



The Activist Files Episode 30: Organizing-works - lessons from recent SCOTUS decisions

Ghita:

Welcome to The Activist Files, the Center for Constitutional Rights podcast I'm Ghita Schwartz. I'm a Senior Staff Attorney who fights against abusive immigration practices, government misconduct, Muslim profiling, and racial injustice. I am here with my colleague, Chinyere Ezie, a Senior Staff Attorney who fights against LGBTQI prosecution, mass incarceration, corporate human rights abuses sexual and gender-based violence and racial injustice.

Chinyere:

Hey y'all! Good to be here.

Ghita:

And we are welcoming Eliana Fernandez of Make the Road, New York to talk about a couple of key Supreme Court decisions before we dive in, Eliana, please tell the audience about Make the Road, New York and what you do there.

Eliana:

Good morning, everyone. And thank you for having me. My name is Eliana Fernandez. I am a lead organizer and Make the Road, New York. Make the Road is a grassroots organization that fights for the day-to-day respect of all immigrants and communities of color across New York. We have five community centers in New York that provide legal and survival services, transformative education, community organizing, and policy innovation. And our centers are located in Brentwood, Long Island, New York, Westchester, Brooklyn Queens, and Staten Island.

Ghita:

Can you tell us a little bit about your role there and what you do there?

Eliana:

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Absolutely. So I work with Make the Road as a lead organizer and I helped lead some of the campaigns that we do when it comes to immigrants rights. And one of the campaigns that I've been working for the last two years is the DACA Campaign. Well, we've been fighting really hard to keep the program alive and other campaigns that have all continued to affect the immigrant communities such as this fight that we had to do to win a green light, to restore access to driver's licenses, doing a lot of lobbying, talking to elected officials. At the same time, educating the community about the many issues that affect them on a daily basis, providing them with tools and the workshop that they need, and also creating leadership out of our members as they become, or are at the front for every single issue [inaudible] at Make the Road. .

Ghita:

That's amazing. It's such an amazing range of things that Make the Road does and that you yourself do. I believe you yourself are a plaintiff in one of the cases we're going to discuss today, the DACA decision DACA stands for Deferred Action for Childhood Arrivals. It was a program initiated by President Obama in 2012 to provide authorization for authorized immigrants would come here as children to work, to go to school and to stop proceedings against them in immigration court. And as we all know, when President Trump took office, while he said he was going to hold onto the program for a while, he and his cabinet members decided to rescind the DACA program in the summer of 2017. And that caused a whole bunch of litigations all across the country in this kind of amazing litigators coordinated fashion. And I believe the case that you were a plaintiff in Eliana is Batalla Vidal, which was brought in the Eastern District of New York. Can you tell us a little bit about how you decided to become a plaintiff to challenge the withdrawal of the DACA program?

Eliana:

Absolutely. Yeah. As you've mentioned, the Batalla Vidal case was filed in 2017 to fight against the Trump Administration unlawfully ending the program. And as you mentioned, I am a DACA recipient. And when the Trump Administration took office, I think everything kind of shift for me, right. I think it was like a very dark period for most Americans knowing that a person as him was taking office and for the last three years has been like a roller coaster of emotions for a lot of folks who have DACA, the undocumented community in general, when 2017 in September of 2017, when the Trump Administration announced that they were ending DACA, I think a lot of us were like, you know, upset, frustrated, overwhelmed, and just filled with uncertainty because we didn't know what was going to happen in our lives.

Eliana:

At that particular moment, I was working with the legal team and Make the Road. And one of the legal directors approached me and asked me if I wanted it to become a plaintiff in a lawsuit that was going to challenge the Trump Administration ending DACA. Without any hesitation and without thinking what that entailed. I said, yes, because I felt at that moment that was the only way that I had in my power to fight back to protect not only the rest of the immigrant community, but at that point for myself, it was a fight for my family. I am a mom, I have two kids and I couldn't bear the thought of being separated from my children. So I decided to join the lawsuit. And I think so far it's been, like, the best decision I ever made. I think Make the Road really took me - me and the

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other plaintiffs - under their wings and protect us and gave us tools to empower us and made us like, you know, part of this beautiful concord that is fighting to protect the rest of undocumented folks that have DACA.

