2023 Annual Supreme Court Review
Thursday, July 14, 2023

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall Programs. In this episode, we explore the most significant decisions of the recent Supreme Court term, including cases on affirmative action, religious accommodation, social media regulation, voting rights, and more.

[00:00:31] Tanaya Tauber: Joining the conversation are noted, legal experts and Supreme Court analysts, Erwin Chemerinsky, Miguel Estrada, Gregory Garre, Frederick Lawrence, and Dahlia Lithwick. Journalist Amy Howe moderates. This program was streamed live on July 14th, 2023. It is presented in partnership with ADL. Here's Jeff to get the conversation started.

[00:00:56] Jeffrey Rosen: Hello, friends welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of the National Constitution Center, and we're thrilled to co-host today's program with ADL. ADL is doing such crucially important work, combating antisemitism, fighting hate for good, as its mission statement says, and it's an honor to partner with them on this annual Supreme Court Review.

[00:01:26] Jeffrey Rosen: I'd like to thank Eileen Hershenov, Senior Vice President of Democracy Initiatives, Steven Freeman, Vice President of Civil Rights and Director of Legal Affairs, Karen Levitt, National Civil Rights Council, and the rest of the great ADL team for convening such a distinguished panel and for our continued collaboration.

[00:01:46] Jeffrey Rosen: Let's inspire ourselves for the discussion ahead as we always do at the beginning of our programs by reciting together the National Constitution Center's mission statement. Here we go. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the constitution among the American people on a non-partisan basis.

[00:02:09] Jeffrey Rosen: And now it is a great pleasure to turn things over to Marjorie Zessar, Chair of ADL's Legal Affairs Committee. Enjoy the conversation.

[00:02:18] Speaker 3: ahead..

[00:02:19] Marjorie Zessar: Thank you very much. Welcome to the Anti-Defamation League's 24th Annual Supreme Court Review. I'm Marjorie Zessar, Chair of ADL's Legal Affairs Committee. This program is presented jointly with the National Constitution Center. We are grateful to our partners there, Jeffrey Rosen, Tanaya Tauber, Lana Ulrich, and John Gara.

[00:02:40] Marjorie Zessar: Before we hear from our distinguished panelists, I wanna recognize our National Civil Rights Chair, Rachel Robbins, our Vice Chair, Jared Lindower, ADL's, outgoing Senior Vice President, Democracy Initiatives, Eileen Hershenov and ADL Senior Council and Director of Legacy, Steve Freeman, who Jeff also recognize.

[00:02:58] Marjorie Zessar: I also wanna thank our National Civil Rights Council, Karen Levitt and marketing manager Samantha College, for their work coordinating this event. ADL was founded in 1913 with the mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. We filed amicus briefs in many of the key cases you will hear about today.

[00:03:20] Marjorie Zessar: Links to those briefs are included in the materials for this program and are available on ADL's event website, along with bios of our brilliant presenters. Let me introduce them now. Erwin Chemerinsky is the Dean of Berkeley Law. He frequently argues appellate cases, including in the US Supreme Court. He's the author of 15 books and more than 200 law review articles.

[00:03:43] Marjorie Zessar: Miguel Estrada is a partner in the Washington DC office of Gibson, Dunn & Crutcher. He has argued 24 cases before the US Supreme Court. He previously serves as Deputy Chief of the Appellate Section, US Attorney's Office, Southern District of New York.

[00:04:00] Marjorie Zessar: Gregory Garre is a partner in the Washington DC office of Latham and Watkins and chair of the firm's Supreme Court and appellate practice. He previously served as the 44th Solicitor General of the United States. He has argued 48 cases before the Supreme Court.

[00:04:16] Marjorie Zessar: Frederick Lawrence is the 10th secretary and CEO of the Phi Beta Kappa Society. Fred is also a distinguished lecturer at Georgetown Law Center. He is the author of Punishing Hate: Bias Crimes Under American Law. Dahlia Lithwick is a Senior Editor at Slate, where she covers the Supreme Court in jurisprudence and hosts the amazing podcast Amicus. Her new book, Lady Justice, was an instant New York Times bestseller.

[00:04:44] Marjorie Zessar: And finally, our moderator, Amy Howe, runs the website How on the Court, and writes for SCOTUS blog for which she previously served as editor and reporter. She has served as counsel in over two dozen merits cases at the Supreme Court and argued two cases there. Amy, take it away.

[00:05:02] Amy Howe: Thanks so much, Marjorie. Thanks so much to NCC and ADL for inviting me back this year as the moderator. I'm delighted to be here because it means that I get to listen as well to all of these incredibly talented people with another big term at the Supreme Court. We could easily spend the entire hour and a half talking about any one of

these cases. Instead, we're gonna spend it talking about more than a dozen of them. But we're gonna start with Erwin who's gonna take a look at the term from the 35,000 foot level. So, Erwin, take it away please.

[00:05:36] Erwin Chemerinsky: Thank you. It's an enormous pleasure to be part of the program again. It was another momentous term in the court. I wanna make a few overviews to get us started. First, I wanna talk about the term by the numbers and what they mean. The Supreme Court decided 58 cases with signed opinions after briefing an argument. It's exactly the same number as a year ago.

[00:05:59] Erwin Chemerinsky: Two years ago, the court decided 54 cases, and the year before that it was 52 cases, which was the smallest number since 1862. It seems the court has now stabilized the deciding 50 some cases a year. That's a significant decrease from the past. For the first decade of the Roberts Court, they were averaging over 70 cases a year in William Rehnquist. Last year's chief. October term 2004, the court decided 80 cases. And in the 1980 eighties, not that long ago, the court was averaging 160 cases a year.

[00:06:36] Erwin Chemerinsky: Of the 58 cases decided this term 47% resolved unanimously, that's dramatically more than the 28% of the cases they were unanimous a year ago. But if you look at the last decade, the court has averaged 43% of the cases being unanimous. So it's not outta line with that. I think the degree of unanimity is probably more a function of the cases on the docket than a desire for consensus.

[00:07:03] Erwin Chemerinsky: This year, there were 11 six to three decisions a year ago. There were 18 six to three decisions, and the number six, five to four decisions this year. Overall, the conservative position prevailed in many of the most important cases, but there were more notable liberal victories than a year ago. I think of the last two days of the term, June 29th and 30th, when the Supreme Court handed down conservative decisions with regard to ending affirmative action, invalidating the Biden Student Loan Program, and allowing individuals to violate state anti-discrimination laws on account of their beliefs.

[00:07:43] Erwin Chemerinsky: But we'll also talk about decisions with a liberal position prevailed like in finding that Alabama violated Voting Rights Act, rejecting the independent state legislature theory, and also the court upholding the Indian Child Welfare Act. I think we saw that it is very much the John Roberts court.

[00:08:02] Erwin Chemerinsky: Brett Kavanaugh was the justice most often in the majority in non-unanimous cases. He's the majority, 90% of the time. John Roberts was second being in the majority 86% of the time. But Roberts wrote the majority opinion in so many of the most important cases this term, the affirmative action decision, the case with regard to Alabama, the Voting Rights Act in validating the independent state legislature theory, and also with regard to the student loan cases.

[00:08:33] Erwin Chemerinsky: The second theme that I'd identify is that I think we're in the era of the Supreme judiciary. If I had to pick a single theme that unites the cases we're gonna talk about today, it's how much the Supreme Court now shows deference to no one.

[00:08:50] Erwin Chemerinsky: It doesn't defer to the President, the Executive Branch. We'll see that when we talk about the student loan cases. It doesn't defer to Congress. When we talk about the Supreme Court changing the interpretation of Title VII with regard to religious discrimination. Rather than that, Congress advises the statute. The court effectively overruled a 46 year old precedent on its own. It's not a court that defers to the states.

[00:09:16] Erwin Chemerinsky: Every case that came from state courts was a reversal by the Supreme Court, and we saw the lack of deference to state governments when the Supreme Court said that state anti-discrimination laws must yield to First Amendment beliefs, it's certainly not a court that was deferring to educational administrators. In prior cases and upholding affirmative action, the Supreme Court stressed the need to defer to the judgment of those who were on educational institutions. Chief Justice Roberts' opinion and invalidating affirmative action came to exactly the opposite inclusion saying there should be no deference to their judgment.

