Short Circuit 307 Working Both Sides of the Bench

Thu, Jan 18, 2024 10:57AM 40:57

SUMMARY KEYWORDS

case, 5th, federal habeas, religion, circuit, issue, appeal, panel, viewpoint discrimination, first amendment, dreidel, en, judge, conviction, hart, point, regulation, religious, court, judges

SPEAKERS

Anthony Sanders, Jaba Tsitsuashvili, Keith Neely

A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, January 17, 2024. We have our usual format today with a couple of recent cases from the federal courts of appeals, presented by a couple attorneys who work at the Institute for Justice, but we have a special case this week. One of those cases is an Institute for Justice case, and the attorney who is here is an attorney on that litigation. It is our old friend at Short Circuit, Jaba Tsitsuashvili. Jaba, welcome back.

J **Jaba Tsitsuashvili** 01:09

Hey Anthony. Thanks.

A **Anthony Sanders** 01:11

And Jaba has a crazy case where our client, Erma Wilson, has gone through quite a lot to get to the position where she is today, which is a loss at the 5th Circuit Court of Appeals. But it's an interesting loss because the court basically says she should have won. So we'll get a little bit more on what that means later on in the show, and then after that, we will turn to a bit of a more whimsical story about Chanukah on Ice. That's right, Chanukah on Ice is brought to you by none other than my favorite Judge Boggs clerk, Keith Neely. Keith, welcome back.

K **Keith Neely** 01:53

Thanks, Anthony. That's just because I'm the only Boggs clerk you know.

A Anthony Sanders 01:56

Well, I think I've run into a few over the years. There are certain circles that some of us run in where you can't swing a cat without hitting a Boggs clerk and certain other judges' clerks, I'll say, too. But, definitely, you are my favorite and most recent Boggs clerk I've talked to.

K Keith Neely 02:18

Well, I'll take it.

A Anthony Sanders 02:19

Great. But first, we have Jaba and our client, Erma Wilson, and her story, which is quite a story. So Jaba just take it away, and tell us what happened.

J Jaba Tsitsuashvili 02:33

Thanks, Anthony. Yeah, so like you said, this is an IJ case. It is Erma Wilson v. Midland County, Texas. I will give the case number in case anybody's interested in looking up more about it.

A Anthony Sanders 02:46

And we'll put a link in the show notes too.

J Jaba Tsitsuashvili 02:48

Okay, great. It's 22-50998. So, with that little preamble, as you said, I have the privilege of representing our fantastic client, Erma Wilson. And just as a little introduction that sets up, kind of, the scene here, the 5th Circuit panel here (three judges, unanimous opinion), they called the facts of what happened here "disturbing," "dodgy," "hard to take in." And they called the result that they were forced to reach under their 5th Circuit precedent "difficult to explain." And I think once I explain what happened here, I think all of that is gonna make sense. And they also called it "unseemly." So, basically, what happened here was Erma, our client, was prosecuted in the early 2000s on an allegation of drug possession, of cocaine possession. She, as the panel explains doggedly maintained her innocence that any drugs that might have been found near where she happened to be standing with some friends one night were not hers. And maintaining that innocence, she did what a lot of people don't do these days, which is go to trial, rather than accept a plea deal because she was so assured of the fact that she just simply didn't do this. Unfortunately, what she didn't know was that when she went to trial, there would be a prosecutor, namely Ralph Petty, who was working both sides of the bench in her case. What I mean by that is that he was simultaneously employed and working with the prosecution team that was bringing the charges and litigating them against Erma, while also working as a law clerk, which, most people know, is really the right hand advisor to a judge and kind of tells the judge what they think the outcome in any particular case should be, in a particular motion should be, in a particular argument should be. So I think anybody half paying attention

