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Hello, and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, July 8, 2021. If you enjoy this podcast, you should check out our newsletter. And often irreverent take on recent Court of Appeals opinions, which we publish every Friday, you can subscribe and shortcircuit.org or find it on the Volokh conspiracy blog. And please, also check out our sister podcast, the documentary series Bound by Oath. We're going to talk about some recent fascinating opinions with a fascinating guest, as we always aim to do. But please let me conceptually set the stage and bear with me because what we're going to tackle can be a little bit confusing. So, say you have a Supreme Court case, we'll call it Augustus, you know, Augustus v. Jones, or whatever it would be we'll just say Augustus, and Augustus is holding is that a certain kind of statute is constitutional. The court then follows Augustus in a slightly different context with a slightly different kind of statute in a second case, called Brutus. Get it? A then B. And I know Brutus, after Augustus for Roman history fans doesn't make any sense, but just bear with me. Okay, so then, years later, the Supreme Court overrules Augustus, in another case called Cicero. Again, Cicero after Augustus, just bear with me. So now, because Cicero overruled Augustus, the statutes that were issue in those cases are considered unconstitutional. And as what happens when you overrule a case, Cicero doesn't just mean Augustus is no longer good precedent. But it repudiates the reasoning, which Augustus, but also Brutus, the second case relied on. But it doesn't mention Brutus, and the slightly different kind of statute at issue in Brutus. So, pop quiz hot shot, how do the lower courts handle a new case? We'll call it Drucilla, with the same facts and statute as issue in Brutus, the second case where Augustus is no longer good law. And the lower courts were to apply the reasoning behind the third case, Cicero, they would not come to the result in Brutus, but big huge but, the court hasn't actually overruled Brutus, as Dennis Hopper once asked Keanu Reeves, what do you do? Well, we're going to look at a few cases today, three of which just came out last week that give us an answer, which is that essentially, you follow Brutus, but only as much as you have to. The Supreme Court has said in words that all of these cases we're going to talk about quoted, “if a precedent of the Supreme Court has direct application in a case yet appears to rest on reasons rejected in some other line of decisions. The Court of Appeals should follow the case which directly controls leaving to the Supreme Court the prerogative of overruling its own decisions.” Well, aren't they special, the cases that we're going to talk about come

up in a conflict of a couple areas near and dear to us at IJ, occupational licensing and the First Amendment, and specifically even nearer and dearer to us: the licensing of lawyers. So full disclosure, we are not exactly disinterested, here to walk us through these issues, including those three cases, which were handed down last week is Cleveland's own Rob Johnson, senior attorney at IJ. Rob, welcome back to Short Circuit.

Rob Johnson 04:11
Oh, thank you. It's a pleasure to be here. Although I have to say you, you definitely lost me at Drucilla.

Anthony Sanders 04:16
Yeah, well, we started we throw her in there too. Just to make the history even more nonsensical.

Rob Johnson 04:22
Yeah, I mean, I'm confused. So, I don't know how the audience feels.

Anthony Sanders 04:26
Well maybe we'll have to bring a historian on that to sort it out sometime. Well, we're going to start with the issue at hand, which is not these cases themselves, but is this thing called mandatory Bar Association membership. And then we're going to move on to the background and the cases. So, Rob, for our non-lawyer listeners, what is a bar association in the first place? What do they do? And why does some but not all lawyers have to join them?

Rob Johnson 04:55
Yeah, so as most listeners are probably aware, if you want to practice as a lawyer in pretty much every state, you have to be barred as a lawyer, which means you have to take a test, you have to satisfy the requirements for licensure. But then some states require that you join this organization, the Bar Association, which is not a government agency, it's a private association that is made up of and run by lawyers. And that then, in effect, regulates the practice of law. Now the problem arises, because these mandatory bar associations don't just regulate the practice of law, they also do all kinds of other things. They publish magazines, and they put out statements and they draft model legislation. They even lobby for legislation. They're engaged in all kinds of activities that some people might say, are quite political. And they take stances on some issues that can be controversial, and that not all members of the bar, necessarily, you know, agree with. And, you know, there's sort of a sense, I think, among some lawyers, that they essentially are captured by particular segments of the bar. So, like, in a lot of states,

you know, that the local plaintiff's attorney bar, you know, tends to have more influence in the bar association than say, like the defense attorney side of the bar, you know, all of that's politics. And it varies from state to state. But the real issue is that these, that the government is basically making your ability to practice law contingent on your joining this private association, that may be taking positions on all kinds of issues that you don't agree with.

