Short Circuit 301 | Litigating the Multiverse

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Parents Defending Education v. Linn Mar Community School District, Johnson et al. v. Chesapeake Louisiana, L.P., and Chesapeake Operating, L.L.C.

SPEAKERS

Arif Panju, Anthony Sanders, Braden Boucek

A Anthony Sanders 00:24

Bonjour et bienvenue a Short Circuit, ton podcast sur les cours d'appel federales. Excusez-moi. Very sorry, ladies and gentlemen. This is the English version of Short Circuit. I'll start over. 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 Wednesday, December 6, 2023. We have a special guest here today that I'm very excited to introduce to you. But first, I'm going to welcome on my colleague, Arif Panju. So Arif is the managing attorney of our Texas office, and what most people probably don't know is he is of Quebecois heritage. So he knows le francais much better than I do. And we brought him on today partly because we're talking about a case from a civil law jurisdiction, the great state of Louisiana. And the case from the Fifth Circuit that he'll be discussing has a tinge of its French legal background. So Arif, welcome or bienvenue.

A Arif Panju 01:45

Merci, Anthony. C'est un plaisir d'etes ici a Short Circuit. And your French was fantastic. I could share this with my friends in Quebec and beyond, so thank you for continuing to expand the reach of Short Circuit. I appreciate it and so do all French-speaking lawyers and non-lawyers alike.

A Anthony Sanders 02:04

Well, thank you. Hopefully, the Quebec folks will be more forgiving than those I've met in France over the years who I think would not be so hospitable, given my pronunciation. But more importantly than all this French business is our special guest. He is Braden Boucek, who is the director of litigation for the Southeastern Legal Foundation. So Braden is a proud Tennessean. He lives in the Nashville area. Over the years, he has helped us in a couple of different litigation matters in the great state of Tennessee. He's an ardent practitioner for

liberty. He's been practicing for over 20 years. And he's come on today to talk about a case from the Eighth Circuit that has a little bit of all kinds of things going on that we run into in public interest litigation. So Braden, welcome to Short Circuit.

B Braden Boucek 03:08

Thanks, Anthony. Thanks for having me on. And I'll do everyone a favor by not trying to reply in French, just bearing in mind that my French education consisted of what I learned in middle school in Tennessee in the late 80s, which is probably not the language submersion that you and Arif underwent.

A Anthony Sanders 03:30

Well, I had two years in high school in Washington state, and there weren't a heck of a lot more French people there than Tennessee, I imagine. On a different note, I didn't mention that a few months ago, we talked about a case of Braden's. Some of you may remember the sidewalk case from Nashville and the question of what kind of bucket the regulatory takings claim in that case landed in. And that was actually Braden's case that he argued at the Sixth Circuit. So congratulations on that case, Braden, and then tell us about this other one from the Eighth Circuit that you wanted to share with us today.

B Braden Boucek 04:15

Thank you very much on the sidewalk case. I hope it's the important blow against tyrannical infrastructure funding projects from local governments that we all hope it is, but it's truly a team effort. I know that there's a lot of people who litigate on our side who have been involved in those issues for a while, so I do hope it's important. Anyway, let's talk about something in more of the free speech bucket. And that's *Parents Defending Education v. Linn Mar Community School District*, which was an Eighth Circuit opinion that came out earlier this year. Specifically, it came out in February, but it's a pretty important First Amendment case on some timely topics. So a school district in Iowa, called the Linn Mar School District, came up with a regulation or a policy, and it addressed a series of issues concerning transgender and gender nonconforming students. There were several issues with the policy enacted. First, it set forth a process of what's called gender support for students who might be gender nonconforming, where they would be set aside, they would meet with students or administrators. And I think, you know, critically for purposes of this challenge, it said that the student has the right to determine who will be in those meetings, including whether or not their parent or guardian will participate. And related to that was a provision that kept the student's decisions and the gender support plans pretty highly confidential, including in some circumstances from a parent, unless law required otherwise or the student consented. So that's kind of the first bucket of policies that were being challenged here. The second had to do with the usage of names and pronouns, which implicates speech. And the policy declared that students have the right to make a determination about their names and their pronouns, and a persistent refusal to respect those could be deemed bullying or harassment and subject the offending students to suspension and even expulsion. So these policies were challenged by Parents Defending Education, which is a membership association on behalf of a bunch of parents who were in the school district. And there's parents who were interested in challenging the first set of policies

and parents who were challenging the second set of policies. The parents who wanted to challenge the gender support plans were parents of students who feared that their children would be targeted as gender curious or gender nonconforming and be brought into one of these plans without the foreknowledge of the parents. And then the other set of plaintiffs were more concerned about their students' ability to discuss gender issues to say things like I'm not comfortable going to the bathroom with somebody of the opposite biological sex or to even get into a debate about gender dysphoria or whether or not there are only two biological sexes. So the parents brought a preliminary injunction down below. This was a pre-enforcement challenge, which is important and we'll return to that in a moment, but none of these policies had been enforced against any of the students. And as any of us who litigate in any space knows, bringing your pre-enforcement challenge is always pretty tricky. It's bound up in certain questions about whether it's premature or whether there's been an injury-in-fact for a district court to redress.

