Speaker 1:

Mr. Chief Justice, may it please the Court. There is an old joke that when a man argues against two beautiful ladies like this, they're going to have the last word.

Speaker 2:

She spoke, not elegantly, but with unmistakable clarity, she said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court and the legal culture that surrounds it. We're your hosts, I'm Melissa Murray.

Kate Shaw:

And I'm Kate Shaw. And we have a very special episode for you today coming to you live from The Appellate Project. The Appellate Project should be familiar to you because we've highlighted their terrific work on the show in past episodes. But for those of you who might be new to the pod, The Appellate Project is an exciting new organization that is working to build and expand the pipeline of lawyers of color, going into appellate advocacy.

Melissa Murray:

And we are joined today by several guests to help us preview the first week of the April sitting and to tell us more about The Appellate Project. Welcome to the pod, Juvaria Khan of The Appellate Project, Matthew Fletcher of Michigan State University and Carmen Iguina Gonzalez of the ACLU.

Melissa Murray:

Before we get started, here's a little rundown of the show. Per usual, we will begin with breaking news and then we'll move into the preview of next week's sitting. And then we'll finish off with some court culture, which will allow us to delve into the great work that The Appellate Project has been doing. Kate, do you want to kick it off with breaking news?

Kate Shaw:

Sure. I'd be happy to. Okay. First thing, the Supreme Court decided Google versus Oracle, holding that Google did not violate Oracle's copyright on Java API or application programming Interface code, because Google's use of the code was fair use in light of the uniqueness of the API code. API code basically tells the computer the code, what to look for, how to translate commands, so there was no copyright violation.

Kate Shaw:

Second thing we wanted to touch also in the breaking news category is that the Supreme Court vacated and remanded with an order to dismiss as moot the case involving whether President Trump could block people on Twitter. The case became moot once Trump was no longer president. Justice Thomas wrote separately to outline some interesting theories on how and why social media companies could be regulated.

Kate Shaw:

He mostly focused on Twitter's permanent suspension of the @realdonaldtrump account, which wasn't what the case was about and way postdated the events underlying the lawsuit. But he definitely wanted to make it known that he thinks it might be possible for Congress to regulate platforms like Twitter as common carriers without violating the first amendment. So this was like a fascinating and kind of garbled separate writing.

Kate Shaw:

Mike Dorf, I thought had a really good column suggesting that Thomas actually might be right in some ways for the totally wrong reasons, but it's definitely a space both in the courts and in the halls of Congress that we're going to keep a close eye on.

Melissa Murray:

Last Friday, April 9th was a late night at One First Street, but don't fear, the Supreme Court was not having a raging kegger. Instead, they were enjoining another California measure designed to reduce the transmission of the coronavirus, this one limiting in-home gatherings to at most three households.

Melissa Murray:

In Tandon versus Newsom, the court held that this violated the religious liberty and free exercise rights of the litigants. In a five to four per curiam decision, the court actually gave reasons this time for its decision and appeared to change free exercise jurisprudence in the process. Under the current law policies are supposed to be presumptively constitutional if they treat religious and non-religious entities alike. And this rule prohibits both secular and religious in-home gatherings.

Melissa Murray:

But the court said it triggered strict scrutiny because the policy treated some comparable secular activity more favorable, and the comparable activity was the various businesses that had been allowed to open. Again, sometimes this theory is called the most-favored-nation theory. We will discuss this development more in future shows, but let's just suffice to say for now that the court is bringing some pretty strong stare decisis is for suckers energy to its shadow docket, so good times.

Melissa Murray:

Also important, the fifth circuit in an en banc decision, issued a very highly fractured opinion invalidating certain parts of the Indian Child Welfare Act, though reversing many parts of the district court opinion that had basically invalidated the whole Act. So maybe some good news in that decision, but again, this is a really important case going forward, certainly for Child Welfare Law and Federal Indian Law.

Kate Shaw:

Okay. Then there are a bunch of additional developments that we just want to note and basically put a pin in for more extended discussion on a later episode, so that we don't lose the opportunity to discuss the April cases with our amazing guests. So we're just going to plant a note that we will come back to discussing the following topics. Melissa, you want to start us off?

Melissa Murray:

This week, members of Congress introduced legislation to expand the number of justices on the Supreme Court. So this delegation headed by Mondaire Jones, Hank Johnson, Jerrold Nadler, and Ed

Markey have made a proposal in the House of Representatives to expand the number of Supreme Court justices. But aspiring justices do not start buying new robes just yet. In some public remarks, Justice Stephen Breyer sounded like he was perhaps throwing some cold water on this court expansion party, saying that the process or proposal to expand the court risked politicizing the court in ways that would be negative and deleterious going forward.

Melissa Murray:

Related to all of this court structural reform stuff, President Biden announced the formation of a new Supreme Court Reform Commission, which is tasked with studying possible federal court reforms, but not necessarily recommending any. The commission will study the issue for 180 days. And although it is large, there are 36 people on it. It doesn't include any people who have publicly argued in favor of any of these structural reforms, other than term limits.

Melissa Murray:

It does include those who have argued against or questioned reform proposals. Some of our past pod guests like Ellie Mystal and future guests, Ian Millhiser as well as Mark Joseph Stern of Slate have written pieces questioning the efficacy of this commission. So stay tuned as we hear more from them.

Kate Shaw:

Okay. In the ultimate or at least ultimate until the next really ultimate Cassandra of all Cassandras on the day after Melissa's fabulous Harvard Law Review piece called Race-ing Roe came out into the world. And the piece I should say, outlines how the Supreme Court might use fears or purported fears about eugenics to uphold restrictive abortion laws and ultimately to overturn Roe and Casey. The en banc sixth circuit upheld in Ohio statute that it read as a restriction on abortions are selected or performed because of a down syndrome diagnosis.

Kate Shaw:

Justice Thomas had previously called for courts to take up review of these laws when he voted to deny cert in a case involving Indiana similar statute, a case called Box. Notably, the majority opinion in the sixth circuit and all, but one of the many concurrences cited the Thomas concurrence, and one judge, Judge Griffin leaned into it by likening modern day abortion practices to eugenics. We will have more to say probably a lot more to say about this opinion.