Anthony Sanders 06:40
Right. And, and it varies, I understand from state to state. So, the two states where I have a license in, Illinois and Minnesota, are actually of the minority of states, I think there's, there's 19, apparently, from the from these cases that don't have this requirement. So, I do not have to join a bar association with either of those, I still have to pay a check, which can be quite a large check in my mind, to the bar licensing authorities to have my license. And of course, the government does all kinds of things with that money, usually related to the courts or the bar or whatever. But it's the government doing that. It's not this, you know, supposedly private, although often not really that private Association, but in other states, you have to pay this fee to those associations, which maybe isn't a different, you know, financial impact for you, as far as you're keeping your books on your, your business for your license. But it does mean that you're supporting activities that you might not want to be associated with, that's different than just, you know, paying your money to the government. Is that a good summary?

Rob Johnson 07:59
Yeah, that's exactly right.

Anthony Sanders 08:01
Okay, so this might sound you know, hey, how can we have this in America? To some listeners, some listeners might think it's pretty mundane matters, like why do people even care about that? But there's a bit of history here in what the Supreme Court has said about what can and can't be done with these associations. So, give us a brief historical tour on what all that is, if it's possible.

Rob Johnson 08:28
Yeah. And it's hard to say where to start on this one, I could start in 1956, or 1961. But I'm just going to jump in and 1977. So, in that case, it's called Abood. It was a challenge by people who did not want to be forced to pay money to a public sector union. And the argument in this case was, you know, this union, which, you know, is not that different, in some ways, from a mandatory Bar Association, it's, you know, you want to do this job in this case, you know, had been a public employee, then you got to join

the public's the public union. And these public employees said, you know, we don't want to pay money to this public union, because we don't agree with the things that it's doing. Its funding all kinds of political speech, you know, on political issues that we don't agree with. And so, this issue goes to the Supreme Court. And as I mentioned, the Supreme Court is not writing on a blank slate here, the court in 1956, had, you know, held that you can be required to join a union. In 1961, it held that you can be required to join a Bar Association. But nonetheless, the Supreme Court does say that there are limits on you know, how much you can be forced to compel speech that you disagree with, and the court says basically, we're going to draw a line and on one side of the line, we put chargeable expenses, which are expenses that relate to the you know what we think the union should be doing. And on the other side, we'll put non chargeable expenses, political expenses, and they basically said they got the union has to segregate the fees that it gets. And if people object to paying for these, quote, non-chargeable expenses, then they have to get a refund of the fees. So that's basically, you know, the kind of started this line of precedent, then 1990, there's a case called Keller v. State Bar of California, which was a challenge to being forced to pay fees to a state bar, like we've been talking about on the same grounds. And there, the Supreme Court said, “Sure, it's true that we actually upheld forcing people to join a state bar in 1961. But given the Abood case, you know, we're going to now say that the State Bar also has to distinguish between what they call either germane or non-germane expenditures, meaning, you know, is this something that is germane to the state bar's job of regulating the legal profession or is it not germane. And again, they said, “You can't be forced to, you know, pay money to the State Bar Association, that then is used to pay for these, you know, non-germane things that you don't support.” So basically saying, same rule that we adopted in Abood is going to apply to bar associations.

Anthony Sanders 11:22
Right. And then it does in the court in Keller, they give a couple examples. You know, one is very close to say what the structure of the courts are, what courts do. And then if the Bar Association is, say, talking about the nuclear freeze, and how there's a, we need a nuclear freeze, which was a big topic back then, that would obviously not be germane. And there's a lot of gray area there about what would be germane and what would not.

