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SPEAKERS

Anthony Sanders, Paul Sherman, Joe Diedrich

A Anthony Sanders 00:24

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 Monday, October 16 2023, we have a great show ahead for you with a special guest and an old time favorite. And we'll be introducing those folks in just a moment. First, though, this is the first show we've had in a few weeks that wasn't a special or wasn't recorded live or something like that. So we have a little bit of catch up of what's going on in this Short Circuit universe. The most exciting news is that our colleagues at the Institute for Justice just got a couple cert grants from the Supreme Court. So that means the Supreme Court has taken a couple Institute for Justice cases that it did not have to take, but for whatever reason, thought they were cert worthy. And one of those is a case that we talked about earlier this year on Short Circuit, and that is a case called Devillier v. Texas. Bob McNamara, our colleague talked about it earlier this year. And he will be arguing that case at the Supreme Court, which is super exciting for Bob and super exciting for everyone else here. It's a case, if you remember that episode about whether essentially you can sue a state when it takes your property and doesn't give you just compensation, which sounds kind of weird that that's a question, but the Fifth Circuit said it was a question and so now hopefully the Supreme Court is going to set them straight. Also, in the Fifth Circuit is a case of ours called Gonzalez v. City of Castle Hills. And that is a case about retaliation, a retaliation claim under the First Amendment. And it is mixed in with questions of qualified immunity and the deference given to the government when they arrest somebody, because the police in that town arrested our client who was a city council member when she tried to shake up the status quo there. And so that is also a case that we're very excited has been taken by the Supreme Court. And it will be argued by Short Circuit's own Anya Bidwell, who has hosted the show many times and now gets a crack at those Justices at one first street. So we are so excited that there are two cases from the Institute for Justice going to Supreme Court, maybe more, maybe more. We have another case that's that's been relisted a couple of times. But we'll be talking about those, I'm sure later in the term, even though it's at that Supreme Court, and not our fan favorites, the federal courts of appeals. But getting back to those federal courts of appeals and fan favorites, I'd like to introduce you to an old time favorite at IJ. And that is Paul Sherman. Paul, welcome back to Short Circuit.

P Paul Sherman 03:27

Thanks for having me, Anthony. It's always a blast to be here.

A Anthony Sanders 03:29

And we're gonna have a blast of the kind of case that Paul often talks about, and that is a First Amendment campaign finance case out of the Tenth Circuit that we'll get to a little bit but first, first, we have a first timer here on Short Circuit, and that is Joe Diedrich. Now Joe lives in one of my favorite places in the world, Madison, Wisconsin. He practices there at Husch Blackwell law firm and does all kinds of interesting stuff. Joe, you want to tell us about how interesting you are?

J Joe Diedrich 04:07

Oh, great. Thanks, Anthony for inviting me on and great to be here with you, Paul. Yeah, I work at Husch Blackwell. I focus mostly on suing the government and administrative law cases, judicial review cases, and on appeal in particular.

A Anthony Sanders 04:25

That's right. And Joe has written some amicus briefs for us that have been filed in IJ cases in the past, especially in First Amendment areas. Is that right?

J Joe Diedrich 04:36

Yeah, that's correct. We've been fortunate enough to do a lot of work with the Institute for Justice, writing some amicus briefs, one recent example is your all's great success down in Georgia and lactation consultants case we did an amicus brief in that occupational licensing case.

A Anthony Sanders 04:54

Well, speaking of occupational freedom, we have a case that Joe is going to talk about here from the Seventh Circuit that I have to say is pretty unusual way of looking at occupational liberty, but I thought was pretty interesting. So Joe, wanna tell us a little bit about this?

J Joe Diedrich 05:17

Yeah, so the case is called Biggs v. Chicago Board of Education from the Seventh Circuit from a few weeks ago. So the plaintiff, Biggs, was a principal at a Chicago Public School. And she violated some school policies, including an attendance policy. So the school said, you have to keep track of student attendance in this one particular way. And she directed teachers to keep

