# Short Circuit 165

**Anthony Sanders** 00:04

Hello, and welcome to short circuit your podcast on the Federal Courts of Appeals. I'm your host Anthony Sanders, Director at the Center for Judicial Engagement at the Institute for Justice. We're recording this on March 3, 2021, where we are quickly approaching the anniversary of the last time I flew on a plane or journeyed more than about 50 miles from my house, both of which are records for me. But pandemic or not vaccinated or not, if you haven't already, please feel free to sign up for our newsletter at shortcircuit.org. Please also check out our sister podcast Bound by Oath which just released an excellent episode on the civil rights case. Monroe v. Pape, including interviews of some of the actual plaintiffs in that foundational civil rights case, who are still with us 60 years later. When you're done, please consider giving it or this podcast a five star rating on Apple podcasts. So, we discuss a lot of types of cases on this show, many constitutional but also other important opinions on various legal topics. But today we're returning to some core ideas at the heart of our Constitution. They are enumerated powers, remember those? And the freedoms of Speech and Association. We had two cases in the last few days on these issues, both of which face pretty steep precedent in their way. Here to guide us into and perhaps around that precedent. Our two constitutional guides. They are Michael Bindas is a senior attorney and director of our school choice team. And Alexa Gervasi, an IJ attorney, who we're very happy to have on short circuit for the first time. Welcome to both of you.

**Michael Bindas** 01:55

Thanks for having us Anthony.

**Alexa Gervasi** 01:55

Yes, thank you.

**Anthony Sanders** 01:56

Well, we're going to start with the enumerated powers case, which is actually a federal district court opinion that you listeners may have heard about in the news. It's a challenge to the center for disease control's order forbidding certain evictions based on non-payment of rent. The plaintiff landlords in the case had a challenging set of case law to work with. Michael, how'd they do?

**Michael Bindas** 02:20

They did very well. They convinced the Eastern District of Texas to issue a declaratory order declaring this eviction moratorium unconstitutional. A little bit more about the order itself, it made it a crime for a landlord to evict a tenant if that tenant had provided certain certifications, among other things, that their income fell below a certain threshold, a very generous threshold, I think it was close to $200,000 for a couple filing jointly, that they were unable to pay the full amount of their rent because of substantial loss of income or various other factors, that they had used their best efforts to secure governmental assistance in a number of other certifications. If attendant made these certifications, then under this order, the landlord could not evict the tenant during the pendency of this order. If they did, they were subject to up to a year imprisonment and up to a quarter million dollar fine. Critically, the order only addressed evictions, it didn't do anything with respect to the financial obligations of the tenant. It simply paused evictions for the duration of the order. The parties didn't question whether this order would have been permissible if it had been issued by a state rather than the federal government. The issue was the fact that it was enacted by the or imposed by the federal government. The plaintiffs claim that it did not fall within the federal government's enumerated powers as set forth in the Constitution. The federal government obviously doesn't have a broad expansive police power as the states do. And so this was really a question of whether this order fell within the Commerce Clause power or the Necessary and Proper Clause of the Constitution. At the point of landlords said it didn't, obviously, the government said

