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Anya Bidwell 00:07
Welcome to this special edition of the Short Circuit podcast. I'm your host, Ayana Bidwell and with me today are four outstanding guests. As President and General counsel, Scott Bullock. Hi, Scott.

Scott Bullock 00:19
Hello.

Anya Bidwell 00:21
And three IJ senior attorneys Dick Komer. Hi, Dick.

Dick Komer 00:25
Hi, Anya.

Anya Bidwell 00:26
Wesley Hottot. Hey!

Wesley Hottot 00:28
Hi.

Anya Bidwell 00:29
And Bill Maurer. Hi, Bill.

Bill Maurer 00:31
Hi.

Anya Bidwell 00:33
What do they all have in common? All four of them argued before the United States Supreme Court. Today on the podcast they will tell us about their orator experiences and share some wisdom with those of you listening who one day will be making your own arguments before the court. I'm anxious to dive

in. But first, let me briefly talk about IJ's US Supreme Court practice. We have had nine cases before the court, including the most recent one, Brownback vs King, a police accountability case, which will be argued next year. So far, we won all but one of the cases Kelo v. City of New London and Scott, I'll put you on the spot for that one. These victories have often been secured with broad coalitions of justices. Wesley here brought a unanimous victory in our civil forfeiture Eighth Amendment incorporation case, Timbs vs. Indiana and Michael Bindas's economic liberty case, Tennessee Wine and Spirits Retailers Association v. Thomas garnered support of seven justices. Michael is not here today, so I'll do all the bragging for him. We also prevailed in a campaign finance case, Arizona Free Enterprise Clubs Freedom Club PAC v. Bennett. Bill is here to talk about that one. And we are still waiting on the Supreme Court to issue its opinion in Espinoza v. Montana Department of Revenue, our educational choice, Blaine amendment's case that Dick argued just several months ago. But let's start with Kelo. Scott, can you briefly tell us about the case.

Scott Bullock 02:12

Kelo was a case that arose in New London, Connecticut, and the City of New London and a private nonprofit called the New London Development Corporation wanted to take 15 parcels of land in an old working class neighborhood called Fort Trumbull. And there were a group of property owners there led by Suzette Kelo who did not want to sell, and the takings were not for a traditional public use that eminent domain is authorized for like a road or a public building or a reservoir or something like that. It was not even for the remediation of blight, which the Supreme Court had signed off on in the 1950's. And it first expanded the public use provision, New London's argument was simply that we're an economically struggling city, we need more tax revenue, we need more jobs, and that this new development promises to create more tax revenue and create more jobs. And even though that's not really within the definition of a public use, they relied upon the fact that the court had expanded the meaning of public use to include such things as public purposes and even public benefits. And the public would benefit from these takings, supposedly, in the form of more tax revenue and greater job creation. And so that was the heart of the issue. In the Kelo case, we had argued this case in the Connecticut trial court where we got a mixed decision, partial victory, partial loss, lost at the Connecticut Supreme Court by in a four to three decision and then petition to the US Supreme Court where in June of 2005, and a very divided Supreme Court opinion, the court by five to four majority upheld those takings and said that eminent domain can in fact be used for greater economic development.

Anya Bidwell 04:13

Okay, now, let's talk about Timbs briefly, Wesley.

Wesley Hottot 04:18
Well, Timbs vs. Indiana arose in May of 2013, when a young man named Tyson Timbs was induced by a confidential informant to sell drugs to police officers. Tyson had a heroin addiction that he developed after being prescribed some opioids for workplace injury and having never been a drug dealer before, he was prompted by this confidential informant to sell drugs to police officers and he drove his brand new Land Rover to that transaction. Police arrested him and seized his Land Rover. Now Tyson was convicted of the crime of dealing and had no objection to that, in fact, he pleaded guilty to that crime. But he did object to the state's effort through a private law firm to attempt to forfeit his brand new Land Rover, arguing that forfeiture of that vehicle was excessive. He only incidentally used it to drive to the transaction, and the trial court agreed. The trial court in Grant County Indiana held that the Eighth Amendment's excessive fines clause prohibited forfeiture of that vehicle. Now, the case went up to the Intermediate Court of Appeals in Indiana and they agreed as well, with only one dissent. The Indiana Supreme Court then decided that because the United States Supreme Court had not yet clearly held that the Excessive Fines Clause applies to the States through the 14th Amendment, that it did not apply at all in Indiana. Now, this meant that not only was Tyson's forfeiture appropriate, because the Excessive Fines Clause didn't apply to state or local authorities. But indeed, there were no protections against excessive economic sanctions for anyone in that state. To our surprise, two other states had agreed with that proposition. And so had the Michigan Court of Appeals. So, we petitioned for cert, got cert in June of 2018, argued the case in November of 2018. And the court held unanimously that, indeed, the Excessive Fines Clause of the Eighth Amendment applies to the States, just like nearly all of the Bill of Rights.

Anya Bidwell 06:42
Alright, and let's talk about Bennett now, quickly, Bill?

Bill Maurer 06:47
Sure. Bennett concerned an initiative that was passed by the voters of the state of Arizona, called The Clean Elections initiative. And the idea essentially was that in order to get the so-called corrupting influence of money out of politics, they would essentially give people running for office a certain amount of money if they agreed to abide by spending limits and not collect or raise money themselves. This wasn't a mandatory system. So, people opted in and decided to become publicly financed candidates, or they ran a traditional campaign. For traditional candidates, though, in order to keep them from

speaking more than what the government wanted. Every time a traditional candidate spoke above or spent money above the amount of money that was provided to publicly financed candidates, the government would cut a check to the publicly financed candidate. So, for a privately financed candidate, the more they spoke, the more their opponents benefited. And it wasn't just one on one, it wasn't just I'm running against a publicly financed candidate, I spend more money than the government wants, they cut him or her a check. If you had multiple candidates who were all publicly financed in the case, every time you spoke above that certain amount, all of the publicly financed candidates would get a check from the government in that amount. So basically, one instance of a person or a privately financed candidate spending more than the government wanted, could resolve up to three, four or five times the amount of money being distributed to their opponents. And we represented both privately financed candidates and independent expenditure groups, who basically said, Look, this is a tremendous disincentive for us to speak as much as we like. And every time we speak our opponents benefit, and that is interfering with our ability to freely express ourselves. We won at the trial court and then moved up to the Ninth Circuit where we lost which created a split with the 11th and a number of other circuits. So, we petitioned for certiorari with the US Supreme Court, and were granted it and the argument was the first campaign finance law case after Citizens United which was a, you know, so it was a very closely watched very contentious case. But we were able to prevail in the end five to four.

Anya Bidwell 09:52
Excellent so now last but not least, Dick Komer. Take it away.

