ShortCircuit298

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SPEAKERS

Bob Belden, Anthony Sanders, Ben Field

A Anthony Sanders 00:24

Doesn't matter how big the warnings on the cigarettes are, you could have a black pack with a skull and crossbones on the front called tumors and smokers would be around the block going, I can't wait to get my hands on these things. I bet you get a tumor as soon as you light up. Well, that was a heavily edited snippet from Denis Leary's classic 1993 album, no cure for cancer. Now, conversely, the state of California seems to think that everything causes cancer, and regulates how you speak about that cancer. And we're going to talk about those restrictions on speech today, on 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 Tuesday, November 14 2023. Now I have two of my colleagues who are going to talk about that case that California case from the Ninth Circuit and a little bit, and also a case from the Fifth Circuit about who you're supposed to sue. But first, I have a special announcement. Now some of you may remember in the past that we have a another podcast here at the Institute for Justice our sister podcast, bound by oath. Now unlike this podcast, short circuit and our new spin off podcast unpublished opinions, we you know, here we we talk about the news of the week, cases coming out, we try to entertain you, but we don't take ourselves too seriously because you know, we don't spend that much time on it. However, bound by oath, we spend a lot of time on especially the host of bound by oath, John Ross, my colleague. John, he has spentan incredible amount of time, the last couple years, including many of our colleagues, and many outsiders who've been working with him, putting season three of bound by oath together, I am very pleased to say it is coming out imminently. The first episode should be out in about two or three weeks. And a preview of it will be out next week, a trailer that we're putting out there. So for fans of bound by oath, who have enjoyed season one on the 14th amendment and season two on remedies, and immunity and accountability. Please get your podcast apps ready to get the new episodes. I know there's you know, there's rot in podcast apps, sometimes you lose subscriptions, sometimes you switch phones, and it's not there anymore. So all of you should check out just you know, sometime next few days, when you got a moment, look at your app, make sure you're subscribed to bound by oath and resubscribe. If you're not, and then when the preview comes out next week. So that's the week of Thanksgiving. We'll be releasing this before that week, make sure that it's popped up, maybe by Thanksgiving, if it's not look in, make sure you're re subscribed, to bound by oath. And then when the actual episodes start coming in a week or two after that, you will be ready for them. It

is all about property rights. This season, we're going to be talking about property rights to do with the Fourth Amendment to do with the Fifth Amendment to do with the First Amendment to do with state constitutions do have all kinds of stuff even beyond the Constitution, we're going to be talking about property rights. So stay tuned. It's gonna be very exciting. We've spent a lot of time on it. And we are very proud to be bringing it to you. But first, the fun podcast short circuit. So I have a couple wild and crazy fun guys who are going to be talking about these two fun cases this week. They are my colleagues, Bob Belden and Ben Field Welcome back, gentlemen.

B Bob Belden 04:25

Thanks for having us, Anthony.

B Ben Field 04:27

Yeah, very happy to be here.

A Anthony Sanders 04:28

Well, we're happy to have both of you. And first we're going to start out west with Ben who himself is not out west, but this seems to be a kind of outwest. You know, if you heard about this law in a vacuum and you didn't know where it was, you'd be like, that must be from California. And indeed it is from California. So what's up with cancer warnings in California ban and what can't causes cancer? What does?

B Ben Field 04:57

Yeah, so obviously it is California. Everybody who has purchased almost any consumer product, you've probably noticed some warning on it that says, this is known to the state of California to cause cancer. And you've probably also noticed, as Anthony said, The California thinks everything causes cancer. And so we're going to talk about the intersection of that and the First Amendment, but I should preface it with an apology. Usually, I'm a real stickler for not doing holidays before Thanksgiving. But I'm gonna have to make an exception here and move Festivus up, because I have a lot of grievances there. And I have a lot of problems with the people involved in this.

A Anthony Sanders 05:33

are there going to be feats of strength as well?