Melissa Murray:

All I will say is that I usually love being right. I did not love being right this time, but I was really right. And-

Kate Shaw:

You were really right and-

Melissa Murray:

I really was.

Kate Shaw:

It feels like this thing is going on a fast track to the Supreme Court. Don't you think?

Melissa Murray:

For sure. Yeah. I said, this would happen, everyone said I was nuts. Not you, Kate. You and Leah-

Kate Shaw:

No.

Melissa Murray:

... had my back on this, but other people said I was just making stuff up and here we are, so

Kate Shaw:

And I doubt you expect it to happen to be this right this fast.

Melissa Murray:

Why didn't expect it to have the kind of amazing coincidental timing. Literally, the article came out on Monday and this decision dropped on Tuesday. So yeah.

Kate Shaw:

Everyone read the article. If you have to choose, just read the article, but if you have an appetite for a lot of pages, read the article and then read the full Six Circuit opinion and then go hide under your bed because it's scary stuff.

Melissa Murray:

Put a pin on all that scary stuff, we will be back to it in later episodes. Now it's time to preview next week sitting, the April sitting. We are so glad we have so many terrific guests here with us to help us do that. I'm going to start with the first case. The first set of cases on deck for the sitting is Alaska Native Village Corporation Association versus Confederated Tribes of the Chehalis Reservation and Yellen versus Confederated Tribes of the Chehalis Reservation.

Melissa Murray:

And this is a case that involves Federal Indian law, and we are so delighted to have one of the nation's foremost experts of Federal Indian law with us to discuss it. So, please welcome Matthew Fletcher. Matthew is the foundation professor of law at Michigan State University College of Law and director of the Indigenous Law and Policy Center. He sits as the chief justice of the Poarch Band of Creek Indians Supreme Court and as a member of the Grand Traverse Band of Ottawa and Chippewa Indians.

Melissa Murray:

We have it on good authority as well that he is a very popular visiting professor at the University of Michigan Law School, where he teaches Indian law and will also be teaching a class on tribal law. Kate, do you want to tell us what this case involves?

Kate Shaw:

Just the basic issue. The case is about the proper interpretation of a very recent federal statute, the CARES Act, which was one of the coronavirus relief packages. In that statute, which was enacted in the

spring of 2020, Congress provided a great deal of coronavirus-related aid. Among other things it gave the treasury secretary $8 billion of relief funds to disperse to tribal governments.

Kate Shaw:

And so tribal governments were defined in the statute as the recognized governing body of an Indian tribe as Indian tribe was used in the Indian Self-Determination and Education Assistance Act, so ISDEAA. And that statute defines Indian tribe to mean any Indian tribe band nation or other organized group or community, including any Alaska native village or regional or village corporation as defined and/or established pursuant to the Alaska Native Claims Settlement Act, which is, and the last language is important, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Kate Shaw:

Okay. That's the statutory background.

Melissa Murray:

Maybe Matthew, this is a good time to get your take on this. So ANCSA as that statute is known is part of a way to bring in indigenous Alaskans into the whole orbit of Federal Indian law and indeed federal programs that are available to registered federal tribes. So what's the difference between an ANC, these Alaska Native Corporations and what are known as FRTs, the Federal Registered Tribes?

Matthew Fletcher:

Sure thing. The Alaska Native Claims Settlement Act was enacted as sort of a form of weird social experimentation. Like let's try something totally different in Indian law and see what happens. There was like almost a billion dollars of cash distributed to Alaska natives out of ANCSA as part of a land settlement agreement. It was all of Alaska that was being effectively bought in addition to millions upon dozens of millions of acres of land that would be distributed to Alaska natives.

Matthew Fletcher:

And what Congress decided to do is to create these corporations, Alaska Native Corporations to accept those funds. Now, there are also Indian tribes, 229 of those Indian tribes that Congress just left to the side, didn't say anything in ANCSA about those tribes. So the real question is, who's the tribe and who is not the tribe? And Alaska is just different than the rest of the remainder of the United States. And it didn't have to be that way, but that's just the way Congress and the executive branches treated those tribes all along.

Matthew Fletcher:

And it took a few decades after ANCSA to really figure out who the tribes are going to be and what these corporations were in that context. And they more or less centered around the tribes that were around before as being the actual tribes that have governmental power, and the corporations is just being this other thing, sort of sui generis.

Melissa Murray:

Got it. Okay. That's really helpful background. And As Matthew suggests, this case arose when several tribes filed suit to enjoin the secretary of treasury from dispersing funds to the corporations. And the

issue is whether the corporations count as Indian tribes under the Indian Self-Determination and Education Assistance Act, and therefore eligible for CARES fund relief.

Melissa Murray:

The treasury department argued that the corporations were tribes for purposes of these statutes and accordingly that it has the authority to disburse the funds to the corporations. The district court below agreed, but the Court of Appeals disagreed, which is how we are here at the Supreme Court.

Kate Shaw:

And an issue in the case are these two competing, so is a case about statutory interpretation, it's a case with real, very significant on the ground stakes. And it's also a case about how the court interprets the language that Congress drafts and statutes and how statutory language interacts. So just to pause for a second on the statutory interpretation questions, in the case, you have these two canons of interpretation in conflict in the argument in this case in a similar way as you did in Facebook versus Duguid case that we have talked about previously, just a little bit earlier this term.

Kate Shaw:

One is the series qualifier canon, which basically says that in general, you read a modifying clause that comes at the end of a sentence to modify all the preceding nouns or verbs in the sentence that precedes it. So here that would mean that the clause, which is recognized as eligible for the special programs and services provided by the United States to Indians would also modify these ANCs, these corporations

Kate Shaw:

But the canon again surplusage counsels against reading language in a statute to have no practical effect. And here, the secretary said that invoking this serious qualifier canon would basically read this ANC-specific language in the definition of tribes superfluous since the ANCs haven't been formally recognized as part of these government to government relations for federal recognition purposes. There's also a second argument that agencies are not governing bodies as that phrase is used in the CARES Act.

Melissa Murray:

As Kate suggested, and as Matthew said, this case has real practical implications on the ground for those living in Alaska and indigenous communities. And again, it does seem to be a sort of idiosyncratic flavor to Alaska here relative to other circumstances that involve native tribes. The amicus briefs here really highlight some of those Alaska-specific issues.