Rob Johnson 11:48
Yeah, and the court says something, you know, it's a, it's a Rehnquist opinion. And so, it's, as always, it's very breezy. And he basically says, you know, the line between germane and not germane might not be immediately obvious, but we trust that we'll just figure it out, as we go along. I'm paraphrasing, which, you know, as we'll see, it sort of turns out that that's easier said than done in the Union context,

this kind of stumbles along for the next several decades. And, you know, there ends up being a huge amount of litigation about this line between chargeable and non-chargeable expenses. And then all of this kind of comes back to the Supreme Court, in a case called Knox v. SEIU. And in this case, you know, there was a union, that issued a special assessment. And the purpose of this special assessment was just to basically lobby the government and participate in an election. And the union actually did not give people the option to opt out of the special assessment, it goes up to the Supreme Court, and the Supreme Court, you know, on appeal from a Ninth Circuit decision that basically had said, you know, well, in this in this context of the special assessment, we're not that worried, the court reverses that, but then also says, we're just a little confused about this whole line between chargeable and non-chargeable. And like, why does that make any sense? And then also, like, why should people be forced to opt out of paying money to a union? Why shouldn't they instead have to opt in to paying money to the union?

Anthony Sanders 13:21
Along the way I believe there's some kind of guidance from the court about how you do this opt out, right, for certain procedures. And to me, they seem very breezy and cumbersome as to how you might actually ask for that money back, whatever the percentage of your fees that, you know, went to a non-germane activity.

Rob Johnson 13:41
Yeah, they call them Hudson procedures, and basically, you know, the, the union or the, you know, bar as it will maybe they have to give you notice of what the expenditures are they have to have like an audited report dividing it into, you know, germane or not germane expenditures, and then they have to give you the right to opt out. And then if you know, if they can test your right to opt out or not like there's a whole procedure for contesting it. And it Yeah, it's extraordinarily cumbersome.

Anthony Sanders 14:11
Yeah. So as a former labor lawyer, I can say without breaching any privileges, that unions can be very good at putting these notices in not very noticeable places, in it, say a newsletter or, you know, buried at the bottom of an annual notice about something else. And so often this does not come to members' notice, and you know, whether you're even going to go through those procedures in the first place, even if you know about it, given the small amount of money that might even be an issue for non-germane activities, is not something that happens all that often.

Rob Johnson 14:52
Well, yeah, exactly. And so the court basically takes a look at this and is like, what is going on here, I mean, it's just a whole amount of effort to sort of sort out what you can and can't charge for and all the rest of it when, at the end of the day like, shouldn't you just have to opt in rather than opting out, and in a case called Janus in 2018, that's exactly what the Supreme Court finally says. They say, you know, the Abood is overruled. And that you actually have to opt into these procedures or to these fees, rather than, you know, going through this whole cumbersome opt out procedure.

Anthony Sanders 15:31
And so, we have Janice, but, Janice, as I was saying of the mythical Brutus and Cicero, Janice does not say anything directly about this Keller case.

Rob Johnson 15:46
Right, exactly. So, this is where we get to the ABC or D or, you know, Latinate equivalent. Yeah, it raises this sort of fascinating question because Keller basically said, you know, we're going to apply the same rule that we applied in Abood. And, you know, now, Abood is overruled. So, you know, there's two ways of looking at Keller. One is that Keller holds that the, you know, the rule adopted in Abood applies to state bars. And the other way of looking at it is that state bars and unions are the same and should be subject to the same rule. So, you know, if you look at it the first way, then well, then Abood still controls in the in the bar context under the sort of heading of Keller but if you look at it the second way, then will now that Abood is no longer good law. Shouldn't Keller just kind of follow right in its wake?

Anthony Sanders 16:58
And despite that, quote, I read earlier about following a Supreme Court case until it's overruled. If Keller really was about unions, and it just happened to have not get mentioned in Janus. People would understand, okay, that's no longer good law. But because it's slightly different, it's about this this bar association context, courts are trying to figure out whether it follows or not. And this was a pretty easy to spot issue after Janice came out. So, we've of course, had some litigation, some of which is now is actually already reached the Supreme Court in the form of cert petitions. There was a case from the Seventh Circuit that was denied last year, although Justice Thomas and Justice Gorsuch said they would have liked to take the case. There's a Ninth Circuit case that came out, we covered in the short circuit newsletter that came out a couple months ago, I believe that has now reached the Supreme

Court in terms of a cert petition. And then just last week, three cases, two from the Fifth Circuit, one from the Tenth Circuit come out, and take it away, Rob, what did they all say?