B Ben Field 05:36

I mean, if you disagree with me, maybe okay. So, just to set the table, you know, in 1986, California passed this ballot initiative as it is want to do, which requires it to compile this list of

things that cause cancer. And then, as a result, they make warnings, they require people to put warning labels about them. And that kind of comes head to head with the First Amendment, which generally says that you can't compel people to say things that they don't want to say, that's just the flip side of being able to if you in the same way that you can choose what you want to speak about, you can choose not to speak about something, it's pretty obvious why that's true. Because if the government could force you to, you know, parrot the party line, that would really infringe on your freedom of conscience. But there's an exception to that. That means the courts are generally willing to let the government impose disclosure requirements. And the conditions for that are that the disclosure has to be something that's factually true. And that's non controversial. So things like, you know, like the example you were giving from the Denis Leary quote that, you know that that bit, you know that cigarettes cause cancer at this point, pretty much everybody accepts that that's true, or putting nutrition labels on food, things like that. So the question here is, what about the specific warnings that California is demanding? And this case has to do with Glyphosphate, which most people probably know better by it's more common trade name, Roundup. And the question is whether or not California can require people who use Roundup to put warning labels on their products, saying that it potentially causes cancer in warning consumers that products that have roundup are likely to cause cancer might cause cancer. And this is really important because Roundup is by far the most common pesticide in use. And so virtually everything uses it. And you can tell that by the caption to this case, which in short form is National Association of Wheat Growers versus Bonta. But in reality, it's just a list of like every single agricultural trade organization suing the state of California saying, We shouldn't have to put these warnings on all of our products. And so how did we get here? Well, we got here via this organization called the International Agency for Research on Cancer, which has some shady relationship to the to the World Health Organization. And it put Glyphosphate on a list of things that probably cause cancer, there are a few things to know about this list before we dive into the legal analysis. So the first as the Ninth Circuit points this out, is that the IARC doesn't really think about cancer risk the way that you and I do, they think about cancer hazard, which means that something could cause cancer, but they don't think about the amount that you're ingesting or that you're exposed to. It's just in the abstract at some level of exposure, this thing could cause so

A Anthony Sanders 08:51

like if I took a bath in Roundup every day for a number of years, perhaps that could cause cancer that would qualify.

B Ben Field 09:00

Yeah, in a lot of the studies. And this isn't just for the triphosphate. But for a lot of the things on this IRAC list. The way they do it is they take mice who are genetically prone to cancer, and they just pump them full of whatever the chemical that they're testing is. And if they develop cancer, they're like, Oh, well, it seems like it causes cancer. Regardless of whether or not you would actually encounter that exposure in the real world. So I sort of learned about the IRAC this summer when they put aspartame on one of their lists. Now, if anybody else like me is a Diet Coke enthusiast, you're probably horrified by that now, but if you had looked into it, you would have seen that they're real. It was the exact same thing where they had just pumped a bunch of mice full of aspartame, when the whole point of aspartame is that you need very very very little of it, because it's so sweet that a tiny trace amount can replicate, you know having a ton of sugar in a soda. So you know, I was skeptical to begin with and if you dive into this case,

it doesn't look that much better. So just a couple more background points on the IRAC while I'm airing my grievances. So they have a bunch of different lists of things that, you know, definitely cause cancer probably cause cancer likely cause cancer. Reading from a Reuters article from a few years ago, they've tested about 1000 different substances, they've only found that one of them did not cause cancer. And on that list of the things that are in

B Bob Belden 10:28

Ben, sorry, what was it? Do ou have what it was?

B Ben Field 10:30

I do, it was an additive that goes into pantyhose.

A Anthony Sanders 10:38

What about like, water or oxygen?

B Ben Field 10:41

Well, so I'm not sure that they I'm not sure that that those appear on the list, I can give you some other great examples. So on the top list, the one that says this stuff definitely causes cancer. So there's plutonium, mustard gas, smoking, you know, I'm gonna spot the IRAC, all of those. But in the exact same list, there is Chinese salted fish, and processed meats. So if you just looked at this list, you'd have no way of knowing well, you know, if I like stand next to a nuclear reactor for 20 years, is that going to give me more or less cancer than if I have a salami. And then on the list that they put Glyphosphate or Roundup on that list also has such dangerous activities as being a hairdresser, having a night shift, drinking hot beverages, or eating red meats. So we've definitely established the IRAC is no fun. But if you delve in a little bit more, it's even worse for them. Because as the Ninth Circuit points out, in this case, the IRAC is like the only organization that thinks that Glyphosphate causes cancer. So the very same regulatory body in California that's forcing them to put that forcing the plaintiffs put the labels on their products, the California Office of Environmental Health and hazard assessment OEHHA itself doesn't think that Glyphosphate causes cancer. Neither does the US EPA, the EU, Canada, Australia, New Zealand, Japan, South Korea, so it's just the IRC versus the world. Yeah,

A Anthony Sanders 12:19

when you've lost the EU, come on. Exactly.