A Anthony Sanders 08:10

It's great fun for defense counsel though. All kinds of these arguments they can raise.

B Braden Boucek 08:15

That's absolutely true. And as, no doubt, both of you know, oftentimes, the thing you think you're going to argue about in this momentous issue of constitutional law winds up not being the thing you think you're going to argue about in a momentous issue of constitutional law. And instead, you're having a whole bunch of arguments with a government attorney about whether or not you sued us the correct way, including whether or not it was too soon or too late or, probably, both. Of course, that's what this case wound up being about. Parents Defending Education did not get their preliminary injunction on either the issues relating to the gender support plans or the free speech issues down below with the court ruling, among other things, that they had just not proven that this would ever in fact injure them or had injured them yet. And he rolled it on both the parental rights claim and also on the free speech claim. And then it goes up to the Eighth Circuit on appeal with a preliminary injunction. And in the meantime, Iowa had enacted a law that prohibited school districts from giving false and misleading information to a parent about a student's gender that would be different from their birth certificate. So now we have another just disability argument about mootness. So a case that was not ripe because there had not been an injury-in-fact down below is now being considered for mootness, bringing some sort of quantum mechanics about whenever this case might have been potentially viable. As somebody who has personally lost on rightness to a trial court, only to have the opinion affirmed on mootness grounds, I can relate.

A Anthony Sanders 09:34

Wow.

B Braden Boucek 10:05

Yes, it's quite a feat to be able to, you know, occupy that sort of multiverse theory of standing.

A Anthony Sanders 10:13

It's like a Doctor Who episode.

B Braden Boucek 10:15

Yeah, it's the multiverse theory of standing, right? I don't know. I mean, I'm not sure when, to a metaphysical certainty, that case ever actually was a live controversy.

A Anthony Sanders 10:24

It reminds me, I think Teddy Roosevelt once tried to make a recess appointment between congresses because his argument was there has to be a recess on January 3 or whenever it is when one shifts to another. I can't remember. I don't know if he won that argument or not. But anyway.

B Braden Boucek 10:44

Yeah. Well, the Eighth Circuit ruled that it was indeed moot: the due process challenge to the parental rights. And that had been framed up as a substantive due process challenge. I want to return to that in a moment, but the district court had ruled that they hadn't suffered an injury because none of them had shown a threat that they were going to be subjected to these policies. And HR could just roll with it; it was moot. I don't know how much Parents Defending Education cared about it, given the fact that they essentially got a state law that had given them more or less the right. They made some arguments to try to keep it alive, but the Eighth Circuit didn't buy it. The more interesting arguments in the Eighth Circuit centered around the First Amendment issues. The lower court had ruled down below that not only was there not standing because there wasn't an injury, but they also ruled that this policy would survive First Amendment scrutiny; that it wasn't content-based, that it wasn't viewpoint-based. And it wasn't unconstitutionally vague or overbroad just to demand title policy that says you have to respect other people's names and pronouns, and if you don't do that, you can be subject to discipline. It's easy to hypothesize about what the potential injuries could be from that. I mean, PDE pointed out like, look, I might have a kindergartener that calls a biological male who is transgender "him," and is that a failure to respect? I don't know. Or you might have a middle schooler that wants to debate biological males in women's sports or whatever. Is that a persistent refusal to respect someone's gender? And here, the Eighth Circuit agreed with the plaintiffs that there was a credible threat of enforcement. And they didn't get into a lot of the free speech arguments: the content-based, viewpoint-based. They just said it's impermissibly overbroad because they've not sufficiently defined with precision what it means to respect a person's pronouns or when it crosses the line into disrespect. And therefore, they found that it was sufficiently chilling to a person's rights. A couple other things bound up in that is within this decision, and I think this is an issue you'll see keep coming up in a lot of free speech issues that are really live right now. The Eighth Circuit says that even though it's obviously fine for schools to regulate harassment or discrimination under their laws and policies, what they can't do is label pure speech to be a form of harassment and bullying and think they're going to sidestep First Amendment scrutiny. I know IJ and myself have both litigated a lot of these so called

