

# Short Circuit 192

**Anthony Sanders** 00:01

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, October 7, 2021. If you enjoy this podcast, you should check out our newsletter, an often-irreverent take on recent court of appeals opinions, which we publish every Friday. Also, please check out our sister podcast, the documentary series Bound by Oath. If the government does you wrong, what's stopping you from taking it to court? Well, as we learn on this podcast week after week, quite a few things, but frequently, what's standing in your way is funnily enough, standing. I think what government attorneys like to argue more than anything else is standing. That's the legal doctrine that says when you file a lawsuit, you need a dog in the fight, cash on the line, a bone to pick, something to gain or something to lose a stake in the outcome, or a shrimp on the barbie. In other words, winning the case will give you something specific, and not just further a cause you believe in. All too often, however, people are thrown out of court for lack of standing when they plainly have been injured and do have something to lose. We're going to look at two cases today where the courts took their time wading through the thicket of today's standing law, and unlike many other times, ended up not cutting the plaintiffs off at the knees, but allowed them to continue to the merits. Whether those merits are meritorious, as we'll see, is a different question. For our first case, we must fully disclose it's one we're litigating here at the Institute for Justice. It's on the subject many of you are interested in; in civil forfeiture, and it's litigated by the very interesting Paul Avelar, my colleague at our office in Arizona. He and his clients just won an appeal in the Ninth Circuit challenging Arizona's forfeiture laws. He's here today to tell us the tale of a car, a dollar, and a whole lot of standing standing in the way. Welcome back to the show, Paul.

**Paul Avelar** 02:13

Thanks, Anthony. It's good to be back. Finally.

**Anthony Sanders** 02:17

Well, we like to make some cases age like fine wine, just like the Ninth Circuit. Standing also stood up in the Second Circuit this week, when some states who enjoy Levying high taxes sued the federal government paradoxically for levying higher taxes. As you'll hear, the state's defeated their standing

problems, but the paradox itself wasn't so kind to them. Here to tell us all about it, in his first appearance on short circuit, is IJ attorney Will Aronin. Thanks for coming on Will!

**Will Aronin** 02:49

Thanks so much for having me, Anthony. I'm really excited to be on the show.

**Anthony Sanders** 02:53

Well, we're excited to have you, but first, Paul, I think we could spend the next two hours on this case and this opinion, but we're not that kind of podcast. So, if you could in a nutshell, and it's okay if it's a coconut, what happened at the Ninth Circuit?

**Paul Avelar** 03:10

Well, you know, it's... what a long, strange trip it's been. This is a case that we filed five years ago in state court, and yet here we are five years later in federal court. Finally get a ruling on our pleadings essentially. The upshot of today's ruling is that we have spent years litigating about the right to litigate about \$1. So, five years ago, our clients, the Platts, their car was seized in Arizona when their son was driving it, and it was subjected to forfeiture. And under Arizona's then system of forfeiture, the Platts found themselves in what is essentially an administrative proceeding where the prosecutor, whose office was going to profit from forfeiting the car, got to decide whether or not the Platts could, in fact, fight back against the forfeiture. And if that sounds wacky to you, it sounded wacky to us as well, and we sued. And at the time, we asked that the courts order the government to return the car to the Platts and also award them \$1 in nominal damages. That is damages for the completed violation of their right. About two weeks after we filed the lawsuit, the government gave the car back voluntarily. Said, you know, we've decided to give it back to you, but we haven't done anything wrong. And so, there you go, and then they removed the case to federal court, and we started talking about mootness, which is the close cousin of standing. It's essentially standing in time. Not only do you have to have standing at the beginning of the case, you have to have standing throughout the case, and these two doctrines are called ripeness, which is essentially, at the time you filed the case, do you have a ripe injury that can be redressed, and as the case continues, do you continue to have a ripe injury that can be redressed by the courts. And so, in a series of rulings, the federal court, the federal district court in Arizona, ruled, well, you can't get prospective relief here. I can't order the government to give you your car back. They've given you your car back, so there's nothing I can do for you. That's not there's no remedy for you, even if there was a violation. And under federal law, and this is where things begin to get really complicated, as if standing wasn't complicated enough already, the county prosecutors are actually

agents of the state, and as agents of the state, and their official capacity, they're not persons under 1983. So, I can't award you \$1 for the violation of your federal rights either. Aha! But we had also claimed a violation of this state constitution, and we don't have those same sorts of issues under state law. Under state law, we can sue them for \$1 in nominal damages, even if they are agents of the state, and based on some rulings on federal courts rule on state law with some frequency, not always correctly, and sometimes rule in areas where the state hasn't actually settled its law yet. And the federal district court ruled essentially that we couldn't sue the state for \$1 in nominal damages either, because we hadn't complied with something called the notice of claim statute. And we said, we don't have to for nominal damages in this case. So, that was about two and a half, three years of litigation before we even made it to the Ninth Circuit, and then the Ninth Circuit took its time, as it is want to, and just recently ruled that, in fact, yeah, you do have a redressal claim here. You didn't have to file a notice of claim under state law, which means you can ask for \$1 in nominal damages. And as the Supreme Court just clarified or reiterated last year in a case called *Uzuegbunam*, the case that's easy to understand, but hard to spell,

