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SPEAKERS

Bert Gall, Erica Smith Ewing, Anthony Sanders

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 Abdication at the Center for Injustice. No, that's just a little Halloween joke everybody! No, this is the Center, of course for Judicial Engagement at the Institute for Justice. And we are joined here this week with two of our friends at the Institute for Justice, who will tell us some spooky stories in this, our last episode that we'll release before Halloween. We're recording this on Thursday, October 26, 2023. And our chief ghost storytellers who will tell us some spooky tales of conversions of land use stymied by zoning and oral arguments before Judge Easterbrook of the Seventh Circuit, I mean, nothing can be scarier than that in the federal courts of appeals, are our two ghost storytellers are Erica "Specter" Smith-Ewing and Bert "The Ghoul" Gall. Welcome to both of you to Short Circuit.

E **Erica Smith Ewing** 01:50

Thanks for having me.

B **Bert Gall** 01:52

Thanks, Anthony. It's good to be here. I was a little worried about your voice for a second there.

A **Anthony Sanders** 01:56

Yeah, well, I think we've excised the demons from the studio here and we'll be okay going forward. But I do want to warn listeners that there can be some spooky elements coming never the less. And so please be be ready for for that if you're driving, you might want to just keep your eyes on the road because there are going to be some scary elements of constitutional law

coming your way. Now, first, we're going to start out in the 10th Circuit with Eric has case Van Sant v. Town of Calhan, which sounds like a pretty scary place in in Colorado. Tell us a bit about that, Erica and what happened there.

E Erica Smith Ewing 02:46

Yeah, so this case definitely has scary elements. Or at least it was certainly a nightmare for the plaintiff. The plaintiff ran a mobile home park in a small town. The town is Calhan, Colorado, but the plaintiffs business went belly up and the plaintiff argued it was because of new ordinances passed by his local government. He argued that the local officials passed these ordinances to protect their own business from competition which put him out of business. This case has some pretty disturbing facts. But nonetheless the 10th Circuit ruled against the plaintiff and granted summary judgment to the government. So let's get into the details. Calhan, Colorado is a small town of only 760 people, it's in the middle of the desert and if you Google image search it you can see why people want to live there. It's fantastic scenery, very unusual rock formations. Beautiful. And I'm guessing that's why Calhan is a popular destination for recreational vehicles, aka RVs, because it's so pretty, and that's going to become relevant in just a moment. So the plaintiff had a mobile home park, where he rented space to a bunch of mobile homes. And more recently, he also started renting out space to RVs. And for listeners who don't know a mobile home is more of a permanent structure, but RVs are are more vehicles, are connected to a vehicle, so people often ride around in our views for vacation. So the plaintiff had RVs and, in addition, there were two RV parks in town. One was owned by the Chaussee family, I think that's how you're pronouncing it, Chaussee. Calvin and Annette Chaussee. Now the Chaussee family didn't just have an RV park. They had other businesses. Plus there were three Chaussees in the local government. So Calvin and Annette, their son was the former mayor. He was also the current town council member. And Calvin and Annette also had two grandchildren in local government. One was also a town council member and another was a member of the local zoning board. So it's hard to keep track of all the family tree but suffice to say is we have a lot of Chaussees and they seem to have their finger in everything in this very small town. I think you see where this is going. Up to this point, RVs and mobile homes were both virtually unregulated. But a few months after the plaintiff started adding RVs to his mobile home park, a couple of things happened. First, the town passed a law that mobile home parks could not have RVs anymore. And then the town cites the plaintiff several times over the next year for having his RVs. So the plaintiff decides he's going to focus on just RVs. So he actually evicts all of his mobile home tenants and just so he can have RVs. And that's this is where things go very bad for the plaintiff. The town passes another ordinance about RVs and this time, the ordinance makes it very, very difficult to have an RV park or otherwise provide parking for RVs. You have to satisfy a whole bunch of health and safety and aesthetic requirements that probably cost something in the hundreds of thousands of dollars for the plaintiff to implement. We're talking about complicated regulations about utility hookups, fire safety, even requirements for sidewalks and common areas. But importantly, this new ordinance has exemptions for the existing RV parks in town, including the RV park owned by the Chaussee family. So in other words, the Chaussee family RV park can continue, no problem. They don't have to comply with any new regulations. But the plaintiff can't start his own RV park unless he spends an arm and a leg. So plaintiff argues "hey, this is pretty suspicious." And that and not only do these regulations seem to be benefiting the Chaussee family, but if you look at who voted for these regulations in the local government, two thirds of the vote to pass them came from the Chaussees. So they probably wouldn't even have passed, if not for the Chaussees. The Chaussees also did not publicly disclose that they had this family RV business. And there's a strong argument that the state law required them to not only disclose this, but recuse