track of it in a different way. The result was inflated statistics for for that school and how many students showed up on a regular basis. She also violated a transportation policy that required her to get parental consent before school employees could drive students around and there was never any parental consent. So she did a couple of things that she shouldn't have. And the school board terminated her employment. And when it terminated her employment, the school board also did two other things. It blacklisted her within the school district by putting a do not hire designation on her personnel file. And then in a couple of public school board meetings, it made some comments about Biggs and her termination, and what she had done to get get fired. So Biggs goes out into the world and tries to find another job. She tries a couple of jobs within the Chicago school district, doesn't get anything there. She applies for principal jobs in particular. Then she goes out into a couple of other school districts in the Chicago suburbs can't find anything there. She applies to some different nonprofits, and some charter schools. Even the Obama Foundation. Eventually gets a job at an education nonprofit. And then a few months later, she and a colleague open up an educational consulting firm, but she was never able to get the job she wanted, which was School Principal at a public school. So she goes into court and files a lawsuit against the Chicago school board under Section 1983 alleging that her 14th amendment due process rights were violated, specifically that the board deprived her of a liberty interest in pursuing an occupation of her choice. Now, the Seventh Circuit goes in and says, look, there is a recognized right to quote occupational liberty, the liberty to follow a trade or profession or calling of your choice. And there are different circumstances when such a claim might be available. And maybe we'll be able to talk about those other circumstances in a few minutes. But but the claim that was specific to this case was when a public employer takes adverse employment action, like firing you, and then also make stigmatizing public comments that foreclose future employment opportunities, you can sometimes bring a claim. The standard is very high, though, the court said you have to show that it was, quote, virtually impossible to find new employment within your occupation. And that phrase within your occupation is going to be key here. The district court dismissed the case at summary judgment, saying, hey, Biggs, you actually got jobs within the, quote, field of education. So we don't even see how you are harmed really, because, you know, whatever the school district might have said about you, you got the jobs, you wanted. The Seventh Circuit goes on to affirm, but does so on very different grounds. And this is where the case gets really interesting. They say, "Like much in the law, it's best to think of an occupation as existing on a spectrum of generality, somewhere between a specific job and a field." And so they go on this this rather lengthy discussion about what is, what was Biggs' occupation, and what she prevented from getting another job within that occupation? They say it's a case specific inquiry. And what I found most helpful to analyze this sort of level of generality problem was the different examples that the court gave. So they said, being a police officer, for example, that's an occupation, but a police lieutenant, that's a specific job. And so if you were to analyze a police officers claim in this in this framework, you would have to analyze it the level of police officer not a specific rank. They also give the the sort of the counter example of medicine being a field, a very broad field, and then having nurses and doctors and therapists have different occupations. And then my favorite example of all they said food service, that's a field. Different occupations within that field would be cooks and waitstaff. And a specific job might be a head chef at a prestigious restaurant. So applying that analysis and that framework to Biggs, they said, look, the district court got it wrong here, because they analyzed her claim at the level of a field. They said, well, she got a job in education, and therefore she had nothing to complain about. Seventh Circuit said that was wrong, it was much too general. They said what her occupation was a school administration, as a distinct from, for example, being a teacher. And they looked at things like what degree she had, which was a degree in School Leadership, they also looked at the fact that she had a state occupational license to be a school administrator, and not a teacher. And then they went on to differentiate that from individual specific jobs within, you know, sort of

under that, meaning like head principal, which she was versus vice principal and assistant principal, for example. So they said the district court got the analysis wrong, but as I mentioned, they ultimately affirmed. And they said that there was two problems at summary judgment. Number one, there wasn't any evidence to show that the Chicago Board of Education made it quote, virtually impossible for her to find a job as a school administrator. Because her search was so limited. Apparently, she only applied to a few jobs, and only one or two of those was actually within the school administration, occupation, as opposed to other things within the broader education field. She only applied for jobs for a few months, and only within this relatively small geography of the Chicago suburbs. And they also faulted her for applying only to principal jobs, and not applying to vice principal jobs or assistant principal jobs, things that really were within her occupation. And then the last point they made was that with one exception, there was no evidence of causation. So most of the places she had applied to, apparently didn't even know about the allegedly stigmatizing comments that the Chicago Board had made in those public meetings right after she was fired. So in the end, I would say a relatively, you know, maybe non controversial outcome based on her lack of evidence, but a super interesting discussion about levels of generality, and about the right to occupational liberty, which is something that comes up in different contexts.