**Anthony Sanders** 07:26

that's a good guess though

**Paul Avelar** 07:28

you can... *Uzuegbunam* is the traditional spelling. You can ask for \$1 in nominal damages to remedy a past violation of your rights, and that is enough for Article Three standing. That's a remedy. The courts can give you \$1 to remedy the violation of your rights. And so, you can litigate about that. And so, the upshot of the ruling from last week, although it covers 49 pages, is that we can go back to District Court, and now finally, litigate the merits of the Platts constitutional claims. And when we win, we get \$1. We've spent five years, and I don't want to even think about how many hours of attorney time, to win the right to fight over \$1. But that \$1 is important, because it remedies the Platts' rights. It says that their rights were violated, and it establishes the law that what the government did in this case is in fact unconstitutional. And all those things are very important. So, we were looking forward to doing that. But yeah, this has been a case about forfeiture, that ever since it got to federal court has been entirely about standing, and ripeness, and mootness, and 1983 personhood doctrines, and Manel, and all, a whole bunch of just stuff that most sane people will have never heard of before, but things that really do get in the way of people getting their day in court when their rights have been violated by the government.

**Will Aronin** 09:10

So, when I was reading the case, I was very excited about another aspect of the nominal damages claim, and I have to admit, I have absolutely no idea how to pronounce *Uzuegbunam*, or *Uzuegbunam*, or whatever it is. There's a couple of cases I don't know how to say. But I see helping a lot in qualified immunity and sovereign immunity cases too. This may be the year where nominal damages is finally getting it's time to shine. In qualified immunity as most our listeners know, one of the huge problems we have is that you can't win a case, you can't show that a right is clearly established, unless a court has already said that it's clearly established, and you keep going in this circle. Now, if you can keep nominal damages alive, and you can say that the financial aspect that protects the officers from a lawsuit do not apply, because it's literally just \$1, there's no real financial risk. If you can keep cases alive, and actually get courts to say what rights are clearly established, you can actually make real headway on fixing some of the problems with qualified immunity too.

**Paul Avelar** 10:17

And Anthony, I know you and I both share a passion for state constitutions, and this is one of those instances where, you know, the state law, constitutionally, may be quite different. The Arizona Supreme Court has said, our state constitution is broader than the federal constitution when it comes to due process. And so, it's a chance to litigate about that. And then also state law, in some instances, makes it possible to pursue claims when you can't, under federal law. Like, you know, Will was just talking about qualified immunity. Arizona doesn't have qualified immunity doctrine for state constitution. The 1960s, our Supreme Court ruled that Arizona didn't even have sovereign immunity. And so, in many ways, it can be easier to litigate a claim under the state constitution, in state court, under state proceedings. You may be able to more easily drive a decision there. Now, there's a whole bunch of other things that you have to comply with, like notices of claim requirements, which the Supreme Court has said you can't require for federal claims. So again, there's all of these different doctrines, all of these different things that make it harder to pursue your constitutional rights, but this is another case in which pursuing your rights under both the federal and the state constitution has really allowed the Platts to continue to push forward.

**Will Aronin** 11:37

And what I'm really excited about is we now have a powerful decision from the Ninth Circuit saying that the financial considerations that protect a state, and with a notice of claim requirement, don't apply because you're only suing for \$1. It's not about money. That applies equally well to saying the financial considerations and the protections for the police with qualified immunity also shouldn't apply for just \$1.