themselves from the vote, which they did not. So here's another juicy detail. Not only are the Chaussees passing laws that benefit their family's RV parks, but there's some evidence that the Chaussees and local government actually would inherit this RV park, when Calvin and Annette, their grandparents, passed away. Some dispute about that, but overall pretty shady. So plaintiff is not happy. And he brings a lawsuit in federal court. And he brings three claims. He brings a monopoly claim under the Sherman Act. I'll admit I'm not an expert on that. So we'll just go over that very briefly. He also brings a substantive due process and equal protection claim. We do a lot of those at the Institute for Justice so I'll spend the most time discussing those. Ultimately, the district court rejected all the claims and the 10th Circuit affirmed. All right, so the Sherman Act, so plaintiffs claims that the local government and the different Chaussee officials were violating the Sherman Act, because it passed the ordinance in his argument to create a monopoly to protect their own business. But the court refused to consider the merits of this claim because it reasoned that these were official government acts in passing the ordinance, and the government officials are protected by immunity for passing them. And the court found they are protected by immunity because essentially, these are official acts and they're allowed to get away with this. Now, I think the court's reasoning is a stretch here, there's a good argument that it's not an official act, because the Chaussees arguably violated state law in voting for the ordinances instead of recusing themselves. But again, I'm not an expert on the Sherman Act, I'll let the audience read the opinion and decide for themselves. Alright, let's jump into substantive due process. So just a refresher, the question under a substantive due process is whether the challenged ordinances are justified by legitimate government interest. Now the town says "Well, of course these ordinances are justified by health and safety reasons." And the plaintiff says "Yes, health and safety, that's a totally legitimate government interest to have. But that's not your sincere motivation here. Instead, it's pretextual, you're really just trying to keep me out of business to protect yourselves from competition." Strikingly, the 10th Circuit says point blank, point blank, that the asserted rationale for law does not have to be quote unquote "sincere." All that matters is whether there's a conceivable justification for the ordinance.

A Anthony Sanders 09:21

Refreshing honesty there.

E Erica Smith Ewing 09:24

Yes, not the first time the 10th Circuit has been refreshingly honest on on government corruption, but we could talk about that another time. The court says it's at least conceivable that these ordinances are justified by health and safety. And it comes to that conclusion really without doing any analysis or discussion at all. In fact, the court doesn't even really discuss the regulations or why they were even needed. For example, RV parks had been operating in this town for decades unregulated, there was no evidence that any of them had any ever had a safety problem ever. And of course, as the plaintiff argues, if these regulations actually were needed for safety reasons, why did the town exempt the two existing RV parks, including the Chaussee RV park. If this is really a, you know, a safety problem, and these ordinances are needed for safety, you would think everybody would have to be regulated. Unfortunately, the court cites some Supreme Court precedent giving a lot of deference to grandfathering and these type of exemptions so the court barely considers these exemptions in its analysis. Court again just concludes, as long as it's at least conceivable that the new ordinance would benefit

