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SPEAKERS

Betsy Sanz, Anthony Sanders, Ben Field

A **Anthony Sanders** 00:24

In the beginning was the Word, and the Word was with God, and the Word was God. The same was in the beginning with God. And moving on now from the Gospel according to John, what if the word was not the same in the contract as it was in the parole evidence? Indeed, what if the word in the parole evidence and the intentions of the parties completely contradicted what was in the contract? And even more, what if the contract concerned acts of God? Well, we're going to figure that out 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, April 18, 2023. See, I got the day and the date right that time. It didn't line up so well last week. We are having a normal Short Circuit here today. I'm going to introduce you to a couple of our guests in a moment. The next couple of weeks will be a couple special Short Circuits. I won't give away too much of what we'll be talking about, but next week, we're going to get a little bit British if you know what I mean. So stay tuned for that. But today, we're going to be talking about a case from the Eleventh Circuit involving contracts and acts of God, hence the introduction, and also a case from the Fifth Circuit about a core Short Circuit subject, and that is free speech. Joining me today are two of my Institute for Justice colleagues. They are Ben Field. Welcome back, Ben.

B **Ben Field** 02:13

Thank you. Good to be back.

A **Anthony Sanders** 02:15

And for the first time on Short Circuit, Betsy Sanz. Betsy, welcome to Short Circuit.

B **Betsy Sanz** 02:21

Thanks, Anthony. I'm happy to be here.

A Anthony Sanders 02:24

Now, Betsy, I understand that you actually heard about IJ through the Short Circuit podcast, back in the day before you were even close to being employed by us. Is that right?

B Betsy Sanz 02:39

That's correct. I found IJ through the podcast when I was in law school. I was like, I need to understand the law better, and I probably found it searching some libertarian law podcast search. And there you were. I loved it. And, of course, that made me aware of IJ and move across the country. And here I am.

A Anthony Sanders 03:01

Right, easy peasy. Well, that's a great story. Maybe some listener listening today can learn about what we do at the Institute for Justice through all of our voices. And one of those voices is Ben Field. And I couldn't think of anyone sunnier to tell us about Sunny Florida, where apparently, sometimes it's not always sunny. So Ben, tell us about that and contracts.

B Ben Field 03:29

Sure, so this case is Shiloh Christian Center v. Aspen Specialty Insurance Company. And I really can't do better than introduce the case than to quote Judge Newsom's opinion which starts, "This is an insurance case. Fear not, keep reading." And he assures us in a later parenthetical that it turns out, it's interesting, and I agree with Judge Newsom. So I'll start with the basic facts which you know, your introduction, eloquently put it. It sounds like John was a Willistonian, which we'll get into in a second. So there's a church in Melbourne, Florida. If you head southeast from Orlando to the coast, you'll hit Melbourne. They had property insurance through the Aspen Specialty Insurance Company, and it was really expensive. As you mentioned, Florida has some storms occasionally, and insuring them can be expensive. So in 2015, they decided they didn't want to be insured for hurricanes anymore, which in contract parlance, are named storms. You know, names like Andrew or Irma or Katrina, you know, those kinds of things.

A Anthony Sanders 04:41

By the way, Ben, do you know if Tropical Storm C is a name storm, or it's not good enough to be named?

B Ben Field 04:49

Well, I don't know. Fortunately, the two storms issue in this case were both full on hurricanes so we didn't have to resolve that question. So okay, so in 2015, the church decides, we don't eant to pay for this exorbitant insurance anymore, so please remove our named storm coverage.