recognizes immediately that this is just an egregious conflict of interest, right? You have the same prosecutor simultaneously helping the prosecution prosecute and helping the judge judge. And this was obviously, maybe not obviously, all concealed from Erma. She had no idea this was happening. And, in the course of her case, shefiled what's called a motion to suppress saying that the cocaine that was allegedly found should be suppressed as evidence based on various constitutional violations that occurred or lack of probable cause, etc. And, I mean, if you think about it, in a drug possession case, if you win a motion to suppress the drugs, you have essentially won that case, right? But that motion was denied. And, again, that motion, that denial, occurred by a judge who simultaneously was employing Ralph Petty as his law clerk, while Petty was also employed by the prosecution. So the effects of that were two-fold. One was that Erma received an eight-year suspended sentence, meaning she was put on probation for eight years, which is she wasn't put in prison, but she was subjected to all of the requirements and restrictions that come with a probation sentence. And, second, it had the effect of derailing her lifelong, since childhood, dream of becoming a registered nurse. But, under Texas law, a drug conviction makes it all but impossible to become a registered nurse. And so, in addition to the conviction, she now has this stain which keeps her from pursuing her dream. Despite all that, despite all those hurdles and difficulty, she has managed to work in the medical field for the last decade plus and has lived an exemplary life and is doing her best under the circumstances to kind of come as close to her dreams as possible. She studies for the possibility of one day getting that license if these restrictions are removed from her, etc. But, as you can imagine, that's a lifelong kind of stain on her, and this continues to impede her dreams. So, you know fast forward after that sentence expires, that eight-year probationary sentence, expires. At a certain point, she comes to learn about what the 5th Circuit called Petty's dodgy side hustle. But, here's the thing, because she's no longer in custody ... Her sentence has expired, so she's no longer in custody. She cannot go to a federal court at any point, basically ever. For the rest of her life, she can't go to a federal court and seek what's called habeas corpus. It's a federal court order that says that this conflict of interest, which tainted her trial, was a constitutional violation (a violation of the Fourteenth Amendment's guarantee of due process and a fair trial). She can't have that conviction set aside via habeas corpus. So what other avenue does she have for this violation of her federal constitutional right? Well I think regular listeners of Short Circuit probably know about Section 1983, which is the statute that says when a person's constitutional rights are violated, they can sue for damages or an injunction. Obviously here, there's nothing to enjoin; there's no ongoing conduct. But she sued for damages against the county, against Ralph Petty (the prosecutor who was working both sides of the bench), and against the district attorney who hired him, knowing that Petty was already employed by the judge and went and expressly blessed this arrangement. What's really shocking about all of this is not only that the judges of the county, and it wasn't just this one judge, it was several know about this and bless it, but so did the district attorney who explicitly put it in Petty's employment contract that he could do this work ...

A Anthony Sanders 09:34

It's amazing.

J Jaba Tsitsuashvili 09:36

... on both sides of the bench, while also putting in his employment contract that he couldn't do any work that might benefit criminal defendants, for example. So they knew conflict of interest

for me, not for the type of thing, right? So yeah, again, it's what the panel called, and I'm quoting these two words from the panel, "utterly bonkers." I don't think you see that in a lot of judicial opinions, but I think it's ...

A Anthony Sanders 10:04

Especially when you lose. And yet, it's to your credit that it was utterly bonkers.