public safety it's a-okay. I have a lot of thoughts on this. We'll get to that in a moment. Next, the court rejects plaintiffs equal protection claim. The question under equal protection is whether the town is treating plaintiff differently than similarly situated RV parks. Predictively, plaintiff argues, "of course, you're treating me differently, these two other parks are exempted and I have to comply, it's gonna cost me hundreds of thousands of dollars." But again, as I just noted, lots of federal case law saying grandfathering doesn't violate equal protection. So the court rejects this as well. All right, so what are the takeaways? IJ does quite a lot of constitutional challenges in the zoning and land use context very similar to those in this case, and this is why I think the plaintiff lost. First, there were a couple of weaknesses in the case, you can infer from the opinion that plaintiff was not the most sympathetic of plaintiffs. Apparently, he had been cited by the town for having a lot of junk in his mobile home park. He apparently had some shady utility hookups seemed the plaintiff later fixed up the property, but he's portrayed a little bit like a slumlord and that may have left a sour taste in the judge's mouth. But I think the bigger weakness is that there was no smoking gun. Reading between the lines, the plaintiff's depositions didn't go great. There wasn't any direct evidence that the Chaussees actually did pass the ordinance to benefit themselves. For example, no emails or testimony that the Chaussees had been talking to their grandparents about the ordinances or that the grandparents had tried to influence the government. Instead, we just have speculation, or at least that's what the court says. But I think we really have to consider common sense here. There is a very strong inference, of course, that the Chaussees were thinking about their family RV park when they passed regulations about RV parks. And I think that most local officials are sophisticated enough not to put their bad behavior in writing. I think it would have been remarkable if we found an email saying something like, "Hey, grandpa, we got the ordinance passed for you. Yay!" But maybe I'm jaded about this. I wasn't there. Maybe the Chaussees are the most upstanding citizens in Colorado. But I think at the very least, the existing evidence was enough to send this case to a jury instead of being decided on summary judgment. But I think the most disturbing thing about the opinion is is something else. And that is even if there was a smoking gun, the 10th Circuit strongly suggests that the plaintiffs would have still lost. The court said it didn't matter if the town's asserted justifications for law were not, quote unquote "sincere." Instead, the court says that under the rational basis test, as long as the rationales for the law, were "objectively reasonable" plaintiff still loses. And worse yet the opinions articulation of what "objectively reasonable" is is so incredibly deferential to the government, that pretty much any ordinance ever would satisfy the standard. So in other words, even if there was a smoking gun that the Chaussee family passed these ordinances to benefit themselves, and that the health and safety justifications were actually protectional, it wouldn't matter under the court's reasoning, as long as it's at least conceivable that these ordinances might benefit the public. The ordinances survived screening. This is obviously a huge problem and exactly why it IJ we work so hard to change how the court uses the rational basis test. Some courts use the rational basis test just as a rubber stamp for the government and that's exactly what happened here. And it lets the government trample people's rights.

A Anthony Sanders 14:26

Bert did this leave you quaking in your boots? After getting to the end? I thought it was chilling. And I think Erica is is right that common sense would would lead you to believe that there is something rotten going on behind the scenes in terms of this family's power and influence in the town. I wonder the inability to find a smoking gun. I wonder how much of that was the product of objections at depositions about legislative process privilege, you know, where basically they say, "we're not going to give you any internal documents, any internal deliberations." And that can be a real obstacle when you are trying to find that smoking gun,

when you are trying to confirm that common sense observation that this just doesn't smell right. And I don't know how much of that happened at the District Court. I'd be interested in that because when you stack that privilege on top of rational basis you've created a real barrier to vindicate economic liberty. It's a one-two punch that's very difficult to overcome, unless you have some truly excellent lawyering. And I don't think the plaintiff had that here. I think Erica's also right that he did not cut a sympathetic figure for the court. But the 10th Circuit noted that the magistrate judge, I think this was tried before a magistrate judge or originally before magistrate judge, noted that there was some unethical behavior below, but the 10th Circuit just kind of sweeps that aside. You know, when I read a decision like this, I keep thinking about Schoolhouse Rock. You remember "How a Bill Becomes a Law," you watch that, we watched that when we were kids, right? And it presents this pristine version of the legislative process. Everyone's operating in good faith to serve the public interest, nothing, there's no corruption. You know, a bill is enacted, it's signed, after considered reason and debate. And we all know that that's not actually what happens. It's a fiction. But here, I think the court, and I'm that singling out this court, I think a lot of courts don't want to look at what really happens when the sausage is getting made and it's that refusal to look that will help or hurt folks who are trying to vindicate economic liberty. You really need courts to look with facts. And I think looking at facts includes looking at the the legislative process.