And the insurance company says sure, issues a change to the policy and lowers the price, and rebates some of their money. In 2016, they asked to renew the policy, and they're very clear they don't want the storm coverage anymore. But the problem is that the actual policy that's issued doesn't say anything about that. And as you can expect, whenever you have a interesting legal conundrum happen, obviously, a hurricane is going to show up to test that. And that one was Hurricane Matthew in 2016. I guess the church decided, well, lightning can't strike twice, so they renew in 2017, and they say we want the same policy. Don't give us the named storm coverage. The insurance company issues a policy which is substantively the same and again, doesn't actually have an exclusion for named storms. And of course, that year, Hurricane Irma comes through, same thing happens, the roof of the church gets torn off, everything is wet, lots of damage. And after that, the church then sues and says you should cover us because there isn't an exclusion for named storms in the policy. And I think that requires us to take a little bit of a historical detour to two men named Samuel Williston and Arthur Corbin. So Samuel Williston was a professor at Harvard in the first half of the 20th century, and he was sort of the foremost proponent of a theory called formalism when it came to contract interpretation. His view of contracts was you essentially should look at what the contract says. That's what the parties agreed to. If they wanted it to say something else, they would have made it say something else. He wrote the first restatement of contracts, which is the first sort of compendium of law professors getting together saying, this is what contract law is. A little bit farther south in New England at Yale Law School was Arthur Corbin, and he was a legal realist, which was a theory that actually law isn't this highfalutin thing in the skies, it's a social phenomenon. Judges should interpret the law in light of what's going on in society to reach a sensible result. And he said it's impossible to write a contract that encompasses everything you think you could ever want, and so, you should look at evidence outside that, things that lawyers call extrinsic evidence or parole evidence. Just figure out what's the best reading of what the parties actually wanted. And this actually relates to a much bigger thing that was happening in the law at the time. Harvard at the time was seen as like the conservative grandam of the legal academy, and it was supporting a more old fashioned formalistic view of the law. Yale Law School was at the forefront of this legal realism, and at the time, Harvard was by far the preeminent school. This is actually sort of where Yale overtakes it because in the 30s, the FDR administration needed people to staff the New Deal who didn't have sort of stick in the mud views. We at IJ are obviously a fan of many of those stick in the mud views. And so they couldn't go to Harvard, with some very notable exceptions, like Felix Frankfurter. Instead, they had to staff up with Yale people who were big fans of the administrative state and changing the Constitution to allow wacky new things to happen.

A Anthony Sanders 08:45

All that legal realist stuff.

B Ben Field 08:48

Exactly, and that's sort of when Yale came to the floor as taking Harvard on. But as listeners may know, there's sort of been an inversion, and in the last 20 to 30 years, the formalistic view of both contracts, but also taking that same view to interpreting statutes and constitutional provisions, has really come back. And so, I think this case is not a grand constitutional issue, but it has the Samuel Williston pure formalism v. the Arthur Corbin legal realist position, in a sort of small, obviously a big issue for the church, but a small issue in the grand scale of legal

theory. And so when the rubber meets the road in Florida, what happens? Well, at least according to Judge Newsom of the Eleventh Circuit, Florida law is 100% Willistonian, at least when it comes to insurance contracts. And so the contracts, like most insurance contracts, broadly covers a bunch of damage and then has a series of very specific exclusions, and named storms is not one of those exclusions. For Judge Newsom in the Eleventh Circuit, that's pretty much the end of the ballgame under Florida law. And to make it even clearer, when it comes to an insurance contract, there's an additional principle layered on top of that, called contra proferentem. Obviously, you need a Latin phrase in order to reach any legal conclusion. And that's just the basic idea that an insurance company is the one writing the contract, and it's the one in the best position to know or to be very clear about what it plans to cover and what it doesn't plan to cover. If there's any ambiguity, it should be construed in favor of the insured. And so in this case, even though the church specifically said we don't want named storm coverage, and everybody pretty much agrees that they didn't expect to get named storm coverage, the actual policy that they signed didn't say those names storm coverage, so therefore, the church gets two beautiful new roofs, care of Aspen Specialty Insurance.

A Anthony Sanders 10:58

Betsy, do you know if your insurance contract covers named storms?

B Betsy Sanz 11:04

Oh, goodness, no, I do not know that. I need to find out. I got to keep my your roofs. And as we have discovered, lightning might not strike twice in the same place, but hurricanes sure do. Now that I'm an east coaster, instead of a west coaster, I should probably look at these things.