12:24

And before, you know, and the last thing I'll say is that, you know, I think that people think of, you know, they hear roundup they hear Glyphosphate, and people, you know, don't like

Monsanto, who is the company that makes Roundup, but I think it's important for people to recognize that, like, the world population has been exploding. And yet, hunger has never been lower, like these biotechnology advances are miracles. And, you know, you can have criticisms of Monsanto's, you know, patent policies and things like that. But at the end of the day, I mean, we should just count ourselves blessed that we have products like roundup that allow farmers to just be way, way, way more productive, so that we don't need 90% of the population farming 2% of the population can just easily feed everybody. In fact, we have the opposite problem, where people have too much food. And that's, you know, and indeed, it does, probably much, much, much, much more so than any of the things on the IRACs list. So that gets to this case. So these plaintiffs go into court, and they point all of these things out, and they say, Look, you cannot force us to put something on our products that say they cause cancer, when they just don't. And at the very least, it's a highly controversial topic. So again, remember the two requirements for that, you know, that first amendment sort of exclusion for disclosures? One, it has to be true. And two, it has to be non controversial. So the idea being that, you know, the government shouldn't be able to put a thumb on the scale, when it's wading into a point of significant dispute. But if they're just asking you to be honest with your consumers, you know, be honest and upfront with your prices, or what ingredients are in the product, things like that. That's totally fine. And so it's a pretty straightforward case for the plaintiffs. They say, Look, this is not even true. Nobody thinks that this is true, except for this one organization. At the very least, it's highly controversial with the weight of scientific evidence on the other side. And so, you know, that's really the key legal question. So let's just like walk through some of the warnings that California has proposed because another interesting wrinkle about this prop 65 law is that it doesn't say exactly what you have to put on your product. It just says you got to warn people that has cancer. It does give you a couple options of quote unquote safe harbors where if you use a specific set of words, you're guaranteed to be safe. But if you don't use those words, then you know anybody, their uncle can sue you and say that you're violating the law. So there's a strong incentive to use the magic words. So let's show Look at what those magic words would be. So one is you have to put a yellow equallateral triangle with a bold black outline on your product that says Warning in capital bold letters, this product can expose you to chemicals, including, in this case by phosphate, which is known by the State of California to cause cancer seems like that saying like phosphate causes cancer, in my humble opinion.

A Anthony Sanders 15:25

I mean, if you know something, it's true belief, right? It's true

B Ben Field 15:29

Ineed it is. Another one is warning, again, with the capitals and bold, cancer, and then a link to a website with the list of things that cause cancer again, you know, it doesn't say known to cause cancer, but warning cancer on my product. There's really only one thing as a consumer, I can take away from that. So I think the Attorney General's office to its, you know, somewhat credit, I think, is obviously a little embarrassed defending what's going on here. So they've over the course of this litigation, which, you know, as you'd expect, takes years, they've come up with a series of alternative labels, that they say, well, these are a little bit more truthful and when wouldn't be misleading to a consumer? So I just want to get your take. So Bob, what do you think about this one? Warning, this product can expose you to Glyphosphate a chemical listed as causing cancer pursuant to the requirements of California law, for more information,

go to this website? Does what would you take away from that? I mean, I probably just wouldn't buy the product. Yeah, so the the California eventually their attorneys kind of acknowledged that that one probably didn't fly either. So

B Bob Belden 16:47

I guess it does depend what's on the website, I suppose, you know, maybe if I've got good reception. And I go, you know, I'm reassured that the big triangle is actually nothing to worry about that, that could that could lead to a different conclusion.