Melissa Murray:

There is a brief that's been filed by Alaska congressional delegation, so this includes, both senators, Murkowski and Sullivan, as well as Alaska's congressional representative, Don Young. And they make clear that this whole question of whether or not the corporations are included in the definition of Indian tribes really hangs in the balance the whole question of how coronavirus relief will be distributed or dispersed to native communities throughout the state.

Melissa Murray:

As they explain in their brief and the brief has photographs of how health services happen in native communities in Alaska. There are people pictured in bush planes, and on snow machines, and ATVs delivering vaccines to individuals. Basically they're making clear that these corporations are an integral and vital part of the tribal health system in Alaska. And if they aren't eligible to receive federal funds through the CARES Act, all of their efforts will have to be funded through the state government, which will mean that it is necessarily more limited.

Melissa Murray:

Again, making clear the practical implications, and making clear to the court that Alaska is different on this front. Paul Clement in his brief for the ANCs highlights these practical concerns as well. He says that ANCs are the principal purveyors of benefits and services to more than 100,000 Alaska natives, some of whom live in communities not accessible by road and cut off from basic necessities.

Melissa Murray:

The Court of Appeals here had said that the state of Alaska and the state's department of health services could fill this gap. But again, he's making the point that this really is something where federal funds and federal services are really needed to address some of these issues.

Kate Shaw:

And so the brief on the other side was filed by Riyaz Kanji, and he represents several federally recognized Indian tribes, including Alaska native villages, who sued to enjoin what they say is the illegal disbursement of all of these funds that should rightfully be allocated to them. And that are sorely needed to fund their governmental efforts to confront the public health emergency.

Kate Shaw:

So the tribes argue that there are other statutes that do give specific aid organizations like ANCs, but that this particular statute does not. And they cite Muggeridge, which Riyaz argued as an amicus for the tribe and one basically for the point that warnings of dire consequences are not an excuse to ignore the law, which they think clearly favors bear position.

Kate Shaw:

Okay. Matthew, we want to bring you in here. Again, there's this sort of dry legal questions, there are the kind of on the ground impact questions. We very much want your take on both. You've got an article forthcoming about canons of interpretation and textualism in Indian law. We're wondering if you could just tell us a little bit about that article, and then we could maybe drill down a little bit on how these issues play out in this case.

Matthew Fletcher:

Thank you so much. I'd be happy to do so. I wrote an article called Muskrat Textualism in which I articulate a theory of Indian law strict statutory interpretation. And I contrast that with basically how Indian law almost always is interpreted what, I call Canary textualism. Now, the muskrat and Anishinaabe, the sacred stories, the cultural stories of the tribes that I come from is a hero. Now, muskrat is just a rodent, and it's like a cute rat and even the story of the great flood, it saves humanity. It saves all the Anishinaabe.

Matthew Fletcher:

Now the Canary is to be contrasted, is not from an Anishinaabe sacred stories. It's really from the metaphor of the miner's Canary, which is usually how Indian law or Indian tribes and Indian people are described when we talk about constitutional republic law as being the caged bird that serves as a warning to those who actually matter. The people in power who we really need to save. And if the Canary's sacrificed, that's terrible, but at least they served as a warning to others, which sounds like a demotivational poster to me.

Matthew Fletcher:

So the Canary is a caged bird, and that's how the Supreme Court, and for probably 175 years Congress thought of tribes as these passive entities that are super weak and dependent. But really they serve as a boon, a benefit to outsiders, to others, not the bird themselves. And these competing theories of interpretation, the muskrat theory of interpretation would give tribes and Indian people, a lot of agency about and input and how the public policy works.

Matthew Fletcher:

Whereas the Canary side is just like, "We're going to provide these services to Indian people, canaries, just let it happen." You can actually see this play out in the briefing. The players are a little bit different, so usually the state and federal government on the Canary side saying, "We're going to take control. We're going to do all this stuff for the tribes and just defer to what we want."

Matthew Fletcher:

And there's a lot of that going on with Congress and the CARES Act here. There's a lot of that going on in the executive branch, where the Department of Treasury and Department of Interior saying, "We'll decide who gets this money." And then interestingly enough, you align the Alaska Native Corporations with that side of thinking. And a key feature of Canary textualism is, if you don't do it our way, bad things will happen.

Matthew Fletcher:

Here are all the public policy reasons that we're going to tell you that are going to happen. And you could see the brief that you highlighted has all of that stuff. I'm going to tell you on the other side, there's very little briefing on the public policy applications. They don't call it that because I guess I just invented it, but it's a very unique form and a new form of muskrat analysis, which is here's the law. And that's all that matters.

Matthew Fletcher:

And the text of the law in this case is very ambiguous, but the canons tend to support at least that proposition, if nothing else, it's a 50/50 toss up. But the policy implications are totally silent on that side of the ledger, and that's a really weird place to be. The policy implications in any law are always that if you rule in favor of tribes or if you rule in favor of tribal interests, you rule in favor of the Canary, the whole world's going to collapse.

Matthew Fletcher:

And I think the Supreme Court is moving away from accepting those rote accusations. Now, in Alaska, there's a really odd circumstance and there's not enough study. Nobody really knows what the policy

implications are. First of all, if you take the Alaska Native Corporation side and the federal government side, and they say, "People won't get coronavirus relief if you don't do it through the Alaska Native Corporations," ignores the fact that there are 229 federally recognized tribal governments who could receive the money and do that work themselves.

Matthew Fletcher:

It's not the state of Alaska that's going to do that. Nobody in their right mind believes that the state of Alaska is even remotely good or efficient at governing pretty much anything in Alaska whatsoever. There's also an underlay that can't be talked about and nobody will talk about it, but it's the real reason this case is actually at the Supreme Court has everything to do with Canary textualism.

Matthew Fletcher:

Alaska Native Corporations are part of the oil and gas industry. They own all the land, right? They got all the land in the Alaska Native Claims settlement Act. So they're huge partners with private industry and the federal government in terms of being a part of that mentality, that rhetoric of energy, independence from Russia and other countries. And they're enormous, some of these corporations are enormously wealthy.

