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SPEAKERS

Marco Vasquez, Anthony Sanders, Paul Avelar

A Anthony Sanders 00:11

"I am a rather elderly man. The nature of my avocations for the last 30 years has brought me into more than ordinary contact with what would seem an interesting and somewhat singular set of men of whom, as yet, nothing that I know of has ever been written. I mean the law copyists or scriveners. I have known very many of them, professionally and privately, and if pleased, could relate diverse histories at which good-natured gentlemen might smile and sentimental souls might weep. But I waive the biographies of all other scriveners for a few passages in the life of Bartleby, who was the strangest scrivener I ever saw or heard." Those are the opening lines—as many of you may remember from English class—of Bartleby, the Scrivener by Herman Melville. "Scrivener" is not a word that many of us use in our daily lives. That's even true of most lawyers. But some lawyers are quite familiar with the word "scrivener" when they are dealing with dumb mistakes by legislators. And believe me, legislators do, on occasion, make dumb mistakes—including when they make a scrivener's error. So what happens when a scrivener's error is made, and how does a court deal with that? Well, we'll discuss that this week with a case from the Eighth Circuit, plus yoga on the beach from the Ninth Circuit, here 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 are recording this on Thursday, July 3, 2025, and it's going out tomorrow, July 4, 2025. So I want to wish a happy July 4 and Independence Day to everyone. Last year, we did a special episode on July 4 with the theme of "The British Are Coming." We're not exactly doing that this year, but next year—of course, next year is a big one, the 250th anniversary—so I'm sure we'll do some 1776-type stuff then. But for this episode, instead, we have, as I said, scrivener's errors, some other goings-on about hemp and Arkansas in the Eighth Circuit, with a newcomer to the podcast. And before that, some yoga on the beach and the First Amendment with my longtime friend and colleague, Paul Avelar, from our Arizona office. So we'll get to Paul in a little bit, and I'm going to introduce our newcomer in a moment. But first, I have a couple Short Circuit announcements. One of them is a segment called "Where Are They Now?" for past cases and what's happened to them. That's especially pertinent this week with the Supreme Court kind of clearing out its docket, and so we finally get some closure on a few Short Circuit cases from yesteryear. But the bigger announcement is for Chicago-area folks and for Seventh Circuit practitioners: the Seventh Circuit Judicial Conference, which is one of those conferences that

some of the circuits run where members of the bar and judges get together and—well—do a conference. That is in August in Chicago. It's August 17 through the 19th at the Swissôtel in downtown Chicago, right at the mouth of the Chicago River. And Short Circuit will be there. Short Circuit has a Short Circuit Live at 7 p.m. on that Sunday—Sunday the 17th. It's not a big deal. You don't have to register in advance or anything. It's not part of the conference, but we are holding it the night before the conference begins. So if you're going to that conference, if you're a good Seventh Circuit practitioner, and you enjoy a little Short Circuit, and you're there at the hotel but the conference hasn't really started, feel free to come by to our Short Circuit Live. And also, if you just live in the area, you can come even if you're not part of the conference itself. Just come into the hotel and see our show. It will be at 7 p.m., as I said, on Sunday, August 17. There'll be more details to come—we don't have the webpage up about it or anything—I just want to put it on people's calendars for our Short Circuit fans. I will be hosting. John Wrench of CJE will be on the panel, and we'll have a couple other attorneys as well. Okay, those are our announcements. And now to our new guest. He is Marco Vasquez. He is an attorney at IJ's Texas office. He just joined IJ a couple months ago. He'll be discussing this case about scrivener's error from the Eighth Circuit in a little bit. But first of all, Marco, welcome to Short Circuit. Tell us a little bit about yourself and why you are at IJ Texas.