Rob Johnson 17:57
Well, so they all kind of said the same thing, but in slightly different ways. And the differences, I think, in some ways, it's more interesting to kind of get to the commonality first. So, backing up a little bit, Keller kind of has this very interesting line where they say, you know, not only are they drawing this germane, non-germane line, but they also left undecided, a question of, can you be required to join a bar at all if the bar is engaged in a bunch of non-germane activities? Or is there some line where, you know, the fact that they're engaged in these activities, not only can you not be required to pay for them, but you can't actually be required to join? Because that violates your freedom of association, right?

Anthony Sanders 18:52
Maybe there's a de minimis amount or something like that. Who knows?

Rob Johnson 18:56
Yeah. And that sort of carve out or not carve out, for that reservation and Keller kind of lurked in the case law, I think unremarked for a long time. Because the case law in this area was so bad, and nobody really was paying that much attention. But then after Janus, as people start to take a fresh look at it, suddenly that becomes very important, because, you know, I think lower courts rightly so are saying, well, we have to continue to apply Keller. And I think that partly has to do with the fact that you know, the Supreme Court has two justices have said that Keller should be overruled and a dissent from certiorari, well a denial of certiorari. But, you know, that, in itself kind of indicates that the other justices are not quite ready to overrule it yet. You know, it's also not, it's a fairly recent case. I mean, in the grand scheme of things, it's only 30 years old. So, you know, you can see why the lower courts feel like they have to follow Keller, but if they're going to follow it, they're not going to apply it to its maximum extent, they're going to interpret it narrowly. So, they kind of appropriately seize on this language from Keller that reserves this question, and they say, “Alright, we're now going to send these cases back or in one case, actually render judgment on the theory that because these bars, you know, are engaged in non-germane activities, you can't be required to join them.”

Anthony Sanders 20:23
And let's go through maybe some of the facts about what was germane. And what was not. So, there is one of the cases is from the Fifth Circuit, about Texas's mandatory bar. And the court basically said, a

lot of what the bar is doing is germane, maybe it's questionable, but it seems germane. But there were a handful of things that were just a bit outside of whatever that line is, and then that meant that there was a certain relief for the plaintiffs in the case. So, walk us through what happens to them.

Rob Johnson 21:04
Yeah. So, this Fifth Circuit case from Texas actually comes up on, I think = it was a motion for summary judgment. And so, there's the factual record. I don't know if it was summary judgment, or I think it was summary judgment.

Anthony Sanders 21:17
I think it was preliminary injunction actually.

Rob Johnson 21:19
Preliminary injunction. Anyway, there's a factual record. The key idea here is that this case has developed factual record. And so, the court feels a certain amount of comfort in basically saying, you know, we're looking at the different things they did, and we're going to divide them into the context of germane or not germane. And the court says, you know, it adopts an interesting line, actually, between what is germane and what's not. And is it makes very clear that, in its view, the line does not depend on whether something is political, or controversial, but instead is about whether it relates to the administration of the courts and the legal profession, or whether it is more about the substance of the law. So, for instance, the Texas bar had lobbied to change the definition of marriage. And so, the Texas bar says, or the excuse me that this circuit says, well, changing the definition of marriage is a substantive change to the law. So that's not germane. But then it also says there are other things that they lobby to change, like, you know, visitation rights for grandparents, that are much less controversial than changing the definition of marriage. But those also are not germane because they're about the substantive law, and not about the administration of the legal profession. Now, on the flip side, they say the state bar has all of these diversity initiatives, that might actually be very controversial. And yet, those diversity initiatives relate to the administration and the legal profession, so they are germane. And then there are also things like funding pro bono legal help, that maybe are not controversial, and pertain to the administration of the of the judicial profession or the legal profession. So those things also, not all are also germane. Right? So, it's kind of an interesting line that they're drawing, they're basically saying, it doesn't really matter if it's controversial, it doesn't matter if you disagree with it. The only thing that matters is does this relate to the administration of the legal profession or not? And they say, well,

the Texas bar did some things that crossed that line, like advocating for changing the definition of marriage or advocating to change visitation rights. And so, for that reason, you can't be required to join the Texas bar.

Anthony Sanders 23:50
And so, it seems, one thing I don't quite understand from the opinion is the really is the relief. They don't have to join the bar because of these activities. It's not just it's not just a refund of part of their bar dues.

Rob Johnson 24:07
Yeah. So, I mean, there's two parts of the opinion, the first part says, addresses this associational claim and says you can't be forced to associate, you know, because of these non-germane activities. And then the second part says, “and in addition, you have to have all of these, you have to have the same opt out rights and procedures that were formerly applied in a union context.”

