

# Short Circuit 311: SCOTUS Ladies

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Consumer Research v. CPSC, Netflix v. Babin

## SPEAKERS

Anthony Sanders, Elizabeth Slattery, Anastasia Boden

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### A Anthony Sanders 00:24

Hello! Welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, February 12, 2024. And finally, we have the special guests that I have been teasing all of you about for the last few weeks. Last week we were going to do it, and we had to move it, but today, we're finally ready. So I am very pleased to introduce to you, ladies and gentlemen, the SCOTUS ladies. They are Elizabeth Slattery and Anastasia Boden. You may know them from podcasts such as Dissed, which they produced together at the Pacific Legal Foundation. It was a great podcast about famous dissents. They also have many other projects. Elizabeth is still at PLF, and Anastasia is the director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. So Elizabeth you may also know, and where I first heard of her, from when she hosted the SCOTUS 101 podcast at the Heritage Foundation. So these are women steeped in the podcasting tradition at a much deeper level than I am, but they have this new project, SCOTUS Ladies, which looks like it's a little bit of a blog, little bit of a podcast, a little bit all kinds of things to do with the Supreme Court. Now, this is a podcast about the federal courts of appeals. Of course, we dabble in the Supreme Court from time to time, so we're going to do a little bit of SCOTUS, and then we're going to do some cases that they have selected to present. So before we get to all of that, welcome to both of you.

### A Anastasia Boden 02:15

Yay!

### E Elizabeth Slattery 02:16

Thanks for having us!



Anthony Sanders 02:18

So thanks for coming on! Excited to talk all about all of these subjects. Let's start with this SCOTUS Ladies thing. What's it all about? Where'd it come from? What are you looking to do with it?



Elizabeth Slattery 02:32

So it's a blog. It's not the SCOTUS blog, but it's a new SCOTUS blog.



Anthony Sanders 02:38

Yeah, we kind of need a new SCOTUS blog, it sounds, in some ways.



Elizabeth Slattery 02:42

Yeah. So we're, you know, both Supreme Court super fans. And it was just an outgrowth of we follow the Court, and we have, you know, our own perspective about things that are happening and so we thought we would create something that gives us an outlet to chronicle what's happening at the Supreme Court from a particularly liberty-focused perspective. I feel like that might be lacking in the blogosphere. So that's sort of what we were going for with SCOTUS Ladies.



Anastasia Boden 03:15

I was just going to add to that and say I think part of the idea also is that law ought to be fun and accessible. And too often, you know, I think people talk about law in a very academic, removed from real life, way. And we want law to be fun, you know, informational, and educational. And we want to, you know, give people real substance, but we also want it to be fun and so we try to have fun.



Elizabeth Slattery 03:42

Come for the SCOTUS, and stay for the memes.



Anthony Sanders 03:44

Well, unfortunately, we are a meme-free podcast, as are most audio-only podcasts. But one fun thing that I see you have been doing lately is your Q & A. You've interviewed some Supreme Court practitioners. Can you tell us a little bit about that?



Anastasia Boden 04:05

Yeah, we have this feature called Interview with a SCOTUS Lady or, perhaps a little teaser here,

Interview with a SCOTUS Gentleman maybe coming up. And the idea is to get, you know, people really well known for having some affiliation with SCOTUS. So far, Supreme Court advocates but also perhaps clerks, maybe a justice him or her self. That would be the ideal, if you're listening. If you're listening, SCOTUS Justices, come on, come do an interview. But yeah, the idea is to try to ask some interesting questions about these people's careers, perspectives, advice they might have, and lessons learned. Hobbies ... Some of these people have really ... I don't know where they find time, you know, for these people who are arguing a record number of Supreme Court cases, but we want to ask them things that maybe you don't see in the normal interview and, again, have fun with them, but also give some real substance about the practice of law.

A

Anthony Sanders 05:03

Well, I'm looking forward to some substance about the practice of law at the federal courts of appeals, which is our bread and butter. So each of our guests has chosen, and they could choose just about any they wanted, I don't think it's any coincidence that both of them chose a recent case authored by Judge Willett on the 5th Circuit. So we're going to start with Elizabeth, who has a Judge Willett opinion about a fascinating area of the law, which is the Consumer Product Safety Commission. But this opinion isn't really about the Consumer Product Safety Commission, but about the Constitution, administrative law, a whole bunch of things coming together. Take it away. What is the deal with the CPSC, as it's called?