Dick Komer 09:57
So, our case, Espinoza vs. Montana Department of Revenue is still awaiting decision. We argued it on January 22nd. And I expect it won't come out until probably the end of June at the end of this current term. It clearly for moral argument looks like it'll be a very close decision. So around 2000, the Montana legislature started trying to pass a tax credit generated scholarship program for private schools. And in 2015, they finally passed it. We had been helping them all this time in trying to create such a program. But as usual, they created a bit of a monster of a program, very small, but with all sorts of regulatory issues which required the Department of Revenue to write regs and in writing their regulations. The Department of Revenue applying the state's Blaine Amendment, which was originally an anti-Catholic enactment, decided that the state constitution required that they exclude parents who select religious schools, religious private schools, from the program, we challenged that immediately in the trial court, we won first a preliminary injunction and then a final injunction. The other side, that Department of Revenue appealed to the Montana Supreme Court. And in April 2018, right before I retired, we are

huge out in Missoula, Montana. The argument went very well. And then in December 2018, after I retired, we lost in a five to two decision. That decision was, we requested cert from the US Supreme Court, then, you know, somewhat to our surprise, the Supreme Court granted it. So, I came out of retirement and started preparing for that oral argument. And we are awaiting the outcome of that argument now. The issue is, does it violate the US Constitution Free Exercise Clause, Establishment of Religion Clause and Equal Protection Clause to exclude the religious schools from the program in Montana, as in every other state, the majority of the private schools are, in fact, religiously affiliated of some sort. And if you exclude the religious schools from the program, you severely truncate the value of a school choice program like that of Montana.

Anya Bidwell 13:03
So did you mentioned that cert was granted to your surprise, right? And that's not surprising at all since getting your cert granted, it's almost like winning a lottery right? It happens so very rarely. So. question to all of you. How did you feel when you learn that your cert was granted? What was going through your mind?

Dick Komer 13:22
Oh, I was delighted. Yeah, I was delighted. It was finally a chance to attack Blaine amendments at the U.S. Supreme Court. I mean, Blaine amendments have been in the background of a lot of school choice cases. 37 states have them in their constitutions. And about a third of those states, about 17 have interpreted their Blaine amendments very broadly. Although the Montana Supreme Court is the first Supreme Court to apply their Blaine amendment to a tax credit funded scholarship program. We won that issue already at the Supreme Court, in a case called Winn v. Arizona Christian School Tuition Organization.

Anya Bidwell 14:12
So I guess you were all right. Coming out of retirement for this. You weren't too inconvenienced.

Dick Komer 14:18
Oh, I was inconvenience terribly, but I wanted to do it in the worst way.

Anya Bidwell 14:23
All right, Scott, how about you? How did you feel when you learned that you're going up?

Scott Bullock 14:27

Well, it was phenomenal, of course. And it was one where the court called in, I think they still do this, as they call the counsel of record in the case and let them know. It was but you know, a few minutes before it had gone public and at that time, it wasn't quite as instantaneous as it is now when you kind of get this as soon as the orders list is put up online and then everybody can see it. So, I got the word and I walked over to Dana Berliner. She and I had been litigating. not just the Kelo case together, but a whole range of these eminent domain abuse cases from Mississippi to my hometown of Pittsburgh to Westchester County to Ohio, all over the country. And we were hoping that one of these would pop and eventually get up to the Supreme Court. And that's exactly what had happened. So, I walked into her office just completely unexpectedly, we didn't know the court was going to hand it down and, gave her a hug. And she looked at me like I kind of lost my mind. And, and then I whispered to her, the court granted cert in Kelo, and then was able to pull back and see what her reaction was. And I don't think I've ever seen a wider pair of eyes in my entire life.

Anya Bidwell 15:44

So Wesley, the day after you learned you basically had to start preparing. What was your plan? How did you go about it?

Wesley Hottot 15:54

Intensely. You know, it was a tremendous opportunity, for me, to be the spokesperson for big team of people that were working on the case. And the excitement on that team was a tremendous motivator for me to work very hard, and ensure that what felt like an easy win, came off, indeed, as an easy win. We workshopped every possible answer, every contingency as though this were a case as closely fought as Kelo or Espinoza, or, or Bill's case. And, you know, I think that ultimately it paid off. When you argue at the Supreme Court, you're playing on a national stage in a way that you're not in any other court. And it was very important to us. As an institution, it was very important to me personally, it was very important to Tyson that everything come off without a hitch.

Anya Bidwell 17:05

Bill, your case was kind of difficult to explain. Right. So how did you think about the day after the cert was granted? What did you think about in terms of framing the case and kind of talking to the justices about it as well as talking to the members of the public?

Bill Maurer 17:23

Well, our case was in kind of an unusual position. And actually, kind of goes back to your earlier question about how did you feel when we find out about cert being granted because ours was a consolidated case. So, there was another set of lawyers from the Goldwater Institute in the case. And so we, the U.S. Supreme Court frowns upon divided argument. And they went, and so we, we attempted to get divided arguments, so that both an aggregate from Goldwater and I could argue the case, but the court denied it. And so, it came down to a coin flip that we won, and we ended up arguing the entire case.

Anya Bidwell 18:18

Next time I go to Vegas, remind me to invite you.

Bill Maurer 18:21

Well, it was well, it wasn't until that coin flip that it really became real to me that, you know, I was going to be up there, I was going to be doing the argument that, you know, the, my grandkids would be able to open up the U.S. reports and see my name in it. And so that, that kind of happened much later in the process than with everybody else. And so, it was kind of, in some ways, it was good, because I didn't really have too much time to get nervous about anything. And I got, once that happened, we, it was just a boot camp really, constant preparation. We, I remember, like, we instructed people who briefly saw me in the hallways to ask me questions, you know, basically asked me an oral argument question. And so I just got, you begin to train yourself as to how to distill a rather complicated constitutional question into not only, I don't want to say sound bites, because that doesn't convey the seriousness of what you're trying to do, but manageable amounts of information that answers the justices questions in a way that also recognizes that you're not going to get a whole lot of time to talk and a whole lot of time to argue or say anything before you're going to get cut off. So, it really was a training of how do I get this information to them in an understandable manner and as quickly as humanly possible. And that takes a lot of training. It's extremely difficult. It takes a lot of hard work to make it seem like it's not a whole lot of work.

Anya Bidwell 20:12

Right? Because the oral argument actually sounds extremely conversational. When you're talking back and forth with the justices.

Bill Maurer 20:18
It was, and I think those are the most kind, the most effective kinds of oral arguments where you're actually having a conversation with the justices. They're trying to…. There's a whole bunch of different things going on in the during the argument, the justices are talking to each other with their questions. They're trying to get you to, either they're pitching you softballs that you can address something that they want another justice to think about, or they're trying to get you to concede something. And so, it's, there's a great deal of things going on when you're having this conversation, that you have to be mindful of the entire time. And I really enjoyed it. I loved it. It was one of the most fun I've ever had. So, it was, I can't wait to do it again.

Anya Bidwell 21:09
Scott?

