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SPEAKERS

Justin Pearson, Anthony Sanders, Michael Bindas

00:00

A Anthony Sanders 00:07

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Sunday, June 5, 2022. Why are you recording on a Sunday? Well, normally we would not do such a thing. But this is no normal Sunday, because we have a live studio audience at the Institute for Justice's Law Student Conference. How you doing, everybody? [audinece cheers] That's right. Every every year, we have one of these conferences. We bring some of the top law students from around the country to learn about litigating for liberty, public interest law, winning in the court of public opinion, yada, yada, yada. So they're all very excited to be here early on a Sunday morning, I can tell you that. And we're going to also be having our normal format talking about a couple of great cases, or not so great cases, from the Fourth Circuit with a couple of IJ's top attorneys. First though, I want to make an announcement for our listeners who are in the Los Angeles area. Ihere is a chance to engage with IJ Live coming up. It's on June 30, which is a Thursday. We're going to be at UCLA Law. And we're presenting a new study called Constitutional GPA: Is Your Government Preventing Accountability? It's a new database and project of our Project on Immunity and Accountability about grading states for clearly established law to establish qualified immunit, which is something that we talk about here on the podcast quite a lot. There also be a Short Circuit Live. So it's going to be either side of lunch. The lunch once again will be free. We're continuing to disprove that maxim of no free lunch. So you can register for this event, again, Thursday, June 30. We'll put a link in the show notes to register. It's on our website. And we hope to see some of you there. Parking is available, which isn't always a thing in Los Angeles sometimes. So you LA listeners who guide your travels on whether you can park, you'll be safe there. And we look forward to seeing many of you. Anya Bidwell, IJ attorney, and Kendall Morton of our Texas office will both be there and they'd love to meet some of you. But today, we have these Fourth Circuit cases. Joining me are Justin Pearson, managing attorney of our office in Miami. Welcome, Justin.

J Justin Pearson 02:51

Hey, Anthony. How you doing?

M Michael Bindas 02:53

Just chipper, thank you. And Michael Bindas is here too. Michael is in our Washington State office. And he's also director of our educational choice litigation. Hey, Michael. Top of the morning.

A Anthony Sanders 03:05

Well, let's start with Justin in Virginia. And we got something about riding the bus. Do you ride the bus, Justin?

J Justin Pearson 03:15

I mean, I have in my life, but it's been a while.

A Anthony Sanders 03:17

Are you one of the 98% of Americans who believe in public transit for other people?

J Justin Pearson 03:23

I definitely believe in the other people part. I'm not sure about the first part.

A Anthony Sanders 03:26

Okay. Well, we'll leave that aside. Public transit does need to fund itself some way. And luckily, it's not always through taxes. But it's through advertising. But apparently they didn't like all advertising.

J Justin Pearson 03:38

No, that's exactly right. We have here an interesting case about advertising on the side of buses. I think that's a sentence that's probably never been said before in human history. But I promise you it's true. The name of the case is the White Coat Waste Project v. Greater Richmond Transit Company. And what's going on there was the government run bus company in Richmond had a policy of not allowing any political action groups to speak or, if it wasn't a political action group, to engage in certain types of non-politically neutral speech. However, the

