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Anthony Sanders 00:06
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 are recording this on Wednesday, January 13. And I'm sure many of you feel uncomfortable in light of recent and ongoing political news about the health of our constitutional democracy. So this week, we thought it would be good for us to move away from all of that for just a little bit, and discuss some recent cases that concern other uncomfortable subjects. Because what better to forget our problems than by focusing on other problems? Now, this isn't quite as bad as it seems, because each of our cases, although involving those uncomfortable subjects, and about them, is also about other things and bigger issues. The subjects are school desegregation, in the case of an Eighth Circuit case, and sex offenders in a case out of the Seventh Circuit. Each of them ultimately is about something that we at IJ care very much about, and that's the 14th amendment. So Joining me to discuss these uncomfortable matters are two of the most comfortable people I know. We have Justin Pearson, the managing attorney at IJ's Florida office, and Robert Peccola, an attorney in our Virginia office, and a proud dog owner. Welcome to both of you. Oh and Justin also has a dog. So thanks, guys for coming. Now, before we turn to Rob, who's going to talk about the Seventh Circuit case, we have a postscript from a recent show, but also a tie in to this one. Just before the holidays, as some of you might have heard we had on IJ attorney Michael Bindas, who told us about his excellent adventure to the Supreme Court regarding the navigable waters of Lake Chelan in Washington State case that he litigated for over nine years. Well, sadly, that adventure finally ran aground this Monday, when the supreme court denied cert in the case. That case was about the long lost privileges or immunities clause of the 14th amendment. But it's pretty uncanny that just days before the Seventh Circuit actually use that clause to find it find an Indiana law unconstitutional. Thus, when you think the privileges or immunities clause, which I don't think I'll get in trouble for saying is IJ 's white whale, is all washed up. It resurfaces again, somewhere else again in Indiana, of all places. So Rob, tell us what's going on in the Seventh Circuit in this case that was decided by Judge Rovner last week, Brian Hope et al vs. Commissioner of Indiana Department of Correction.

Rob Peccola 03:04
Well, nice to see you, Anthony. And Nice to see you too, Justin, I'm glad that we are all in relative comfort. This case was about a sex offender registry law and how it applied to various people as they went about their lives through decades moving around the country and moving back. The facts are complicated, so much so that you need a sort of matrix to parse them out. So I will do my best to simplify the Gordian knot. Going back to class, I love it when anytime an opinion describes the facts as a Gordian knot, we know that we are not the ones who are falling behind that everyone struggles with what's going on here. So, Indiana, like so many other states in the wake of really heinous crimes against children in the 1990s has a requirement that sex offenders register and go through various steps to comply with reporting and making sure their whereabouts are essentially public information. The Indiana Supreme Court examined what happens when somebody committed a crime before the

registration requirement kicked in and determined that if it predated this registration requirement, it was an ex post facto law essentially, punishing somebody for something that was permissible at the at the time, or at least not in this case, punishable in the same way at the time. Well, some people who had committed their crimes prior to the enactment of this requirement moved then to states that had their own sex offender registries, and then moved back to Indiana where they were required not under Indiana law, but under the essentially equivalent sister state law to register. The District Court decided that this was a violation of the privileges or immunities clause of the 14th Amendment by hampering their right to travel. Now, this is a well traveled so to speak doctrine, when it comes to things that are typically associated with the state giving out goodies, you move to a new state, and there are benefits that those state residents enjoy. Maybe it's public benefits, like welfare, or tax breaks, or other things that are the sort of privileges you have of moving to that more generous state. Well, in this case, it was sort of the converse, and the court pointed out that this was a different fact pattern than we're used to seeing in these privileges or immunities cases where essentially, you are punishing people who are moving to your state, under a requirement that had they lived in that state the whole time, they would not be subject to. So just to try to simplify this, let's think of it this way. There is an Indiana citizen who lives in Indiana, commits this predatory act in Indiana, and stays in Indiana The Indiana Supreme Court had determined that that person couldn't be subject to the registration requirements that happened after the fact, if that same person were to move out of Indiana to a state that had a registration requirement in effect at the time and then moved back to Indiana, they would not be treated the same as their brethren in that state, who had the benefit of the Indiana Supreme Court's ex post facto decision. So this was a rare instance, where we have the privileges or immunities clause being invoked this, frankly, that's the reason I think we're talking about it is that it doesn't come up very often. And unfortunately, you know, pedophiles are the vermin of society. And so anytime they come up in a case, it's easy to sort of become lost, and that horrid underlying fact. But this is a discussion for another day about whether these laws sort of over encompass the kinds of crimes that are not really threatening to children. But in any event, I'd be curious to get Justin's thoughts on whether this might be exportable to the good people in society?

