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SPEAKERS

Anthony Sanders, Ari Bargil

A **Anthony Sanders** 00:24

Hello, and welcome to "Short Circuit," your podcast on the federal courts of appeal. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, August 4, 2023, but it won't be going out for a few days, a week, perhaps two weeks. We are doing some episodes in advance of some vacations, which often happens in August in the northern hemisphere, as many of you know. So, you will get your "Short Circuit" at a regular schedule, but on an irregular schedule on our end. But, someone who is most regular and is a sometime, regular guest on "Short Circuit," and we are very happy to have today, is my colleague, Ari Bargil. So, Ari, welcome back.

A **Ari Bargil** 01:14

Thank you for having me, Anthony. Always good to be here.

A **Anthony Sanders** 01:17

So, Ari is going to talk to us about betting on elections - something that is kind of legal sometimes, although not so much in our country. If you go, you know, to the betting shops in Britain, you can bet on basically anything, but in the U.S., that's more frowned upon. But, there's been certain ways to do that. But, now, it seems like there are less ways to do that because of some administrative law irregularities that came to light recently in the 5th Circuit, so Ari is going to talk about that. Then, I am going to take us on an international adventure. I'll be presenting the second case, which will take place partly in, but mostly outside of, the Bolivian Republic of Venezuela ... Bolivarian Republic of Venezuela. I'm mispronouncing both of those words, as Ari has already told me, but I will do my best with my Spanish pronunciation. I did not take Spanish at school; I'm sorry, everyone, just in advance. But, we will be talking

about a tale of investors and sovereignty. Governments come and go, but sovereignty remains. All that cool international law stuff, we'll be talking about later on. First, though, Ari and this outfit called PredictIt. So, Ari, what is PredictIt, and can I place a bet with them?

A Ari Bargil 02:57

So, the case is Clarke vs. Commodity Futures Trading Commission, and it involves, as you said, a company called PredictIt. And, what PredictIt does is they provide a platform for people who want to place wagers on political outcomes. So, if you go to PredictIt's website right now, you'll see a whole slate of potential bets. One of the most common bets that people can place on the website is on who will win the nomination for the presidency from the Republican Party. So, here we have a whole slate of candidates. Donald Trump is in the lead with a handful of, you know, other followers - people who have also thrown their hat in. The way that PredictIt works is, essentially, you can buy a share, which represents the chances that a candidate will win the nomination. The share price varies based on the likelihood of that person winning, so Donald Trump is currently trading at 59 cents per share, whereas Mike Pence and Nikki Haley are bringing up the rear at three cents per share. If you're correct in your prediction, the share that you bought - say you bought Donald Trump at 59 cents, or Nikki Haley or Mike Pence at three cents, respectively - will mature to a value of $1. And, you can cash it in. So, if you bought a bunch of shares of Nikki Haley at three cents, if she wins the nomination, it's worth a dollar. You can cash that out; that'll be quite a windfall. Whereas, if Donald Trump wins the nomination at your 59 cent share price, you'll cash that out at a dollar also (not quite the same windfall). But, obviously, this is based on probability. And, what this is, is a reflection of people's confidence in who will win various political races. This idea is the brainchild of a university in New Zealand. This is Victoria University who decided, hey, wouldn't it be great if we could gauge future outcomes or predict future outcomes based on people's willingness to essentially put their money where their mouth is? Let's see who's likely to win an election, and let's see whether or not these markets are actually providing good predictive value. So, the academics at Victoria University decided to set up this exchange. They acknowledged or realized that it would probably violate American federal law under the ... which is regulated by the Commodity Futures Trading Commission. So, they sought something called a no-action letter from the CFTC, basically asking them in advance, hey, please tell us that you won't enforce any of your regulations against us. This is an academic project. We're going to limit it. We're going to only allow something like 5,000 total traders on the platform, and we're going to limit investment to $850. The CFTC said, okay, you can go ahead, and you can get this started. They hire this third party called PredictIt, who's going to set up the platform. This is in 2014, and so ...