policy was arbitrarily applied in a number of ways. And so there were all sorts of exceptions where all sorts of different groups that were in favor of political advocacy could speak, could say things that weren't neutral. Also, there was an exception for all government speech. But then every now and then they actually would apply this arbitrary restriction. And so for example, when a vegetarian group, an animal rights group, wanted to have an ad that said, "Eat More Chickpeas," that was rejected because they were a political advocacy group. Meanwhile, if they had been a natural chickpea company with an ad saying eat more chickpeas, that would have been okay. And what happened here. the actual rejection that gave rise to this lawsuit was an organization against animal testing wanting to run an ad that showed dogs behind bars and asking the local VA hospital to stop with animal testing. And that one also got rejected. And so they filed a challenge. The district court ruled in their favor in terms of an as applied challenge, but not in terms of the facial challenge. And so, the bus company, the government-run bus company, appealed the ruling that it was unconstitutional. And then the advocacy group cross appealed regarding the ruling that it was not facially unconstitutional. And so, basically, there were three issues on appeal, all of which I think are interesting. So first, you know, the bus company claimed that because it was a corporation, the First Amendment didn't apply, right? And we have really smart students here today. Hopefully, they realize the First Amendment protects you against the government. It doesn't protect you against private entities. This is actually something we're hearing about quite a bit in the news these days with social media and things like that. But what's important to realize is sometimes the government will create and control corporate entities. And so that's what was going on here. There's actually a test they relied on called Lebron or Lebron. I prefer to say Lebron because, like in basketball, relying on LeBron was the way to go here. And basically what it said was that if the corporation is created by the government and the board of directors are controlled by the government, then the fact that the government chose to create a corporate entity won't allow the government to avoid constitutional restrictions. And so that was exactly right. That's what happened here. The government had created this bus company, the government controlled the board of directors of this bus company. And so despite the fact that the bus company tried to argue that it was not bound by the First Amendment, the Fourth Circuit correctly affirmed the district court in saying, No, you're still part of the government, even if you happen to be a corporate entity. So that allowed them to get to the actual constitutional argument. And what the court looked at was whether this law was capable of reasoned application. Basically, what you need to know is because this is speech in a government forum, you have to figure out what type of forum it is. And they can get a little complicated. So for example, on one hand, you have traditional public forums, right? These are things like public parks, or sidewalks, you know, areas that even though they're government property, they're historically associated with freedom of expression. And in those situations, the government has less latitude to restrict who can speak. But advertising on the side of a bus is not a traditional public forum. In fact, it's all the way on the other end of the spectrum. It is a non-public forum. And so there the government has the widest latitude to determine who can speak. But that doesn't mean that that latitude is unlimited. And so what happened here is the court looked at it and said, you know, even when it's a non-public forum, the restriction on speech, the way that the government applies the restriction, it must be viewpoint neutral and reasonable. And here, the court again agreed with the district court that this restriction was not. And so the court pointed out that, for example, McDonald's could have an ad saying, Eat at McDonald's, but a vegetarian group, or an animal rights group, or, you know, any other group couldn't have an ad saying, Don't eat at McDonald's. Or also, you know, the court pointed out that the government could have an ad in support of the US troops literally saying support our troops. But if another group, a political advocacy group had the exact same message, that would not be allowed. And so again, because this restriction on speech was not reasonable or viewpoint neutral, even though this was a non-public forum, the way the government was determining who got to speak and

who didn't violated the First Amendment. And then the court turned to what I actually think is possibly the most interesting part of the discussion and a part that really warmed my heart because so often, maybe I'm just a nerd, but so often, we see these, these distinctions between facial and as applied and courts kind of getting confused about when something's a facial challenge when something's an as applied challenge. And this opinion really gets that analysis right. And so I want to give credit where it's due. This was written by Judge Julius N. Richardson of the Fourth Circuit. I really enjoyed his entire opinion. And as you both know, I am not shy about pointing out when I disagree with something, including with judicial opinions, but here Judge Richardson got it right. And what he explained was that, you know, this is the one place where the district court got the analysis wrong, because what the district court said was, because there are times when the government can restrict political speech in a non-public forum, that meant you could not have facial relief, but what Judge Richardson correctly pointed out was that the challenges were not challenging the idea of ever restricting political speech in a non-public forum. They were challenging this particular policy, this particular law. And this particular law was incapable of reasoned application. Another way to think of it is, as Judge Richardson also correctly pointed out, the analysis didn't turn on the facts of this particular challenger's case, right? If another challenger came forward, the reason that that challenge would also prevail would be because the entire way that this law is being enforced is unconstitutional. Right? The entire way that the government is deciding whether their speech is allowed or not allowed is unconstitutional. So sure, sometimes people are allowed to speak and sometimes they're not. But in all of those cases, it's not as a result of any type of reasoned application of a valid rule. And so consequently, the court not only affirmed the district court when it came to the fact that the bus company was part of the government and that the restriction was unconstitutional, but the court reversed the district court on the question of facial verses as applied and said that, you know, this actually is a facial challenge. And so, the relief granted should be that the law is facially unconstitutional. And so, like I said, I have no problem criticizing opinions I disagree with, but judge Richardson did a great job here.

