Short Circuit 315: A Day at the Races

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SPEAKERS

Christian Lansinger, Paul Avelar, Anthony Sanders

A Anthony Sanders 01:06

Well, that rendition of Camptown Races will let you know that, today, we're talking about horses. It is a day at the races today on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, March 12, 2024. And yes, we are going to be talking about a case today about whether you have a constitutional right to name a horse a name that makes fun of someone. So, we also have some administrative procedural roadblocks and all that kind of stuff that we often talk about on Short Circuit as well. So, we'll get to that a little later in the show. And, at that time, we will be hearing from IJ's Christian Lansinger. So Christian, I think it is your second time on the show, so welcome back to Short Circuit.

C Christian Lansinger 02:04

Thanks, Anthony. Good to be back.

A Anthony Sanders 02:07

But first, before all that, we are going to be discussing a case that does not involve a horse, but it does involve Florida's governor, Ron DeSantis. Now, we talked about a case a few weeks ago where Governor DeSantis and the Legislature had some work that the 11th Circuit was not very impressed by and sent it back down. And that was a First Amendment case. That was the Disney case. Well, now, we have another First Amendment roadblock that the Florida Legislature has apparently run into involving the 11th Circuit. And, this time, it is about the Stop WOKE Act. I mean, who doesn't like the sound of the Stop WOKE Act? Well, we'll hear why there were some problems with this law, and to bring us that news is one of IJ's First Amendment experts. He is also the managing attorney of our office way out in Arizona. We brought him all the way from Arizona to Florida for this, and that is Paul Avelar. Paul, welcome back to the show. And I'm guessing you yourself also wouldn't describe yourself as exactly woke.

P Paul Avelar 03:23

Anthony, always good to be back. No, probably not. I think, more importantly, most people wouldn't describe me as woke.

A Anthony Sanders 03:30

But, yet, you might have some sympathy for how the good conservative judges on the 11th Circuit said that this law itself maybe had some problems, and those have to do with the First Amendment.

P Paul Avelar 03:44

Not maybe. It definitely has some problems. So, as you said, this is all about Florida's Stop WOKE Act. WOKE is actually an acronym here. It stands for Stop the Wrongs to Our Kids and Employees. And that is strike one because any bill, any law with a cute acronym usually is highly questionable, and frankly, all of them should be declared unconstitutional. It's just misleading people about, you know, what they're actually about. But, setting that little issue aside, what the Stop WOKE Act does is it said that, in relevant part, employers cannot subject "any individual, as a condition of employment, to training, instruction, or other required activity that espouses, promotes, advances, inculcates, or compels" a certain set of beliefs. And then, it has a list of eight sorts of topics, beliefs, subjects that were prohibited from being trained and instructed, promoted, advanced, inculcated, or compelled. And you'll notice that all of those action verbs right there are really just stand ins for speech, specifically sharing ideas. Now, whether you agree with these ideas or not, and I think the panel sort of went out of its way to express some sympathy with the idea behind the bill, ultimately what the panel says is, look, this is a restriction on speech after all, and not only a restriction on speech, content and viewpoint based restriction on speech because the law prohibits requiring attendance at these trainings, only for trainings that endorse those sets of ideas. Employers could still require employees to attend sessions that rejected those ideas or presented them in an objective manner without endorsement of the concepts. And so, you know, that looks like a pretty straightforward, classic First Amendment type problem. The government is regulating speech based on content, and not just content, but also viewpoint. And there's just a whole host of cases that say you can't do that. But aha says Florida in a now very familiar move that lots of governments all across the country try every day. We're not restricting speech, they say. We're not regulating speech; we're regulating conduct. We're not stopping anyone from saying what they want. We're simply prohibiting mandatory meetings, and meetings are conduct. They're not speech. And so, although its content and viewpoint based, it's not a restriction on speech at all. This is just conduct. And, as listeners here know, that's an important distinction because speech receives actual judicial review in our system where the government has to justify its reasons for having these things, has to show some sort of tailoring, etc. And restrictions on conduct, however, receive rational basis review, which again, everyone knows requires neither a rationale nor a basis to be upheld. And so, the court is very familiar with this move. As they say, the characterization reflects a clever framing, rather than a lawful restriction. And so, recognizing, of course, that there is huge reason for encouragement for government to call things a restriction on conduct when they're really restricting speech, because they're hoping that will get the courts out of the way of actually analyzing these things, the court makes short