A Anthony Sanders 11:22

One thing I don't get from the facts, Ben, maybe I just missed this, is so the first storm strikes, the church makes a claim. So at that point, they at least want it or they think it might cover it because they make a claim. And they also got the discount on the insurance policy, which seems to reflect that it was taken out. And then the next year, they don't just say they want to renew, as you said, they actually like check the box that says we don't want the named storm coverage. And then that's after having had one storm, and having made a claim after that storm, and getting the price reduction. And then they get this next policy, which it seems embodies that price reduction but nevertheless covers the storms. It's like there was a breakdown on both sides as to what the heck the paperwork said, or that the person making the claim wasn't talking to the person renewing the policy. Do you have any sense to make of how that came together?

B Ben Field 12:40

I don't. I have the same confusion. You know, it could be all sorts of things. Obviously, the leadership of the church could have changed. Maybe they had a wily insurance lawyer who said, well, there's not an exclusion, and you may as well make the claim renew. We'll see what happens and then we'll file a declaratory judgment action. But I actually think that this point

that you're bringing up really weighs in favor of the Willistonian approach to contracts because when you're looking at extrinsic evidence, you can read it any which way. So I could read it as, well, the church was obviously being the bad faith actor here. They kept getting these discounts but were submitting claims. And so they knew what was going on, and we shouldn't give them a windfall. Great term for this particular case. But you could say the other way. Well, look, they were making claims. They were getting this big discount. Someone at that the insurance company should have made sure the contract actually reflected what the insurance company thought that it was covering. And so I think the Willistonian position makes sense, especially where you have a sophisticated party, like a big insurance company on one side. They should write the contract that they expect to be held to.

B Betsy Sanz 13:54

This is my feeling too. As I was reading this case, I was thinking, I wouldn't mind whichever way this came out. Because the party, the church, clearly was like yes, we don't plan on obtaining the named windstorm coverage in the affirmative. I don't even think they checked a box. I think they actually wrote on the paper, excluding windstorm or something like that. Very affirmative and obvious. And so it felt like they were entering into that decision with open eyes, so I wouldn't have minded if the court had come out differently. But at the same time, it's not just that the insurance company was the one that wrote the contract, right? Like Ben said, they're this sophisticated party and two times, not just once, but twice, they didn't include the exclusion that was bargained for. And so I guess everybody just gets the effort that they put in, I guess, and I don't mind it.

A Anthony Sanders 14:55

To take the devil's advocate, I mean, the Corbin position, it's absolutely clear both parties wanted this different provision. You could almost say, and this throws in another idea that didn't come into the opinion that maybe could have, tha there's almost like a scrivener's error here. I remember in law school, scrivener's error is maybe a legislative canon of construction. But it's one of those things that can almost trump everything else. It doesn't happen very often, where you actually have the parties mean one thing, and they write something else. Everyone knows it's the one thing and not something else. And so you just read it to have what was intended. You could have said that here, but for some reason, that doesn't come up. And I wonder if that it really is because it's an insurance contract and there's this contra proferentem canon of construction that if this was a normal contract between two sophisticated parties, I think there's a good chance that would go the other way. But here because we're dealing with kind of a special area of contracts where you definitely don't have the same balance of power and the courts look at that too, maybe this is more of a Corbin idea, Ben.

B Ben Field 16:31

Yes, and there were a couple doctrines that the court refers to, which I think is at least getting it why they don't do that. So obviously, the contract had an integration clause, which just means that the contract says, everything that we intended to do is in the contract. And so that just creates a very big barrier to even looking outside in the first instance. And also Florida law

appears to have a rule that each contract should be read independently. You don't look at the series of conduct to interpret, so you don't look at when they first got the 2015 change to the policy to interpret the 2017 contract under Florida law.

A Anthony Sanders 17:12

Well, we once again prove here on Short Circuit that insurance policies and and cases can be fun. We did a couple of those a couple of months ago with Dan Knepper, our general counsel at IJ. And thank you, Ben, for bringing in these ghosts of Harvard and Yale past that that weren't even in the opinion. But now we're gonna move on to solid, Short Circuit territory and that is free speech in the Fifth Circuit, which is always fun and always unpredictable, as it was for this place called Tofurky Company. So Betsy, take it away: Tofurky free speech. Can I get my Tofurky dogs in Louisiana?

