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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. Okay, you've heard me say this before, but the time to register for our online event on Tuesday, April 20th is running short. So, you should do it this moment. If you're not driving, right now. Yes, right now, look at the app or webpage where you got this episode from, and click the link in the show notes to sign up for our celebration of the 150th anniversary of the adoption of Section 1983. The civil rights law that allows for lawsuits against state officials acting under color of law, it's a big and timely anniversary. And we are the ones hosting the birthday party. Little old IJ, we're where the party's at. It is from noon to two, eastern time that day, April 20, 2021. And by the way, when I say you sign up, I do mean you, the person listening to this podcast, let's not make this like in the never-ending story where the boy is slow to pickup that the story is actually talking to him. And he almost lets the nothing destroy the universe. No, don't be that guy. Don't be that girl. Just look at your phone or computer and click “Register.” Or if you're driving, do it when you're in a safe position as long as the nothing doesn't win first. All right. Speaking of the nothing, we all know that running for political office is hard. so hard that it seems like the only people who run for political office are precisely those who shouldn't do it. Now, it's even harder if you're not a member of a major party. And it was so hard that a man in the state of Michigan or for Ohio State fans, I should say the state up north, went to court to get on the ballot. We're going to hear about this story that the Sixth Circuit recently told from IJ’s election law guru back by popular demand, Paul Sherman. Paul, welcome back to Short Circuit.

Paul Sherman 02:17
Thanks for having me back. I'm not sure how popular the demand was for election law discussions. But I'm happy to participate and help out.

Anthony Sanders 02:25
It's pretty intense, Paul. Let me tell you that.

Paul Sherman 02:31
Emails, real letters,

Anthony Sanders 02:35
Real people even, not just not just Russian bots. All right. And before we get to Paul's case, I also want to welcome Andrew Ward of IJ, who's going to tell us some ins and outs of a tricky case from the Second Circuit a little bit. Welcome, Andrew.

Andrew Ward 02:49
Thank you. I am delighted to be there, to be here, excuse me, and delighted to be learning about election law.

Anthony Sanders 02:56
Okay, Paul, if I'm not a member of a political party, tell me how I run for office in Michigan

Paul Sherman 03:02
Yeah, so well, Michigan made it pretty difficult. And in fact, this case is the latest in a long series of cases from basically every state involving the requirements for getting placed on the ballot. And these cases involve sort of a balance between two different interests. On the one hand, the state has a legitimate interest in making sure that the ballot is not filled with just cranks. You know, if everybody who wanted to be on the ballot could be on the ballot, you have a ballot that was a mile long, and that would be a problem. On the other hand, you don't want a set of rules that is only going to protect incumbents or protect the major parties. And because incumbents of the major parties are the ones who write these laws. That's typically what you end up with. And so there's been a long series of supreme court cases and circuit court cases, trying to figure out where we draw the line. This case out of Michigan is the latest one. So in this case, you had a fellow named Christopher Graveline who wanted to run statewide for attorney general in the state of Michigan. Now to get on the ballot, he had to get 30,000 signatures. And he had to get at least 100 signatures out of half of the states' 14 congressional districts. He tried to do this, he was unable to do it. He spent I think about $1,000 doing this, he only got like 3800 signatures. And, you know, realizing the problem that he wasn't going to be able to get on the ballot he filed a federal lawsuit. Now the first question the court had to answer was, is this still a live controversy because the election was long over by the time it got to the Court of Appeals. And this is very common in election law lawsuits. And for those who are kind of procedure nerds this