[00:09:53] Erwin Chemerinsky: And it's not a court that defers to the judgment of the predecessor justices. It's not a court that gives much weight to precedent. We saw that a year ago when the Supreme Court overruled Roe v. Wade. We saw this term when the Supreme Court overruled the affirmative action decisions. So it's not a court about judicial minimalism, it's not a court about judicial modesty. As I say, if I had to pick a theme for the term that unites the many cases, we'll talk about that were an era of judicial supremacy.

[00:10:25] Erwin Chemerinsky: Third and final observation, I don't think we can ignore the context in which the Supreme Court is operating right now. The Supreme Court has the lowest approval ratings of its history. A recent Quinnipiac poll had 30% of the population expressing approval for the Supreme Court's performance, 59% expressing disapproval. There were major ethics scandals revealed involving a number of the justices. It's hard to know whether this context affected the decisions this term.

[00:10:59] Erwin Chemerinsky: Hard to know what their impact will be on the court for the future, but I don't think we can talk about this term without keeping that context in mind.

[00:11:07] Amy Howe: Thanks so much, Erwin. I know that our panelists will, will have more to say on these themes as we dive into the cases, which we're gonna do right now. We're gonna start with free speech and religion cases, and in particular with the case of Pennsylvania Postal Carrier Gerald Groff. And Dahlia is gonna tell us more about his case and the Supreme Court's decision.

[00:11:32] Dahlia Lithwick: So thanks so much to ADL, to the Constitution Center, to this amazing panel. This is always like really, really a capstone to me of the end of any term. And it's really a pleasure to be with all of you. And thanks to everybody who's tuning in. Gerald Groff is an evangelical Christian who believes that Sundays should be reserved for rest and prayer.

[00:11:59] Dahlia Lithwick: He started working for the US Postal Service in 2012. And when the postal service entered an agreement to deliver packages for Amazon on Sundays, he was told he couldn't take Sabbath off anymore on Sundays, and he was disciplined when he refused to do that. He resigned in 2019. As Erwin just told you, Title VII of the Civil Rights

Act of 1964 provides that employers are required to accommodate the religious practices of their employees only if providing such an accommodation does not present an "undue hardship to their business."

[00:12:39] Dahlia Lithwick: And in some sense, Groff is just a case that turns on the meaning of undue hardship in trying to determine the nature of a religious accommodation for a worker. And as Erwin also just told you, in a 1977 case, TWA v. Hardison, the court held that providing a religious accommodation imposed an undue hardship on the employer any time it required the employer to "Bear more than a de minimis cost and de minimis you can tell by the name means it's a trivial or minor cost.

[00:13:16] Dahlia Lithwick: As a result after Hardan, if an employer could demonstrate that a religious accommodation entailed even a small cost usually the worker would lose Justice Thurgood Marshall furiously dissenting in that case, joined by Justice Brennan lamented that despite Congress's best efforts, one of the pillars, this nation's pillars of strength, our hospitality to religious diversity has been seriously eroded. All Americans will be a little poorer until today, this decision is erased."

[00:13:49] Dahlia Lithwick: And I just wanna flag for you that the liberal lions were the furious dissenters in those case, as opposed to where we are now on religious accommodations. Tells you the degree to which we live in sort of autopsy turvy religious accommodations moment the Third Circuit analyzed graph's case. And they felt that employers could establish and quote, undue hardship by showing that a religious accommodation would affect other employees or reduce morale. So Groff loses in the lower courts. I wanna flag here that ADL signed onto an amicus brief in this case, urging the court to adopt a higher standard.

[00:14:32] Dahlia Lithwick: They wanted undue hardship in Title VII to mean what it does under the ADA significant difficulty or expense. This is one of the unanimous opinions that Erwin just told you about Justice Alito writing for the entire court. He did not explicitly overrule Hardison but the court, as Erwin also just told you, essentially rewrote what undue hardship really means under the law.

[00:15:00] Dahlia Lithwick: And what it means is that employers must grant religious accommodations unless they can show "substantial increase costs to their business." So Groff's case is now sent back to the lower courts for further proceedings under the new standard, because the third circuit had relied on the more than de minimis cost standard.

[00:15:21] **Dahlia Lithwick:** Justice Sonia Sotomayor writes a concurring opinion joined by Justice Jackson, in which she notes, among other things that we need to take into account burdens on other employees. So what's the net effect of graph? In some sense, it corrects a, a bad precedent a precedent that was deplored by Thurgood Marshall.

[00:15:44] Dahlia Lithwick: Under the de minimis standard, as it stood in Hardison, a huge number of negative impacts were felt by religious minorities like Muslims and Sikhs, whose garb and whose observances are our suspect in Christian dominated workplaces.

[00:16:01] Dahlia Lithwick: Under this higher standard, however, it's worth flagging that the court is likely opening the door to a whole different kind of religious objectors including the Walmart employee who repeatedly told colleagues that LGBTQ folks are going to hell, or employee at HP who posted Bible v. on his cubicle calling for the execution of gay Americans or a pharmacist at Walmart who refuses to fill birth control prescriptions under religious conscious objections.

[00:16:33] Dahlia Lithwick: So this is in the aggregate and we'll hear what Greg has to say, but I think in the aggregate, this is in some sense a fix that might very well help a lot of minority religions. And it may also be part of this larger move to use religious dissenters from certain objecting Christian employees to widen the scope of what is a religious accommodation.

[00:17:01] Amy Howe: Greg? Yeah, go ahead.

[00:17:02] Gregory G. Garre: Thank you. And thanks to ADL and Constitution Center for having me here like the others, it's one of the highlights of my year. I think, you know, the only real surprise here is that the opinion was unanimous, and so relatively straightforward. And I think that in that respect, this opinion is an example of a theme that we see emerging from this term, which is, you know, the term, the court ended last term, literally barricaded from the public.

[00:17:30] Gregory G. Garre: And, you know in a sense, in a hardened 6-3 conservative liberal majority in the wake of the docs decision in this term, I think we see the justices to a large degree trying to find consensus in middle grounds. We're possible, certainly not in every case, but, but we're possible.

[00:17:48] Gregory G. Garre: And here, the justices found a middle ground one in which everyone could agree, even the justices who are probably more aggressive on religious liberty and, and liberals who have at least in the last few years not been as receptive to these claims. And they did so without formally overruling their prior precedent, which I think is another theme that emerges from this term.

[00:18:14] Gregory G. Garre: Unlike last term in the adopts case in particular, where the court expressly overruled this precedent, this term, the court I think notably stayed away from that. And as we'll talk about later certainly there's an argument that they effectively overruled some cases, but they didn't expressly overrule any cases. And in this case, they looked at their prior decision in TWA and said, yeah, there was a line in there that referred to de minimis.

[00:18:39] Gregory G. Garre: But if you really look at the whole decision, the right way, clarifying it today, is that you have to show, in order to show an undue hardship, you have to show genuinely substantial burden. Despite the fact that this is unanimous, I think it is quite important, and I think it's likely to lead to an increase in the number of religious accommodation suits perhaps of the both types that Dahlia described.

[00:19:07] Gregory G. Garre: And therefore, you know, more of this kind of litigation. And we'll have to see how this plays out. But it likely will result in additional cases before the court perhaps, in which the court will not be.

[00:19:21] Amy Howe: Thanks so much. We're gonna move on to a different case, a different kind of issue, which is the tension between LGBTQ rights and the rights of business owners who are devoutly religious. And that's the case of 303 Creative v. Elenis. And so Miguel is going to introduce that case for us.

[00:19:42] Miguel Estrada: Well, thank you. And I start also by thinking ADL and the constitutional center for having me. I have known I think many, if not most of these people for years and years and years. And I love to be in the company of everybody again. So this is one of those cases that I got a lot of press and as always, not to be overly harsh on the fourth estate, not in my judgment entirely accurate.

[00:20:05] Miguel Estrada: You may recall that five years ago, the court in a case called Masterpiece Shop, considered the question whether he would violate, you know, the First Amendment for a state to punish a Baker for refusing to bake a wedding cake for a same sex couple. When the Baker claimed that he had, you know, religious objections to providing, you know, the service and the state was trying to enforce a public accommodations law.