E

Elizabeth Slattery 05:57

What is the deal with it? Yeah, this is an important case involving an area of the law that's near and dear to my heart: separation of powers. So it's *Consumers' Research v. CPSC*. And just to give a little bit of background about the Commission, so it's an independent agency, a so-called independent agency, that has a mandate to protect the public against unreasonable risks of injury associated with consumer products. So, to that end, it can issue safety standards, ban hazardous products, initiate administrative proceedings, which is just another way of saying it can haul people into its in-house kangaroo courts, it can issue legal and equitable relief, it can commence civil actions in federal court, it can levy fines of \$120,000 per violation or \$17.5 million in the aggregate. So not small potatoes. It has a lot of authority. So the reason I wanted to talk about this case is because it concerns the structure of the Commission. So how is it set up? It has five commissioners that have served for seven years, staggered terms. So they're appointed by the president and confirmed by the Senate. So those are good things. But they may only be removed from office for neglect of duty or malfeasance in office. So, basically, it's really hard to fire them, like a lot of federal employees. And there are limits on how many from any single political party can serve at a time. So you can only have three of the same party at the same time of the five. So this case concerns two organizations. They're educational groups that try to, you know, boost consumer awareness of products. And so they both submitted FOIA requests for several safety standard things that were happening at the Commission concerning infant and toddler products. And the agency had recently implemented a process where you can seek a waiver of their fees for FOIA requests to make it even easier for people to get this information, but the Commission staff denied some of these FOIA requests and then outright denied the request for the fee waiver. And the groups appealed this to the Commission. And the Commission said, well, we're siding with our staff.

A

Anthony Sanders 08:42

What a surprise.

E

Elizabeth Slattery 08:43

I know, shocker. So this action commenced in federal court, and basically, Consumers' Research and the other plaintiff, they argue that the for-cause removal limit violates the separation of powers. So the fact that the Commission members cannot be fired by the president at-will, that violates separation of powers. And then there are, you know, APA and other issues that they get into, but the at-will removal piece is the big piece of the case. So the district court judge says, yeah, these removal restriction violations (sorry, it's a mouthful, these tenure restriction protections that they have, this violates Article Two. And the Commission is not protected by the Supreme Court case called *Humphrey's Executor* because it exercises substantial executive power. So, okay, what is *Humphrey's Executor*? This is a case from 1935 where the Supreme Court says that limits on the president's ability to fire members of the Federal Trade Commission were permissible, and that was because it was an independent agency. This was a different sort of, a different breed of FTC than the one we know today. But they said it's an independent agency that exercised quasi-legislative, quasi-judicial power. It's not really exercising any executive power, so the president didn't need to have control over it. And, in fact, the Court, there's this line that just kind of makes me chuckle when I read it. But the Court in 1935 said, and in fact, it's a good thing that the members of the FTC are protected, insulated from the president's coercive influence. I mean, of course the president should be able to influence agencies that are within the executive branch. But, you know, that's a rant for another day. So the Supreme Court, the modern Supreme Court, has started to walk back this precedent. There was a case from about a decade ago called *Free Enterprise Fund* where the Justices said that dual level insulation was not permissible. So there you had an independent agency whose members had tenure protection from firing. And they were overseen by another independent agency that their members also had tenure protection from being fired by the president. So dual levels are not okay. And then in *Seila Law*, which was a few years ago, maybe five years ago, I'm losing losing track of time, but in that case, the holding was that the single director of the Consumer Financial Protection Bureau could not have tenure protection because it was a single director, and it was an agency that exercises, I mean, a lot of executive power.

A

Anthony Sanders 11:45

By the way, it was four years ago, so very close.

E

Elizabeth Slattery 11:47

Four years. Thank you. Here I was thinking like, was it three years? Was it seven years? Who knows? It could be 15 years. The years march on. So in *Seila Law*, Chief Justice Roberts kind of put a spin on what the Court said in *Humphrey's Executor* in 1935 and said, you know, today's FTC is different. It exercises a lot more executive power than the 1930s FTC. So what *Humphrey's Executor* really stands for today, according to the chief, is that Congress can limit the president's ability to fire members of multi-member agencies that are ideologically

