Short Circuit 156

Anthony Sanders 00:07
Hello, and welcome to short circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for judicial engagement at the Institute for Justice. We have a packed show today. So let's get right to it. Joining me in the virtual studio are Michael Bendis. And Diana Simpson, both IGA attorneys. Welcome to both of you.

Diana Simpson 00:29
Thank you, Anthony.

Michael Bindas 00:30
Thanks for having us, Anthony.

Anthony Sanders 00:32
Well, both of them will have an interesting Federal Court of Appeals case to talk about later. But an even more interesting thing is that Michael is just finished briefing a cert petition to the US Supreme Court from the Ninth Circuit. And he's joining us to talk a bit about that before we get to our usual format. And this is a case that many listeners may recognize. Michael and IJ have been litigating this case for, I believe, nine and a half years now. And it concerns our old friend the privileges or immunities clause of the 14th amendment. So Michael, tell us what's going on with our privileges or immunities.

Michael Bindas 01:16
Sure, thanks, Anthony. This case, as Anthony mentioned, is nearly a decade in the making, at least just in terms of litigation, but it's really almost a quarter century in the making, because it involves two brothers Jimmy Cliff Courtney, who since 1997, have been trying to provide some form of boat transportation on Lake Chelan. Now Lake Chelan is a 55 mile long lake in Washington State. And Jimmy Cliff live at the far end of the lake in a very remote community called Stehekin. Stehekin is only accessible by a very long hike, or by boat or floatplane. And Jimmy and Cliff, along with their family have several businesses in Stehekin. And they've long sought to increase access to Stehekin and to their families' businesses. And so they've been trying to provide since 1997, everything from a full blown public ferry on the lake to shuttle folks back to and from Stehekin or something as simple as just shuttling customers of their own businesses to increase the accessibility to their own business. But they've been thwarted at every turn by an anti competitive state licensing law known as a public convenience and necessity requirement. Basically, Washington State prohibits anybody from operating any form of boat transportation on Lake Chelan unless the existing incumbent ferry provider consents to this service or the would be boat transportation provider proves to the government in a trial basically that that their transportation is necessary for the public convenience. That is problematic in our view. And so we filed a lawsuit on behalf of the Courtney's back in 2011, challenging this anti competitive licensing law and we challenged it under as Anthony mentioned, the privileges or immunities clause of the of the 14th amendment. And at this point listeners out there are probably saying, come on that's

ridiculous. Everybody knows the privileges or immunities clause is dead. You know, Akil Amar famously said that that the slaughterhouse cases which were decided just five years after the privileges or immunities clause was ratified, strangled the clause in the crib. And there's something to that. Slaughterhouse was a horrible opinion. And it really restricted the the the the scope of the privileges or immunities clause. But slaughterhouse also recognized a handful of rights that the clause does, in fact, protect and one of those rights is the right to use the navigable waters of the United States. Lo and behold, that's the very right that Jim and Cliff Courtney seek to exercise on Lake Chelan. Lake Chelan is a navigable water the United States in fact, the federal government has designated as a navigable water of the United States, and they wish to use that water to to shuttle customers to and from their businesses. So we challenged the public convenience and necessity requirement as an infringement on their right to use the navigable waters. Back in 2013, the Ninth Circuit held that, you know, whatever the privileges or immunities clause protects when you know, whatever this right to use the navigable waters is it's surely not the right to operate a full blown public ferry because that has traditionally been the prerogative of the states and surely states can limit who provides public ferry service. We thought that decision was wrong but you know, that disposed of kind of that portion of the case. But even if done circuit is right that the clause doesn't protect the operation of a full blown public ferry, the Courtneys still believe it protects the right to at least transport customers to and from their own business. So after that first ruling from the Ninth Circuit about public ferries, we pressed on with our second argument, which is that the right to use navigable waters at least protects their right to shuttle their own customers to and from their own business. And earlier this year, the Ninth Circuit unfortunately, held that the the right does not protect that. And therefore, the Courtney's could not stay privileges or immunities clause claim. Basically, the Ninth Circuit said that this right to use the navigable waters is only a right to use the navigable waters in interstate commerce. And since the Courtney's would be traveling wholly within Washington State, their transportation is not protected. And worse, the Ninth Circuit went so far as to hold that the privileges or immunities clause generally bars claims against a citizen's own state. And since the Courtney's beef was with Washington State, they have no recourse under the privileges or immunities clause, which just flies in the face of everything that everyone agrees about when it comes to the privileges or immunities clause, which is that it was meant in large part to protect the freedmen, in the wake of the Civil War, from abuses at the hands of their own southern state governments. So