P Paul Sherman 12:38

Yeah, I thought it was an interesting case as well. It was it was almost it was kind of like a "through the looking glass" moment for me as I was reading it, because there's this just radical difference between the kinds of cases that we see at IJ, where we're representing people who are employed in the private sector, and the kind of expectation that this former government employee had about what her rights were vis-Ã -vis, her former employer. And one of the things that I thought was most interesting about the decision, was that there's no analysis, and it doesn't actually seem to have been relevant, that the statements about her were true. Like, the statements were, you know, we fired her because of an integrity issue, which seems to be true. And I don't recall exactly what what the other statement was. So essentially, what she's she's alleging is that she has this constitutional right for the government as her former employer, not to reveal things about her that are true and relevant to to other employers that make it harder for her to get a job. And, you know, I, like I can imagine situations where, you know, even if the statements are true, it seems like the government is going out of its way to sort of torturously interfere with her ability to find jobs elsewhere. But the notion that just, you know, just closing Yeah, we fired her because she was falsifying these important statistics on student enrollment. I had that it's just kind of shocking to me that that that can be the basis for a claim.

J Joe Diedrich 14:32

You know, in perhaps a little bit in her defense, there was a note in the case saying that she disputed the truthfulness of those claims, and for whatever reason, probably based on the way it was briefed, the court decided it, you know, in this way rather than getting in the factual dispute, but you raise a great point, Paul, because this really does differ from a lot of the other sort of occupational liberty cases that folks like the three of us may be interested in, I mean, this was a very specific job, that she was terminated from, based on, you know, very as applied conduct from government to her, versus the other types of occupational liberty cases that we might be familiar with, where there's a generally generally applicable rule of conduct usually

passed by a legislature, or maybe put in place by an administrative agency is saying, for example, you need a particular licensure in this state, if you want to work as a as a florist, or as a lactation consultant, or as a, you know, pick your occupation. And, and you have to go in and you have to show basically, not only am I unduly burdened by that, but that anybody in my similar circumstances are unduly burdened, both have high standards, you know, whether it's the rational basis test for that legislative challenge, or here is the virtually impossible test for the sort of, you know, specific to one person challenge. But there's there's a difference in that that causes some, some legal tension, I think,

A Anthony Sanders 16:09

Yeah, there are so many things, I think that could be said about this case, bigs in comparison to the types of occupational Liberty cases that we do at at IJ. And for listeners who are somewhat familiar and interested in the kind of work we do at IJ, for occupational liberty, I'd really encourage you to read this case and it's always there's a, there's a link to it in the show notes. Because it's, it's like Paul said, it's like through the looking glass in a lot of different ways. If you're used to the kinds of things that the kinds of claims that we bring at IJ. When Joe first mentioned this case, to me, I thought, well, okay, well, that sounds like one of these procedural due process new property cases, which some listeners may be familiar with, there's this idea in the law, the last that the Supreme Court's come up with the last like 50 years or so that if you have a if you're a government employee, and you are unceremoniously or for whatever reason, let go or, or demoted or whatever. And you're not given proper due process. So that could be a hearing, it could be, you know, all kinds of different things, depending on your station and employment, then you have, you might have a claim against the government. And I guess this woman was an at will employee it turns out, so she dropped her that claim, but she did bring that claim. But then there's this other claim. And the interesting thing apart, about this claim is it's although most of the jobs that, you know, she was applying to were other government jobs, not just with Chicago School District, but with others, it seems like it would apply to, you know, the private sector. So if she was applying to be a principal at a private school, the same claim would apply, which makes it sound like the kind of thing we challenged at IJ, which is government action unreasonably barring you from, you know, employment and getting almost always, when we do those kinds of cases, it's involving private employment. But it's an it's also it seems like it's a due process claim. But it's like this whole different test, and this whole different idea. And you know, they don't mention rational basis, or tiers of scrutiny or anything like this the whole time. It's just this like, three part test that it sounds yeah, it sounds hard to satisfy virtually impossible. But actually, considering the rational basis test itself is so impossible, that it might be a little better than the rational basis test maybe I'm just shaded from litigating some of those cases, maybe Paul is too, but that, it it's interesting, it's like kind of caught its own being. And it seems like it's just a Seventh Circuit thing, from what I can tell. So they cite to this case, that is a procedural due process case, called Roth from the early 1970s from the Supreme Court, and everything else, it seems like is the Seventh Circuit which kind of raise it for those of us who have practiced before the Seventh Circuit, like I know you have Joe. It's kind of its own animal. Sometimes, like there's these, there's all kinds of weird due process, you know, equal protection, whatever name it's stuff in the Seventh Circuit that's like its own little universe. And there I could pontificate why that is, but it seems like this is an example of that, and it just kind of does its own thing.