deals with an exception to the concept of mootness, called “capable of repetition yet evading review.” And basically, that just means that elections are too short a period of time in which to resolve these kinds of disputes. So even when the election is over, you can still hear the case. Now getting to the merits of the case, the court dug in to see whether or not this is a fair place to draw the line. And one of the things that it did was, it looked at well, have any third party candidates gotten on the ballot before and what is holding them back from doing so. And in fact, third party candidates were not getting on the ballot in Michigan, it was essentially impossible. And part of what made it difficult for them was that they had to qualify for the ballot, well in advance of the major parties’ primaries. And for people like the plaintiff in this case, he wasn't sure if he wanted to run until he knew who he was going to be running against. Now, ultimately, this goes to summary judgment at the district court and the district court agrees This is an unconstitutional limit, it places too much of a burden. And he had to draw some kind of line. He ultimately said that 30,000 was too much. But he entered an injunction saying that as long as potential nominees got 12,000 signatures, they could appear on the ballot. This goes up to the Court of Appeals, and the Court of Appeals agrees. One of the interesting things here is that, you know, how broad is the courts’ equitable discretion in drawing this line? And the Court of Appeals ultimately finds it? Yeah, you know, you've got a lot of discretion. And 12,000 is a perfectly legitimate line to draw. It's related to other lines that are drawn under state election law. And of course, the legislature can always go back and adjust that line. But the $30,000, excuse me, the 30,000 requirement falls, there is a dissent in the case, that essentially says, you know, the plaintiff in this case was just dilatory, he waited too long. He should have started gathering signatures earlier, and there really was no meaningful barrier to him getting onto the ballot. And in fact, the expert witness in the case said that it is possible to get on the ballot with the 30,000 signature requirement. But again, we want to look at reality, right? Like not just is it theoretically possible? Can you imagine it? But does this ever actually happen? And in fact, it doesn't actually happen? So generally, I think the court in this case got it right. I think ballot access laws should generally make it, you know, again, you don't want every crank to get on the ballot if they want to, but people who can show a meaningful amount of support and I think 12,000 signatures is a meaningful amount, they should be allowed to appear on the ballot and compete with the major party candidates. So I think the court got this one right.

Andrew Ward 08:09

I'll tell you one thing that I am not convinced was right about the court's opinion, which is that it described the major political parties as Democrats, Republicans and Libertarians. And as a member of a libertarian law firm, I'm not 100% sure that 1/3 of that description is correct.

Paul Sherman 08:30
Yeah, I think that's true. And, in fact, the libertarians have been behind a lot of these ballot access challenges. And I do want to throw out a plug for a really great website, if you are interested in this sort of stuff. There's a guy named Richard Winger, who's a libertarian, he runs a website called ballot access news, ballot-access.org. And it has for years been the number one best source of information on ballot access litigation, and there's a ton of it. And, you know, it's just a tremendous resource. So this is something you're interested in, ballot-access.org, hyphen in between ballot and access, that is the place you need to go.

Anthony Sanders 09:18
And I should point out that ideologically, the Institute for Justice and Center for Judicial Engagement are definitely libertarian, but we are affiliated with no political party.

Paul Sherman 09:27
Yeah, we're small “L” libertarian, not big “L” libertarian.

Anthony Sanders 09:30
That's right. individual members may be members of whatever party they wish.

Andrew Ward 09:35
You know, one of the interesting things about this case is the difficulty of challenging a law when you can't really say what its effects are. Like it mattered to the court here that that people just weren't getting on the ballot. But the reason it mattered, you know, I'm sort of putting things together here is because the courts think that elections and voting rights matter. And in other cases, you know, you might challenge a law and say like, “Look, x thing has never happened.” And we can take the obvious inference that’s because the law is making it so that it can't happen, but whether courts would do that and other kinds of cases, like the kinds of cases we litigate, where you might say, you know, this law is totally burdensome for no good reason and look at what it's doing, you won't get that same kind of concession to, yeah, that fits, we can put two and two together there, because in other areas of the law that courts consider just less important, where people's rights don't matter as much, you know, who knows whether a law could be having that effect? Maybe no one's just interested in doing the sort of

thing that you're talking about. And it's nice to see sort of common sense things being recognized by courts that they do that some of the time, and it's nice to see here.

Paul Sherman 10:57
Yeah. And, you know, it's another example of how and this is something that lawyers know that I think non lawyers typically don't know is that constitutional cases are by and large decided by the standard of review or the standard of scrutiny that the court applies, how close are they going to look and what evidentiary standard are they going to hold the state to? And that's part of the dispute between the majority and the dissent in this case, is, do these burdens trigger a really close review? Or do they trigger a less searching more intermediate type of review? And, and, ultimately, in many cases, that's outcome determinative, because if you hold the state to a burden of producing real evidence, very often they can't produce the evidence that they need to justify the burdens they put on any particular right.