Scott Bullock 21:11
Well, as you see, all the people who are talking here today, the focus is oftentimes on the people arguing but when IJ gets a case before the court, it really is an all hands on deck affair. And really everybody at the Institute contributes to the success of the argument. And everybody pitches in. And that includes, of course, not only the lawyers who are doing everything from rounding up amicus briefs, looking at research questions that have come up on potentially obscure parts of the law. Of course our communications team is so active in getting this issue in the national spotlight. And then we have people here that doing everything from making sure that people's relatives are in town for the argument to camping out overnight to make sure that we get the people we need into the courthouse for the arguments. So, it's really special to see how everybody rallies to make sure that we do everything we can to achieve victory.

Anya Bidwell 22:16
And it sounds like a quite an intense training essentially, when you are doing moots. Right, and trying to run through every different possibility. Every different question that a justice might ask. So, Dick, how different was it training for the Montana Supreme Court argument vs. the U.S. Supreme Court argument?

Dick Komer 22:40

Very different. I mean, for the Montana Supreme Court argument. We had relatively limited knowledge about the Justices of the Montana Supreme Court. But we you know, we had a, we were the winners below. It the US Supreme Court, we were the losers below. So, we were the petitioners that the US Supreme Court, preparing, I had the huge advantage of being able to talk to Scott, Wesley, and Bill and see how they had done it. And so basically, the Espinoza team, of which I was merely the mouthpiece followed the game plan for preparation that they had laid out over their cases. Obviously, we tried to emulate what Wesley and Bill had done more than what Scott had done. Because, you know, we wanted to win in the worst way and still do. But you never know. But it was an extremely intense period, especially because I went from being retired to being grilled every day. I just censored myself. And we had constant moot courts, both internally and externally, involving lots and lots of IJ lawyers. And it was a such good preparation. And by the time the argument rolls around, you don't get any questions that you didn't anticipate at some point in a moot court or just in the question and answer sessions that you go through. So, it was really good. An oral argument, like Bill, I really love oral argument because that's the only time that you actually get any feedback, any sense of what the justices care about. And that if you're well prepared as we all were? You got answers for their concerns.

Anya Bidwell 25:05
Wesley, how was your travel schedule? Like when it comes to moots? I don't think people realize quite how many moots all across the country people actually do to prepare for this?

Wesley Hottot 25:16
Yeah, well, in my case, as a first time Supreme Court advocate, I wanted to do as many moots as possible I enjoy them, I think that they're productive. I did 12, formal moots. Four of them were outside of IJ. I did one here in Seattle at the University of Washington, before doing moots at Harvard, Northwestern, and week before the argument at the Georgetown Supreme Court Institute. And those were tremendously helpful because they allowed us to get outside of the kind of IJ silo and hear from people who may have a different perspective on the law or may have more experience with the court. And like Dick said, I think it resulted in virtually every question that I got being something that we had already practiced more than once and in most occasions. The only thing that was an exception to that was Justice Breyer's kind of line of questioning, which I think kind of famously, he will ask questions out of left field that can be very challenging for counsel. I remember Justice Ginsburg being kind of helpful in that respect and telling me what he was driving at, then that made it easier to address

Justice Breyer 26:41
My question really is are there cases where we have said that the punishment is disproportionate? Where it's simply a question of the degree of punishment, i.e. life imprisonment, and the nature of the offense, E.g. stealing a golf club? I'm not sure there are and if there are not, it seems odd, and I think I'd have to think about it, or maybe we should address in some way or argument as to why there is that difference?

Wesley Hottot 27:15
Your Honor, I think if we posit that difference, yes.

Justice Breyer 27:20
You're saying there is a difference?

Wesley Hottot 27:22
Between sentencing a person for stealing a golf club and a life sentence?

Justice Breyer 27:27
Mmhmm.

Wesley Hottot 27:29
I think that no, there is no difference. And that if there is that tension between the Excessive Fines Clause and the Cruel and Unusual Punishment clause, that in an appropriate case, this court should resolve it.

Justice Ginsburg 27:40
I thought the three strikes, it wasn't simply stealing a golf club, it their third offense? So, his punishment for recidivists?

Wesley Hottot 27:50
Absolutely. Your honor and thank you

Justice Breyer 27:52
But, he also robbed the chicken coop.

Anya Bidwell 27:56

We'll talk about oral arguments in a second. And one last question before we dive into that, tell me how the hours before the argument went? How was it when you know, that you know, within a very limited amount of time, you're going to go before the justices? What happened, then what was it like, Scott?

Scott Bullock 28:18

Well, needless to say, I think that's probably true of all of us. You don't sleep very much the night before the argument. The important thing is you sleep the night, two nights before the argument to make sure that you can do a day without a whole lot of sleep, but for it, but we were ready. And it really is. All the other folks here have mentioned it. But we think of every possible question that could be asked. You're constantly thinking about not only the questions, but also how you boil them down to their essence too, because that's the one thing that every person who looks at the Supreme Court tells you, you have extremely limited periods of time to answer the questions. And so, you have to say yes or no, typically, and then maybe get out a sentence or two to explain your answer. But it's a real challenge to explain sometimes difficult, and complex legal questions in a very, very simple and quick manner. But we were ready to go.

Anya Bidwell 29:21

And tell me what happened on the way to the Supreme Court. In the car.

Scott Bullock 29:24

Oh, well, Yeah. So, I picked up Dana in a cab. And so, she and I both live in DC. And we were ready. And at that point, you know, she had constantly been quizzing me along with everybody else. What Bill said that people stopping you in the hall and asking you questions about things and this is just occurring randomly. So, we weren't going to do that. And so, both of us were course keyed up and you know, Dana and I agree on a lot of things and litigated many, many cases together and now she and I are running things at it. But the one thing we don't agree on very much is music. Dana being a product of the 1980s, and not really liking some of the things that I'm into like jazz and rhythm and blues and that sort of thing. So, I knew I had to get her to sing something for me, something that she knew. So she gave me a little version of Eye of the Tiger. Right before we went, stepped out of the cabin into the Supreme Court, and she did a pretty good job with it. She has a good voice, even if I had to listen to some more at 80’s from her.

Anya Bidwell 30:32
Did you did you get all pumped up after that?

Scott Bullock 30:35
I did. Surprisingly so.

Anya Bidwell 30:40
Bill, I know you have a story to tell, rather than a macabre one.