professional speech cases. But we're all familiar with the *NIFLA* case and the so called speech incidental to conduct restriction exception to *NIFLA*, and I think this was an effort to argue that this was at most a speech incidental conduct restriction. But the court took a clear-eyed look at it and said that any time you are calling something that entirely consists of speech and labeling that as bullying or harassment, it's going to get full on First Amendment scrutiny. And they also rejected the argument that speech becomes unprotected merely because it's bullying or harassment or could be construed as disrespectful or anything like that. So it's an important First Amendment ruling from that perspective as well. Remarkably, there is a concurrence here that reads a lot more like a dissent to me. And it's a concurrence because the concurrence agrees that the policy sweeps impermissibly too vague. But the opinion mostly says that the school might have a compelling interest in regulating the speech under the guise of federal anti-discrimination law, which probably applies in these settings. This is coming mere months from the *303 Creative* decision, where the Supreme Court says that anti-discrimination laws are still subject to the First Amendment. This isn't really a very challenging proposition for a lot of lawyers. Obviously, if there's a federal regulation or a federal law that implicates free speech, it too is going to get bound up by a First Amendment analysis. You can't have a local school district just saying, well, the reason why I'm violating somebody's First Amendment rights is because the federal government is making me and then have that become a compelling interest that satisfies First Amendment scrutiny. So that's an interesting aspect to this, and I'm sure it will be live. The two other things I think that I've flagged for listeners is first, this is, as I mentioned earlier, pre-enforcement challenge. And as IJ attorneys certainly know, there is substantial disagreement about when a potential harm is sufficiently imminent to trigger pre-enforcement scrutiny when the Supreme Court said in a decision called *Clapper* that the injury has to be certainly impending. And if it's certainly impending, it's very hard for a plaintiff to find the moment before the actual injury to their free speech rights occurs, where they still have standing to challenge it. And the district court squarely relied on the *Clapper* standard and used that to explain why the injury was not sufficiently imminent. Then you get to the Eighth Circuit, and the Eighth Circuit relies on an opinion that came out I think within a year or two of *Clapper*, the Susan B. Anthony case, which I'm sure you're familiar with.

A Anthony Sanders 10:45

Yeah, it tiptoed around the *Clapper* standard and did its own thing.

B Braden Boucek 16:39

Yeah. And I think that they were trying to tiptoe around it, as you said, but it's definitely a more relaxed standard, at least in the First Amendment context. But it just says that there just has to be a credible threat of enforcement. And the Eighth Circuit, not mentioning the *Clapper* standard, not mentioning the tension between the two opinions, just cites Susan B. Anthony and says we think that showing has been made here because they debatably fall within the scope of this policy, and there hasn't been any official disavowal of enforcement of it from the other side. And so that was sufficient to make a pre-enforcement showing there. But you know, it's easy to imagine future district courts leaning on *Clapper* as a way to bounce a potential plaintiff out of court. The other thing that I think is really interesting too is this is a substantive due process claim; the parental rights claim is. And I think that these things are just starting to become emergent again, substantive due process has been a bad odor for a lot of people for a long time. Certainly not for IJ attorneys who understand that substantive due process claims

also embrace economic liberty. But there's always been this pushback from some people about whether or not the Constitution protects unenumerated rights, and if they do, if it's under the substantive due process clause or not. And if it does, when those things are accorded legitimate First Amendment scrutiny, and I think that this is going to be a real live issue going forward because suddenly, you're going to have people like Parents Defending Education, who are going to be defending more conservative parents. And they're going to have to reconcile with substantive due process, which a lot of the more conservative Supreme Court justices are, you know, particularly skeptical of those sorts of claims. And so, you know, I think that that's going to be an issue and a trend going forward. In oral argument, prior to the case getting mooted, there was a lot of questionings about the scope of their suffering of due process claim. And I think that just highlights the tension and the need to reconcile the parameters and come up with a cogent way of identifying both what rights are protected that are unenumerated and how to determine what the appropriate standard of review from rational basis to strict scrutiny, what those tests are going to be and how we determine when to apply which tests. Which I think is very much something that is unclear in light of *Dobbs* and *Bruen*.

A Arif Panju 19:14

I agree. And not in light of *Dobbs* and *Bruen*. In light of cases that are much older.

B Braden Boucek 19:20

Oh, for sure.

A Arif Panju 19:21

In *Pierce v. Society of Sisters*, it's pretty clear that you have a fundamental right to direct the upbringing of your children. And in that case, the lobbying challenge involved a requirement in Oregon that all kids be funneled to the government schools, even if parents didn't want that. In *Meyer v. Nebraska* similarly. So I think, you know, whatever stench of substantive due process that folks may have perpetuated both in being hostile to deeply rooted rights or being indifferent to them or in law schools by caricaturing judicial review and using scary boogeymen like *Lochner*. I think, eventually, more reasonable minds will realize that even the dissent in *Lochner*, the primary dissent, got it right. And the courts in *Meyer* and in *Pierce* got it right. And as Anthony knows, unenumerated rights are deeply rooted. They're reflected in state constitutions. They're reflected in the U.S. Constitution, and our framers would have understood them to be so deeply rooted both at the founding and at the second founding as well.

B Braden Boucek 20:26

Yeah, I think as you are well aware though, the way that the modern legal mind makes sense of *Lochner* and *Meyer* and *Pierce* is to just sort of reconstitute *Pierce* and *Meyer* as First Amendment cases. And somehow, we've allowed the First Amendment ... you know, nobody has a problem with the First Amendment getting muscular versions of review. So that's number one. I don't think that that is a faithful reading of *Meyer* or *Pierce*. They are clearly substantive due process cases to me. That's what the court understood them by, and they embrace the

same logic as the discredited *Lochner* majority. We just are more comfortable with the result. But the second thing is there has always been this issue about how do we define the scope of an unenumerated right? You can always zoom down with a sufficient level of granularity such that you can say there's no historical tradition to any kind of a right. So this is starting to become a real live issue in these parental rights cases. I think it was in the District of Maryland where there was parents who had brought a challenge to school curriculum and said, look, I've got a substantive due process right to control the education of my child; everybody agrees that that's recognized by *Pierce* and *Meyer*. But the way the court characterized the right has never included the right to control public school curriculum. And it all is just as susceptible to manipulation about how high level you view a particular right. And I think that that is something that methodologically the court is going to have to reconcile in short order.