Anthony Sanders 06:29
And that's not something that like slaughterhouse intimate or even a couple more modern cases intimate that's just completely weirdly out of left field, what the Ninth Circuit said there

Michael Bindas 06:42
It's out of left field in one respect and interest how bizarre it is, and inconsistent with the history of the privileges or immunities clause. But the way the Ninth Circuit got there is really disturbing. The Ninth Circuit in reaching that conclusion conflated the privileges and immunities clause of Article four section two sometimes called the comity clause with the privileges or immunities clause of the 14th amendment. And when it comes to the former the privileges and immunities clause, that that clause does not protect you from your own state as it is meant to protect citizens who are temporarily in other states and therefore that that clause correctly, is limited to claims against a state other than your own. But that's not the clause at issue. In this case, this case involves the privileges or immunities clause, and the Ninth Circuit just botched it, and it's done that twice. Now, it did it first in a case called

Merrifield, back in the early 2000s. And it relied on Merrifield, in this case to again, kind of double down on this notion that the privileges or immunities clause does not protect you from your own state. And again, that just flies in the face of the history of the privileges or immunities clause. It also flies in the face of to US Supreme Court decisions, most recently a case called Saenz versus Roe, the Supreme Court expressly held that the privileges or immunities clause does protect you against your own state. So the Ninth Circuit just got it wrong. It botched the analysis here. It confused two constitutional provisions. And that sure sounds like a reason for the Supreme Court to take this case and correct that decision. And that's, you know, even apart from this other holding that the right to use the navigable waters a right that the Supreme Court expressly recognized as protected by the clause is somehow only limited to traveling between your state and another or your state in a foreign country. Clearly, that right applies even when you're traveling within your own state.

Anthony Sanders 08:49
And so the case is fully briefed before the court now and how many advocates briefs were filed in the case,

Michael Bindas 08:56
We received three amicus briefs and they're fascinating. One of them is on behalf of a group of law professors who really take the the Ninth Circuit to task for this notion that the privileges or immunities clause doesn't protect you against your own state. Another one was by a group of historians who have done a lot of historical work on the importance of the right to use the navigable waters to the freedmen in the wake of the Civil War. And this was a vitally important right to them. It was very common for the freedmen to earn a living in maritime pursuits, other trades on the water, and it was also very common for Southern governments to restrict their ability to engage in these economic pursuits on the navigable waters. So it's a really fascinating brief that informs just what it meant to use the navigable waters at the time the 14th amendment was was ratified. And then we also received another brief from Americans for Prosperity Foundation, which focuses on the origins of the right to use the navigable waters, which is again, a fascinating issue. It's a right that dates back to Magna Carta, believe it or not, that was protected in English common law around the time of our Framing. And it was memorialized in the Northwest Ordinance, which is part of the very organic law of our nation. So this is a storied right. One that dates back centuries. And one you would certainly hope is worth the Supreme Court protecting here.

Anthony Sanders 10:30
Well, I understand the cases. It hasn't been scheduled for conference yet, but it's going to conference next month probably?

Michael Bindas 10:38
That's right. It should, barring anything unforeseen it should go to conference on January 8. So it's conceivable that sometime in early to mid January, we could hear something one way or the other about the court taking it up.

