

ShortCircuit332

📅 Mon, Jul 29, 2024 3:13PM ⌚ 51:18

SUMMARY KEYWORDS

case, contribution limits, court, political party, government, school district, first amendment, candidates, speech, district, decision, viewpoint discrimination, eighth circuit, intermediate scrutiny, applied, limits, engage, party, political, new york

SPEAKERS

Anthony Sanders, James Dickey, Paul Sherman



Anthony Sanders 00:10

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 Thursday, July 11, 2024. And we have a bit of a First Amendment special today. We have a special guest who's going to talk about a recent victory of his under the First Amendment involving public school speech in the Eighth Circuit. And then we're going to turn to an old friend who's going to discuss the latest campaign finance news from the Second Circuit. And you may feel a little bit of anger in his voice, as he explains why the court doesn't really understand the First Amendment. So we'll get to that in a little while. And that will be our dear colleague, Paul Sherman. So Paul, welcome back to Short Circuit.



Paul Sherman 01:04

Hey, thanks for having me, Anthony. It's great to be back.

A

Anthony Sanders 01:07

Paul is one of our campaign finance experts. So you should all stick around and enjoy his explanation of this latest case from the Second Circuit. But before that, we have someone who a long time ago was a clerk at the Institute for Justice Minnesota chapter. That was just after he came off his career as a golf pro. And I think this is the first time we have a former golf pro, or you know, maybe like current golf pro, you might even say, on the show. He's gone on to bigger and better things since those many years ago. He now is a litigator at the Upper Midwest Law Center in the great state of Minnesota. And that is James Dickey. So James, welcome to Short Circuit.

J

James Dickey 02:00

Anthony, thanks so much for having me on. And I appreciate you bringing up my exploits as a golf pro. It's always nice to harken back to those days.

A

Anthony Sanders 02:08

Yeah, well, you know, we could just turn this into a into a golf podcast, but I remember you were doing the golf thing. And then law school kind of arose and you had to choose the one path or the other. And you chose law school, but then you moved to Minnesota and it was like—I remember that summer you had just come to Minnesota first time, it was like you came to the promised land. But the problem was it was summer. And I think I remember we all told you, we reminded you of that several times, but you've stuck around for like 14 winters now.

J

James Dickey 02:41

Yeah, I'm the rare person who's moved from originally South Florida because of the weather, mostly.

P

Paul Sherman 02:49

I'm a transplant from Florida myself to Northern Virginia. And there's appeal to moving to a place with seasons if you grow up in Florida.

J

James Dickey 02:58

Exactly, you get it.

A

Anthony Sanders 03:00

Well, we get it. And also I think the Eighth Circuit gets a little bit of the First Amendment. So tell us about this case. So James actually argued, and won this case at the motion to dismiss stage at the Eighth Circuit. It's now been remanded for further proceedings. So what's it all about?

J

James Dickey 03:19

Thanks, Anthony. Yeah, this case is called *Cajune v. Independent School District 194*. It's the Lakeville public school system. And our clients are Bob and Cynthia Cajune and other parents of children in the school district at the Lakeville schools. What happened here is after the death of George Floyd in May of 2020, teachers and local activists in the Lakeville public school district decided that they wanted the school district to put Black Lives Matter posters up in the school. And the district's policy at the time, contrary to that—which is, by the way, the same policy that it is today, at least on its face—is neutrality on all political issues like the Black Lives Matter issue. And what the district had said to those local activists at the time was no, no, no, no, no. For months, they pressured the school district and said you need to put up these posters because we need to have this message endorsed essentially by the district. District said no, we can't do that. We can't do that. We can't do that because of our neutrality policy. Well, all of a sudden, in March of 2021, the inclusive poster series, as it's called, shows up at the district's work session. And by April 2021, the district had completely allowed these posters created by private activists to be put into school district hallways and classrooms—not by the district's own affirmative decision to put those posters up, but based on the individual decisions of teachers and administrators who want to feature this message themselves. Well, at the same time, our clients throughout this entire process had been going to school board meetings, being involved locally in their local school district, and continuing to praise the decision of staying neutral, neutral, neutral, neutral—don't get into politics in our classrooms and hallways. And then after the school district flipped 180 on this issue, they said, well hold on a second, if you're going to allow these local activists to have these messages placed up by teachers and administrators and others in the hallways and classrooms of the district, then you also need to allow messages like Blue Lives Matter and All Lives Matter to be placed up equally. Well, that didn't sit well with the district. And it never ceases to amaze me what some people will actually say in writing in response to inquiries like this. But the response to the request to allow those types of posters to be placed was that All Lives Matter and Blue Lives Matter mottos were created specifically in opposition to Black Lives Matter. And so the district would not allow them because they expressed a contrary viewpoint to the school district's position.