it did. And the court began its analysis by kind of surveying the various categories of permissible Commerce Clause regulation. You know, those categories include regulation of the channels of interstate commerce, regulation of the instrumentalities of interstate commerce, and then activities that have a substantial effect on interstate commerce. And the parties agreed that if this order could be justified, it was only in that third category, that that the activity regulated had a substantial impact on interstate commerce. So the court proceeded to discuss the various factors that courts look at in determining whether an intrastate activity substantially impacts interstate commerce. It mentioned the economic character of the interstate activity at issue, whether the regulation contains what's called a "jurisdictional element" that is some kind of hook in in in the regulation itself. that guarantees it will only be triggered when the activity being regulated impacts interstate commerce, whether there were any congressional findings about the impact on interstate commerce. And then finally, just how attenuated the regulated activity is from interstate commerce. And the court went through each of these factors on the first, that is the economic character of the activity being regulated, the court said that, "look, that this isn't a regulation of say, you know, the production or trade of a commodity or a product. It's a regulation of property rights, specifically an owner's possessory rights in in her building." And as the court noted, that's an area traditionally of state concern, not federal concern. And, and, critically, this order, again disclaimed any impact on the financial obligations of the less sore. So again, the court said, you know, made much of this fact that it's solely related to possession of the property, not to any kind of economic activity or to the financial obligations of the tenant. The court acknowledged that, you know, there's a market for rental housing, and that involves economic relationships. But the thing being regulated here was purely intrastate non-economic activity in the in the courts view. On the second factor the whether or not there was a kind of jurisdictional hook in the order or the legislation authorizing it, that would ensure that it was triggered only when there was a an impact on interstate commerce. The court just observed that there was no such jurisdictional hook in the in the in the statute, so that one was easy for the court to dispose of. It then went on to whether or not there were any congressional findings about the impact of evictions on interstate commerce. And in order to determine whether maybe this is part of

kind of a broader congressional scheme to regulate interstate commerce. And here again, the court pointed out that there were no congressional findings to support that notion. It noted that the agency, the CDC itself, had made some findings about the public health benefits of its order. But those findings, the court noted concern public health, not interstate commerce, which is the kind of relevant constitutional touchstone here. So that left the final factor, how attenuated this order was from interstate commerce or how attenuated the activity being regulated is from interstate commerce. And as the court noted, you know, number one, it's not clear that the eviction of one tenant has any bearing on interstate commerce at all. The court acknowledged that, you know, in the aggregate, perhaps there could be some impact on interstate commerce. But the court noted that under Supreme Court jurisprudence, you can't consider kind of the aggregate impacts of isolated activities, if the isolated activities are not themselves economic activities, which in the courts view, these evictions were not. So that was one point the Court made. Another factor and it's kind of attenuation analysis was the fact that that analysis has to preserve traditionally state activities in its proper sphere. And here, the order criminalized the use of state legal proceedings to vindicate property rights, again, an area that is traditionally reserved to the state. And then finally, the court noted that the government had pointed to evidence that 15% of changes in residents each year result in an interstate move. The court acknowledged that fact but it then acknowledged the fact that there are for far more changes of residents every year attributable to marriage or change in relationships. And if it was sufficient to say that you know, 15% of moves each year, effected interstate commerce. And that gave you therefore, a hook to regulate evictions. The federal government would then have the power to regulate marriage and divorce and things that are obviously reserved to the states historically. So, the court wasn't convinced by that point. And then finally, I think this is one of the biggest factors in the opinion. The court noted that the government expressly disclaimed the notion that its power to impose this order was limited to the fact that it was in response to the pandemic, the government actually said it could have imposed this order, out of just basic notions of fairness, even in the absence of a pandemic. And that obviously rubbed the court the wrong way. The court saw that this was basically just an expansive, you know, incredibly expansive

notion of the Commerce Clause power if the federal government could simply impose an eviction moratorium out of basic considerations of fairness, which was apparently the government's position here. So in light of all this, the court concluded that this was not a valid exercise of the federal government's commerce clause power. And as I mentioned at the outset, it issued a declaratory order, saying as much. It didn't enjoin the government from enforcing the order. Interestingly, it assumed that the government would abide by the declaratory order and refrain enforcement. But it left open the possibility that if that's not the case, if the government did try to go ahead and enforce, the plaintiffs could come back and request an injunction at that point. So that's a very long winded encapsulation of the case. But there's a lot of territory to cover here.

**Anthony Sanders** 11:46

Yeah. Well, thank you for all those details Michael, which are important in understanding what's going on here. And there are all kinds of ways that we can move from that to discussing the case more broadly. And of course, we don't have time for all of those. But Alexa, begin that process and tell us your reactions to the case. And if you if you think that the courts going to have some challenges when this is appeal.