B Betsy Sanz 17:15

Sure, I think you can still get your Tofurky dogs in Louisiana, but we'll see. I think it kind of still remains to be seen and all in all, not really, but I'll explain that more. This, as you say, involves a First Amendment challenge to a Louisiana statute that was passed in 2019. The case is Turtle Island Foods v. Strain. And Turtle Island Foods is a food manufacturer, and they do business as Tofurkey as you said, and I assume that our listeners have all heard of Tofurky. I think we've all gone through our vegetarian stage or phase and enjoyed ourselves to some Tofurky. They are plant based foods that imitate the flavors and textures of certain meats. But of course they are not meats. The whole point of Tofurky is to be like meat but not be meat. So their product names and their food labels and their marketing all employ certain words that are meat like word. The court refers to these words is meat-esque, so they use words like sausage and burger and roast. I mean, we've all seen this. These products have exploded in the last several years, and Tofurky is kind of the OG plant based meat. Important to know is that everyone in this litigation agrees that Tofurkey is not intentionally misbranding or misrepresenting its products. And this law deals with a truth and labeling issue. So Tofurkey sells its products all over the country, and that includes Louisiana. So I'll tell you a little bit about this statute. It is the Truth in Labeling of Food Products Act. We'll just call it the act, and it was passed in 2019. It's fairly new, and the stated purpose is to protect consumers from misleading and false labeling of food products that are edible by humans. So one of the ways that the act proposes to accomplish its purpose of protecting consumers is by barring intentional misbranding or misrepresenting of any food product as an agricultural product. And it does that through several labeling practices. So one of those practices that is barred is representing a food product as meat or a meat product when the food product is not derived from certain animals. So if you're intentionally misbranding or misrepresenting a food product as an agricultural product by representing it as a meat or meat product when it's not, then you may be running afoul of this act, and you risk $500 per day per violation, so it's pretty serious. And there is no carve out in the statute for plant based imitation meat products. So you can see how Tofurky sees trouble, right? So on the one hand, the statute seems to be focused on intentional misrepresentations by food makers, which Tofurky definitely is not doing. But then the statute explicitly includes this list of practices, one of which is representing non-meat products as meat, which Tofurky is definitely doing. So out of an abundance of caution, Tofurky sues the guy who has the responsibility of enforcing this act, and they claim that the act violates the First Amendment because it unduly restricts their commercial speech rights. And they also

claim it violates due process because it's vague. So at the district court, Tofurky wins. The court finds that Tofurky has standing to challenge the act. And then it proceeds to rely on the plain language of the statute to find that the act prescribes Tofurky's conduct, namely Tofurky's representations that its products are meat-like when they're not. And then it goes on to apply the Central Hudson Test, which is the test for the constitutionality of restrictions on commercial speech. And under Central Hudson, commercial speech is protected as long as it is not misleading or related to unlawful activity. And so the First Amendment does not protect commercial statements that are actually misleading, meaning they deceive or are inherently deceiving. But if they're not misleading, or even if they're just potentially misleading, the commercial statements are protected by the First Amendment. Here, everyone agrees that the Tofurky commercial statements are not misleading. So the district court finds that Central Hudson applies. Now under the Central Hudson Test, it's on the government to show that it has a substantial interest, the restriction on this speech directly advances that interest, and the restriction on this speech is not more extensive than necessary to further the government's interest. So the district court looks at all of that. It finds that the state sure does have an interest in protecting consumers, but the restriction doesn't directly advance that interest because there really wasn't any evidence that the state came up with that people are confused. And then the state also has to show that the restriction on speech is not more extensive than necessary to advance its interest. And here, the court just found, hey, you know, instead of prescribing speech, we could ask food makers to put more disclaimers on their labels to clear up any confusion. But that's not what the state is doing here. For all those reasons, it just finds that the state has failed the Central Hudson Test, and the speech is protected. And the whole act is unconstitutional under the First Amendment, but it does not reach the vagueness claim that Tofurky had brought. So now we're at the Fifth Circuit. And first, the Fifth Circuit addresses standing. The state claims that Tofurky doesn't have standing because the act only covers intentionally misleading speech. And everybody agrees that this is not intentionally misleading, and the act doesn't even apply to Tofurky, so they don't have standing. Of course, for our non lawyers, and maybe for our 1Ls, the standing doctrine requires that there's an injury to the party. And because Tofurky's speech is not covered by the act for the state's reading, they say they don't have standing. So this state here has not enforced the act against Tofurky, so this is a pre enforcement challenge. And so in order to have standing and a pre enforcement challenge, you don't have to have violated the law and been arrested. It's enough that your speech has been chilled. Chilled speech is an injury, and in here, Tofurky speech has been chilled. It can't afford to make Louisiana specific labels, and it would cost about a million dollars to change its marketing nationwide. So instead, Tofurky has avoided saying anything new. They've avoided putting out new messages and new marketing campaigns and refrained from using certain words. Their speech has definitely been chilled. All they have to show is that they intend to engage in a course of conduct that is affected by constitutional interest. And that course of conduct is arguably prescribed by the statute. And then they have to show that there exists a credible threat of prosecution under the statute. And the court finds that Tofurky meets all these conditions and ultimately finds that they are standing, and I'll tell you why. First, they find that Tofurky intends to engage in the conduct that is protected by the Constitution. And the court does say that it intends to speak about its products, which is commercial speech, and commercial speech is protected speech. So it acknowledges that, but then this is the important part. The court also finds that Tofurky's intended commercial speech is arguably prescribed by the act. So the state had argued that Tofurky's speech is not prescribed by the act because Tofurky is not intentionally misleading consumers, and the act only prescribes intentional misbranding or misrepresentation. So, since Tofurky's speech is not prescribed by the statute, the First Amendment is not even implicated, and Tofurky does not have standing. But Tofurky argues that the intention to mislead is not actually required by the act and that's because of the wording of the lead clause of the relevant