A

Anthony Sanders 06:27

That was not run by the district's counsel, I'm guessing?

J

James Dickey 06:32

I assume not. I look forward to the deposition to find out exactly what went into this. So you know, so our clients were obviously very upset by this. They believe that they were had their viewpoint discriminated against. So we brought this lawsuit on their behalf. District court dismissed under Rule 12. And the basis for the dismissal was that the school district had essentially actually engaged in government speech. And the government speech doctrine allows governments to say whatever they want without triggering First Amendment scrutiny, under the test that was originally—well, maybe not originally, but famously put forth in the *Pleasant Grove v. Summum* case. And then recently reaffirmed and, I think, improved and clarified by the *Shurtleff v. City of Boston* case from the Supreme Court just a couple of years ago. Now, the district court held, you know, there is no First Amendment right here because the district is engaging in government speech. And the district court didn't actually get to the merits of the case below. Of course, that was something that the district could raise as an alternative argument for affirmance at the Eighth Circuit. Then we appeal the case to the Eighth Circuit. The Eighth Circuit then says no, this is not government speech. And there's another part of the decision, the beginning of the decision, talking about whether plaintiffs can proceed as pseudonyms, which is an interesting issue but maybe beside the point for this particular discussion. But the Eighth Circuit Court of Appeals said, under the test from *Summum* and *Walker and Shurtleff*, the school district did exactly what the Supreme Court said you cannot do as a government in *Matal v. Tam*, which is to slap a government imprimatur on private speech and call it government speech. And I think that that *Matal* case persuasively says, you know, this is a doctrine that is subject to dangerous misuse. And as you can tell from the facts as I've relayed them to you—and I have my biases, but I'm pretty confident that we got the public record right on this case—this was all cooked up by private activists in the school district. At the very last minute the district came in and put their imprimatur on this poster series and allowed teachers and administrators to make the individual decisions to hang them up. And as a result, the Eighth Circuit said that's not government speech, you're laundering private speech through the government imprimatur. And on top of that—this is where this decision is really good, in our view, and makes it very difficult for the district now if we prevail and go forward to summary judgment here—the court actually said that the government engaged in viewpoint discrimination. Now, I know it's a Rule 12 motion and the court is deciding whether or not we've stated a claim for viewpoint discrimination. But the court held that there is a limited public forum here because they opened up their hallways and classrooms. So that issue, as far as I'm concerned, unless the facts in discovery show something wildly different from what the public record shows, is essentially established for this case. And beyond that, the court said this—I'll quote from it on page 16 of the decision. According to the district, however, it rejected Cajune's request because the phrases All Lives Matter and Blue Lives Matter "were created specifically in opposition to Black Lives Matter." Quote: that was impermissible viewpoint discrimination. So, you know, we have the email from the administrator and the court was analyzing their own words at the time. It's going to be kind of hard for them to back away from that. So the Eighth Circuit held that we did state a claim for viewpoint discrimination under the First Amendment. And since the government speech doctrine didn't apply, the case has to go forward to summary judgment and potentially trial.

A

Anthony Sanders 10:35

Paul, this isn't an issue—the issue of government speech isn't an issue we really cross paths much with at IJ. But I'm guessing you'd agree with me that the lines around what is government speech and what isn't have gotten a little clearer in the last few years with the Matal case, the one that James mentioned, and the Boston flag case. Do you see this as kind of like the next level after those cases, these kinds of situations?