Anthony Sanders 24:35
Right. That was one of the Hudson factors you were talking about earlier.

Rob Johnson 24:38
Yeah, exactly. And that was the alternative argument that the plaintiffs had made was, you know, even if we can be forced to join, the opt out procedures aren't sufficient to comply with these Hudson procedures. Now, the Fifth Circuit addresses both issues, and actually splits with a Ninth Circuit opinion that had said you don't need Hudson procedures in the state bar contest. And says, yes, you do. And I agree, it's confusing because I don't really, I can't imagine how they think that the second holding is ever going to be relevant if the first holding stands up. What I mean is if they if you can't be required to pay dues at all, engage in non-germane things, then why would they ever have to apportion out a part of it to you? It just doesn’t, the two don't fit together. But they have a footnote where they say, well, in our circuit, we can issue holdings in the alternative. I don't know. I mean, I that's fair enough. But I don't know that this is really an alternative holding. It's kind of like, in this hypothetical situation that could never arise, here's what we think should happen. But I guess they just think that well, the Ninth Circuit ruled on this issue, this issue is kind of percolating out there. So, you know, we should kind of have our say about it as well.

Anthony Sanders 25:56

Yeah, I think that's what confused me is, it seemed like, at that first part of the court should have just stopped. And that and that because, that's what they were asking for. So, but that was an interesting opinion. The same day, another opinion from the same panel comes out, which really follows from that on Louisiana's structure of Louisiana's mandatory bar, anything you want to add on what the Fifth Circuit said there?

Rob Johnson 26:28
Yeah. So, this one's also kind of interesting, because it just, you know, this one's decided on the pleadings. And so, it's much more factually kind of bare bones. And it really, to a large extent, the panel seems to have treated the Texas cases as a kind of lead opinion and the Louisiana one is more of a follow on.

Anthony Sanders 26:49
The Louisiana one's a Judge Willet opinion, by the way, everyone. So, it's fun for that reason too.

Rob Johnson 26:55
Oh, it is beautifully written, but it's kind of interesting that they decided to publish it. Because, you know, the other one is kind of clearly the lead opinion. I'm not sure what the kind of reason for having two opinions that say basically the same thing was, but the interesting kind of aspects to this is, you know, here there, it was on the pleadings, and just, Judge Willet, I was going to call him Justice Willet, but he is not Justice Willet. Not anymore.

Anthony Sanders 27:20
He will always be Justice Willet to some of us.

Rob Johnson 27:25
Judge Willet, you know, basically says, well, there's a dispute about whether some of the Louisiana bars expenditures are germane or not germane. And we don't need to decide that on the pleadings. We just say that they've alleged that they do some non-germane stuff, and we send it back. And you know, all of that will be decided on the full factual record, which I only mentioned as interesting because it stands in contrast to what the 10th Circuit did, then the opinion that we will get to I assume, eventually.

Anthony Sanders 27:54

Yeah, well, let's get there in just a moment. I was I just wanted to say it's interesting with how Judge Willet opens this opinion, because he talks about in the in the wake of COVID. And, and people not, you know, coming together to do things like take bar exams, the question is being asked, “Is the bar exam, the best way to measure how to be a competent lawyer,” and he says the exam is being reexamined, which doesn't have a lot to do of the case. But I thought it was neat that he raised that question as well, and then went on to the other issues. But just a couple days before these cases, there was the 10th Circuit case. So, tell us what's going on there was challenged the mandatory bar in Oklahoma.

Rob Johnson 28:40

Yeah, so this one is interesting, because it basically does the same thing. But it does it in a very strange way. So, this case also is on the pleadings. You know, the plaintiffs here had alleged that there were a number of things that the bar were doing that were not germane, including lobbying for various substantive changes to the law, like a big one being that the bar had lobbied against changes to statutory damages available in tort lawsuits, like a big, big issue, you know, of interest to a lot of lawyers, but also a huge substantive issue as well. And then in addition to that they had they complained about a lot of the different articles that had been published in the Oklahoma bar journal magazine that goes to all the lawyers and they said that these articles addressed all kinds of controversial things that they didn't necessarily agree with. And then they also complained that the bar hosted these conferences where people would make controversial statements at the conferences. So that's kind of what they were focused on in the pleadings. It comes up on appeal. And the 10th Circuit does two things that I think are interesting, and I'm not sure right. And the first is it basically says, well, anything that's alleged in the complaint that happened more than two years ago is basically irrelevant because there's a statute of limitations, which, you know, I get that the I get the idea that there has to be kind of a cut off. Like, you can't argue I can't be required to join the bar, because it's something that bar did like, you know, 30 years ago, like we're talking about the bar today, not the bar in the past. On the other hand, like, the statute of limitations is about joining the bar, like I'm being required to join the bar today, not like two years ago, and I'm challenging joining it today. And the relevance of these things that the bar has done is to show what kind of organization I'm being required to join. And those don't become irrelevant, just because they're more than more than two years ago. So yeah,