B Ben Field 17:02

So eventually, the after many years of efforts, including staying the case, so that OEHA could like come up with a new label, they came up with this language, using this product can expose you to Glyphosphate, the International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans, US EPA has determined that like phosphate is not likely to be carcinogenic to humans, other authorities have made similar determinations, a wide variety of factors affect your potential risk, including the level and duration of exposure to the chemical, for more information, and including ways to reduce your exposure, go to the website. So the Ninth Circuit ultimately tackles this one. And I think that its analysis is, is strong and straightforward. And it says, Yeah, each individual sentence is true. But if you read it, there's no way to come across without the conclusions, one, that there's something seriously wrong with this product, and that there's a good chance that's gonna give you cancer and two that at best, the evidence is in equipoise. One way or the other that, you know, some people say this, some people say that California is forcing them to put this on on the label. Whereas in reality, consumers, if they're being accurately informed, should come away with the conclusion that everybody says it doesn't cause cancer, except for this one organization that thinks everything causes cancer. And so they said, look, it's just not, it's neither truthful. And it's certainly not non controversial, given that there is this huge scientific debate where the weight of authority is all on the other side. And then just quickly at the end that said, so if you're if you're not in this disclosure world, which is named after a case called Zauderer, or if you're not in this Zauderer world, then normal First Amendment standards apply. And when you're talking about commercial speech, which essentially just means advertising, you apply a form of intermediate scrutiny where you look at does the government have a sufficiently important interest? And is what it's trying to do, you know, narrowly tailored enough that there aren't obvious alternatives, that would be just as effective. And the court says, Look, given that this thing doesn't even cause cancer, there's not even really a government interest. And even if there were, the government could just inform the public itself, or required act or, you know, have actually truthful disclosures. And so it's not really furthering that whatever, you know, weak interest, the government has. There is a dissent from Judge Schroeder. And, you know, I think the basic theme of her dissent is just that she doesn't she thinks that California should be able to require basically whatever it wants, she's not a big fan of the First Amendment applying to commercial speech. And basically she says, you know, each individual sentence is true. And so at the least, we should send this back to the lower court for it to reconsider you know, this newest label that California has come up with, at least my take on that is you know, if this if the if the posture were reversed and California were going after somebody for a, you know, a misleading statement, they definitely would not think that it's a defense that each individual sentence is true if the overall impression is a falsehood, and I think that the state should be

held to the same requirements. And I'm Fortunately, the majority of the Ninth Circuit agreed in this instance and said, You've had years of opportunities, California, you haven't come up with a label, that's actually honest. And so we're gonna put this to bed and just enjoying you from doing it. And, you know, kudos to them.

A Anthony Sanders 20:33

Bob, can you come up with a better label?

B Bob Belden 20:37

No, I'm not. But I mean, echoing Ben's last point there, I was struck by how many chances, the OEHHA and California was given to craft this sort of thing. It's kind of a, something I think we see in a lot of our cases, you know, regular average, people are held to kind of standards that are very live or die. But then, you know, you're forcing companies to say, my, my product causes cancer, and you get five or six chances to come up with a way to say that that's not going to immediately cause people to run away from the product and just can't do it. But no, I, I don't think I don't think I could. And so, I believe that to two people like you and Ben.

A Anthony Sanders 21:24

Yeah, I? Well, because I know what California does, I think I probably take no heed on any of these warnings. You know, even if it's plutonium, I probably would be, would be skeptical, because there's been so much warning inflation. I mean, some of that, some of that is, you know, it's that funny, I didn't mean to do this, but that Dennis Leary, quote, we said, you'd have a boxes called it's a tumors, that was 1993. I think that's basically how cigarettes are sold, and a lot of countries now is they'll just be like a skull and crossbones. That's the legally the only cigarettes you can buy. And of course, people do still buy them, although not nearly as much. But I think that's that's for other reasons. The interesting kind of 30,000 foot view foot view of this thing of this case that I found is that it gets out of the Zaunderer box for a warning label, which I think is pretty rare. I mean, I don't know that much about this area. Ben, you probably know a lot more than than I do. But I know that there has been for years fights in the DC Circuit about whether various warning, well, warning labels or other consumer information labels you have on products is in this Zauderer box, which is this case from 1985, where the Supreme Court's First Amendment jurisprudence was quite different from today, or whether it's in some other box, whatever, you know, whether it's commercial speech or something else. And it seems like this is kind of against the trend that a court actually says, Yeah, you know, this is just so misleading, or not noncurrent controversial that it's coming going to go out of his outer box. Is that right, Ben?

B Ben Field 23:17

Yeah, and I think this gets to something that I didn't talk about, but is in the opinion is that there's there's just like the DC Circuit, there's an interesting fight about these kinds of disclosures in the ninth circuit. So many of the precedents that the court was discussing have

to do with various cities in California, trying to impose warning labels on cell phones to suggest that cell phones cause cancer. So you can see,

A Anthony Sanders 23:40

We'd all be late by now if cell phones caused cancer.

B Ben Field 23:43

You can see how this quickly abuts you know, sort of 5g conspiracy theories and things and it's a fine line. And I think that the majority took guidance from a Supreme Court opinion from a few years ago called NIFLA. And in that case, you had the disclosure requirements were crisis pregnancy centers, who are these, you know, groups that are opposed to abortion or trying to counsel women on alternatives to abortion was requiring them to give disclosures about the availability of abortion in California. And the Supreme Court said, That is like the opposite of non controversial, you're requiring people to take a stand on a really contentious social issue that they don't want to take. And I think that it gets to the point you were making, Anthony that, you know, the First Amendment is just far more robust now than it was in the mid 80s. And I think the majority was taking the Supreme Court's recent signals to say, look, we have to be serious about this Zauderer exception, and that where we can't apply it broadly, where there truly is debate.