Bill Maurer 30:44
Yeah, it was I had kind of an unusual morning, before the argument and in some ways it was, it did take my mind off any nerves I might have had. While I was getting ready that morning for the argument, I was, I reached into the one of the drawers at my hotel, in the bathroom, and somehow managed to run my finger across the blade of a razor. And really cut myself very badly. And I was already in my suit, thankfully. And, but I was just I was bleeding a lot. Tried to bandage it, it didn't work. Steve Simpson, who was the senior attorney at IJ was there to pick me up and help me. And we were trying to like wrap up, wrap my hand up in paper towels. And it, you know, we finally got it to the point where I had this big ball of paper towels on my hand. And we started heading off to the court. I bled all over my phone. So I'm trying to text people about the arrangements. You know, we get there, we go inside. And there's actually a lounge in the Supreme Court for people who are about to argue. And so I walked in, and the, the clerk of the court, the US Supreme Court, was a guy named William Suter. And he noticed this, you know, just this, this gory mess at the end of my at the end of my left hand, and he was like, do you want to go down to the nurse's office? And I had no idea that was a nurse's office of the U.S. Supreme Court. But apparently there is. And I tried to you know, so I didn't want to, I didn't want to interrupt that, or anyone cause any problems. You know, I tried to say no, when he gave me some stories about some very famous, some very famous advocates who had appeared before the Supreme Court with injuries. And he basically did an excellent job of sort of manipulating me to go down to the nurse's office. And so I went down there. The nurse down there was a fantastic man, very, you know, kind of understood what was going on. And, you know, calmed me down about my finger. I wasn't really all that upset. I was assuming it was more of an extreme inconvenience than anything else. But he bandaged me up so I didn't look like something from a crime scene photograph. And sent me back upstairs, where I learned that I had left my ticket to actually get into the court in the lounge. And the Marshal stopped me and said, you know, do you have your ticket? And I said, No. And he said, Well, then you can't come in. And I said, but I'm the opening act. And the eventually, Dana Berliner actually went back and found the

ticket for me, and brought it to me. I went in with you know, a surprisingly large amount of time to spare. And by that time, I was thinking, you know, nothing, nothing else that happens today is really going to be as you know, sort of exciting and challenging as this, and so I was pretty calm. By the time I sat down, I had everything all set up. And I was you know, it was just at that point. I was just like Bring it on. I just want to you know, I just want to argue.

Scott Bullock 34:46
I got the pleasure of reporting to the to the IJ team because I'd gone to the bathroom before the argument downstairs and happened to run into Bill and Steve was there trying to re-administer this makeshift bandage that he had on his finger at the time, and they told me the story. And I got to report back to the rest of IJ. So, I saw Bill and, how's he doing? He's, he's bleeding.

Bill Maurer 35:20
Luckily, my sister in law's also a nurse. And that evening, she was able to sort of put me back together. Well, so I was I was appreciative that it wasn't a long term injury.

Anya Bidwell 35:34
And so that's kind of gets me to thinking about succession plans, as it for like, do you guys when you're preparing for arguments, are you thinking about, “Okay, there's got to be, in case something happens to me when I'm incapacitated for some reason that, I have a second chair, who is going to be ready and able to step in and do this unbelievably important high stakes argument, Wesley?

Wesley Hottot 36:05
Well, in my case, there was nothing formally set up. But there was no question that my co-counsel, Sam Gage, was equally capable of handling the argument, I think, had something happened to me, he would have been able to step up and seamlessly do it. Sam was with me, every step of the way, at every moot, the source of a lot of my good answers. So, I feel like had something happened to me, it would have been pretty seamless,

Anya Bidwell 36:34
Very nice to have, although it creates a perverse incentive a little bit, doesn't that right? If you are Sam Gedge that

Wesley Hottot 36:44
I suppose so. But you know, I trust that guy and my other colleagues with my life, I suppose.

Anya Bidwell 36:51
Well, let's then talk about the actual substance of the oral arguments. Let's begin with Kelo, right. And Scott, you had quite an opening statement. Tell us about what you were doing there?

Scott Bullock 37:06
Well, one thing that we always do in Supreme Court arguments, and it gets back to this point of having to boil down your arguments to their essence, is you need to have a theme, you need to have the theme of the argument is true, really for just about any argument, but it's especially important at the at the Supreme Court level, and something you are constantly trying to draw the court's attention back to. And so that's what you want to get out in your opening statement, because that's oftentimes about the only chance that you have to speak uninterrupted. Of course, that's changed now, as probably many of the listeners to the podcast know, the court is now letting advocates get two minutes, I think it is to talk uninterrupted.

Anya Bidwell 37:47
And we will talk about that with Dick.

Scott Bullock 37:48
When Kelo was argued, that wasn't the case. So most you could get out two, maybe three sentences before the barrage started. And that's what happened in Kelo, even with a smaller Supreme Court at the time, we actually only had seven justices on the court because Justice Rehnquist was still on the court at that time was sick and in a treated for cancer. So he was not able to attend the arguments. And Justice Stevens had actually missed his plane back from Florida, where he was after their kind of winter break. So, he wasn't able to attend. It was actually the first time in the Supreme Court's history that a female presided over the Supreme Court and Justice O'Connor, who was the next most senior justice, was the presiding justice at that time. And so, you know, once we got out this opening statement, then we knew that the semicircular firing squad was going to commence. And that's what happened for the rest of the of the main argument in Kelo. And so, the theme that we got out was the one that we wanted to keep returning to, which is if the court signs off on this use of eminent domain, we'll call this abuse of eminent domain, this expansion of eminent domain, then really, there's no limit on what governments

can take in the name of economic development. And that was captured in this opening in the opening statement, and something that we return to, again and again in the argument.

Anya Bidwell 39:15
And then when the opposing console gets up there right and answers the Justices' questions. There is this amazing hypothetical, and it's actually Justice Scalia, and Justice O'Connor, tag teaming, and then Justice O'Connor talking about motel six. So talk about that a little bit. And tell us what was going through your mind as you're sitting there and preparing for your rebuttal.

Scott Bullock 39:38
Yeah, I think that was really the key point in the entire argument. And it was something that rarely happens at an argument, but it did happen in Kelo, which is the other side, essentially conceding the very theme of your argument. And this is what you know, we were hoping to make this impression on the justices to leave them with it. What are the limits on this? And is there any limit on eminent domain power for economic development purposes? And so that's what I said in my opening statement about every church and corner store could produce more tax revenue from a big box retail store, and the like. And then Justice Scalia and Justice O'Connor picked up on that and asked the Motel Six question is, say if a community had a motel six, and they wanted more tax revenue, could they take it and give it to the Ritz Carlton? That was the theme of our argument. And the opposing counsel for the city said, "Yes, Your Honor. That would be okay."

Justice Scalia 40:37
I just want to take property from people who are paying less taxes, and give it to people who are paying more taxes that'd be a public use wouldn't it?

Justice O'Connor 40:45
For example, Motel Six, and the city thinks, well, if we had a Ritz Carlton, we'd have higher taxes now. Is that okay?

Opposing Counsel 40:53
Yes, your honor, that would be okay.

Scott Bullock 40:55

And at that point, I was like my work here is done, is what we wanted to get to, to convey to the court, they conceded it. And you could almost see, you know, when you're that close to the Supreme Court, you really get to see their expressions. And so, the look of shock on Justice O'Connor's face when he said that, yes, that would be okay to do that was really apparent. And, and so that was exactly the theme we wanted to drive home. Of course, that statement about the motel six made it into her very passionate dissent that she wrote in Kelo. And it was a point that I obviously had to hammer home in my remaining rebuttal time that I had it the at the end of the argument.