work of all of this. It goes through its usual analysis and says, no, no, look. The restriction here turns entirely on the content of what is presented at one of these meetings, and where a regulation turns on the content of the speech that's involved, that's not a regulation of conduct. That is a regulation of speech. And that's part of a long line going back to at least *Holder v. Humanitarian Law* from the U.S. Supreme Court that recognizes that's the way you do this sort of analysis. And so, having very easily decided that this is a restriction on speech and not of conduct, the court then applies the usual rules when it comes to strict scrutiny and regulation of content of speech and says no, this bill does not meet those high standards. And, at that point, it's a very straightforward First Amendment case. But, I think the real move here, of course, is to recognize this speech/conduct distinction and to really meaningfully engage with that analysis. As all of us here at IJ know, courts are not always great at doing that, at making this speech/conduct analysis and really drawing those lines. It's nice to see the 11th Circuit do that, although I should note that the 11th Circuit itself does not always do that. There are other cases in the 11th Circuit which say, yeah, I mean, this kind of looks like a restriction on speech because it's stopping you from speaking, but really, we're going to call it a regulation of conduct, and that conduct is the practice of an occupation. One would have thought that the U.S. Supreme Court had sort of nipped that in the bud in the NIFLA case several years ago. The 11th Circuit continues to struggle with it; lots of circuits continue to struggle with it. And the 9th Circuit is clearly struggling with it right now in a case that I'm litigating. So, mark this one as another win for speech because the court does this hard, well, in this case, easy conduct/speech analysis comes down on the right side and after that, the First Amendment applies, and we all know how that's gonna go.

C Christian Lansinger 10:01

It really is interesting when you hear it says Stop WOKE Act and not really hiding the ball there. Stop insert ideas. And then, they go even further to list out the ideas one through eight on which ideas they think are not okay. It's definitely a different case from what we're used to when we're dealing with the practice of an occupation, where they're just saying we are stopping this speech in the actual name of the bill itself.

A Anthony Sanders 10:25

Paul, I think you made a really good point about how this is pretty straightforward. A lot of people who really, you know, know classic First Amendment law would read this and kind of go duh, like, you know, obviously, it's gonna go that way. But, a bunch of circuits including, as you said, the 9th Circuit very recently in an IJ case ... The 11th Circuit has gone both ways on the question of conduct and speech. And it's done it a couple times or more than a couple of times when it comes to occupational speech. And I was just reminded this morning of a case that our old friend Clark Neely litigated a few years ago about interior design licensing in Florida. And basically, what was being licensed was someone stating to someone else about how they should design their office or their house or whatever, and so, if you were to just draw a picture of how the office should look, that was considered regulated speech. And if you didn't have a license, that could actually violate the law. And so, in light of that case and the following cases that have come from that, at least on one side of, you know, these lines of cases in the 11th Circuit, you can't think that the Legislature and Florida's counsel were all that crazy for thinking maybe they would get away with this case. I mean, this is obviously kind of more core ideological speech, but those are cases about speech. And so, you know, why not give it a

shot? So, although the panel, you read this case, this opinion, and the panel is like, you know, WTF, get out of my courtroom. We'll go through the ringer here, but of course this violates the First Amendment. It wasn't crazy for them to try.

P **Paul Avelar** 12:16

Yeah, the 11th Circuit points out that the, and this is a quote from them, "the comparative freedom to regulate conduct sometimes temps political bodies to try and recharacterize speech as conduct." And that's really what they're going for here because if it's conduct, then they have free rein to do what they want, almost free rein to do what they want. You know, speech still gets real judging. And so, that distinction, speech versus conduct, is critical for courts to really engage in.

A **Anthony Sanders** 12:45

There's one great, I mean, there's a few great lines in this paragraph with Judge Branch as the author, but when Florida keeps coming up with like nuances on how to say that this is actually conduct and not speech, one remarkable paragraph says, "Florida proposes an alternative approach. It says that even if speech defines the contours of the prohibition, so long as the resulting burden is on the conduct, that conduct is all the state is regulating. That, in turn, means the law does not regulate speech. Remarkable. Under Florida's proposed standard, a government could ban riding in a parade float if it did not agree with the message on the banner." So I love that one word sentence there: "Remarkable." You can always tell if that's in the opinion, you're probably not doing very well.