[00:20:32] Miguel Estrada: It was an interesting feature of the case, which is sort of at the final fluke in in this area, that even though the reason for the Baker sort of opposition to wanting to do this was, you know, religious, the claim was a speech claim. And the reason for that is that although no, a lay person might think that this is really most naturally a free exercise claim.

[00:20:57] Miguel Estrada: The Supreme Court in Smith case held many years ago that under the free exercise clause, generally you are not entitled to a get outta jail free card from the enforcement of generally applicable laws. And until that case is have ruled, what people have tried to do is to recast claims that are sort of naturally cast as a religious freedom claim, as a speech claim. Now, it was a little bit harder in the [inaudible 00:22:04] a cake claim because if you're thinking of pastries, you know, Rembrandt doesn't come most naturally to mind.

[00:21:32] Miguel Estrada: But ultimately, you know, the court, although it struggled with the question whether forcing somebody to bait to your wedding cake was a form of compelled speech, decided the quest the issue in that case on, on another ground and did not deal with the First Amendment question. So five years later, the issue is back in front of the Supreme Court, and this time is Lori Smith, who is the owner of 303 Creative and she's a graphic designer who has a graphic design business, and she does websites, so at least we're getting warmer in the speech area.

[00:22:06] Miguel Estrada: And like the Baker she has a religious objection to providing certain services, not all services to same sex couples. And so she wants to expand her businesses. She hasn't yet to same sex couples. And, but she does not I mean to wedding websites... Excuse me. But she does not want to offer her website business to same sex couples only to straight couples.

[00:22:28] Miguel Estrada: She is in Colorado, the same state as the Baker, and they have a very strong public accommodations law, and so fearing that they'll come after as the Baker files a enforcement challenge the state perhaps dismay of many people afterwards stipulates

to a number of facts that I think were very key in how the Supreme Court ultimately dealt with the issues in the case, including, you know, the fact that she's willing to serve people of all sexual orientations.

[00:23:01] Miguel Estrada: So if you're a gay person who walks into her shop and you want a website for something else other than a wedding she's more than willing to serve you. And the state crucially also stipulated to the fact that the websites that she would be creating for a couple who was about to be married were her original speech creations.

[00:23:22] Miguel Estrada: You could sort of conceive of a circumstance in which a state could have argued that in fact, it was just the execution of the desires of the couple, and not her own speech, but that was sort of stipulated away by the state. It was sort of stipulated that it was her original speech. And so the state goes to the district court in the Tenth Circuit, she loses the Tenth Circuit, holds that what is at issue is pure speech and subject to strict scrutiny, but she loses under strict scrutiny.

[00:23:49] Miguel Estrada: The case goes to the Supreme Court where she went six to three in an opinion by justice or search. And these two concessions by the state, or these two stipulations by the state, are sort of key and fundamental in the holding by the court that she's in fact willing to serve people of all faiths and creed and of all sexual orientations, and that she has a limited objection not to speak for certain voices.

[00:24:16] Miguel Estrada: And as the court sees you know, the case, then this case falls in the tradition of the flag salute case, you know, the Barnett case, where the state could not make you salute the flag. And it falls in the tradition of the Hurley case where the court had held that a gay group who wanted to participate in, say, in a Patrick's Day parade, could be excluded by the organizers because it was the organizers on speech. And finally in the Boy Scouts case where the court had held, you know, the right of the Boy Scouts to exclude the gay scout massacre based on their own First Amendment associational rights.

[00:24:54] Miguel Estrada: You know, there is a very, very spirited dissent by Justice Sotomayor, joined by Justice Kagan and Jackson where there is to some extent a fight with the stipulations that the state entered into. And whether this is really a case involving speech rather than conduct, and whether serving the public is conduct that they should be able to regulate.

[00:25:15] Miguel Estrada: And as the case has been widely, you know, reported in the press, you know, there has been a fight about whether this is, you know, the end of public accommodations laws. It is true that the court has sort of created an expressive expression exception, excuse me, to these sort of laws. On the other hand, I mean, there are a number of hypotheticals that would trouble most fair people.

[00:25:37] Miguel Estrada: I mean, if you're a left leaning speech writer, you have a speech writing business, can you be compelled to work for the party or for Donald Trump? If that's not your inclination can you be compelled to like, lend your speech sort of crafting abilities to something that you really don't agree?

[00:25:57] Miguel Estrada: Can you, if you write for a left-wing organization, can you be compelled to write for a right-wing organization and express a point of view you, you don't agree with? So there, there's some troubling issues, and it's possible that this is in fact several more limited than people think. But it's in fact, true that it is a big case for the year, and only future cases will tell us how far the court will go down this road.

[00:26:24] Amy Howe: Dahlia, I think you may have thoughts.

[00:26:26] Dahlia Lithwick: A couple quick notes. I wanna start by saying I think Miguel is exactly right, that a lot of the what's tricky in this case is the stipulations that Colorado enters into. And I think another thing that's very tricky about this case is that it comes as both a religion case and a speech case, and religion gets stripped out so that it is treated as a speech case, even though it's almost impossible to unbraid the religious component in the, in the holding of the case.

[00:27:01] Dahlia Lithwick: And Lori Smith is very clear that her view is that same-sex marriage is "false marriage." That's a religious view, and it's very, very hard, although the court treats it as a pure speech problem to sort of see where religion isn't sort of everywhere and nowhere in this decision. And that makes it slightly fraught.

[00:27:24] Dahlia Lithwick: I think, you know, one thing I wanna say is I think it's absolutely true what Miguel says. This is treated as a sort of pre enforcement challenge. It's also, I think, a case in which there's no one on the other side that unlike Jack Phillips in the Masterpiece Cake Shop, where we had actual plaintiffs who were refused service in the face of Charlie Craig and Dave Mullins, who were not allowed to have their wedding here, there's nobody, there's only one party whose story is told in this suit and the invisible parties who have not yet approached her for services.

[00:28:01] Dahlia Lithwick: And as a consequence, I think you get a sort of lopsided narrative where the only perceived harm is the harm to the website designer. There's no other party to claim dignitary interest. And so I think Justice Sotomayor writing this very, very sharp, as Miguel says, dissent has to try to give voice to all of the perceived people who will be refused services.

[00:28:27] Dahlia Lithwick: The other thing that I think is worth saying is that it's very hard, and I think Miguel makes this point to find a principled limiting principle here, and this is the bulk of Justice Sotomayor's concern is a how do we determine what is expressive under this new analysis? If you're gonna have a carve out from public accommodations law, it has never existed.

[00:28:54] Dahlia Lithwick: Who is to say whether a photographer who is to say whether a florist? We have this week a hairdresser in Michigan who is claiming that hair cutting is a bespoke expressive First Amendment protected activity, and there's really, I don't think much of a clue from majority opinion how we're gonna draw that line. The other really deeply concerning thing that I think Justice Sotomayor lifts up is that all of these public accommodation statutes that were created in order to protect people from discrimination on the basis of race, it's hard to find a principle distinction that doesn't sweep in.

[00:29:36] Dahlia Lithwick: And the example that Justice Sotomayor gives is the photographer who comes to take class pictures and doesn't think that interracial marriages are real marriages, that they're false marriages and has a principled religious objection to taking those photos. And so it's hard to see how all of the analysis in the race discrimination cases that really form the spine of public accommodations doctrine don't also get implicated here.

[00:30:06] Dahlia Lithwick: And I always remind people that when you look at those denials of service to African-American customers at restaurants in the 1960s, religion was lifted up as the basis for those denials. Religion was at the heart of the original opinion and Loving v. Virginia. So I think it's very, very hard to strip that out of this case. And maybe the very last thing I wanna say is where Justice Sotomayor ends up, and it's where Miguel started, which is, this is a really remarkable moment.

[00:30:42] Dahlia Lithwick: We are not in the line of cases that is compelled speech, you know, Hurley Barnett, because these are ultimately commercial businesses who hang out a shingle and say, we will serve all comers. And now after today, you can also put up a sign on your website that says, we will serve all comers except for gay couples.

[00:31:03] Dahlia Lithwick: That is remarkable in terms of a departure or a carve out and using compelled speech as the vehicle to do that. It is a sea change, and I agree with Miguel, it's gonna be left to the courts now to determine how we apply that and whether we can find those sort of principled end point.