J Joe Diedrich 19:45

I yeah, I would agree with that. You know, I can't speak whether or not there's any other circuit perhaps that you know, does a test somewhat similar to this but, but this is a case that seemed largely based on precedent and exclusively based on either U.S. Supreme Court or Seventh Circuit precedent, if you look at the panel here, it's it's ideologically diverse, it the opinion was written by Lee, who is a relatively recent appointee, and then you've got Rovner, who is a Clinton appointee, and she chose Sykes, who is the George W. Bush appointees. So you've got you got people from all over the spectrum with with all different backgrounds, and they're all coalescing on this on this test. Yeah.

P Paul Sherman 20:29

You know, another kind of interesting you know, it's not an issue in the case, but it does seem like, like sort of something that's kind of floating around it is there is an entire doctrine, First Amendment doctrine of government speech. And generally, courts are very solicitous of, you know, the government's ability to express itself on, you know, the issues that it thinks are important and not second guessed that, and maybe that's maybe that's actually reflected in how high the standard is here that you have to prove that it's virtually impossible to get a job in your field. But it's just kind of another interesting sort of aspect of it that that just seems kind of pregnant in the opinion, but but isn't discussed directly. Yeah.

A Anthony Sanders 21:19

It almost seems like, yeah, it's another way of thinking about it is it's a libel case against the Chicago Public Schools for saying this, and that they have this high standard, like you would, you know.

P Paul Sherman 21:31

Except the truth isn't a defense.

A Anthony Sanders 21:34

Yeah, well, it didn't come up at this time, at least, I have this other theory about the Seventh Circuit and these weird cases that I'm sure, you could do a long article about that, that I probably will never have time for, but that there's so much just endemic corruption and bad government in the state of Illinois, not so much Indiana and Wisconsin, both at the state level, and especially at the municipal level, that like the Seventh Circuit to deal with, that just kind of has this odd take on reality that you don't see in other circuits. And so that's a little bit of what's going on and in the background here. I've always just kind of got that flavor that, you know, in the in Illinois, the federal, the federal courts and the US Attorney kind of see themselves as like the last best chance for hope. And so they do what they can to kind of just, you know, let the people not give the people a little bit of a respite from this morass of corruption that they live under.

J Joe Diedrich 22:41

Joe Diedrich 22:41

I don't have a comment specifically on that. I've got many great colleagues from Chicago, so I won't

A Anthony Sanders 22:48

I practice there for five years. That's where some of that comes from.

J Joe Diedrich 22:52

But if I may, just one last one last thought on this case, which I, you know, I talked about, but I found to be the most interesting part of it. Was this, this lengthy discussion of levels of generality in the law, because we see this in so many different contexts. For example, in qualified immunity cases, what is the right level of generality to analyze whether a right is clearly established for purposes of qualified immunity? And for that matter, anytime you're dealing with a fundamental right or an unenumerated right, you know, how do we define that? How specific are we? How general are we, you know, I would say, Anthony, correct me if I'm wrong, but IJ wants to have the right defined as, as general as possible, and the government will typically try to make the right more specific to limit it against government.

A Anthony Sanders 23:42

That's true, although, and I did appreciate how the court was trying to be careful in that regard. And, you know, sometimes it can be like for this woman here, when you're fighting the government, it could be that you want it a little bit more specific, because, you know, sometimes we have these occupational licensing cases where the government will say, well, we didn't totally eliminate your right to, you know, work an occupation, because you could just go like, do something completely different. You could go bake bread, for example, if you're trying to be a florist, and hey, there, you can make money over there. So what was your beef of us? And the court here was trying to be, you know, realistic, I guess, and kind of where, how they define things. So that's another, I think, point of reference between these two types of cases.

J Joe Diedrich 24:30

Yeah, I think it really does depend. And you're right, the court was very careful. And so for that reason alone, I thought this case was really interesting.

A Anthony Sanders 24:39

One other place where it seems like a court was trying to be somewhat careful is in the Tenth Circuit, where we have a campaign finance case now, campaign finance when I first got to IJ, like 13 years ago, campaign finance, this huge thing, all this stuff going on, there was Citizens United. There was a case we had at the Supreme Court the year after that, that our friend Bill Mauer argued as he likes to remind us from time to time, about from Arizona about public funds for campaign finance. Then there was a case a few years after that called McCutcheon, which

had to do with different kinds of contribution limits. And last few years, it's been pretty quiet out there. And then so we get this, this is an interesting find that Paul had out in the Tenth Circuit in Wyoming. So, Paul, what's going on in Wyoming? But also kinda you know, why is this like the only campaign finance news that we've heard in some time?