M Marco Vasquez 05:21

Thank you so much for having me. Right before I joined IJ in April, I was at Paul Hastings for a couple of years, and before that I clerked for a couple of federal judges, including on the Eighth Circuit for Judge Steve Grasz. So I'm excited to talk about the Eighth Circuit here today. Joining the Texas office was an easy decision. I clerked for IJ back in 2017—my first day was actually the same day Anya Bidwell, one of IJ's attorneys, started at IJ as well. So we go back, and she's been recruiting me for a while. It was really just a matter of when it would work for my wife and me, with timing and everything.

A Anthony Sanders 05:59

So yeah, and you clerked at the Texas office when it was much smaller than it is today.

M Marco Vasquez 06:05

That's right, it was just me and one other law clerk. And then the office, I believe, was only six or so people.

A Anthony Sanders 06:13

And so that day—Anya herself, a former IJ clerk, but then starting as an attorney—there must've been a lot of energy in the building. There was. There absolutely was, yes. And I'm sure all regular Short Circuit listeners know what I mean by "energy" and Anya being in the building, so we won't belabor that. Well, welcome, Marco. So now we're going to go out to the Ninth Circuit. This is a case that Paul has picked to present, and Paul can take a little bit of pride in this case, I think, because it cites a case of his in the Ninth Circuit from a few years ago. And it also—when you read this case, I bet a few people saw a headline and thought, "Oh,

that’s an IJ case,” because it’s about speech, and occupation, and yoga—all of which we’ve litigated before. But it’s actually not an IJ case. It’s a case in the wild, which, you know, might be one of our many children out there—which we can take a little pride in. But Paul, tell us a little bit about this yoga class.

P Paul Avelar 07:25

Right. So this is a case about teaching yoga on a beach, which means it is, of course, from the Ninth Circuit, and more specifically, from California—in San Diego. The case is Hubbard v. City of San Diego. The upshot is this: San Diego prohibits teaching yoga to four or more persons at any of the city’s shoreline parks or beaches. This is challenged by two yoga teachers who offer classes in shoreline parks. The case comes down to the fundamental question of whether this is a regulation of speech or of conduct. As we all know, restrictions on speech get strict judicial scrutiny. Restrictions on most conduct get the more deferential, rational basis review. Everyone knows this, which is why San Diego makes it illegal to carry on or conduct commercial activity or provide any service—except expressive activity, like this yoga class—on the beach. More specifically, the city defines teaching yoga as non-expressive activity, which is why yoga gets regulated while other expressive activities do not. Maybe I’m jumping the gun there. So back to the suit: the yoga teachers sued and asked for a preliminary injunction. The district court denied it on essentially two grounds. First, it ruled teaching yoga is not speech. To the extent teaching yoga potentially involves something the district court might call speech—like discussing the philosophy of yoga—the court said that’s just an incidental regulation of speech, incidental to the directing of poses, which is apparently conduct. Also, the court said the regulation is content-neutral, notwithstanding that the statute specifically regulates teaching yoga. This is a ruling on a preliminary injunction, so it is an appealable order. I’m only going to discuss the success-on-the-merits factor, because it’s really the only interesting part, which is true in most of these cases. The Ninth Circuit panel said teaching yoga is speech. Why is it speech? Because an individual’s right to speak is implicated when the government prohibits him or her from sharing information they possess—that is, from speaking. Well, really, it could be seen as conduct—the conduct of sharing information or knowledge. Governments love to try to label their way out of the obvious, which is that teaching is speech. As you recognize, this is the first time this has come up in California. Years ago, IJ litigated a case on behalf of the Pacific Coast Horseshoeing School, which, as the name implies, teaches people how to shoe horses. They were regulated, prohibited from teaching some people. That was a regulation of speech, of course. The state argued it was a regulation of conduct, but the Ninth Circuit made short work of that argument, and that reasoning comes back in this case. No, teaching is speech when you’re restricting people’s ability to teach or their speech. That should seem straightforward to anyone who understands the First Amendment. There is also a brief forum analysis—very brief because everyone agrees a public park is a traditional public forum. That’s easy enough. Finally, the question comes down to whether this is content-based or content-neutral. This is pretty easy: it’s content-based, because the regulation expressly regulates teaching yoga while other expressive activity is expressly exempted. Strict scrutiny applies. Of course, the regulation fails. Why did the city single out yoga? What harm comes from teaching yoga that is not present with other sorts of speech or even activities? Why a complete ban on teaching yoga? Were there lesser regulations available? The city has no answers for any of this because it assumed it would get the more deferential rational basis review and never bothered to build a record.