P

Paul Sherman 11:06

You know, I think this was sort of so clearly not government speech that I don't think it develops the doctrine in kind of a new way. But I think what this case does is it really shows the danger in the temptation of the government speech doctrine. Because clearly, what has happened here is the the school district is sort of trying to play like a heads, I win tails you lose, where they will be able to get only one set of messages out there without being accused of viewpoint discrimination. And the way to do that is to actually make it government speech. But they also want to affirmatively disclaim that this is their speech, because they don't want to make anybody mad. And the the result, I think that the court does a good job of saying, you know, at this stage at the motion to dismiss, we actually have to read the factual allegations in the light that are most favorable to the plaintiff. And here it really does seem like, you know, no, they actually just wanted to let these other people on one side of a political debate into the schools. James, I appreciated your discussion of the facts too, because it clarified some questions I had about sort of different ways this might have been structured that would not have raised some of the same constitutional problems. Like, I wondered at first, why are these private citizens—why do they have standing to sue? Because the case keeps discussing it about like, well, this is about whether teachers have these messages in their classrooms. And it seemed to me that maybe what the school could have done is say, you know what, we're changing our policy. And now teachers will be allowed to make political statements in the classroom. Now, of course, if they did that, teachers couldn't engage in viewpoint discrimination. A teacher who wanted to put up All Lives Matter or Blue Lives Matter would be able to sue. But as your explanation made clear, that's not what they did. I mean, they basically did say like, nope, we're going to let people come in and put these posters up in the hallways. And we're only letting one side of the political debate in. And when you do that, yeah, I think the facts are pretty clear. They didn't have to create a limited public forum. They didn't have to create a limited public forum that was as broad as they did. But that's what they did. And if you do that, you can't engage in viewpoint discrimination.

J James Dickey 13:56

Yes. And just just to add on that, Paul, thank you for that. You know, this is a situation we've run across, of course, with other school districts around Minnesota. And it's something that governments across the country are engaging in. You take a contrary example to this case and you look at New York City. Mayor de Blasio at the time, I believe, affirmatively said we are going to put Black Lives Matter on murals in the city of New York. And they made that decision. It was the government's idea. The government crafted the message. The government did all that kind of stuff. And I think it was the Second Circuit that upheld that—despite their bad decisions on campaign finance law sometimes—they upheld that, and we distinguished that case from this case in our briefing. And what's interesting about this case as well is that while this is a Rule 12 decision, like I mentioned before, the district in this case supplemented the record and we were okay with it, because hey, the truth shall set you free. We're happy to have the public record in. They really brought a lot of the public record that will be the discovery in this case into this Rule 12 motion on appeal. And that was all stuff that we talked about in the oral argument, which you can of course go back and listen to—it was a really very interesting oral argument. And there is one other kind of follow-on issue that I think is an interesting one, and it doesn't necessarily get to the First Amendment, but it gets to the question of, to what degree are government speech actions by school districts like this—if they were to go back and recreate the policy and change the way that they approached it and make their own messaging—to what degree does local government really get into politics? To what degree can they use taxpayer dollars to get involved in partisan politics? I think it was Judge Grasz who asked the opposing counsel at the oral argument, can the school district decide that they're going to create a mantra of "from the river to the sea" and paint that on the hallways of the school district using taxpayer dollars? And there wasn't really a good answer to that question. And I think that even the school district attorneys recognize that obviously political speech could run afoul of state constitutional provisions. Anthony, since that's your baby—state constitutions. And I think that there is something there. There's a public purpose, there's a backstop that's going to prevent government speech from intruding on making illegitimate uses of taxpayer dollars for political purposes.

P

Paul Sherman 16:34

Yeah, this is something that I was thinking about recently. Because the court touches on this a little bit when it says that that the government has a right to speak. And typically your remedy when the government speaks and you don't like it is the political remedy at the ballot box. And I think New York's a great example of that. If you say, hey, I don't like how politicized the school district has become, then you vote for different school board members. But there does seem to be some deeper principle that I think is not well developed in the case law. That is almost—and maybe people have written about this and I'm just not familiar with the literature—but there's almost like an anti-propaganda principle, that there are limits to the government's ability to engage in partisan propaganda in ways that sort of directly undermine the balance of our political system. Because it's one thing to say you can't engage in viewpoint discrimination. But in the government's own speech, can the government go out there and just talk about how great Republicans are and how terrible Democrats are? Right? Like, could that be the official lesson plan in Minnesota schools—today we're going to learn about how terrible Republicans are and how great Democrats are, or vice versa. And in many ways, I think some of these issues—a lot of the really interesting First Amendment issues that arise in the context of public schools arise because people's interactions with public schools are not fully voluntary. We have compulsory education laws. Your kids have to go to school. A private school typically could engage in this kind of blatant viewpoint discrimination. And it could say, you know, if you wanted to have the super woke private school or the super conservative private school, you could do that. But if kids are forced to attend, if their parents can be punished civilly or criminally for not sending them there, then it does seem that there should be limits on the government's ability to indoctrinate or propagandize. But I also feel like those are not fully developed in the case law yet. But as politics comes to dominate more and more aspects of our life, maybe we will see further development in that.

