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SPEAKERS

Rob Peccola, Anthony Sanders, Bert Gall

A Anthony Sanders 00:24

My dad gave me $1 bill, because I'm his smartest son. And I swapped it for two shiny quarters, because two is more than one. And then I took the quarters and traded them to Lou. For three dimes, I guess he don't know that three is more than two. And then along came old blind Bates. And just because he can't see, he gave me four nickels for my three dimes, and four is more than three. And I took the nickels, the Hiram Coombs down at the seed-feed store. And the fool gave me five pennies for them. And five is more than four. And then I went and showed my dad and he got read in the cheeks, and closed his eyes and shook his head, too proud of me to speak. Well that, as all elementary school graduates know, was Smart by Shel Silverstein. This is Short Circuit, your podcast on the federal courts of appeals. I'm Anthony Sanders, the director of the Center for Judicial Engagement at the Institute for Justice. And we are recording this on Friday, December 2, 2022. Now, as that poem might indicate, today, we're going to be talking about money, the coin of commerce. You know the Constitution and liberty those are important things. But at the end of the day, we want to talk about cash. Cash is king. And so I have assembled two of the Institute for Justice's most accomplished financial gurus to try to walk us through some financially minded circuit court opinions. First of all, I would like to introduce to everyone an old friend of the show, Rob Peccola. Rob, welcome back to Short Circuit.

R Rob Peccola 02:17

Great to see you on this lovely Friday, Anthony, and even even nicer to see Bert and welcoming him to his first appearance on Short Circuit.

A Anthony Sanders 02:29

That's right. Our other guest is an old friend of IJ. He has worked for us for many years and done all kinds of things. He has accomplished great victories in every one of our our pillars, school choice, economic liberty, property, you name it, he's done it. These days, Bert is kind of

like the guy behind the guy behind the guy. And I thought I'd take him out from behind the curtain, or at least his voice, and share him all with you. So as Rob says, Bert, welcome to Short Circuit. Very good to have you on for your first time.

B **Bert Gall** 03:10

It's great to be here, you know, longtime listener, first time caller. Now, that's probably a reference only folks, your gen xers and maybe early millennials will get but you know, I'm ready to rock and roll. Let's go.

A **Anthony Sanders** 03:23

Okay. Well, I don't think we have an exclusively Gen Z audience. So hopefully a few a few folks did get that reference. And hopefully they they still read Shel Silverstein in the schools these days. I know my kids did. So we're going to first go to Rob. So we have a case about bankruptcy and then a case about attorneys' fees. But don't worry, they're much more exciting than than those sound -- both very important things to many lawyers and many normal people, of course. So Rob, take it away with a little bankruptcy.

R **Rob Peccola** 04:00

Well, Anthony, even though we're talking about bankruptcy, we are still not straying far from the Constitution. Article One, Section Eight of the Constitution, in fact, gives Congress the power to create uniform laws regarding bankruptcy to attempt to treat debtors fairly throughout the country. And we often talk about people being morally bankrupt or artistically bankrupt. But, constitutionally and legally, we have something different than our colloquial understanding of bankruptcy, which is a highly codified system for establishing what to do when you are out of money and you have creditors and they need to be paid. And the Second Circuit recently took up Congress's bankruptcy scheme and a case called Clinton Nurseries, where a plant grower was going through the bankruptcy process, and encountered some unfairness in the fees that they have to pay. So what you have in the bankruptcy system is essentially two systems: one for Alabama and North Carolina and one for the rest of the country where --

A **Anthony Sanders** 05:25

Makes perfect sense.