P Paul Sherman 25:39

Yeah, I mean, so in a lot of ways, this case is kind of a blast from the past, it very much feels like the kind of issues that were super hot back in like 2008, and then kind of went away. And so before I get in the case, I'll just give kind of a quick history lesson that will kind of explain the arc of campaign finance and why back in 2008, it was like a major component of IJ's First Amendment practice. And now, you know, we don't have any active campaign finance cases and haven't for a while. Largely that's a result of our success and the success of other First Amendment advocates in litigating in this area. But this case, Wyoming gun owners, the gray involves the regulation of what are called electioneering communications. And what an electioneering communication is, is it's an ad that mentions a candidate or a ballot issue, but doesn't expressly say vote for or vote against the candidate or ballot issue. But we all know what's going on. And these became a hot thing in the early 2000s, with the passage of the McCain Feingold law. So when the Feds first regulated campaign finance in the 1970s, went up to the US Supreme Court and in a case called Buckley v. Valeo, the court said, you know, this law would be unconstitutionally vague if we don't draw some kind of bright line about what can and can't be regulated. So we're gonna say that this law only applies to ads that expressly advocate the defeat or election of candidates. So the ads had to say vote for vote against, support, oppose, defeat, elect, this was called the magic words test. And it got a lot of criticism, because people quite naturally would go right up to the line. And they would run these ads that are like, you know, Bill Yellowtail says he supports family values, but he took a swing at his wife. Call Bill Yellowtail and tell him what you think of him. And so in the McCain Feingold law, which passed in 2002, Congress started treating electioneering communications the same way they treated ads that expressly advocate the defeat or election of candidates. And that was upheld in McConnell V. FEC, which was kind of the high watermark for regulation of campaign finance. Then, in 2010, we get the Citizens United decision. And everything changes. And basically what happens is the Supreme Court says, you can no longer restrict the financing of these kinds of ads. So corporations if they want to, can pay money to finance electioneering communications, but you still have to disclose your donors. And that was kind of the compromise that was reached in the law. So the sort of more substantive restrictions on funding the ads were all unconstitutional, but disclosure kind of reigned supreme. And in fact, one of the underappreciated things of the Citizens United decision is that even though it was very closely divided on this issue of whether corporations can spend money on the ads, it was actually an eight to one decision, with only Justice Thomas dissenting on the question of whether they could be forced to disclose their financing of those ads. So fast forward to the modern day. Wyoming enacts a regulation of these electioneering communications and says that if you spend more than $1,000 financing them, you have to register with the state and you have to disclose the donors who funded the ad. Unlike the federal electioneering communication ad law, which only covers broadcast, this covers basically everything whether it's billboards, cable, TV, brochures, emails, websites, but you only have to disclose contributions that quote unquote, relate to the electioneering communication, and that's going to be central to the decision. So the plaintiff Wyoming gun owners is the small nonprofit that defends Second Amendment rights. And it has an annual budget between $50 and $100,000 a year. So you know, there's they're spending some money on these ads, but they're not a huge political player there, as the Court calls them. They're a mom and pop shop. And they don't

have super sophisticated bookkeeping. They've got an account for donations that come in online, and they've got an account for donations come in by mail. They don't allow people to earmark their contributions, and 90% of their budget comes in and contributions under $100. So they want to run this ad and I'll just read the ad because I think it gives you a good sense of what what an electioneering communication is and kind of how close people come to the line without saying vote for vote against so here's the ad. America is under attack. Violent thugs are rioting, looting and vandalizing pushing socialism for America. Only a few brave champions will stand against them and fight for your gun rights. One of those champions is Anthony Bouchard, a nationally known conservative leader who has always led the fight for Wyoming gun owners. That's why the left hates him. And that's why they are propping up liberal Aaron Johnson in the August primary, hoping that this self described Country Club Chamber of Commerce moderate will help them pass red flag gun seizures in Wyoming. We all know Anthony Bouchard has fought like hell for gun owners. But Aaron Johnson won't even mention gun rights on our website. That's pathetic. But that's Aaron Johnson. Tell Johnson that Wyoming gun owners need fighters not Country Club moderates who will stab us in the back the first chance they get this is Aaron Dorr. And this ad is paid for by Wyoming gun owners.