[00:31:25] Dahlia Lithwick: But I don't think this is a trivial case, and I do feel very, very strongly that the absence of anyone on the other side of this case meant that there was really only one compelling story told.

[00:31:37] Amy Howe: So we will perhaps be discussing this issue in future panels, perhaps next year in Philadelphia. I wanna move on now to two of the highest profile cases of the term involving the role of race in college admissions one was a challenge to UNCs admissions policies. One was a challenge to Harvard's admissions policies.

[00:31:59] Amy Howe: The cases when the court granted review were consolidated for oral argument, then unconsolidated because of Justice Jackson's recusal and then effectively consolidated again for the court's opinion. So Fred is gonna walk us through that. Thanks so much.

[00:32:15] Frederick M. Lawrence: Thank you. And, and thank the ADL and the National Constitution Center and all of my colleagues. It's a great joy to be back together for this program this year. The Harvard and University of North Carolina Chapel Hill, affirmative action cases were among the most closely watched nationwide, and certainly for ADL, which participated with one of the many, many amicus briefs that were put before the court.

[00:32:38] Frederick M. Lawrence: This is the fourth major time the court going back till 1978, has revisited this issue of race conscious admissions policies in higher education Bakke in 1978, the Grutter case in University of Michigan in 2003, the Fisher case in University of Texas in 2016, and now in 2023, involving a public school.

[00:33:01] Frederick M. Lawrence: The University of North Carolina, a private institution, Harvard and asking the question of whether race conscious admissions is constitutional under the 14th Amendment for public schools legal under Title VI for private schools for schools that accept federal funding.

[00:33:17] Frederick M. Lawrence: That's about 3,000 colleges and universities in this country. But for context, if you combine those two categories, public schools and private schools accept federal funding. That's about 97% of the 18 million or so students in higher education institutions in the United States. So the impact is dramatic.

[00:33:36] Frederick M. Lawrence: The facts of this case are well known in part because it's been so widely discussed, and in part because this issue has come before the court so many times. Ever since Bakke no school has had a strict quota that would not be legal for students of color or any particular group.

[00:33:53] Frederick M. Lawrence: Race cannot be the determining factor in an admissions decision, but it has been a factor in a process both University of North Carolina and Harvard included race as a factor in a complex sophisticated process of winnowing down a large number of applicants into the students, actually admitted. The majority opinion written by the Chief Justice.

[00:34:15] Frederick M. Lawrence: And this is one of the examples that Erwin talked about earlier of the Roberts Court. This has been an issue as associated with this Chief Justice since he had his confirmation hearings back in 2005. The court struck down the use of race as a factor of any kind in admissions and asserted a race blind view of the Constitution.

[00:34:34] Frederick M. Lawrence: The Chief Justice in his majority opinion for six justices, traces back to Brown against Board of Education in the cases that follows a sense of the equal protection clause having a core purpose to do away with all governmentally imposed discrimination on the basis of race. We said as, as Greg mentioned earlier, this was not a term where the court was going to overrule cases expressly, and in fact, the court does not overrule the Grutter case, although Justice Thomas in his concurrence says, that's actually in fact what the court is doing. And Justice Thomas does seem to have the better of that.

[00:35:12] Frederick M. Lawrence: For all intents and purposes, Grutter does not seem to survive this decision in these affirmative action cases. It's a Roberts like approach instead not to overrule a case, but to look at the body of cases in this area and to divine three principles that are required to justify admissions decisions on the basis of race. And the majority finds that University of North Carolina and Harvard fail on each of the three counts.

[00:35:40] Frederick M. Lawrence: First, that the program has to comply with strict scrutiny. Second, that it may never use race as a stereotype or as a negative factor. And third, that there has to be some kind of a end date to this project of using race as a factor in admissions. Let me just touch on each of those three.

[00:35:59] Frederick M. Lawrence: With respect to strict scrutiny. The majority was very concerned that the compelling state interests that have been proffered training leaders expanding knowledge from diverse per perspectives, creating a robust marketplace of ideas.

What we at Phi Beta Kappa like to say, preparing students for meaningful lives, productive lives, and engaged lives as citizens.

[00:36:20] Frederick M. Lawrence: All of those kinds of factors, the majority found too vague and too unmeasurable for purposes of meaningful judicial review. Majority also felt strict scrutiny was not satisfied because they found that there was no meaningful connection between the means that the schools had employed and that the goals that they were pursuing. Specifically, there was mentioned that the racial categories used by both schools, Harvard and Chapel Hill, that the majority felt was over broad grouping together, for example, all Asian ethnicities into one category or using the category of Hispanic which in fact comprises many subgroups.

[00:37:00] Frederick M. Lawrence: So the court felt that strict scrutiny was not satisfied. This, the court majority also felt that race was being used as a negative factor. And here in a, in a finding that was somewhat puzzling to those of us who've been involved in the admissions business the court took a position that college admissions is a strict zero sum game. If one receives a benefit of any kind, another has lost as if it came down to two candidates.

[00:37:25] Frederick M. Lawrence: Otherwise, identical being decided between based on one factor, those who've done college admissions knows, know that in fact that is not how admissions processes work. But the court found that race was a negative factor. If it advantaged one by implication on the zero sum theory of admissions, it would be disadvantaging others.

[00:37:45] Frederick M. Lawrence: Justice, Chief Justice Roberts also felt that there was negative stereotyping engaged. Let me use his language. It engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike. As to the logical endpoint, the court found that the schools had not provided any kind of a benchmark to measure when meaningful representation in a diversity had been achieved on a college campus and would no longer require racial conscious admissions practices.

[00:38:17] Frederick M. Lawrence: There are a number of observations one can make from this case. Let me very briefly touch on three. One is an issue that Erwin mentioned in his introductory remarks. Where does this leave academic freedom? One of the core places where the court has developed its jurisprudence of academic freedom over the past half century has been in the context of race conscious admissions.

[00:38:37] Frederick M. Lawrence: One of the four core principles of a university's right of academic freedom has been how it comprises its class, the other being who teaches at the institution, what they teach and how they teach it. Chief Justice Roberts cuts back on that and he says it is true that our cases have recognized the tradition of giving a degree of deference to a university's academic decisions, but the deference he says exists within constitutionally prescribed limits and does not imply an abandonment of judicial review.

[00:39:10] Frederick M. Lawrence: As the Chief Justice said, universities can define their mission as they see fit. Our mission is defined by the Constitution. To a certain extent,

academic freedom survives, but I think academic freedom took a hit here in terms of a limited deference to institutions of higher learning.

[00:39:30] Frederick M. Lawrence: Second issue I would touch on is the particularly sharp exchange between the two African-American justices on the court, Justice Thomas and his concurrence, Justice Jackson. In her dissent, they represent fundamentally different views of race and the law. Justice Thomas articulating a race blind constitution based on his originalist reading of the text, Justice Jackson saying now famously, I think deeming race irrelevant in law, does not make it so in life.

[00:39:58] Frederick M. Lawrence: She says further in her dissent, lengthy history of state-sponsored race-based preferences in America causes the well-documented intergenerational transmission of inequality that still plagues our citizenry. She felt the majority opinion did not take account of that profound impact of past discrimination.

[00:40:18] Frederick M. Lawrence: Finally, the majority opinion by the Chief Justice does seem to leave two doors open. One in direct response to a question that Justice Jackson asked during oral argument when she very pointedly asked about the irony of the fact that a legacy student who benefited from discrimination in the past could mention that, whereas a student whose ancestors have been excluded from the school on the basis of race discrimination could not mention that.

[00:40:45] Frederick M. Lawrence: So the Chief Justice says, near the end of his opinion, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise. I suspect there will be litigation going forward, probably starting already as to how broad or narrow that language should be interpreted. Finally, another door left open is the military. The majority opinion expressly does not deal with the argument made by the Biden administration in its brief with respect to military programs of race conscious admissions on the basis of the need to develop diverse leadership corps within the military.

[00:41:27] Frederick M. Lawrence: The majority said in the footnote that the court would not weigh in on this issue in light of the potentially distinct interests that military academies may present, not clear exactly why that difference is different from other academic freedom differences. This may be an issue we see in future cases as well.