R **Rob Peccola** 05:26

-- where, through through legislative compromise, you have trustees whose job is to be fiduciaries for getting people paid, who themselves have to be funded. And in these parallel systems, you essentially had a situation where one system of trustees had their fees go up. And another system with the bankruptcy administrators or the BA's in those two states did not. And that would be very frustrating if you were a debtor, to know that you were subject to these fees

when others weren't. And we're talking about a lot of money here: several million dollars. And if you go through the opinion, they actually break it down. And I didn't know this, but the fees are pretty hefty. It's a quarterly fee that you pay to fund the system as a debtor. And in this 2017 amendment, which is refreshing, I think, because Congress actually passed this fee increase, because bankruptcies were going down at the time, which is a good thing. So we're talking about, you know, close to $10,000 a quarter for a bankruptcy estate of this size. And what we had was the US Supreme Court weighing in and saying, Hey, we're not treating people fairly here. There has to be uniformity. That's what the Constitution calls for. And the Second Circuit taking a second pass at this Clinton Nursery case, decided that indeed, you can't have parallel systems that are charging people different amounts when the Constitution says that we need to treat debtors in a uniform manner across this great nation. So it's an interesting case, and it's one that I think can touch on some of our constitutional issues at IJ, sometimes even more than we know. Recently, for example, in our Memphis environmental court case, one of our clients was dealing with a bankruptcy. And fascinatingly, and somewhat troublingly, bankruptcy courts essentially treat you like you're dead. They own every aspect of your bundle of rights that you carry around as a person, including constitutional claims. So we had to effectively release those constitutional claims before we can bring them in federal court. So this is serious business, and it touches on all aspects of our system of litigation, including constitutional law.

A Anthony Sanders 08:18

And, Bert, how many times have you declare bankruptcy?

B Bert Gall 08:23

I have never declared bankruptcy. Although one of my favorite episodes of The Office was when Michael Scott declared bankruptcy by simply walking through the office and yelling the word repeatedly much to Oscar's chagrin.

A Anthony Sanders 08:35

It doesn't work that way I understand.

B Bert Gall 08:37

It doesn't Oscar had to walk Michael through the fact that there's a process. And Scranton is neither in North Carolina nor Alabama. You know, so it's part of the, what would you call that the regular bankruptcy system, Rob?

R Rob Peccola 08:52

Yeah, I would say that's about as regular as it gets. The trustee system where these good folks get on the trustee wheel, it turns, and they end up handling a bankruptcy.

A Anthony Sanders 09:06

Yeah for listeners who hopefully never been through the process yourself, either yourself or your business, or have never represented clients in a bankruptcy proceeding or made claims in one. Your're right. It's the trustee. It's not the debtor who's really the client there. It's the debtors stuff. And the trustee does all kinds of things. And of course, that trustee needs to be funded somehow. And I had no idea about this fee system. The really interesting thing to me is right, for people who care about things like enumerated powers in the Constitution, where you know, there's there's these powers listed in Section Eight of Article One, and Congress supposedly doesn't have powers beyond just those listed and a few others elsewhere in the Constitution. The fact that there's something like, as specific as bankruptcies seems to indicate that, you know, the separate power to regulate commerce among the several States isn't like everything. Because then you wouldn't need the subject of bankruptcies because bankruptcy sounds a lot like commerce. Of course, the modern Supreme Court has basically washed all that away. And commerce has come to mean almost everything. So the powers of Congress are very broad. But it's like the Supreme Court, though it's done all that, it's tried to keep a little bit of the original text of the Constitution in play. And it's interesting it does it here where it says, uniform laws on the subject of bankruptcies throughout the United States is the text. So that even though there's separately the Commerce Clause and the Necessary and Proper Clause that would allow, very arguably, these days legislation about bankruptcies, including having different fees in different places, because that text is there it's kind of like a residual stop on these expanded expanded powers of Congress. And so the court points this out that, you know, even though maybe you could do it through the Necessary and Proper Clause, we can't just ignore this text. So it's a restriction on Congress's powers or at least a mandate that Congress's powers have to be done in a certain way, even though you could arguably do it a different way, which is, for those of us who aren't big fans of that modern jurisprudence, it's a little bit of solace on what the court could do.