Matthew Fletcher:

Now, if you take the $8 billion that was distributed to Indian country under the CARES Act, and about 30 to 40 something percent of that money is going to these hundreds of corporations who are already for-profit entities, some of them are already wealthy. The optics of that from the 229 tribes who have nothing and all the rest of Indian country, the 350 odd tribes, other than the Alaska native tribes is terrible. Many of these tribes really struggle.

Matthew Fletcher:

There are tribes in the upper peninsula, Michigan, where I live that are receiving a few hundred thousand dollars of CARES Act money. Whereas these corporate entities are going to receive millions upon millions of dollars.

Melissa Murray:

That is such a helpful lay of the land, because one of the questions I had was, why are the tribes so vociferously objecting to the prospect of the ANCs being involved here and being denominated tribes for purposes of the CARES Act? So that is an incredibly helpful primmer, not just on the idiosyncrasies of Alaska, but more generally, just the whole question of how the government intervenes and recognizes particular tribes.

Melissa Murray:

To the point of Canary textualism, I wonder if the courts shift toward focusing more on the terms of statutes as opposed to their policy implications is really because of the introduction of a single justice who happens to have some experience living within Indian country and who is a professed textualist himself. So to what extent does this really all hinge on Justice Gorsuch? And what do you anticipate happening when this case is argued next week?

Matthew Fletcher:

What I anticipate is it'll be a dry rendition of those canons that you described. They're going to crack open Justice Scalia and Brian Garner's book on the-

Melissa Murray:

So it's going to be a riveting oral argument, and we are going to be glued to our seats, right? It's riveting.

Matthew Fletcher:

I'm 90% sure Latin will be uttered during this argument.

Melissa Murray:

Good times, good time.

Matthew Fletcher:

Keep in mind, there are actually canons of construction that are applicable on the Indian law side. And the thing about Canary textualism is that, because of policy reasons, because of this perception that Indian people are weak and dependent and caged birds, that it's okay to deviate from the Indian law canons construction and just do what we want. The canons are construction that are relevant here.

Matthew Fletcher:

There's a canon that says, "In the event that there is Indian affair statute that is ambiguous, it is to be interpreted to the benefit of the Indian tribe." So if an Alaska Native Corporation is not a tribe, then the canon itself answers the question. Let's admit the statute's ambiguous, the 229 tribes, as well as all the other tribes in the U.S. who are parties to this case should be the beneficiary of that canon. And I doubt you'll hear much discussion about that, other than to say, "It doesn't apply here."

Matthew Fletcher:

The assumption of the canon not applying is rooted in the assumption that the corporations are tribes or at least that they have some Indian affect to them. There are tribal interests at play on that side of the ledger so we can apply the canon. And I think that's probably wrong, but it all depends on whether these corporations actually are tribes. And there's actually no reason why Congress or the executive branch could just declare tomorrow that these 300 odd Alaska Native Corp's are actually Indian tribes.

Matthew Fletcher:

All they have to do is say so, and they could make it happen. The ironic thing is, the Department of Justice who has run of Indian affairs when cases get up this high on the litigation ladder, their argument hinges on Alaska Native Corporations being completely ineligible for any possible tribal nationhood. And I find that ironic, but that's a totally separate question.

Melissa Murray:

Put a pin in that. We'll come back to it for a later episode.

Kate Shaw:

That was a totally brilliant decoding of the real stakes and interests in this case. And so thank you so much for doing that. And I want to shout out to Muskrat textualism forthcoming, if I'm not mistaken in

the Northwestern University Law Review, is that right? Everyone pick up a copy of that brilliant article. And thanks again for shedding some light on this important case the court is going to argue next week.

Matthew Fletcher:

Absolutely. Thank you.

Melissa Murray:

All right. Next step for the April sitting is Sanchez versus Mayorkas. And to help us break it all the way down, we are delighted to be joined by Carmen Iguina Gonzalez. Carmen is a senior staff attorney at the Immigrants Rights Project at the ACLU. And she previously served as a law clerk for Justice Sotomayor and as a staff attorney at the ACLU of Southern California.

Melissa Murray:

I'm just going to note that the Sotomayor clerks are now, I think numbering three as guests on this pod leading any other chambers, and that is by design. So we're going to keep going with that. Kate, you and Leah can do whatever you like for the Stephens and the Kennedy clerks, but I'm going to keep going with this.

Melissa Murray:

All right. Carmen has been incredibly involved in really important immigration and criminal justice litigation, including cases seeking to have counsel appointed for minors in the immigration system. So she's the perfect person to help us break down this case. And the question at issue in Sanchez versus Mayorkas is whether an individual who has received what is called temporary protected status may obtain lawful permanent resident status if they would otherwise be eligible for it?

Kate Shaw:

Carmen, can we start off with you just walking us through what temporary protected status is? You're the expert, we'd be grateful if you'd help us with some definitional groundwork.

Carmen Iguina Gonzalez:

Of course. And this is something that I'm sure even before this case, is something that people have been hearing about a lot for cases given the Trump administration terminating a lot of TPS designations and how that was enjoined by the court. Just to break it down, it's a form of humanitarian relief, basically. The INA authorizes the secretary of Homeland Security to designate certain countries under the TPS statute based on whether it's ongoing, armed conflict.

Carmen Iguina Gonzalez:

It could be a natural disaster, an epidemic or other "extraordinary conditions" that basically prevent the non-citizens from safely returning to that country. So, following that designation, it gets published in the federal register, then TPS is granted usually in about 18 month increments and subject to extensions to nationals who were present in the United States as of a particular date.

Carmen Iguina Gonzalez:

So important to know it's not sort of an invitation, oh, everyone from this country, come on over. It's saying, "People who are here can't safely return to their countries because of what's happening. So

therefore we're going to grant this form of protection." Because of that requirement that the individuals be present in the United States as of a certain date, it's important to know that it's a huge proportion of the people who have TPS are people who entered either without inspection, overstayed a visa.

Carmen Iguina Gonzalez:

So you have some individuals who were here on some non-immigrant status and they're after applied for TPS, but a large portion of the people did not have lawful status at the time that they applied. And then also important to note, TPS designation can be extended and many last for years. For example, TPS designation for Somalia has been renewed continuously since 1991, Honduras since 1999, El Salvador since 2001.