[00:41:46] Amy Howe: Greg, you argued in the Supreme Court twice defending the University of Texas's admissions policies, so we'd love to hear your thoughts on these decisions.

[00:41:55] Gregory G. Garre: Great, thank you. So this is the result that pretty much everyone expected. I think when the court agreed to hear these cases, and we're gonna talk about a few decisions where the court reached somewhat surprising results for the liberals, but this is one where the sort of six three strong conservative court held and shows that when, you know, push comes to shove on the most important issues to the conservatives the conservatives are gonna come together in the six three decision, if you were gonna put

together a, a sort of wish wishlist for conservatives of issues to reexamine, certainly affirmative action would've been high on the list.

[00:42:32] Gregory G. Garre: I think, you know, there's a really interesting contrast between the decision in this case and the decision in Dobbs last term. And Dobbs, the Chief Justice was on his own and saying, "Look, all we need to do is in this case is uphold the Mississippi law. We don't need to actually overrule Roe v. Wade. So let's just do that."

[00:42:53] Gregory G. Garre: And in this case, by contrast, the court stopped short of formally overruling its prior precedence and Grutter and Fisher instead it, it simply picked what it liked from those cases and ignored the stuff that it didn't like. And, and so I think, you know, this sort of less aggressive and arguably less transparent approach is, is a win for the chief and I, although I think it remains to be seen, you know, whether it's really better for the law.

[00:43:22] Gregory G. Garre: But, the bottom line is that the court stopped short of overruling Bruter and Fisher, and in Fisher's case, at least expressly distinguished it. I think this is a really important symbolic win for conservatives. But I think the practical importance of this case is less clear.

[00:43:39] Gregory G. Garre: As, as Fred indicated this decision does not require race blind admissions. The Chief Justice at the end of his decision explicitly said that nothing in the decision prevents the consideration of applicant's race in the context of discussion of his or her own individual experiences. And you know, what that really comes down to is taking race as checked as a box into account v. race as it bears on one's individual experiences.

[00:44:08] Gregory G. Garre: And so I expect that we will see that. It'll be interesting to see the extent to which universities may encourage that. Schools can still pursue holistic admissions. They can seek diversity through race neutral means. And this is an area where schools have gotten more creative recently. They can they can go after financial means, first generation students, languages spoken at home, target students from particular lower income areas and enact things like Texas had top 10% plan.

[00:44:39] Gregory G. Garre: All of those things may be ways to help offset the impact of this decision. It has to be said that when Michigan and California prohibited by state laws a consideration of race in their public schools the numbers of African-American Hispanic students in the immediate after that fell rather sharply. You know, there's debate about that in this case, about the extent to which they've come up, but I think they have come up a bit.

[00:45:04] Gregory G. Garre: And so I think that that is something to follow. As Fred mentioned the, the court also distinguish military academies. So I think there are ways that schools can respond to this decision and still seek to pursue diversity, and that all of that will result I think, in the next frontier at which will be litigation over whether schools have permissively done indirectly, what this decision forbids them from doing directly.

[00:45:35] Gregory G. Garre: And the chief, while on the one hand, noting that schools could consider race as in the context of one's individual experiences, also said that we're not saying that you can do indirectly what we say you can't do directly.

[00:45:48] Gregory G. Garre: And I think you know that that's where the litigation is gonna head. And you know, one, I think of the more important aspects of this decision is a chart and the decision which shows the remarkable consistency in numerical bands among races. And my sense is that could be important in future cases and subsequent challenges to, for policies that don't expressly consider race as a standalone factor but nevertheless produce classes that may be similar to what we've seen.

[00:46:20] Gregory G. Garre: So a lot remains to be seen in terms of how this decision will shake out as a practical matter, but no question, it was very important as a symbolic win for conservative.

[00:46:32] Amy Howe: Thanks, Greg. We are now about to move on to the part of the program where we discussed the cases in which we saw arguably surprising results. And we are gonna start with Moore v. Harper and the so-called independent state legislature theory. And Miguel is gonna introduce that for us.

[00:46:52] Miguel Estrada: Great. Thank you. So this one starts with a dispute about the congressional map that was adopted by the North Carolina legislature in 2021, the legislature is controlled by the Republicans and to no one's great shock. It turned out that the map they came up with gave 10 outta 14 seats to the Republicans. You know, the Democrats cried foul and claimed that this was a partisan gerrymander.

[00:47:16] Miguel Estrada: A claim that, as you may recall from the case in the Supreme Court, is not judiciable in the federal courts. Luckily, the state courts are open and available, so they rushed into the state courts where the North Carolina Supreme Court, which at that time was controlled four, three by the Democrats discovered in the state constitution that they claim is judiciable under the North Carolina constitution and invalidated the map leading ultimately at the trial court to the adoption of a seven seven map for the 2020 election.

[00:47:48] Miguel Estrada: The North Carolina legislator Republicans not [inaudible 00:49:51] giving up took the fight to the US Supreme Court on the basis of the Elections Clause of Article One of the Constitution. Now the Elections Clause basically says that the times, places, and manners of congressional elections shall be prescribed in each state by the legislature thereof.

[00:48:10] Miguel Estrada: This has led to this so-called independent legislator theory, which basically says that the legislator gets to call these things having to do elections, including the congressional map in this case without really any interference from any other organ of state government, including the state courts, you know, the Supreme Court in this case or the governor or any other state actor.

[00:48:35] Miguel Estrada: There is a related argument as it, you know, relates to the presidential elections that is based in Article Two of the Constitution, the Electors Clause, which says that each state may appoint electors to the electoral college in such a manner as the legislature. There may the direct those of you with long memories may you know, recall that, you know, this argument played some role in the arguments in the now very old Bush [inaudible 00:51:09] Court case, where it got three votes from the then sitting justices Brett, Scalia and Thomas.

[00:49:10] Miguel Estrada: And we'll come back to that. So the case gets to, gets to the Supreme Court of the United States where the first question is mootness because in the intervening 2022 elections, the North Carolina State Supreme Court has flipped five, two, the Republicans who have promptly overruled. You know, the case that the four, three Democrats had used to invalidate, you know, the map and had, you know, dismissed the case or so they thought they did not, however they need better lawyers reinstate the congressional map.

[00:49:49] Miguel Estrada: And so the Supreme Court, an opinion by Justice Roberts finds that the case is not moot because even though you know, the case has been overruled, and you know, the plaintiffs have effectively been dismissed in the state courts, the Supreme Court can provide effective, you know, relief to the state court legislature if they win by reinstating the 2021 map.

[00:50:11] Miguel Estrada: Going on to the merits, however the Supreme Court in an opinion by the Chief Justice finds that the so-called independent state legislative theory has no legs. And the reasons for these are both based on common sense and on Supreme Court case law.

[00:50:28] Miguel Estrada: What the court says is that it has already repeatedly considered earlier challenges in which some flavors of this theory had been tendered to the court. In the early 1920s, you know, there was a case in which in the state of Ohio called Hildebrand, in which the state constitution in Ohio provided that the state map or the state law that had been approved by the legislature could be overruled, in effect by a popular referendum that had been challenged under the Elections Clause, the Supreme Court of the United States rejected that challenge.

[00:51:04] Miguel Estrada: Later on, you know, there was a challenge in which, you know, the governor had exercised veto and you know, the Supreme Court of the United States again held that that was consistent with the Elections Clause, and therefore so somewhat inconsistent with the notion that the legislature alone gets the sole say on this.

[00:51:21] Miguel Estrada: And finally, most recently the people, Arizona had changed their system to provide that you know, the electoral maps would be sort of drawn up by an independent commission rather than by the legislature that has been challenged by the legislature and the Supreme Court had upheld that as well.

[00:51:43] Miguel Estrada: What the Chief Justice drew from that is that the Election Clause basically assigned these duties and effect to the legislative power of the state as it may be confined by the own by the own constitution of the state. And that the state cannot say that the legislature alone gets to exercise this independent, that may impose or other lawful, you know, restraints caveat, which was sort of followed up by Justice Kavanaugh in a concurrence.

[00:52:16] Miguel Estrada: The Chief Justice did say, of course, there is a federal law that would conceivably underlie and exercised by a state court of authority in this area. It is possible, hypothetically that a state court could exercise such an outlandish mode of, you

know, review in an elections case that is no longer basically exercising either a judicial function or possibly construing what the electoral code of the state actually does.