Justin Pearson 08:00
Well, I'd like to think so. And, you know, there are really two things that struck me about this opinion. You know, obviously, the first is you'd be hard pressed to find a least sympathetic set of plaintiffs than you have here. But it's really important to be consistent with our principles. And I think a good test for whether we're being consistent is whether we're applying those principles, even to those people we don't like even to those people that aren't sympathetic. And so as counterintuitive, as it may be, you know, considering how much I detest the plaintiffs here, I'm actually happy when the courts respect their constitutional rights, because it's important to have that consistency here. So that was that was the first thing and we'll see whether it can be exported to other situations, but usually when you know, when there's a consistent application of rights that does lead itself, or protection for rights, I should say, that does lead itself to being able to sometimes be exploited to other situations as it should be. And so hopefully, that may happen. Then the second thing I'd like to point out, and you guys touched on this as well, is anytime we could talk about the PRI clause, that's a good thing, as hopefully our listeners know, that PRI clause was supposed to play a much more important role in the 14th amendment than it has, in large part due to some really mistaken Supreme Court opinions, most notably in the slaughterhouse cases. But, you know, it should have a more prominent role. And even though it's in a case involving,

you know, unsympathetic facts and unsympathetic parties, the fact that the PRI clauses, at least in some form, receiving respect is good to see. And so I'm in this kind of interesting situation where even though the plaintiffs are unsympathetic, and perhaps extremely unsympathetic, I agreed with the result, and I was happy to see that it relied at least in part on the PRI clause.

Rob Peccola 09:54
It was also interesting that in the opinion, the majority pointed out that well, you've got this narrow class of people who committed their crimes decades ago, during this window, where it was before the law had passed. And when they moved to a state requiring that reporting, and then came back and basically just said, well, at least they'll be dead soon enough and this narrow class of people will be, will be gone. And we can just forget about this. So I thought that was a an interesting sort of concession to the realities of life.

Anthony Sanders 10:25
Yeah, and to get the attorneys, you know, who brought this case, credit. And in, as you said, Rob, you're not going to find a lot of sympathetic plaintiffs in a situation like this. But it does seem they picked people who had who is as good as you could hope for, in this case, who had done something bad, quite bad, say 30 years ago, but it seems like at least on the facts in the opinion, they've rehabilitated themselves and lead a fairly harm free life since then, in the, you know, in the background to some of this is this overreach that you discussed that that does often happen with the sex offender laws. And it can be a problem, a big problem, but is not an issue here, and definitely an issue for another podcast. But the one thing, I found interesting was, you know, this is a case where the court could easily have distinguished the relevant precedent and gone the other way, like happened to our friend, Michael Bindas. In the Lake Chelan case that I just mentioned, the you know, the relevant precedent is this case called Saenz v. Roe from 1999, where the Supreme Court kind of out of nowhere revitalized the Privileges or Immunities Clause, but just for the right to travel, which the slaughterhouse cases from 1873 do mention. But the right to travel has been enforced in various other guises over the years, you know, it's an unenumerated rights that everyone agrees is something you have as an American citizen, that you can cross state borders, and go live in in another state. But it's not exactly spelt out anywhe re. And so the, the fact that that Saenz use the privileges or immunities clause to enforce it should have been a bigger deal than it was. It's been used very infrequently since then, to put it mildly. But the court here, faced with a factual situation different than that case, which was about welfare benefits, I think it was a six month waiting period, if you move to California, before you get welfare benefits, applies it to pretty different kind of facts with someone being on a sex offender registry, but definitely, you know, would prevent someone maybe from moving to a state if they know they're going to have to register as a sex offender. So I see why it fits. But the court could have avoided it, and it didn't, and then it applied strict scrutiny, which it should if it's a fundamental right, and then finds it unconstitutional. And you can tell from the dissent, Amy St. Eve, Judge Amy St. Eve, in the dissent, said, “Well, this doesn't really apply to the right to travel” and had a number of other critiques of the opinion, you could tell she wasn't quite ready to go there. But the majority took Sand seriously and was.

Rob Peccola 13:29
And we also got a flavor of rational basis in this to where they pointed out that the scenario I gave earlier, where you have one lifelong resident of Indiana who commits an offense and doesn't move

versus one who moves and comes back, it's not even rational to say that one would be more of a threat to children than others it was it was arbitrary. So seeing that kind of engagement was also I think, encouraging and seeing that in the analysis.