J

James Dickey 19:08

I don't want to get too far afield of this decision. But we also in the Eighth Circuit a couple of years ago, at the motion to dismiss stage, won a case related to the municipal taxpayer standing doctrine. And it has to do with whether municipal taxpayers can be forced to subsidize union leave for political purposes within the school district—teachers from the school district taking time out of teaching students to go and lobby in St. Paul. And so it's kind of a follow-on, and I think the municipal taxpayer standing doctrine and whether, you know, what vestige of it is left and what vestige of it will be left—after we are now on appeal on summary judgment on that same case on the same issue, the *Huizenga v. Independent School District No. 11* case—what is going to be. There is a unique relationship between the local taxpayer to the school district and that school district itself that's very similar to the compelled association inherent in members of a collective bargaining unit related to their public employers, like in the *Janus* case. So I think that there's a lot of interplay. And by the way, a couple of our clients in this case—you asked about standing—a couple of our clients are taxpayers and they're standing as taxpayers because of the Eighth Circuit's decision in the *Huizenga* case. So anyway, these issues are certainly needing more development. So glad to be involved with trying to push the law a little bit.

A

Anthony Sanders 20:41

Yeah, that case—glad you brought that up, James. That is a—I remember I was surprised when you told me about that case a couple years ago and I read it, because that is a little bit of an exception to the bar on taxpayer standing in federal court, which is, if it's the federal government or a state, you're out of luck if you're just a taxpayer, unless it's Establishment Clause—the one exception. But with municipalities there is this kind of recognition that it's kind of more like you're a shareholder for a private company. And they analogize to that. So to the extent that exists, we'll put a link in the show notes to that case if people are interested. And the final thing I'd say about the public schools is, I have all kinds of critiques to make of public education, as do many of us at IJ. And people are familiar with our school choice work won't be surprised by that. But I think it's to some extent maybe a sign of a healthy political culture, such as it is, as Paul was saying, that these issues aren't developed that much in the case law. Because schools have done all kinds of crazy things, but it seems like—I mean, maybe this was not true in the Jim Crow South, I don't know—but in public schools you don't typically just have, okay, our policy is we're going to say that this party is always right, this party is always wrong, and you should vote for this party when you turn 18. You don't really have that in American public schools, and I think it's because the political checks on it luckily have kept that at bay, even though there's all kinds of, of course, ideological bents in all kinds of ways. I would say that in some ways this is the flip side of the issue that Justice Alito highlighted back in the angry cheerleader case. So from a few years ago, a favorite case of mine—many listeners probably remember about the cheerleader who said something on Snapchat and got punished and whether that's in-school speech, out-of-school speech, and all that. And Justice Alito, who I disagree with on a lot of things, had a really interesting concurrence I really liked where he said, you know, public schools—for all the reasons Paul gave—public schools are just kind of a weird thing when it comes to the First Amendment. You're forced to go there, but the school does have this ability to teach the doctrine it thinks is correct about all kinds of stuff. And you've got to find a comfortable kind of medium there that comports with all kinds of values, including First Amendment values, but it's not exactly clear what that's supposed to be. And so I'm glad, James, that this case has shown a few lines about where that's supposed to be. So there are lines when it comes to public schools, but there are much clearer lines, I think, when it comes to political speech. But the Second Circuit isn't really aware of those lines, it seems, at least as they are developed in current case law. And Paul is going to tell us about that and how it relates to New York campaign finance.

P

Paul Sherman 23:53

Well, so the distressing thing here is not so much that the Second Circuit is completely off base in its interpretation of modern campaign finance law. It's more that modern campaign finance law, for all the what I consider improvements it's had in the last 20 years, is still in kind of dire shape. And it bizarrely treats activity related to the most core political expression in America as lesser protected than all kinds of speech that indisputably gets the full protection of the First Amendment. So this case is a challenge to a New York system of campaign contribution limits. It's brought by a group called the Upstate Jobs Party and some people who are affiliated with funding it. And the laws at issue are about a distinction between what New York calls political parties and then these other organizations that are called independent bodies. But a better way to think of that distinction is, at least in many cases, the distinction between what you might call major or established political parties and minor or startup political parties. And there are three laws at issue here. If you're a major political party in New York, you can accept vastly