balanced, that have staggered terms, and that don't exercise executive power. So that brings us to ... Doesn't that sound familiar? Kind of sounds like the CPSC. So that brings us to the panel decision, and the case is going to be reheard en banc by the full 5th Circuit, I think, later this spring. So Judge Willett in the panel says, you know, the CPSC is twins. It's a mirror image. It's structurally identical to the FTC at the time of *Humphrey's Executor*, not today's FTC. And so he says, look, we are just middle-management circuit judges. We have to follow binding Supreme Court precedent. The Court didn't overturn *Humphrey's Executor* and *Seila Law*, and so it's not our job to do anything but sort of keep the boundaries of *Humphrey's Executor* where it is. And if the Supreme Court wants to change that, then they can do that. But, you know, that's above my paygrade is basically what he says. So, you know, a lot of it turns for him on the fact that there's kind of some wiggle room in what the Chief Justice says in *Seila Law* about how much executive power does an agency need to exercise before it falls out of the protection of *Humphrey's Executor*? Is it substantial? Is it any? Is it significant? And so Willett says, well, I'm not sure, but it doesn't seem like adding up all these factors and comparing the CPSC with, you know, the CFPB and other agencies, it doesn't seem like this falls on the line of being outside of *Humphrey's* protection. So he sides with the agency, unfortunately. But there's a fantastic partial concurrence, mostly dissent, by Judge Edith Jones, who she is just a spitfire, by the way. So she says, yeah, this is wrong. And if you actually look at what the Court said in *Humphrey's Executor*, not Chief Justice Roberts' spin on it, it says no executive power. So the FTC in 1935 exercised no executive power, according to the Court, and the Consumer Protection and Safety Commission clearly exercises some, I mean, I think it's pretty significant, but some executive power. And so they really wouldn't be touching the boundaries of *Humphrey's Executor*. And she actually accuses the majority of expanding the borders of *Humphrey's Executor* by extending the rule from agencies that do not exercise executive power to those that do. So that's sort of the high level overview of the back and forth between Judge Willett and Judge Jones. And, you know, you might suspect that they often tend to agree on these sorts of things. And I think Judge Willett was probably trying to do his best. As he says, he's a middle-management circuit judge and trying not to run afoul of, even if it's a disfavored precedent, it's still a precedent of the Supreme Court. But sort of taking it at a higher level, like why does any of this matter? Like why do we care if the president can fire people or not fire people? Well, this is because the first part of the problem is Congress delegates enormous amounts of like, they don't say it's lawmaking, but it's totally lawmaking to these agencies. So that's a big enough problem. But then these agencies aren't even under the president's control. So who do they answer to? You know, the government is supposed to work for the American people. And so if these agencies don't answer to the president, who do they answer to? And how do we hold them accountable? Like, they can just, you know, do what they want to do. And the president ... Harry Truman famously said, so this is not a new problem, you know, I thought I was the president. But when it comes to these agencies, I can't do a damn thing. And so the idea is not to let politicians, you know, continue to pass the buck and say, well, you know, that's not me making that decision. That's that rogue Commission that I can't control. You know, at the end of the day, the president should be in charge of those members of our government that exercise a part of his authority, which is the executive power. So that's ... I have more to say, but I'll pause there.

A

Anthony Sanders 17:03

Well, you've definitely not said enough. But we'll let Anastasia have a say here. Do you see this more, Anastasia, as a middle-management problem or a passing the buck, as Judge Jones might see?

A

Anastasia Boden 17:16

I mean, I thought it was interesting that Elizabeth brought up that Judge Willett mentioned that this is a middle-management problem because, actually, in the case that I'm going to talk about, Judge Willett takes that view too that, you know, he's just trying his best here to deal with the fact of his place in our structure. You know, I think my comment on everything Elizabeth just said is she's our separation of powers enthusiast between the two of us, so here's my bird's eye view, hot take, or maybe a lukewarm take is it's ... Sure, it's a great decision. Glad to see Elizabeth get super pumped about it. I think ...

E

Elizabeth Slattery 17:59

No, it's not a good decision. It's not a good decision!

A

Anastasia Boden 18:02

Oh, well, I mean, it could be better, right? Whatever. I'm glad to say ... Here's what I'm happy, I'm pumped about is that I'm pumped to see I think judges are becoming increasingly receptive to separation of powers claims. Overall, we are seeing a trend that way. And certainly at the Supreme Court, I think there's really been a resurgence of understanding the importance of federalism and separation of powers. And that's all to the good. I think that matters and is going to make a lot of difference for liberty, especially because, you know, the administrative state regulates everything nowadays. To borrow a phrase from Elizabeth, they regulate everything from gas stoves to Greek yogurt. And that's a problem, and we need to rein that in. But it's sort of ... This trend is bittersweet to me because all I hear when I hear about this is I think I get PTSD that judges are fighting over, sort of, structure because they don't want to engage with substance. And, you know, structure matters, but so does substance. And, you know, to use one of your buzzwords, Anthony, they shouldn't be afraid to engage with the substance. And I think that judges see these fights over structure as somehow being more objective maybe and that they have more credibility and more room to kind of engage on that topic. But, for me, I miss these sort of same heated debates about the substance of laws and whether they meet the substantive standards of our Constitution. And so when I'm hearing this debate between all the judges, I'm just thinking about how when I was in courts, when there's the rational basis test, it's like you didn't even really get a real debate, right? It was just like dismiss the case on any procedural ground possible. And I want to see the same fiery interchange when it comes to substance, not just a process and structure.

E

Elizabeth Slattery 19:58

Hey, but without that structural protection ... I mean, it's the greatest protection for individual liberty.

A

Anastasia Boden 20:06

Is it though? Isn't substance the greatest protection for individual liberty? Like structure is

good. Structure helps, but structure will not guarantee individual liberty. Like it's aimed towards that end, it should be understood that way, I think it will trend that way, but like it doesn't guarantee individual liberty. Substance does.

E

Elizabeth Slattery 20:21

Yeah. But it seeks to cabin government into their own little buckets where they're supposed to be.

A

Anastasia Boden 20:27

I said it's good, Elizabeth!