Ghita:

I mean, it's an amazingly brave decision to participate in a case like this. And to have it be one of the major things that the Supreme Court handles in a term that was very scary for a lot of people who fight for social justice. You know, where I think many of our listeners are pretty familiar with the sort of immigrants rights trauma that has sort of been, it's not new, but has been visited in a very intense and acute way during the Trump Administration. And the Supreme Court's decision to preserve DACA was really almost a surprise. I think it was a 5-4 decision. A lot of people weren't sure what they were going to do. And we're, you know, all these young and approaching middle-aged people gonna have their lives upended. And one of the things we want to discuss today is how did this happen?

Ghita:

That a Supreme Court that a lot of people thought was not going to side with, you know, immigrants ended up doing so. And one of the things that also happened this term that was somewhat of a surprise or sort of touch and go, and another 5-4 decision was the decision that the Supreme Court made in the Title 7 cases about sexual orientation and gender identity. And that too was a surprise. And maybe Chinyere, you could talk to us a little bit about what happened in the Supreme Court this term with the Bostock Zarda, Stephens cases.

Chinyere:

Yeah, absolutely. I think that as an advocate for LGBTQI rights, you know, I was not happy at all when I learned that the Supreme Court had decided to review a series of cases that in many instances had affirmed the rights of LGBTQ workers to be protected from discrimination in the workplace. I think many people in the movement, myself included, viewed it as kind of an ominous sign that the court was deciding to review these cases after having all of the Trump appointees ascend to the court and the more liberal and progressive justices, including Kennedy, who had been a champion for LGBT rights, and perhaps nothing else in his later years, leave the court. But, you know, I think we got kind of a miraculous decision in so far as the Supreme Court, after various [inaudible], one that I was able to attend in person where there was [inaudible], et cetera, et cetera, to the point of almost directly [inaudible] that sex discrimination encompasses discrimination against LGBTQ people just by the plain language of the statute.

Chinyere:

And the idea that sex is really inseparable from societal understandings of what it means to be transgender or what it means to be LGBT. And so it was really a terrific decision and it's very hard for me to separate the victory, the parts of the decision that are victory from the movement organizing behind the case, which included everything from people, flooding the Supreme Court, flooding the steps, taking to the streets before the decision much like the DACA case and included an Amicus effort where dozens of briefs were coming in from all across the country from people, many of whom were part of the community, explaining in the context of their own lives, why

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employment discrimination protections matter. The Center for Constitutional Rights was very proud to submit a brief along those lines that featured people like Miss Major Griffin-Gracy, who was a Stonewall veteran and other sort of black and Latinx trans people explaining how their lives have an impacted by discrimination and have led them to experience kind of a discrimination to incarceration pipeline that this case that an affirmative decision would be poised to remedy.

Chinyere:

And so I think there are some parts of the decision that are concerning, and I think we're going to turn to those next, but all in all, I really believe that the organizing brought to the fore for people like Justice Roberts, who ended up joining the majority, that the credibility of the court was at stake and that if he wanted to preserve the court as an institution that people viewed as being in the business of justice, that only one decision was possible. And that would be a decision affirming, the rights of LGBT people to work, which is I think, a very similar result to sort of what happened in the DACA cases where Chief Justice Roberts was actually the author of that opinion. Again, perhaps because of social pressure, because of the cultural work and organizing work that people like Eliana and others have done really came to understand that a defeat in these cases would actually impugn the court and its independence and its integrity in the eyes of so many.

Ghita:

I think you bring up a really interesting point, Chinyere, that, you know, the organizing and the movement building that sort of put all this scrutiny on the court and maybe had many people who serve on the court worried about the court's legitimacy should they reach another outcome in both the Title 7 and the DACA cases, that a huge part of the organizing and movement building was shaping the story and changing the narrative. And, you know, I wonder if, you know, you think that it would have been possible to have this kind of decision in Title 7, you know, where, where Gorsuch is saying because of sex includes sexual orientation because of sex language in Title 7 includes sexual orientation and gender identity. Do you think, you know, without that narrative shifting a decision like this would have been possible with these justices a decade ago?