Anya Bidwell 41:41
And that kind of goes to my question about the rebuttal. So you're sitting there and you're thinking about it, you probably have somewhat of a prepared rebuttal, right. But you're also listening to the justices. I'm thinking about, okay, what do I do? What do I address when they get up? So, what were the things that you addressed in your rebuttal? That was obviously one of them.

Scott Bullock 42:04
Yeah, yeah. So that I mean, that was clearly a one, it's a couple of few factual questions that you want to clear up in it. But that the theme and bringing it back to the theme that we addressed in the opening, and then what the opposing counsel had just conceded in his statement about it was something that we really wanted to drive home. And that's how we concluded the argument. So really thinking through and picking up on where the justices were in their thinking on this, and driving home your theme is key, this is also something it's really helpful for the second chair and the other folks at the table to do, because you're trying to decide what is the most important thing. And having that kind of almost instant powwows that people do is, is really essential for making sure you hit all the all the right points in in the remaining time that you have. And what's interesting, too, is that would happen in Kelo, I've seen this and other arguments is that the court kind of exhausts itself, oftentimes during the argument and as I said, it was a nonstop barrage when I was up there for it. But then they let me talk uninterrupted for the for the rebuttal. So I was able to drive home my themes, for it, it was also this funny thing to where the attorney for the city, in addition to making the big concession, his time was expiring. And he was trying to rush and get in a bunch of points and then at this time, you'd have Justice Rehnquist was very much a stickler for time. And so, he said, “your honors, I'd like to leave you with just four points,” red light. And he said, “Well, I guess I could be able to tell you what those are. Thank you.

Anya Bidwell 43:53
If only the court knew them.

Scott Bullock 43:55
Yeah, they had actually asked me “Do you know what those words were?” And it, you know I should have said, you know, I joked afterwards, that it should have been “we can take everything” would have been the would have been the words. That was kind of the theme of their argument. And so that provides a little bit of a light moment amidst the emits the proceedings, then he got to be able to tell that on the steps of the Supreme Court afterwards.

Anya Bidwell 44:20
And Wesley that kind of brings me to this thought about, like, knowing how to walk that line between, you know, being very professional and very serious, but at the same time realizing that the justices over there, they're human, they're actually talking to each other. They also appreciate a good joke, like Justice Scalia, you know, famously got so many laughs from the audience. So when you're out up there, and maybe there is an opportunity for sort of a moment of lightness, do you take advantage of that? Or do you just kind of like stick with like a very serious script that you have?

Wesley Hottot 44:56
Well, I think it's very important for advocates to go and see the court in operation before they argue. And I did that a few times, I'd actually never been to an argument before. And something that struck me was that for the justices and the advocates, this is like any other courtroom, folks have a job to do. One thing that, you know, I've tried to stop doing, and kind of can't is holding up my pin, as I'm arguing and sometimes even clicking it. And I was reassured to see that advocates at the Supreme Court are doing that too, because, you know, they're working. It's not a performance. It's a legal argument. And I have tried, and I think successfully did this at the Supreme Court to think of the argument not just as a conversation, but as a conversation among peers. It can be challenging at the Supreme Court to think of yourself as being on the same level. But the bottom line is, no one in that room knows more about that case than you, at least that's how prepared you should be. And, you know, viewing the situation as one in which you are on the same level as the justices, and trying to help them do their jobs. To get to the opinion that they should reach that you're convinced is the correct outcome, does require a conversational tone, does require you to be relaxed enough to laugh at a joke when one comes up, you know, Justice Breyer was being self-deprecating and saying, you know, I have a hazy recollection, often these are wrong. And you know, you can hear me on the recording just kind of cackling as I leaned back. So I mean, I think that, you know, you have to rely on your instincts to make sure that you walk that line well, but you're probably more in danger of being stiff and overly formal. If you don't have

that sense of sort of “goddamnit I know the right outcome here, and I will ensure that you at least hear my perspective on this.”

Anya Bidwell 47:12
Yes, Bill.

Bill Maurer 47:13
I got a, regarding humor at the court, I got a very good piece of advice. That I'm a person who has a tendency to crack little jokes and make little, I think, are witty asides.

Dick Komer 47:28
Noooo.

Anya Bidwell 47:31
We don't get those emails Bill.

Bill Maurer 47:35
And one of the advocates who had been up there a long time said that, you know, you shouldn't necessarily be stuffy and stiff. But do remember that you are the straight man to the Supreme Court's Joker, and that they like to make jokes, and you can participate them in those jokes as basically the guy who is setting up the joke and if to really show my age, he basically said that you're the Bud Abbott to their Castello. And it was it that I found that to be extremely helpful, because it reminded me not to crack jokes, but to allow the conversation to go forward in a way that allowed some levity but didn't necessarily originate from me.

Wesley Hottot 48:37
I was just going to say one of my favorite moments of Bill's argument is a human moment where you can hear his charming guffaw at a joke that one of the justices was making. And it just struck me that, you know, he's in the zone, he's comfortable.

Anya Bidwell 48:52
Yeah, that's very important. And speaking of Bill's arguments, so Justice Ginsburg, was, as she often is, the first person to ask a question, the first justice and a very pointed, challenging question. Right.

She talked about Arizona traveling the amount. And how did you deal with that question, and what was she driving it?

Bill Maurer 49:15
So her question, and this is consistent with a reputation as being a, she's not a very aggressive questioner, but when she does ask questions, she is very much, a goes to, especially when she's not on your side. She goes to what she sees is the weakest point in your argument and asks you to specifically address it, and a less prepared advocate would be in danger of conceding something. Basically saying some something that would undercut their argument with the other members of the court. And for us, the argument, the biggest challenge was the idea that the U.S. Supreme Court had already held that the government could fund political campaigns without violating the US Constitution. And, and so we were, we were sort of arguing that they can do that but they can do that in a way that doesn't disincentivize people who are not getting that funding from speaking. And so, what Justice Ginsburg asked was, well, Arizona could give your opponent a ton of money, way more than they would get under the Clean Election system. And that would be unconstitutional. So why is it if they give you under this system, if they give your opponent significantly less money? Why is that unconstitutional? And it's a good, it's a very, very good question. And but one that we had prepared for, and it was precisely, Scott was talking about earlier about the theme. And it allowed me to actually draw to our theme, which is that what's wrong here is not the provision of funds to publicly finance candidates. It's the trigger of what gives that money to the publicly financed candidate. And because that trigger is something that the speaker, the privately financed candidates' speech triggers, that creates the disincentive to speak, that's not present in those circumstances where the government simply gives a lump sum to publicly financed candidates.

Justice Ginsburg 51:36
Mr. Mauer, do you, you don't have any objection, you wouldn't have any objection if Arizona trebled the amount at the outset? In other words, there is a maximum amount, the so-called matching funds, if it were given all in one month, and the publicly funded candidate was told, "give it back. If you don't use it," that would be okay.