A Anthony Sanders 06:15

Ari, sorry, before we go forward, is the reason why - they're in New Zealand, they're setting this up - they bother talking to the CFTC is because they want Americans in the United States to be part of this because it's going to be more real that way and not just have people in New Zealand, the U.K., or wherever else doing the bets (where it sounds like they wouldn't have this problem)?

A Ari Bargil 06:39

Yeah, the opinion doesn't touch on this, but I suspect that's right. One of the things - obviously,

if you're offering this with American political candidates, and you want to predict the outcome of American elections, the people with the most knowledge (presumably) would be Americans, as opposed to outsiders offshore. So, with the knowledge that this is going to operate within the United States, they had the sense to get in touch with the CFTC to get this no-action letter, which, in 2014, like I said, the CFTC issues. What the letter essentially says is, hey, we're not going to enforce against you ... subject to these terms. And, PredictIt then opens up its doors, essentially, and people can begin to wager on political outcomes in the United States. But, in 2022, a division of the CFTC, the DMO (I forget what the acronym is, and I had it written down), rescinds the no-action letter, and they accused PredictIt of having violated the letter's terms. The only problem is they don't tell PredictIt precisely what terms of the no-action letter they violated. They don't say what the evidence is of this violation, and they don't tell them why they've got to stop operating within a certain period of time. They just say, your no-action letter is rescinded. This, of course, results in chaos and upheaval at PredictIt. They're not really sure what their rights are, whether they have to cease operating. And, as a company that's been in operation for eight years by this point, there's quite a bit of money on the line and quite a high number of participants who've already placed wagers, whose wagers are now in limbo. So, they file a lawsuit, and they seek a preliminary injunction. They say that the rescission of the letter was arbitrary and capricious, among other reasons, because it didn't say why the no-action letter was revoked. The preliminary injunction just kind of sits, and if you know anything about why people seek preliminary injunctions, it's usually because they need a ruling. They need a ruling right away, usually because there's a lot of money on the line, or there's a certain event that's going to occur that's irreversible. So, they need their decision at the front end, rather than at the back end, because litigation takes a ...

A Anthony Sanders 09:04

Emotions don't age like fine wine.

A Ari Bargil 09:06

That's very true. And yet, this preliminary injunction motion sits. So, PredictIt appeals this to the 5th Circuit, even without a decision, saying, hey, the fact that this has sat for so long is effectively a denial; please take it up. CFTC raises a whole bunch of arguments in response to the 5th Circuit taking this up, mostly on just disability grounds, saying, hey, this is improper. One of the things they say is, this is moot because, weirdly, after oral argument, the CFTC - I'm going to make sure I get this framing right - withdrew its rescission of the no-action letter. What it did with that withdrawal is it replaced it with a different letter saying that the no-action letter is still void and should be withdrawn, and providing a little bit of explanation on why the no-action letter was originally withdrawn, but also saying that this new letter is just advisory. So, you can't really rely on that. Why do all these letters matter? Because, the CFTC comes into court, and they say, well, the rescission that you're suing about - the rescission of the no-action letter - that's been withdrawn, so the case is moot. And, we said in another letter, basically, that you still can't operate. But, that's a whole different letter, so you can't challenge that either. The court, to its credit, the Fifth Circuit, is unpersuaded by this. The CFTC says, hey, this cuts the legs out from all of your arguments because we've now given you a bit of an explanation, and, the court just says, look, these are high jinks. There's still obviously a dispute about whether PredictIt can operate, and so, this chicanery is unpersuasive. But, the CFTC also says, this wasn't final agency action; we just provided this advisory letter, and you are a fool to