Chinyere:

Certainly not. I will acknowledge I'm someone who's an advocate, both for LGBTQ rights, but also racial justice. And, you know, I share the viewpoint as do many that the LGBTQ movement has made advancements at a rate that's really unparalleled to some of the other social movements. Certainly I would flag here the movement for racial justice, as you see issues like voting before the court, criminal justice matters, you know, even affirmative action. And there really being a lot of cynical decisions the courts put out. And so I think that there's both movement advocacy, but I would also acknowledge. And I think there's a bit of a phenomenon that I describe as pinkwashing. That's also sort of at play, which is a way of saying that the court sort of takes the LGBT case docket as good of a, a valve to sort of express values that are positive and that are benevolent, but perhaps, you know, turn your eye away from mischief they're making on other corners. I think it's significant that, and I think this is actually the path that justice Kennedy has to become an LGBT advocate that even halls of justice, where you perhaps see a lot of men, you see a lot of white men, you can still have people who are LGBT clerks and so forth and so on that can do the work of hearts and minds. So, so it's a yes, and, but nonetheless, the movement work is really vital. And I

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think it's the only thing that explains why a court that is so terrified of transgender people nonetheless did the right thing and sort of acknowledged trans people and their, and their right to work.

Ghita:

It's interesting that you use that phrase a valve, you know, and I wonder if Dreamers in a certain way sort of operate in a similar way as a valve for these sort of larger immigrants rights issues and, and movements, you know, there's been, you know, for a long time, the long predating during the Bush administration, even there was this sort of narrative about what we now call Dreamers that these exceptional valedictorian, young people who, you know, came here when they were not in a position to decide whether to come into the country should be treated as this exception to our overall hostility, to immigrants. And there's this sort of sense that the courts should do something different with Dreamer immigrants than they're allowing, you know, for so many other immigrant groups and so many other terrible things that are happening in the immigrants rights landscape Eliana, could you speak a little bit to, you know, how that sort of exceptionalism narrative, you know, has been working and, and how you and others that Make the Road and others in the, in the Dreamer movement have been dealing with that?

Eliana:

Yeah, absolutely. I'm going to start by, for Make the Road. We honor and follow the leadership of those words are directly impacted. Those are the ones who are leading and moving the work forward. And I think like, you know, overall, like for us as an organization, like I'd Make the Road, DACA is kind of like paving the wave for something bigger and bolder that we want to see when it comes to like, you know, an immigration reform. But I think in order to do that in something that you brought up is like really important that we discuss. There's a lot of folks across the country that believe that only those who are like, you know, exceptional, I mentioned I've got a Victorians and attorneys and doctors and whatnot. I'm more deserving than other immigrants. And I think that's, that's far from the truth, right? I think as a movement, we trying to, to move away or shift that direction where that is going.

Ghita:

I think that Make the Road. And I think the larger immigrant movement across the country is trying to shift away completely from that narrative of exceptionalism. And like only Dreamers need to be protected. I think every immigrant, regardless where they come from their education, their economic or social status are deserving of dignity and respect. And that's how we want to lead moving forward. I don't - Make the Road doesn't seem to believe that because I am a DACA recipient, I am more deserving than my parents, or like, you know, people who have been here before me, and I think that's just not right. I think for a lot of us, we're not willing to negotiate our livelihoods in exchange of our parents or other immigrants to be punished. And I think for the longest time, this is what the administration has been trying to do it, right? Use DACA recipients or so-called Dreamers as a bargaining chip for them to do more damage to our community. By increasing the number of ICE agents, you know, trying to build that wall, giving more money to DHS. I think we are in the right moment, right? To activate other folks across the country, through the larger movement that we're trying to build. And I think we don't want to go down that path.

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We strongly believe that every, every immigrant documented or undocumented is deserving of the same justice and dignity as any other immigrant.