Anthony Sanders 14:02
That's right. Now, a situation where there was also engagement, I think, on both sides, but a real fundamental disagreement about what they were engaging on, is the Eighth Circuit case that Justin is going to tell us about now. It's Junction City School District, the Arkansas Department of Education concerns some old desegregation orders and some not so old new state law and how the two go together. And it's interesting because it's about school desegregation and some uncomfortable facts of the Old South. But also, you know, how these consent decrees that a lot of these old desegregation cases concern how they work in in 2021. So Justin, tell us this story and what's up with how you change consent decrees.

Justin Pearson 14:57
Yeah, thank you, Anthony. So I think this case is a great example. Both of how consent decrees can be used to combat injustice but also how sometimes it can be abused to create injustice depending on what happens. And so what happened here is, you know, hopefully, our listeners all know the story of the Little Rock Nine in Arkansas and the desegregation efforts that happen there. Arkansas was one of the worst places when it came to the whole separate but equal approach and kind of resistance to desegregating the school system. Brown vs. Board of Education. The amazing landmark Supreme Court case was in 1954, the American heroes known as a Little Rock Nine that was that happened in in 1957. And then in the 1960s, there were some consent decrees entered into Arkansas because the school districts were just extremely resistant to desegregation. And so what these consent decrees had to do with was getting rid of that segregated dual track system so that we would have what were called unitary schools. And so basically, the consent decree said you can no longer have a neighborhood where you had a white school and a black school, you know, that had to be combined into one school, one unitary school. And over the years, there were a number of consent decrees, and amendments to the consent decrees. And those are allowed, when basically, the consent decrees aren't being followed, or situations change, where you need to have an amendment to address the new impediments to the consent decree. And so for example, sometimes people who are resistant to change will find new and creative ways to prevent the purpose of the consent decree from coming into fruition that unfortunately, was happening in Arkansas. And so for a number of decades, you'd have these amendments to the consent decrees to take on these issues where the schools were resistant to fully integrating the way that they were required to. And of course, you know, that was wonderful, that was noble. That was constitutional. But now we come to the present day. And what happened a few years ago, was the Arkansas legislature passed a school choice program. And without getting too far into the details, the relevant aspect was it had to do with picking which school to go to, usually when we think of school choice IJ, we think of private school alternatives. And some of that was encompassed here as well. But it also had an interesting provision where it allowed students to pick which public school to go to. And so basically, what it did is it allowed intra-district transfers, where you are not limited by your zip code. And this is this can be hugely important, right? I mean, when you think about it, many middle class and upper middle class and wealthy families exercise a form of practical school choice by choosing to buy a

house in a good school district. And so one of the things that school choice proponents have been pushing for a long time, is to not limit children's choice of school to their zip code. And so this school choice program, did that to some degree. The teachers unions, of course, did not like school choice, they did not like this program. And we could spend a whole episode talking about, you know, the public choice problems with public sector unions, and school boards. But all you really need to know for our purposes is that usually when the teacher union tells a school board to do something, they tend to do it. And so the school board's didn't really like the school choice programs, either. But it was Arkansas State law that they'd have to follow. Unless, of course, they could find a way to shoehorn it into this series of consent decrees that I just talked about. And so what they came up with was this idea that the consent decrees should be amended to say that they didn't have to follow in fact, we're not allowed to follow certain aspects of the new school choice law. And anytime a defendant who is being restricted by a consent decree, goes to the court and says make this order more restrictive on me, like that should be a red flag, that maybe something else is going on here. But that's what they did. Apparently, the attorney for the US Attorney's Office on their side, didn't object to this. And so what actually happened was the Arkansas Department of Education intervened to kind of defend the school choice state law from this attempt to amend the consent decree. And what the school board was trying to do was to get the consent decree to say that they could ban and in fact, we're required to under this new amended consent decree, to expressly discriminate against students based on the color of their skin. Basically, the way it would work was, you would not be allowed to engage in one of these inter-district transfers, if the school you were transferring into had more of your ethnicity than the school you were transferring from. And so this can apply to both black students, white students, you know, all ethnicities, and in fact, I should point out, you know, I was so intrigued by this, I was looking online and there are quite a few news stories, talking about different people of different races who are upset about this law who have been hurt. I mean, they're basically, you know, one situation is you can have a black student and a white student in school who both want to use a school choice program to transfer to a better school that's better for their situation. And because that school they want to transfer into has marginally more, a slightly higher percentage of African American students, the black students can't transfer in, and the white students can like that's a true story that's been covered in the media like, and so there's this injustice being created by this attempt, at least in theory, to follow in the footsteps of those terrific consent decrees earlier on that helps to desegregate the school system. In my view, the district and I should point out, the district court agreed to enter into the consent decree. And they it was affirmed by the three judge panel, the Court of Appeals, although it was a two, one split, and there was a dissent. I should point out that I think the dissent was actually correct. But I could understand, and I'll explain why in a second. But before I do, I should say, I can understand why the district court and the two appellate judge majority made the mistakes that I think they made because, you know, there's going to be this initial imprimatur of having a sympathetic case, right. When someone says, Well, we just want to further these incredibly important and well reasoned earlier consent decrees that help combat the whole separate but equal segregation that was going on in the south, like, obviously, that's gonna make you sympathetic. But the problem is, you know, it's kind of like the converse of what we were just talking about with Rob. And that case, you know, even when you have a sympathetic argument, judges still have to look at the facts, right, the facts still matter. The record still matters. And I think the judge, the district court, and to have the appellate judges allow that sympathetic argument, to lead them to perhaps overlook some important details in the record and with kind of the rules for amending consent decrees. And so I really think they made three mistakes, as does the dissent. And it was Judge Kobes