R Rob Peccola 11:48

Well, it's interesting too that some of these concepts that we think of as being at least somewhat modern, actually go back to the Founding. Another example would be copyright, where we go back to the actual text of the Constitution, and there similarly was an 18th century understanding that there would be a role for the federal government and for the courts to enforce people's intellectual property rights. Similarly, the way that we treat creditors, trustees, and debtors has has that 18th century predicate too. So it's also a testament to the the foresight and the prescient understanding of how our society would deal with the somewhat esoteric rights.

A Anthony Sanders 12:36

Yeah, and you know, one other interesting thing that I mean, maybe I thought about in law school, but I certainly haven't thought about long time is, you go through the powers of Congress in Article One, Section eight. And there's a lot: to regulate commerce with foreign nations, to coin money, to provide for the punishment of counterfeiting, a lot of these specific things. But the uniform only comes up -- they're in the same clause: bankruptcy and naturalization. To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies. So that the convention was concerned about the Congress's powers but concerned about uniformity specifically in these two areas. Naturalization, that makes sense.

Because the federal government was going to have the sole role for foreign affairs. But uniform laws on the subject of bankruptcies is -- bankruptcies is a special thing. They wanted to especially have Congress the power of -- probably because of things like Shay's Rebellion, that that led to the actual Constitution in the first place. Well, I'm glad, Rob that that we have these fees worked out, even though they're pretty hefty. But I guess you have to fund the system somehow. Another thing that can be very hefty, but often not hefty enough, are attorneys' fees in civil rights cases. Now, Bert, I believe you have tried to get attorneys' fees in the past for some of your victories. So maybe walk us through how that works and how sometimes courts are a little reluctant to hand those out. Although it doesn't seem like they were in this case.

B Bert Gall 14:29

Sure. Yeah. And we you know, have a really interesting case about attorneys' fees and I promise our listeners that attorneys fees' is actually very interesting.

A Anthony Sanders 14:39

Well, the attorneys listening will be very interested I'm sure. Even non-attorneys.

B Bert Gall 14:43

And I hope so even more broadly because attorneys fees are a mechanism that appear in multiple federal statutes when it comes to the enforcement of rights, whether those be statutory rights, or as in this case that we're dealing with from the Sixth Circuit, the Tennessee State Conference of the NAACP et al. versus Tre Hargett for civil rights litigation under the Constitution. And the governing statute there is Section 1988. It covers attorneys' fees, and like many fee shifting provisions, it awards fees to the prevailing party in civil rights litigation. Now, a lot of ink has been spilled on what is a prevailing party. And in 2001, the US Supreme Court in a case called a Buckhannon versus West Virginia, some department or other, basically said, Look, in order to be a prevailing party, you've got to secure yourself court-ordered relief. So it's not enough for you to file a lawsuit and accomplish your goals but not get some sanction from the court, at least, of that relief. So if you don't get a judgment, if you don't get some sort of a court-ordered settlement, you're out of luck when it comes to getting attorneys' fees. Now, that was a five-four decision pretty hotly contested. And up until that point, every single circuit to consider the issue had embraced something called the catalyst theory, which is that if I file a lawsuit, but I get the government to change its behavior, as a result of my lawsuit, I'm gonna get attorneys' fees. Because I have succeeded in my objective. After all, a civil rights litigant doesn't file a lawsuit to get a piece of paper from the court saying kind of attaboy. Good job, you're right. No, you actually file a lawsuit in order to accomplish something practical, you know, to have the government stop doing something that is infringing upon your rights. And so every circuit had said, yes, the catalyst theory. That's right. That's what Congress intended. The Supreme Court said, five to four, no. That is not what's intended. And so then you have subsequent litigation, okay, about if the relief has to be court ordered, what kind of relief can that be? Because litigation often terminates before final judgment. Sometimes it terminates right after you file a lawsuit, and you secure a preliminary injunction stopping the government from enforcing an unconstitutional law. And that's what happened in this case, where you had the Tennessee State Conference of the NAACP and others sued Tennessee because Tennessee,