A Anthony Sanders 11:20

You're also great at criticizing colleagues you disagree with. I want to stick in there too. So I appreciate the clarification.

J Justin Pearson 11:28

Well, just agree with me more often and you'll be okay.

A Anthony Sanders 11:30

Well, I'm going to talk to Michael instead. So Michael, you're a train rider, maybe not so much the bus, but what was your take on bus advertising?

M Michael Bindas 11:42

The thing that struck me about this case was the person in charge of Richmond transit, in terms of processing the sign applications and approving or disapproving, she testified about how they determine whether a sign is political and therefore ban. So you have a situation where the

determine whether a sign is political and therefore ban. So you have a situation where the Supreme Court says, a regulation of a non-public forum has to be viewpoint neutral. This person in charge of processing the ad says, We consider an ad to be political and therefore banned if it's not viewpoint neutral. So the Supreme Court says it has to be viewpoint neutral. We only ban the signs if they're not viewpoint neutral, therefore, our regulation must be viewpoint neutral. Like it's totally tautological. And I think that's the thing that struck me most is just how incapable they were of articulating some standard that they were purporting to apply in processing these and just said, Well, you know, we know what the test is and we only approve signs if they comply with the test. I get they get to be the regulator and the judge.

J Justin Pearson 12:46

And so they can't have a regulation that just says we only do constitutional things?

M Michael Bindas 12:50

Right.

A Anthony Sanders 12:53

Lot of guidelines there for the bureaucrats with a law like that.

J Justin Pearson 12:56

But we know they always exercise their discretion in a proper manner.

A Anthony Sanders 12:59

I was taken on this case in the application of the Mansky case, which is this case from a couple of terms ago, some of you may remember, I know a bit about this case because it's from my home state of Minnesota, where someone in a polling place was told they couldn't have a badge on. I think it said "ID me," and political t-shirt because of a ban on on political signage, basically, in the polling place, which is definitely a non-public forum. But even so the court found that that was unconstitutional. And at the time, people thought, well, of course polling places are everywhere, so it affects polling places, but it does it really have application beyond that? And this shows really, I mean, there's a lot of reach of that case, because this is the size of a bus.

J Justin Pearson 13:55

Right, and what I really like about that, there are many great things about the Mansky opnion and it's a great opinion, but it also shows that there it was a facially unconstitutional policy, even though in theory, right, some political pins and things were allowed, but because the way the rule was always applied was unreasonable, regardless of whether something was allowed

or not allowed, the law was facially unconstitutional. And that's correct enough. So often in our work, judges sometimes get confused despite our best efforts about whether something is facial or as applied. And cases like Mansky and this case as well, from the Fourth Circuit, I think really helped to show that no, you know, you courts need to be a little bit more willing, a little bit more engaged, if you will, when it comes to recognizing that a law can be facially unconstitutional, you know, perhaps more often than they're willing to say so these days.

A Anthony Sanders 14:41

And one other bottom line on your point about facial versus as applied, which I also liked, was that the court didn't do the thing courts sometimes do and did in a case our colleague Bill Mauer had a few years ago in Washington State, where the court said, Well, I could give you facial relief, but we're trying to keep things near arrow here. So I'm just going to give you as applied because that takes care of you so you're happy now, you can run those ads, the puppy ads, but there's no need to go all the way and find it facially unconstitutional, which is, of course, not a great way to to do constitutional litigation where the next controversy is going to have the same problem.