E

Elizabeth Slattery 20:30

It is good. No, but I do ... Okay, so speaking of, I mean, this is sticking with structure. But, you know, this particular case, like I glossed over the facts because, I mean, it's hard to get like really riled up about someone not being able to get a FOIA fee waiver from the CPSC. But PLF has a client that has been dealing with its own woes before the CPSC: Leachco. And, you know, it underscores the fact that this is an agency that can destroy people's businesses, their livelihoods. And so I just wanted to put in a plug for our case because we are still toiling away in the agency's internal process. There was a hearing last summer, and we're waiting on a decision from, you know, the ALJ who probably shares a coffeemaker with the Commission members. And then, you know, when we lose before the ALJ, we have the privilege of appealing to the Commission members who voted in the first place to initiate this administrative proceeding. But just to back it up for a second, Leachco is a company that sells infant and baby products. Like, you know, when I had my little ones, I remember having a pillow like this giant sea pillow I would sleep with when I was pregnant. And when I was getting rid of baby stuff, I looked at the label and was like, hey, it's Leachco. It's our client.

A

Anthony Sanders 22:10

It all comes around.

E

Elizabeth Slattery 22:11

Circle of life. Yeah. So Leachco sold these infant loungers called the Podster. It's kind of like, you know, there's DockATot, and there's, oh, I forget the name of the other one. It's like they make a nursing pillow, but then there's one you can lounge your baby on. Anyway, there are all sorts of these lounge things.

A

Anastasia Boden 22:34

Boppy.

E

Elizabeth Slattery 22:35

Boppy! Thank you. Yes, I never had the Boppy lounger. I just had the pillow. But, anyway, there's the Boppy and the Podster and the DockATot and all of these things. They all have, you know, these warning labels on them that say, like I looked, and the Podster had a warning label that said, all caps, "Warning, do not allow baby to sleep in this product." And then it said, "Sleep," and there was a line through it. And there were z's, and there was a line through it. And like very clear that like you're not supposed to leave your baby sleeping in this thing. It's for your baby to lounge in it.

A

Anthony Sanders 23:09

It seems like for newborns, there's not much of a line between lounging and sleeping, by the way, but I'll just throw that out there.

E

Elizabeth Slattery 23:16

No, that's true. But like you're not supposed to leave them alone in these, just like you're not supposed to leave your baby with pillows.

A

Anthony Sanders 23:22

Yeah, alone, I think, is maybe the key word.

A

Anastasia Boden 23:23

Unattended.

E

Elizabeth Slattery 23:25

Yeah, with pillows or blankets. Like you're not supposed to leave them with anything like that. So they've sold, you know, more than 18,000 of these Podsters, and this is very sad. But the CPSC issued a recall after there were three deaths caused by misuse. Like one was a circumstance, I think, where there was co-sleeping, and you know, the baby was in the Podster. And anyway, like, you know, people make mistakes. And I think the warning labels were like really clear; you're not supposed to do this. But the CPSC says the Podster presents a substantial product hazard and that it was foreseeable that consumers might misuse the Podster. And so, you know, we're waiting on the result, what's gonna happen with the ALJ. And, you know, we're also seeking a preliminary injunction in federal court. And you know, the district court denied that. You know, my colleague, Oliver Dunford, argued the appeal at the 10th Circuit, and we're waiting on that decision. But it underscores that, you know, this is an agency that has the power to, has very destructive powers, to ruin businesses.



A

Anthony Sanders 24:42

So I am very tempted to jump in this whole debate about procedure and substance and put my cards out there. My proclivities lie with what Anastasia had to say, but I also get what you're talking about, Elizabeth, and believe in it. But I, rather than go down that rabbit hole for a while ... One thing I have noticed, and this is me not having had to litigate these issues all that much, so I could be getting this a little wrong, but it seems like in these types of cases where you're talking about the appointment power and someone's insulated from being fired, and so the structure is thrown off, I get the legal claim, but it seems sometimes it is really hard to get the right remedy, depending on who the client is. Like sometimes, they'll just say, well, okay, yeah. The president can fire in the future, fine, but everything else remains the same. And so the actual plaintiff, it's like nothing, you know, nothing better has happened for them. And also, in this case, I was trying to think like what would actually be different because there were like too much would be different. So they're saying I shouldn't have to pay these FOIA fees, or I should get the FOIA documents. So if they're right that this whole thing is unconstitutional, I guess the rule about the FOIA fees goes away, but then the whole agency goes away too. So how would I ... Yeah, I mean, Elizabeth is shaking her fist in the air like, yeah, that's great. And it, from a constitutional government point of view, seems that then you don't get your FOIA documents in the first place because, you know, the agency is not there anymore. So is there a little bit that the fit of the claim and the relief, in some of these structural cases, it's kind of hard to figure out, in a different way than like this law environment violates my rights; the laws, therefore, can't be enforced anymore, where it's a little bit more clean cut?

E

Elizabeth Slattery 26:47

Yeah, it's definitely challenging because, you know, Anastasia talks about the games that are played early on in cases from her world, you know, trying to dismiss cases. But in these structural cases, the games kind of seem to happen at the tail end, and it's, you know, where you end up with, oh, well, this person wasn't properly appointed, so we're gonna let the agency or we're gonna let the president go back and appoint the right person. And then the new person is just going to ratify everything that the improperly-appointed agency head did. So that's one thing you see. Or you see the Supreme Court will decide we're gonna get our red pen out, and we're just gonna strike this from the statute so that 10-year protection is gone, you know. And honestly, one of the worst things is that if it's a case involving, you know, an ALJ and someone has litigated it through the internal process, gone through federal court, appealed up at the Supreme Court, it could be years in the making, and then their reward is that they get to start all over at the beginning. And it really is like the process is the punishment with a lot of these agency cases that can drag out for years. So yeah, I take your point that it's not from a, you know ... It's hard to find people who want to go through the gauntlet and want to challenge these sorts of things and stick it out all the way through federal court and, you know, maybe up to the Supreme Court when it's all too tempting to just settle and be done and move on with your life.