Anthony Sanders 11:48
There are a lot of things that could be said about this case, really interesting case that that you've presented. Paul. I think one particular nugget that didn't get a lot of play in the case, but was pretty swayed me in a big way is what the major political parties can do to get people on the ballot versus these independent candidates, that the independent candidates not only have to get the 30,000 signatures, but they have to do it pretty darn early in the calendar, as you said before, they know who the major party candidates are. And it I mean, I think they had to get the signatures in sometime in July, whereas the major parties can hold their convention for it, and this is for the office, that was an issue, by like Labor Day, where you only have a couple months to go. And that brings up another issue that is, you know, these days with early voting, and of course, more absentee voting you need to get ballots done earlier. I'm guessing that leaves very little time between when they actually have their convention and then the ballot is ready to get the names on the ballot, which means there's very little time for say legitimate litigation about you know, whether the ballot is set up right, whether the right candidates are on the ballot. This is something I've whined about before when Diana Simpson and I had our election law special last fall about how the need to get the ballot right versus the need for early voting. Sometimes, you have to balance the two. And in the middle, I think gets lost this issue of ballot access. One other thought I had, Paul is that you said there's a legitimate reason to not let every Tom, Dick, and Harry on the ballot. And I think that is true. But I think it is way less of a concern than just about every state puts out there. And definitely way less than what the court said in this case, even though that this man eventually won. I just remembered that the California recall ballot in 2003, where Arnold Schwarzenegger,

Paul Sherman 14:05
I remember this one, Gary Coleman was on the ballot.

Anthony Sanders 14:08
Yeah, well, there were a lot of people on the ballot. Yeah, including celebrities. And I just looked it up. I couldn't remember, I knew it was a lot. It looks like it was 135 people were on the ballot. So for those of you too young to remember, you had to get like a massive a number of signatures to recall the governor of California and that's being talked about again now. But this was the only time it's happened in 2003. And you voted first on whether the recall the governor and that passed, and then assuming, even if you voted no, you then as a backup, you'd vote for who you want to be the winner of the recall. And there were 135 names, but everyone know who like the top two or three, like real serious candidates were and I think Schwarzenegger got over 50%, if not just at 50%, so it's not like masses of people who wanted to vote for him couldn't find him amongst the 135. They actually were able to find his name. Now, if that's true for 135 people, it's got to be true where a state where you have, it's pretty easy to get on ballot like, like where I live in Minnesota. I think, I don't know what the current law is. But I know it used to be something like 2000 signatures statewide to get on a statewide ballot. And so the ballots are a little longer here, you might have like eight or 10 people running for president, you know, this socialists Party and the marijuana party, we have two marijuana parties actually in Minnesota, you could still find your candidate that you want to vote for. So a law like this in Michigan, where you end up only having two or three people on the ballot is just, I mean, it is so far overboard, that there is really no legitimate, let alone strict scrutiny. There is no legitimate governmental interest not to let these people on the ballot, but I'm gonna get off my soapbox from my signature collection days now.

Paul Sherman 16:02
I didn’t know you were a signature collector.

Anthony Sanders 16:03
I, a very long time ago, I did collect signatures, it is not the funnest thing in the world to knock on someone's door and say, Please sign this petition.

Paul Sherman 16:12
It is a tough job. I've worked with signature collectors before it is not easy. And there's actually there's also been a ton of litigation about who can be a signature gather, because one of the things that states

do is they, these have been held unconstitutional, but they would pass laws saying that you could not have paid signature gathers, you had to rely entirely on volunteers. Now, if you're a large party with a big established support base, that's not such a big deal. But if you're a small third party, you know, or if you're trying to promote maybe an unpopular ballot initiative, without paid signature gathers, you just have zero hope of getting on the ballot.

Andrew Ward 16:52
I don't believe that the parties that are already elected, Paul, would make it harder for the small parties that might you know, get them out of office to get on the ballot. That's too weird of a coincidence. Yeah, I'm a proud signature giver, honestly, you know, like not to nutjobs. But if you come to me and say like, “Hey, can I get your signature to get on the ballot?” And you're someone I would never vote for? Like? Absolutely. You know, we live in a democracy, let that let the people choose.