Carmen Iguina Gonzalez:

TPS designation, what that means for the individual is you can not be removed, you can not be detained and you have the authority to work here, as long as you continue to meet the requirements for TPS. That's basically what it means for individuals, and the provision that's at issue here is within the statute that walks through all of this complicated process for TPS, there's a provision F4 that talks about, "For purposes of adjustment of status under a different provision of the INA, the alien shall be considered as being in and maintaining level status as a non-immigrant."

Carmen Iguina Gonzalez:

TPS doesn't give you non-immigrant status. It doesn't give you lawful permanent status, but for purposes of adjustment of status, that's what the statute provides that you will be considered to be in and maintain that status.

Melissa Murray:

Carmen, can you help us understand how the TPS regime interacts with the lawful permanent resident status, which I assume means green card holders?

Carmen Iguina Gonzalez:

Right. Yes. So that the LPRs or green card holders are like TPS, you are protected from removal, you're authorized to work, but unlike TPS holders, it means that you're permitted to reside in the United States permanently, so it's not temporary. And after a certain amount of time and after meeting certain qualifications, you are eligible to apply for citizenship. And also being an LPR affords some additional protection, so you routinely see courts looking at statutes differently if they effect LPRs than if they affect other types of non citizens.

Carmen Iguina Gonzalez:

The LPR status is available only to limit a category of non-citizens, so for instance, if you have a sponsoring family member who was a U.S. citizen, or you have a sponsoring employer and there are also caps on the number of LPR visas that are available though, not for every category. So if you marry a U.S. citizen, for example, you're not subject to that cap. And the interaction at issue in this case is that the statute that sets out what the process is for adjustment of statute by changing your status from a non-immigrant to a lawful permanent resident is eight U.S. code, 1255.

Carmen Iguina Gonzalez:

And the relevant language here is that it allows for adjustment for non-immigrants, who were "inspected and admitted or paroled into the United States." So then the question here is how these two provisions interact.

Kate Shaw:

If I'm understanding correctly, this is about whether and which TPS recipients will be deemed or may be deemed inspected, and admitted, and/or paroled into the United States, such that they can apply for this status. Okay, so let's break down the argument. The government is arguing that there's a difference between being admitted and being in lawful immigration status. So there are some forms of status like asylum that don't actually require admission.

Kate Shaw:

You can be admitted, but then lose status like if you overstate a visa, but it's just not clear that you can have lawful non-immigrant status, but not be admitted. I'll put this question to you, Carmen. This case is part of a longer litigation arc on these questions in both federal courts and in agencies. Can you give us a little bit of a sense of the history of these questions here?

Carmen Iguina Gonzalez:

Right. It's one of these questions where both parties are arguing that the statute is clear. And in fact, the history of it is that courts and the agency itself has actually found the language to be ambiguous. Initially, TPS starts in... the provision that authorizes TPS about 1990, I believe and the agency early on takes a very narrow reading of what the statute permits. And basically says as the government is saying, "Now only individuals who had lawful status at the time that they applied for TPS." So you were already in some other non-immigrant category, you were a visa holder, a student.

Carmen Iguina Gonzalez:

Only those individuals are basically covered by that statute. It was meant to say, you maintain that status for purposes of adjustment later on. The question really doesn't come up to the courts until about 2011, I believe and you see a split. So the 11th circuit and the sixth circuit reaching the different conclusions as to what the statute provides, and the ninth circuit in 2017 really issues what I think is like the first, really thoroughly reasoned going through the statute, going through other provisions of the INA and looking at why it is that based on that reading of the statutory text of the context that...

Carmen Iguina Gonzalez:

What Congress actually meant to do was provide a path for all TPS holders who are otherwise eligible for adjustment to be able to use this process through 1255. And then 2019, the Trump administration comes in. We already talked a little bit about the context of what else is happening with TPS. The termination of what had really been the Democratic and Republican administrations extending TPS for many years, terminating that status.

Carmen Iguina Gonzalez:

So part of a campaign to limit what protections are afforded under TPS, they use this really obscure process where they refer TPS case to basically an agency. DHS was created, I believe that only issued about five opinions, and they refer this case to basically then come out and say, "Actually, the statute is

clear. We're going to go back to that narrow interpretation. Only people who had lawful status can seek adjustment. Otherwise, you have to leave the country and apply through a different process."

Carmen Iguina Gonzalez:

Interestingly, the BIA, which is the Board of Immigration Appeals, the Department of Justice agency that you usually hear about deciding immigration questions. That's how the law usually gets interpreted in this context, they reached the opposite conclusion and they say, "Actually, the statute is ambiguous. We don't agree that it's clear, but we're still going to find that it's narrow for these other reasons."

Carmen Iguina Gonzalez:

So it's this very interesting history where the circuit courts are split, the agency itself is split on whether the statute is ambiguous or not. And now here we are the court with both parties trying to tell the court, "No, this is really how the statute should be read."

Melissa Murray:

This case will obviously bring some much needed clarity to the interpretation of the statutory scheme, but I imagine it will also have really significant practical implications on the ground. Carmen, what will be the practical effects of this case on immigration policy, for example, family separation or some of the other immigration news and events that we see in the news each day?

Carmen Iguina Gonzalez:

Absolutely. What I first want to make clear is that what it actually means for individuals who are right now TPS holders, and we're talking here about roughly over 400,000 individuals. There's 11 countries that currently have TPS designation. Venezuela just received it last month, so that Venezuelans are not counted in that 400,000. We're not talking about a pathway to status for every TPS holder.

Carmen Iguina Gonzalez:

And I think that's very important to understand, and I think that's a mistake that the third circuit makes where it says, "This other interpretation would really just allow this pathway to permanent status for all of these people who have TPS protection." The reality is that you still have to meet the statutory requirements for adjustment. So you still have to have a sponsoring employer or a sponsoring relative.