statute. I'll quote here. It says that "no person shall intentionally misbrand or misrepresent any food product as an agricultural product through any activity, including," and then it goes on to list several subsequent actions, "including the representation of non meat products as meat." So Tofurky says that because the act has those words, through any activity including, the act essentially includes all of those several subsequent actions, including the actions that Tofurky is taking, and so on. In fact, it kind of expands the definition of intentionally misleading to include representing the non meat products as meat. And so by that wording, Tofurky thinks that the definition of misbranding is actually explicitly including its conduct. And it worries that it can be held liable under the way that the act is written for making a plant based product and labeling it in the way that Tofurky wants to label it. And they worry that they will accidentally confuse a customer and then be held liable under the act, even if they didn't intend it. So the court essentially credits Tofurky's argument for the purposes of standing. It can be read that way, the way that Tofurky is reading it, that its conduct is included in the definition and intentionally misleading, then it can be read that way. Their conduct is potentially prescribed. They may be suffering an injury here, and therefore they have standing. And, of course, Tofurky faces a credible threat of enforcement. So apparently, there were nine Tofurky labels reviewed by the state and the court. They kind of demonstrated Tofurky's labels are the typical label. And the state said that those labels are not intentionally misleading, so it had no intention of enforcing the act relating to those nine labels. But the state wouldn't promise that it would not consider future Tofurky labels to not be misleading. Nothing in that promise bound a future commissioner from interpreting it the same way.

A Anthony Sanders 29:01

Just trust is what they said.

B Betsy Sanz 29:02

Yeah, always trust us. For those reasons, the court did find that there was a credible threat of enforcement. Tofurky has met its burden to bring a pre enforcement First Amendment claim, and it has an injury and so all told, it has standing. Its conduct that it intends to keep doing as arguably prescribed by the act, and there is a credible threat of enforcement. So, so good, so far, we have standing, but then the court moves on to the merits. And first, it finds that the challenge was a facial challenge. That's the first finding that this is actually a facial challenge. I think it's significant because the district court did not discuss the nature of the challenge as being facial or as applied to Tofurky was kind of silent on that. But the Fifth Circuit says that since the lower court invalidated the entire statute, it must be a facial challenge that Tofurky is making. And I recall that the lower court applied Central Hudson, and under that test, it declared it unconstitutional. But the state continued to argue that the lower court got it wrong, Central Hudson doesn't even apply because the First Amendment doesn't apply. Under the state's reading of the act, the only way that a food maker can make misleading commercial statements on labels is by intentionally making misleading commercial statements. But Tofurky says that the plain language of the act sweeps in most misleading speech, not just misleading speech, but also some potentially non misleading speech too, and that's why Central Hudson applies. So unlike in the court's analysis of standing, the court credits the state's reading of the act there. And it appears to do so because the challenge was a facial challenge. So it says that to succeed in the facial challenge, Tofurky bears the heavy burden of showing that either no set of circumstances exists under which the act would be valid, or there's some plainly illegitimate