A Arif Panju 22:03

Yeah, and I'd recommend that folks ... Recently, the Federal Society's national convention dedicated the entire convention to originalism on the ground, and there was a great panel called Near Natural Law. It's online. And Randy Barnett gets up to a double ballroom full of people that showed up to listen and learn about natural law. And just, to a huge round of applause, basically deconstructs this false idea that unenumerated rights should not be protected in any meaningful way, marches through *Pierce* and *Meyer*, and points out that this kind of strawman, of this boogeyman rather, in *Lochner* is incompatible with how you look at how eight of the nine justices resolve that case. And that you can't be scared of judicial engagement. That's just a genuine pursuit of the truth on the behalf of actual facts and evidence. And it's good to see a jurist engage with these constitutional questions and not merely pull out their rubber stamp because the rubber stamp is what kept unenumerated rights unprotected for far too long, and the rubber stamp has worn out. It is worn out. And it's important that jurists get their arms around these deeply rooted, meaningful rights, like property rights and economic liberties and the ability to raise your children and direct their education. These are foundational to the American experience and to a free society. And it's a great talk with a very refreshing reception for many conservatives in the audience. There were several hundreds of people that were applauding Mr. Barnett.

A Anthony Sanders 23:43

We'll put a link to that video in the show notes for folks who want to watch that debate. This issue of substantive due process and parental rights and trans issues is super interesting, of course super controversial, but also super ironic in I think how it's going to play out. And I am not the first one to say this. Luke Berg of the Wisconsin Institute for Law and Liberty, I was at an event a couple of months ago, and he pointed this out that there are right now in different states very concerned parents raising these claims for exactly the opposite type of issues. So there are parents like the parents here who don't want their schools not telling them when their own children are picking a different gender at school. And so they want to know about that, and that's actually an issue, I should alert listeners who are interested, we talked about a similar case, like the one Braden talked about, from the Fourth Circuit a few months ago, but the court found there was no standing basically. It was *John and Jane Parents v. Montgomery County Board of Education.* We'll put a link up to that episode also in the show notes. But so there are these types of cases, and then there are cases in states that have enacted laws that are prohibiting gender transition in some kind of way for children. And the parents want their kids

to do whatever it is, whether it's hormones or a surgery or whatever, about affirming their gender and are challenging those laws based on the same theory based on these two cases that we've talked about on Short Circuit many times, *Pierce* and *Meyer*, from 100 years ago about the scope of your rights as a parent to control the upbringing of your children. And so a clash of these two different lines of cases, both using substantive due process, is going to be perhaps coming in different circuits, maybe the Supreme Court, in coming years. And this is on top of all these, you know, challenges that substantive due process claims have, whatever you feel about the abortion issue itself, it's fair to say that there are challenges based on the *Dobbs* opinion in that region. So a lot of interesting parts in play here. The other thing about this case that I found kind of weird, but it didn't really come up, I think maybe it's a case of a court not worrying too much about a step because it was going to get after that step anyway is when the court is looking at the vagueness challenge, and the majority is dealing with the vagueness challenge, they first do standing. They say, as you explained, Braden, that the parents had standing. And so they could move on to whether this policy was vague or not. But in talking about whether there was standing, they basically were saying, well, there's a colorable argument here. Like it looks like you might win, so you have standing. That's not how standing is supposed to work. Standing is supposed to be do you have a cause of action? Do you have a right? So they could have claimed something like, to bring up an example that true First Amendment lawyers everywhere hate, I want to go into school and scream "fire" right when class starts so everyone has to run out of the building. And yes, I want to do that. I know it's for no good reason, but I want to do that. You have standing to bring that claim. You will lose 100 percent in that there's, of course, no First Amendment right to yell "fire" in that way or to, you know, all kinds of other things that might be covered by this policy. But it doesn't matter for the merits whether or not you have standing. And the court just kind of is like oh, yeah, you have kind of a chance here, so let's get forward to the merits, and oh, you win. And that's not how it's supposed to work.

B Braden Boucek 28:11

Yeah, among other things, it kind of makes the preliminary injunction sort of the end all, be all, right? I'm not sure where this case currently stands, but yeah.

A Anthony Sanders 28:17

Right.