E Erica Smith Ewing 17:22

I totally agree with Bert. I think another takeaway is, regardless of whether there is was corruption in this case, this opinion just shows how much power local governments have to break a business. And yet so many people don't pay attention to local politics. So please vote in local elections, pay attention to what your local government is doing. They can change a lot of people's lives.

A Anthony Sanders 17:46

Yeah, show up at a meeting, you know, where this has been talked about and say "Are you guys actually serious?" Maybe if someone had done something like that things might have gone a little differently. I always talk about that Schoolhouse Rock episode as a fairy tale. It's a fairy tale that we we like to tell ourselves about how the legislative process works and is basically at the core of modern constitutional law, especially when the rational basis test is before us. One other aspect of the rational basis test in this case that true old time followers of IJ will recognize is Powers v. Harris, another 10th Circuit case is cited a couple of times. It's cited basically for just kind of how the rational basis test works and the court uses the real strong version of the rational basis test, as Erica was saying from this infamous case, FCC v. Beach Communications, that says you can just make up reasons that the legislature had without even looking at real facts. And of course, that's what the court does here. But it's interesting, it doesn't cite Powers v. Harris for what we all remember it saying, which is it's a very rare case that says that government protectionism of one party, in support of one party and against another, is a legitimate government interest. And most courts are not willing to go that far. And a handful of courts have actually rejected it and said Powers was wrong about that. And the court could have used Powers in that way. But I think it maybe realized that would just be a little too much and maybe you know the 10th Circuit went a little too far when it did Powers so instead they go

with this, you know hand waving health and safety yadda yadda yadda approach the rational basis test so it doesn't have really a different result for this poor property owner, but it is a different way of getting there.

B Bert Gall 20:06

One might say that the spirit of Powers has possessed this opinion.

A Anthony Sanders 20:12

Yes. And so we need a method of exercising that spirit from from the 10th Circuit, but apparently it's not going to be right here. So, that was a very spooky tale. I'm going to have a hard time getting to sleep tonight, Erica, thinking about what happened with that RV park. But I think Bert might just be able to top it with his jurisdictional yarn that he's about to tell. So take it away.

B Bert Gall 20:46

Yes, I mean, when I was a kid, you know, my nightmares came from watching the Nightmare on Elm Street movies. You remember those with Freddie and "don't fall asleep"? I purposely avoided all of those. Yeah, "One, two, Friday's coming for you." You remember that? Scared anyway. Well, as a lawyer, your nightmares change. You know, you wake up in the middle of the night, you worry that you've missed a filing deadline, that you left something important out of a bit of a brief that you're just not ready for something that's coming up. You know, that the nightmare where you wake up and you've got oral argument, and you don't even know what the case is about, right? Like, I think every lawyer has probably had

A Anthony Sanders 21:27

Or you're back in law school, and you never went to class or read and the exams the next week.

B Bert Gall 21:34

Yes, but this features this case here. Yeah, East St. Louis v. Netflix features two types of nightmares. The first nightmare is one I'll use to set the background for the case, which is that, across America, Americans are cutting the cord from cable. And this has big implications, not just for cable companies, but for municipalities who collect what are called "franchise service fees." Because when the cable company, you know, they they dig, they put in cables and wires and lines, and for the privilege of occupying public rights of way cities charge the cable companies for this. And the typical situation is where the cities will get a small percentage of the cable company's revenue. In this particular case, it was 5%. So the city of East St. Louis, which is actually in Illinois and Illinois municipalities get about 5% of revenue from the cable companies and they rely on this this revenue stream. And it is a big deal that across the country, people are cutting the cords, because suddenly, you know, the cable companies, that

revenue goes down, so do the taxes or the fees that they're able to collect. And so I was unaware that there has been litigation across the country in several states, both state and federal court. It's an issue that's reached, for example, the Ohio Supreme Court, the Tennessee Supreme Court, on this issue of whether municipalities can force Netflix, Disney, Paramount Plus, Hulu, to pay these fees. And the question is really is Netflix, a video service provider? Is Disney Plus a video service provider? And under the law, people have always understood video service providers, they're the people who own the wires, they own the cables, it is the cable company. What cities are trying to do is convince courts that it's not just the people who own the wires, own the cables: it's the people who use the internet to put out content. And if that content just happens to go over cables, then those content creators need to be need to be charged.