A Anthony Sanders 31:47

I think the tone of voice probably is what pushes it over the edge. Yeah if you asked me

P Paul Sherman 31:53

Yeah, so mystery where Wyoming gun owners stands on these candidates and how they want to, how they want voters to respond. Well, the greater Cheyenne Chamber of Commerce did not appreciate apparently the reference to Chamber of Commerce, moderates. Files a campaign finance complaint with the Secretary of State. Secretary of State investigates, tells Wyoming gun owners you got to disclose and register, and we're gonna fine you $500 if you don't. The Wyoming gun owners tells him to pound sand. They pay the $500. And then they challenge the electioneering communications regulations. Now, if you had asked me to guess, how this case was going to turn out, just based on the facts, and what they claimed, I probably would have said the law is going to be upheld, like, you know, they've got, you know, maybe they have a chance on some of their as applied claims. But it's probably not a great chance. Lucky for them, they pulled Tim Tymkovich on their panel on the Tenth circuit, Tim Tymkovich, Judge Tymkovich, former campaign finance attorney, expert on campaign finance. And he actually does a very careful and thorough job, in this opinion going through all of their claims, and they have many of them facial and as applied. Looking at them closely, and I think applying the law in a very nuanced way. And I think sort of the upshot of the case is there's been a general perception since the Citizens United ruling that disclosure cases just largely don't win. And I think Tymkovich does a good job explaining no, you know, disclosure is not subject to rational basis scrutiny. It's not subject to strict scrutiny, but it is subject to what's called exacting scrutiny. And that's a meaningful standard that imposes a real burden on the government, particularly when it comes to tailoring their laws. So I'm not going to go through all of the claims that Wyoming gun owners brought. But, you know, the kind of the core of their argument was, they objected to this related to language about the donations that they had to disclose. They said that this this was vague. And then they also said just, you know, it imposes this undue burden on us in making disclosures. And the court rejected those arguments facially, but as applied to Wyoming gun owners, it accepted them. And it said, you know, look, the law,

you know, they're in compliance with everything they need to be doing, accounting wise. But it's completely unclear which contributions they received that are, quote unquote, related to these ads. And the state's response to that was just well, they can avoid that vagueness by just disclosing every contribution. they receive, easy peasy. And the court says, you know, no, that's not how exacting scrutiny works, you know, because they're, you're just trading, the vagueness for over disclosure. And this is something that I think gets lost in a lot of campaign finance decisions is, you know, most people, you know, when they give unrestricted funds to an organization, I think it can be very misleading for that organization to say like, oh, you know, this ad was funded by this person, because person, frankly, doesn't know.

A Anthony Sanders 32:41

Probably has no idea it was gonna be done.

P Paul Sherman 34:55

You know, they may support the organization more generally. But it's I think it's wrong to impute that specific message, which was chosen by the group to that specific donor. So, one of the, I think most interesting things about the decision is that it takes a close look at a recent Supreme Court case, called Americans for Prosperity, v. Bonta. And this was a case that IJ did an amicus brief in, and I was a little disappointed with the outcome in that case, or well, not the outcome, but the reasoning in that case. But Tymkovich, I think really brings the most out of it that he can, in a way that is very speech protective. So AFP v. Bonta, dealt with a California policy, where if you were a nonprofit registered in that state, you had to disclose what's called your Schedule B to the state. 501, C threes and C fours have to file this form with the IRS, and it contains a list of their biggest donors. And California, as it turns out, was terrible at maintaining the confidentiality of these documents, bunch people schedule Bs got leaked to the public. And Americans for Prosperity sued and said, you know, we should not have to disclose this. They won at the US Supreme Court under exacting scrutiny. Now, we had argued in our amicus brief, that the whole exacting scrutiny applies to disclosure thing was just a campaign finance thing. Campaign finance is kind of this suey generous area of First Amendment law, where the court has made a bunch of exceptions to general First Amendment principles. And it shouldn't expand that outside of that narrow context. And we hoped that the court would say, outside of that context, strict scrutiny applies to compelled government disclosures. And part of this is the Supreme Court has used the phrase exacting scrutiny to refer both to strict scrutiny and to intermediate scrutiny. And and as a result, there's a ton of confusion in the law. Instead, what the plurality in Bonta said is no exacting scrutiny is a form of intermediate scrutiny. But it's one with teeth. And Justice Alito, in his concurrence, you know, reinforced that as well. And so, this particular disclosure, we're going to hold is unconstitutional. I would not have expected that to sort of come back and play a major role in campaign finance decisions where, you know, courts have been so forgiving of the government and its justifications for these disclosure laws. But Tymkovich really latches on to it and he applies exacting scrutiny in a meaningful way. He says that, you know, that the government has not really attempted to narrowly tailor this law and it does impose sort of serious burdens on these unsophisticated mom and pop shops. So long story short, Oklahoma's law survives facially. But as applied to Wyoming gun owners, it is unconstitutional. A pleasantly surprising outcome. And definitely a very much a blast from the past. I read a bunch of these cases in the in the mid 2000s. And it was a it was a nice walk down memory lane. Going going through this one.