[00:52:47] Miguel Estrada: And in those cases, just as in a case involving a taking of property where the state says this is not property at all, there would be a federal role for the federal court. And so he holds that out in a concurring opinion. Justice Kavanaugh points out that there is a standard to that that had been voiced by the concurring opinion in Bush v. Gore under the Electors Clause of Article Two.

[00:53:11] Miguel Estrada: And he signals that as something that will be available in future cases. Important footnote here, you might think that if on the first go around when the North Carolina Court had essentially, you know, discovered that these claims were GEs under the state constitution, perhaps, and consternation of other people in the state, you might have had a good claim that this is one of the circumstances in which the state court has departed from its proper role under the Elections Clause.

[00:53:46] Miguel Estrada: And there was a federal role to undertake under the Chief Justice said, "Well, that may well be, but the state legislature did not raise that claim separately. They did not preserve it, and it is waived." So, you know, the court did not address whether the conduct of the court here in, with respect to the particular claim was, in fact, within the Elections Clause. It said that the exercise of judicial power was appropriate without looking at the claim itself.

[00:54:17] Miguel Estrada: There was a, a dissent by Justice Thomas Alito and basically, you know, disputing mostly, you know, "the case was moot."

[00:54:28] Amy Howe: Thanks so much. Fred?

[00:54:30] Frederick M. Lawrence: Just a couple of brief, brief notes. I think Miguel is correct that the arguments about the invalidity of the independent legislature theory both based on common sense, reading to the tests and precedent, we're clear here and I think that drives the result to a large extent. There are a couple of things that are worth noting.

[00:54:51] Frederick M. Lawrence: One is that those with long memories in a different way will recall the famous language in Bush v. Gore that said, our consideration is limited to the present circumstances. It was the ticket good for only one ride, as was said at the time. Well, it seems that that ticket still lives and rides on to continue the pun.

[00:55:11] Frederick M. Lawrence: So exactly what the vitality continuing forward a Bush against Gore is going to be is interesting after this case. The fact that Justice Kavanaugh, in his separate opinion relies on that itself, is noteworthy. He, of course, was quite involved as a litigant, as an advocate in the Bush against Gore case and perhaps some other people on this zoom as well.

[00:55:31] Frederick M. Lawrence: So that there, that is, that is certainly worth watching. In addition and this is something that Justice Thomas points out in his opinion after saying

that the case should not have been taking up his moot and we should let it go at that, he decides, of course, not to let it go at that and does discuss the merits.

[00:55:47] Frederick M. Lawrence: But one of the things that he does talk about is that at the same time as this is an elevation of the role of state judiciaries in the face of an argument that legislatures and legislatures alone can make these decisions, it is a big power grant to federal courts.

[00:56:01] Frederick M. Lawrence: And you have this, this odd blend of federal and state function of state institutions, of using state law to evaluate state activities that is delegated by the federal Constitution. So there is a federal issue involved as well which does lead to the concern of when federal courts get involved in the the play out of elections, particularly if it's not exity, but it's right during the election or immediate aftermath raising serious questions.

[00:56:31] Frederick M. Lawrence: And again, those of us who remember Bush against Gore remember that as in many ways, not being the court's finest hour.

[00:56:39] Amy Howe: I wanna turn now to what was arguably the other big surprise of the term, which was the court's decision in Allen v. Milligan, the Alabama Voting Rights Act case. And Dahlia is gonna cover that for us.

[00:56:53] Dahlia Lithwick: And I, and I'm gonna do it at a gallop, Amy, 'cause I feel like we have so much ground left to cover. So I'll try to-

[00:57:00] Amy Howe: Panther gallop, whatever you'd like.

[00:57:02] Dahlia Lithwick: I will do the Acela version of this. And I just wanna make just two precatory points. One is to the extent that last term was really consumed with issues of abortion and guns and religion, this term was meant to be kind of the referendum on race. And as you've just heard in the affirmative action cases that was a huge win for a sort of conservative colorblind view in the Indian Child Welfare Act case, which we're gonna get to if I talk faster.

[00:57:35] Dahlia Lithwick: And in this voting rights arena, it was in fact not born out by the end of the term. And I think that using sort of Erwin's construction, which is there were a lot of wins, surprising wins for liberal views this term. I think this was the one that was actually a win and not a status quo decision.

[00:57:57] Dahlia Lithwick: This actually was a net huge win. And just very quickly, folks will recall in Shelby County v. Holder in 2013, a divided Supreme Court struck down Section five of the Voting Rights Act, which contained that pre-clearance formula used to determine when state governments had to obtain right approval for changes to their voting laws and practices. But they could still use Section two, two years ago in Benevich by a six to three margin.

[00:58:28] Dahlia Lithwick: The court narrowed Section two and it looked as though this case would've further narrowed. The case is Merrill v. Milligan later renamed Allen v. Milligan. It would have sort of expanded that idea to vote dilution cases and it didn't happen.

[00:58:46] Dahlia Lithwick: It was a genuine win for Section two, just very briefly, the law at the heart of this case. Section two bars election practices that result in a denial or abridgement of the right to vote based on race. In this case, we had voting rights groups challenging Alabama's 2021 redistricting map because seven seats in the House of Representatives had only one black district, despite the flat fact that black residents make up 27% of the state's population.

[00:59:19] Dahlia Lithwick: And this was done by way of sort of what we know is traditional cracking and packing. And the challengers contended that they had a right to a second majority black district a three judge panel including two Donald Trump appointees ruled that the map violated Section two. In February of 2022 the Supreme Court by a five, four margin stayed that and allowed Alabama to use the map in the 2022 elections.

[00:59:49] Dahlia Lithwick: The case was set for argument this term, and in a sort of surprising five for four decision authored by the Chief Justice joined by Brett Kavanaugh, the Supreme Court upheld the idea that the 1986 decision in a case called Thornburg v. Gingles, which outlines a three-part test to evaluate claims under Section two had didn't permit the new map, which violates the Voting Rights Act.

[01:00:18] Dahlia Lithwick: And the Chief Justice is very clear in his opinion. He writes, Alabama's understanding of Section two would require abandoning four decades of Section two precedent. We declined to recast the case law as Alabama requests. There were very, very strong dissents by Justices Thomas and Alito.

[01:00:39] Dahlia Lithwick: And I just wanna lift up that this really goes to Erwin's larger point, that to the extent that last year at this time we were saying this is the Thomas Court, this is the Alito Court this was another case in which they wrote dissents. I think that the knock on effects is that voting rights groups are going to benefit in terms of not just Alabama voters but Louisiana and Georgia litigation.

[01:01:06] Dahlia Lithwick: And I think that this is in some sense this huge, huge surprise to the court, to the public in many ways predicted what was going to happen in the affirmative action cases we just discussed. And one tiny little wrinkle is that we're now seeing arguments from Republicans in Louisiana who are challenging Section two, using the logic of the affirmative action decisions we just discussed.

[01:01:35] Amy Howe: Greg, if you have any quick thoughts on Allen v. Milligan, we'd love to hear them.

[01:01:40] Gregory G. Garre: So I think this case underscores that probably the most important and interesting relationship on the court is between the Chief Justice and Justice Kavanaugh right now. We have a very strong six, three conservative court. What that means is it takes not just one, but two justices to flip the court. And if you put the chief in the middle of the court, that means you've gotta find someone else.

[01:02:02] Gregory G. Garre: And this term at least, it was Justice Kavanaugh who tended to supply that vote. The next point that I think this case illustrates is that this is still very much as Dean Chemerinsky indicated the beginning of the presentation, the Roberts the chief really had a remarkable year writing the most important decisions on both the left and the right." And this is one where he pulled Justice Kavanaugh to join him. Initially the court agreed by a five, four vote to stay implementation of the district court, the plan in this case. And so the ultimate five four decision upholding that plan required the chief to pick up a vote. And he did that in Justice Kavanaugh.

[01:02:44] Gregory G. Garre: I think the best way to understand the case is stare decisis. Another theme that we've talked about in particular, statutory stare decisis, as Dahlia mentioned the Chief Justice and Justice Kavanaugh viewed Alabama's argument as simply an attack on 40 years of the court's interpretation of Section two.