A Anthony Sanders 24:15

Can I ask a point of clarification here, Bert? I read the case and was still confused by this: if you cut the cord, but you're still getting, of course, internet service, and so you're using streaming or whatever, does the internet service provider have to pay this fee? Or do they not, even though that you're getting the internet through those same cords from your ISP instead of, but you're not getting the actual cable? Is that how it works?

B Bert Gall 24:46

These statutes, so many of them were written before we got internet delivered by our cable companies and you obviously you can buy internet service from your cable company separate and apart from your cable service

A Anthony Sanders 24:47

Don't they have a cause of action just through claiming they don't get the tax, though? Right.

B Bert Gall 25:02

And it looks to me that at least in the statutes here, that internet service providers have not been charged for the use of the wires, the use of the cables. And if you think about it, Netflix is putting its content out there on an open circuit, you know, the internet, right, you don't need to have a cable subscription in order to access internet, you can access it from your laptop, you can access it from your phone, it's just that the way that a lot of us access that content is through the internet, and, the cables that the cable company has installed. And so that's how we get it. I was left with a question after this case of like, whether, you know, are we going to see states, for example, trying to, like go after internet service providers and say, you know, to the extent that these cable companies own the cables, and they're providing internet through them, we're going to like charge for that. We'll see if that happens down the line. But it looks like we're dealing with this kind of antiquated model that doesn't take into account the internet. And it would have big implications if municipalities were to win under the statutes, because we stream everything. And as the Seventh Circuit notes in its opinion, this would have implications for the New York Times, you know, they stream video, Major League Baseball, every streaming

service that's out there, they would have to pony up. And of course, those costs would be passed on to the consumers and make streaming less competitive. Also, I don't think it's noted in the case but at oral argument it's noted that typically under these laws cable companies have to have a physical office in a jurisdiction for customer service; at least that's the case in Illinois. And so the implications of of the the city of East St. Louis winning this case, would be that Netflix would have to set up an office in every single jurisdiction. You know, in Illinois, it's a pretty, pretty absurd, I think reading of the statute. So it looks to me from the brief research that I've done looks like these challenges under these old statutes have been just beaten back at every turn, usually beaten back for one of two reasons. One, you know, look, internet service providers are just streaming content, that's created by Netflix. Netflix doesn't own the wires or anything like that. Come on, you know, they're not video service providers. And the second, two, is, you know, who has an actual right of action here to enforce these these laws concerning cable service? And a lot of courts will say there's no private right of action here. The cities cannot cannot bring a bring a lawsuit.