rely on it. The court rejects that too because the letter said explicitly that you may rely on it. That's kind of the end of the inquiry. It doesn't matter that there's now this new letter; you violated the terms of the old letter. You told PredictIt that they violated the terms of the old letter, and they need to change their conduct; that's final agency action. The agency also says, you don't have standing because Victoria University isn't a party to this lawsuit. The court quickly brushes that aside and says, hey, the parties who did file this lawsuit stand to lose quite a bit of money; their financial situation is already very much in doubt as a direct result of the conduct of the CFTC here. So, all of these just disability arguments are kind of set aside. It moves directly to the preliminary injunction factors, and it says, look, there's a substantial likelihood of success here because you're going to have to come in and show PredictIt that the rescission of the no-action letter was arbitrary and capricious. And, here, they gave absolutely no reasoning whatsoever for why they were sending the letter. The court calls that the epitome of arbitrary and capricious action. They also say, this new letter that you gave can't save you. It has some of the same infirmities as what you did before, and it's plainly a post hoc attempt to rationalize what you did after oral argument. The court also acknowledges that there's going to be irreparable harm to PredictIt because they're suffering loads of financial harm being in limbo like this. They also acknowledge that the balancing of the equities and the public interest tip in favor of PredictIt because -while they're sympathetic to the CFTC's argument that there's going to now be all this litigation over no-action letters, and that's going to disincentivize agencies from issuing no-action letters to begin with, the court also says, well, yeah, that might be true - if we don't find in favor of PredictIt here, that's going to incentivize awful behavior like this on the part of administrative agencies. And, we can't let that go either. So, ultimately, they brush aside these jurisdictional arguments. They grant the preliminary injunction, or they remand for the district court to enter the preliminary injunction and allow the plaintiffs' claims to be heard on the merits. And, in the course of doing that, they did something that we'd like to see courts do more of, which is kind of take the agency to task for the gamesmanship that's very obviously afoot here with the issuance of letters; the rescission of letters; the insistence that, by getting rid of one letter and replacing it with a new one, you've mooted the case; and that the right parties aren't here. All of this legal gamesmanship that we often see from agencies, especially after lawsuits are filed, is to evade merits decisions. And so, here, we're going to get a merits decision from the district court. It's going to go back to the 5th Circuit, almost certainly, and we'll actually get a ruling here on the propriety of telling somebody that they can no longer operate, after you've told them that they could operate, without having told them why they can no longer operate, after you told them that they could operate. That is the story of PredictIt. I hope it's not too convoluted. But, that, in a nutshell, is what's going on at the 5th Circuit. There are some interesting concurrences and dissents if we want to talk about those as well, Anthony.

A Anthony Sanders 14:19

Well, let's get to those in a moment. By the way, the DMO is the Division of Market Oversight at the CFTC. So, those guys could not prosecute because of this letter, although it sounds like they're basically the only ones who would anyway. Yeah, well, just what PredictIt does and the conversation about prediction markets is fascinating. We could have that conversation sometime and their utility and why they're basically illegal in the United States in all kinds of ways - which is really stupid policy, I think. But, this administrative law kind of runs through it. I mean, it just sounds ... the basic administrative law principles - one way of thinking about them, I think, for listeners who are maybe more familiar with some of IJ's work under the rational basis test, where if there's a regulation on what you want to do, and you think it doesn't make any sense, you essentially have to (unless you're lucky enough to have a