in 2019, had enacted a series of laws that really kind of made it onerous to conduct voter registration activities in the state. And so Tennessee got sued very promptly, and they lost. Basically, the parties had extensive briefing on a preliminary injunction with lots of exhibits, lots of briefing, and the district court said, Yeah, I find that the plaintiffs are very likely to succeed on on the merits. I'm going to enjoin the enforcement of all these laws. And, shortly thereafter, the Tennessee legislature repealed all of those laws. And the plaintiffs requested attorneys' fees, as they were entitled to do under Section 1988. And they secured attorneys' fees, but that proved controversial before the Sixth Circuit because they had not secured a final decision from any district court. And so the question was, while it has been established that you can get attorneys' fees for a preliminary injunction, apparently, in the Sixth Circuit, that is generally disfavored. And the Sixth Circuit by a two-one vote upheld the award of attorneys' fees and said, Look, in this case, even though the government basically withdrew before a final judgment was reached, and even though that normally means that you're not a prevailing party, the fact is the plaintiffs here secured a preliminary injunction that all but ended the litigation. And the state never appealed from it. This this case was extensively briefed. Everything was was aired out. And the plaintiffs were able to conduct voter registration activities for the upcoming election unimpeded by the law. So they are prevailing party that. But the dissent said wait a minute, No, they should not be considered a prevailing party because the relief that the plaintiffs secured here was not enduring. And by enduring what the dissent meant was, look, they wanted relief, not just for the upcoming election but all future elections. And they didn't get that because the government withdrew the laws. It repealed the laws before a final decision was reached.

A Anthony Sanders 15:31

Well, they kinda did get that in a sense.

B Bert Gall 18:03

Well yeah they did. I think the dissent's on the on the wrong end of things here. The opinion is fascinating because it's kind of almost an existential discussion of like, what is enduring? And the majority clearly says, Look, no, this was this was enduring, because they secured relief, that was a irrevocable. They got to they got to conduct voter registration activities. And the dissent says look, under Buckhannon, we should have essentially a bright line rule that if you get a preliminary injunction, but the government voluntarily eliminates the offending legislation, that's not enough. You're not going to be a prevailing party. The majority rejects that and says, No, that's not the case. And, you know, it does say, you're not going to be a prevailing party to get attorneys' fees in every instance where you've obtained a preliminary injunction. For example, if you obtain a preliminary injunction, and you lose on the merits, the Supreme Court has already said you're not going to get attorneys' fees for securing that preliminary injunction. Because the relief that you got was fleeting, and not enduring. But you know this topic is a very important one, because Congress intended by use of a fee-shifting statute for vigorous enforcement of civil rights laws and the Constitution, and to incentivize the vindication of those rights. Because as we all know, the government is not going to police itself. And that's why there's a big fight over who's a prevailing party or not. And from the perspective of a civil rights litigator, I think all of us have seen all too often, the government gets caught with its hand in the cookie jar, it gets sued, and it looks like it's going to lose, and it then basically repeals the law in question in order to try to moot the case and avoid attorneys' fees.

And that is a common problem. And one that you often have to have to deal with. I mean I think the original sin here goes back to the Buckhannon decision, and it's read of prevailing parties. I analogize this to, you know, a little bit like a football game. Where let's say one team is beating up on the other one and up by like five touchdowns with two minutes to go in the fourth quarter. And the the other team just says, we're just going to walk off the field. So you know, you're not going to get a final score. Sorry. And does that mean that the team that was up by five touchdowns shouldn't prevail? No, in the real world, the losing team forfeits. But under the rejection of the catalyst theory basically means the government can be down big late and can just walk off walk off the field and not have to pay for the constitutional wrongs it has inflicted upon its citizenry.

A Anthony Sanders 23:57

Rob, what does enduring mean to you?