Carmen Iguina Gonzalez:

So it's not like we're saying, "Now everyone who has TPS can look to 1255 and adjust their status." You still have to meet all these other criteria. And the question is, are they allowed to do that in the United States when their visa is immediately available or they're required to leave to their home countries, the same country that is unsafe to return to based on the TPS designation and wait there for potentially a years while their process is completed to then return back under that same status that they would have had if there were allowed to apply here.

Carmen Iguina Gonzalez:

So it's just really important to keep that in mind. And because we're talking about people who have been here, I believe of those 400,000 TPS holders, over half have been here for 20 years. The vast majority have been here for over 10 years. These are our neighbors, these are people who have worked

here lawfully for years, for decades, who have family. I think it's over one quarter of a million U.S. citizen children have a family member who is a TPS holder or a member of a household who is that TPS holder.

Carmen Iguina Gonzalez:

So when we're talking about family separation, it's not really just an issue that affects the border. We're talking about families that have been together for years, for decades, who all of a sudden will have to make this choice, do I go back and wait three to 10 years in my home country until I can come back under this visa? Or do I lose this status? Do I bring my family with me to this unsafe country?

Carmen Iguina Gonzalez:

It's really heart-wrenching to know what these individuals are going through in this sort of limbo.

Kate Shaw:

And can I just pose like one or two final questions? Am I right that the Biden Justice Department, this is a case that spans the end of the Trump administration, the beginning of the Biden administration. There hasn't been a change in positions, the same sort of harsh reading that the Trump Justice Department was advancing has been continued and is being continued in this case by the Biden Justice Department. So have they made any changes in position?

Kate Shaw:

And if not, are there any other avenues they have that might allow them to mitigate the harshness that you were just describing?

Carmen Iguina Gonzalez:

Absolutely. It's a position that spans even before that. The case out of the ninth circuit for example, comes out in early 2017. That was the position-

Kate Shaw:

Obama to Trump, to Biden. Got it.

Carmen Iguina Gonzalez:

... the Obama administration carried over through Trump. The agency that sort of, referral to the agency actually. I think it's an attempt to really entrench it, but then carried over now to Biden. Absolutely, the fact that you think that the circuit courts are split, the agency itself is split. The administration really has an opportunity to take a step back here and say, "We will accept that the ambiguity and the statute, and then that's better policy. We could engage in rulemaking to say there's really a gap year in the statute that allows us to direct how these applications are going to be treated."

Carmen Iguina Gonzalez:

And I believe David Martin wrote months ago this suggestion to the administration and saying, "There's a pathway here for you to put this case on hold before the Supreme Court, and change the policy, and do something better for these communities." And they unfortunately haven't done that. And just because we're talking over here about The Appellate Project and this event, I will just add one thing, which has that to me, this is...

Carmen Iguina Gonzalez:

One of the reasons why I feel so passionately about diversity in our profession about diversity in the appellate bar is because, if think about how this case is presented and you read the party's briefs. The data is here and there about what the effect is for these communities and what this means for people. But really we're talking about really hyper-technical, what does the statute say? What does it mean to consider? What does it a mean to being in or maintain status?

Carmen Iguina Gonzalez:

And really losing sight of the fact that we're talking about individuals who have lived here lawfully for decades, who have U.S. citizen family members who are integral members of a community. During the pandemic, I think it's over 130,000 of these TPS holders are essential workers, working in healthcare and the food industry. And I think as lawyers, we're taught to forget about that and not talk about that and focus on the legal question.

Carmen Iguina Gonzalez:

I think if you look lately at some of the cases where I feel like judges or advocates are starting to say, "Of course, we'll engage with a legal question and we'll do the statutory interpretation, but also let's not lose sight about what this case is about." I think of Justice Sotomayor's concurrence in a bankruptcy case saying, "Hey, this is affecting low-income communities. This is affecting communities of color."

Carmen Iguina Gonzalez:

I remember being in the courtroom, Brian Stevenson argued Madison and him saying, he goes through the eighth amendment, he goes through what the constitution requires, but at the end oof his rebuttal, he really tells the justice, says, "This case is about how we treat the most vulnerable people in the system." And I think it's just that as we diversify the bars, we diversify the bench. I see a lot more of that happening. And I think is so important to keep us grounded and to remember what really the stakes are in these cases,

Kate Shaw:

It's such a great point, and particularly on the regulatory change, I really hope from your lips to the Biden policymakers ears. This is a thing they could still change course on, and I very much hope that they do, but thank you. And it's so helpful for all the reasons that you've just provided to have you actually help us get a deeper understanding of the case. So thank you so much.

Melissa Murray:

All right. Shifting gears, also on deck for the April sitting is a set of cases, Greer versus United States and United States versus Gary. And this pair of cases concerns the implications of the Supreme Court's 2019 decision in Rehaif versus United States, and whether or not Rehaif is retroactive to convictions that were obtained before that decision. And you'll remember, we have discussed Rehaif before because our co-host Leah Litman loves the Armed Career Criminals Act and this is another ACCA case.

Melissa Murray:

Rehaif interpreted a provision of the Arms Career Criminal Act, ACCA, which prohibits persons convicted of felonies from possessing firearms. And in Rehaif, the court said that an individual violates that provision only if they knew their status, that is, they knew they fell within the category of persons that

are barred from possessing a firearm. The question in Greer and Gary is whether or not the determination of whether a defendant can be retried or re-sentenced in light of Rehaif, so the retroactivity of Rehaif.

Melissa Murray:

And in Greer, Mr. Greer was convicted and sentenced under ACCA, but the government didn't submit evidence or trial or its sentencing that Greer knew he fell into category of persons who are barred from possessing a firearm. It did have to at the time because this is before the Supreme Court's decision in Rehaif and no appellate court had said the government had to prove a person knew a person that they fell within that category, that are persons that are barred from possessing a firearm, so it was never introduced into evidence.

Melissa Murray:

Now on appeal, the government is arguing that a Court of Appeals doesn't have to overturn the conviction if the government points to other evidence, evidence that was not submitted at trial, that a defendant knew they fell within a category of persons that are barred from possessing a firearm. And so here, the government is relying on the pre-sentencing report, which is filed at sentencing. And in this pre-sentencing report, it noted that Mr. Greer had several prior convictions and the Court of Appeals concluded that he therefore must have known that he fell within the category of persons who are prohibited from possessing a firearm.