higher contributions from political contributors. You can take in contributions up to \$138,600. If you're an independent body, your contribution limits are much lower. They're about the same level as what you could give directly to a candidate. So for a statewide candidate, it's like \$9,000. Political parties are also allowed to make unlimited contributions to members of their own party who are running for office. So the New York Republicans or Democrats or the New York Conservative Party can give an unlimited amount to someone who's running for office. Whereas independent bodies can only give the same amount that could be given directly to the candidate. So if the contribution limit for a statewide candidate is \$9,000, the independent body can only give \$9,000 to the candidate. And then finally, political parties are allowed to set up what are called housekeeping accounts, which cover things like their staff, rent for their headquarters, that sort of thing. And they are allowed to accept unlimited contributions for funding their housekeeping accounts. Now, there are also obligations that come with being a political party. You have lots more recordkeeping requirements. You have to have a certain structure for managing yourself. But the financial benefits of being a political party are huge. And New York has also drawn the line between who can be a political party and who can't, largely based on how successful and established you are at being a political party. So you have to have received, I think it was 130,000 votes, or more than 2% of the vote, whichever is higher, in the last statewide election. That has gone up since 2020. So in 2020, there were eight official political parties in New York, including the Libertarian Party. When they raised the threshold to 130,000 votes, it dropped to four political parties. So now the Libertarian Party is not a political party in New York. It is an independent body. And so the Democratic Party can accept \$138,000 contributions; the Libertarian Party can accept \$9,000 contributions, because the big parties need a lot of help. Yeah, and so, here it would be helpful to give—and I could talk about campaign finance for way longer than our audience wants to hear—but I'm going to give a very, very brief history of some background principles in campaign finance law. So in the 1970s, in the wake of the Watergate scandal, Congress enacted a law called the Federal Election Campaign Act, which was the first comprehensive regulation of federal election financing. And this was challenged in a case called *Buckley v. Valeo*. There were two main components of it. It's a long case, it's like 120-some-odd-page case, maybe even 200 pages, I forget. Very long. It's got a lot going on. But the two main components of the law are that Congress enacted contribution limits—so limits on how much you can give to candidates or political committees—and enacted expenditure limits, limits on how much candidates could spend on their elections. And when it got to the Supreme Court, the Supreme Court held that expenditure limits are a direct limit on the amount of speech you can engage in. And so those are subject to strict scrutiny and they're essentially per se unconstitutional. And then in a series of cases it struck down expenditure limits for independent groups, and yada yada yada. Contribution limits, it said, are not so direct a burden on your speech. They don't limit the total quantity of speech you can engage in. They just limit your ability to fund it by, you know, you have to raise money from more people. And so they said that gets intermediate scrutiny. And if you know anything about intermediate scrutiny at the Supreme Court, you know that intermediate scrutiny is entirely in the eye of the beholder and sometimes it means something and sometimes it means nothing. And the question is, does the intermediate scrutiny that applies to contribution limits mean something? And for a long time, it seemed like it didn't. And in more recent years, particularly since the Supreme Court's decision in *Citizens United*, while the court hasn't overturned this distinction between contribution limits and expenditure limits, it seems to have started to tighten up the contribution limits analysis a little bit. So then we get to this case, and the Second Circuit has to decide, are these differential contribution limits and this differential treatment of these groups—is it constitutional under the type of intermediate scrutiny that we apply to contribution limits? And it holds that all of them are fine, that all of them are closely drawn to the government's compelling interest in combating political corruption. There is like a little bit of hope here that's sort of technical and procedural. The