Anthony Sanders 17:21
Amen. Exactly. Well, something that is not about letting the people choose is this thing that lawyers know about, and I think almost literally no one else does. And that's called the Erie Doctrine. Now, the Erie Doctrine has nothing to do with Halloween. It has nothing to do with the lake or even the canal. It has to do with state law and this weird, mysterious substance called federal common law that Andrew is going to tell us all about. Take it away.

Andrew Ward 17:56
All right, so I am talking about a case called New York v. Chevron, ConocoPhillips, Exxon, Shell, and BP. As you can imagine, there's a lot at stake in this case, because it's about global warming. And everyone is in it. It's the City of New York suing these fossil fuel companies. They have like every billion-dollar firm from New York City Gibson Dunn, Wachtell, O'Melveny and Myers, Kellogg Hansen, Arnold and Porter. The DOJ is appearing in the case, the National Resources Defense Council is in the case. Friend of IJ, Richard Epstein is in the case. Acquaintance of IJ, Thomas Fisher, the SGA of Indiana on behalf of several states is in the case, Harold Koh, the former dean of Yale Law is in the case. And it's really about who decides the doctrinal reason for it, as Anthony was saying is the Erie Doctrine. But it's really, it's a tour de force of federal, the class fed courts from law school. It's like a tour de force of a bunch of different aspects of how our federalist system works. But it's ultimately about who decides, you know, is the mayor of New York, the mayor of one city, albeit a big one, in one state in one country, or is he like the god emperor of mankind? And we will see, because trillions of dollars and the future of humanity, are all involved in this case. So, what's going on? So, basically, New York

City sued these companies about global warming, and it wants to sue them under state, like New York State, common law of nuisance and trespass. So, these are very long-standing doctrines that to anybody that's not familiar, they mean what they sound like. Nuisance is when someone is sort of unreasonably interfering with your enjoyment of your property. So, like if you live next to a factory, it pops up next door and starts producing a bunch of soot, and it makes your land gross and you know, your walls are all dirty, that could be a nuisance. It could also similarly be a trespass. The, you know, the traditional trespass is somebody like walks into your house or something. But it could also be with matter, right, like particulates. So, the soot from your factory getting, from the factory next door, getting onto your land might be a form of trespass. And the idea here is that these companies burn fossil fuels, they burn them. They sell fossil fuels that get burned, the burning releases carbon dioxide and other greenhouse gases into the atmosphere that causes global warming, which means your own property, your rights in it are getting interfered with the temperature goes up, you know, sea levels in New York, as a coastal city, sea levels rise, it's also a form of trespass, because you know, carbons, carbon dioxide is coming into your air. And so, New York sued these companies are saying that you owe us and you need to pay for sort of mitigation we will have to take. Like sort of sea level rise proofing of our infrastructure, you know, building levees and dikes and, and things like that. And so, they sue under New York State law. But what the Second Circuit ends up saying and in an opinion by a relatively new to the Second Circuit Judge, Richard Sullivan, although he had been on the Southern District of New York for quite a while before that, is that, you know, this isn't something that we can deal with under state law, it's actually an issue of federal common law. And that brings up the Erie doctrine. In the first year of law school, everybody learns that there is no federal common law. From the 1840s in a case called Swift v. Tyson for about a century, there was federal common law, but then, in a case called Erie, Erie Railroad v. Tompkins in 1938. The Supreme Court said no, there basically, is no federal common law. You know, it's a law of statutes. If federal courts are deciding state law issues, as they sometimes might, between parties from different states, they have to apply state law for substantive rules. And that's the basic gist of the Erie doctrine. But it's not true in two ways. Number one, it's just not true at all, like this is such an angels on the head of a pin question, because huge amounts of case law act in a common law way, you know, they might be nominally based on a statute, like saying that things in restraint of trade in the antitrust context are illegal, but then the entire body of law. That's super vague, it's just courts, elaborating on what that means in a normal common law sense. Or you might have something that is not even tethered to a statute like terrible doctrine, qualified immunity, that's entirely judge made and operates in an entirely common law fashion. The idea that it's developed by courts, rather than legislatures is sort of the basic idea of common all the slow, incremental decisions. So the whole thing's a little bit goofy, the Erie doctrine, but there's also explicit exceptions. There actually are a

handful of areas that are reserved to the federal government, sort of things like Admiralty and other sort of uniquely national concerns. And so the question at first is, is this area of global warming uniquely national and if it's uniquely national, the Federal common law under the Supremacy Clause of the Constitution is going to trump and displace the sort of state common law actions that New York is trying to break. And the answer, right, obviously is yes, global warming is by definition, global. It's not, you know, New Jersey and Connecticut and Pennsylvania that are causing global warming in New York. I mean, to some extent it is, but it's also China and Mongolia and like the research stations on an article global warming comes from everywhere. You know, if you, when John Adams was dying and said Jefferson still survives, the atoms he exhaled in that breath are atoms that you are breathing right now because..