who wrote the dissent, I think I think he's right. And so the first mistake that that Judge Kobes and I both think they made is they didn't, the record didn't actually support the criteria for amending a consent decree. Right. If you look at the actual facts in the record, the districts actually admitted that there was nothing in the consent decree that this school choice law was preventing them from doing. And, you know, there seem to be some fear among the judges about the possibility of white flight, which is a real problem and a legitimate concern. But the district, excuse me, the school board's actually disclaimed that, and pointed out that this wasn't really leading to white flight. And so for example, in one of the biggest uses of the school choice program, 15 students wanted to transfer out of a school with 2700. And even that was a little misleading because of those 15. Some of them were from private schools, not from the actual public schools.

Anthony Sanders 22:59
And isn't that just because, sorry to interject, Justin. But isn't that just because if you're in a school district, but you're going to a private school, you're counted for funding for that school. But then if you start actually going to a public school in a different district, even though you don't move, you're not counted for funding. That's the sense I got.

Justin Pearson 23:17
Right. And that was the sense I got too. What's important was that they were combining the numbers for both private and public. But even when you combine them included, that included the public school kids, it was 15, out of 2700. So this wasn't some huge exodus or white flight. That's a legitimate concern. But this wasn't really impacting that. And so there was this fear that the judges had that just wasn't backed up by the record. And that record matters. And those facts matter. And it's important for judges to be engaged and do real judging based on the facts in front of them, not hypothetical fears. And so that was the first mistake that the Senate thinks that the majority made and I personally agree. The second was, because this was a state law, in order to amend a consent decree to overrule parts of a state law, the facts giving rise to the amendment had to themselves be a federal constitutional violation, in order to supersede the state law. And there was nothing in the record supporting that there were just these kind of ephemeral statements about kind of the implicit intent of the different consent decrees and the amendments, but nothing concrete tying this in, even if there were white flight, which again, is a problem that wouldn't necessarily cause a constitutional issue. And so the majority just overlooked that component that the dissent pointed that out that that analysis was required and wouldn't go well, for the school districts. The majority just ignored it. And then finally, and I think this was the part that was most striking to me, is the remedy was itself probably unconstitutional, right? I mean, so what you have now is, you have this amazing series of worthwhile consent decrees that helps combat injustice, and that were designed to combat racism and now the most recent consent decree expressly directs the school boards to engage in racism and discrimination based on the color of people's skin. It to put it, you know another way, if the Arkansas legislature had passed a law saying what this consent decree says, and then someone were to challenge its constitutional validity, those challenges would have a very good argument. It's not to say that you can never have a race as a criteria at all. And God knows there have been cases about that at Supreme Court and will be more in the future. But as a dissent points out, you would need a compelling interest and none was even asserted in this case. And so while you know, again, I'm sympathetic to the district judge, I'm sympathetic to the majority. And perhaps that's part of the problem is because when you follow these

footsteps with these amazing cases, they're just kind of this inherent sympathy. I think that the Senate is right that the majority allowed that sympathy to overlook the important facts that should have led it to another decision, another type of decision to rule the other way. And as a result, we now have this consent decree, upheld by the Eighth Circuit, ordering, ordering school districts to discriminate against students based on the color of their skin. And that's a little disturbing to me.