J Jaba Tsitsuashvili 10:08

Yeah, so they said it's utterly bonkers. I encourage anyone to read the opinion just because it's hard to kind of choose which quotes to pull from this to describe how like just ridiculous everything that happened here was. But, unfortunately, a panel said we can't do anything about this because we have this doctrine, which the Supreme Court established in the 90s under Heck v. Humphrey. They said that if you have an existing criminal conviction in state court and you want damages under Section 1983 for a constitutional violation, but winning that argument would necessarily imply the invalidity of your conviction, then you can't bring that damage as sued under 1983. You instead have to use the alternative federal habeas statute, which is known as Section 2254. And the reason they said that was because they essentially were saying, well, 2254 has these kind of more onerous procedural requirements. You have to first exhaust your state potential remedies; there's certain statute limitations issues, etc., etc. So 2254 is kind of notoriously hard to use. And, I mean, anybody who has been following recent Supreme Court decisions about the scope of federal habeas knows that it's becoming harder and harder to use. So if you have that kind of tension, that intersection, between 2254 and 1983, then we can't allow you to essentially circumvent 2254's more difficult requirements by bringing this damages suit that would imply the invalidity of your conviction. You need to do that through federal habeas. But both in Heck and in a follow-up case called Spencer v. Kemna, you had a bunch of justices, specifically four in Heck and then five in Spencer that said this rule simply cannot and should not apply to people who do not have that federal habeas remedy because you don't have this tension. You don't have this intersection between the two statutes in a situation where, for example, Justice Souter wrote these concurrences where he said exactly this situation where a person learns of their constitutional violation after their custody ends, just like Erma did here, they have to be able to use 1983 because there's no longer that concern about circumventing 2254. So that's what we have here. Unfortunately, in 2000, the 5th Circuit had a decision in which it said, no. Actually, this rule that you have to first get a favorable termination of your conviction via, some state proceeding or direct appeal or a pardon from the governor or state habeas or something like that before you can bring a 1983 damages suit, they said it applies even to people who do not have federal habeas available, even to people who don't kind of fall into this intersection between the two statutes where you might be able to circumvent 2254's requirements. And so that's what we're left with here. And, we did our darndest to convince this 5th Circuit panel that that 5th Circuit precedent is actually no longer binding. I won't get into the details why here, but we did our best to convince them that they're actually not bound by that anymore based on subsequent Supreme Court statements. But they said no, unfortunately, we are still bound by that. But they made clear that they're unconvinced by that 5th Circuit precedent, that's their words, by its reasoning, again, because they point out, if you have a situation where someone cannot use section 2254, the federal habeas statute, then what is left to them is section 1983, the federal civil rights statute, for a deprivation of their federal constitutional rights. And so this obviously matters

beyond just Erma's case. Obviously what happened to her is egregious and terrible, but she's not alone, right? We have cases of prosecutorial and other misconduct abound that could be discussed on Short Circuit all the time, right? And so, in the panel's words, they said, "Examples abound of non-prisoners with facially meritorious constitutional claims, denied their day in court, including Erma Wilson." And then it goes on, "Today's result is difficult to explain. What allegedly happened here and in hundreds of other criminal cases in Midland County is," like I said, "utterly bonkers. The presiding judge employed a member of the prosecution team as a right hand adviser." So the panel here really recognized both how terrible what happened to Erma was and how unconstitutional it was. And that its precedent is probably, is almost certainly, wrong. But it said its hands were tied, and it didn't say that the full court en banc court, should take this up. But it all but said it in the way that it discussed these issues. And so we have filed that en banc petition and asked the full court to take it. We did get, which, you know, you don't always get, a request that the other side filed a response, which means, that it's being considered for en banc reconsideration. And, hopefully, we'll have an update in a few weeks or so that says yes, the full court is going to re-hear this issue and hopefully eliminate this barrier to people who are not in custody. And it's worth pointing out that this is the subject of a circuit split. Six circuits do not have this categorical rule that the 5th Circuit has, whereas five circuits, including the 5th, do have it. So it's like pretty ...

A Anthony Sanders 10:54

Yeah, more of a split than that. That's like 11 of the 12 circuits that could take a position.

J Jaba Tsitsuashvili 15:54

Yeah, exactly. Yeah, I guess it's not all, but it's 11 of the 12. So that's where we're at. And I'm just gonna leave it with justice for Erma.

A Anthony Sanders 16:20

And when is the other side's response due, Jaba?

J Jaba Tsitsuashvili 16:25

On January 29.

A Anthony Sanders 16:27

Okay, okay. Keith, have you ever lost a case by winning or won a case by losing, or however you want to talk about this opinion?

K Keith Neely 16:36

I've never quite run across this. It's frustrating when you see a panel kind of say that their

hands are tied like that, even when they go to such lengths to explain why, I think from a common sense perspective, your client ought to win the case. It's helpful in the sense that I think it does tee the issue up for en banc consideration. And it sounds like an active opportunity for the 5th Circuit to reconsider its 2000 decision. I mean, it's just especially bonkers in a case like this, where it essentially says that controlling law would have required Erma to press a direct appeal on her criminal conviction, even though she received what is, by all criminal standards, a fairly low sentence in that she wasn't actually placed in prison. But, in the absence of federal habeas review, it strikes me as the only way that she could have potentially dodged this favorable termination requirement was to spend a lot of time and money directly appealing her criminal conviction, which just isn't sensible in a case like hers where the criminal penalties just aren't there. What am I missing, Jaba?