**Alexa Gervasi** 12:19

Yeah, I think, you know, if we're talking about this case, as a matter of what is the Constitution, say, I think the district court would be upheld. But if we are talking about the precedent that it's up against, the district court might have had some trouble getting affirmed on appeal. And what this case, really, one thing that was striking to me, as I was reading it, was just how far this attenuation pendulum swings. And how much room there is for someone to do what they want to happen, you know, do I feel as a judge that it is too attenuated from an economic activity? Or is it close enough, and especially when we think about Gonzalez v. Raich, for instance, which, of course, is the case coming out of California,

many years ago, for whether or not people can grow their own personal use of marijuana, grown marijuana for their own personal use and use it themselves for medicinal purposes. And, of course, in that case, the court said, of course, that's very closely attenuated to economic activity, even though you're only growing enough marijuana for yourself for you exclusively to use for your own medical health benefits. You know, and then in this case, we have the exact opposite conclusion of "No, of course, this is an economic activity. We're talking about a possessory interest in your property." So I think, you know, just really highlights when we have these, these tests that use words like "too attenuated are close enough", you know, the amount of wiggle room that it gives the courts to reach a conclusion.

**Anthony Sanders** 14:05

Yeah. And there are many things that were striking about the opinion. But the most striking I thought was that the possessory, the regulation of this possessory interest of what we call eviction is not economic, certainly the payment of the rent is economic or the demand for the rent is economic. But as the court does point out, that's not exactly being regulated here. It's this possessory interest. I have to say that, you know, not having that possessory interest, that mechanism does affect your economic relationship as a landlord. So that was a conclusion of the court that I think is going to be hard to defend on appeal, but more, you know, more Generally, what my take on this case is that there's other arguments that could be made to attack this order, and that are being made and other litigation in other cases in the country. But when I, when I first saw this order come out, I thought, well, there's some problems with this that that people are, you know, some landlords are going to be attacking it with and I thought they might be successful, but the Commerce Clause didn't even pop into my head, that it would be a way to attack it. And yet, this, you know, the Texas public policy foundation or friends over there are the ones who brought this lawsuit on behalf these landlords. And that's the only claim they brought. So that's what the court ruled on, which goes to show at framing the case can have a big impact as to how, you know what, what happens in the how it's ruled upon, I would have thought that that would

mean that they'd they wouldn't be successful where they could have been, but instead, we have this more surprising result.

**Michael Bindas** 16:01

Interestingly, Anthony, on the Commerce Clause issue, specifically, the court noted a couple of times, I think, in the opinion that this was entirely unprecedented in terms of an exercise of federal power that the federal government hadn't attempted to do this during the Spanish influenza hadn't attempted to do this during the Great Depression, kind of at the height of the kind of expansive Commerce Clause. A jurisprudence and I think that factored into the courts analysis as well, obviously, that's not a legal reason to invalidate the order. But I think the court didn't make much of the fact that the federal government had never attempted to impose this kind of moratorium on evictions in the past. It noted that states had done similar things and in the party seem to agree that had a state done this, there would not have been a constitutional concern. But the court, again, repeated several times the fact that this was an entirely unprecedented exercise at the federal level.

**Anthony Sanders** 17:08

Yeah. And that in, you know, in the modern era, that is what you need to win in a in a Commerce Clause case, as we know, from Lopez, the case that kind of started this modern era off about possessing a gun near school or Morrison about sexual assault or the Obamacare case, which we forget sometimes actually did find the law to not be a constitutional exercise of the commerce power, because it was about the inaction, of not buying health insurance. So that that makes it kind of a situation that could result in in the government not having the constitutional exercise of its authority. But as you say there's, you know, there's a lot of other work for it to be done there. What I thought when I first saw this order was that it there, the CDC did not have the statutory authority, because if we look at the actual, the actual language in the statute that gives the CDC this power, it is really hazy. I think I got

it here, it's that the Health and Human Services Secretary has the power to make and enforce regulations, as in his judgment are necessary to prevent the introduction transmission or spread of communicable diseases from one state or possession into any other state or possession. Not allowing evictions is pretty attenuated from that. So I mean, you could easily have a statutory argument, maybe even a non-delegation argument there. But the thing is, that's what the hook is for this order, right is to stop the spread of covid across state lines. But really, why we have this order, everybody knows is because of the recession, that is accompanying the pandemic. And because people are thought to be hurting out there, as they absolutely in many cases are and can't afford their rent. And so we don't want more homelessness, we want to maybe prop up the economy by instead of spending rent now, you spend it later, and now you buy food and shelter, or you buy food and clothing. And I should say, all of which sounds like regulation, interstate commerce.