M Michael Bindas 15:25

But you also have the situation where a few states have now passed laws that say if a challenge brings a facial claim, as opposed to an as applied claim, it has to be referred to a three-judge panel as opposed to a single trial judge. And we're litigating this case in North Carolina right now, just trying to determine whether the plaintiff's claim that we're defending against. it's a school choice case so we're on the defending side, whether it's a facial challenge or not such that it needs to be referred to a three-judge panel, and we're well into the litigation and still don't have an answer yet as to whether it's a facial or as applied challenge.

A Anthony Sanders 16:00

Sometimes it's not super clear if it's facial or as applied. And you know, the Supreme Court has never really done a great job saying what is facial and what is as applied? There's different kinds of as applied claims, there's different kinds of kinds of facial claims. So yeah, I like how the court just kind of got simple with the relief here and there was facial relief. A not so simple relief, well it was simple in that the government won, but a not so simple end of the story is in North Carolina for certain sommeliers and winos. So, Michael, you know a bit about sommeliers and winos?

M Michael Bindas 16:40

The wino part, yes.

J Justin Pearson 16:42

I mean, you know me. We got all points of view represented on this panel for this case. So, Michael, tell us a bit about in-state versus out-of-state wine.

Michael, tell us a bit about in-state versus out-of-state wine.

M Michael Bindas 16:55

Yes. So this case, also from the Fourth Circuit, is called B-21 Wines v. Bauer. And it was a challenge to a North Carolina regulation that allows in-state wine retailers but not out-of-state wine retailers to ship directly to consumers in North Carolina. Now, this fact pattern may sound familiar to some of y'all. It's certainly a familiar one to us at IJ because we have twice litigated and twice won at the U.S. Supreme Court cases involving discrimination against out-of-state alcohol interests. The first of those cases, a case called Swedenburg v. Kelly, which was consolidated with another case, Granholm v. Heald, concerned a New York law that allowed in-state wineries but not out-of-state wineries to ship directly to New York consumers. We challenged that law and won. And then the other one was a more recent case, Tennessee Wine and Spirits, which was decided just a few years ago, where we challenged a Tennessee regulation that prohibited out-of-state residents from getting a retail liquor license in Tennessee. So this Fourth Circuit case sounds a lot like those cases, and you've got the government discriminating against out-of-state alcohol interest in favor of in-state. And so given the result in Tennessee Wine and Spirits and Granholm, you might think this is kind of a slam dunk case for the plaintiffs challenging the law. Not so, says the Fourth Circuit. It starts out by correctly observing that this case lies at the intersection of the Dormant Commerce Clause and the 21st Amendment. So we all know the Dormant Commerce Clause doctrine, generally speaking, says a state cannot discriminate against out-of-state economic interest in favor of in-state interest. And if this case involved any other industry other than alcohol, this regulation clearly would be unconstitutional becuase there's no question that this regulation discriminates on its face against out-of-state economic interest. But things get hairy when it comes to booze because of the 21st Amendment. And, of course, the 21st Amendment repeals prohibition, which is a good thing. But part of the bargain that was struck with the 21st Amendment was a provision that was inserted in Section Two of the amendment that historically has been understood to give the states some heightened regulatory authority over alcohol. Now, in both Granholm and Tennessee Wine, the Supreme Court says, while that's true, it doesn't absolve the state from complying with the non-discrimination principle of the Dormant Commerce Clause. The heightened regulatory authority that you have is not a license to just discriminate willy nilly against out-of-state alcohol interests. That said, in those cases, the Supreme Court didn't just default to the traditional Dormant Commerce Clause test, which is if the law is discriminatory it's virtually per se unconstitutional. The Supreme Court said, Look, Section Two must mean something. It does give heightened authority to the states and must mean something. And so we have to engage in a different analysis. And in Tennessee Wine and Spirits, the Court kind of set forth that analysis. It said, really what you have to look at is whether the predominant effect of the law is protection of the public health and safety or instead protectionism in favor of in-state interests. And crucially, the Court said the burden to show that it is serving the public interest and not merely protectionist is on the government. You have to look at evidence about whether the law is actually serving the public health and safety interests that the government claims that it's serving, you have to look at whether the government could have accomplished its interest through some kind of non-discriminatory regulation. And the court says the government actually has to have real, concrete evidence to support its position. It can't rely on mere speculation, it can't rely on unsupported assertions, the government has to have evidence to show that this is not merely a protectionist law. So that's what the Supreme Court tells us, you know, we have to do when we have one of these cases. So what happens in North Carolina in this case, the state says, The purpose of this ban is to preserve the three-tier system of alcohol distribution. So North Carolina, like most states, has