A Anthony Sanders 39:10

And you litigated some of those cases, including one that they mentioned a few times the the Parker North case from from Colorado.

P Paul Sherman 39:19

Yeah so there is another Tenth Circuit case from 2008 called Sampson v. Buescher. One of the earlier cases I worked on when I was at IJ. And that case was about a group of neighbors that spent like $782.02, advocating against the annexation of their neighborhood, Parker North into the adjacent town of Parker, Colorado. And as a result, the main proponents of the annexation filed a private enforcement complaint against them in Colorado. Call this a separate story. Colorado had a privatized system of campaign finance enforcement. Which IJ later succeeded in having struck down as unconstitutional.

A Anthony Sanders 40:03

Which Paul may have also litigated.

P Paul Sherman 40:05

I may have litigated that one. But, but anyway, in Sampson, the court said look as applied to this very tiny group, you know, just neighbors essentially getting together and pooling money. You can't force them to go through the formalities of registering with the state, setting up a separate bank account, behaving like a full blown political action committee. Just because they want to get involved in politics, that's just that's too burdensome for that kind of organization. Here, the panel distinguishes Sampson and says Sampson really was just neighbors getting together. They were not they, you know, I mean, I spoke with them. And, you know, they were not politico's they were just people who spontaneously came together and cared about this issue. This is really a policy group that's established, and it's taking in $50 to $100,000 a year. It's not unreasonable to expect it to do some kind of registration and disclosure, at least under existing Supreme Court precedent. But, you know, at least in this case, as applied, the vagueness of the law and the relating to is what made it unconstitutional, as opposed to the pure burden of compliance.

A Anthony Sanders 41:25

Right. Joe, do you see this as fairly burdensome with maybe how things are running in Wisconsin?

J Joe Diedrich 41:34

Well, I certainly think it was, it was burdensome on any small organization. I mean, the discussion about how the Wyoming group kept its accounts, right, had really two only two

accounts in the whole shop. And it was, it was one for a hell of a pile there was,

P Paul Sherman 41:56

yeah, what's what one was online donations, and one was mailed in donations.

J Joe Diedrich 42:00

Right. And you know, that that seems reasonable, I think, to anybody who's only operating on a $100,000 budget, but that made it sort of impossible to comply with the law. And you you'd have a probably a much bigger shot before they start breaking down accounts in a way that would have been so. So yeah, I think the burden analysis sounds spot on. You know, another thing that I found interesting that the majority of the case was talking about exacting scrutiny and comparing the governmental interest with the burden. There's also the earlier discussion of vagueness and the phrase relate to and how that could be applied, at least in these circumstances in a, in a vague way that would lead to arbitrary enforcement, and they really didn't know how Wyoming might enforce that. And I thought that was also a good and correct analysis.

P Paul Sherman 43:01

Yeah, just a couple of reactions. Number one, you know, with these campaign finance laws, like they are generally written, with a view towards the big players like this is a lot it's written to regulate the NRA. And what we expect of the NRA is different than what we should expect of Wyoming gun owners, this tiny mom and pop shop, you know, the NRA is a super sophisticated, highly funded group that, you know, they can they can deal with some of these burdens in a way that smaller groups can't. And if we aren't sensitive to that, then what ends up happening is that we allow only established and sophisticated political speakers to participate in public debate. And I, you know, that's a huge loss to our political culture. You know, and then just one quick comment, unrelated to just a notoriously vague phrase, in the law, as anyone who has ever done, you know, discovery knows, because you get these discovery requests that say, you know, we want every document related to blah, blah, blah, and invariably, everybody objects and says, you know, what the hell was related to me, you know, what's the level of going back to what's the level of generality at which something relates? So not surprising the court, particularly in this situation, where first amendment rights are at stake, and we expect more clarity, generally from laws than we do in other contexts, not surprising that the court was not very sympathetic to the government's claims that this was clear and easy to understand.