Melissa Murray:

And so this kind of review is known as plain error review. So it's review of an error that the defendant did not previously raise. And the question is whether on plain error review, review in an appellate court and review of a question that wasn't decided or raised below, an appellate court can actually consider evidence that was not in the trial record.

Melissa Murray:

Gary, on the other hand presents a distinct but related question, and this one is about plea agreements reached before Rehaif was decided. So when a defendant pleads guilty to an offense, he has to do so knowingly and voluntarily. And the question here is if a court did not advise a defendant that one element of the offense was that the defendant knew that they were prohibited from possessing a firearm, whether the plea agreement is in fact knowing and voluntary.

Melissa Murray:

And so this issue is really significant, not just because there are lots of individuals convicted under the ACCA, and there are many convictions that would fall into this retroactivity sort of gray space. But because in the case of Gary, the sheer number of federal cases that are resolved by virtue of plea agreements is actually staggering. Well over 90%, but some have said that it's even closer to 98% of federal criminal cases being resolved by plea agreement.

Melissa Murray:

So again, watch this space, Leah will be watching very closely and we will see an acapelling resolution to this. I tried, I tried really hard to-

Kate Shaw:

It is so hard to talk about ACCA-

Melissa Murray:

I know. It's so hard, it's so hard.

Kate Shaw:

... and do ACCA without you, Leah. Melissa, you did amazing, but it's just never the same talking ACCA without Leah.

Melissa Murray:

It's because I went to UVA where they literally make you listen to acapella music all the time as an undergraduate. And so here-

Kate Shaw:

And you have something to show for it.

Melissa Murray:

That's the only thing I have to show for it, but yes, but yes.

Kate Shaw:

Okay. Two more quick cases being argued, we're not going to really preview. One, Minerva Surgical will address whether a defendant in a patent infringement case who has assigned the patent, i.e. given the patent to someone else can defend against infringement on the basis that the patent is invalid. And then second, City of San Antonio versus Hotels.com asks whether district courts can reduce the appellate costs that are deemed taxable in the district court under federal rule of appellate procedure 39E. Okay.

Kate Shaw:

That's all we got in previews. Melissa.

Melissa Murray:

All right. This is the moment we've been waiting for. It's time for court culture and we are so excited to spill the tea on diversifying the appellate bar with our friends from The Appellate Project and Juvaria Khan. Again, we are taping live today with The Appellate Project. It's a great new initiative that we've highlighted on the show before. In an earlier episode, we chatted with Tiffany Wright, an Orrick attorney and Amir Ali, a lawyer with the MacArthur Justice Center about the work that they were doing with The Appellate Project.

Melissa Murray:

And today, we are joined by the founder of The Appellate Project. Welcome, Juvaria. You have such an interesting background in civil rights litigation and your work as a law clerk, but how did you come to found The Appellate Project? What was the need that you were trying to fill here?

Juvaria Khan:

Thank you so much for having me. I really came into appellate work a little bit later. I was a few years into my career and doing impact litigation, and that's when I got my first meaningful understanding about appellate work and appellate spaces and a couple of things really struck me. The first was just the nature of this work. There's no juries, you're deciding matters of law. So it's really a conversation between appellate attorneys and judges on what these laws mean and how they apply to all of us.

Juvaria Khan:

And those attorneys shape the arguments and not infrequently go on to become judges. So the second thing that really struck me was the absence of diversity, especially racial diversity in these spaces and the very clear impact that has on those conversations and the law that is produced itself. And so I really focused on issues impacting the American Muslim community because that's like, I think many people of color driven to this work, what really drove me.

Juvaria Khan:

It wasn't so much, these are interesting intellectual issues in the appellate space. It's because they have very significant real impact on our everyday lives. And so it's tough to finally be in those spaces and realize that there's very few people who look like you, I think just to give the example of the Muslim ban litigation, a case that went through so many appeals, but had almost no Muslim attorneys leading those appeals.

Juvaria Khan:

And of course, going through so many courts, not a single Muslim judge heard that case because there are no article three Muslim judges. And so, to Carmen's point the human impact of this work is so important.

Juvaria Khan:

I think the other thing I'd say is, what really drove me and realizing that was taking a step back and looking at my own journey into this space. I didn't know lawyers growing up. I certainly didn't know about appellate work. I found law school extremely challenging for all the wrong reasons. It ironically was not the academics, it was the culture, it was the environment. It was feeling very out of place and overwhelmed because it felt like so many of my classmates came in knowing how to navigate these spaces, having networks, people who could guide them and tell them how to get from A to B.

Juvaria Khan:

I didn't learn about clerkships until a year after graduating. I went to a networking event and a very kind man came up to me and asked me, "Where did you go to law school? What were your grades? What do you want to do? Why didn't you clerk?" And I said, "Honestly, it's not for people like me." And he said, "What do you mean by that?" And my immediate image in my head was just the students in law school are mostly white, who just knew how to navigate these spaces. And it just felt like one more thing I didn't understand, and I didn't understand the value of it.

Juvaria Khan:

I think it's incredibly important to share resources, opportunities. You don't know what you don't know. There's so many highly qualified law students of color who just need access and opportunities to do this work. So all of that really is what drove me to start The Appellate Project.

Melissa Murray:

Juvaria, your point about the dearth of Muslim attorneys arguing some of these really important religious freedom cases, immigration cases, it really hits home. And I think Matthew, you have mentioned in other contexts that there is a similar issue within federal Indian law advocacy, just the absence of native advocates to argue these cases. Can you say more about that?

Matthew Fletcher:

Sure thing. It's been 20 years now since an American Indian person or an indigenous person has argued an Indian law case in the Supreme Court. It's really quite shocking for the two decades or so before, it was something less than on average of one native person a year would argue a case. It used to be that if a tribe somehow found its way in serious appellate litigation, even in the Supreme Court, that tribes' attorney who was usually in-house would argue the case.

Matthew Fletcher:

And more and more native people became in-house counsel for their tribes and were actually arguing cases. People like Bill Rice, who won a case in 1993 and was lauded by the court for his outstanding argument. Another instance is a native woman named Arlinda Locklear, who won two times in the Supreme Court in the 1980s. But tribes were losing horribly in the late '90s and into the 2000s. And this came at the rise of an acknowledgement that there's this thing called the Supreme Court Bar.