B Bob Belden 24:46

I was gonna ask Ben I didn't see in the opinion but like on the point of whether the disclosure is controversial or uncontroversial, the cell phone case, seemed like it went off on that point on Like the EPA or whoever, or the FCC already makes you disclose this information. So like it's not controversial to make you do it again. Is there another example of when something is uncontroversial information that like, you know, offhand, I didn't see one in there.

B Ben Field 25:16

So I don't think they discuss it. But I mean, there, there are a billion things you see in your everyday life. So as I was saying, nutrition labels, this Zauderer case itself effectively stood for the proposition that the government can force in that case, it was lawyers, I think this would be more broad, applied more broadly, to be honest and upfront about your pricing structure in your fee arrangements. So where you're just describing the, you know, the service that you're offering, and, you know, describing it accurately, then I don't think I think that then Zauderer is relatively uncontroversial. But when the government's asking you to, you know, step out and say something else that is a subject of scientific debate, then that's where these cases come up.

A Anthony Sanders 25:55

So a question I have that was not at all in the case. And I think that's because the plaintiffs didn't push it, because they didn't need to, is why are why are these warning labels? If they're

didn't push it, because they didn't need to, is why are why are these warning labels? If they're not in the Zauderer box? Why are they considered commercial speech? Because they're not advertising? Right? The person is not like, has an advertisement trying to get you to do your product, it is just speech that the state is requiring you to put on their. Is it's just close enough that no court is, you know, tried to put it outside that the commercial speech box, or what's the reasoning?

B Ben Field 26:34

I think the idea is that, I think that you're right, that they didn't get into the so it doesn't

A Anthony Sanders 26:39

because they want under central Hudson, which is the commercial speech tests, like the fastest I've ever seen it. So yes, a page and a half. So they didn't need to.

B Ben Field 26:48

right. I mean, I think that, my guess is that what's going on is that the idea is that if it's on the packaging, that, you know, packaging, for consumer products, it just kind of inherently commercial speech, because the idea is like, you know, you encounter it in a store, it is of necessity being advertising to you.

A Anthony Sanders 27:10

Yeah, I mean, there are edge cases, right? I know, there's been some litigation about that, if they put something on there about like, save the whales, you know, that that didn't have to do with the product. But maybe it made you like the product better. Would that be commercial speech? Would that be just, you know, normal, highly protected speech? But yeah, this this is maybe less less edgy in that way? Well, when there is an edge case, we, of course, will cover it here on short circuit. But here's another case that I, I rung true to me, because I have been in this situation before as a public interest attorney, where you want to have a law declared unconstitutional, or have the government stopped doing something, but you're not exactly sure who you're supposed to sue. Because the way we do things in this country is you don't actually usually sue the state or the federal government itself. you sue a person, so that person does not enforce the law anymore. And Bob, sometimes it's a little hard to figure out who that person is. Isn't that true?

B Bob Belden 28:19

Yeah, unfortunately. Yes. Thanks. Thanks for handing off to me, Anthony. So the case I've got for today is USA versus Abbott. And it is all about the question Anthony raises, like whether these people have sued the right defendant. And as you can probably infer from the surname, there the defendant that we're talking about as the governor of Texas, Greg Abbott, and in response to the COVID pandemic, and border security crisis over the past few years in Texas,