Anthony Sanders 30:42

It's evidence of a past practice. I think the statute of limitations is entirely irrelevant when you're talking. I mean, we're talking about damages from three years ago. Sure. But you're talking about what the bar gets up to. Right? It's a little bizarre that they cut that off.

Rob Johnson 30:59
Yeah, it's it creates this weird situation where you basically have to wait for the bar to do something you don't like, and then like, sue, within two years of that thing. And then if you if you strike at that exact moment, you can never be required to join the bar again. But if you like, wait past the two years, suddenly like, it doesn't matter. It just doesn't make any sense. Like, the question is, are you being forced to join the bar right now? Yes. Okay. Well, is this the kind of organization you can be forced to join?

Anthony Sanders 31:24
Right, but lucky for the plaintiffs, there were, I think, two articles right in the in the bar journal that that made it in the two years.

Rob Johnson 31:32
Yeah. So, there were a number of articles in the in the two years, I think it was like six or something. But the court narrows it down and says, well, some of these articles are, you know, are germane and some of them are, are potentially not germane. And so, it goes through these articles. And it basically says, well, like, I forget, like, some of them were about like, you know, can you? Oh, gosh, what was like the number of lawyers working in the legislature? I think here sorry, for the paper ruffling, let me. Yeah, so, one of the articles is about, you know, advocating that more lawyers should be in the legislature. And the court says, “Yeah, that's germane because that's about the legal profession.” Also, an article saying, you know, the criticizing merit-based process for selecting judges, the court says, “That's germane too,” and then another about encouraging people to warn the Bar Association about the harms of politics in the judicial system. I'm not sure what that means. But of course, that's germane too. But on the other hand, there's an article about Citizens United, criticizing Citizens United, that's not germane. And then there was an article about tort lawsuits by prisoners. And the court says, “Well, that's not germane, either.” So, or potentially, at least, so then it sends the case back, and there's going to be a discovery about these two articles. And then the courts say to make a decision about whether those two articles are like sufficient, given everything else that the bar does in order for people not to have to be joining the bar.

Anthony Sanders 33:11
I just kind of see a little hint, hint there.

Rob Johnson 33:15
Well, I don't know. It's sort of bizarre, right? Is it really all just about two articles? And like, you know, it's interesting to me, too, because the Fifth Circuit, actually, in his opinion addresses because the plaintiffs in the Texas case had challenged some of the articles in the Texas bar monthly. And the Fifth Circuit says, “Yeah, no, the articles are not the problem. It's the lobbying.” And the court. It says, like the articles, you know, they're publishing a newspaper, but they're not endorsing everything that's in this magazine.

Anthony Sanders 33:48
Right. It doesn't have your name on it as member of the bar, it's whoever wrote it.

Rob Johnson 33:53
Right, exactly. And just providing a platform to kind of spread speech around a little bit is not necessarily endorsing it in a way that, you know, lobbying would be. So, you know, it's kind of interesting that the Fifth Circuit, completely uninterested in the magazine. On the other hand, the 10th Circuit, the only part of the case that they seem to care about, but it creates this odd. I mean, it's just an odd result, because you basically then are setting up the federal courts is like the super editors of the State Bar magazine, but only for articles that were published in the last two years.

Anthony Sanders 34:31
One other thing going on these cases that we didn't talk about much when we're setting the stage is there's freedom of speech claims. And then there's freedom of association claims, right. And as is often discussed in freedom of association cases, it's not exactly in the First Amendment freedom of association but it's pretty grounded because of course, being able to speak you need to associate with people and there's also the assembly clause in the First Amendment, which sounds like people associating publicly. So. So the case law, I know, in Keller is more direct on a freedom of speech claim, but a little bit more “well, you could have more of an issue here with freedom of association.” And some of that is what's going on in these cases. Right, that one is foreclosed, but when you have a bit of a shot on.