A [illegible] 11:57

A Anthony Sanders 11:57

It seems like they didn't even try. They didn't even say well, you might have people twisting their ankles on the sand- there's nothing,

P Paul Avelar 12:06

There’s really nothing—nothing appears. It’s just, “Well, you know, we’re regulating on government property, and therefore it must be conduct. We defined teaching yoga as non-expressive conduct. Why are you giving us a hard time here? This is non-expressive conduct.” Listeners may be wondering, “This seems like a pretty easy case. Why did you pick it?” Well, one, it was pretty easy, and I’ve been busy this week. But more specifically, I picked it because I have a little bone to pick with the Ninth Circuit. This is a problem in the Ninth Circuit that hopefully the U.S. Supreme Court will straighten out next term, which is that the Ninth Circuit has a really hard time distinguishing speech from conduct. Notwithstanding this case and notwithstanding Pacific Coast Horseshoeing, there are a number of cases in the Ninth Circuit that have really botched this speech-conduct distinction, and they all occur in the context of occupational speech—that is, where speech is regulated by the existence of an occupational license. Not for nothing, I lost one of these cases in the Ninth Circuit not so long ago. The U.S. Supreme Court is holding that case for resolution with the Chiles v. Salazar case, which it has already granted cert on and is going to hear next term. IJ has written an amicus brief in that case, Chiles v. Salazar. For those curious about IJ’s current—and longtime but most up-to-date—view on the distinction between speech and conduct, that’s a great brief to read.

A Anthony Sanders 13:54

We will put a link to it in the show notes too.

P Paul Avelar 13:56

So, I raised this case only to say, good job. Ninth Circuit, you got this one right but you've missed on a couple. U.S.Supreme Court, please, please straighten this out for us, and hopefully, one day soon, all speech will be protected as speech and not relegated to second class status as conduct.

A Anthony Sanders 14:16

Marco, do you have any speech about this speech or conduct perhaps?

M Marco Vasquez 14:22

Yeah, I thought the Ninth Circuit’s analysis was pretty straightforward. They leaned heavily on a 2015 case, which they started with when discussing what yoga is. That case helped move the activity out of the conduct bucket and more into the speech bucket. They used that case later on to frame their analysis and resolve the issues. So it remained speech. My main takeaway reading this was: what are the implications? Is this just yoga-specific, or how far will it go?

Maybe that thinking will be limited by the panel's reliance on that 2015 case, so it's hard to know. I was also struck by one of the footnotes where the Ninth Circuit panel rejected the government's argument trying to convert non-commercial speech into commercial speech by saying yoga is still commercial activity, even though it's free. The Ninth Circuit said they weren't going to buy that distinction between free and not free, or all that converting.

P **Paul Avelar** 15:29

The Ninth Circuit was right to do that. There's a long line of cases—like Sorrell v. IMS Health from the U.S. Supreme Court—that say speech is speech, and it doesn't matter if it's paid for or offered gratis. Speech is speech, and you're not allowed to restrict it, even if it's paid-for speech. The plaintiffs here took pains to note they didn't charge for their classes, but they did accept donations, which is not only still expressive conduct, it was also regulated by the city of San Diego. So this notion that paid-for speech is commercial speech is something we've seen pop up again and again. Commercial speech is speech that invites a transaction—like a sign that says, "Buy your books." That sign is commercial speech; the books themselves for sale are not commercial speech. That's straight-up speech.

A **Anthony Sanders** 16:34

Or newspaper or what have you.