reason for the law. And it goes on to say that courts must accept a narrowing construction of a state law in order to preserve its constitutionality. So here we have the court favoring the state's construction of the act, which only prohibits a company from intentionally misleading a consumer by claiming a product is made of meat from animals when it's not. And since it only applies to actually misleading representations that fall outside of the First Amendment, Central Hudson doesn't even apply. And the court doesn't say this explicitly, but it appears to equate intentionally misleading with actually misleading. So even though the act can be read Tofurky's way, it could also be read the state's way. And under the state's construction, the restriction on speech doesn't even come into the protection of the First Amendment. So the Fifth Circuit says the district court erred in ignoring the state's limiting construction and in implementing the district court's own interpretation of the act. Ultimately, the Fifth Circuit does not do a Central Hudson analysis at all. And since the district court did not address the due process vaugeness claim, the Fifth Circuit does not do so either. And it reverses the lower court. So I find this to be confusing. I guess I have some questions for you guys. I mean, all of that's probably clear as mud, but it appears that the case turns partly on whether to read the statute the state's way or Tofurky's way. And if you read the state's way, then the First Amendment doesn't apply. And I find it odd that it could clear a standing hurdle by reading the statute one way to get standing, but then once you get to merits you just read it the other way. But it seemed like because there was a facial challenge, that was the way to go. Does that sound right to you guys?

A Anthony Sanders 33:05

Ben, I'm curious if you have a more Harvard reading of the answer or a Yale reading?

B Ben Field 33:11

Well, unfortunately, they're both the same now. I would have had the more Harvard reading at the beginning of the 20th century.

A Anthony Sanders 33:21

Well some student clubs might disagree with you on how they are today, by the way, but continue.

B Ben Field 33:27

Yes, without getting into that can of worms, I think that people who don't litigate First Amendment cases regularly would be very confused by this posture because it's a weird situation where the regulated party is saying, I am breaking the law, and I'm, like, liable for thousands and thousands if not millions of dollars of fines. And the government is saying, no, you're not breaking the law at all. And so, how does that happen? It's because in these cases, in order to have standing to challenge the law, you have to show that you're injured. And so you end up in a weird situation where the regulated party is interpreting the law in a way that they would not argue for if they were in the posture of the law being enforced against them. And it's just a practical reason, which is, as y'all both said, this particular set of lawyers from the attorney general's office are trying to get out of this lawsuit by interpreting the law

narrowly, but that doesn't bind the commissioner in the future. A new commissioner can come in and read the law entirely different. And the frontline people who are actually enforcing it might not have any idea what the attorney general's office is arguing in the Fifth Circuit. And so it makes sense that a regulated party wants to get a clear declaration of what the law means. And when you're in this posture, where it's a facial versus as applied, courts are much more willing to grant as applied relief, which would mean essentially you come in and say, this particular label, I should be able to say, I should be able to say it. And it makes sense the courts don't want to reach as every conceivable application of the law unconstitutional if you could answer the narrower question. But the problem comes when you've got this broad statute that's new, and it's going to be enforced in the future by people who aren't going to be beholden to whatever the attorney general was arguing in court today. And so it's understandable why a party needs facial relief. And I think that there's also something else lurking in the background here, which is if you think of the date that the law was passed, it was 2019, so this isn't like it's a 40 year old law that is now suddenly being applied to this new class of products. It's pretty suspicious. It seems like there was this new class of products on the market, meatless meat, and then 2019, Louisiana decided, well, we don't like those, so we're gonna pass a law. And now the attorney general is coming in after the fact to say, well, actually, the law isn't really as bad as you might have thought. So it makes total sense why Tofurky is concerned about the law, given the timing. And it's really unfortunate that now you've got the court that says, well, we're going to credit what the attorney general says here. But this is the Fifth Circuit. Louisiana courts can interpret the law in an entirely different way in the future. And so after going through all this rigmarole and going up to the Fifth Circuit, they've got this declaration that might be persuasive to a future court, that the law actually is somewhat narrower, but it's not binding at all.