**Michael Bindas** 19:28

Yeah, it's interesting, you know,

**Anthony Sanders** 19:30

If you had made that argument, you know, if it came through a different rubric, if it was through some other legislation, it would have been a really straightforward Commerce Clause argument. But because you're arguing about public health and spread of disease, it's like, you know, ships not passing in the night and not really understanding each other. I don't know what the right metaphor is. But anyway, it came together in this way.

**Michael Bindas** 19:54

It's fascinating, the attenuation analysis, you know, obviously focusing on the Commerce Clause stuff, but really, you know, the big attenuation problem seems to be the orders relationship to the statute

which purportedly authorized the order, which, as you note addresses, you know, preventing the spread of communicable disease, which this has very little, if anything to do with. So it's a fascinating case. And it's going to be fascinating to watch how this plays out at the Fifth Circuit and potentially beyond.

**Anthony Sanders** 20:25

Well, someone who knows a lot about the Fifth Circuit is Alexa, who, instead of talking about what goes on there, we're now going to move to something much more interesting, which is paying your bar association dues. Now, Alexa, I hear that's something that all lawyers in Oregon have to do, but not everyone is happy about it. Can you tell us why?

**Alexa Gervasi** 20:49

Yeah, that's exactly right. So we're talking about the case of Crowe v. Oregon State Bar coming out of the Ninth Circuit. And that's right, that not everyone there wants to. They don't want to have to be a member of their State Bar Association, and they don't want to have to pay these annual dues. And so it's not unusual for somebody to have to be a member of their state bar to practice law in their state. That's the way most states work. And most states also charge an annual due to do so. And what's important to know is that these state bars when they have this integration with the government, they are state actors for the purposes of being bound by the First Amendment. And why these bars, these state bars exist is to among other things, they're supposed to improve the quality of legal services, they're supposed to advance access to justice, they you know, they have a role in administering bar exams and helping to regulate professional conduct. These generally, you know, helpful things we would generally argue, for regulating the legal profession. And in Oregon, their State Bar Association also publishes a monthly bulletin. Now, the bulletin is also supposed to stay inside this realm of only speaking about issues that relate to the legal profession that are, quote, unquote, “germane to the legal profession.” And that word is going to be really important as we talk about this, this case, “germane”,

button, April of 2018, the Oregon State Bar, their bulletin actually published two articles, one of which was signed by the bars leaders that disavowed white nationalism and racism in the protests in Charlottesville, and even went so far as to disavow Donald Trump in his leadership. And generally, the whole administration. And some of the lawyers in Oregon, who are members of the bar, were not pleased about this, they felt that this state bar was going beyond the scope of what was germane and what their purpose is. And they raised this complaint with the bar. So their first solution was to refund all of the dissenting lawyers $1.15 of their annual bar dues. They said, yeah, big bucks, to say that, you know, that's how much of your money we spent on this publication. So have it back. Not surprisingly, that didn't cut it for the plaintiffs in this case. They don't want to be members, they don't want compulsory membership of this state bar, and they don't want to pay annual dues. They say that that violates their First Amendment rights to freedom of speech and freedom of association. The District Court disagreed, the District Court said, “Well, first of all, you can't sue the Oregon State Bar, because they're the arm of the state. So they have sovereign immunity. And also the bulletins were germane to the practice of law. And even if they weren't, you got a buck 15 back. So I don't know why you're complaining.” No harm, no foul. Right? Well, now we're in the Ninth Circuit, that didn't, plaintiffs still aren't happy. And the Ninth Circuit says, okay, yes, District Court a little bit, also, you're a little bit wrong. And it affirms in part and reverses and remains in part. First of the issue of “Can you can you sue the Oregon State Bar?” The Ninth Circuit said, yes, you can, as I mentioned before, it's a state actor for the purposes of being bound by the Constitution. But being bound by the Constitution alone, and being a state, you know, a government actor in that sense, doesn't necessarily mean you're an arm of the state entitled to 11th Amendment sovereign immunity. And so, the court went through that analysis, and they said, you know, and in this case the State Bar, it's liable for its judgment, it has to pay the judgment, the state's not going to pay that for the State Bar. It can sue and be sued. It can own property. In other words, it's not an instrumentality of the state and it's not entitled to immunity. And then it got into our First Amendment, freedom of speech, freedom of association. And first it says, Supreme Court precedent, it forecloses your freedom of speech claims and you got your refund, you're