Ghita:

I think those sorts of lessons are really important for, you know, what's going to happen in the future and what these cases, what the impact of these cases is going to be in the future. I mean, as a movement victory, I think it's, it's unassailable that a proposition that because of movement work in both of these areas, there were these unexpected victories, but of course not all is not sunny in the Supreme Court world. And there are some things, you know, looking forward the impact of these cases is not, is not going to be entirely positive. Both the DACA decision and a sort of subsequent decision, Our Lady of Guadalupe that we're going to discuss hold some sort of, there are some perils going forward for people who are doing all kinds of social justice litigation, but especially anti-discrimination litigation. So in the DACA decision, the positive part of the decision, the part that sort of preserved the program was the part where the Supreme Court held that the Administrative Procedure Act had been violated.

Ghita:

And even though the Trump Administration had the right to rescind DACA, you had to follow certain processes carefully. It had to put out its reasons in advance of making its decision. It had to consider all the factors, not just some of them. And so the decision that Homeland Security Secretary Duke made, and then Nielsen later, her successor later justified - they were improper under the Administrative Procedure Act, but the DACA case is also made equal protection allegations under the Fifth Amendment. They said that the decision to rescind DACA was, was discriminatory. I think almost 90% of DACA recipients are Latino. Something like 78% of DACA recipients were born in Mexico. And of course, President Trump himself had been very vocal and repeatedly stays, you know, stating incredibly hostile, racist, hate filled language about Latinos, generally immigrants generally, and specifically Mexicans. And the part of the DACA decision that is sort of, you know, somewhat perilous for people who do discrimination litigation is that Roberts joined by seven others only spoke to my or descended descended Roberts held that there was not a legitimate equal protection claim here that Trump's statements were too remote in time to be counted against the rescission of DACA.

Ghita:

That it was understandable that the program that the rescission disproportionately impacted Mexican immigrants, because they were, they, you know, comprise a significant portion of the unauthorized population and that nothing was unusual about how the Trump Administration decided to rescind and those that decision that's part of the decision that these sort of outrageous statements is, you know, total disproportion and who was affected doesn't really matter. And isn't sufficient to keep an equal protection claim going. You know, that's going to the government is already trying to use that decision in a case where CCR represents Make the Road, New York, the public charge cases, you know, they're really gonna use that part part of the decision to try to chip away at, at equal protection. And so I think, you know, one of the lessons from, you know, the successes of the DACA decision is that we have to keep our eye on these cases on the courts. We have to battle on every front and, you know, take the wins where they are, but, you know, the fight

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keeps going at least on, on this piece of it. And, you know, a few days after the Title 7 decisions, similarly, the Supreme Court made this decision and Our Lady of Guadalupe, which, although it wasn't officially about LGBTQI rights certainly has an impact on it. And I wonder Chinyere, if you could eliminate us on what that decision was and how it interacts with the Title 7 Bostock Zarda, Stephens decisions.

Chinyere:

Yeah, absolutely. So remember when I've alluded to there being kind of a shadow side to [inaudible] decision, it's precisely this, and it ties into the, Our Lady of Guadalupe case, as well as a case that's on the court's docket for this upcoming term, *Fulton V. City of Philadelphia*, but in essence, the court, after, you know, [inaudible] in a way that was, you know, quite powerful and moving into a members of LGBT community, that sex discrimination included discrimination against us, and that there was no way to sort of parse words or use kind of rank policy arguments, slippery slope arguments to kind of escape that conclusion, the court turns around and says, but to be clear, we are not opining on the interaction of religious liberty claims and and Title 7 or, you know, the ways that our religious liberty argument interacts with discrimination protections. And, you know, I saw that as a, as really an exception that was likely to sort of swallow up the rule.

Chinyere:

And that was just with *Bosdock`* on its own and no kind of adjacent authorities, but sure enough, just days later, the Supreme Court issued *Our Lady of Guadalupe* [inaudible]. And in that decision, the court found that statutes that prohibit discrimination nationwide, including discrimination based on age or discrimination based on disability, that they had no effect when the employer was a so-called religious organization and the employees who were raising the discrimination claims or so called ministers. And I think what's about the case is how stunningly broad that conclusion is despite kind of the language that would deceive you into thinking that there's some narrowing or some, some limitations. So the plaintiffs, in this case, they were not nuns. They were school teachers. There were school teachers who were employed at schools with a religious mandate, but they had, you know, by self attestation, no individual kind of religious responsibilities, they, you know, one of them was a math teacher.