Anthony Sanders 10:49

Great. Well, we're recording this I should have said on December 22. So maybe just a few weeks from now, we'll know the fate of this cert petition. It's always a fun feeling. Having a cert petition, sit on the docket of the US Supreme Court and waiting to see what will happen. I know Diana has been through that experience,

Diana Simpson 11:09
very anxiety producing.

Anthony Sanders 11:12
I say funding quotation marks there. Yeah, of course. Well, so let's get away from that anxiety and to a different kind of anxiety. And that's recording the police. So Diana, tell us how that has come down in the state of Massachusetts.

Diana Simpson 11:26
Yeah, so we've got a case today out of the first circuit. And, you know, as one of the few, one of the few courts to use courier as its font, which is something I always feels worth mentioning, because it makes my eyes bleed a little bit.

Anthony Sanders 11:38
We should do an episode on fonts of the circuit. So I was thinking that because

Diana Simpson 11:41
You know the Fifth Circuit they use equity. The Fifth Circuit uses equity, and it's beautiful. They've recently come back around to this. But I suppose we could have that conversation at a different day, rather than, you know, go from these like big picture questions about the rights of the privileges or immunities clause and contrast to the privileges and immunities clause to then just talking about fonts. Well, I'll shift back to the first circuit here. And so that case, coming out of Massachusetts, and this case is about a law that was passed over 50 years ago, called section 99. And section 99 makes it a crime for any person to willfully commit an interception of any wire or oral communication. And so basically, what that means is that it is illegal in Massachusetts to secretly record the contents of a communication. So if people are talking outside, and they can't see that you are recording them, you can't record them. And so, about eight years after the law was first passed, the Massachusetts high court in a case called Jackson interpreted the law to say that a recording was made secretly, if the person being recorded doesn't have actual knowledge of the recording. And so that sweeps pretty broadly. Because that means that that, you know, if other people know that you're recording them, it doesn't matter, the the one person whose knowledge is important is the person being recorded. And so in that case, that Jackson case in 1976, the Massachusetts high court upheld the statute and said that, you know, audio recordings of a kidnappers ransom calls violated the law, even if the person had no reasonable expectation of privacy in that communication. And then in 2001, in a case called Hyde, the Massachusetts high court, again, upheld section 99. And it said that it did not impliedly exempt recordings of police, who are lacking in expectation of privacy. And so that case came out of a prosecution for a guy who had recorded the audio of traffic stop without the officers knowledge. And so the court said, you know that that's perfectly illegal under this law. And so what people should do is just announce the recording before it starts. And so, you know, this was, what, 19 years ago. And so this