A

Anthony Sanders 28:36

So, finally, I want to just ask for a little prediction. The petition for en banc has been filed. Most circuits, you would say well, that's a very small chance of it being accepted. This is the 5th Circuit, however, where it's hard to predict anything these days, and sometimes, you get a

sense that the 5th Circuit goes en banc just to tempt the Supreme Court that they take the case later on. So do you get a sense? I mean, it was, of course, it was two to one, and Judge Jones is a very respected judge in that court. Do you get a sense of where it might go?

**E** Elizabeth Slattery 29:09

Oh, I would be surprised. I mean, I am surprised often by courts, but I would be surprised if this, if they didn't take it en banc. And I think I said at the outset, that it's going en banc. I guess it isn't official, but ...

**A** Anthony Sanders 29:22

Well, it's moving in that direction.

**E** Elizabeth Slattery 29:24

Yeah, it's moving in that direction. I think given the Jones dissent and this is an area that the Supreme Court has signaled interest in, you know, in several cases over the last decade, I would be surprised if it wasn't accepted for en banc review.

**A** Anthony Sanders 29:45

Well, another instance of prosecutorial overreach in the 5th Circuit is in a different Judge Willett case. And this involves a tiny little defendant named Netflix, who it seems was able to defend itself or for attorneys to defend itself. And Anastasia is going to tell us about this saga: Netflix and some preteen girls.

**A** Anastasia Boden 30:12

Yes. So this is a case in which a sort of rogue Texas prosecutor attempted to prosecute Netflix for obscenity and, later, child pornography for streaming a documentary about a young girl who's on a dance team, sort of facing the pressures of social media in France. And from a nitty gritty legal perspective, the heart of the case is about *Younger* abstention. That's a judge-made doctrine that says that federal judges may not interfere with ongoing state proceedings as a matter of federalism and comity. But, you know, just a quick comment on that is that I'd argue that in a lot of ways, these abstention doctrines have gotten out of control. And they are a way for judges to just sort of shovel cases off of their docket that they don't want to deal with because, you know, judges catch a lot of heat nowadays for supposed judicial overreach. And they're forced to make these big decisions that affect our lives because government keeps on regulating, and the more government gets involved, you know, now the courts are forced to make a decision on whether that's constitutional. And so, you know, at least in my experience, I see judges really not wanting to, again, engage on these issues. And so they use things like standing, mootness, ripeness, abstention, deference, what have you, to not actually make a decision. But here, it's interesting because the 5th Circuit rejected the government's claim of *Younger* abstention because it said that a state has no interest in a bad faith proceeding. One

that is actually not trying to ameliorate some harm but just really intended to harass, and that's what the court thought was happening here. So the facts of the case are there is this Texas state prosecutor. He's the DA of Tyler County, Texas: Lucas Babin. Incidentally, I think the opinion mentions that he was a former actor himself. Fun fact. Maybe he's just bitter his career didn't turn out the way he planned. But now, he's a state prosecutor, and he sought criminal charges against Netflix for streaming the documentary "Cuties." This was a pretty controversial film. People may have heard of it in the media. It's about an 11-year-old Senegalese girl named Amy who wants to compete on a dance team with her friends. And she's sort of navigating the conservative culture of her Muslim family and modern day French society in which there's a lot of pressures, including the pressure of social media and the media writ large, which is kind of interesting since it's Netflix putting out what really is sort of a critique of modern culture and media. But, anyway, the documentary includes these scenes depicting preteen kids in skimpy clothing doing public dance routines. You know, these routines are routines that many of us may not let our 11-year-olds engage in. And many people had something to say.

A

Anthony Sanders 33:11

Probably not in our house.

A

Anastasia Boden 33:13

Yeah, same. So, many people had something to say about the editorial choices in this film, you know, actually recording these routines and putting them out in the movie. And, in particular, people were upset about two scenes. So there's one where a little girl is undergoing what's sort of a baptism. It's like a religious experience. And the girl is in her undergarments, and they're pouring water on her. And so, in isolation, it could be taken to look like something different than what it was, which is this whole, you know, religious scene, but if you just showed this girl writhing on the ground, being drenched in water, some people thought it was not tasteful. And then, secondly, there's a part in the movie where some of the girls are watching a dance video on their cell phone, and one of the dancers briefly flashes her breast. This dancer is later found to be over 18, and it's like a fleeting second in the film. But, nevertheless, people were upset by this nudity, or at least one person was upset and that was Lucas Babin. And it wasn't enough for him not to like it or to speak out against it. He wanted to prosecute Netflix for distributing and streaming this film. So he sought a grand jury indictment charging Netflix with the promotion of lewd visual material depicting a child, and apparently, he did so by showing clips from this film in isolation. So he's, you know, picking out what clips he wants to show the jury. They didn't get to see the whole film and kind of what the film is about. They just saw these lewd scenes in a way that Babin had picked out. He was the first and the only prosecutor in America to criminally charge Netflix for this film, and he publicized it.