A Arif Panju 28:20

One thing that I was happy to see in this Eighth Circuit opinion relates to enforcement. Sometimes, you know, a law will hit the books, and you can tell this thing was just a product of red meat politics at the legislature. And then the state will defend it saying, well, we're not really enforcing it yet. It's too early. And this is kind of something they throw out there to kind of ding your standing. They're trying to knock the legs off the stool or the merits. And the Eighth Circuit says that, you know, one of the general rules of standing is when there's a credible threat of enforcement. When is that? And when a course of action is within, you know, the text of a policy, there's a credible threat. And the district had argued that, you know, the policy was only enacted recently in 2022. And, you know, there's no real credible threat of

enforcement, but the Eighth Circuit kind of flipped it and said, no, the policy was enacted only recently in 2022. And there is thus no established practice of non-enforcement that would, you know, satisfy the concerns about those that are subject to the law and about the imposition of discipline. And that's right. The law's on the books, it threatens people's rights, and the government can't get out of a case on standing by pointing to the lack of enforcement or non-enforcement. It's on the books, and if it's recent, the mere fact that there's no established practice of non-enforcement is what should govern whether you have standing here. And here, they're kind of walking through and knocking down the different arguments of the district.

B Braden Boucek 30:13

Yeah, and, you know, the Eighth Circuit has been pretty good on that for a while. Even since *Clapper*, they've kind of said, absent non-enforcement, if you're within the scope of a law or policy, that's when you bring pre-enforcement challenge. But that's, to me, I think, fairly obvious. Otherwise, why have a pre-enforcement doctrine at all if that doesn't qualify, but that's not how all other circuits see it. I mean, the Sixth Circuit, among others, very much clings to the *Clapper* standard. It is very hard to figure out when you can bring a pre-enforcement challenge short of actually being injured, which, you know, kind of defeats the purpose of the chilled speech doctrine for First Amendment purposes because most people are simply going to chill their feet rather than risk penalties. And if you've got to risk penalties and have it certainly be impending before you can challenge it, why not just self answer. You know, Arif, you made a good point about kind of the gamesmanship about enacting a policy and then defending it in a different way. So in the oral argument, one of the things that actually occupied a considerable amount of attention was they were challenging the issue about parents not being notified about a gender support plan in their kids' files. And the policy itself says the student has the ability to decide if the parents are going to know about this. It'll be kept confidential, unless the student consents. However, it has a provision in there that says, unless required by state or federal law. And the government attorney spent a considerable amount of time arguing back and forth with the court that well, we're required to give student records to parents under FERPA, and you can easily imagine a scenario when that would be persuasive. Of course, you know, probably people are listening right now screaming through the mic like, what's the point of the policy to begin with if, in all cases, the parent still has the right to access the records? And I do think that the judge draw here was sufficiently incredulous of that claim that they really kind of pushed in on that purported claim that we enacted this policy to keep these records confidential, but it doesn't actually mean anything when it comes to the parents because of the state law, even though we wrote in there that the parents need the consent of the student. But that's the kind of thing we all have probably seen a time or two.

A Anthony Sanders 32:43

Well, that's the kind of argument that defense counsel for the government are paid to come up with. We're now going to shift from the First Amendment and free speech to property rights and property law. And this is an area of property law that I have to say, I know almost nothing about, but Arif is going to walk us through it. And it actually provides some fascinating questions and issues that we're going to be getting to in our season of Bound by Oath, which is just starting. If you check your podcast app, you may when you're listening to this also have the first episode of Bound by Oath ready to listen to, which is all about property rights this season, season three, and hosted by our good friend, John Ross. So check out that and these issues

coming up this season. But first, Arif. This is about oil and gas. And the thing about oil and gas is I guess it tends to move around under the ground, and so it's a little different than your average piece of property. Is that right?

A Arif Panju 33:51

That is right. You learned about the surface estate in property rights in law school. You also learn that there's a mineral estate, what's underneath the surface. And a lot of people down in Texas for sure, where I'm at, but also in Louisiana, where this case arises from, own property and retain the mineral estate as part of their property interests. So I guess that's the best way to tee up this case because it involves oil and gas law. It involves property owners with mineral estates that haven't agreed to sell any of their mineral estate, any of the oil or gas underneath. It involves Louisiana's relatively new conservation law, which I'll get into in a moment. And it involves this deeply rooted doctrine called negotiorum gestio.

A Anthony Sanders 34:49

Excellent Latin pronunciation by the way.

A Arif Panju 34:51

Merci, monsieur. Merci. This Frenchman will reach into the Latin roots of French to try to get it right. And it involves statutory construction, and statutory construction is where the panel splits. And I'll get to that split later at the very end. I'll tell you who's on the panel. On the panel were judges Dennis, Elrod, and Ho. And this case is *Johnson et al.* (on behalf of Linda and James Johnson and other similarly situated members of the class) *v. Chesapeake Louisiana, L.P., and Chesapeake Operating, L.L.C.,* which is this Louisiana subsidiary of Chesapeake, an oil and gas operator. And so this case concerns the interplay between Louisiana's relatively new conservation law and its deeply rooted negotiorum gestio doctrine. And it arises when Linda and James Johnson, who own land in Louisiana and who also own the mineral interest under the surface, so the oil and gas under the surface of their property belongs to them. And according to state law, they were forced into a forced drilling unit. So there's a couple of things I want to set the stage with, and one is what is that? If you know about oil and gas law, unitization is something that is often addressed in the law. It creates rules to try to conserve, from the state standpoint, oil and gas and efficiently pump it out. And so unitization is part of conservation law, including Louisiana's, and it refers to combining separately owned mineral interests like the Johnsons'. Some may be leased to the driller, and some, like the Johnsons', are not leased. But regardless, they're combined into a common supply or reservoir. And they do this to create a joint operation with one driller to maximize the production and maximize operations. And it usually involves a pretty large area. And you can be either voluntarily part of the unitization or you can be forced into it. The Johnsons were forced into it under Louisiana law under their conservation law. And so some people that were part of this unitization of the oil and gas under their property and other neighboring properties agreed to be part of it; they have contracts. Those contracts with Chesapeake say, here's what we're going to pay. They say, here are the costs we're going to deduct for pumping this stuff out. And, you know, they also address post-production costs of bringing it to market. The Johnsons, however, don't have a contract, but they are part of the pool. And under Louisiana's law, you have to be paid for your pro rata share