B Betsy Sanz 36:30

And also, it seems like the state is kind of wiggling out of the whole purpose of the law, it seems. To your point, Ben, if you look at some of the comments that the lawmakers made, and even the commissioner has being sued here, they're pretty protective of their agricultural industry. It's very important there. To your point about the timing, I don't know how this could be seen as a statute that doesn't target these kinds of products. And yet, when we get to court, it's like, oh, no, no. No, we agree you're not misleading people at all. It seems like if Tofurky came back to this court and with an enforcement action against it, then maybe the court would think differently because the state is actually taking the position that this is misleading. But right now they're not, and the courts just believing them are crediting that position. And

B Ben Field 37:44

You know, IJ has cases to happen in that posture where there's an enforcement action taken against one of our clients, and then we go to federal court and say they're violating the First Amendment. And even then, when attorneys from the state AGs office come in, they will say actually, yeah, the frontline officials were enforcing it against you, but they were wrong. The court shouldn't reach this First Amendment issue. They get caught with their hands in the cookie jar, and then the lawyers tried to clean it up. But if federal courts aren't going to be serious about that, then you're in a situation where the only time you get to raise the argument is when it's too late, and your speech has already been chilled.

A Anthony Sanders 38:26

One thing that the court does not discuss it all, but I think it's pretty obvious what the actual meaning of the act is, is that if you're intentionally misleading meat in a way that's not just ambiguous but is actually intentional. So I'm selling burgers. They say burgers, but they're actually made of rice. Maybe they even say beef on them. Right? That is already illegal. I'm pretty sure it's illegal under federal law. It definitely would be illegal under some kind of state consumer fraud law, or just common law fraud in probably every state in the country, including Louisiana. And so this whole act comes along, which I guess you could say, well, it has higher penalties or there's more mechanisms the state can use to enforce it. But other than that, it's exactly the same thing as law has been for hundreds of years involving fraud. And the state at bottom, the AG's office or the whoever the attorneys are here, are arguing that yeah, that's all it is, which is preposterous. I mean, everyone knows what this is doing. It's trying to shut down the veggie burger hotdog industry, the Tofurkys of the world. And so the court just kinds of accepts that, which at the end of the day shows us that the court, the Fifth Circuit, and the attorneys who are, as you're right Ben, screaming to try to get out of the Civil Rights action are saying, this is such a stupid law, please read it so it doesn't do anything so we can all go home. And maybe this will mean, by the way, in the future that the folks in Louisiana are not going to enforce this against Tofurky, and it's going to go forward and sell its stuff, and it'll be fine. But it doesn't give the solace that an injunction saying the law is unconstitutional and you are not to enforce it in the future is the reason why we have those kinds of civil rights actions. So do you guys actually enjoy Tofurky dogs and burgers? Maybe no comment?

B Betsy Sanz 40:43

Well, I did go through a vegetarian phase, and I did try Tofurky. I'm no longer a vegetarian. Maybe it had something to do with that. I don't think I've ever really enjoyed a meat imitation product, but I sure think that they have a valuable place in the market. And they should be able to clearly and non misleadingly say, hey, we are meat like, we are meat-esque and not have a problem.

A Anthony Sanders 41:09

Absolutely. And I am not a big consumer of these products, but we have many vegetarians at IJ who do. Some of my best friends, in fact, have been vegetarians over the years and some of our best clients have sued for exactly the same right here. And our colleague, Justin Pearson, has represented people in these lawsuits and will continue in the future. I know Betsy has been involved in some of that work. We look forward to perhaps more direct challenges, where courts actually allow a declaration about silly laws like this being unconstitutional. Maybe there's more of an incentive now for legislators like Louisiana's to not pass silly laws like this, but we shall see. So thank you both for coming on Short Circuit. I enjoyed talking about named storms and veggie hotdogs. We'll talk about more issues like those in the future, but in the meantime, I'd ask that all of you get engaged.