**Anthony Sanders** 12:02

Yeah, it was gratifying to see that statement about notice of claim because, I mean, I've been involved in past times, in a couple cases where for the benefit of listeners who don't, luckily don't have a law degree, what a notice of claim does is when you're going to sue the government, doesn't apply for most other people, but when you're going to sue the government, you have to let them know you're going to sue them, and then they get a certain amount of time to try to, I guess, come to you and try to work out a deal. You have to tell them how much they've injured you for, and then if you don't like what they come back with, or they just blow you off, then you can go to court and say, you know, you owe me \$50,000 of damages for this accident that I got into with you, or, you know, whatever it is. And I've always... States have said, state courts have said, look that that shouldn't apply when it's just an injunction or a declaratory judgment of unconstitutionality that you're asking for, because, I mean, what is the city going to do in that case? And it goes, it stands to reason that if you're literally asking for a dollar, that this whole song and dance of a notice of claim, which I admit I did do in one case, we asked for a dollar, and you know, funnily enough, the city never got back to us, and so we filed our lawsuit and went on our merry way, that it doesn't apply, and in this case, and I see that reasoning going to qualified immunity. Paul, for the sake of completeness, because I know some people would like to know the nuts and bolts of this case, even though the appeal was on standing, tell us about this Kafkaesque situation your clients were in about what path they take in challenging this seizure and forfeiture, and then what the district attorney cleverly did with what your clients asked for.

**Paul Avelar** 13:53

So, five years ago, Arizona's forfeiture law said that if the government was trying to forfeit your property, they would tell you we're trying to forfeit your property, and they can make something called uncontested forfeiture available which is really a misnomer. Uncontested forfeiture is really an administrative scheme or administrative proceeding, where instead of filing a claim in court, you file what's called a petition, and you file it with the prosecutor, and also with the agency that seized your property, your car in this case, in the first place. And then, the prosecutor, like in the one who's filed the forfeiture papers in the first instance, and whose agency stands to profit from the forfeiture, can then make a decision as to whether or not to proceed with the forfeiture or not. And the way the system is, I think, meant to work, is the prosecutor makes a decision within 90 days, tells you what that decision is, and then you can essentially appeal that decision to the court. And there's a loophole in Arizona system, and that's what happened here, the prosecutor can say, I don't think your paperwork is sufficient, and therefore you didn't timely file a complete petition or claim.

**Will Aronin**

It's like you never said anything.

**Paul Avelar**

Exactly. And so, under Arizona law, the prosecutor can then go to the court and file what's called an application for forfeiture. And that application says, no one's filed a claim or petition, so the property is abandoned. Give us the property. And the standard, the burden of proof on the government goes from clear and convincing evidence all the way down to just probable cause. And as the Arizona Supreme Court itself has recognized, this is a process that their words, virtually guarantee of forfeiture, because there's literally, it's an ex parte proceeding. You are precluded, that you the property owner are precluded from the proceeding. And so, there's no one there to fight back against the state's case. And just the cherry on top of this whole incredible system is, as part of the early case workup, we did FOIA requests, and got a history of all of the judgments that were entered in Navajo County prior to our case for like five years, and we noticed something peculiar. They were all citing a statute, the judgments that were prepared by the prosecutor's office, citing a statute that hadn't existed in Arizona for 23 years at that point. They had just never updated their forms, and no one had caught the mistake. So, it goes to show this sort of, you know, close scrutiny, I'm sure that judges were applying to these things by signing off on judgments that cite statutes that don't exist anymore. So, it's a real problem. It's such a problem that actually, earlier this year, the Arizona legislature abolished the uncontested forfeiture system, and now there's only one way for the government to do forfeiture, and that's in front of a judge, and your rights, they're perfectly laid out, and you don't, you can't fall into this little trap for the unwary, and really the unrepresented. And that's the problem in most of these forfeiture cases. People can't afford a lawyer, can't get a lawyer in time, they wind up doing this on their own, and they are really at a disadvantage.

**Anthony Sanders 17:26**

Well, that's some great news that has come out of the efforts of the Institute for Justice, and in this case in particular, so we can, we can enjoy that victory and then we also look forward to hopefully more victories in the case of this car, and hopefully one day a dollar. So, thank you, Paul. Will, you're going to tell us about some states that are interested in much more than a dollar. In fact, they're interested in, I understand it, they're interested in SALT.

