prevail on a position where it's saying, court, please don't do this. And the court might be like, no, government you have the power to do this, even though you're saying that you're disclaiming that position.

J Justin Pearson 32:06

It is interesting, and for me, you know, I just always think about the abuse that we see with stacking, where prosecutors will often take one misdeed, but then anything you do these days will violate so many different laws, and instead of just having that one punishment, they can throw the book at you, and then really coerce these ridiculous plea deals, because you just do the math and say, Well, I can plead guilty and go to jail for a little time, or if I don't plead guilty, because they've charged me with 20 different crimes for this one offense, I can spend the whole rest of my life in jail. And that's how you end up with people who are completely innocent pleading guilty. It's a problem, and I'm glad that the Congress was at least trying to rein it in a little bit.

B Ben Field 32:42

Yeah, but I think one interesting thing about the First Step Act, so right after it was passed, I was practicing in DC at a firm that had a Supreme Court practice that did the thing that everybody does, which is like, troll for circuit splits. And the First Step Act just immediately spawned a bajillion circuit splits on a ton of different questions, because there's always these questions of, like, how does retroactivity work, and Congress was less than perfectly clear, right? But like, it's interesting. So I think that the principal sponsors were Chuck Grassley and Cory Booker, and they have had this road show of filing briefs in all these cases, trying to say, actually we did mean to be very lenient. But it's like, quite frustrating, because, you know, back in the good old days, if the courts interpreted the law in a way that Congress didn't like, they would amend the law to make clear what their purpose was. But, you know, obviously, in the years since the First Step Act, criminal justice has become this hot button issue, and it's just, it's inconceivable that Congress will actually pass a law to say what they meant. And so we're stuck in this world with what everybody agrees is vague language, and it would be best if Congress would actually pass a law to say what it meant, but sadly, they don't do that anymore.

A Andy Hessick 33:54

The Court will just say rule of lenity, right? It's vague language.

J Justin Pearson 33:57

I'm a big fan of the rule of lenity, so I guess that's not the end of the world. But now let's talk about cert petitions. Hopefully most of you realize that cert petitions tend to be long shots. At one point, the stats said that only 1% of cert petitions got granted. Even if you took out all the pro se cert petitions and just looked at the ones filed by lawyers, it was only 2% and frankly, that number has gone down because the court keeps taking fewer and fewer cases. It's not that the cases aren't out there. We could do a whole different whole different session on on why the

court isn't taking cases, but the cases exist. They're just not taking them. And so these cert petitions are real long shots. That said, though, there are certain criteria that the court looks at and certain things that make some cert petitions more interesting than others. And so the panelists now are going to talk about two cert petitions that they think are particularly noteworthy. Ben, which petition do you want to discuss?

B **Ben Field** 34:43

Sure, so I'm going to talk about a pair which are closely linked. These are both IJ cases. So it's 360 Virtual Drone Services v. Ritter and Crownholm v. Moore. And I'm going to focus more on 360 Virtual in part because it arises out of North Carolina. And so it is a case where the company that we represent 360 Virtual Drone Services basically was started by a client of ours who got into drones, like when drones were a new thing, and he realized he could provide commercially valuable services. And you know, take pictures of work sites so that people can have them, and put things like a scale on them so that people can get a rough sense of what the distances on the pictures are. And so his business consists entirely of taking pictures and giving them to people. So communicating information. But North Carolina said that that is the act of surveying, and therefore he needs to be a licensed surveyor, and to spend like 10 years under the supervision of a licensed surveyor. As we point out, many great Americans, like George Washington and Abraham Lincoln were surveyors, and they didn't need a license to do that. Surveying is a pretty—

J **Justin Pearson** 35:57

Were they accurate surveyors? Do you know?