case, there's actually two cases at issue here, there's a case brought by the Martin plaintiffs and a case brought by Project Veritas. And so the first circuit hears these cases together. And these cases are very modern, in contrast to the origins of the law, and in contrast to kind of this historical understanding , or interpretation of what the law means and what it's meant to do. When you know, some of these recording devices were a little bit different than they are today, where now today everyone's got, you know, a camera in their hand and they can they can broadcast it to literally millions of people as something is going down. But anyway, so the Martin plaintiffs were a group of civil rights activists who brought a dec action, a declaratory judgment action, saying that they want to record police officers without their consent as the police officers are discharging their official duties in public. Massachusetts still enforces the statute and the Boston Police Department training materials tell police that they can arrest people for secretly recording cops who are performing their duties in public. So the Martin plaintiffs one below with trial court, they had the district court say that this was unconstitutional, that it failed intermediate scrutiny. And so they the the police did not appeal that decision, but the district attorney of Massachusetts did. So you've got that case. But then now we've also got the Project Veritas case, and then those plaintiffs and so that one's a little bit different. And that one was also a dec action. And basically, it boils down to a group that wants to record people, any people, not just police, but any person who is lacking a reasonable expectation of privacy in what is being recorded. And they also want to record all government officials, not just police, but any government official anywhere, discharging their duties in public spaces. And so they were a little bit less successful below. But so they appealed, and the DA in the other case, in the Martin case appealed. And the first circuit heard heard these all together. And the first circuit kind of dressed the Martin plaintiffs first, and it spends 14 pages going through explaining why the Martin plaintiffs have standing to pursue this case. And I gotta say, it is exhausting having to read through these 14 pages on standing because people are not -- that there's this whole line of case law saying that people do not have to risk enforcement first before they can challenge, particularly when it comes to the First Amendment. And yet, it's, you know, they had to go through a lot to just convince the court here, that they had standing that, that they were at risk from the statute that they record the police and all other states, and they want to record the police in Massachusetts, but they can't given that the statute exists, and it's still being enforced. And so it's exhausting, just in terms of being a constitutional litigator and bringing these kinds of cases, like thinking through exactly what you have to do to establish standing. But it's also exhausting just thinking about, you know, what you have to do to just participate in society and record these kinds of things and engage in this kind of activity and challenge statutes that you think are unconstitutional, before they're applied to you, and before you risk having to go to jail for them. But put that to the side. The first circuit ends up saying that the First Amendment applies to recording the police because this is gathering information. And this is well within the protection of the First Amendment. And so the the court points to a bunch of other courts of appeals decisions. And not one of them has said that that the First Amendment does not protect the right to record police. Some of them at least have held that it was not clearly established for qualified immunity purposes, which the Third Circuit did in 2010. But none of them have said that, that there isn't this right, or that it's not protected at all. And so then the court goes on and says that, you know, there's actually a lot of benefit to secretly recording the police and that this undetected recording can itself serve a cardinal first amendment interest in protecting and promoting the free discussion of governmental Affairs, so that it can be even more important than open recording because the police may not know they won't be disrupted. And it clearly shows what's going on. And so the first moment applies what standard of review, you get an intermediate scrutiny, and this law fails

intermediate scrutiny, because it just sweeps far too broadly. It prohibits all kinds of recording, even though there are lots of places where this kind of recording can come in handy and can be really important. And I think, you know, everyone in this country saw just how important police recordings are and can be. And by police recordings, I mean, recordings of police that they're they themselves are not necessarily taking, you know, look at this past summer. So the Martin plaintiffs win. And it's, you know, this this great announcement of the ability to record the police in public without the police's knowledge. The opinion then shifts to the Project Veritas appeal, and they do not fare as well. And so they they raised this facial overbreadth challenge that they did not succeed at, because they did not point to enough unconstitutional applications of the law to show that it was substantial compared to the constitutional applications. And basically, what that just means is that they didn't point out enough times where it would be unconstitutional. And this this standard for facial over breath is just an exceedingly broad and very challenging to beat.

Anthony Sanders 19:53
Is that because they talked about how it applies to people other than government officials -- because there's so many non government officials out there, it's kind of like overwhelms the math.

Diana Simpson 20:04
Yeah. And it's just, there are applications of this law where, you know, it would be constitutional. And I think it said, I think the opinion said that the Project Veritas had provided 10 different examples where there was unconstitutional, okay, but then there's a lot more than 10, where it is constitutional. And so if it's a simple math equation, you know, 10 is not substantial compared to more than 10. You know, and so that ends up being a tough standard to beat. Then the court moves on to kind of the last two arguments that are not facial overbreadth. But that sre kind of more of the traditional first amendment analysis that the Martin portion of the case talked about, and some of the others. And this was the ability to secretly record anyone lacking a reasonable expectation of privacy and what's being recorded, and the ability to secretly record all government officials to start discharging any of their duties in a public space. And the court basically kicks it and says that the issue isn't ripe. Because it just isn't clear exactly what they want to challenge, who has a reasonable expectation of privacy, and what the edges of the case are, particularly considering the breadth of the remedy sought. And so it's interesting kind of seeing how the court shifts from this Martin portion of the case where I think they really fully embrace the First Amendment and exactly, you know, one of the strongest places that it can be used. And then this other portion of the decision where Oh, well, you haven't explained exactly what you mean by government officials, you know, that that doesn't just include the police. But that also includes teachers, and, you know, the DMV, and anybody else. And so, what kinds of recordings are you going to do? Well, you can't tell us clearly. And so we're just not going to reach the decision. And so it's it's just interesting to me to see kind of the difference between those two.