A Anthony Sanders 28:21

Yeah, apparently, the way these things are worded, in fact, actually, the Seventh Circuit notes it here that the private right of action argument was one actually, I think, actually it was waived at the trial court level. But a lot of other jurisdictions where has not been waived have said no, there's private rights of actions to do other things, but not when it comes to these, not when it comes to these fees. And when it too is before states passed some of these laws to say basically municipalities get a certain percentage. The problem was municipalities were doing their own thing. And so you had this patchwork of fees. And so I think the state wanted to kick that up to its level, and frankly, I'm sure the cable companies wanted that as well. So, anyway, there's this big national legal battle going on over this that I was completely unaware of. And so that's obviously scary for municipalities to lose this revenue. But now we get to the scare of oral argument. And I had to listen to this oral argument after after reading the decision, because the first several pages of this short opinion are based on on the issue of jurisdiction. Can this court even hear this case? The city of East St. Louis v. Illinois, it's sued all of the streaming companies, Netflix, Warner Direct, Disney, and it sued based on diversity jurisdiction and as you may remember from law school to have diversity jurisdiction you need parties that are completely diverse. They're from different states. And everybody thought, "oh, look, we have diversity of jurisdiction here, East St. Louis is in Illinois and all of these other companies are in other in other states." And not only did the plaintiff's counsel think that, but so did the counsel for the streaming companies. But Judge Easterbrook did some research, apparently, on the internet before the oral argument and he traced the Warner Direct, the LLC. He traced it back and found it's actually owned by AT&T Capital Services, or it was at the time before AT&T spot sold off its Warner assets, which is located in Illinois. And this was revealed, of course, during oral argument, so that the plaintiff's counsel again, gets up against making her presentation. And he says "Let's talk about jurisdiction because it looks like you know, we've got defendant in Illinois, St. Louis is in Illinois. Can you please tell me, you know, why this case shouldn't be dismissed? Don't you have an ethical obligation to dismiss this case?" Plaintiff's counsel was completely blindsided and frankly, so was counsel for the defendants, who had actually filed an amended jurisdictional statement, saying that Warner Direct was, I think, headquartered in Texas. So this was embarrassing for all. I think it certainly derailed a lot of the the oral argument. And certainly there's just no answer to it. So go from that horror to is then some post argument briefing, which established "Wait, there actually is jurisdiction all along to the class action Fairness Act." And so there was a lot of drama, a lot of scary moments with stomachs and throats, hearts and throats. But it's all passed, we get past that horror, but then

we get to the merits of "Okay, well, you can actually bring this lawsuit we've established now, but can you win?" And the Seventh Circuit says, "No, you really can't, you can't win. You know, we know the difference between the video service provider and streaming content, the implications here would be would be crazy in terms of streaming services." The plaintiffs point out that Illinois had recently changed the statute at issue to make it even more explicit that video content creators like Netflix aren't video service providers? The plaintiffs argued, "Well, that shows that the old version of the statute did include them." The court rejects that and said "No, this was a clarification. It wasn't a substantive change." The plaintiffs try to argue that there's a trespass going on under common law property, whereby look, these Netflix, they're streaming, they're trespassing without permission Classic trespass Classic trespass, right. That's rejected. There's an argument that there's a resale of cable services that's going on here, that the court just pretty quickly rejects. And so this legal effort by municipalities is once again thwarted and they're gonna have to go to the state legislature to see if they can get something done when it comes to streaming, but it's a good reminder that for counsel, when you're litigating, here's one more nightmare for you to worry about and one more thing to plan and check is jurisdiction. Don't assume that you've got it. And don't even assume that you've got it if the other side says you've got it, and provides information saying that you do because everything can be searched on the internet, and I am sure that there were some associates on those cases who were probably at least staring down at council's table during the argument, thinking "Oh, wow, I really should have checked that." So, scary indeed.

E Erica Smith Ewing 34:54

Wow. That's definitely anxiety producing.

A Anthony Sanders 34:58

There's a lot that can be said about jurisdiction here. But it probably should be noted that this likely would not have happened in any other oral argument in the country before any other judge. But Judge Easterbrook is a big believer in jurisdiction of the court's own responsibility to bring up jurisdiction. And he did this in a recent IJ oral argument about a totally separate kind of jurisdictional idea. But he wasn't picking on us. He does this all the time. And the interesting thing about it is though, in the end, yeah, it was the class action Fairness Act, there was jurisdiction anyway. It seemed like it was even, you know, they pled this, it's just that it wasn't at the front of their minds when they get up for their 10 minutes of oral argument or whatever it was. Which is another kind of scary thing about the Seventh Circuit is you do not know your panel of judges until that morning of the argument. So unlike a lot of other circuits, where you get it a few days before, maybe a week beforehand, you know, if it came out and says, "Oh, this is the judge panel," a prudent practitioner would then kind of get their jurisdictional stuff ready. But in the Seventh Circuit, you just you got to have that ready anyway. Because you never know when this is going to come up. This also raises a ghost story that I think I have told on the podcast before but but maybe is time to retell it now that one of my Seventh Circuit arguments when I was in private practice before IJ, it was just, it was a normal case, it was an arbitration case. And I have the Seventh Circuit argument. And the whole time, I'm thinking, wow, I really hope I don't get Judge Easterbrook or Judge Posner on my panel, and we get the sheet that morning: 7:30am. Judge Easterbrook is on the panel. And it was a real tough argument for us. We had told the client, you know, this is going to be a tough one, and get up there and two minutes into the argument, or something like that he's asking me if we have, if