the governor, there issued a disaster declaration under Texas law, and then issued a follow up executive order. It's called Executive Order ga 37. And in the order, Abbott directed the Texas Department of Public Safety to stop all vehicles. With if DPS reasonably suspected that the vehicle was transporting somebody who had been detained by ICE or somebody who was subject to removal from the country under Title 42, the kind of federal rule that suspended sort of various crossings at the at the border with Mexico and the the top line order was basically a prohibition on the private transportation of those individuals who have been detained by ICE or are subject to removal and, you know, I kind of struggled to think of what exactly this could be like Maybe it's Uber's or you know, just any, any private driver, but the DPS is directed to stop any cars with reasonable suspicion. And even to reroute those cars. If during the stop, it's determined that the car has unauthorized migrants or folks subject to the order in it. And the order also authorizes DPS to impound any of those cars. So those are kind of the three things, three ways in which this order is enforced. And the case that we're reading today is brought by private plaintiffs. One is a pro bono lawyer who provide services to migrants and the other three are organizations that provide services to migrants, and they're bringing a claim against Governor Abbott, under the Fourth Amendment and the 14th. Amendment, a legend, this executive order is going to lead to us being stopped in our operations, like on the side of the road and subjected to prolonged traffic stops. And from various Supreme Court cases over the past 10 years, we know that if the traffic stop is extended, for reasons unrelated to the original stop, there's got to be independent, reasonable suspicion or cause to extend the stop. And here the argument would be there is none. And those are all. Those are all really interesting questions. But they are unfortunately, questions. We don't get into in the case, because the plaintiffs here sued the wrong person, it turns out, well, they sued one wrong person and the right person. So when they brought the lawsuit, they sued not only Governor Abbott, they also sued the Director of the Department of Public Safety. And in the trial court, the governor immediately moved to dismiss arguing sovereign immunity. And so it's a concept we borrowed from the English and you know, the concept like 1000 years ago that the king could do no wrong. Well, now, that theory, sort of clothes, people like Governor Abbott in immunity from lawsuits. And so he moves to dismiss the lawsuit under sovereign immunity. The trial court rejects it. And so Governor Abbott appeals and it is important to note that Governor Abbott alone appeals, the Director of the Department of Public Safety, he also moved to dismiss I believe, but did not appeal the negative ruling. So on appeal, the question is really just whether these folks have sued the right person under ex parte young, which is an exception to that general rule of sovereign immunity. And in ex parte young, the supreme court basically said, you can bring a claim for injunctive or declaratory relief against a state official, who is got, I believe the language the Supreme Court used was some connection to enforcement of a rule that you say, is unconstitutional. And, you know, at this point, you might be thinking it's weird, they weren't able to sue the governor. He sounds like he has some connection, right?

A Anthony Sanders 33:26

I mean, he issued the order.

B Bob Belden 33:30

Right. So he issues the order. The order directs one of his subordinates to enforce the order in certain ways. And so you're probably thinking, this is a really odd choice for short circuit, there can't be much interesting that happens after this. And unfortunately, it does get more

interesting, but in a bad way, the plaintiffs here so even though Greg Abbott, Governor Abbott has a connection to enforcement. The Fifth Circuit in prior cases has said when the Supreme Court said some connection, what it actually means is the particular duty to enforce and for various reasons, and prior Fifth Circuit cases, that particular duty question can be answered by the law itself. So and the way that it is typically answered is the law expressly gives some government agent, the authority to enforce it and directs them to enforce it, and here, you have Governor Abbott, specifically saying DPS will enforce this. And so, at the end of the day, that is enough to decide the case for the panel, but they go through the remaining aspects of ex parte young and say, you know, there is no demonstrated willingness here on Governor Abbott's part to enforce the order because he's delegated enforcement to DPS and even though He has said he wants to see them enforced and wants to, you know, address the border security crisis. That's not enough to infer that he's actually willing to enforce it if he were the one who enforces it anyway. And for the same reason, in ex parte young, you have to sue to stop something that is ongoing or imminent. And here, Governor Abbott issued that issued the order in the past, and it's going to be enforced in the future by somebody else. So everything Governor Abbott has done is in the past. And that is basically how you get to the end of this opinion in the panel looks at a few prior Fifth Circuit cases, that addressed specifically executive orders under the governor of Texas his disaster authority, and said, just alleging that the governor issued an executive order about a disaster is not enough to get around sovereign immunity and invoke ex parte young. And we'll come I'll come back to those cases in just a second because judge Stewart issues a dissent that really kind of explores the differences between those prior cases in this one, but So the third thing that the panel addresses is actually to rebut an argument that the plaintiffs raised, which is there's another provision in the Texas government code that allows the governor basically to take over DPS during a disaster. And the executive order we're talking about is a disaster based executive order. So it's kind of a circular, circular issue. In this context, Governor Abbott could just take over DPS and cause all of these rules to be enforced. But the panel says, you know, the availability of that power is not enough to say the governor is imminently going to be enforcing these things. And so ex parte young doesn't apply. And it is an interesting discussion by the panel. And one of the footnotes, gets it what I think is really going on here, there's a reference to a jurisdictional fishing expedition about the governor's relationship with various people at DPS or various people who are involved in the case. And I kind of wondered, after learning that the director of DPS had not appealed and had sort of agreed, like, you know, we can continue with this case, why there was such a push to keep the governor in. And, you know, I think maybe having him as a, as a party potentially makes discovery easier, you're more likely to find sort of interesting communications. And by that, I mean, like, flashy or newsworthy if it's from the Governor, rather than somebody who reports to him. So just kind of a question about why this was such a big fight, being raised by the panel, I think. And then, just to touch on the dissent briefly. Judge Stewart looks at the same elements in ex parte young but reaches a different conclusion, because there are prior Fifth Circuit cases that interpret the some connection to enforcement requirements in ex parte young to be basically what that language is. And it's kind of looser than what the panel interpreted to mean. And Judge Stewart says, All you have to find is that this person has some authority, some connection to the authority to enforce the rules here. And just looking at the terms of the the executive order shows, the governor's directing DPS, not recommending how they should or could exercise discretion, but like directing them to take specific steps. And also, that Texas Government Code provision that allows the governor to just take over DPS if it if he wants to, Judge Stewart thinks that that is another sort of, you know, hallmark of authority, right, like you have created these rules and told people to go enforce them. And you also have this other thing that allows you to just do it yourself. And it seems like ex parte Young would want people to be able to bring a you know, at least a claim against that person. And that is the sort of distressing thing about this. You don't ever talk at any point