Anthony Sanders 21:58
And what, what the bottom line, it seems to me is that if you're in Massachusetts now, because of this ruling, and you see the police, you can record them secretly?

Diana Simpson 22:09
Yes.

Anthony Sanders 22:10
Like, it's not like it's only a small segment of when you see the police.

Diana Simpson 22:15
So I say, yes, this, this was a big portion of it. I mean, this is a long decision. This is a 72 page opinion. And so because it's in courier, it takes a little bit less space than, you know, one of the others might. But they spent a lot of time talking about the difference between facial and as applied relief. Because the plaintiffs here were asking for a declaration that section 99 was illegal when it applied to the recording of police discharging their duties. Well, so that's only a portion of the statute, you're not challenging the whole statute. So is that an as applied claim? Well, no, it's facial because you're not just looking for relief for you, you're looking for relief for anyone trying to record the police. And so basically, the upshot is that recording the police in who are discharging their official duties in public, you're probably fine to go ahead and record them without they're not without the police officers knowledge. Of course, you can't get in the way you can't like be right in the middle with your camera phone up in their face while they're trying to do something. But that that's at least protected by the First Amendment now.

Anthony Sanders 23:22
Yeah. And I would say if people are interested, or have been confused in the past about the whole facial as applied distinction, and there is literally no one who studies this issue, who is not confused by it. The case does a really good job, I think of drilling down into how that works in these circumstances where you're challenging part of a statute, not the whole statute, or you're challenging the statute as applied to a certain type of situation. But it's not just as applied to this one thing that this one person did, right. So there's a continuum between something happened to someone in one set of circumstances. And so they're trying to have the law declared unconstitutional as applied to that one person in that one circumstance. And then on the other side, is that the entire laws facially unconstitutional. And courts often get very confused as to what all that middle is, there's a lot of middle there. And this court actually tries to dig into what that means. Now, what the standard is for as applied versus facial is still messed up, and probably will be messed up for some time to come. But the court at least tries to grapple with it. One other thing I thought about this opinion, and you I think were kindly intimating it earlier, Diana, is that they did spend a lot of time on standing. They spent a lot of time and a lot of other issues. I don't know if the god bless his or her heart, whoever the clerk was, who drafted this opinion. I don't know if that person needed to spend as much time on all of the issues in all 72 pages in courier font, and I would just encourage all those good clerks out there writing opinions that you know, there there there is some value in brevity. And man, this opinion really drilled down into a lot of issues. But, you know, for to be remembered for posterity, it helps to say things in fewer words sometimes.

Diana Simpson 25:19
Indeed, it certainly will be helpful to be cited. And, you know, if you're looking up standing issues, that'll certainly kind of come to the forefront here. One thing I neglected to mention at the beginning was the makeup of the panel. Our friend, Judge Selya was on it. But he did not write it as evidenced by the lack of vocabulary words, and Judge Barron wrote it. And Justice Souter was also on the panel sitting by designation, of course. So that was an interesting trio. I thought.

Anthony Sanders 25:51
That's right. Well, there was a different trio with with an interesting guest also in the ninth circuit in a case that Michael is going to tell us about.