P **Paul Avelar** 16:36

Or yoga classes or horseshoeing classes or drawing a map- not to take an example, at random, at all.

A **Anthony Sanders** 16:44

Not at all, although you can check out some of IJs work in that area on our cases page. Everything you guys have said, is absolutely correct, but I'm gonna speculate here. What I'm interested in is how this law exists in the first place? So the court points out, it doesn't just regulate, like, teaching a class on the beach, teaching a yoga class, so you could have, like, a morning calisthenics class, or tai chi, or all kinds of other things you might just do-

P **Paul Avelar** 17:24

- a morning horseshoeing class.

A **Anthony Sanders** 17:28

That would be fun—maybe not with a horse, but, you know, if you're throwing horseshoes, or perhaps a nature walk, or looking for whales or anything. But specifically yoga, you can't do, which means someone wasn't happy with yoga classes on the beach. And the city attorney

wasn’t, I guess, quick or clever enough to point out you can’t just single out yoga. Maybe just do it for all classes, then it wouldn’t be content-based, right? I mean, you could argue if it’s about a class and not something else, well, is that content-based? But the city would have a much better time if it wasn’t specifically speech about yoga.

P Paul Avelar 18:11

Yeah, and restricting teaching anything is a restriction on speech. Here’s where the way the statutes are written and what triggers them is pretty important. What is the city actually regulating? If the city is regulating overcrowding on beaches, okay, then regulate overcrowding on beaches. You don’t do it by regulating, “We’ll allow this speech and not allow that speech, we’ll allow this and not that.”

A Anthony Sanders 18:41

Yeah because that's the actual worry- is the overcrowding or noise. I mean, yoga can't be all that noisy, I'm sure. But whatever they were worried about.

P Paul Avelar 18:52

I'm sure there's a rock and roll version of yoga somewhere out there, and it's almost certainly in California.

M Marco Vasquez 18:58

Unfortunately, we'll never know, because the city never explains how teaching yoga leads to, "harmful consequences."

A Anthony Sanders 19:05

Well, if any listeners, know the background about this ordinance, I would love to hear how it got passed, and you know what was discussed at that city council meeting, but we'll leave that for another day. What we won't leave for another day, though, is the Eighth Circuit and the legality of hemp in Arkansas. Just when it seems everyone else is getting more rational about drug regulations and the dangers of hemp, and hemp versus marijuana and all that, Arkansas seems to have gone in the other direction. And while they did it, they made some legislative errors. Marco, if you could tell us this, this story from the Eighth Circuit.

M Marco Vasquez 19:52

Absolutely. So, this is the case titled Bio Gen v. Sanders. It’s a June 24, 2025, Eighth Circuit decision out of Arkansas. There are a number of issues here: scrivener’s error, preemption, void for vagueness, ex parte Young—it sounds like a constitutional law or federal courts exam question. It’s a Short Circuit bingo card, really. I’ll do my best to explain how it all comes

together. First, the federal law at issue is the 2018 Farm Bill, which legalized hemp at the federal level but allowed states to regulate hemp production if they get permission from the federal government. It gets tricky because the federal law has an anti-preemption clause, saying the law isn't meant to preempt or limit any state law regulating hemp production. In other words, states are free to regulate hemp if they get permission, but there's an exception: a state cannot prohibit the transportation or shipment of hemp or hemp products through the state. So a state can regulate hemp but cannot prohibit its transport through the state—this will be an issue for the plaintiffs. Turning to the state law, that's Arkansas Act 629, the law challenged here from 2023. Before that law, Arkansas had a legal hemp industry, but Arkansas took a different path, passing this law that made much of that industry illegal. The law lowered the THC concentration limit, but importantly, for this case, clarified that it's not illegal to continuously transport hemp through Arkansas. So, yes, it's harder to produce hemp in Arkansas now, but they won't stop it moving through the state.