**Will Aronin 17:59**

In salt. So, my case, and I want to start with words that I am not sure have ever been said before. I have a really interesting tax case that I want to discuss, but that's what it is. It's New York versus Yellen, and it's the salt case. It just came out of the Second Circuit like two days ago. And that is where four states, New York, Connecticut, Maryland, and New Jersey, sued to say that capping the state and local tax deduction, SALT, state and local tax, that was unconstitutional. Now I think anyone listening to this podcast probably knows, but in 2017, the 2017 tax plan, or the Trump tax cuts, whatever you want to call it, it lowered a lot of taxes, but it also kept or significantly weakened the SALT deduction, and SALT also includes property taxes. That deduction is particularly helpful and popular in high tax, let's be honest, blue states, because it allows you to deduct what you already paid in state taxes from your federal income. The 2017 plan didn't eliminate it entirely, but it did cap it at 10 grand. Very quickly, this is how it works, and these are just rough numbers. Please don't email me that the marginal rates don't work. These are just made-up numbers. If someone has \$100,000 in taxable income, and they paid \$20,000 to New York City in New York state taxes, their income is \$80,000 when you deduct the SALT, when you duck the state local tax, for federal tax purposes, exactly. They capped it at \$10,000 now, so the income is 90,000. It just raises your federal tax rate. And honestly, this is double taxation. It just is. You are taxing income that has already been taxed. And like I said, it's really popular and important in blue states, and Democrats somewhat rightly felt targeted by the Republicans when they passed this change. And as with most things, both sides have some real points, and it's interesting because there's also some hypocrisy on both sides, and it's just fun to talk about. Republicans point out that this deduction subsidizes high tax states at the cost of low tax states, and I'm not quoting, but I feel like I'm kind of quoting here. States should not have such absolutely insane tax rates, and I say this as a born and bred New Yorker. However, honestly, for the piracy part, this is double taxation, and they've been on record, the Republicans have always opposed double taxation. Conversely, Democrats talk a lot about tax the rich, and this deduction is really only for higher net worth individuals, and this is especially true because the 2017 tax cuts also doubled the standard deduction, so it's really, generally, this is the demographic. That Democrats want to tax more.

**Anthony Sanders** 20:50

But people who pay over \$10,000 in taxes, I mean, that's, you know, your average man on the street right?

**Will Aronin** 20:55

Unless they use the standard deduction, but I don't want to go through all of the details of taxes, but I can, but I have a feeling nobody in the world wants me to. But that's what the SALT deduction is, and

it's also why everyone cares. So, whether you like the SALT deduction or not, there's arguments on both sides, but there are policy reasons to keep it, but that's not what this case is about. New York did not argue the policy. They sued, and said that just reducing it, capping it, was completely unconstitutional. They made two arguments. Honestly, neither of them was very strong, at least in my opinion, and the Second Circuit rejected them both, so, and the second circuit's opinion too. Their arguments were that the Constitution itself mandates this deduction, and just eliminating as per se unconstitutional, and that capping the SALT deduction infringes on the state sovereignty and coerces them to abandon their preferred fiscal policies. Now, before we hit the merits, keeping with the intro of this podcast, I want to briefly talk about my absolute favorite part of the decision, which is actually standing ironically. Basically, to have standing, the states have to have been injured, right? And New York argued that it was injured, because this effectively makes their taxes higher, and these higher taxes reduce property values, cost jobs, and hurts the economy.

**Anthony Sanders** 22:16

If only there was something you could do about those high New York taxes.

**Will Aronin** 22:20

It would work better with video, but you all know that Will Smith meme of him just pointing aggressively. I just want to be clear; New York is saying high taxes hurt the economy. That's from New York. And the Second Circuit bought it. They said that the states have standing to make the arguments, but the arguments themselves were rejected. To start, they said that the Constitution actually requires this deduction. The plain language does not discuss SALT at all, and this is also where history matters. This is another kind of fun part of the decision. There's like this, in the beginning, the federal government was small and did not need income taxes to fund itself. But as its size grew, so did its need for revenue. That may just be funny to me, but I laughed at least. But sir, as long as... so, the history was important. So, as long as they had, as long as Congress enacted income taxes, they also had some version of a SALT deduction, partially because it does make sense, and it is double taxation, and you want to make sure the states also can get their cut and can tax as well. But the idea that the Constitution requires it is belied by the history, and the corporate, he's said that pretty aggressively. While there has been some SALT deduction, it has been changed over and over, it has been weakened over and over, it has been redefined over and over. So, for example, it used to cover sales tax. It generally does not anymore. There is an alternate minimum tax, so it may just not apply to some taxpayers. The existence of the standard deduction means that honestly, most people don't use this anyway. You only use this deduction if you itemize. So, the Congress has already caught it. There is nothing in the Constitution