of what's extracted from the unit based on how much property you own that's combined here. And you have to be paid within 180 days. And the statute says you, driller operator Chesapeake, can deduct production costs. It's silent as to post-production costs. So the dispute arises between the Johnsons and other class members and Chesapeake because Chesapeake decided to pay everyone, the contracted lessors and also the ones without a contract like the Johnsons, but they deducted not only production costs to get this stuff out of the ground. They also deducted post-production costs. The statute is silent about this. The Johnsons are seeing the value of their mineral estate diluted by post-production costs, and they never agreed to post-production costs being deducted. So this goes to court. And the district court, the plaintiffs, the Johnsons et al., received a partial grant of their summary judgment motion. Chesapeake, not liking that result, filed a motion for reconsideration. And unlike a lot of people, they prevailed on that motion for reconsideration. And the motion for reconsideration led the district court to hold two to one the quasi-contractual doctrine of negotiorum gestio provides a mechanism for Chesapeake to properly deduct post-production costs. So what is this doctrine? Well, this doctrine is very different than the unitization law. Louisiana is the only state, like I mentioned, that actually employs this doctrine. It has deep roots, but under the doctrine, there's a few things that have to exist. The proposed gestor in here, Chesapeake, would need to proceed in a way that I think is consistent with what the historical roots of this doctrine are. So to give you an example, let's say you live in a hurricane path and you're not home in Louisiana, and your neighbors decide to stay put during a category one. But you've booked, you've left town, and then your windows are smashed. So the neighbor walks onto your property, brings his plywood, nails it on the wall to protect your property. That act of trespass is protected, even though they had no authority under the doctrine of negotiorum gestio. And it's a doctrine that is rooted in altruism. And that person that went and put wood up on the windows that were smashed can recover under a theory of unjust enrichment the cost of doing so. There are certain legal requirements though to fall within this doctrine. One is that you have to act the gestor. In here, Chesapeake, in this case, you have to act voluntarily and without authority. Second, you have to be protecting the interests of another, not your own. And you have to have the reasonable belief that the owner, your neighbor, if it's a hurricane, or here, the Johnsons, would approve of the action if they're made aware of the circumstances. And the circumstances here are post-production costs. So the way that Chesapeake wins their motion for reconsideration is by shoehorning post-production costs and their ability to deduct them from the Johnsons' take of their mineral estate in this ancient doctrine that is grounded in this idea that you're just trying to help people and are just recovering costs for helping them. So this hits the Fifth Circuit, and there's a split in how this comes out. Two of the judges believe that you can't answer this question. Does negotiorum gestio provide Chesapeake with a mechanism to allow it to deduct post-production costs, or are they bound by a more narrow, a more specific statute, that conservation law, which spells out exactly what can be deducted at the wellhead, is silent as to post-production costs, and makes pretty clear that unitization is the law in Louisiana. You can be forced into this process, even if you don't have a lease, but you have to get paid within 180 days. And if you're not paid within 180 days, even the production costs before reaching the wellhead can't even be deducted. So that's the lay of the land. So what happens at the Fifth Circuit? Well, like I mentioned, two of the judges agree that negotiorum gestio is a deeply rooted doctrine. The parties agree that whether you look at this case through the lens of the unitization conservation law or through negotiorum gestio, you're basically dealing with quasi-contractual relationships. The Johnsons have no contract. And unlike the other people that are tied in this oil and gas unitization, their relationship with Chesapeake is quasi-contractual. It's rooted in, you know, what the statute dictates or, in this relationship, negotiorum gestio, which the Johnsons say does not apply. And so two of the judges want to send this to the Louisiana Supreme Court, but a third says no. We can answer this quite easily. We're not making an eerie guess. We could just apply principles of statutory

construction and reach the answer that we need. So the dissent opens up by saying look, you know, a unit operator like Chesapeake can sell the owners' production under statutory authority but cannot be a gestor. Why? Because a gestor under negotiorum gestio, as the code makes clear, is someone who acts "without authority." Chesapeake is engaging in unitization pursuant to legal authority under state law. But this doctrine as the threshold requirement requires that someone act without authority. And the dissent criticizes the other two judges by saying that by certifying this question, we're basically disregarding just the plain text of article 2292 in this case, which lays out how you can fall within negotiorum gestio and basic rules of statutory interpretation. We have a more specific statute. It should govern the dissent side's case law: oil and gas cases in state court that show that, especially in the oil and gas context, statutes that are more specific govern. And in any event, we can just read the statute and easily conclude that you need to be operating without authority. And Chesapeake is doing the exact opposite. They're pursuing unitization under state law. And so it is true that the statute did not specifically address whether you can deduct post-production costs. These are costs after the minerals are reduced to possession. So taxes, transportation, dehydration, treating compressing, gathering: the statute is silent about that. But negotiorum gestio seems to be a mechanism that can't get Chesapeake where they want. They want to be able to deduct costs that benefit everybody else that's part of this pool, not just the Johnsons. And they want to do so by invoking a doctrine rooted in altruism where you're trying to help your neighbor.