"fundamental right" you're dealing with) show that there's absolutely no rational basis anyone could come up with for why you would want this law - sometimes shade into that. Sometimes, it's a little beefier than that kind of review. But, the one thing that's the big difference, I find, in administrative law work is that the agency has to give the reason. Now, if the agency gives a reason, then they get all kinds of deference as to whether that reason is (usually the standard is) "arbitrary and capricious," or not. But, they have to give a reason, so the fact they didn't give a reason at all, I think, was an alarm bell with some of these judges that there is something not right here. That allowed some of these other inferences to be made or that, maybe normally in a case, wouldn't be made: all this technical administrative law stuff; is this a final agency action, which the dissent is arguing that this really doesn't seem like a final action (these little, interim letters that are going on); and a bunch of other steps that you outlined. It seemed that the reason why the CFTC got caught with its pants down, basically, is because that first letter was just so atrocious. PredictIt had some good lawyers, and they were able to show that, look, we have all this reliance on this letter, and then you take it out, really, completely arbitrarily because you don't tell us what we've done wrong. I think, finally, of course, it helps that this is not some hedge fund doing shady stuff, which a lot of this type of area usually is when you're dealing with the CFTC or SEC regulations. This is a few academics trying to do research, and these bets are not huge. They're what? Less than $3,500 or something is the cap that you can even bet on this stuff. I think all that may allow this injunction to happen, but even then, it seems like, going forward, it's by the skin of their teeth that they can stay in business.

A Ari Bargil 18:06

Yeah, you're right about all of that. You know, one of the things that that concurrent starts out with is this acknowledgement that, although we've said here that this might be final agency action, other courts (other circuit courts) have actually said the opposite (that note that these letters are not final agency action). Yet, given all of the misbehavior by the CFTC here, the court said, yeah, but we'll get to that. Or, they can criticize, but we'll probably get to that later on after the district court enters its order issuing a preliminary injunction, and then, deciding the case on its merits. Now, that the dissent (as I think you pointed out) says, I'm not even sure they deserve an injunction here, but given all of the background here and how improperly the CFTC went about doing what it did, I think that bought PredictIt some time to get back into court and to be able to make its case. You also noted the harmlessness of what PredictIt does; this is an academically fruitful endeavor. It provides data that oftentimes is far more reliable and accurate than some of our traditional political polling. I think the fact that it's been able to exist for eight years sort of underscores how silly, as a policy matter, it is that it would be barred to begin with. One of our colleagues, Jeff Rowes, likes to talk about how, if you look at something that's allowed to exist for eight years without incident, that's probably a pretty good indication that it's a harmless endeavor. You wouldn't allow other, presumably, illegal markets top rate for eight years if they were problematic in any way. So, I think you can - just by virtue of the fact that they've existed without problem for a long time - show that laws barring their existence, generally in the absence of no-action letters, are probably pretty silly and ill-advised.

A Anthony Sanders 20:08

Absolutely. Well, we wish PredictIt the best of luck. But, yeah, it does seem like it is a touchy situation. The one, last thought I had is that the very short concurrence by Judge Ho makes it sound like he is erring on the side of caution that let's give the injunction, allow the case to go

forward, and preserve the status quo. Who knows what the the merits are going to be? That kind of raises the question because he doesn't dig into this, but, there's this four-part test that everyone always uses for injunctions, especially preliminary injunctions. Always, the biggest one is likelihood of success on the merits. And, then, there's irreparable harm; there's a couple of more loosey-goosey ones about public policy, essentially; down to the equities. Usually, especially when the government is involved, it mostly comes down to likelihood of success on the merits. Courts often, and the Supreme Court and different circuits have said this, when - at least in the constitutional challenge - you need to have likelihood of success on the merits. You can't not have, in a private context, over 50-50 with likelihood of success on the merits. But, the irreparable harm is just so massive, right? If you don't get this injunction, the case goes away. Sometimes, that can be like a bond that a business needs to post, or something like that. Judge Ho was kind of saying here, I think, it's less than 50-50 that you're going to win, but we'll let it go forward anyway. I mean, he is not saying that explicitly, but I get that sense. I wish that was articulated as an actual rule because, sometimes, you have situations like that.

A Ari Bargil 22:09

Yeah, I read it the same way. And, I do find it interesting - the way he articulated, or at least presented it: Hey, you might not win, but it's close enough that that will allow it to continue, or at least, allow the injunction to be issued so that you're not totally destroyed while we're figuring that part out. I agree; it would be better if it were just a little bit more explicit. But, I'm sure PredictIt will take what they got here and be happy and get back on down to the district court, where they can hash it out.