J Jaba Tsitsuashvili 17:22

So she actually did appeal her sentencing, her conviction, in the state court system. But I think what's crucial here is that no aspect of that appeal involved this issue, right (the issue of this conflicted prosecutor), because it was concealed from her and concealed from all the 300 other criminal cases that Ralph Petty did this in, right? So I do think that it might be a little bit different of a situation. We won't get fully into this rabbit hole, but if she had known about it and appealed it and it had been rejected for some reason, although it wouldn't have been because another prisoner who was actually put on death row as a result of Petty's misconduct did win in state court when this came to light. So it's worth pointing out that she never knew about this and never had a chance to litigate it in her appeal. So I just want to make that one point clear, which is an important point, right? Because, again, she's never had an opportunity to litigate this issue.

A Anthony Sanders 19:03

One question I have, Jaba, and this is just me not knowing too much about the issue or a little bit at 30,000 feet, but having read the opinion, why exactly is it that she can't use habeas relief to get rid of the conviction? Because although she served her term, as they say, everyone knows that convictions stay on your record, that it's preventing her from becoming a nurse. But, you know, people get pardoned after they die to get things taken off their record. So how is there not a federal cause of action to attack that, being that it was a federal constitutional violation?

J Jaba Tsitsuashvili 19:46

So, obviously, we think that there is via 1983, but it's via 1983, not via habeas, right? And the reason that it can't be via Section 2254 is because of the custody requirement for habeas corpus under Section 2254. You have to currently be in state custody. Now, if she was still on probation, that would count. But once the sentence ends, the collateral consequences of kind of like these employment issues, etc., other stuff like that, the federal courts have said, don't meet the custody requirement for getting federal habeas.

A Anthony Sanders 20:27

Gotcha. Yeah, the case we did just a few weeks ago, the episode that we had that came out over the holidays, was Petteway v. Galveston County. Very different case, a voting rights case. But that was another case where the 5th Circuit ended and said, we think that should go en banc. The language in this case was a tiny, little bit different, but I think if you just read Judge Willet's phraseology, including many that you've just quoted, it seems like he thinks the case should go en banc and the judges who signed along with him. So we'll see what the rest of the 5th Circuit wants to do.

J Jaba Tsitsuashvili 21:11

Yeah, we're hopeful.

A Anthony Sanders 21:13

Yeah, I would say it's a request to go en banc by engraved invitation, even if it wasn't explicitly stated there. Okay, so before we leave the 5th Circuit and en banc review, a tiny little bit of legal nerdery for our audience, some of whom are into this stuff, because we've talked about this a few times in recent weeks ... about the rule of orderliness and how a circuit is bound by its own precedent, and usually, it has to go en banc to overturn that. Well, a listener who is a law student and is actually helping host a book talk for me soon at the University of North Carolina, Connor Fraley, wrote in and said there is something we left out in that discussion, which is called an Irons footnote from this case called Irons from the D.C. Circuit in 1981. And so the D.C. Circuit has this procedure where it like takes a poll of other judges when everyone realizes that something has been superseded by the Supreme Court and so all the judges will want to get on board and get rid of and overrule that precedent without going the full en banc process. And they just do it in a footnote, and that's called an Irons footnote. Still, it is pretty unusual. It looks like the 5th Circuit has something similar but doesn't use it very often, including the couple cases that I've just been talking about and Jaba's case. So, with that aside, everyone who isn't into Irons footnotes can come back to listen. And we're going to turn now to the Ice Capades, the First Amendment, and Chanukah to Keith.