Chinyere:

I believe one of them wasn't a gym teacher and nonetheless, the court determined that they were ministers or that they were some back to the so called pursuant to kind of a first amendment you know, doctrine. And so as such, because basically they were at the school that had sort of religious mandate and not was their, I mean, their individual job duties or their protestations that they should not, and were not to be classified as ministers. The court said, you know, it would intrude upon the first amendment to apply these generally applicable anti-discrimination laws to your workplace. And so we declined to do so, and, you know, please feel free to jump in here, but I mean, it's, I mean, two things are kind of profound. One is that the plaintiffs were incredibly sympathetic. One of them was a teacher who was fired after disclosing that she had a breast cancer diagnosis and required treatment.

Chinyere:

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You know, so it's like if these aren't compelling facts for applying disability discrimination laws, then what is? And, you know, but on the other hand, because the case, you know, it was not sort of a movement target. It was not a case that screamed, this will impact the future of anti-discrimination cases for forever and a day. It really was not the target of the sustained organizing and advocacy that you saw in the DACA case and in Bostock. And so I wonder whether it was more susceptible to what I consider to be a tremendously significant and problematic result. And just to fast forward ahead to the *Fulton V the City of Philadelphia* case, that is a case that is quite literally inviting the court to determine whether to overturn its decades long precedent that says basically that laws of general applicability, such as discrimination laws, such as criminal laws do not bend to religious objections that, you know, if a religious practice is incidentally burdened by law of general portability, without it being expressed intent of the legislature to, you know, cause that result that basically, you know, you cannot assert a first amendment violation [Inaudible] case, but I believe was 1992 that that so held [inaudible] the court is whether they should overturn the cert a first amendment claim, two laws that are written on the book that are completely neutral, but, you know, in this instance would speak to, for instance, forbid discrimination, you know, against protected groups. And they're also deciding the case in the context of religiously affiliated child services agency that took its position or decided to deny same gender couples, access to foster or adoption, you know, and violation of the city charter. And so this is exactly the case that Bostock alluded to being the kind that might unseat its own decision.

Chinyere:

So on one hand, you know, Bostok makes clear that if you are declining to service LGBT people that might be sex discrimination, but you know, this case is basically inviting the formalization of this exception that would say, well, yes, but these people object to LGBTQ people on the basis of their so called religion, which by the way, we're not going to really intrude. We're not going to ask for the citations, the biblical references, we're just going to take on face value lest we intrude too deeply that, you know, you have a colorable objection and therefore the first amendment protects you. And, you know, I think it's something that a lot of people in the movement are afraid about. I certainly I am because the idea that, you know, a religious or moral objection trumps, you know, kind of inclusion or anti-discrimination protections, it doesn't just impact LGBTQ people. It's a stone's throw away from, you know, people's objecting to integration, objecting to the presence of immigrants, or racial minorities in their communities and their schools and their places of business and claiming religion as the defense and it's succeeding, you know? And so again, CCR was able to join an Amicus effort before the courts explained the real dangers of the invitation that they're being given to sort of create this first amendment carve out that allows people to have a license to discriminate.

Ghita:

I mean, what you're describing is so alarming and worrisome, but I just want to highlight one little piece of what you said, which is two litigators or people who are sort of thinking specifically in terms of litigation strategy. It might seem like the best idea was to have someone suffering from breast cancer, bring this discrimination case or a woman over the age of 50 who's worked as a teacher for years bringing this discrimination case, Oh, those are the perfect plaintiffs. Those are the ideal plaintiffs because they won't sort of trigger those Supreme Court justices who are so

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hostile to LGBTQ rights or other kinds of rights to vote against them. But in fact, it looks like the opposite was true that without the movements behind these cases and the scrutiny on the justices for making these decisions, the outcome went exactly the opposite of what you would think it would have happened, that where there was sort of open activism and support and narrative shifting as in the Title 7 Bostic's artists Steven's cases. And in the DACA case, the outcome was surprisingly a lot better than we expected. And I think there's some lessons we can draw from the Supreme Court that, that we can use for, for future movement building.