a three-tier system, where you have the producers of alcohol, in this case, wineries, you have the wholesalers or the distributors, and then you have the retailers who actually sell it. And the purpose of this scheme, like I said, many states have them, is to prevent vertical integration within the marketplace. The Supreme Court has several times said it's perfectly permissible for the state to have this kind of three-tier system. Now, we won't get into the particulars of the state's argument about why its regulation was supposedly necessary to protect the three-tier system or to preserve it. Because really why this case is so interesting, is its discussion of the standard that the Court will apply in reviewing the state's justification for the law or the standard it won't apply, I should say. The plaintiffs here say, Look, in Tennessee wine, the Court said you have to ask, number one, whether the government's interest could have been achieved through some non-discriminatory means. And the Fourth Circuit acknowledges that that was part of the analysis in Tennessee Wine. But it says and this is the Fourth Circuit's language here, that inquiry was not central to the Tennessee Wine analysis. And the Fourth Circuit just absolves itself from really undertaking the inquiry at all. And it seems kind of strange. I mean, usually when the Supreme Court says this is how you analyze a claim, lower courts don't just kind of casually brush aside and ignore that, one would hope. Now, the plaintiffs challenging the law also say, under Tennessee Wine the state has to come forward with concrete evidence that this law actually promotes the public health and safety and that it's not just some kind of protectionist scheme. And here, again, the Fourth Circuit acknowledges that that was part of the analysis in Tennessee Wine. But then it says, and, again, I'm quoting here, "the Supreme Court only referenced that requirement in the context of a statutory provision that was not an essential feature of the three-tier system." The Fourth Circuit goes on to say, here this discrimination against out-of-state retailers is an essential part of the three-tier system, and it absolves the government from having to come forward with any evidence whatsoever. Tennessee Wine never said any such thing. I had a hand in it. So Tennessee Wine again, never says you only charge the government with proffering evidence, you know, if the provision is an essential part of the three-tier system, in fact, I don't know how you can tell whether it is or isn't is not an essential part of the three-tier system until you have evidence but the Fourth Circuit says government doesn't need to have evidence. So it upholds the law. Judge Wilkinson dissents and he gets a lot of stuff right. He gets pretty much everything right until he gets to the part of, you know, what should the court have done here. And he gets that just totally wrong. He argues that prohibiting direct wine shipments from out-of-state retailers is not, in fact, an essential part of the three-tier system. He even notes that North Carolina has largely abandoned the three-tier system when it comes to wine. He notes that the state allows wine producers, so not the retailers but the producers of wine, if they get a special permit, they can ship directly to retailers, so they can bypass the wholesalers. They can ship directly to consumers so they can bypass the wholesalers and the retailers. And he says, Look, if the state has largely abandoned the three-tier system when it comes to wine, it can't justify this regulation by saying it's an essential part of the three-tier system when it comes to wine. So, so far, so good. But here's where things go south with Judge Wilkinson's dissent. He says, this law is blatantly unconstitutional. It violates the Dormant Commerce Clause, there are two things we can do to remedy the situation. He says number one, we can extend direct shipping privileges to out-of-state retailers. Or number two, we can rescind the direct shipping privileges in-state retailers, either case will make the law non-discriminatory. And he goes with Option B. He says the correct remedy here would be to enjoin the in-state retailers from shipping directly to consumers.

J Justin Pearson 23:51

How would you know, Michael?

A Anthony Sanders 25:59

Who aren't even involved in the case.