A Anthony Sanders 45:54

If you're being sued, it doesn't seem so altruistic anymore. That's just my take.

A Arif Panju 45:59

So that's where things go. And this is going to be resolved ultimately by the Louisiana Supreme Court, which will pronounce whether and how negotiorum gestio applies in the unitization context in the context of Louisiana's conservation law. And I think, you know, where I come out on this, my sense is that the dissent got it right. You've got an oil and gas conservation law that provides a unique quasi-contractual relationship between unleased mineral owners and operators like Chesapeake. And just using basic rules of statutory interpretation, you can apply only the specific provision that allows for unitization that speaks to the deduction of production costs, but not post-production costs. And that is a statute that confers legal authority to engage in unitization and start pumping even from mineral states that you've never leased. And that should govern and so the proper outcome is clear. I agree with the dissent here. I don't think it's necessary to go to the Louisiana Supreme Court. That was Judge Dennis who dissented. The majority is Elrod and Ho. Now, maybe there's a reason that'll cash out at Louisiana Supreme Court. And that is how deeply rooted is this doctrine? Now, we know it's deeply rooted in ancient Roman history. And there it was rooted in helping your neighbor, protecting your neighbor's property when they're away.

B Braden Boucek 47:33

And that's something in history the evil Normans were renowned for doing.

A Arif Panju 47:42

And perhaps in Louisiana, with the historical aspects of oil and gas exploration drilling, there is evidence reflecting a deeply rooted historical tradition of applying this doctrine. Although I'd be surprised to see it, to deduct the marketing costs of selling the oil that's leaving someone's land. I could see capping a well that has popped to save the oil and keeping it underground, but pumping it for someone just to be nice to them and then deducting all the costs seems a step further, but maybe there are examples of that. And that's what the historical understanding of that doctrine in Louisiana at least is. So we're going to find out once the Louisiana Supreme Court has a say. I will say, having weighed in on IJ's behalf as amici in the Louisiana Supreme Court in a case involving eminent domain and the taking of a port that was a private port by a public port operator, I was kind of shocked at just the departure from textualism and property rights protection and that case involving eminent domain at the high court in Louisiana. That case *was Violet Dock Port*. And you know, my hope is that property owners like the Johnsons get a reception from the court where their property rights are properly cast as deeply rooted in history that predate this conservation law. And that, you know, when push comes to shove, you should ultimately side with the individual property interest. Now, Louisiana is different than the other 49 states. And maybe that's not going to happen there. But we will find out soon enough, so we'd have a two to one split with a certified question headed to the Louisiana Supreme Court in *Johnson v. Chesapeake*.

A Anthony Sanders 49:36

So Braden, two questions, how deep is your knowledge of ancient Norman oil and gas law? And second, have you ever tried to certify a question from a federal court to a state court?

B Braden Boucek 49:52

Yeah, so on the first question, I would probably have to say it's probably a little bit less than you might suspect. Yeah, well, it's not exhaustive. I think I took a survey course in law school, but since then, nothing.

A Anthony Sanders 50:05

Maybe in middle school with that French you learned?

B Braden Boucek 50:09

Yup. I am a little bit ... I mean, I do watch the Vikings show on Netflix. So I'm a little bit in the neighborhood, but they didn't talk about this doctrine. I suppose the only reason why this exists in Louisiana is that this is a throwback to like the French civil code, I assume? Is that right, Arif?

A Arif Panju 50:31

Yes, yeah. And you see this type of doctrine prevalent in many European countries, including France's civil law systems, but it's definitely not something that's grounded in the common law.

And that's what permeates the other 49 jurisdictions in this country, the other states or laboratories of liberty, as I like to call them.

B Braden Boucek 50:50

So because of the French, somebody can undertake an act ostensibly on my behalf that I do not want them to do. And then when I don't pay them for it, they can sue me.

A Arif Panju 51:04

Under a theory of unjust enrichment, that's correct.

B Braden Boucek 51:07

I don't understand how this stuff still exists in America. I thought we fought two world wars to like get out from under the French thumb. I mean, where am I wrong about that? What am I missing?