A

Anthony Sanders 35:01

And this could have been anywhere in the country, right? Because Netflix is everywhere.

A

Anastasia Boden 35:04

Right. I mean ...

A

Anthony Sanders 35:05

Like there's over 3,000 counties in the country. Any of them could have prosecuted.

A

Anastasia Boden 35:10

It kind of really says something that this is the only prosecutor who thinks there's something to criminally charge Netflix for. It's a big company. And, you know, as you said, it's national, seen everywhere. So yeah, I think that's indicative of what's going on here. So yeah, he publicizes his prosecution, he sends out a press release, and then after the whole press release and fanfare, nothing happens in this case for a year. And the court finds this interesting, right? They're like, well, you put out this big press release, and you don't even really prosecute it. And Babin's like, well, it was COVID, and there were other things going on. And the court's like, okay, well, we're just going to keep that in the back of our mind, right, that you didn't prosecute it until there was a subsequent court case, which found that Texas statute unconstitutional. So it said that, you know, it's overbroad, and in fact, that court decision cites the Netflix prosecution and says, hey, if this statute were constitutional, it would mean that Netflix could be held liable for streaming a film. And, in fact, it might even mean that everybody who watched that film is also now guilty of a crime. So Netflix contacts Babin, and it's like, hey, this court decision just came out. It said that the statute that you're prosecuting us under is unconstitutional, you know. What do you want to do? And he's like, no, I'm good. I'm just going to continue. So they then bring this habeas action in federal court to stop the prosecution because they're like, hey, you can't prosecute us anymore. And everyone agrees to a hearing a couple months out. And then a couple of days before that hearing, Babin says, actually, I've dropped that charge, so we don't need to have this habeas hearing. You'll get my new indictment in a couple of days. And sure enough, he's doubled down. Now, he's going to prosecute Netflix under a child pornography statute. So he's like, sure, I'll withdraw that action. And now, I'm going to charge you with three indictments, and they're substantially harsher sentences, you know, much more serious crimes. So Netflix is like, okay, you're charging us with child pornography. What exactly is your objection here? There's no child nudity in this film. And he cites this brief flash of the breast, even though he originally had told Netflix that's not actually the problem with this film. And Netflix had actually offered to give him proof of age. They said this actress is over 18, and he was like, no, I don't need to see that. And now, a year later, he says, oh, I'm going to charge you with child pornography for this flash of the breast, even though he now is on notice that she's over 18. And then a scene where these clothed girls are engaging in this dance routine. So there's no child nudity, even though that's a prerequisite of the crime. So Netflix then goes back to federal court saying that this whole thing is a violation of their First Amendment rights. And they also start demanding some evidence related to what happened at the grand jury stage because they want to know how Babin was able to get this indictment when they don't even have any child nudity. They don't even fit the statute that he's prosecuting them under. Babin says, hey, federal court, you have to stay out of this because of *Younger* abstention. And what ends up happening is the district court says there's no *Younger* abstention when you have a bad faith prosecution. You have no legitimate interest in prosecuting people just to harass them. So Babin appeals, and that's how it gets to the 5th Circuit. Judge Willett writing for the 5th Circuit affirms, and he says, I'm not even going to rule this case moot with regards to the first, original indictment that Babin dismissed because even that is just gamesmanship, right? That's just voluntary cessation. You said okay, I'm going to

dismiss that cause of action because there was another court opinion that struck down that statute, but he never said that he wouldn't bring it again. And, in fact, he said I can't wait until that case is overturned, and then, you know, I might actually charge Netflix again. And he continued to defend his behavior from the outset. And the court says we can't, in good faith, dismiss that claim that Netflix has when you haven't truly disclaimed an intention to move forward with that. You're just voluntarily ceasing your activity to get this off of the court's docket. So that was the first holding of the 5th Circuit's decision. And then the second one was regarding this bad faith prosecution. And it said, you know, if we look at all of these facts, and we are just a middle court here reviewing the district court findings, applying precedent as best we can. You know, the district court had this long trial, long hearing and heard testimony from Babin, and it found that this was retaliatory and that he had no hope of conviction. And so this is a bad faith prosecution, and we're not going to apply *Younger* abstention. I thought it was really an interesting case because, so often, it seems to me, you know, Elizabeth and I are Supreme Court watchers, and there's been a few cases this term where the government has marched into court and said hey, we're entitled to some sort of special presumption that we are acting in good faith, that we are not making strategic choices that are just aimed at avoiding precedent or mooted cases or what have you. We want a special standard for the government because we deserve the special solicitude that we're acting in good faith for the public. And we want the rules to apply differently to us. And this is one of the many cases where I think the facts just don't bear that out. Like why should we trust the government? I think the Founders would have been horrified by that argument, you know. That liberty is built on skepticism towards government actors. And, in fact, if you look at cases like this, what's good for the goose is good for the gander, and the government should be held to the same standards as everybody else. And if you're going to try to get a federal court to not step in, if you're going to try to cease your conduct and then try to get the case dismissed, then you should be held to the same standards as everybody else in litigation. And you don't deserve any presumption of good faith because, you know, attorneys are going to attorney. Government's going to government, and there's some bad incentives at play. And there are real instances of abuse. And this, this really is one of them.