Anthony Sanders 24:41
Except he was wrong

Andrew Ward 24:50
Oh, yeah, yeah, Jefferson had pre deceased him by a few hours when they both died on July 4, 1826. Exactly 50 years later. It's just fascinating constitutional trivia that might be more interesting than the Erie doctrine.

Anthony Sanders 25:00
And that was causing globing warming?

Paul Sherman 25:01
More interesting than the Erie doctrine?

Andrew Ward 25:03
And they were causing global warming, I mean, probably, they breathe out carbon dioxide, and, you know, basically everything that he makes to cause global warming. So, you know, it is of course, a uniquely national concern. And so the court holds that this is can't be something you can do under federal law, it has to be, excuse me, can't do under state law, it has to be under federal law. But then actually switcheroo, there isn't federal common law that governs domestic regulation of emissions because it's been displaced by statute. Congress when it passed the Clean Air Act, passed a law that governs this, so you no longer need to have federal common law. So basically, the court says, These

state claims get yanked into the federal realm, and then general ideas in the federal realm get displaced by a specific statute, and under that statute, New York just doesn't have the authority to do this. New York, of course, could regulate emissions in its own state, if there's, you know, a coal plant in New York, it can say, you know, you have to have these sorts of emissions caps, that's the general idea, you might be able to sue a producer in another state for not following its own state laws. But there's no sort of nationwide ability for one state to regulate emissions. And then, as to the, the rest of the claims, which are international, in scope, because New York is, is also saying, you know, Shell, you're responsible for gasoline that got sold in France and burned in Germany, because that because that still affects us. The Clean Air Act doesn't cover those, but general federal common law still does. And the basic idea there is, and there is a presumption against doing this sort of thing about giving one state the authority to go and police the rest of the world that's sort of uniquely reserved to the federal government, because it's the federal government that's responsible for these things. Some of the cases that the court cites for this are sort of interesting things about, like, the law of pirates, and who's an enemy of all humanity. That's, that's pretty in the weeds. But the basic gist of the cases the court cites is that, you know, laws, American laws stay in America, without real good reason otherwise, and so here, New York just doesn't have the power under federal common law to go around policing the rest of the world. They never mentioned the Dormant Foreign Commerce Clause. But if you want a really nerdy spin on the case, it's arguably about that, that the federal government's ability to regulate commerce, with other nations is, is limited to the federal government. You know, basically, the takeaway of this case is that this stuff really matters, you know, in theory, according to what New York was saying, you know, we're only talking about billions of dollars here, right? It's just hardening the infrastructure in New York and effects specifically on New York. But you know, if this is the law in New York, then the rest of the states in the Second Circuit could do this, Vermont could do this, and Connecticut could do this. And then, you know, if this law, if these principles were good, other circuits could adopt them, and the rest of the states could do it. And pretty soon you're talking about ultimately having fossil fuel producers pay the costs of global warming, and maybe they should, maybe they shouldn't, but that's not a decision for the mayor of New York, right? The market cap of a company like shell was like $200 or $300 billion. The amount of damage that global warming costs, in today's dollars decades from now is going to be trillions of dollars. It's the cases about whether the mayor of New York or the governor of New York, or any one particular state can decide entirely what to do about fossil fuels and global warming.

Anthony Sanders 29:24

The court does note that they asked for an injunction, but it's kind of like buried in a footnote. And it thinks that this kind of undercuts that you're asking about damages, that you're also asking for an injunction which I guess could solve the entire world's problems, but it would be quite an injunction.