A Anthony Sanders 51:17

In defense of the French, (I know nothing about this other than what Arif has said and what Judge Dennis says in his dissent, which I touch on also in a moment I guess it hints that what's going on this case is quite the perversion of this doctrine, which should be about examples like Arif gave about a hurricane and helping your neighbor out. When you get to the point where there's a lawsuit, it does seem that this doctrine has kind of outlived its altruistic usefulness. But this property law issue is fascinating, and I think gives shades of what we're going to talk about this season on Bound by Oath. You know, this also relates to this case we had for my state here of Minnesota. Many listeners know about *Hennepin County v. Tyler*, which was the case at the Supreme Court last year about the woman who had a condo, and her condo was taken for not paying property taxes and sold. The county made a profit of it and didn't give the excess back to her. And so the argument was that state law just says that this is the law that we get to keep it, and it's just the definition of property. And the court said no, you can't make an end-around around property rights by just defining property differently at the state level, even though usually we look to state law to define property rights. Here, I see kind of like the absolute opposite end of the spectrum, which is that we all realize that over time in a common law system, definitions of property and understandings of property can change. And that's not necessarily a taking, right? If our understanding of what you own now is different than 200 years ago, it's not like the court set a taking over that time. It's just that law changes to some extent over time. And I see what the Louisiana legislature did here by moving away from, Judge Dennis explains, the old capture idea. There you would have like four different adjacent landowners all pumping as hard as they possibly can to get the oil out because you get whatever you capture. And this tries to, you know, more collectivize it. I mean, I say collectivize it, but I think they would say rationalize it. So you don't have that problem. Now, maybe when that was enacted, that was some kind of a taking, maybe not. But it's a lot more understandable way to kind of like refine property rights, but also still allow the original property owner, like the plaintiffs here, to get their share. It's just rearranged a little bit how

that comes about. So I see this doctrine as kind of like, you know, coming in to make a bit of an end-around around what the legislature was trying to do: to give more of those property rights to the driller than was, you know, then was probably foreseen. And so, I am supportive, I guess. I looked around a little bit online, and it seems like that motion for reconsideration of the district court had all these amicus briefs from all these oil and gas interests, which is kind of unusual for a motion for reconsideration in a district court. So this seems like a big deal to the oil industry, which brings me to my theory here. So tell me if I'm wrong, Arif. My theory is that maybe the three judges are more aligned here than we think. And that they're like, okay, there's another case coming up. So I imagine these issues are coming up all over Louisiana. The Louisiana Supreme Court needs to sort it out. They haven't. And so if the Fifth Circuit rules well, that's not the law of Louisiana for the reasons you gave because it's a state law issue, it's just going to be law on the Fifth Circuit. And so they want the Louisiana Supreme Court to sort out this mess, but at the same time, Judge Dennis says, well, I think that the answer is pretty plain. So Judge Dennis is kind of the fall guy who does a dissent, which is like, here's how you should rule, court. The other two judges say we're not really sure; we'll send it along. He could have done that as a concurrence. But I think that then it would look more funny because it's like, well, I think the answer should go to the Supreme Court. But also, I think the answer is this. So he's the one who takes the dissent, the other two send it to the court. And now, the Louisiana Supreme Court kind of already has this amicus brief from this Fifth Circuit Judge, which makes it harder to just kind of go into what the oil and gas industry wants, which seems a little bit more devious by my limited knowledge of the law. So do you agree with my conspiracy theory, Arif?

A Arif Panju 56:21

I do. I agree with it to the extent that it this an easier posture to lay out reasons by dissenting, as opposed to concurring to a certification of a question, then basically answering it. And so yes, and frankly, I also agree that I think Elrod and Ho want to put this to bed. I mean, they realize that there is historical aspects to this doctrine that may be unique to Louisiana because the doctrine is unique to Louisiana, and respecting the Louisiana Supreme Court as the highest court in Louisiana, from a state law standpoint, kicking it over to them gives them the opportunity to brief the deep roots that this doctrine has, including the Johnsons' ability to show that it doesn't extend to what Chesapeake is trying to do here. And so perhaps that's where the three landed. And I agree with you, I think they probably see this. And these are serious judges, they're good judges. They understand statutory construction. And this is interesting, I think, when it hit the chambers. So I think that this is a roadmap, Dennis' dissent, to what the Louisiana Supreme Court should probably do with this. I mean, look, this doctrine requires as one of the requirements under under Louisiana Civil Code that Chesapeake would have to have a reasonable belief that the Johnsons would approve of the action if made aware. I mean, just the fact that they've drawn swords in federal court is enough to say that they're not approving. And that's it. And I don't think you just need to overuse these doctrines to try to do end runs around what the law clearly articulates.

B Braden Boucek 58:17

Well, to be clear, they didn't choose to cross swords in federal court. They chose to cross swords in the states, right?

A Anthony Sanders 58:24

That's right. Yeah. And one other tea leaf that I see is that they, the majority, say at one point, well, the lower court and this lower state court think it applies, but the scholarly dissent provides cogent reasons to think it does not, which is not usually the kind of treatment that a majority gives in its own dissent. So I thought there was something there, but there was a lot here today on Short Circuit. And so I'd like to very much thank Braden for coming on and giving us some of his expertise. We'd love to have you on again some time. And Arif, as always, thank you for joining us. And for all of you listening, we hope that you listen to the next podcast and also Bound by Oath, which is coming out imminently. But in the meantime, I hope that all of you get engaged.