Rob Johnson 35:27

Yeah, and so there's, it's, you know, the, I think I got into this a little earlier, like the court is basically parsing Keller very narrowly. In saying Keller said, if it's a speech claim that it's this chargeable, or, you know, germane non germane line, but that there might be this association argument that like, you can't be required to associate if the bar engages in non-germane stuff. And so, you know, that kind of lay around for 30 years, and now, people have picked it up.

Anthony Sanders 36:01
So, we have, we went, so we've had five circuits, by our count weigh in on this issue. And listeners, you can let us know, feel free, you can email us or find us on Twitter, if we're missing one, but I think five circuits, one's been denied cert, one just filed for cert, the Ninth Circuit one is now pending at the Supreme Court. I think it's scheduled for the long conference in September. And then we have these three new ones that if I'm guessing we may see cert petitions from them too, in the not-too-distant future at all. What is your crystal ball say, Rob, for where these are going with the court might think of them what different justices might think of them?

Rob Johnson 36:48
You know, I think that it's going to become increasingly, I don't know when the courts going to take this, but it's going to become harder and harder to ignore this issue. Because I mean, if you look at just these opinions that have come out in a very short time, you're already seeing the circuits go every which way on this, right? Like the Texas bar opinion is basically saying like, well, magazines we don't care about. But, you know, lobbying we do care about. The Oklahoma opinion is doing something very different, you know, focusing on the magazines, there's this weird statute of limitations question, there's a split between the Fifth and the Ninth Circuit on whether you get these opt out procedures. You know, we're seeing circuit splits galore that are, you know, already starting to come out here. And ultimately, what that all just shows is, this whole idea of distinguishing between germane and not germane expenditures, just doesn't really make any sense. It's impossible to administer. And this whole area, just like the court decided in the Union context, we just need to stop doing this at all. And we just need to say, you know, if you want to join, you know, this volunteer association that's going to do this stuff, that's just got to be voluntary. And those people who want to join great, those people who don't want to join, great, and, you know, give people the choice, which is how we do it in, you know, 20 out of the 50 states. And, you know, certainly there's no reason that 30 states have to force people to join these kinds of associations.

Anthony Sanders 38:24

And even further, I mean, we know from our work at IJ, that this comes up in other professions to where you need to join Association in different areas. And you know, and similarly, it comes up in these industries, where everyone is forced to pay in to make, you know, advertisements, there's that famous one about the milk, the milk industry from years ago, where, where it was okay to force people to pay in and advertise milk that I think now is very much in question. So, something swirling around this whole area is going to have to be taken by the court sooner rather than later. And not just because of the lawyers, but lawyers being lawyers are suing about being lawyers. And so, it's not surprising that all of a sudden we have these, these five different circuits going every which way.

Rob Johnson 39:17
Yeah, and you know, at the end of the day, I mean, I think the Fifth Circuit opinion also is a really neat illustration of the fact that the germane/non germane line doesn't really make sense, right? Like, why can you not be allowed to, why can you not be forced to subsidize speech about, you know, visitation rights for grandparents, but you can be forced to subsidize speech about diversity in the legal profession like that, there's nothing sort that makes any sense there. I mean, people might disagree with one and agree with the other and it has nothing to do with whether it's germane or not, that's just kind of an imaginary line the court has drawn in some of these past decisions, and you know, it also it's an impossible line to draw. It's, you know, sort of like, we know it when we see it line. But that's not a basis on which people's speech should be regulated.

Anthony Sanders 40:13
Well, on that very germane note, I think we'll, we'll leave it for now. But, Rob, thanks for coming on. And even though I didn't educate you on much Roman history, the listeners will thank you for your education on these much more pertinent matters.

Rob Johnson 40:35
Well, it's all Greek to me, Anthony.

Anthony Sanders 40:37
That's the other half of the Loeb series. And I'd like to say to all of our listeners, thank you for joining us today. I have two final things to say. One is that football is coming home. If you happen to be watching the Euro Cup this Sunday, you'll know who I'm rooting for. And finally, I'd like to ask all of you, as we always do here to get engaged.