Bill Maurer 52:05
That would be constitutional under Davis, Your Honor. This case is not about whether the state of Arizona may provide campaign financing using public funds. Nor is it about whether the ability of Arizona to ensure that those who receive the public funds can run effective campaigns, but this case is

about is whether the government can turn my act of speaking into the vehicle by which my political opponents benefit with direct government subsidies.

Bill Maurer

So it was it was a challenging question. It was the most, I think, logical and sort of straightforward attack on our argument. And it was, but I believe we were able to use it as a way to actually undermine that argument and really draw the court to the real issue, the theme, which was it's the trigger, you can't have a trigger that disincentivizes me from speaking.

Anya Bidwell 53:05

So, in a way, it was an opportunity, right? This is her first question. And it actually allows you to continue with your theme and to set the record straight.

Bill Maurer 53:15

Yes. And you're always drawing, there's always a balancing act, when you're getting questions from justices that you anticipate are going to be hostile to your position. You want to answer their question, and you want to be respectful. At the same time, you want to make sure that you're able to communicate, not just the answer, but why you're correct in why you should continue to win in light of that. Later on in the argument, for instance, one of the big issues in the case was the court had held repeatedly, that leveling of the playing field was in a legitimate reason for regulating political speech, that the government shouldn't be acting basically, as a sound engineer, making sure that some people's voices got raised and some people's voices got lowered. And in ensuring that people, you know, basically sitting there fiddling with the knobs in a way that interfered with people's free speech. And Justice Kagan asked me, you know, isn't, isn't the purpose of this, isn't the purpose of this law to fight corruption. And that's how they had to sort of categorize it because it wouldn't be constitutional otherwise. And luckily, I had a quote from the head of the government agency that handed out this money, saying that it cannot be disputed that the purpose of this law is leveling the playing field. So, she asked me that I said, You know, I respectfully disagree, Justice Kagan. In fact, I have this quote from the head of the organization that hands out the money saying, not only that the purpose is leveling the playing field. But it can't be disputed that the purpose is leveling the playing field.

Justice Kagan 55:23

The purpose of this law is to prevent corruption. That's what the purpose of all public financing systems are.

Bill Maurer 55:30
Your Honor, I would respectfully disagree that the purpose of this law is to prevent corruption. And I would like to read from the executive director of the Clean Elections Commission, who said that "it cannot be disputed that the purpose of the Clean Elections Act is to equalize the playing field and to give participating candidates equal opportunity to get their message out," which is at Joint Appendix to 36.

Bill Maurer 55:53
And so, I think that that was, you know, if you didn't have the level of preparation that we have and hadn't thought strategically about the questions that we were going to get, that would have been a missed opportunity. And as it turned out, that question was, I think, extremely effective in shoring up the justices who were on our side, that this was an illegitimate purpose behind this law.

Anya Bidwell 56:19
Speaking of Justice Kagan and leveling the playing field, Dick, she had a question in your case, Espinoza, about discrimination, right, and harm. She kept asking you about there is no discrimination. What is the harm there?

Justice Kagan 56:34
And the consequence of this decision, is that there is no discrimination, that neither set of parents is getting what they want. Now, you might say, well, both should get what they want. And maybe that would be a better world, maybe. But the constitutional harm that it seems that you have to allege here is the discrimination and there is no discrimination.

Dick Komer 57:02
Your Honor, there is no discrimination, because the Montana constitutional provision requires discrimination on its face, and as applied to our clients.

Anya Bidwell 57:15
So how did you deal with that question? What was she driving at there? And did you also see it as an opportunity to drive the theme of your case home?

Dick Komer 57:29

Definitely. But to put the question in context, you have to understand that the argument of the briefs from our opponents was very peculiar. They didn't really try and defend the decision below, on the merits of the decision below, because the Montana Supreme Court had basically said, there's no problem under our Constitution or the Federal Constitution, with discriminating against families that want to choose religious schools as opposed to secular schools. But because there was no severability provision in the legislation, they decided that what they had to do after they said that the inclusion of the religious schools violated the state constitution, they then basically invalidated the whole program. And so, she was saying, because the program is invalidated, there's no discrimination against people who want religious schools versus non-religious schools, because that was what the other side had argued in their supreme court papers. It was a very disingenuous sort of argument, because they had basically conceded that the underlying reason that the Montana Supreme Court had acted was that it's perfectly okay to discriminate against religious families, and the choice of religious schools. And so, we were trying both throughout our briefing in response to that, and in the oral argument to say, no, wait a minute. What they're not doing here is leveling down as opposed to leveling up. What they're doing here is acting because they think it's okay to discriminate against religion. It's just, you know, irrelevant that they invalidated the whole program. There's no doubt and the other side has conceded, which we had right there in our opening. They have conceded that to exclude religious schools from a religiously neutral program would in fact, violate the Free Exercise Clause and so that was what we wanted to get them back to.

Anya Bidwell 1:00:03
And speaking of opponent's briefs, Wesley, in your case, Timbs, your opponent also kind of took an unusual position, right, at least a position that wouldn't be expected at first glance. How did they try to frame the argument and what did you do to respond to that, to frame their argument?

Wesley Hottot 1:00:23
Sure, similar to Espinoza that Dick was talking about, they kind of assumed that we were right on the question presented, that the Eighth Amendment' excessive clause apply to the states and instead advanced, I thought this rather clever argument, that regardless of whether the excessive fines clause applies to the States, generally, it does not apply to state civil forfeiture actions. And the argument being that, correctly pointing out that there were many cases of civil forfeiture actions that were

manifestly excessive where no one had raised the excessive fines clause. I think that was the best they could do with a dog of a case. And, you know, it was challenging for us to address because it wasn't the issue that the court had granted cert to decide. And so, we've been talking about themes. I mean, our theme was, we're here to decide if the excessive fines clause applies to the States, not to decide issues that the other side has introduced into the case that never existed before. And, you know, ultimately, our work on that issue, I think, was very influential on the court. Justice Ginsburg was asking in our argument about incorporation of the Sixth Amendment's jury unanimity guarantee, while a case Ramos v. Louisiana was pending, asking whether that guarantee applies to the states and Ramos was heard this term. And the argument of the state of Louisiana was similar that, you know, regardless of whether jury anonymity is required under the Sixth Amendment, it applies differently to the States than it does to the federal government. And after Timbs, and relying on Timbs in Ramos, the court was very clear that there's no daylight is said between the scope of a federal constitutional right as it applies in federal court and the scope of that right as it applies in state court overruling a case from the 70s called Apodaca v. Oregon. And so, you know, the, again, the government's argument was an opportunity for us to focus the court on our thematics. And in our case, you know, I think we set them up to reach the correct result in Ramos as well, effectively closing the book on incorporation of the Bill of Rights.

Anya Bidwell 1:03:02
Yes. Let's talk a little bit about Justice Alito. Was he not clear what constitutional provision you were brought your argument under? You brought your argument under?

Wesley Hottot 1:03:11
Oh, no, I don't think he wasn't clear on that.

Anya Bidwell 1:03:15
I'm joking. Yes. What was going on there?