A Anthony Sanders 22:04

This is like a law in the old days of prohibition, or patchwork prohibition, where, like, if you don't take the booze out of the package, it can move through a state, but it can't be sold or consumed in the state.

M Marco Vasquez 22:12

Exactly. So the key phrase is "continuously transport" and "through." The plaintiff took issue with those terms. Now, a company called Bio Gen sued several officials in their official capacity—including the governor and the attorney general—and asserted a few claims, but I'll focus on two: the Supremacy Clause and the Due Process Clause of the U.S. Constitution. The district court was not happy with the Arkansas law and enjoined it, first finding that the 2018 Farm Bill likely preempted the Arkansas law and that the Arkansas law was void for vagueness. Regarding preemption, the 2018 Farm Bill legalized hemp at the federal level but said states cannot prohibit its transportation through their states. The district court said that conflicted with Arkansas's law, reasoning the phrase "continuously transport" is ambiguous—it's unclear whether stopping at a gas station or staying overnight counts as continuous transport. Under this rationale, because of the ambiguity, Arkansas law effectively criminalizes such transport, making it illegal and contradicting Congress's express preemption. How did the Eighth Circuit resolve this? Oddly, it looked to federal constitutional law, saying the phrase "continuous transportation" is well defined there. It cited a 1943 Supreme Court case and an Eighth Circuit case, holding that "practically continuous" or a temporary stop that's continuous counts as continuous transport. So these federal constitutional cases were used to interpret state law, which is unusual from what I've seen. I imagine a normal person reading the state statute wouldn't think to look to federal constitutional cases to understand the words and orient their conduct—but apparently, for the Eighth Circuit, that was enough here.

A Anthony Sanders 24:56

And then they make a prediction, right that the Arkansas Supreme Court would do it the same way.

M Marco Vasquez 25:00

They would do it the same way, and I sort of agree with their reasoning to some extent. Interestingly, the Eighth Circuit isn't one of those circuits that commonly certifies questions to the state's highest court to ask what a state law means—unlike the Fifth Circuit, which frequently does that. But here, the Eighth Circuit panel said they think the Arkansas Supreme Court would adopt the same interpretation. Moving on, another really interesting issue is the unconstitutionally vague claim. The district court said the phrase "continuous transport" is unclear and thus unconstitutionally vague, so it likely violates due process and should be enjoined. Void for vagueness is the idea that the government violates the Due Process Clause when a law is so vague that people of ordinary intelligence don't have notice of what it means. Here, that phrase came up again, but the Eighth Circuit panel quickly rejected the vagueness claim based on those two federal cases. I'm a big fan of void-for-vagueness claims because the law is often complicated and difficult to understand, and there's hope that this doctrine will be used more often in the future. But in this case, the panel wasn't buying it; those two cases govern here. Basically, the import of those two cases is that the Arkansas law allows continuous transportation of hemp, so it doesn't violate the federal law that says a state can't prohibit transportation through the state. That makes sense, but the way the court got there is somewhat notable. Also, touching on the scrivener's error issue: one argument raised—which made me read that part of the opinion a couple times because I hadn't come across it before—was that Biogen argued the transportation clause, even though signed into law, wasn't actually in effect because Arkansas's Revision Commission, responsible for codifying laws, changed the substance. Basically, the law has what's in effect now and what comes into effect if the first part is enjoined—a backup law. When the legislature was amending and finalizing the bill, they added provisions which shifted some sections, making it unclear whether the savings clause protecting continuous transportation was in effect when first passed. The Eighth Circuit quickly rejected this argument, saying they think the Arkansas Supreme Court would say the savings clause is in effect because it wasn't a change in substance—just a scrivener's error. The analysis wasn't deep, but it was an interesting argument by the plaintiffs' attorney.

A Anthony Sanders 28:21

So basically, what the legislature did pass that phrase wasn't operative. But the Revision Commission, which Arkansas law delegates power to, has authority to fix or clean up errors before the law actually goes into effect. That's different from some other jurisdictions that might not have that kind of delegated authority, but Arkansas does.