K Keith Neely 22:57

Thank you, Anthony. Yes, I'm taking us all to the mystical land of Tampa, Florida, where a local Jewish Orthodox synagogue called Young Israel of Tampa wanted to throw its 14th annual Chanukah on Ice. There's a wonderful picture of the ad that they wanted to run to promote it, in the opinion. It features a menorah. It talks about listening to Jewish music and skating around. It's a standard community event. And they wanted to run advertisements for it on Tampa, Florida's, local public transit agency, the Hillsborough Area Regional Transit (HART). But when they submitted the advertisement, they ran into a bit of a problem. HART said we have a policy that we cannot run ads that "primarily promote a religious faith or religious organization." Now, any law student listening probably has their First Amendment senses going up because this is an outrageous kind of regulation, not only from a free speech perspective, but also problematically, from a free exercise perspective. So understandably, Young Israel brought suit in federal court. And the district court said, wow, this is a bad, bad policy. And it spent a lot of time running through the facts of the case, and the panel opinion does this as well, but it kind of demonstrates the importance of good discovery here, and we'll talk about that in a bit. But

the district court entered a permanent injunction in Young Israel's favor, saying that this violates the free speech provisions of the First Amendment in two respects. First, it's viewpoint discrimination, which is maybe the biggest no, no you can have in First Amendment land. And second, even if you set aside the potential viewpoint discrimination issue, you have a very unenforceable standard in place because nowhere in the regulation or in internal guidebooks does Tampa's HART agency define what "primarily promote" means or what "religious" means. It kind of leaves that up to the agent who is reviewing the advertisement application. So HART decides to appeal, and the 11th Circuit issues this really beautiful 50-page opinion. It's a majority opinion and two concurrences, which means that everyone agrees that what HART was doing was clearly wrong, but for very different reasons. And all the judges on the panel, it seems like, were very engaged. And so when the panel starts to run through it, they focus exclusively really on the free speech aspects, both because the district court ruled on those grounds and because if you dispose of it on free speech grounds, you don't reach maybe the thornier free exercise issue because, from a free speech standpoint, it's pretty clear that this doesn't work. So the panel majority was written by Judge Jordan. He focuses on the standardless aspect of the case: the fact that there's nothing to define what "primarily promote" means or what religion means in this context. And here, the citations to the record are borderline comical. At one point, in footnote three, the panel majority talks about the fact that an agent testified that when they sent the ad back to Young Israel with recommended edits, they asked to remove the menorah, but they didn't ask to remove the pictures of the dreidel because they didn't recognize that as a Jewish symbol. They just assumed oh, so there's the menorah and then, apparently, there's this spinning dreidel here that has no religious significance whatsoever. And they poke fun at that. Another agent testified that Easter eggs would be okay because of a potential secular component but that the word Easter itself might be problematic. The majority goes on to talk about, what about the Book of Mormon? The HART agent there testified that he didn't know what the Book of Mormon was and that he would probably allow it but that an advertisement promoting the Bible would be not allowed. It's pretty clear based on this extensive discussion that the regulation here was plainly standardless.

A **Anthony Sanders** 27:25

And the officials, they're steeped in knowledge of religious history, it sounds like.

K **Keith Neely** 27:30

Clearly, I mean ... And there was another really funny example. They, HART, prohibited St. Joseph's Hospital from advertising because it was founded by the Franciscan Sisters of Allegany, but it would have allowed the advertisement to proceed if they listed it under their corporate parent, BayCare. And they allowed Saint Leo University in Florida, the oldest Catholic university in the state, because it was "an institution of higher learning and not a religious organization." So you have all of these really bizarre, internally inconsistent applications of this policy that just further hammer home how it is absolutely standardless for First Amendment purposes. Now, there's a brief discussion about facial versus applied relief, which is something that IJ cares about because, oftentimes, we argue that the difference between facial and applied relief is a matter of remedy. It's not a matter of your burden of proof and challenging the constitutionality of a law. They do some tweaking to the permanent injunction that the district court issued in the case as part of a way of really side-stepping this issue, but the most