that requires it. It may be good policy, it may not be, but the Constitution doesn't mandate that because New York likes it, it's therefore constitutional. So, that argument was just flatly rejected. Second, coercion. The states argued that getting, or even capping this deduction, effectively is so coercive, that it makes them abandon their chosen fiscal policy of again, high property, and high state and local taxes. This, again, was rejected. Congress is allowed to incentivize and can use fiscal policy that may impact upon States choices, but the standard for coercion is, as the Supreme Court put it, and the Second Circuit quoted, it's effectively if the Congress is putting a gun to the states head, which is not there. The Supreme Court has only held one time that fiscal policy was coercive, and that was NFIB V. Sebelius, the Obamacare case, and that was because Congress was threatening to cut all of a state's Medicaid budget unless they expanded Medicaid, and the court said that was just too far. You were effectively cutting 10% of the state's budgets conversely, and I also like this example. New Jersey said they were going to lose \$100 million in property taxes and transfer taxes over two years. Also, New Jersey has insane property taxes. That's just, it's horrible. But 100 million over two years, except it's budget is \$37.3 billion a year. So yeah, it's not 10%. Also, they argued that this violated the principle of equal sovereignty amongst the states. Again, the Court rejected it, kind of out of hand, and they pointed out that if we have to treat the states equally, they're only disproportionately harmed by getting rid of this deduction, because they have been disproportionately benefited by this deduction for about 100 years. So, you can't have it both ways states.

**Paul Avelar 26:15**

So, this is an interesting case, sort of top to bottom. And will is right, the merits here were not good. This was a weak case. But I'm always interested in cases where states assert their own sovereignty interests against the federal government. For whatever reason, for whatever geeky reason, I've always found that area to be really interesting, because I'm at IJ. Even before I was at IJ, I just thought that this was, you know, if we're serious, if the states and the federal government are separate sovereigns, like what does that mean? And maybe I think it's probably tied to my interest in history. And, you know, there's this idea that the state's founded the federal government, and so the federal government can't take away from the States. Well, you know, the federal government actually set up a majority, clear majority, of the states. The original 13 states, of course, were the ones that established the federal government. But after that, the federal government established territories, and admitted states, and the Constitution doesn't say a whole lot about how's that to be done. What really happened was the Northwest Ordinance, which predates the Constitution, set up a system for not just creating territories and expanding the United States, but was very clear that when we admitted states, they were going to be on an equal footing with the original 13 states. And so, there are just some things the federal

government can't do to two states, and that's true for all of them. And this is important, not just legally, obviously, for things like the equal footing doctrine, the equal sovereignty doctrine that Shelby County talked about a couple of years ago. It was really a rejection of the colony system. The US came out of British colonies, and the colony system was how most nations sort of expanded themselves. And what's interesting is that originally, the US government, or the United States decided, no, we're not going to have colonies. When states come in, they're going to be just the same. So, in the Northwest Ordinance, Indiana, Illinois, Ohio, those states come in, and they're just like Massachusetts, or Virginia or New York. Same Same all the way across. And so, I've always found that to be, you know, sort of an interesting aspect of sort of the American view on political rights.

**Anthony Sanders** 28:51

I would say, one, I agree completely with the history, Paul. One exception that I know, perhaps our listeners in Vermont may bring, is that Vermont was not created out of US territories. It was actually a merger, because it was a preexisting sovereign nation that had declared its independence from New York, and then was finally let in, but other than that example, yeah, all states have been created out of the, you know, what of the status of the land was before that, usually a territory, but it was on equal footing. I mean, I think the most, you know, maybe the most drastic example of this is West Virginia, because West Virginia was taken out of the state of Virginia somewhat without Virginia's authorization. You can argue that, and our colleague, Adam Shelton, wrote a blog post on this a year ago, but it was then created as a state on equal footing, and later went over Virginia was readmitted to the union, it's not like, you know, it went back together. It's the state as a separate sovereign within the 50-state system. Now 50.

**Will Aronin** 30:11

I like to think I know a lot about history, but all I can really say on this is, yeah. I concur.

**Anthony Sanders** 30:18

So, Will, you're not a New York resident anymore, so you don't have to worry about SALTs, but what do you think knowing the fiscal realities of what your people live under? What do you think this bodes for the future?

**Will Aronin** 30:35

Higher taxes?

**Anthony Sanders** 30:39

That's the solution.

**Will Aronin** 30:43

That seems to be. Yeah, um, I lived in New York City for a decade. I only moved to Virginia about a year and a half ago. I can just say I really prefer the taxes here.

**Anthony Sanders** 30:56

Well great. Yeah. I was about to say, they're not (*inaudible*) being in Arizona compared with that. Well, I hope we've uplifted some of our listeners from thinking their own tax situations, and maybe depressed a few others, but what whatever you are, you're all sovereign Americans together, who all get to pay the same federal income tax. So, on that note, I'd like to thank Will and Paul for coming on the show and talking, standing their ground on some standing, talking through these issues. For everyone else, I hope you also will stand your ground, and for all of you to get engaged.