Matthew Fletcher:

And the thinking was, if you're going to come back and push back on, try to win some cases in the Supreme Court again, you've got to delve into the Supreme Court Bar, and there are no native people in that Supreme Court Bar. I think this trickles down extensively. I did a very unempirical survey of screenshots of ninth circuit oral arguments, going back a few years involving Indian law cases. And there's probably 15 or 20 of them a year.

Matthew Fletcher:

I found three or four native people had argued the case in the last five years in the ninth circuit compared to probably 30 or 40 non-native people argued those cases. And it troubles me a great deal.

Kate Shaw:

And as in the most recent few years, last couple of decades, both the dwindling number of cases that the court takes, I think does have something to do with this. And then there was also this, yeah, the emergence of this so-called elite Supreme Court Bar in which it's mostly advocates who've done a ton of arguments previously. And as that becomes the norm and the expectation, there is a fear that you're going to be doing a disservice to your chances of success if you do go with an advocate who is not named Paul, because they mostly are or done a number of arguments.

Kate Shaw:

And I think just it's a huge barrier to entry. And I think that justices are very much to blame actually in this. I do think that... We talk a lot about amicus invitations, it's this tiny little thing, but the justices could extend these invitations in ways that diversify the ranks of the Supreme Court Bar. But I think it's also, you hear even Justice Kagan about whom we always speak very favorably on this podcast. We

admire her a great deal, but when she's spoken publicly, she says, "We want advocates who all argue in a certain way. There's a very particular style we like, and that's what we want."

Kate Shaw:

And I think that's a problem in terms of the kinds of perspectives, modes of reasoning, right back to Carmen's point that the justices encounter. And I think that everything you just said really speaks to that.

Kate Shaw:

Juvaria, you talked about the motivations, which really resonate for founding The Appellate Project. What kinds of specific initiatives do you have going on?

Juvaria Khan:

The heart of all our work is race equity, what could you do if you had the same opportunities and access? And so we are excited to partner with Howard University School of Law with their Civil Rights Clinic, Tiffany, who was on here before, co-directs it with Ed Williams.

Carmen Iguina Gonzalez:

She's also a former Sotomayor clerk.

Kate Shaw:

You guys run the world, and you should.

Juvaria Khan:

Appellate clinics being such a great way to get substantive experience early on and get exposure to these issues, but most appellate clinics are law schools. Just the handful of law schools that are not particularly diverse and the clinics are not particularly diverse. So it's very exciting to be able to partner with Howard on this, really a school that has incubated civil rights appellate advocacy, and work on current cases, and bring the important perspective that students in Howard have on issues impact their communities.

Juvaria Khan:

Our second main program is our mentorship program. I see a number of our mentees on today's call, which is very exciting. Students around the country who are interested in appellate practice and have demonstrated a commitment to racial equity are paired with appellate mentors. We are really fortunate to have such a diverse, awesome group of appellate attorneys who signed up including Carmen.

Juvaria Khan:

In addition to that, we provide resources every month to make sure the students are getting a holistic set of resources to do this work. So everything from support, navigating the clerkship process, the opportunity to learn from judges, networking events with the appellate bar, it's a pretty insular elite space. It can be hard to meet people there, especially if you're coming from a background where you're first-generation or didn't grow up around lawyers.

Juvaria Khan:

So much of this hiring and recruiting is done based on networks, and I think that's something that we don't talk about enough. We also do substantive skill-building workshops, so for example, legal writing workshops to really develop those core skills given that there's often so many disparities in the opportunities students of color get to really hone in on their legal research and writing skills.

Juvaria Khan:

So that's been really great just to see the response both from the students and the appellate bar, but also to see that simply by connecting genuinely amazing students with people in this space, opportunities being created. We've had students get appellate internships, clerkships, fellowships, and I really hope that that continues. We also do talks at law schools, really trying to target one Ls and affinity groups to talk about appellate work.

Juvaria Khan:

You don't know what you don't know. So going over the fundamentals of what appellate work is, why it matters, why diversity is so important, and then what concrete steps should you take if this is an area of practice you might be interested in? I think the last thing I'd say is, one thing that I'm excited about with the programs is, it's amazing to work with the students. They're very inspiring, they give me a lot of hope for what the future looks like in this space.

Juvaria Khan:

But it's also really exciting to work with the appellate bar and to see the response. And I think that's really where change is going to come. And I hope that by really creating a community that is much bigger than any one person or organization, we start challenging some of the assumptions about who is qualified to do this work and how we identify those people. And my dream is that all highly qualified applicants are considered for these opportunities

Melissa Murray:

Juvaria, if you are a student and you are intrigued by what you hear, how can you get involved in The Appellate Project and be part of this network? And if you're an appellate lawyer and you want to help make the bar more diverse and seed a new cadre of all women, all people of color river masters, what can you do to get involved?

Juvaria Khan:

I love that question. You can reach out to us through our website, theappellateproject.org, sign up to our listserv for the latest. But if you are an attorney, or judge, or at a law school, and you want to be involved in our programs, we are pretty much entirely volunteer-run. So if you want to be a mentor, lead one of these workshops, come speak to the students, join the networking events, we really would love to work with you.

Juvaria Khan:

As students, if you're at Howard, check out the clinic, for sure. If you're at Howard or more broadly and you're interested in the mentorship program, our inaugural cycle is ending next month, but we'll be reopening our new class in the fall. So definitely look for the application in the summer and be sure to apply.

Kate Shaw:

All right. I think that's all we've got time for today, so let me wrap by saying, thank you so much to our fantastic guests, Matthew Fletcher, Carmen Iguina Gonzalez, and Juvaria Khan for joining us. We learned so much and you all were inspiring. So thank you for doing the podcast with us today.

Kate Shaw:

As always, we are grateful to our producer, Melody Rowell, to Eddie Cooper, who does our music. We are grateful to you, dear listeners, thank you for tuning in and for supporting the podcast. If you'd like to support the pod by being a subscribing member, please check out our Glow campaign, www.glow.fm/strictscrutiny. Till next time.