about whether any of the things that are contemplated by the executive order would be violations of the Constitution, like there are months and sometimes years and hundreds of hours by attorneys and parties devoted to just addressing the question whether we can sue this one person and there are a lot of consequences of the decision, but it is it's frustrating to have sort of really important substantive issues raised and then kicked out on procedural grounds like this. But that is, that's the case. I'm curious to hear what you guys think about it.

B Ben Field 40:17

Yeah. So I agree entirely with where Bob was going at the end that this, the bigger picture of this speaks to a potentially really big problem in the law. If you go back to the history, the whole reason we fought a civil war, and had the Reconstruction amendments was to make federal constitutional rights in federal law supreme over states who are violating those rights. And that's why we had all these civil rights acts during Reconstruction. But there was this conundrum, because at the same time, you know, the people had changed the constitution so that federal rights could be enforced against the states. But there was this background ancient presumption of sovereign immunity, which some of us might think in a Republic we shouldn't have. But unfortunately, that wasn't the view of the courts. And the Supreme Court sort of squared that circle in 1908, in this case that Bob was talking about ex parte young where it said, Okay, well, you can't sue the state because they have sovereign immunity. But you just sue the state official who's enforcing the law, and then we can get to the same basic question. And yeah, it's a little bit of a legal fiction that you're suing the person rather than the state. But that's what you know, American constitutional law has been based on for the last century, is that you can bring a challenge to a law, because you can use ex parte young to simply if

A Anthony Sanders 41:33

you're not asking for money, we should add.

B Ben Field 41:36

Exactly, yeah, it's for you're asking an injunction saying, Look, this what the state is doing is illegal, you shouldn't let them do that to me in the future. And if we didn't have this doctrine, then everybody could only raise constitutional claims as a defense. So you would have to break the law, and be willing to, you know, roll the dice and hope that your constitutional claim is successful. Or if you if you roll the dice, and you're wrong, you might end up spending some time in jail. And so if we didn't have ex parte young, you know, the Constitution can be very, very, very weak. And over the last several years, bizarrely, essentially based off of this one guy named Jonathan Mitchell, states have been trying to push back on ex parte young and so like, famously, a few years ago, Texas before dubs overturned Roe, Texas effectively banned abortion just by saying that it was entirely privately enforced, and that there were no government officials who could have any role in enforcing this ban. And largely, were successful in getting out of federal lawsuits as a result of that. And I think that you're now seeing in a case, you know, this case, fortunately, the plaintiffs were able to find the right person to sue. So it doesn't matter if this much, but I just fear that when the judiciary is drawn into these kinds of culture, war valence cases that it's tempting for judges to say, well, you sued the wrong person to get out of this one particular case. And if they keep doing that on

both sides, and sort of narrowing the number of people, you can sue, eventually, you might just completely undermine the ex parte young doctrine and say, there's nobody you can sue and so the Constitution isn't really enforceable. And I think that's the big concern that's lurking in this case.

B Bob Belden 43:21

Yeah. Reading about like, DPS, presumably, in Texas is a rather large, rather large agency. And I think that the point you just made Ben multiplies in the agency, right? Like, if it's not Governor Abbott enforcing it, because of these, this distillation of factors. The next case, if we sue the director of DPS, maybe he is also said, like, oh, no, I don't enforce that I directed my deputy to enforce it. And it's sort of, sort of you get to a point where, if you can't sue anybody, he can't, you can't vindicate your rights, right.