fascinating discussion in my mind is in the concurrences because Judge Newsom comes in with his concurrence, and he opens it with a fascinating question that I think every stoner has asked in his parents' basement since 1975, which is what exactly is religion? That's quite literally the opening sentence of his opinion. And he goes down this really interesting discussion because he tried to break out what distinguishes religious views from philosophical views. In other words, can you ever use religion as a measuring stick in a constitutional regulation? And his point is that you really can't because either you run into this problem in this case, which is that you have a standardless application to define what is and is not religious, or what is and is not promoting religion. Or if you try to specifically define it, on the other hand, it starts to look a whole lot like viewpoint discrimination because, and the concurrence goes through this, how can you create a rule that properly captures everything that everyone in society agrees to be a religion? You know, is it belief in a higher power? Okay, well, you'll capture Judaism and Christianity with that, but are you going to capture, for example, humanists? Or are you going to capture Taoists or Buddhists? So he kind of hammers home that it's really difficult to parse out exactly what religion is, and because of that inherent ambiguity, you're always going to run into these problems of standardless enforcement. And he points out as well that this is a deeper issue within First Amendment jurisprudence from a free exercise standpoint because courts are understandably very reticent to say, oh, here, you plaintiff in a free exercise challenge, you're not really subscribing to a religion, because you're essentially holding that their religion is invalid. And courts don't want to do that, nor are they particularly well positioned to do that. And so it's just a really unique discussion. Judges don't often go out on a limb to engage in these sorts of deeper, philosophical back-and-forths, but Judge Newsom does. And I think it's a fantastic read. He seems to kind of be arguing at a certain level that when you're talking about religion, or when you're trying to classify things using a religious measuring stick, you're almost going with this kind of gut level "I know it when I see it" sort of thing. But that's incredibly problematic.

A Anthony Sanders 31:15

And, I mean, he's not on thin ice there either because the Supreme Court said for decades going back way before the current court, that it doesn't want to get into those issues of saying a religion is this but not this. And, usually, they just defer to the believer, and if they seem sincere, they say that's a religion.

K Keith Neely 31:35

Exactly. And, that answers the question from a free exercise standpoint. But then, when you start dealing with free speech, the sincerity no longer matters quite as much. And it just created this really interesting kind of philosophic quandary that I thought the concurrence did a great job of exploring. And then you have Judge Grimberg. He's a judge in the Northern District of Georgia, so he's sitting on this panel by designation. And he says I would have gone a little bit further. I think the majority is mostly right, but I would have gone a step further and said this is clearly viewpoint discrimination. And I kind of buried the lead here a little bit. The reason that the majority didn't dig into that issue so much is that there's an active circuit split that says, before you answer the question of viewpoint discrimination versus content discrimination, you first have to look at the forum where all of this is taking place. And because this is an arguably non-public forum, and it's a public transit company that's choosing whether or not to run ads, it's kind of a thornier issue. And there's an open circuit split right now over whether the

extent to which the venue matters for viewpoint-based discrimination, and the majority side-steps it. And Grimberg says no, no, no, no. I would have reached that issue. I would have decided that this is viewpoint discrimination, notwithstanding the venue. And oh, by the way, the way that the majority crafted its injunction in this case specifically only prohibiting HART from enforcing its current policy and saying nothing about future policies, that's creating this giant loophole that will allow HART to continue to create these unconstitutional policies and effectively evade meaningful judicial review that will kind of put the issue to rest because it's just going to keep coming up as vague and standardless. And these parties are going to have to waste years litigating it. And it's worth pointing out that this case arose out of an ad that Young Israel was trying to run in 2020, so it took three years for this case to get a final decision at the 11th Circuit. And, arguably, in Grimberg's view, that decision doesn't go far enough.

A Anthony Sanders 33:49

Jaba, have you ever seen Chanukah on Ice?

J Jaba Tsitsuashvili 33:53

I have not. No synagogue that I've ever associated with has put on a Chanukah on Ice, but great for Tampa. And I'm glad that they have this available to them. I had one question, and I guess this gets at the viewpoint question under the First Amendment. What if they had a policy that instead said, we won't run anything that denigrates religion, right? And I wonder if, and maybe it's related to my other question that I had about this case, were there cases where the courts have said this is really the government speaking, rather than just them just kind of like running someone else's speech? And so, did they touch on those kinds of issues in their opinion?