B **Ben Field** 35:59

I mean, I would, I would think so. Obviously, they went on to bigger and better things, so maybe not, but they didn't seem to harm anybody. And so our basic point is well, this is communicating information, and therefore he should be protected by the First Amendment. And to just step back a little bit, arising out of a case from the 80s, there was a one justice concurrence in that case; it had to do with securities advice, which had this idea that, well, if people are like in a professional context, and they're giving one on one advice, then that's not real speech, and therefore shouldn't be protected. And the circuit courts kind of ran with that for decades and allowed licensing all sorts of things down to like our favorite example is this case out of the Fourth Circuit, out of North Carolina, I believe, involving licensing fortune tellers. And the Fourth Circuit said, Yep, totally fine. But that all sort of came to a halt a few years ago in this case called NIFLA, which was a case to do with crisis pregnancy centers in California. California was making them make disclosures about abortion that were fundamentally opposed to what they believed in. And this went up to the Supreme Court, and California's lead argument was, well, they're providing professional services, therefore it's professional speech, and so the First Amendment doesn't really apply. And the Supreme Court said, Absolutely not. There is no professional speech exception to the First Amendment. Speech is speech. Go back down and do it again. And so we at IJ have thought like that's pretty straightforward, and therefore, if you are speaking, that is speech and should be protected by the Free Speech Clause of the First Amendment. But the courts have been all over the place. So just in

surveying, we have these two cases, the one out of the Fourth Circuit and the Ninth Circuit, which have said, Nope, we're going back to professional speech. We can restrict it without treating it as speech. The Fifth Circuit has done the exact opposite in a surveying case out of Mississippi and said, No, it gets regular First Amendment scrutiny. And not only did the Fourth and Ninth circuits disagree with the Fifth Circuit, they also disagree with each other. So the Ninth Circuit's version was essentially, we're just going back to old professional speech, in fact, relying on one of the cases that the Supreme Court expressly abrogated in the NIFLA case, saying, No, we're just gonna, like, re-characterize this communication as conduct, therefore it's not speech, and therefore it doesn't get any protection. The Fourth Circuit version, I think, is—frankly, like, we've been bringing these cases in a lot of different professions. So death doulas who help people prepare for the end of life and talk to them about making an end of life plan. I've represented them in California and Indiana. We've represented tour guides. We represent a lot of people who speak for a living, people who teach horseshoeing. And the courts have come out all different ways on those cases, but this one out of the Fourth Circuit is, frankly, the most bonkers yet, I think, where the court not only said, like, we're going to treat it as conduct, but we're not going to come up with some crisp line. We're going to create a non-exhaustive, multi-factor test to decide whether something is speech or conduct. And some of those things are so for instance, one of them is, is the speech happening in public or in private. Which one do you think is more speechy and more conducty? So you might think like, oh, like a private conversation in a church confessional that seems, like, really speechy, right? Well, the Fourth Circuit disagrees with you and says that if it's on a public sidewalk, it's more speechy and therefore gets more protection. They also look at things like, does it have to do with health or other economic consequences? I mean, pretty much any speech, I think, you could say, fits into that. And certainly the speech in NIFLA did. So it's unclear where they come up with that. And so they've got this non exhaustive, multi factor test, which I think, you know, we'll see. As I've said, courts have been all over the place on this. There's a split within the specific question of surveying. And I think this Fourth Circuit case hopefully will be attractive to the court, because the court has been trying to, like, take free speech law and draw some brighter lines, and the court generally hates multi factor tests now; they're much more formless and so I hope that the Fourth Circuit has actually—despite ruling against our client—has actually done us a favor by like, showing just how crazy this area of law has gotten, and hopefully the Supreme Court will agree and take it.

J Justin Pearson 40:30

And it has gotten crazy. I mean, just the logic makes no sense. Could you imagine the court ever saying that the New York Times isn't protected by the First Amendment because someone pays to read their articles? Like the First Amendment doesn't stop applying just because money is involved, but unfortunately, that's how some courts view the professional speech doctrine. And so hopefully the court will fix that. Professor, which cert petition would you like to discuss?