B Ben Field 43:58

And it goes both ways. You know, I've had cases where, you know, we sue the entire chain of command. So you sue, the person who's the governor, you see the person who leads the department, you sue the person who runs the agency who enforces the specific thing you don't like you sue, like the line person who enforces against your client, and the government can play this game on all of them. So the topic and say, oh, this person is too senior, she doesn't actually have any, she doesn't have any role in this. If it's too Junior, it's like, oh, well, if we enjoin this person, you know, there are 20 other different line officers who could enforce it, so it wouldn't really do anything for your client. And so, you know, if you play this game enough, there's eventually there's just nobody to sue

A Anthony Sanders 44:38

Yeah, I mean, proper approach that most federal courts I think still take is that the most obvious person to enforce the law is an okay stand in for this challenge to the law and then the injunction generally, you know, will be followed by that person and, and their subordinates or anyone close to them, like in You know, and but this does show the oddness of this doctrine, like, often when you're, when you're enjoying trying to enjoin a state law, you actually sue the county attorney, because that's just how things work in that state is that the county attorney's enforce the laws, not someone at the Attorney General's Office, for example. So you don't sue the governor, you don't sue the Attorney General, even though in theory, they could enforce this law. They usually don't. You don't enforce enforce, you don't sue, like the class of Assistant Attorney General's in the AG's office, you sue the county attorney, where the plaintiff lives? And then everyone's just I mean, that's kind of silly, but everyone just kind of accepted. Oh, yeah, it didn't force a lot probably would be that county attorney or their subordinates. And so yeah, we'll just go with that. But, you know, if you get to that point, it's it's odd, because, like, the county attorney works for the county doesn't even work for the state. So why why do they even have the interest in enforcing that law, and it's just kind of like everyone, just, you know, we're in this ex parte young world, and let's go with it. But if you really take it seriously, like, you know, there's shades of in this opinion, then you're right, then it really starts to get like whack a mole, and we have enough whack a mole, public interest litigation already. We don't need this too.

B Ben Field 46:25

Right. And the result of it is like it actually, you know, in any particular case, the government might be happy with the result that they've managed to, like, we've we've foiled them this one time. But the result is that, you know, every single government official in the state gets sued, just to make sure that you're suing the right person. And even if they don't end up defending it, as Anthony saying, it's like, they've got to deal with the process, they at least have to appear in court, they have to convince the Attorney General to defend them. And so the result is that it just makes life more difficult for everybody, it would be better if we could just all agree, you know, you sue this person in the state will defend that we can cut through the legal fiction, really all that's happening is you have a plaintiff versus the Attorney General's Office defending the state law.

B Bob Belden 47:05

Yeah. And it puts you in a position as a plaintiff's lawyer to come in. And well, I didn't want to ruin all these people's days, but you're on are not really sure who you're gonna say I was supposed to sue, so I had to sue them all. I'm sorry. Man.

A Anthony Sanders 47:21

I think judges are usually fairly understanding of that. But it does get expensive, suing 20 people or or whatever you're going to do. I wonder also, in this case, if it be because it's consolidated in one case that the United States itself is involved the Biden administration that might have made the governor want to appeal even though as a practical matter, it seems like they got the wrong person that DPS official, so it's not going to change the outcome of the of the case. But that that was some both sides, I guess, had an interest in highlighting what's going on? Yeah, yeah.

B Bob Belden 47:58

I think that's right. I mean, I guess the that parallel suit by the US, like, the federal government got a TRO, in this case against the enforcement of the executive order. And then after consolidation, the court changed it into a PI. And so like, another thing about the frustrating sovereign immunity ruling is like, clearly there's something going on in the merits here. If you get a PI at the stage or a TRO, like something, something is going on, but the US I think, I think that part of the case has just been sort of stuck. While this is all been going on, as far as I know, this was only those private plaintiffs who were opposing the appeal. But yeah, could be the governor wants to draw attention to it. Who knows?

A Anthony Sanders 48:44

Well, we would like all of you to draw attention to bound by oath when season three comes out in a couple of weeks. So watch for that. We'll be talking about it more here on short circuit. But in the meantime, I'd like to thank my colleagues for coming on and enlightening us about how

to not catch cancer, although it sounds like that's hard because everything causes cancer, and who to sue, and for all of you. I would ask that until next time, you get engaged