done. But it also said that precedent does not foreclose their freedom of association claims. Now, the Ninth Circuit declined to get into whether or not that claim was valid on the merits, but said there's enough there for this to go back down to the district court. And something that's worth mentioning is that plaintiffs' arguments, they're not novel these days, they're hot. It's something in the Fifth Circuit. The Fifth Circuit is currently considering very similar challenges to the Texas bar and to the Louisiana bar. And IJ, and in fact, Anthony Sanders himself, is currently litigating a case in the District of Columbia on related issues, and the reason why

**Anthony Sanders** 26:16

The Pilots' Association.

**Alexa Gervasi** 26:20

Yes, yes, good. I'll plug the name of the case, the Seaway Pilots Association. And the reason why these arguments are so popular right now and why the Ninth Circuit's holding the particularly on the free speech argument is so important is that it has to do with this 2018 Supreme Court decision, Janus v. American Federation, that overturned a fundamental Supreme Court decision regarding union dues. I will take you back to the year of 1977, a simpler time, and there's this case known as Abood, where the Supreme Court held that it does not violate freedom of speech to require public employees to pay union fees, even if they choose not to join the union. But the court said the union cannot use those fees for political or ideological purposes that are not germane. There's that word again, that are not germane to the union's purpose. And then later cases, the court will grapple with what procedures do unions need to follow for ensuring that it does not engage in non-germane speech and when it does, making sure that non-members aren't charged for it. And then if we flash forward to about a decade, members of the California State Bar bring similar claims to the ones we're discussing today. And in that case, Keller, the Supreme Court says "not so fast golden state attorneys. Remember our decision a decade ago in Abood, that same reasoning applies here. As long as your membership dues aren't used for non-germane speech. The state can require that you pay dues if you want to practice law here." So it

seemed that you know, that the Ninth Circuit's right that the question is foreclosed. But as I mentioned in 2018, the Supreme Court decided Janus. In in a rare move, it expressly overturned its prior precedent and Abood, Justice Alito wrote for the court just lambasted Abood, describing it as poorly reasoned against our First Amendment principles, un-originalist, and just downright un-workable. And so after Janus, no more may public employees be required to pay union dues if they choose not to be a member of the Union. And that brings us back to the ninth circuit's decision. The Ninth Circuit looked at Janus and it said sure, Janus overruled Abood and Keller, our State Bar case from 1990. It relied pretty exclusively on Abood's reasoning, but the Supreme Court did not expressly overrule Keller. And when the court overrules a case, it does so with a bang, not with a whisper. And so Keller is still good law, we are still bound by it, attorneys can still be charged membership dues, even if they don't want to be members of the State Bar. But it's not all lost. I guess that the Ninth Circuit also recognized that the Supreme Court has not reached plaintiffs' freedom of association argument with respect to being forced to be a member of a state bar. And it is axiomatic that freedom to associate includes the freedom to not associate, so that argument will live another day. But the Ninth Circuit declined to grapple with the question itself. So now we're forced to wait and see what will the Fifth Circuit do with a similar question, how is it going to interpret Janus in this context of state bars? And are we going to have a circuit split? And also, what is the district court going to do on remand with this freedom of association question.