Wesley Hottot 1:03:17
Well, as some listeners may know, Justice Thomas does not effectively believe in the concept of substantive due process. And because the court’s incorporation cases are built on the idea of substantive due process under the 14th Amendment. He has in other incorporation cases refused to join the opinion incorporating the case and instead has joined the court in its judgment basing the application of a federal constitutional right to the States, not on the due process clause, but on Section One's Privileges or Immunities Clause. And, you know, we knew from the decision in McDonald v. City

of Chicago that Justice Alito and Justice Thomas agreed on the outcome of these incorporation cases but did not agree on the constitutional provision on which they relied. And so, we very consciously made the Privileges or Immunities argument in order to get Justice Thomas's vote, you're just not going to get it if you don't, in part base, your argument on that. So what Justice Alito was asking me was, what's the precise provision of the constitution that you rely on? And I said, about to say Due Process Clause and stopped myself and kind of realize the trap that was being laid for me and said, “Section One of the 14th Amendment, Your Honor.” So, he says, “it's part of the Substantive protections that you get for due process, right.” “Yes, Your Honor. We also have an alternative argument under the Privileges or Immunities clause that I'm not here to concede,”

Justice Alito 1:05:06
What is the provision in the constitution that you rely on?

Wesley Hottot 1:05:11
The section one of the 14th Amendment, your Honor.

Justice Alito 1:05:14
It's a component of liberty that's substantively protected by the Fourth Amendment's Due Process Clause.

Wesley Hottot 1:05:22
Yes, your honor. And we also have an alternative argument under Section One's Privileges or Immunities clause.

Wesley Hottot 1:05:28
So that's a sort of unspoken dynamic that's going on, you know, Bill alluded to that. The conversation between the justices and the advocate, I think, is often more nuanced than what the audience might recognize.

Anya Bidwell 1:05:45
Let's move to this phase of the case, when the oral argument is over, you're waiting, and now the decision comes down. Scott, in your case, what was it like to hear the decision? And what did you do next?

Scott Bullock 1:06:05

It was one of those instances where, you know, we kind of knew was getting close to the end of the term, we were expecting decision, really, any day, we were refreshing the websites that were tracking it, and then again, though, the court calls you to let you know, a little bit before they release it publicly. And, and so the call was put through to me. And if they say it in a way, that's, you know, very legalistic, "I was just calling to let you know that the court today affirmed the decision in Kelo." And, you know, I knew what that meant, we had lost by one vote at the Connecticut Supreme Court. And then we quickly found out that we had lost by one vote at the, at the U.S. Supreme Court. And so it was, you know, incredibly disappointing to hear that. And not only was I disappointed for the effects this would have potentially on the country, but also for our clients as well, and having to call them and tell them that and is, you know, one of the one of the most joyous things you can do as a lawyer is to call your clients in a public interest case and tell them that you won. And, of course, the most disappointing and devastating thing is to let them know that they that we had lost the case, but it was something you know, that the clients in this case had fought for so hard, and it all stuck together. And, and really were, you know, really incredible people to represent. But we knew that we were not going to just take this and say, well, the court issued its decision, I guess that's it? Well, you know, look for another issue to litigate. The whole reason why you have a public interest law group is you don't just argue cases in court. You use all the tools of public interest law, to raise awareness of these issues. And that's what we were able to do in the context of eminent domain abuse. And so, we had hoped that this backlash was going to happen, we had laid the groundwork to effectively make sure that it happened. And as soon as the court's opinion was handed down, we did just that. We marshaled resources here at IJ. We put together a campaign called "hands off my home" that was going to capitalize on what really happened in the wake of Kelo, which was this genuine backlash against the decision, and you saw this manifest in all kinds of different ways. I remember, after the decision was handed down, the day or the day after I was walking along the street in DC, I heard people talking about it, and saying, "Can you believe what the court had done?" You know, Jay Leno had Arnold Schwarzenegger on that evening. And he was saying, you know, can you believe this happened? "It was unbelievable, Jay," that the Supreme Court that, you know, so it was just one of these kinds of cultural moments that, you know, rose up where people were just astonished that the court had had had decided the case the way it did. And so we knew it was a special moment to capture this national mood. And so we, for the next several years, put together a program to fight back against this in state courts, which we did and got a lot of opinions that rejected Kelo's under the state constitution. And then 44 states have passed legislation that if somehow, some ways better protected property owners, and half of those states are actually better protected than what they would have been even in a favorable outcome and in Kelo, so it was kind of

one of those classic examples of losing the battle, but winning the overall war, but it doesn't make it any easier to deal with the fact that the court got the constitution horribly wrong. And it also, you know, meant that Suzanne and her neighbors had to leave this neighborhood that they were so devoted to but, you know, they know that their fight was not in vain and that out of this very bad Supreme Court decision, we got a really lot of a lot of positive changes in the law to better protect home and small business owners throughout the country.

Anya Bidwell 1:10:06
Yet to the point that your opposing counsel actually just a couple of years ago, he wrote an article and the headline said, “Why Kelo is not Dred Scott.” Right. And that's just like if you actually have to talk about Dred Scott, when you talk about Kelo, you know, you're in trouble.

Scott Bullock 1:10:25
That's right. That is. And I've heard this at various conferences and things that the supporters of eminent domain abuse and advocates for private development thinks this is the worst outcome that could have happened to them. And they, they recognize that, and they know how wildly unpopular this power is become. But our ultimate goal, of course, is to get this constitutional mistake corrected. And we'd love to get this issue back before the Supreme Court and have them overturn this. Justice Scalia would routinely say in public addresses that he was convinced that they would have asked him what was the decision most likely to be overturned? He invariably answered with Kelo,

Anya Bidwell 1:11:05
And Wesley, in your case, you know, Tyson got a unanimous victory, but that his ordeal of was far from over, right.

Wesley Hottot 1:11:14
Yeah, it's honestly still far from over. We got a unanimous decision from the U.S. Supreme Court that the Excessive Fines Clause applied to the States, but were remanded to the Indiana supreme court to decide how you decide whether a forfeiture is excessive, and therefore unconstitutional. So Sam and I, litigated before that court. Again, I think we've been there three times now. And they ultimately adopted the test that we advocated, essentially, you got to look at all of the circumstances and decide in equity, whether or not given forfeiture is excessive. They didn't resolve the case, they remanded it back to the trial court and Grant County, Indiana were earlier this year, we had a mini trial on, you know, on those factors that the Indiana Supreme Court had laid out. And the trial court recently, again ruled in Tyson's

favor holding the forfeiture was excessive in ordering the state to return his car. The state is now appealing that decision to the Indiana Supreme Court. And they've indicated that if they don't get a favorable decision there that they intend to petition the U.S. Supreme Court for cert. So fortunately, in the course of all of that, Tyson has gotten his car back, the state agreed, I think kind of seeing the writing on the wall that it was, it was high time after six plus years to return the vehicle to him. So, he's got it, he just got it this week. And we will continue to defend his right to keep his property. You know, I don't think they stand much of a chance of getting a reversal at the Indiana Supreme Court, and virtually no chance of the Supreme Court revisiting this at this stage. So, we anticipate ultimately that, that our victory will stand

Anya Bidwell 1:13:25
More importantly, Bill, how's your finger doing?