Andrew Ward 29:40
Yeah, it's a good question about whether, you know, New York courts could or New York law could control what a Dutch company does in Japan that has an intermediate effect in Russia before it affects the city of New York and you know, should these companies go out of business by paying for global warming, maybe, then we also want to fossil fuels. Who knows? But I know the one thing is that the state of New York individually does not know. This is really a matter of federal concern. It is why we have a two tier federalism where the federal government is supreme. And the court gets the correct and I think, pretty obvious answer on this. These are federal issues that need to be dealt with federally.

Paul Sherman 30:28
Yeah, I mean, I think I remember when this lawsuit was filed, and the immediate impression that I think anyone who is familiar with federal courts had when this case was filed was, you know, “Oh, come on,” you know, there's no way the federal courts are actually going to entertain the ability of the single state to upend the fuel production for the entire world. So yeah, certainly not a surprising outcome. And I think even apart from the important federal courts doctrines that are discussed, it can be understood just through the realm of, you know, federal courts don't want to cause chaos. And if you are going into court asking them to up and the entire energy infrastructure for the world, that's going to cause chaos there. And they're not going to do that.

Anthony Sanders 31:20
I like the description of what federal common law was, at the beginning of its section, I would encourage folks to go read Andrew’s case, at least the beginning of the legal analysis, it says “it functions much like duct tape, as in, if there's something in federal law, that just kind of doesn't make sense. And there's a black hole, you put that in the federal common law, but as soon as Congress does anything, or I assume even the executive does anything, then that gets subsumed in and that they don't have to worry about that that federal common law anymore.”

Andrew Ward 31:56
Yeah, it was, you know, at everyone. This was a unanimous opinion. Unlike Paul's case, there was not a dissent. This case is not going to be reheard by the full Second Circuit. This case is not going to be

reheard by the Supreme Court. There was no way, as you know, it, there was no way the courts are going to give New York the power to undo the Industrial Revolution. Never gonna happen.

Paul Sherman 32:27
You know, it raises, it raises some interesting sort of legal ethics questions actually about filing these kinds of lawsuits. And they're questions that as public interest law firm we're sensitive to because, you know, we file many cases that are long shots where we are pushing the boundaries of the law, we're trying to get courts to adopt new interpretations of the law. But there's a limit to that, you know, and I think there's a point at which cutting edge public interest law sort of becomes more like performance art. And I think that's sort of what we were seeing here. I don't think I don't think the lawyers who filed this case could have legitimately believed that they had any realistic chance of winning.

Andrew Ward 33:10
I wasn't going to say, but I'm glad somebody else did.

Anthony Sanders 33:13
Well finally and maybe this was performative, maybe not, but the last part of the court's analysis about federal common law, that's International, because it recognizes, well, any federal common law that's international is not displaced by the Clean Air Act, which only applies domestically. But I really didn't know international federal common law was a thing. I know, there's the law of nations, which the constitution recognizes, and that goes into stuff like piracy, like you were talking about, but like, is there an international federal common law or the court just kind of like, well, whatever that is, we defer to, you know, the international relations of the political branches. But it, could you have a claim in theory that would be based in whatever that is?

Andrew Ward 33:59
I don't think so. It's a complicated question like, surely analytically, in a total vacuum, which would have no air so there's no global warming, right. If there is no federal common law, internationally under normal principles against presumptions against extraterritoriality. It actually should mean that you could bring a state law claim because there's no federal common law there to displace you. But I think that you know, that the gist here is that you can't, you just can't do this. States can't do this. Maybe. I'm struggling for words, because it's just such a simple idea. But like, whatever body of law that we're in, it doesn't allow this.

Anthony Sanders 34:53

Yeah. And I think this there's a little subtext like you said of the international dormant commerce clause, which does exist, and I've actually litigated, it's kind of fun. But it wasn't actually part of this case,

Andrew Ward 35:11

Nor the dormant foreign affairs power. I don't know if that even exists, but right. It's up to the President and the Senate to do treaties that govern these sorts of things. It is not New York.

Anthony Sanders 35:24

Nor the Southern District of New York, I guess. Well, one thing that the Southern District of New York does sometimes, but other times does not and many other courts do is to engage in judicial engagement. But I know our listeners are big fans of that. And so I want to thank our panelists for coming today. Next week, we have a special short circuit that's going to have an originalist flavor and historical flavor. So I encourage all you to listen in on that. Remember to sign up for the event on April 20th. And in the meantime, I ask all of you to get engaged.