J Justin Pearson 26:03

I mean, I don't want to go off on too much of a tangent, and I know the Supreme Court has said you can do this. But how does that not raise procedural due process concerns when you're taking something away from people who are not parties to the case? Like it's infuriating for many reasons.

M Michael Bindas 26:16

I'm glad you're upset by it. I was thinking I'm upset just because I like getting wine shipped directly to my house. It offends me on that level.

J Justin Pearson 26:23

You and I are similar in that regard. But I just remember when I read this opinion for the first time, I got so angry and just hearing you go through it again, all those feelings are rushing back. And it's just, I mean, the majority opinion is just completely wrong, as you correctly point out, Michael, and then the dissent, at first I was like, okay, well, maybe there's a little bit of sanity here. You know, this is starting to look okay, and then you get to the end and it's just like, oh, no, I'm angry.

M Michael Bindas 26:47

I need a drink after that.

J Justin Pearson 26:52

Well, good thing we're not in North Carolina right now, I guess. But, it's unfortunate. The opinion I discussed was a great opinion out of the Fourth Circuit, and then this is kind of on the other end of the spectrum within one week. Yeah. It's crazy. Different judges, different panelists, but same circuit.

A Anthony Sanders 27:07

Yeah. So I think what the Supreme Court has said in Tennessee Wine and past cases was more than enough to show that the panel came out the wrong way here. But it did remind me that Tennessee Wine was a little loosey goosey about what scrutiny is applied in these alcohol Dormant Commerce Clause cases. Because, like we've always said in our litigation at IJ in these

cases, it's like the normal Dormant Commerce Clause cases, where if you have discrimination, especially facial discrimination against out-of-state interests, that that is subject to strict scrutiny, which as you said, is virtually per se unconstitutional. Now, the Court has said in the past, if the law is for the purpose of temperance, so people not drinking, then it's not subject to that, then I guess it's per se constitutional, but it really has to be for temperance. So if it's not for temperance, then it seems like it's subject to strict scrutiny. But in Tennessee Wine, they don't even heightened scrutiny, they definitely don't say rational basis scrutiny. They just say Commerce Clause scrutiny. What is that? Well, like you said, they give the examples and say the government has the burden and needs to come to the table with facts and things like that. But there's some mist there that is to be worked out. And I think the the Fourth Circuit like kind of drove a truck through that.

M Michael Bindas 28:51

I think you're right. Here's the most interesting aspect of that discussion in Tennessee Wine about the government having the burden. The primary case that the court relies on for that proposition, Mugler v. Kansas was not even a Commerce Clause case. It was a due process case. So it's relying on early, early, late 19th-century....

A Anthony Sanders 29:17

It's a really bizarre one to bring up other than just the point it was about alcohol.

M Michael Bindas 29:21

But I mean, I would love to see kind of a revitalization of Mugler v. Kansas here.

J Justin Pearson 29:27

Sounds like a new IJ project.

M Michael Bindas 29:28

I think it is. But I mean, if the government had to meet this burden in a due process case, I mean, I think we'd all be a lot better off but, yeah no, I think you're right, there is some still some uncertainty about the precise test that applies in a case like this. Neither Granholm nor Tennessee Wine and Spirits were entirely clear. And I think we can safely say, however, that the non-standard that the Fourth Circuit majority applied here is not the standard.

A Anthony Sanders 29:58

Now, I'll just play a little a bit of devil's advocate here, because I've done a little bit of this wine litigation myself and I saw this crop up in some other cases that I don't think are discussed in this case and some other circuit court and district court cases where, so it's a law that definitely

affects in-state interests and out-of-state interests differently. But it's kind of more to do with where the state can regulate. And, you know, states aren't supposed to have extraterritorial regulation. So they do say in this case, that, okay, if you are an in-state liquor store, you can ship directly to consumers. If you are an out-of-state liquor store, you actually can, you just have to establish some kind of, like, office in North Carolina, warehouse. And I think the reason for that, you know, the proffered reason for that is that you need to have someone in the state that the state can have be responsible.