[01:03:03] Gregory G. Garre: And they refused to go along with that. And then the last thing I would note is that as important as this, when was for the progressives it's narrow and conceivably limited in time. Justice Kavanaugh wrote separately as the fifth vote declining to go along with the Chief Justice discussion of the difference between race consciousness and race- racial pre- predominance, which is not permitted, but then also raised the possibility that even if Congress could authorize the use of race in the redistricting con- context for some period, perhaps that wasn't an indefinite authorization.

[01:03:39] Gregory G. Garre: And that caveat, I think is particularly or potentially ominous in the wake of the affirmative action cases in which the court went out of its way to emphasize the Lion and Grutter, that they were only allowing this for a limited period of time. So I think that'll be an important feature.

[01:03:56] Amy Howe: Terrific. Thank you. We're gonna move on quickly to a pair of cases involving liability by tech companies for content posted by others. So Miguel, if you could talk us through those, please.

[01:04:12] Miguel Estrada: Well maybe I can do this even faster. These are a pair of cases, both of which came to the Supreme Court from the Ninth Circuit, Gonzalez v. Google and Twitter v. Taamneh. The Ninth Circuit that engaged in somewhat of an inconsistent disposition of them. But basically what's at issue here, underlying this is the Anti-Terrorism Act, under which a US national who's injured by an act of international terrorism may recover tribal damages.

[01:04:39] Miguel Estrada: May also you know, victims may also, you know, recover from anybody who by knowingly providing substantial assistance or conspired with who committed such act of international terrorism. So here we have two separate acts of international terrorism, one in Turkey and one in Paris. Families of you know, the victims sued separately trader Google and other companies sort of claiming in essence that the social media companies in one case Google had had sort of like aided through YouTube aided ISIS under recruitment and ultimately was, you know, responsible for aiding and abetting the act of international terrorism.

[01:05:21] Miguel Estrada: Because, you know, the algorithm had aided, you know, the recruitment of terrorists by ISIS and ultimately had led to you know, the victim's, you know, demise. You know, there were similar allegations in the Twitter case you know, with respect to Twitter and Facebook and others.

[01:05:38] Miguel Estrada: And the Google case, you know, the Ninth Circuit dismissed most of the case under Section 230 of the Communications Decency Act. And when the case got to the Supreme Court, everybody thought that this was going to be the big issue in the Supreme Court. Section 230 generally protects internet platforms for making available under platforms, content posted by others. As to Twitter, you know, the Ninth Circuit had held that if there were allegations that the defendant had assisted a broader campaign of terrorism that could be enough to survive, you know, dismissal.

[01:06:13] Miguel Estrada: Now the headline in the case is that, you know, the case got to the Supreme Court and to degrade, you know, relief and perhaps the many people and to the conservation of some, the Supreme Court didn't get to anything having to do with Section 230 the CDA. Which was why everybody thought these cases were gonna be obviously important and as significant court sent that issue back to the court.

[01:06:40] Miguel Estrada: You know, the court wrote its main opinion and opinion by Justice Thomas in the Twitter case. And you know, the bulk of the opinion is partially through the sedentary language of the APA to try to figure out what aiding and abetting means. And basically the court held that it means the same thing as in the common law terms, and therefore you have to engage actively in the particular act of terrorism as something that you need to bring about is basically something that the court had said in some of its old case.

[01:07:09] Miguel Estrada: There a case called and you know, there was some ambiguity in the text as to whether you're aiding the, the, the organization or the act. But at the end of the day what the court essentially holds is that you have to engage in some that aids, you know, the act with a culpable mental state. And you know, the court found that there were not enough allegations with the Twitter case. In the Google case, you know, the court found that there might be some conceivable factual claims that sort of got passed that test, but there were not well treated.

[01:07:42] Miguel Estrada: But in any event, all of this was sent back to the Ninth Circuit. The holdings of the case, you know, if you ever need a good exposition of the contours of aiding and abetting law Justice Thomas wrote an exhaustive a well research opinion on this. But as to the issue that everybody was interested on whether the court was gonna cut back or do something about Section 230 of the Communications Decency Act, that was left for another day.

[01:08:09] Amy Howe: Terrific. Thank you. Erwin, any quick thoughts?

[01:08:12] Erwin Chemerinsky: Real quickly. I think this is important 'cause these are the first cases to come to the Supreme Court, but horribly social media companies liable, the court didn't do so. If the oral argument both conservative and liberal justices were expressing great concern about opening that door, there's be many more cases coming up with regard to

social media and the internet. They'll be interested to see if the court follows this caution in the future.

[01:08:38] Miguel Estrada: Yeah, if I could just add something that I will say was interesting about how the court chose to analyze what social media is under traditional aiding and abetting law is that as far as the court looked at the question, people who use social media to commit wrongs are not legally different from people who use the males or the phone to commit wrongs.

[01:09:04] Miguel Estrada: And although someone might claim that the algorithms and everything else that, you know, social media used to steer people to one room to another were may or should make a difference on the questions of liability. Justice Thomas basically said that that basically was passive nonfeasance. And just as if the phone company becomes aware that you're engaged in wrongdoing, there's generally no general legal duty for them to stop giving you the service. Prove that, you know, these algorithms are anything other than part of the architecture that is essentially passive in this media. They're basically like the wires and the phone.

[01:09:41] Miguel Estrada: It is a service that being provided, but it doesn't itself give rise to liability.

[01:09:48] Amy Howe: Thank you so much. I wanna move on to student loans. And so I'm gonna toss it to toss it to Fred.

[01:09:55] Frederick M. Lawrence: In the student loan cases, we see several of the themes we've been talking about this afternoon. We see a strong opinion by the Chief Justice. We see a six, three court and we see something Erwin told us at the very beginning, a lack of deference here to the political branches, the executive branch and the legislative branch at issue was the Biden administration's issuance of debt, student debt relief of $10,000 for students making 125,000 or less or up to $20,000 of debt relief for those who are Pell Grant eligible have been Pell Grant recipients.

[01:10:28] Frederick M. Lawrence: Total price tag of this package was over $400 billion, estimated about $430 billion. That becomes an important issue, an oral argument, and we see that come up in the opinion as well. The two sets of issues in these cases. One is standing where briefly in one of the cases brought by the private plaintiffs, the court in unanimous opinion by Justice Alito. That's interesting. That's the first time we've mentioned Justice Alito here, where we talked about him a lot last year. There's a story to be told in that as well.

[01:10:55] Frederick M. Lawrence: He writes a nine zero opinion saying that there was not standing of the private plaintiffs who had been denied debt relief under this plan, but the case brought by six states, the Chief Justice writes the opinion saying there is standing. This is in spite of the fact as the administration argued, and as Justice Kagan argued in a very strongly worded dissent, that the party that really stood to be harmed by this debt relief program was an independent state agency of Missouri, which was not a party.

[01:11:25] Frederick M. Lawrence: And that's not accidental. They had not joined the case. The Chief Justice says, "Well, they're a state agency and they're connected with a state that's

enough to create standing for the state of Missouri and therefore give standing for the six states that brought this allowing the court to reach the merits."

[01:11:38] Frederick M. Lawrence: On the merits the administration had used the Heroes Act passed back in 2003, which among other things provided the Secretary of Education with the authority to waive or modify student loan obligations, student debt obligations in connection with military operations or other national emergencies. That's the operative language here. Congress never modified that, Congress could have dropped the or national emergencies language. They didn't, and of course, Congress didn't repeal this act.

[01:12:08] Frederick M. Lawrence: Chief Justice Roberts in the majority opinion, said that language was not sufficient to authorize the debt relief of $430 billion here under the continuing use of the Major questions doctrine, there were something of this level, this magnitude is involved, it requires more direct authorization from Congress and that this was to use the language from last year's case EPA in West Virginia oblique and elliptical in the statute rather than direct.

[01:12:36] Frederick M. Lawrence: Justice Kagan in her dissent says the language was actually quite clear and that it does authorize debt relief waiver or modification. In this case, there was waiver and that was the authority that was used. She pulls together our two questions in this case and says that the taking of the case where there was not standing is a judicial overreach and the rejection of the administrative action based on what she finds to be a clear authorization of the statute is also judicial overreach. Interestingly enough, it was Justice Scalia, who years ago talked about standing as the bulwark against judicial overreach and the limitation on self-governance.