Chinyere:

Definitely agree.

Eliana:

And I think just to add to that, I think you're right. I think based on my own experience and the movement that we created around our DACA case of the Supreme Court, it was very inspirational and empowering, I think for us, not only as to Make the Road, New York, but also as the broader coalition, the national coalition, the home is here. It was like, you know, pivotal to so have those four dynamics impacted like you guys mentioned before, like you lead the work. And, you know, I think a lot of us coming from different like organizations and backgrounds, where we all had a little something to add, we all share like resources. We have plans when he came in our communications, we were like in a dreaming big, being very like, Oh, that's jsu about like, you know our organizing skills and how we're going to hold that moment to make sure that the Justices will pay attention to our case.

Eliana:

I think overall our collective power, let us the big three. Right. I think we, we poured our souls into this campaign when it was going to the Supreme Court. And I think, you know, to me, it was just wonderful to see how many people across the country were coming together to like brainstorm. And like you create this space where many of us to use our voices to, and be elevated in the press, our stories to be heard. And I think like, you know, it was a huge win. I mean, we were able to mobilize over 4,000 people the day of the hearing and in DC. But not only that, like we were also able to mobilize people like, you know, across the country from coast to coast to show up, you know, in their own neighborhoods the day of the hearing.

Eliana:

I myself with other folks, we marched over 230 miles from New York City all the way to DC. DACA was trending online when we were getting ready for the hearing. And I think it was a beautiful thing to see. And it's mainly because the environment of the work that we have created many undocumented people were able to make, you know, come out of the shadows for the first time at that moment in, in November, when, you know, regardless of the administration that we were facing, which is, you know, very racist and like white supremacist. So we, to me, I think seeing like new folks coming out and saying like, you know, I'm undocumented and afraid, even in those moments of uncertainty, it was like really powerful. And I think that speaks volumes around the work that we were doing collectively with all their partners and through the Home is Here campaign.

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Eliana:

And also at the same time, like, you know, building that connection with our litigators, I believe it was critical. They value our inputs, our opinions as plaintiffs. And like, you know, the collaboration between litigators and plaintiffs was just like, you know, beyond my imagination, like they were so like in a thoughtful, creative, and more than just being our, our attorneys, I think a lot of us have, you know, embrace our relationships, you know, become friends. And they always made make sure that our stories that our voices were at the forefront of the, of this litigation. Right. And the work that was being handled, like, you know, I think when the decision was made at the Supreme Court and people just showing up, you know, I think for the different meetings for the different rallies that we had, we were always trying to be very inclusive, making sure that we had position and also acknowledging that not only Latino immigrants are affected by those issues.

Eliana:

Right. I think we want to make sure that other folks from other backgrounds are also included in our part of the conversation. And that includes people from the Asian community, that are from the black community and just try to create a more transformative movement. I think that's like our goal, and I think ideally that's what it will lead us to the North Star as we call it, like, you know, to the immigration reform that we so badly want to have relief to all undocumented people, not just DACA recipients. I know we kind of have like an uphill battle, but I think throughout this few months, throughout his years, we've learned that our organizing power works. And I think that has made a huge difference in some of the cases that we've been leading.

Ghita:

I think CCR couldn't agree more that organizing works. It works to shift policy and it even works to shift judges. It's just a, I think the season on the Supreme Court has really, really shown that. Thank you so much, Eliana for joining us. It's been really great to talk about these legal cases with someone who's been at the forefront of making change happen inside and outside the courtroom. It's really been terrific.

Eliana:

Yeah. Thank you so much for giving me the space today. And I look forward to continue to work with you and thank you always for the collaboration that you do as well, like Make the Road and, you know, the fight continues. So thank you, thanks for the space.

Ghita:

This has been Chinyere Ezie, Eliana Fernandez, and Ghita Schwartz. And we have been on The Activist Files. And we thank you so much for listening.