Bill Maurer 1:13:27
Finger is doing well, it appears to have come out of the whole trauma without any lasting damage. But, you know, there's a scar there to always remind me of the good times.

Anya Bidwell 1:13:40
But so you won right? How did you feel? How did your client feel?

Bill Maurer 1:13:47
You know, the clients were obviously delighted. And the interesting thing about how I found out that we would had won was that the you know, you don't know when the case is going to come down. And our case ended up being the last opinion issued on the last day of the term. So I was actually on a long planned vacation with my family. And we're, we were sort of a multi-layer vacation. The first part of it was we were visiting my parents in New York, and the case hadn't come down at that point yet. And my parents were very old school they didn't have WiFi or you know an internet connection or of any kind. So when I realized..

Anya Bidwell 1:14:48
It was 2011, it's not 1988

Bill Maurer 1:14:53

My parents had a rotary phone until they were forced to get rid of it and they were not the type to really embrace new technology. And so, I actually had to go over to one of their neighbors and asked if it would be okay if I hopped onto their Wi Fi signal that day. So, I could tell whether we won the US Supreme Court case or not. And so, I was hitting refresh, hitting refresh, hitting refresh, all the cases come out, ours is the last one. And it comes out that you know, that we've won. And, you know, it was, it was, it wasn't all that surprising, because I had reading the tea leaves in the oral argument, I was pretty confident that we were going to win. But it was nice. It was very, very gratifying to, you know, after all that work, after all that effort to actually get the opinion. And it was written by Chief Justice Roberts, it said exactly what we wanted it to say, one of the things that we tried very hard to do was that we wanted a very good five to four decision instead of a wishy washy six to three decision. So we didn't concede really anything. You know, we went and asked for as much as we could get. And that's exactly what the court gave us. And, and so it was, it was a very exciting day, I was very happy to be able to share it with my parents, both of whom have since been, are deceased. But you know, it was kind of an interesting day where I was doing interviews with the New York Times and The Wall Street Journal from my dad's study. It was a very, it was a very nice sort of way to, to end the whole thing. And it was, in terms of the sort of the meaning of the case, our case, I think, was less about stopping something that was a significant problem across the country already, and more about stopping the expansion of these kinds of programs across the country. Because I think if we had lost this case, this would have been the model for campaign finance regulations for years to come. And essentially, the government would get into the business of being a sound engineer, and that they would decide, and being the government, they would often decide that the people who were speaking too much whose voices were too loud, or who had undue influence, were the people who were opposing those in power. And so, I think what, what we did in this decision was put a stop to a growing trend in a growing effort to use this kind of speech regulation, to basically shut people up that the government doesn't like.

Anya Bidwell 1:18:08
All right, before we go, I have a couple of more questions to ask about oral arguments in general, some of them are from our Dave Kennedy fellows. And if you guys wonder who Dave Kennedy Fellows are, Google IJ Dave Kennedy fellows and consider applying to be one of them. So, Dick, let's start with you. You essentially, were the first orator at IJ, essentially, who was subjected to the two-minute rule, right? Essentially, tell me what the two-minute rule is? And do you like it do not like it?

Dick Komer 1:18:36

I don't think of it as being subjected to it, I think it is being benefited by it. Because the two-minute rule means that in my case, I had 20 minutes to argue. For the first two minutes, you get to say what you want to say, and summarize your key points, and nobody gets to interrupt you with questions.

Anya Bidwell 1:19:02
That's good to hear. Because the other three advocates, you guys essentially you had questions? Barely into your themes, right? Scott?

Scott Bullock 1:19:11
Correct. Oh, yeah, I got out the two sentences got out, maybe three sentences, got the theme out and then it was nonstop response to questions and that's true of, of most arguments. They are there, they're ready to go. And it is you just got to you got to be in that zone and respond as quickly as you can.

Bill Maurer 1:19:34
I actually went through a lot of transcripts and figured out that two to three sentences of about 90 seconds, where it was about the average for an advocate at the U.S. Supreme Court to get out before they started getting questions. So, I prepared three sentences and then sort of stopped expecting the questions. This and that's exactly what they did.

Wesley Hottot 1:20:02
I'm not as, I'm not a big fan of it, because the court can always restrain itself without it being a formal rule. And, you know, I've had my chance to give them the thematics. And my set peace argument in the briefs. What I want to do at argument is hear the justices concerns, and I just assume, start with that.

Anya Bidwell 1:20:29
And the good thing you can waive the two-minute rule, right, so yep, yep. And okay, one last question. Before we go. And that is about telephonic arguments. I'm sure you guys all heard the 10 arguments that were held over the phone. So, if you were to be preparing for an oral argument next term, and you weren't actually quite sure which format the argument would take, how would you go about preparing? And also, do you think the telephonic format created more opportunities for advocates or for the justices? Or maybe it's not as good as the format where you get to see them face to face? Who wants to take that one? Bill?

Bill Maurer 1:21:12

I think the telephonic argument just sounds like, I don't think I would enjoy it at all. One of the things that is actually surprising about the US Supreme Court arguing there is just how close you are to the justices. I've never seen a bench that close to the advocates, you're practically just a few feet away from them. And so, it is a very intimate discussion. And frankly, when you're looking at a justice and answering their question, you really can't see a whole lot of other justices in your eyesight. So, I would find the telephonic arguments, I think to be far more difficult and far more uncomfortable than actually arguing in front of the court itself. But that that and that is largely because of just how close you are you can't see the rest of the room. You can't see what's behind you. You can't see what's on the side of you. You're just looking at whatever justice you're talking to.

Anya Bidwell 1:22:15

And Wesley, you mentioned how Justice Breyer was asking you questions, and you weren't quite sure where he was going. And then Justice Ginsburg, kind of explaining where he was going and kind of saving you right, you think something like that seems like it would be lost? If the arguments given the current format of the telephonic arguments?

Wesley Hottot 1:22:35

I think it would be I don't think the preparation would be any different, except for perhaps, you know, doing moots over the phone, as well as in person just to have some sense of it. I do think the argument would be different as you're alluding to, because, you know, they're going in the questioning process from senior justice to junior justice. And that doesn't allow for the kind of conversational give and take that that makes things more human. And I think it would be challenging. But you know, if the court asked me to stand on my head and make an argument that way, I would still do it. It's, you know, you're there to make your case. And whatever the terms and conditions of having that opportunity would be. I think you've got to take it.

Scott Bullock 1:23:27

Just like with music. I prefer it live.

Anya Bidwell 1:23:31

And that's a good note to end on. Thank you, Scott. Thank you, Dick. Thank you, Wesley. Thank you, Bill. It was great fun.