Rob Peccola 26:09
You know, it also is something that we're very cognizant of and is our work as public interest lawyers here at IJ. You know, when we, our preference, of course, is always to get good precedent. But we do sometimes have consent decrees be the mechanism by which we enforce people's constitutional rights. And when the parties go through the lengthy arduous process of memorializing that consent decree, you want it to be as bulletproof as possible. And I think that the point you made about making sure that there is a factual record sufficient to be able to mount that, understandably, high hurdle is so critical.

Anthony Sanders 26:50
Yeah, and it does kind of it does seem like this was a bit of an afterthought about whether the change in the consent decree was constitutional. And especially it was constitutional given the case law since the consent decrees were first entered, and that's most especially the Seattle school district case from 2007 that Judge Kobes talks about, because that is the that's the one that says that you need any compelling governmental interest for this kind of race conscious measures in schools, in school districts. And, you know, there's really, at this point in this way, there's not, it's not asserted, or at least it's not, they don't try to overcome that it's a compelling governmental interest. So I have always been confused, and I'm sure many lawyers are how consent decrees function, especially down the road, I think they're very valuable, too. We just entered into a consent judgment in one of my cases, they're very important for holding the government's feet to the fire in the future, just like a judgement order would be if the judge had just rolled and it hadn't been a settlement. But how they're, how you think about them changing in the future is always confusing. And if others are confused about that, I'd suggest they check the case out and read the dissent. Just because there's a, he lays out what the test is, and how to think about these things. And I think that's important to think about. I think it's also interesting in this case that judge Erickson who wrote the opinion and then judge Kobes and I think we're pronouncing him right Kobes but I have found it KOBE.

Justin Pearson 28:39
I, actually, you know, I was concerned about that too Anthony. So I actually went and looked at his confirmation hearing. And people, including people who knew him personally called him Kobe,

Anthony Sanders 28:48
Kobes, okay, I'm glad to hear that. That's some impressive homework Justin

Justin Pearson 28:51
It is amazing what you can find on YouTube.

Anthony Sanders 28:53

I've heard people who say they know what they're talking about say Kobe. So kudos to you and not to them.

Justin Pearson 29:00
A lot of times the people who think they know what they're talking about are the ones that are most incorrect.

Anthony Sanders 29:06
Well, speaking of which, both Erickson and Kobes were nominated and confirmed by our, as we record this present president. And so it shows you that not all, not all judges have been picked by the same President think alike, which, which is always a good reminder.

Justin Pearson 29:25
And I would just like to say one more thing about consent decrees. Because, you know, I agree with you, Anthony, obviously. And Rob, obviously, there are times where they're extremely important. It does matter, kind of how they arise, right? It's very different when you have to truly adversary parties who eventually reach an agreement where maybe the government agrees to enter a consent decree but only after pushing back and kind of doing it reluctantly. That's very, very different than when you have the so called friendly adversary relationships that happens sometimes and happen here. You know, our legal system, in terms of our court system is based on the idea that you're gonna have two adversaries, you know, arguing both sides, and that by having people arguing both sides, the judge will be able to see both sides of the argument and make an informed decision. When you have two adversaries that aren't really adversaries, it prevents the judge from having that important inf ormation. And so I don't know what the solution is because again, I do recognize that consent decrees are important. But I do think there needs to be an increased awareness of where that particular consent decree comes from. Do you have someone who's actually has the interests that are opposed to the plaintiff agreeing to do this? Or is it someone who actually agrees with the plaintiff from the get go, who was looking for a way to do something that they wouldn't be able to do politically, those are two very different dynamics, and I think attention needs to be paid to them.

Anthony Sanders 30:54
And that's maybe one additional wrinkle to think about is that the majority does say that the standard for appealing from a district judges change to a consent decree is whether it's clearly erroneous. And the district judge, of course, is closest to the facts to sniff out maybe what's actually going on. And perhaps some of the deference to the district judges is what was going on here. But otherwise, although we like adversarial relationships with consent decrees. I'm glad we did not have that kind of adversarial relationship on this show today. I hope all of you are staying safe and non adversarial and peaceful and thinking about the peace and future of our country. And in the meantime, though, although you should do it peacefully. I asked all of you, when you're talking about judicial engagement, to get engaged.