A Anthony Sanders 22:37

Well, someone else who is going to be happy about what they have gotten is a group of investors in some gold mines. This is a rather different story than the one we just told, but it is also an international one. And, again, I'm going to say a few names and words that I am not going to pronounce correctly, so apologies in advance. Most folks out there listening know a bit about the saga of what has happened in the country of Venezuela the last couple of decades. Hugo ChÃ¡vez is democratically elected to be president of the country. He keeps getting reelected, but he keeps getting more and more dictatorial over the years. Then, the country starts teetering on the edge of really being a dictatorship. He then passes away, and his successor, Maduro, comes to power. Then, there's an election in which, even given all the stacking of the deck that happened, he loses. Most people recognize that he loses, but, instead of allowing this new government to come to power - I know I'm getting some of the details here wrong, but, essentially, a new congress comes to power - Maduro sets up this kind of new congress, a constitutional body, that everyone recognizes isn't legitimate. Eventually, when his term expires, the international community recognize the head of the congress - that would kind of be like the speaker of the house in the United States becoming president because there's no new president - this guy, Juan GuaidÃ³, as the president of the country, even though, within the country, he effectively doesn't have that power. So, that's kind of the backstory on what's going on here. But, meanwhile, back in the days of Hugo ChÃ¡vez, the government is doing things like nationalizing stuff, and there are some gold mines that are nationalized. There's also some other of this business going on, and some international investors are not very happy about that. One of the things they do is go to an international, arbitral panel. So - international arbitration, which has been a big subject of controversy for a few decades now - they are able

to do this, and they get a $1.2 billion award. That's pretty nice to compensate them for some of these nationalizations, which are not compensated at the time. And, then, they're like, okay, well, we're going to go collect on our judgment. Well, how do you do that? When it's a sovereign state that you're trying to collect the judgment for, things get complicated. So, this has been in litigation for a long time. This is just the latest chapter, and it is in the 3rd Circuit. This case that was recently released - the top line is OI European Group B.V. vs. Bolivarian Republic of Venezuela, but there are all kinds of parties involved. To tell the full story, we have to go back a little earlier, in fact, a lot earlier, to some basic ideas of international law and sovereignty. If you go way back, the idea of sovereign immunity is not just a thing for, say, the United States or different states or the United Kingdom before the United States, but it's a recognized principle in international law with other countries as well. If you go back in the United States' history, the United States recognizes other countries as having sovereign immunity. So, if you sue in the United States' courts - you sue a foreign nation - that can be a tricky business. Now, for a while, the U.S. tried to deal with this with letters from the State Department and recognitions of sovereign immunity, and this got to be just very politically influenced, of course; it got to be a sort of business. So, finally, in 1976, Congress passed a law to have these kinds of questions - where a creditor is asking for money from a sovereign nation - go through the courts to try to depoliticize this process. So, these investors (with that backstory) go to the courts to try to get their money. Now, Venezuela, as people know, has a lot of oil. Even though this case itself and the judgments weren't about oil, that oil manifests itself in all kinds of different entities. There's a couple of entities in the United States that are essentially owned and controlled by the Venezuelan state, but one is PDVSA, which is the acronym. There's another entity, and actually, the one that people might recognize, is they are whole owners of Citgo. So, Citgo gas stations, if you trace it all the way back, that's Venezuelan. They get these judgments; they try to collect against the Venezuelan government. But, then, we have this change of control of the Venezuelan government in 2019 that we talked about earlier. Now, the interesting thing about that is the Maduro regime, of course, was continuous in Venezuela, even if it was not constitutional in Venezuela. Because other countries recognized this other fellow as the president, he was able to control, or he and his former opposition leaders, were able to have control of these outside, Venezuelan entities, including this one in the United States. So, they come in and say, look, that judgment was (again, they're trying to attach the assets of these oil entities in the United States) the old government of Venezuela, but we're the new government that's friendly with the United States. So, we can't be bound by that own credit. It's almost the same thing as you'd say, well, there was a revolution in the country; the new people running it, for purposes of these assets, are a completely new set of people. So, we're not, it's almost like, in privity with that former judgment. And, the court says that this is a tale as old as time, that sovereignty does not change. The governments come and go, but the sovereign stays the same. The sovereign is the state, so this is the distinction you get in international law, when, in constitutional law, it's between the government and the state. In some parts of U.S. history, you see examples of that, like treaties made under the Articles of Confederation for the brief period where that was the United States government. Then, we have the Constitution come along. From a point of view of international law, there's no difference in those two time periods. The court even talks about, the 3rd Circuit talks about, an example of the Soviet Union after the Russian Revolution. It was a couple decades after, and they came and made representations in court in the U.S. that they were not the same thing as this tsar of Russia (previously). The court said, no, you are the same sovereign as the previous one, even though, of course, the Soviet Union and the Russian Empire ended the tsar (completely different kinds of governments), but the sovereignty stays the same. So, in an odd way, because of that continuous sovereignty, there's no sovereign immunity for attaching to these assets, and these creditors can go and get paid. Even though the underlying creditor stuff might only be interesting for people interested in international