P **Paul Avelar** 13:38

In Florida's defense, and I don't really mean this as a defense, it's not the first government to come up with this sort of argument. There have been arguments before, like there's an 8th Circuit case involving a video production company where the state tried to regulate the content of what the video production company could do. And they said, we're not regulating the content of the speech. We're regulating things like where you can place the microphone and how you turn the camera on. At some level, all speech involves conduct, right? Me typing on my computer results in speech, but typing is literally conduct. Only a fool would say, oh, I can regulate what you're typing. And that's a regulation of conduct, not of speech. But, you know, the government's full of fools sometimes.

C **Christian Lansinger** 14:28

We've seen in some IJ litigation too out of North Carolina ... We're drafting a report. The government was trying to distinguish drafting a report from the opinions that are actually contained in the reports. And, you know, it gets to the point where you start narrowing this down. It's the you use your vocal cords to speak, and you can really recharacterize or reframe the language the court was using to change speech into any action because speech is an action after all, but just making the verb weaker doesn't actually change the fact that what's going on

here is somebody trying to communicate a message to somebody else, whether it's in a workplace mandatory training, whether it's a report, whatever it is. If somebody's trying to communicate a message from person A to person B, that's speech.

A Anthony Sanders 15:18

And Judge Branch points out that the classic example of that, at least in modern times, is the burning of a flag. That is conduct. I mean, that's fire, but it is about the speech because it's what you are burning that is regulated.

P Paul Avelar 15:35

And, yeah, and I mean, that's really important and, again, that goes to conduct versus speech, right? If you prohibit someone from setting fires, and that then like limits them from setting a flag on fire, then that's one thing, but if you are limiting them from setting flags on fire to ban protest, that's clearly a regulation of speech. The United States Supreme Court figured that out a long time ago. And it's just a question of how are the lower federal courts really sort of dealing with those sorts of distinctions and, quite frankly, messing them up in a lot of cases? There is, I think, a number of conflicts and splits amongst the circuits right now, even within circuits, on exactly how they're dealing with this. A lot of this has come post NIFLA, where the U.S. Supreme Court said, look, just because speech is uttered by a professional as part of a licensing scheme, doesn't mean that the speech isn't protected, even if the licensing scheme is, you know, generally one of conduct. There are these things called as-applied regulation out there. Stop WOKE is, you know, a different sort of case because that one's just pretty obvious, but there are a number of these other cases out there where the restriction on speech the courts maybe think is a little more subtle, but a subtle restriction on speech is still a restriction on speech.

A Anthony Sanders 17:11

And then, finally, an amendment to what I said earlier, I said, recently, we covered a different Governor DeSantis involved First Amendment case that had to do with the Disney kerfuffle. That's not the case that we covered. We covered the one about the prosecutor, Andrew Warren, who was fired, and then that was reversed by the 11th Circuit because there was impermissible First Amendment protected motivation. Hard to keep our Florida and 11th Circuit First Amendment cases straight these days, so my apologies for that. Now, another case that eventually is going to be about the First Amendment but isn't quite yet. But you get a little preview of what it's going to be about. It's out in the 9th Circuit, and this is where we're going to get a little horsey and go to the races. So, Christian, I guess, take it away. And they're off.

C Christian Lansinger 18:13

And we've actually ... Short Circuit's done horse racing before. I think it was in late 2022 when you had another horse racing case. I think it was out of the 5th Circuit dealing with the nondelegation doctrine.

A Anthony Sanders 18:23

Yeah, yeah. And I think we might have used up all our horse puns that time, but if you can think of any more ...

C Christian Lansinger 18:30

I don't think so. The guest on that show, I think he's got a few more puns up his sleeve than I do. But, that being said ...

A Anthony Sanders 18:35

That was our punner in chief, I believe, Trace, who is no longer working currently at IJ. But he's a master of the pun. Yes.

C Christian Lansinger 18:44

But that case dealt with the Horseracing Integrity and Safety Act, which is federal legislation. I think there was a debate as to the pronunciation of that statute in that Short Circuit podcast, but here, we're dealing with state regulation, specifically out of California. And the issue we're dealing with is what's called administrative claim preclusion. And, in layman's terms, all that really means is when you bring a case before a state agency (in this case, it was the California Horse Racing Board) and you get a decision from that state agency, can you then after that file a federal lawsuit (specifically a Section 1983 lawsuit, which is the federal statute that allows you to file a claim for civil rights)? Can you file that claim, or the state agency decision, does it bar your subsequent federal claim? But, before getting into that mess, it's important to really see the players that are involved here because it's really quite interesting. We start with Bob Baffert, who is a Hall of Fame horse trainer. I think he has the tie for the most wins at the Kentucky Derby with six horses who won the Kentucky Derby. But, he has a bit of a problem with his horses testing positive for drugs. He's had over 30 horses in his career test positive for drugs.