J Joe Diedrich 44:41

This is a little bit of a broader comment, but the idea of something being vague as applied, has always kind of befuddled me a little bit because part of the vagueness doctrine right is that you don't have fair notice of what's required of you and that seems to really lend itself to a, we're looking at it as considered for the entire regulated community not for for one person. So I don't know if you've ever given any thought to that, but I don't know. It's always kind of confused me a little bit.

P Paul Sherman 45:18

Yeah you know, it's not something that I've thought about in a while, but it is something that that we have encountered in our cases and briefed. And, you know, I remember reading, reading case, cases about it, some Supreme Court decisions discussing it. I know there's a discussion of it in the Supreme Court's 2010 ruling in Holder v. Humanitarian Law Project, which is very, very different factual context involving advice to expert or expert advice to terrorist groups. But yeah, it is kind of a befuddling doctrine. I think another not to get too deep in the weeds. But another area where I think there's confusion in the law is the distinction between over breadth in the sense of substantial over breadth and narrow tailoring as a component of strict scrutiny. You know, they're all all these doctrines kind of relate and intersect. And it can be really difficult to suss out how they should apply in specific cases.

A Anthony Sanders 46:25

Paul, do you see this as a little fact bound to this peculiar language that in the Wyoming statute, or do you see this kind of the making sense of the Supreme Court's latest statements in this area to be something that we're going to see increasing litigation on or a split, perhaps developing?

P Paul Sherman 46:47

You know, I probably the former, you know, I think certainly the U.S. Supreme Court, you know, it still issues campaign finance decisions from time to time, but it does not have the kind of appetite for it that it did during the 2000s and the early 2010s. So I don't think we're going to see it well and frankly, just a bunch of these laws have already been litigated over and upheld. And there hasn't been, at least in recent years, major pushes for new campaign finance regulations. So you know, Wyoming is maybe a little unusual in that it's adopting an election year and communications law so late in the game. So probably this doesn't herald a major change, I think it is a signal to states that if you want to be active in this area, you got to read those Supreme Court decisions closely. And you have to draw your lines carefully. You know, at least in the Tenth circuit, where we're going to take a close look at this, if you're in the Ninth Circuit, you know, you can write, write whatever you want, and we'll rubber stamp it.

A Anthony Sanders 48:00

Well, thank you both for reading your decisions closely today. Joe, it was great to have you on Joe was very courteous, hosting a talk that I had a panel I was on about my book a few weeks ago in Madison. And thank you again, for that and for coming on Short Circuit and all the work you've done for IJ.

J Joe Diedrich 48:22

Well, thank you for having me, Anthony. I think this has been great. And I don't want you to get any angry letters or comments. So I'm going to correct myself right now. I think I said earlier

that Judge Rovner was a Clinton appointee. That sounded wrong when I said she was actually appointed by George H. W. Bush.

A Anthony Sanders 48:40

That's right. That's what I thought. That's what I thought, but I didn't want to dive in. But she is I mean, I think it's well put that she she's been usually, you know, found to be a fairly moderate republican point she and you know, not someone you can pigeonhole or, or predict. And so, it's it's definitely a cross ideological panel, as you described it. And, Paul, thank you for coming on, and enlightening us on on some blast from the from the past. And I'm sure we'll have you on soon with some more First Amendment news that we we think maybe coming soon from the either Supreme Court or the federal courts of appeals,

P Paul Sherman 49:22

Yeah it was great. You know, I spent the first half of my legal career almost exclusively working on these campaign finance cases. And I from time to time lament that, you know, I've developed this expertise in this very esoteric area of First Amendment doctrine, that just doesn't get litigated very much anymore. So it was nice to flex those muscles a little bit, and I'd be happy to come back anytime.

A Anthony Sanders 49:44

Well, you can you can flex any muscles you want on Short Circuit, especially because we're a podcast. So thank you both. And thank you for listening and we will talk to you next time. But until that time, I'm asking that everyone go engaged.