finance or that kind of thing, this is a very important point to know about how the international system does not like to see states come and go. They like continuity. This idea of the sovereignty of the state as being something that we're not going to recognize as different, unless something really weird happens - like say Venezuela subdivided into four, different nations (and then, things might be a little bit different at that point) - but, generally, if it's the same land, and you're talking about the government of that land, then you are going to be the same sovereign (even if you have two, competing sovereigns at the same time, which is what you had after this constitutional crisis in Venezuela). So, Ari, do you have opinions on constitutional crises and sovereignty?

A Ari Bargil 33:05

Well, the one thing that struck me about this - and I don't pretend to be an expert in international arbitration or foreign nation immunity - and I'm grateful for this, this is a uniquely American viewpoint of what state sovereignty is. By that, I mean the court here says, look, nation states are fixed things. They are lines on a map that represent collections of people and their governments. Those things stay the same, even though regimes and leadership comes and goes. I think that's the best of all possible ways of looking at this. But, I always pause for a moment to acknowledge that isn't intuitive to many people the world over. I'm grateful that it is intuitive for folks like us, despite a lot of our recent upheaval and some of the rancor, it's always just true that institutions remain. The nation itself remains intact, as opposed to other places in the world where, when one leader leaves and another one, often not willingly, takes their place, it essentially becomes an entirely new country. This is the norm in a lot of places, including Central and South America, where you see a lot of regime change and entire systems of government changing literally overnight. So, it makes sense to me that this would be an argument made by Venezuela here because it's something that intuitively makes sense to folks in certain parts of the world. But, it doesn't surprise me that it didn't land well in an American court.

A Anthony Sanders 34:56

Right. I think this is generally a rule that has been with the Western power systems since the Peace of Westphalia, or all that business going back a few centuries, but it is definitely not a necessarily intuitive, universal understanding of different countries. It might take a little bit to wrap one's head around that. But, you can see the reason why we have this is because if it was like, a different government doesn't have to abide by these rules that the old governments were - that makes sense from a libertarian perspective, actually; I can see why you would like that - but then, things would be a lot more complicated in how different countries and different private actors relate to each other. This idea of continuous sovereignty is just kind of something - a legal fiction, if you will - that we all have to abide by in order to make the world go round. To close, there was a really interesting quote that the 3rd Circuit has quoting a case from the Supreme Court from 1936 where they said, "Now as before, 'rulers come and go, governments end and forms of governments change, but sovereignty survives.'" So, somewhat mysterious there. Well, someone who is not mysterious, but is an excellent guest on "Short Circuit" is Ari Bargil. So, Ari, thanks for coming back. We look forward to your next appearance. And, in the meantime, I hope that everyone else will get engaged.