R Rob Peccola 24:01

Enduring to me means that you got what you came for. And that, in this context, I think, enduring means that you will wake up tomorrow with the relief that you sought. And it's interesting the point that Bert made about the underlying policy objectives here. And it does make you sort of read very closely the dissent to think about how it's treating the seriousness of some of the underlying constitutional violations and the importance (a) of making sure that those are resolved and (b) making sure that the incentive is there to bring those in the first place. I noticed that the dissent had heavy use of contractions, sentences that consisted of two words. In some ways, the style of the writing was in keeping with the view expressed.

A Anthony Sanders 25:18

We'll leave it there about the dissent. I had a similar reaction to both of you, unsurprisingly. The other angle on this case is, as with many cases, especially a case about election law, or voting rights, is the defendants here are state officials, and because of various reasons of sovereign immunity, you can't sue them for money. So you couldn't add on, you know, some some damages for violation of your rights in this case, or in all kinds of other cases in different contexts, whether it's voting rights, property rights, what have you. And so you can't get a judgment if the law is repealed, because you can't get money damages. And so the only thing you're left with is declaratory injunctive relief, like they're asking for here. And so if the state can just get out of it by repealing the law, even after you get a preliminary injunction, that seems like even more contrary to what Congress was going for. Because Congress, you know, doesn't didn't pass this, this statute to say, Well, if you're already getting a lot of money from the government, then you can get some attorneys' fees, I think it would be the opposite. That if all you can get is an injunction, and you're a civil rights attorney trying to help some people out whose rights have been violated, that the court has adjudicated the rights have been violated, then you should get some attorneys fees. But because of how our system works and sovereign immunity and all that, and not to mention qualified immunity, if it was a case where where that could be an issue, it's the opposite. So this is trying to get a modicum of Congress's intent in trying to effectuate its civil rights statutes by having a mechanism for attorneys' fees. You know, it is interesting that it is actually still an open question, because I've researched this in

some of my cases in the past, that at the Supreme Court level that a preliminary injunction qualifies for attorneys fees under the civil rights statutes, under Section 1988. I think just about all the circuits have said that it does qualify, and certainly the majority here is. But this this dissent does not agree. And I really hope that the Supreme Court never goes along with that. And I think that the Supreme Court would say that this qualifies. But it's interesting to note that that has never fully been squared, that a preliminary injunction qualifies you for attorneys' fees, even if that's that's all that ever happens in the case.

B Bert Gall 28:16

Yeah, and even the majority here is pretty careful to say, look, you know, on this record, we have a situation where this case was practically completely litigated at the preliminary injunction stage. Andif we had a situation where it was, you know, much more fleeting, had they lost at the district court level, for example, on the merits, they certainly would not have gotten a fee award or not been entitled to one. But, but again, the state denied them that because they saw that they were were about to lose. And I really do want to stress, like why fees are so important, because litigation is expensive. And you're not going to have like a vigorous enforcement of civil rights laws across the entire country if essentially private attorneys generals can't get compensated for their attorneys' fees in order to vindicate those rights. Congress recognized that and said, Look, these these rights are great, but they're nothing without vigorous enforcement across the board. And now making fees harder to obtain makes it essentially harder for folks to bring public interest litigation. IJ, ACLU, other groups, we can't bring every public interest lawsuit across the board. There are lots of attorneys, solo practitioners, attorneys working pro bono for their law firms, they're the ones who really need to be like incentivized to help vindicate civil rights.

A Anthony Sanders 30:19

Well, I'm glad that we started with the cold coin of commerce. And now we've ended up with vindicating civil rights, even if money makes that a little easier sometimes. So I appreciate that, Bert. I appreciate, Rob, you coming on as well. I hope both of you guys have a very happy holiday season as we speed along to the end of December. But in the meantime, I hope all of you listening have a happy holiday season. And I want all of you to get engaged.