K Keith Neely 34:53

They touch on it a little bit. They pose a slightly different hypothetical, which is, well, what if instead, because in most contexts, when you read regulations like this, it doesn't say "primarily promote" or "primarily denigrate," it just says "contains," right? That's kind of how they side-step the viewpoint issue in a lot of regulations; we're just not even going to let you discuss this subject matter. And therefore, it becomes a content-based regulation, and it's subject to slightly lesser standards of scrutiny under the First Amendment. And they go on to make the point that, then you run into the second issue, which is, well, how do you define religion or religious organization? There's still this odd ambiguity as towhether an advertisement is pertaining to religion, and there are all these discussions too about, well, Christmas has both a religious component and a secular component. And how do you look at an advertisement and say, well, this advertisement is for the secular component of Christmas; this is Macy's advertising a sale, versus, well, no. This is actually going toward the religious component because, they're trying to proselytize or they're trying to advertise their specific synagogue. It gets into all this really muddy water. So the opinion talks about it a little bit, but the viewpoint issue, I think, comes out in the fact that the regulation only prohibits promoting a religious faith. So it kind of implicitly says, if I wanted to run an ad on HART that, you know, talked down to a religion that I didn't like, and if they tried to do that, presumably, it would be okay. But that just kind of goes to show how absolutely irrational this type of regulation is.

J Jaba Tsitsuashvili 36:37

I frankly think that they were kind of smart to go on the standardless route, rather than the viewpoint stuff here because that stuff is so much more slippery. But I could see the judge who said, this is also a First Amendment situation too.

A Anthony Sanders 36:56

I have to say, I was a little confused. And maybe it's because of the briefing, or there's some wrinkles of the case law I don't understand, but rather than talking about viewpoint-based discrimination, which is the top of the top of the no no's of First Amendment law and free speech, I would see this as definitely content-based discrimination, which the Supreme ... Even if it's a quote, I don't get, by the way, the non-public forum thing because it's just people buying ads, which is, I know they call it a non-public forum, but like Jaba said, it's not like it's government speech. It's not like the mayor giving a speech, right? It is public buses with ads on the side. So a content-based restriction, the Supreme Court has pointed out the last few years, gets strict scrutiny. So if you say "this kind of content, not this kind of content," you need a really good reason for that. And if they just say, we're not going to have any religious content, you know, who cares if it like promotes or whatever. Just go for the idea of no religious content, but you can have secular content. I don't see how that would hold up to strict scrutiny. So I don't really get why it was attacked in that way. Maybe it was because this program was just so weird, and the bureaucrats were saying all these crazy things about you can have a menorah but not a dreidel, and it just showed it was a better target. But I was a little ... It seemed like to me, and I'm adding to the two concurrences, I guess, here ... To me, that seems like the easiest way of dealing with this.

K Keith Neely 38:34

Yeah, I mean, I agree. I think the panel reached for the low-hanging fruit here because I think they had the benefit of evaluating this case on summary judgment. So you had a really robust record showing how inconsistent this policy was in application, which they might not have had, had the case come up on a motion to dismiss. And then maybe you would have gotten into some of those thornier issues.

J Jaba Tsitsuashvili 38:59

I really wish what the synagogue had done after they got those red line edits was just come back with an ad that said "Dreidels on Ice" with giant dreidels, and it would have been accepted because that would have made an even better record frankly, right? Because then, they would have been able to say they accepted our clearly, obviously religious thing the second time around, but not the first time around because they don't know what they're doing.

A Anthony Sanders 39:22

I think, if listeners are interested in this case, you definitely should check out the ad that is on

page eight of the opinion. And, as always, we will put a link to the opinion in the show notes. But, yeah, it has a fairly large, prominent menorah, a little dreidel with legs or skates that's on the ice, a few other words kind of thrown around. And I have to say, I don't see a lot wrong with it myself.

J Jaba Tsitsuashvili 39:52

Except for the notion of trying to spin a dreidel on ice.

A Anthony Sanders 39:56

That would probably be tough, especially if it's wearing skates. But I'd like to thank my guests here today for skating around these issues, skating right through them, actually, most of the time. And we will look forward to what happens to Jaba's client, Erma, in the near future whether that case goes en banc, and we will look forward to future ads about religion. And next week, we're going to have a little bit of a treat for anyone who likes a little poetry, a little Scotland, especially considering the time of year. I'm just gonna leave it at that. But, in the meantime, I hope that all of you get engaged.