M Michael Bindas 31:12

it was effectively a physical presence requirement, but I think it was, you know, I think was more than just an officer in the state. And as Judge Wilkinson says, it was burdensome enough such that it would drive up the price of out-of-state wine, and therefore still have the discriminatory effect against those out-of-state retailers, even if they were able to comply with these requirements that would theoretically allow them to direct.

A Anthony Sanders 31:37

So, I know at one point there was, I think it was a Second Circuit case a number of years ago now where you could, I think the law was in New York, where it's really screwed up, of course, but the law was the winery could sell directly to consumers, but you had to actually go to the winery and so out-of-state wineries said that this was discriminatory and the state's response was, and the court's response was, well, this is just about, you know, physically going there. And so you're not physically in the state. So you're kind of not similarly situated.

M Michael Bindas 32:10

And I think Judge Wilkinson here says that if what North Carolina had done was to say you can only buy wine from a storefront, that would not be discriminatory, in his view, against out-of-state retailers. Because it's simply neutral, you know, on a kind of neutral basis, saying you can only buy this from a storefront.

J Justin Pearson 32:35

But how do you feel about that, Michael?

M Michael Bindas 32:37

I don't know. I mean, it came up a bit in the the oral argument in Tennessee Wine. I think the court was particularly sensitive about whether what it was saying in the decision would or would not bear on the question of whether a state could have a physical presence requirement at all. And I don't know, it's just a it's a difficult difficult thing, particularly given Section Two and the interplay with the Dormant Commerce Clause. I mean, it's a close case, but it's

certainly not this case, where the states not saying, you know, you can only buy wine from a physical storefront, it's saying you can buy it online, but only if you're buying it online from someone in the state, aretailer in the state, much, much different thing.

J Justin Pearson 33:31

You know, I was struck by how these cases at first glance appear to be different. But if you actually scratch below the surface, they show two very different approaches to judicial engagement in ways that are actually somewhat analogous, right? So, both of them involve situations where the government has arguments and arguably discretion that it wouldn't otherwise have. And the judges react to that in two very different ways, right? In the first case, involving bus advertising, despite the fact that we're talking about a non-public forum, Judge Richardson and the rest of the panel still act in an engaged manner and look at what's really going on and actually analyze the policy.

A Anthony Sanders 34:06

Facts matter.

J Justin Pearson 34:06

Facts mattered, and they reached the right result. Whereas in the wine shipment case, the wine selling case, they say, oh, it's alcohol. Let's dust off the biggest rubber stamp we can find.

M Michael Bindas 34:15

Despite Supreme Court just a couple of years ago saying facts matter, and the government has to come forward with evidence and carry its burden, whatever that burden is. I mean, it is still not entirely clear, but there's no question that the burden is on the government under Tennessee Wine. And here the Fourth Circuit just absolved it from doing anything.

A Anthony Sanders 34:33

Do you see this case going further, Michael? Any tea leaves?

M Michael Bindas 34:37

I you know, I don't know. We haven't talked to the attorneys here about whether they're going to petition for cert. I would note that the folks representing the wine retailer challenging this law were the folks who litigated the companion case to Swedenberg, the Granholm case. So there were two cases. Our case was out of New York and there was another challenge to a similar law in Michigan, and the folks who were litigating this were the folks litigating the case

out of Michigan back in Granholm. So I suspect that they will petition. And, you know, it certainly has the hallmarks of a case that the Supreme Court would take. But coming so closely on the heels of Tennessee Wine, I don't know. It'll be interesting.

J Justin Pearson 35:21

At the very least, I hope they try.

A Anthony Sanders 35:24

I hope they try and I am definitely going to be trying some wine. Maybe some chickpeas in honor of our discussion today, but not for 45 minutes at least. So I'd like to thank our panelists for coming here today. And I'd like to thank all the law students for coming to our conference this weekend. I'm looking forward to meeting many of them during the course of the rest of this Sunday. But for all of you, I would ask that everybody get engaged