M Marco Vasquez 28:46

Yep exactly.

A Anthony Sanders 28:49

Paul have you ever made a Scriveners error?

P Paul Ayelar 28:51

Paul Avelar 28:51

Oh, lots of them. In fact, I try and make sure that I have a typo in at least everything that I write, so that they know it really came from me.

A Anthony Sanders 28:59

Maybe just to check our proofers.

P Paul Avelar 29:03

I wish I could claim that it was intentional, and it is certainly not. I learned to spell, I promise. But for some reason, sometimes the fingers just move faster than the brain.

A Anthony Sanders 29:16

Curious your thoughts on this, Paul- one thing about this case is that the federal government is trying to get out of the the blanket ban on right hemp production, but it has all these tentacles still out there that states have to deal with. And, you know, Arkansas probably went the opposite way that they expected most states would go. But it just has to keep things complicated.

P Paul Avelar 29:42

It really does. This is what happens when the federal government oversteps what it’s constitutionally supposed to be doing in the first place. The requirement here that states leave open the so-called “channels of commerce”—that is, transportation across state lines—makes sense as a federal interest under the Commerce Clause as we understand it. But the idea that the federal government ever had authority to regulate in-state production of anything is relatively recent. That really started with the New Deal Court pushing that boundary. What we’re seeing now is the federal government pulling back from areas it probably shouldn’t have been involved in to begin with, leaving behind this weird patchwork. In this case, it makes sense that states can’t prohibit transport of goods across their borders from a federal commerce perspective. But I’m not sure the rest of it ever really needed federal permission—like whether states ever actually had to ask to regulate in-state production in the first place.

M Marco Vasquez 31:00

Yeah. I was very surprised when I saw that they had to request and receive permission from the department before they can start regulating. I haven't come across that before.

P Paul Avelar 31:11

What Arkansas should have done is just regulated without asking for permission, and then we have a much more interesting case, quite frankly.

A Anthony Sanders 31:19

Sure, yeah, there are all kinds of issues that could come up with that, like commandeering. I wonder which way that would go. This Arkansas thing—the Revisers Office that can fix scrivener's errors—is really interesting, because at the federal level, there's no equivalent. One thing you learn as a lawyer, but sometimes forget, is that when Congress passes a law—most laws, not all, but especially those with operative effect beyond the budget cycle—they get codified into the U.S. Code. Most people interact with the law through the U.S. Code, but the Code is really just an abstract or compilation of the statutes put together by code lawyers at the Capitol. Sometimes there's a conflict between the actual statute passed and the version in the U.S. Code. If there's a scrivener's error in the statute, federal courts usually say, "Well, that's a scrivener's error, we're not going to enforce that mistake," but it has to be a clear scrivener's error—not just bad policy or something no one would want enacted. That can get really messy.

P Paul Avelar 32:57

Yeah, exactly. My understanding is the U.S. Code itself isn't actually the law—it's just prima facie evidence of what the law is. And like you said, if there's a conflict, the actual statutes control. This has come up recently in some of IJ's work, especially around the adoption of Section 1983 and qualified immunity. There's even a recent law review article suggesting a scrivener's error might have left out a provision from the U.S. Code that, in the original statutes, would have essentially prohibited qualified immunity or anything like it. We've been litigating that a bit over the last few years, and others have too. At some point, the Supreme Court may have to weigh in on it—my heart goes out to them. I'm not just a litigator at IJ; I sometimes do lobbying too, and I've got to say, writing law is actually pretty tough. Honestly, from a technical perspective it might be the hardest thing I do at IJ. It's tough.

A Anthony Sanders 33:56

I mean, some unsung heroes in our system that they do things for good or for bad. They do things that legislators tell them to do. Are the revisers offices in state capitals that actually write it in a way that isn't crazy, as a legislator usually would write it, and that kind of makes the law work in a more, at least a little more rational way.