[01:13:20] Amy Howe: Gonna move on to the Indian Child Welfare Act. Erwin, can you tell us please about Haaland v. Brackeen?

[01:13:28] Erwin Chemerinsky: Of course. There's a long, tragic history in the United States of Native American children being removed from their families. Congress adopted the Indian Child Welfare Act to address this. It says that when placing Native American children in foster care adoption, a preference should be given for Native American families. This case, Brackeen v. Haaland, is actually three that came to the Supreme Court together.

[01:13:52] Erwin Chemerinsky: The name case Brackeen v. Haaland is typical. The Brackeen are a white family that took a Native American child into foster care. After a year together, they decided they wanted to adopt the child. Both of the biological parents, both enrolled members of tribes, agreed to the adoption to be the child's best interest. But one of the tribes objected saying that they had a Native American family in another state to adopt the child.

[01:14:19] Erwin Chemerinsky: The Brackeens then brought a challenge to the constitutionality of the Indian Child Welfare Act. The district court struck it down on many grounds. The Fifth Circuit affirmed in part in the Supreme Court, granted review the Supreme Court in a seven to two decision, upheld the Indian Child Welfare Act, but left some of the key questions unresolved.

[01:14:41] Erwin Chemerinsky: Justice Barrett wrote the opinion for the court. She said Congress had the power to adopt the Indian Child Welfare Act. Congress has broad plenary power with regard to Indian affairs. She rejected the argument that the Fifth Circuit accepted that this was impermissible commandeering of the states. She said States are obligated to follow federal law. But a key issue in the case is whether the Indian Child Welfare Act is an impermissible racial preference.

[01:15:10] Erwin Chemerinsky: The Fifth Circuit had split evenly on that question in an en-banc decision. Justice Barrett writing for the court said that neither Texas nor the families had standing in this case, and therefore the court was not going to address it. Justice Kavanaugh wrote a separate opinion saying he thought this was a racial preference. There's two ways to characterize the preference of Native families.

[01:15:33] Erwin Chemerinsky: One is Justice Kavanaugh did is to say it's a racial preference. Then in all likelihood, the Supreme Court would strike it down in accord with the affirmative action cases we discussed earlier. The other is to set a preference based on political affiliation. Native American tribes are sovereigns and then it's likely to be upheld. This issue is now gonna be litigated in the lower courts and come back to the Supreme Court. My sense is there are four justices who will say it's a political affiliation and uphold the preference Justices Gorsuch [inaudible 01:20:02], Kagan and Jackson, the question is whether they'll have a fifth vote for that perspective, and that's ultimately to determine the Constitutionality in Child Welfare Act.

[01:16:15] Erwin Chemerinsky: So for now, the law is upheld even emphatically, but the crucial question is left for the future.

[01:16:21] Amy Howe: Thanks so much, Erwin. We are almost out of time and we wanna get to at least a couple questions. But quickly, perhaps at a Gallup, Dahlia and Greg, what are you looking for next term?

[01:16:34] Dahlia Lithwick: A couple things. We've barely touched on it, but I think there is this overarching other story, this term around public opinion polling the legitimacy of the court. It's worth noting that the term opened with Justices Kagan and Chief Justice Roberts taking swipes at one another over how to think about and talk about the legitimacy questions of the court. The term ended that way in the student loan cases.

[01:17:03] Dahlia Lithwick: So it's an interesting bracketing effect where in some sense there is a very, very loud, silent conversation going on amongst the justices about how we talk about legitimacy in front of the children the children being us in this instance. And I think we can't flinch from the fact that the Dobbs case had a huge, huge effect on the 2022 midterms and that organizing around the court continues to be an issue.

[01:17:33] Dahlia Lithwick: And all that is separate and apart, Amy, from just the absolute conflagration of ethics questions that have arisen this year as a result of reporting by ProPublica, the Washington Post Politico and other places. So all that is both part of this conversation and separate from this conversation, but it's very, very much something and we're now looking at, you know, a markup of a bill that's impending that would impose requirements on the justices to change their ethics practices.

[01:18:05] Dahlia Lithwick: So this is really an essential issue. I know it's worthy of its own discussion, but it's happening. And then before I turn it over to Greg, I will say only that next term, the court is also going to take a long look at the Chevron doctrine, how much we defer to agencies and their interpretations of their own regulations.

[01:18:27] Dahlia Lithwick: It could be the end of the Chevron doctrine, and there's a massive gun case that the court granted cert on the last day of the term that has to do with the gun rights of people who are subject to domestic violence orders that may lift up an issue that the court sort of plopped on us last term and didn't explain, which is what is the scope now of the Second Amendment right to bear arms and how much text in history can determine whether we can have a, a gun restriction.

[01:19:01] Dahlia Lithwick: So there's a lot coming and it's all in some sense shadowed by a public sense that the court is behaving like a partisan political body.

[01:19:10] Gregory G. Garre: So I think just briefly I think what we saw this term in the main is that the court in the aftermath of Dobbs and what are I think, you know, fairly unprecedented attacks on the legitimacy of the court, you know, at least some of which probably are fairly well orchestrated from the left to try to restrain the court, you know, had seemed to have had some moderating effect on the court in some of the cases. And so, some of the justices, particularly the chief and Justice Kavanaugh. So I think looking ahead one of the main areas to think about is whether or not that will continue or whether or not the court will instead sort of tack back more strongly to the right.

[01:19:50] Gregory G. Garre: The other thing I would mention to pick up on one of the points that Dean Chemerinsky made at the outset is that there are only 22 cases on the court's docket for next term right now, which is an unprecedentedly low number. So while the courts total cases has plummeted, the court nevertheless is continuing to take divisive controversial cases.

[01:20:11] Gregory G. Garre: As Dahlia mentioned, they're gonna take up a question of whether to overrule Chevron. They're gonna be active again in the area of the administrate more gen- administrative state, more generally considering the constitutionality of agency proceedings against individuals. And they're gonna take up voting rights again in the context of a South Carolina map and another challenge based on race there.

[01:20:33] Gregory G. Garre: So there will be no shortage of things to talk about next next year or two.

[01:20:38] Amy Howe: Fantastic, thank you. I want to touch on, we have, we have one time for one question that touches on something that we haven't really talked about except in passing, which is a question near and dear to Steve Vladi Hart, which is, what is the ongoing role of the shadow docket at the court these days and has it affected this year's rulings?

[01:21:00] Dahlia Lithwick: I can just say very, very quickly for folks who aren't following this closely Steven, several other people at the beginning of last term were very concerned about the number of cases that were being decided on the emergency docket without full

merits briefing and sometimes without signed opinions and much guidance of what was happening.

[01:21:20] Dahlia Lithwick: And whether or not the shadow docket is a nefarious term, we can leave to another day. But Steve, I think would probably be the first to say that one of the things that we did see this year, and I think it's of a piece with what Greg is saying about ways in which the court has pumped the brakes on some of this much, much less reliance on doing things on the shadow docket and a real attempt to course correct and to not do things at midnight in three sentence orders.

[01:21:45] Dahlia Lithwick: So this is, I see this as an example of the court trying really hard to be responsive to a public criticism,

[01:21:52] Gregory G. Garre: Right. And on the other hand, we have seen concomitantly a growth of something that we, we would've thought extraordinary only a few years ago, which is it skyrocketing on the number of cert before judgment grants. I mean, if you look at the number of times where actually just pretty much everyone thinks nothing of asking for cert, you know, before judgment and the court takes it 10 years ago, 15 years ago, that would've been unheard of.

[01:22:23] Gregory G. Garre: And now it's, you're almost engaged in, you know, malpractice in front of the court if you don't think of asking for that.

[01:22:30] Amy Howe: Well, thank you everyone for a really, truly amazing panel. It was so wonderful to sit here and listen to you all talk about the term I wish we had, we could have done it for another few hours. Thanks to everyone for joining us.

[01:22:49] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast. So stay tuned here as well. Watch the videos. They're available in our media library at constitutioncenter.org/media library.

[01:23:18] Tanaya Tauber: Please rate, review, and subscribe to live at the National Constitution Center on Apple Podcasts, or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.