A Anthony Sanders 20:04

That sounds like a lot.

C Christian Lansinger 20:06

You'd think so, which is maybe what's the motivation behind some of these regulations. But, clearly they're not working that well. Even in 2021, one of his horses that won the Kentucky Derby, I believe it was the Medina Spirit, won but then was subsequently disqualified due to a positive drug test. So, in comes our plaintiff here, Jerry Jamgotchian, which I'm likely butchering that last name. But, he's another horse owner who isn't fond of Bob, nor is he fond of the

California Horse Racing Board. He's a very litigious individual. He's filed a number of lawsuits over the past decade. And he's named horses as well. And that's something that he does is he goes after the Board. He goes after the other horse owners because he thinks that a lot of this isn't done, I guess, the ethical way or the right way. And so, him and the California Horse Racing Board don't get along too well. One of the former chairs of the California Horse Racing Board described him as a "self-destructive person with a mean-spirited persona." Another former chair of the California Horse Racing Board pled no contest to keying Jerry's car. So, it's short to say they don't get along too well. And so, he has kind of a new strategy, maybe that you think is a little bit less harsh. He names his horses to make fun of people he doesn't like. So, in regards to Bob, he named one horse Bad Test Bob. And then, the horse that's relevant here was Malpractice Meuser, again, I might be butchering the pronunciation there. But, that's named after one of Bob's attorneys: Michael D. Meuser, a Kentucky-based lawyer. And although, at the same time, Jerry doesn't seem to want to say in his briefings that that's actually why these horses are named this. He seems to say it might be named after somebody. But, at the same time, it seems pretty clear from his over 10-year relationship, if you will, with the California Horse Racing Board that they're not too fond of each other, nor does he seem to be fond of some of the people who allegedly dope their horses. So, anyway, what happened here was he tried to race Malpractice Meuser in California, and he was unable to because there's a regulation where if the horse has a disparaging name, that horse will be denied registration in California. And, it's not actually California that decides that. It's not the California rule, but rather, they make you get a registration from a private group called the Jockey Club of New York, and it's their rule.

A Anthony Sanders 22:38

And that itself sounds like some kind of nondelegation problem.

C Christian Lansinger 22:42

And, actually, they raised delegation arguments here, but they raised it only under the California Constitution, so it got dismissed on sovereign immunity grounds. But, that being said, there were some, at least, discussions on whether that was improper delegation, but either way, he goes to the Board in California and says I should be able to race my horse. This is ridiculous. I should be able to race Malpractice Meuser. This is a First Amendment issue. They say no, you're not registered. So, he appeals to his good friend, the California Horse Racing Board and alleges First Amendment violations, among other claims. And, shockingly, the California Horse Racing Board does not decide for him and says no, you do not have a right to race your horse in California. And, not only that, though we don't have the right to actually rule on your First Amendment claim under the California Constitution because we're a state agency and under the California Constitution, California agencies aren't allowed to declare statutes or regulations unconstitutional. Nevertheless, they went out of their way to describe in detail why they think his First Amendment claim should fail at the state court, should it get there. So, what happens there is Jerry, instead of going to state court and pursuing his claim through the California courts, which probably wouldn't be too fond of his claim, goes to federal court, which is a normal thing you do in Section 1983 cases because Section 1983 is meant to provide a federal forum to vindicate your constitutional rights. While he's doing that, the Federal District Court jumps in and, despite not being briefed, the Federal District Court on its own accord asks isn't there something wrong with this? And don't we call that claim preclusion? What they wanted to know is if you bring a case to the California Horse Racing Board and they issue a decision discussing the First Amendment issue, combined with the fact that you could have