P Paul Avelar 34:19

Well, in most states, so far as I know, what the legislators are actually doing is, they have implemented the code directly. So when, for example, here in Arizona, when the legislature writes a bill, it is, it is amending an existing code, and within the bill itself, it's, you know, ARS section, you know, title 13 section, whatever it is, is amended as follows, and then you're actually amending the code text. So in Arizona, and I think most states, the code itself is the law, as opposed to just evidence of what the law is. Come on, federal government, get it together.

A Anthony Sanders 34:51

Right. Alternatively, sometimes when state constitutions are amended, where they're placed in the state constitution is handled by the revisers office later, and it's not in, you know, the ballot initiative or whatever the legislature passes, which sometimes can get a little tricky—what to take out of the old constitution, what to put in—but I won't bore everyone with that. Instead, we're going to play a little Where Are They Now? Some of these cases have been kicking around for a long time. One of them we discussed on Short Circuit, man, I think it was over a year ago now after oral argument—it was a case against the CIA where Michel Paradis of Columbia was on and he discussed it. It was a FOIA case against the CIA. Anyway, it went to the Supreme Court. There were all kinds of requests for extensions by the federal government to file a response. They filed a response, and then finally it was just denied cert on June 30. So we will not get into those records of Guantanamo Bay from the CIA, unfortunately, interestingly Gorsuch recused from that decision. Don't know why—maybe he had a relative litigating. I have no idea. Then the case we discussed on Short Circuit just under a year ago, which got a little news but probably was lost in the flurry of everything at the end of the term: MacRae v. Mattos. It was a First Circuit case about a teacher who was fired because she posted some conservative memes online before she was actually a teacher. That came to light later, and then she was let go because they were like, "Ah, that's too much for you as a teacher." So it's a First Amendment case brought under the well-known Pickering and Garcetti tests for public employee speech that we've talked about a bit on the show recently in a couple different episodes. It got rescheduled like eight times—yeah, eight times. Finally, it was just denied the other day, but there was a statement by Justice Thomas, joined by Gorsuch. Now this is interesting and kind of something you'd expect from Justice Thomas. He gave a statement basically saying the lower courts did not apply the Pickering-Garcetti tests right. This woman looks like she shouldn't have been fired, for all the reasons you might say about weighing disruption and public issues of concern under those standards. But it's just a statement; he doesn't say he thought they should take the case. The reason he doesn't think they should take it is because she did not question the whole framework itself of Pickering and Garcetti—so maybe we shouldn't apply that at all. Then he drops in a footnote that some people have argued public employees shouldn't have any speech rights at all, which is kind of like the old rule before Pickering, when Justice Holmes famously said, "You have no rights as free speech as a public employee," his example was a policeman. Which means, of course, that Justice Thomas would not rule for this woman if we reconsidered those tests that way. So, you know, I don't know whether she should be pleased or not pleased about that statement.

P Paul Avelar 38:25

You know, she should have raised an argument that would have allowed me to rule against her in a different way.

A Anthony Sanders 38:30

Exactly. But I guess she got her story heard a little more because of that.

P Paul Avelar 38:36

As an originalist matter, Justice Thomas might be right. On the other hand, it was Justice

As an originalist matter, Justice Thomas might be right. On the other hand, it was Justice Holmes who said it, and so like just reflexively, I have to think that's wrong.

A Anthony Sanders 38:45

Yes, and listeners will know my views on that as well—longtime listeners. Another case we discussed a few months back, Hanson v. D.C. was a challenge to gun magazine limitations in the District of Columbia. It was distributed for conference but denied about a month ago, so that case is not going to be another Second Amendment case at the Supreme Court. And that is a wrap. There are still a few cases headed to the court, and a few we've talked about in the past that are being considered for en banc and things like that, but that’s enough for now. So thank you, guys, thanks for coming on. Have a Happy Fourth of July. Hope our listeners are having, or have had, a happy Fourth of July. In the meantime, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.