Michael Bindas 26:01
Yeah, much shorter case, opinion wise, but no less important than the one Diana just discussed. And it's Calvary Chapel Dayton Valley versus Sisolak, and this case stems from Governor Sisolak, Governor of Nevada, one of the directives that he issued early on during the COVID epidemic. It limited indoor activities in different ways. With respect to indoor religious services, it imposed a 50 person cap on attendance at indoor religious services. But it allowed such establishments as casinos, gyms, bowling alleys, retail businesses, to have up to 50% of their capacity, their fire code occupancy. And so you had, you know, this disparate treatment where indoor religious services were treated, more restrictively then all of these other types of businesses and establishments. And so Calvary Chapel challenged that restriction under the Free Exercise Clause, arguing that it was not a neutral or generally applicable law because it targeted indoor religious services for more harsh treatment relative to these other types of establishments. And the governor in turn defended the law saying that it was a permissible response to the COVID epidemic pointing to Jacobson versus Massachusetts, which is a case I think, has come up in some recent episodes of Short Circuit concerning government's powers during the smallpox epidemic in the early 20th century. And the court, federal district court initially denied the request of Calvary Chapel for a preliminary injunction in the case. And Calvary Chapel appealed that decision up to the Ninth Circuit. And while the case was on appeal, given that it was going to take some time to play out, Calvary Chapel actually asked for an emergency injunction pending the duration of the appeal. The Ninth Circuit denied that the supreme court denied a subsequent request for this emergency injunction. But Calvary Chapel then asked the court, the Supreme Court to take the case up. Grant certiorari even before judgment had been entered by the Ninth Circuit. While that was still kind of lingering out there, the Ninth Circuit actually got around to issuing its opinion on the preliminary injunction. And it reversed that decision in light of a recent decision from the Supreme Court on a another governor's COVID response directive. That was Governor Cuomo's. Order in in New York, that imposed similar restrictions, a bit more severe, on on places of worship in some parts of New York. And the Supreme Court in that case, the Roman Catholic Diocese of Brooklyn versus Cuomo --

Anthony Sanders 29:13
otherwise known I believe, as the case that ruined every first amendment scholars Thanksgiving Eve. This came out about what 9pm Thanksgiving Eve I think.

Michael Bindas 29:24
Yes. But it was a perfect timing Thanksgiving wise from that from the church's perspective and from from the first Amendment's perspective. And it in that case, the Supreme Court, in light of the the kind of disparate treatment of churches relative to other establishments, such as garages, acupuncturists, the many other types of businesses that were treated more favorably than religion. The Supreme Court enjoined enforcement of Governor Cuomo his order. So in light of that, no November 2020 decision from the Supreme Court, the Ninth Circuit in the Nevada case, held that the preliminary injunction was

in fact warranted because the Nevada order -- Governor Sisolak's order -- like Governor Cuomo's order treated religious entities of worse off than their secular counterparts. And that presented a free exercise problem. It's a fascinating case, too, for a couple of reasons that deal with judicial engagement generally. Number one, there's a great line in the ninth circuit's opinion, where the court acknowledges that that the judges are not public health experts, and that they certainly have to defer to, to public health experts in terms of appropriate ways for dealing with the pandemic. But nevertheless, in the ninth circuit's words, the Constitution cannot be put away and forgotten in a time of pandemic. So the court acknowledging that simply because there is this public health crisis at the moment doesn't mean that judges can turn a blind eye to the Constitution and the restrictions that it imposes on the government's response to the public health crisis. So that that was encouraging to see from a judicial engagement perspective. Also, it was, in both cases in both the Nevada case and the New York case, the directives or the orders of the governors had issued had either expired or been superseded. And so the government in both cases tried to argue that the cases were moot as a result of of that fact. And in both cases, the courts rejected that argument, in light of the fact that these orders could very well easily be imposed again or similar orders could be imposed again as the pandemic continues to play out. And in light of the fact that if that were the case, litigants would not have the opportunity to secure any kind of judicial review of those orders in a sufficiently timely way so as to protect their rights. And so it was very heartening to see the courts kind of reject these arguments that the government posited to try to avoid getting a resolution of these cases on the merits. So I think these are, these are both great cases in terms of judicial engagement, both because of of their recognition that the government the constitution continues to apply even in times of a public health emergency. And also insofar as they reject the government's attempt to avoid the litigants getting their decision on the merits of their claims.