raised that issue later on in state court, does that somehow bar your federal claim? And shouldn't you really be in state court, not here? The district court ultimately said yes, that is true, and dismissed his case. And he appealed up to the 9th Circuit, where the 9th Circuit reversed and said no, there's a long-standing principle of Section 1983 law, which is that you don't have to exhaust your administrative remedies just to get your day in federal court. What they said was there's a federal statute, called Section 1738, which is that federal courts get the same preclusive effect to state court judgments. Note that state court judgments, not state agency decisions. When it comes to state agency decisions, then the 9th Circuit ruled that federal common law applies. And the way they interpret federal common law is that you have to consider whether the agency decision was fair. And one of those key fairness factors was did the person have the opportunity to actually litigate their claim in front of the agency? And here, that wasn't the case. The California Constitution bars his First Amendment claim. He's not allowed to bring it before the agency, so how could it have even been decided in the first place? So, it makes no sense to actually preclude the claim in the agency. But, in that case, the agency could never have ruled on that issue in the first instance. The court went further and it tied in this cardinal rule about exhaustion into its reasoning to say administrative exhaustion isn't required. And so, if we were to rule for the government here and say this claim was precluded, we'd create what the Supreme Court warned about, which is, they call it, a preclusion trap, which is the fact that if he actually went to state court to actually get his claim litigated, like they say he has to before he has a right to then seek federal review, his claim would then be precluded. So, it creates this no win situation where he's not allowed to go straight to federal court without exhausting his state remedies and his right to judicial review in the California courts. But then, if he goes to the California courts, he's then precluded. It's a no win situation or, as the 9th Circuit called it, a heads I win, tails you lose. So, overall, the 9th Circuit reaffirmed the long-standing principle that you can go to state court or federal court. It's your choice when you have a Section 1983 claim, and ultimately, this reaffirms that principle and allows someone to have a federal forum for their Section 1983 claim.

A Anthony Sanders 27:08

Now, Paul, you have done this preclusion trap dance a few times, am I correct?

P Paul Avelar 27:14

I have. Yeah. It's pretty common for anyone who is litigating when state administrative agencies overstep their bounds where they do something to your client, and at that point, you're left in this conundrum, which is do I take this up through the state system through an administrative appeals process? And thoughts on that later. Or do I just sort of cut, bait, and run to the federal courts, which are supposed to give you a forum for protecting your federal rights against abridgement under color of state law? That's 1983. Where we used to see this all the time was in takings law. There was a case called *Williamson County* that actually required exhaustion of state remedies before you could go to court. And then, a couple of years later, in a case called *San Remo Hotel*, the Supreme Court said, oh, wait, but once you do that, then you're stuck with all of these claim and issue preclusion problems. So, you can't really litigate this in federal court either, effectively cutting you off from the federal remedy that 1983 was meant to give you in the first place. A couple years ago in Knick, the Supreme Court revisited that and said no, that's all wrong. In order to protect federal rights, at least, you have to have a federal forum for these things. And so, the 9th Circuit's decision here is understandable. It's

correct under governing law, and it's for anyone who faces adjudication by a state agency. This is the sort of thing that they face in all of these sorts of things. And if I can just rant for one second about separation of powers and this notion of administrative adjudication, it's gotten out of control what the state agencies think that they can do. There's this line in here about state agencies', you know, judicial acts, and no agency should be able to engage in judicial acts. Separation of powers says only the judiciary can engage in judicial acts, and one of those is declaring the law unconstitutional. Strictly speaking, no state ... California is simple. There's an express provision in California's Constitution that says state agencies have no power to declare acts of the state unconstitutional. Only a court can do that. You don't even need that expressly. That's just inherent in what the judicial power is, and so that is or ought to be the law in all 50 states and the federal government. The U.S. Supreme Court oftentimes says that sort of thing. Last term, you saw that in two cases called *Cochran* and *Axon*, which talked about your need to go through an agency adjudication in order to challenge some structural problem with that agency adjudication. This term, there is a case pending called *Jarkesy v. SEC*, which really talks about what is a state agency's ability to impose fines on you for having violated the law in some way in like a civil capacity? And is that allowable under Article III? Each of the states has their own separation of powers provision. And so, I think this is an issue that's going to begin to get more and more traction, which is actually what are these agencies doing in the first place? Because if they can't adjudicate, then how can you claim to be giving their decisions preclusive effect as judicial judgments? That makes absolutely no sense whatsoever from a sort of question of first principles.

C Christian Lansinger 31:13

And it's interesting that, here, you have a hearing officer that ultimately is the one that proposed the decision, but it is ratified by the Board. And the Board isn't composed of seven lawyers. It's composed of seven people appointed by the governor, and you have this with these administrative agencies. They're not necessarily a bunch of constitutional litigators or judges with a bunch of experience in dealing with constitutional issues. And, a lot of times, they're intentionally designed to include people that are actually in the industry itself. So, to trust those people to actually litigate the First Amendment claim fully and then to say, okay, now we're done here, the federal courts don't have a right to actually hear a Section 1983 claim, that creates a lot of concerns for constitutional litigators.