A Andy Hessick 40:52

Yeah, thanks. So ordinarily, I like to advertise, showcase things that the Supreme Court program is doing, but we only have briefs in opposition in right now, so that doesn't seem like a good idea. So instead, I'm going to talk about Henning v. Snowden, and this involves Bivens actions. So for those who don't know, Bivens actions, these are damages actions against federal officials for violating constitutional rights. Now these Bivens actions, they are judge-

made. When it comes to state actions, actions against state officials who violate the constitution, there's federal statute, 42 U.S.C. § 1983, that authorizes individuals to bring actions against state officials for violations of their constitutional rights. There's no analog for federal officials. However, in 1971 the Supreme Court in a case called Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, they recognized an implied action. So Bivens involved a claim for damages against federal agents who allegedly violated the Fourth Amendment, stemming from a warrantless search of a house and then using unreasonable force against the plaintiff. So after they recognized that action, the Supreme Court extended the Bivens rationale to some other contexts, for example, the Eighth Amendment. And over the years, courts recognized more and more of these Bivens actions. Fast forward, the Supreme Court just a few years ago said, enough with Bivens actions. They no longer support this idea of Bivens actions. And the theory now is, look, it's Congress, not the courts, that has the prerogative whether to recognize damages actions. Congress, if it wants to, can write a federal statute that's akin to § 1983 and authorize damage actions against the federal officials and the courts shouldn't be in the business of creating these damages actions. They should leave it to Congress. And the court has even gone so far to say that if Bivens were decided today, it would probably come out differently. So they're not excited about Bivens, but the court has not yet overturned Bivens. Instead, what it said is that it won't extend Bivens. It won't extend it to new contexts. So one of the first things a court has to do now, when faced with a Bivens claim, is it has to ask, well, is this a new kind of Bivens claim? Meaning, is it new and different in a meaningful way? Because if it's not, if it's the same as the old Bivens action, one that's been recognized before the courts, they can go ahead and just apply that law and recognize the action, it's just they're not going to extend it to new circumstances. So the question here in this petition, basically, is, what constitutes a meaningfully new kind of circumstance, and the court didn't really precisely define it, but it seems to be something like, if the facts of this new case are different in a way that sort of result in a different policy balancing of whether you would recognize that action, that seems to be a new context for a Bivens action, and the courts shouldn't recognize it. But the point is that the inquiry is really fact dependent, right? Really fact specific. And here are the facts in this case: the plaintiff, Snowden, he claims that he was staying at a hotel, he received a call from the front desk, and the front desk said, Hey, come on down to the lobby so you can pay for your room. He goes down to lobby. In the lobby is an agent who's waiting for him. The agent has a warrant, and then allegedly, the agent just pushes Snowden down and then starts punching him. Now, if this is all true, that seems like a Fourth Amendment violation. You're probably not allowed to do that. And the question is, is this similar enough to Bivens? And in some ways it seems pretty similar. Both involved the Fourth Amendment, both involved unreasonable force, both involved similarly situated federal agents, but there are some differences. So Bivens was in the home, this was in a hotel. In Bivens, the officer didn't have a warrant. It was warrantless, and here the officer did have a warrant. So there's some little differences. Now the Seventh Circuit, they thought that this didn't matter. They thought that this wasn't a meaningfully new context. And so it said Bivens action would be recognized. But I think that the court, even though it hasn't overturned Bivens, it has been hostile to any extension of Bivens. So I think that these differences here could really matter. One could imagine Congress saying, like, oh, we'll recognize this action of someone intrudes in your home, but we're not going to recognize it in the context of a hotel. And certainly, you could imagine Congress saying, like, we'll recognize damages actions if there's no warrant, but if you've gotten a warrant, you've been protected. Like, we're not going to recognize this damage, even if you went further and did things that you're not supposed to do, the fact that you got a warrant is some sort of insulation against damages. So I think that as much as any petition before the Court, I think this one has a decent chance of being granted because it provides an opportunity for the court to cut back on Bivens further.

J Justin Pearson 46:28

Thank you very much. All right, so now we have time for my favorite part, which is the Q and A. And I should say, after we take a few questions, I'll ask the crowd the tie breaker trivia question that I did not need to ask the panelists. But before we get to the trivia question, what questions do you all have? Just raise your hand and I will call on you. Anyone with a question. None. No, yes, ma'am, Professor, would you mind restating the question into the microphone?