Diana Simpson 32:48
It's always interesting to me. And I think a lot of people who litigate against the government are perhaps familiar with the pretty standard tactic of the government fighting until they perhaps realize they're not going to be successful, and then changing stride midway and then saying that the case is moot, and that the court shouldn't address it, which just totally deprives people of the ability to defend their rights in court. And I think we've seen a lot of that, you know, there was a case up at SCOTUS last year out of New York, which certainly resulted in a fiery opinion from Justice Alito about whether the case was moot or not, and whether the court should continue to rule on it or not. And there's a case pending right now at SCOTUS about whether nominal damages are sufficient to continue a case. And all of these go back to the simple question of, of mootness. And what that does to a case, and, you know, once you're litigating about an issue, particularly about an issue, that's been, you know, when the government is trying to really exert its control over your life, and especially when it comes to churches and other kinds of like, really deep, deep issues like that, you know, it's it's it's heartening to see courts saying, like, No, you can't get out of it that quickly government you have to, we're going to address the issue, even if you don't want us to,

Anthony Sanders 34:17
And if there's one thing we've learned from the last few months, whether whether you support a specific pandemic order, or you don't, it's that these things come and go quickly. And right and so the the numbers go down, and so things loosen up and then all of a sudden, they spike up again, and they come back. And so it's really hard to argue that something really is moot as government attorneys are

arguing in these many cases. Michael, before we go, I wanted to ask you about a couple fascinating pages of the opinion in Calvary Chapel, where so they start out when they when they start addressing the Roman Catholic Diocese case the New York case they say the Supreme Court's recent decision Arguably represents a seismic shift in Free Exercise law and compels a result in this case. And then they talk about it for a couple couple paragraphs, and at the very end, and then they they actually, quote, a famous first amendment case, Church of Lukumi, which is about how to apply the the earlier Smith case the the the case about how if you have a broadly applicable law that doesn't single out religion, then it gets a different standard than if it does. And so they talk about that. And then the end of the paragraph they say, but see Church of Lukumi and Smith, as in. Well, yeah, that that's the that's actually the law, as it's been for 30 years, but this new seismic shift case came out. And we're not exactly sure what to do with this, but we're gonna apply that one. So do you see a little subtext there about whether Smith even applies in this area anymore? And you know, what, they don't know what to do, because there's other cases pending at SCOTUS or what what do you make of all that?

Michael Bindas 36:02
I don't know what to make of that. I mean there's been no shortage of calls for Smith to be overruled by the Supreme Court. And there are certainly vehicles by which that that could happen in the near future. But at the same time, I don't see this as any kind of seismic shift in in Free Exercise jurisprudence. I see this as a pretty, pretty straight application of Lukumi. And, you know, I don't know how to explain, you know, the ninth circuit's decision. For me really, the significance of this case is its commitment to enforcing the Constitution, even in the face of a pandemic, and its refusal to allow those circumstances to somehow tip the scales in favor of the government. But in terms of just, you know, the fundamentals of Free Exercise analysis, I don't see this as as the seismic sea change that, that the Ninth Circuit claimed it was sure

Anthony Sanders 37:02
And to be fair, they say, arguably represented a seismic shift.

Diana Simpson 37:08
But the upshot is you can't treat casinos better than churches? I think if you're going to put a bullet point on this case, that's got to be it.

Anthony Sanders 37:17
Yes.

Michael Bindas 37:17
We finally established that as a matter of federal constitution. There was no

Diana Simpson 37:21
I'm glad they answered the question.

Anthony Sanders 37:24
Going back to the beginning, where I said there was an interesting panel in this case as well. What I was intimating Michael is Judge Boggs, Judge Danny Boggs from the Sixth Circuit was was sitting by

by designation on this panel so it's nice, of course, when we see the judge the judges move around and see some some different scenery. Well, thank you all for joining us. You may have already celebrated your holiday of choice by the time you listen to this podcast, whether that's festivus or Happy New Year or Christmas or Kwanzaa, or what have you. But we wish you a Happy Holidays. Stay tuned for our next episode. And in the meantime, we ask you to get engaged.