what we're arguing is frivolous. Luckily, I had an answer ready for that, because we knew this fight happened and we were not found to be frivolous but we did lose the the appeal, but it was a scary time. And there are many other examples of of scary arguments before the Seventh Circuit with him and other other judges on that court. Yeah, oral argument's not going well when the judge asked you about your ethical obligation to dismiss the case. And that you've really got no answer as to why there's jurisdiction that remains. That's, that is, it doesn't get much worse than that. I mean, I think you can. There's, there's a more general lesson, I think, to be learned here, in addition to always checking jurisdiction, which is that, you know, questions, especially apparently before Judge Easterbrook, but before courts generally, can come from anywhere, any direction, which is why it's so helpful to moot your case beforehand, including with some attorneys who are not familiar with the record, not familiar with the facts. So we're going to approach this with a fresh angle and throw some of those curveballs at you so that you have a chance to swing and miss them in private before doing so in public.

E Erica Smith Ewing 38:46

Great point. Although I wonder if all the mooting in the world would have uncovered this jurisdictional effect.

A Anthony Sanders 38:53

I think there was probably some associate, who was maybe they were tasked with this amended jurisdictional statement. I would not have wanted to be them on the return flight home in terms of like, "Why didn't you just Google this thing?" And he could have just Googled it? I mean, I think there could have been some confusion, because as I mentioned AT&T sold off it's Warner assets. And that happened during the course of litigation, but you determined jurisdiction based on the outset of the the case. So I think folks get tripped up there. And the other thing that I didn't even realize, I never had to think about it before, but I didn't realize is that if you're a corporation your principal place of business or where you're incorporated is where you are a quote "citizen" for diversity jurisdiction. But if you're an LLC you're considered a partnership and therefore it's all your various investors or owners and where they live, whether they're individuals or themselves LLCs or corporations. And that could get really complicated, in some cases, considering how these LLCs are structured. So I think that's a another scary story that some of our lawyer listeners should should take note of.

E Erica Smith Ewing 40:23

Especially when you're dealing with these massive companies like Netflix. They have so many parts and subparts, and if just one happens to have jurisdiction, I mean, that's very complicated and very hard to track down.

A Anthony Sanders 40:35

This reminds me of the case we read in civil procedure. So Bert may remember, this was the Pete Rose case, where when Pete Rose was banned from baseball, or the very beginning because of his gambling thing, he sued Major League Baseball, but he did it in Ohio state court,

and he wanted to stay in state court because he thought he had a better shot there than going to federal court because, you know, he was a hometown hero and all that. And the question was, is Major League Baseball like a thing? Or is it all the sub components of it, all the teams, one of which is well, a couple of which, are in Ohio, and so therefore, you wouldn't have complete diversity. And I think he did not win is what I remember but I don't remember the other the other details

B Bert Gall 41:32

So you can say he lost that bet

A Anthony Sanders 41:38

He lost that bet and unfortunately a few others in his life. Well, thank you both for your scary stories that our listeners can now think about when they're they're trying to get sleep tonight. And I hope everyone has a happy Halloween. I know both of you with your children will probably be picking their outfits or leading them around the neighborhood. Maybe not so much Erica, hers is a little small for walking the neighborhood yet, but I will be supervising some of that myself. I know many of our listeners are. And the next time we speak to you we'll have a fresh set of cases and a fresh set of guests but thank you both for coming and until the next time I want everyone to get engaged