A

Anthony Sanders 41:29

We sometimes chide our colleague, Sam Gedge, about his obsession with *Younger* abstention and that it is his white whale. So Anastasia, I think you've done a service by actually catching the white whale here today in a case where *Younger* abstention was not recognized. Elizabeth, do you have the same obsession about *Younger* abstention? And how it is so hard to find an instance of it being defeated in the wild? Or do you have other thoughts about this case?

E

Elizabeth Slattery 42:01

Yeah, I don't have a ton of thoughts about this case. But reading the opinion, I was thinking there are two wolves inside of me. The one really doesn't like it when the government plays games. And this prosecutor who, by the way, I looked up his IMDB, he was in "School of Rock" in 2005. That's his claim to fame. So there you have it. Um, so there's that wolf. But then there's the other wolf that's worried about the kids and the kids who are in this movie and people seeing this movie but wondering like was criminal prosecution really the most effective way to get at the problem here? And, you know, so then I was reading about it, and I'm like does Netflix not have to do MPAA ratings? Because it seems like what would the MPAA rating

for a film like this be? Anyway, I went down a rabbit hole of the internet, and they're kind of part of the MPAA, but they kind of don't use ratings. But this one, the MPAA suggested, would be NC-17, which I think is interesting. I haven't seen it, doesn't sound like my kind of movie. I'm, you know, hearing about it. I'm glad I don't have girls because I don't want to have to deal with that whole era. So, but no, I don't really have anything to say about *Younger* abstention.

A

Anthony Sanders 43:25

So now, I'm curious though about the ratings. So you're talking about like the normal movie ratings when you go to a movie theater?

E

Elizabeth Slattery 43:33

Yeah. And it's, you know, it's like Netflix has joined the MPAA. They sometimes have a MPAA rating, but this one they didn't adopt the rating, I guess, that was recommended, and they just slapped a mature rating on it, so mature instead of NC-17. Which, anyway, I thought that was kind of interesting.

A

Anthony Sanders 43:59

So I just want to go back to the voluntary cessation part of the opinion that, Anastasia, you were talking about. One thing that fascinates me about how Judge Willett describes that here is that we all know about, so all of us who work in public interest law know about, voluntary cessation because when the government knows it's got a bad case, its favorite trick is to try to dismiss the case, get out of it, pretend it never happened, standing, ripeness, mootness, whatever, but then have in mind, well, we might do this again one day. We want to leave our options open. And the funny thing about voluntary cessation is it's recognized everywhere. Courts have strongly knit language that you can't just dismiss the case, because you might file it again the next day after the problem goes away and create a new problem for the other side. But actual cases where the court says this is voluntary cessation, so we're gonna move on to the merits are actually pretty rare. And I think it was puzzling because I wrote, a couple years ago, an amicus brief about this, and I was puzzled why in most of the examples there's a broad statement of it, and then they say, but it doesn't apply in this case because, you know, the city council repealed the law. There's no one on the council that wants to enact it again, or, you know, there would be some excuse. And I think the reason why it doesn't come up as much is because the examples where it really is voluntary cessation, the case really does go away. Or there's some other reason why, you know, the court doesn't get to that issue. So the fact that the court got to that issue shows you how out of hand and kind of renegade this prosecutor was. Like he didn't have a thought out plan, you might say. He knew what he wanted to do. He knew he wanted to get headlines, but he didn't know how to execute it. And that's how he actually got his hand stuck in the cookie jar. And then on *Younger* abstention, it's a great example of actually taking, I think, Section 1983 seriously. There's not a lot of emphasis on that here, but that's the civil rights statute we talk about all the time that says you have this broad grant of jurisdiction in the federal courts to try to effectuate your civil rights. And there's no exception for if there's an ongoing prosecution. So this weird, you know, carve out of *Younger* abstention, but then balanced with this bad faith exception to the exception is hard to reconcile with Section 1983. And it is very rare to find an actual instance of this bad faith exception. So

the fact that you have that also shows that you had a prosecutor who didn't know how to cover up the strife, which makes me actually, you know, worried that in the real world, the prosecutors who really know what they're doing but have bad faith are able to cover this kind of stuff up so it's not as obvious. Plus, they don't have as well funded counsel as, I'm sure, Netflix.