A Andy Hessick 46:52

Of course. Yeah. So the question is, why in the Hewitt case, where the government agrees with the defendant's position, why doesn't it render the case moot? And the reason is that the sentence is still being imposed of 25 years. If the government could somehow remove that 25 year sentence, then it could be moot. But since he still has a 25 year that's a consequence of the judgment, and the government can't remove it, there's still a live controversy, because the court could decide differently, and that 25 years would go away. But it is a real question, because mootness, like, one reason for the mootness doctrine is you don't want to hear cases when there aren't advocates on either side. And it is a problem when both sides agree, but it's more prudential instead of constitutional.

J Justin Pearson 46:53

Absolutely. Any other questions? Yes, sir, anyone want to take that one?

B Ben Field 47:08

I mean, so the question is, is it becoming more common for the government to essentially flip once it gets to the Supreme Court and for the parties to be aligned? So, I mean, I can't tell you what happened in the 70s, but at least over the last several years, like, between the Obama and Biden administration, with Trump in between, I haven't seen it increasing or decreasing. It just sometimes happens, like, either there will be a change in administration and so the position of the government will change. That can obviously happen in states as well. I mean, I think that it has certainly become, at least like people have expressed more concern that there's become a practice of the Attorney General and the Solicitor General of the United States not defending laws that they don't like as vigorously. But I'm not sure. I'm not sure if that's changed much in the last 10 years.

A Andy Hessick 48:49

Yeah, I tend to agree with you. My sense is it hasn't changed that much. You occasionally see these orders appointing amicus to defend a judgment. You occasionally see the government confessing error, and it just, it happens over time, and maybe it happens in batches more or less now and then, but right now, I don't feel like there's a higher frequency.

B Ben Field 49:10

The one thing that I found galling about the case that you were discussing, the Hewitt case, is that the government opposed certiorari. Despite agreeing with the defendant in the lower courts. And as you all probably know, the Supreme Court docket is not exactly brimming with cases, so I'm not sure why the Solicitor General's Office feels the need to be particularly hesitant to acquiesce in cert, and I think their basic argument came down to like, oh, it isn't that important. But this is like the difference between, like a 120 year sentence for somebody and a 20 year sentence for potentially hundreds, if not thousands of defendants. And this is gonna keep happening. So I found that to be...I was very disappointed to read that.

J Justin Pearson 49:56

Totally agree. Great point. Any other questions? Anyone would like to ask? All right, hearing none. Let's ask this trivia question. The way it'll work is, I'll ask the question, and here it is. If you think you want to guess, just raise your hand. I'll call on you and we'll see who guesses it correctly first. So panelists, you guys are done. Let's see. Let's see how smart this Carolina law school crowd is. Here you go, audience, this question is about Velazquez v. Garland. When non citizens lose their immigration proceedings, some of them are forcibly deported, but others who are found to be of good moral character can instead be given 60 days to leave the country, and if they file a post decision motion before the 60 days are up, that time can be extended. In Mr. Velasquez's case, the 60 day deadline fell on a Saturday. His attorney submitted the motion to the Board of Immigration Appeals that Friday, but the board did not accept it as filed until that Monday. The government has taken the position that this means that he has missed the 60 day deadline. Here's my question for this very smart Carolina law school audience: if the government is correct that he missed the deadline, how long will Mr. Velasquez be required to stay outside of the United States before he is allowed to return. Anyone want to guess? Yes, sir.

A Audience member 51:26

Ten years.

J Justin Pearson 51:28

That is exactly right! Now, did you know that, or was that just a guess?

A Audience member 51:32

I know the statute.

J Justin Pearson 51:33

You know the statue. Well done. Yeah, 10 years. Really, really, wow.

B Ben Field 51:38

Really impressive crew!

J Justin Pearson 51:40

What is your name? Impressive. Connor, man, that was impressive. I did not think you'd get on the first try. Can we get a round of applause? [Applause]. Yeah. And then, you know, going back to the case, this individual, he's lived in United States for 20 years. He's married with kids. His kids have been born in the United States. He has founded and run a very successful business in the United States, but if he loses this case, he's gonna have to stay away from the United States for a full decade, which doesn't sound right to me, but, I mean, that's just my opinion. And so with that being said, well done, Connor and thank you all for having us. This was a lot of fun. One more round of applause for the panelists, please. All right, thank you. Carolina law, this has been another episode of the Short Circuit podcast.

A Audience member 51:43

Connor.