A Anthony Sanders 31:58

And it shouldn't matter for the choice of federal or state court, but I would also be curious as to how this actual appeal would work in two state courts. Say they had rolled the dice and said we're just going to stay in the state system, and then gone to state court. I mean, often with those procedures, it's just kind of an old fashioned writ how you go to the state court, and there's no discovery. You can't add to the record. You have the record below, which was built in not any way like a normal adjudicative forum where, you know, you can do depositions, and let alone a trial or something like that. So, often, in my experiences, the little I've been involved in this, in some states is you go to state court, so you have this ... If people do go to state court, they have this not very good opportunity to build a record, so they add on a Section 1983 claim. And a lot of states have said, okay, you can do that. So now, we'll do this in state court. And so, really, it's just a Section 1983 claim, which, you know, then raises the question of okay, well, how about you just go to federal court in the first place? And then, you can get your

federal forum, which really, it looks like is what, you know, happened here. I mean, I don't know the California procedural law here, but if you can do one, you should be able to do the other. And the whole point of having Section 1983 in the first place is to have that federal forum. And so, that's what's going to end up happening.

C Christian Lansinger 33:28

Right. And I know it's a writ of mandamus. I'm not sure if you compare a Section 1983 claim. And, sometimes, you might be required to for concerns of a waiver when it comes to the state level, but regardless, it's still important that we have that federal forum for the fact that a lot of times, you still have to go through the agency first for standing reasons. You need to get the government to show affirmatively that, you know, if you go to the federal court first preemptively without actually having the agency establish what's going on, for them to actually position themselves to say, no, you can't name your horse Malpractice Meuser. But, if they don't actually establish that, they can then go in court and say, oh, we never actually ruled. Maybe we think that name is okay. We don't know until you actually come see us at the agency court, where maybe we'll rule for you, even though, in practice, they almost never do.

A Anthony Sanders 34:17

Well, as we discussed just on last week's show when we had Justin Pearson on in a property rights case, that part of *Williamson County* is still good law that you need to show that this case is ripe. So, usually that means asking for a variance, and when that's denied, then you can go to federal court. And kind of what they did here was, I guess, ask for a variance in some way on the Malpractice Meuser.

P Paul Avelar 34:44

Yeah, and we've talked about this a number of times on Short Circuit that really all constitutional law comes down to weird procedural issues. And so, anyone who is really interested in substantive constitutional law had better be an expert on procedural stuff because you will end up, as here, litigating all of this stuff for years before you ever get to, hey, does the First Amendment actually protect my ability to name a horse whatever I want to name it?

A Anthony Sanders 35:13

And I will remind listeners that we are, as always, hiring at the Institute for Justice. And so, come and do all the headbanging that you want, that Paul was just talking about, against a wall on procedural stuff, and eventually, you can get to the merits. And I think we should close by looking in the crystal ball here a little bit on the merits. So, Malpractice Meuser finally gets its day in court ... the owner does. And really, this rule is that a private club that has been given state power can veto names, and so it's not that the horse can't be named that, it's that it can't be raced professionally in California with that name. I can't see any way that this, under a real First Amendment application like we had say at the 11th Circuit this week, survives. I mean, I guess they want sportsmanship in the sport. Is that really gonna meet strict scrutiny, or would it be commercial speech because it's the name of a racehorse?

C Christian Lansinger 36:19

There's a 2017 case. *Matal v. Tam*, I think. I'm digging back from my business torts class in law school, but it dealt with a trademark for an Asian American band that I think was trying to recapture their band name. They wanted to call themselves The Slants to kind of recapture the name and to own it. And they actually, for a very similar reason, got denied that trademark because it was disparaging towards themselves. And so, they went up to the Supreme Court, and the Supreme Court struck down that restriction as a viewpoint based restriction. So, I think if the First Amendment issue is actually heard in this case, I think it's pretty clear cut. It's just with all of the different issues dealing with delegation, as we discussed, among other problems, I guess I don't know if the merits will ever be reached.

A Anthony Sanders 37:12

Well, we'll see if one day perhaps we can place a bet on Malpractice Meuser. Maybe we'll follow up with that one day. But, for now, I'd like to thank Christian and Paul for a little bit of First Amendment and procedural talk, and everyone, next week is going to be a special about a new report we have at the Institute for Justice. So, I want everyone to stay tuned for that, but in the meantime, I hope that everyone gets engaged.