A

Anastasia Boden 47:21

Yeah, I have a couple of reactions to that. You know, one on just how egregious this case must be for the court to refuse to apply the voluntary cessation doctrine. You know, one thing the court says is that the prosecutor didn't really actually care to prosecute it until Netflix asserted its First Amendment rights. It goes, hey, there's a First Amendment problem here. The statute that you're relying on was struck down. And rather than reconsidering, like giving it a moment and being like, hmm, maybe there's something... maybe I should reconsider this prosecution, he upped the ante. He goes, okay, well, I'm gonna triple down on this situation and go for a much harsher statute. And now, I'm really gonna go full force against you now that you brought it to my attention that there's a possible First Amendment problem. And I think Judge Willett found that really telling, and it is an indication of just how egregious this case was. The second thing I'll say about Section 1983 and this tension between *Younger* abstention and the text of the statute, something that I found was interesting is *Younger* abstention gets applied just based on the theory that if you can vindicate your rights in the state court proceeding, the federal court says, then you're fine. Like just go complain in that state court. And what the court says here is that at least in cases like this, the problem is the prosecution itself. That's the constitutional violation. So it's not as if the government has done something to you that you are now complaining is unconstitutional, and you want a remedy for that. It's that this entire trial itself, this prosecution, is your constitutional injury. And so it's really important that in that situation, federal courts are able to step in, especially because not everyone is Netflix. Netflix can afford to defend itself. It could have gone through the state court proceeding. But most people, you know, that takes away years of their lives, so much money in attorneys' fees. It's going to be life ruining. In fact, it's going to coerce, I think, a lot of people into just pleading or, you know, giving up. And so, it's more important than ever that federal courts step in when there are these state proceedings, where the proceeding itself is the violation especially, so that, you know, people's lives don't get ruined from the prosecution. It's not just good enough to have an opportunity to have your day in court because the court proceeding itself, in this day and age, can be really oppressive for people.

A

Anthony Sanders 49:49

Yeah, good point. Because then if you plea bargain, then the *Heck* bar means you can't come after that prosecutor in the future. So there's yet another barrier put in your way for trying to get justice. I think of like, you know, this prosecutor and all the people who weren't Netflix who may have gone through something similar, maybe not a First Amendment violation, but similar abuses, and I bet they did not have as happy an outcome as my guess.

A

Anastasia Boden 50:20

Yeah. Well, there's just one thing that I forgot to harp on that I was going to add, which is that one of the defenses for this whole action was the prosecutor said, well, hey, I got an indictment from a grand jury, so you can't say that it's bad faith. You can't say that there was no likelihood of success. The grand jury indicted, you know, Netflix, which there is that saying in law that a grand jury could indict a ham sandwich, so that doesn't say much. But the other thing that Judge Willett brings up in his opinion is if that were true, that would mean that you could never bring an action against a prosecutor because they're always going to have to go through the grand jury, so that can't be enough on its own. And what's more than that, in this situation, he was selective. It's only a 90 minute film. I wouldn't want to watch it either, but he could have just shown the grand jury that film in its entirety so that they could get an idea of what it's about. Is it child pornography or not? No. But instead, he just showed these little clips out of context, which I think goes to how easy it is to indict people. And so Judge Willett just says doubly no. No, you can't use that as an excuse because that would mean that no prosecutor is ever going to, you know, be in trouble. And secondly, there was even more strategically going on with that indictment.

E

Elizabeth Slattery 51:36

So, just one additional thing. I think, Anastasia, you alluded to this earlier. Judge Willett uses the same phrase in both of the opinions that we've talked about today: "middle management circuit judges." And I like that. I appreciate that in both opinions. He's ribbing the Supreme Court a little bit, saying, look, your precedents maybe don't make sense. They're inconsistent or, you know, in this case, in the "Cuties" case, he says the record is rather sparse. So, you know, I appreciate that maybe he's trying to prod the Supreme Court a little bit to spur them to action

A

Anastasia Boden 52:21

It's like *Marbury v. Madison* where you're like ... Oh, it's like ninja lawyering where you're pretending that you're being humble. He's like, oh, well, we don't really have that much say, but what he's really doing is like prodding the Supreme Court.

E

Elizabeth Slattery 52:39

He's just a humble country judge from Texas.

A

Anthony Sanders 52:45

Well, I appreciate the allusion to the machinations in *Marbury*, and hopefully, that wasn't on Judge Willett's mind, but you never know. Well, thank you both for coming on Short Circuit and sharing a little bit of Judge Willett and a teeny weeny bit of Judge Jones with us. So best of luck to both of you in your travails on SCOTUS Ladies. So you said there's a gentleman coming soon that we'll get to read about?

E

Elizabeth Slattery 53:17

There might be.



A Anastasia Boden 53:18  
Are you angling for an interview, Anthony?

A Anthony Sanders 53:20  
I don't think I'm graced with the title of Supreme Court advocate.

A Anastasia Boden 53:28  
Maybe we'll have an appellate gentleman on.

A Anthony Sanders 53:30  
I would not be eligible. Maybe some of my best friends, but not myself. But thank you both for coming on. This has been a lot of fun. This has been great. And for the rest of you, I hope you enjoyed it. And until next time, I hope that all of you get engaged.