**Michael Bindas** 30:16

This is, you know, really interesting, I live out in in Washington State, and maybe things are a bit different out here, you know, in Oregon, but I can't even tell you how frustrating it is when state bars do go beyond, you know, just doing the things that they're supposed to be charged with in terms of regulating the bar of the state and such, and, and do kind of move into these kind of more political activities, you know, we have in Washington, a State Bar journal that we get every month, and sometimes I just roll my eyes at, you know, both the positions they're taking, but how they can, you know, take these positions under the guise of practicing kind of looking after the practice of law in the

state of Washington. And so, you know, for some of the listeners who might think this is, you know, just a kind of one off issue about a particular entry in in the Oregon bar journal. This is a really frustrating thing for a lot of lawyers who are compelled to belong to these bar associations, but you know, have significant issues with some of the more political positions that the bar associations take.

**Anthony Sanders** 31:28

And this is a funny situation with the Keller case how, you know, it's really, it's been orphaned, and everyone knows that it's orphaned. And maybe its time is short. But it, it's going to be hard to get a circuit split, of course, because I think most of the circuits are going to agree, I think the Seventh Circuit has already agreed that Keller's still good law. And the Supreme Court sometimes gets rather emphatic that you don't say a case is overruled until we say it's overruled. Even if you know, we're about to overrule it, you got to keep following. Remember, Justice Scalia would get very angry at some of their opinions, when lower courts would presume that the court was going to be overruling the case. So it's going to take one of these cases to be to be plucked up by the court to overrule that understanding of color. But it was an interesting move to reopen this, the association claim, which truly what was not ruled on in Keller, though, you know, we often allied with a freedom of speech claim, a freedom of association claim, and yet they are distinct. There definitely are cases of one and not, not the other. And so we'll see if, when it goes, comes back up. I assume if it if it gets that far, if this if the Ninth Circuit rules on this association claim, or that is ruled on in a different circuit, and maybe that is what makes this issue come to the fore?

**Alexa Gervasi** 32:57

Yeah, that's a great point. And it is the circuit courts are rightfully respectful of the Supreme Court and not overruling the Supreme Court before it gets a chance to overrule itself. But you know, it's just it really is interesting when you have cases like Keller that just rely wholeheartedly on an overturned

case. And, you know, one of the reasons that Janus overruled Abood is that the court just said, you know, this test, the test we put forth in Abood is this, trying to draw distinctions of what is germane speech, what's non germane speech? What can you charge someone for what can you not charge someone for is just, it's too vague. It's too expensive for people who want to object and it's just entirely unworkable. Yet that's the exact test that we're left with in Keller.

**Anthony Sanders** 33:50

That's right. And one, one other point to make on the freedom of association is that I like to remind people whenever it comes up, because this often is forgotten about is freedom of association is not exactly in the First Amendment, there's freedom to peaceably assemble. But that's not exactly the basis for the freedom of association claim. So, you know, when people argue that look, the freedom of speech is an enumerated right, we should really only have judges protecting enumerated rights and not these funny unenumerated rights that we had IJ sometimes like to rely on. Well freedom association is basically an unenumerated. Right, and here it is working hand in hand as it should, with the freedom of speech and the freedom of these attorneys to associate as pleased as we have in the state of Minnesota, where we do not have compulsory dues to our State Bar Association and you can join it if you want but you don't have to, you can start a rival Bar Association if you wanted. And then you just pay your dues for it to be regulated by our lovely board and Supreme Court.

**Michael Bindas** 35:02

Has anyone taken up that rival Bar Association challenge Anthony?

**Anthony Sanders** 35:08

Well, there are many associations of lawyers in in the great state of Minnesota and I have associated with some of them. But speaking of association, it's also a great way to get engaged. And that is what

we're going to remind all of you to do. And in the meantime, I'd like to thank our panelists for coming on today to talk about these weighty, right in the heart of our Constitution, the Constitution issues, then we'll see you next time. And in the meantime, as I said, I want all of you to get engaged.