court says that, well, we're looking at this just as a facial challenge to the law, saying that you have to prove it could never constitutionally apply to anyone or that most of its applications are unconstitutional. And it turns out that most of these independent bodies are not really essentially minor party campaign committees like the Libertarian Party. A lot of them are alter egos of candidates, essentially. And in that case, they say it makes sense to treat them the way you would the candidate. Federal law is sort of like this. When it comes to political committees that support single candidates, they're subject to the same kinds of contribution limits as candidates themselves. But then it gets a little more complicated. I think the court gets it wrong, but it's not a completely hopeless decision. The court bases a lot of its analysis on this distinction between so-called facial and as-applied challenges. And what it says is, this group has brought what is basically a facial challenge. They're saying that this can never be constitutionally applied to anyone. And as it turns out, a lot of these independent bodies are basically alter egos of the candidates, and federal law treats single-candidate PACs as basically alter egos of candidates. So that's not that radical. And then there's a footnote in the case where it says we're not making any statements on what this would mean for a group that was more like a real political party, supporting multiple candidates in multiple offices over multiple elections. Which is kind of like a wink and a nod towards someone like the Libertarian Party, saying, hey, you guys used to be considered a political party, the state raised the threshold, and now you're not a political party anymore. And your contribution limits have been slashed by a factor of nine or whatever. You know, you might have a claim, an as-applied claim, if you brought it. So as much as I think a lot of the analysis in the case shows sort of the bankruptcy of campaign finance doctrine, it does seem like there may be some wiggle room for someone to bring a successful claim here. When it gets to the actual constitutional analysis, though, I think it really shows the weakness of the approach to intermediate scrutiny that has typified contribution limits analysis, which is—and there's a quote from the opinion—so the Supreme Court has said that the only reason you can have contribution limits is to combat the reality or appearance of quid pro quo corruption. So actual, you know, money for political favors. And the court says the scope of quid pro quo corruption can never reliably be ascertained. And what this really means is, we don't need to have any evidence that these kinds of contributions to independent bodies are actually a problem and actually result in quid pro quo corruption. And this is kind of a dodge that courts have used to get out of meaningful analysis of contribution limits for decades. And I really think it can't hold up to meaningful scrutiny, in part because we have this federalist system where we have 50 different systems of state campaign finance laws that vary wildly. So here in Virginia, for example, there are no contribution limits. Individuals and even corporations can give unlimited amounts of money directly to political candidates. Do people think that Virginia politics is more corrupt than New York politics?

A

Anthony Sanders 35:01

I think that sentence speaks for itself.

P

Paul Sherman 35:03

Yeah, and you know, a few years ago, actually, there was a funny report that came out holding that New Jersey was the least corruptible state in the nation, which struck me as implausible. And I looked at it, and I ended up writing an op-ed with a friend of IJ, Professor Dave Primo at the University of Rochester. And what we found is that the way they were measuring "corruptible" is, do you have the kinds of campaign finance laws and lobbying laws that reformers like? And if you have those, then you're less corruptible than states that don't have those. So, you know, Virginia, which has a relatively healthy political culture, is extremely prone to corruption, and New Jersey is incorruptible.

A

Anthony Sanders 35:49

It reminds me—sorry, Paul—reminds me of when people grade states and their their educational standards by like, how many requirements the teachers are required to have to teach classes and not, you know, the actual outcomes of the students. It's kind of a similar mentality.

P

Paul Sherman 36:12

Yeah, I think it's exactly the same kind of thing. So basically, what it boils down to is, I think there's never been strong evidence that contribution limits meaningfully combat corruption, let alone the appearance of corruption. I mean, the fact of the matter is, if contribution limits are going to remain constitutional until people like and trust government, then contribution limits will always be constitutional, because no amount of evidence will ever convince people that politicians are not corrupt. And if just kind of vibes about political corruption are enough to support these laws, these laws will always be constitutional. Which doesn't sound like any kind of evidence-based First Amendment standard, like we would apply in other areas. And so the question I think is, how long is the Supreme Court going to allow this to continue? After *Citizens United* was decided, even though *Citizens United* was clear that it was limited to expenditure limits, I really kind of thought contribution limits are going to be gone in 10 years. Roberts is going to move in kind of an incremental way, the way he sort of does. And in 10 years we're going to see contribution limits be gone. And we have seen contribution limit cases in that intervening time. There was *McCutcheon v. FEC*. There was *Cruz v. FEC*. Which have taken the First Amendment seriously. I sort of wonder, is this going to be the case where they get cert and they're able to convince the court that contribution limits need to get strict scrutiny? I'm a little more skeptical of that now that I've taken a closer look at the case. And particularly the footnote where it talks about, hey, if this had been brought by the Libertarian Party, it might be a different story. Maybe the Libertarian Party should bring such a case. And that could end up resulting in the overturning of *Buckley's* contribution limit holding.

A

Anthony Sanders 38:27

They may have their own problems, by the way.

P

Paul Sherman 38:30

Yeah. I mean, we won't get into that. But, you know, Buckley v. Valeo was actually litigated in part by the Libertarian Party. And they made the arguments that look, these laws are about hamstringing third parties that have difficulty raising money. We often have to rely on a smaller number of patrons to make us politically viable. And I think the facts of this case show that this group here in New York is not really the alter ego of a candidate, but it is a very small sort of nascent political party, the Upstate Jobs Party, that relies on mostly this one patron. And it's not clear why we should view them as a greater threat to political integrity than the Democratic Party of New York or the Republican Party of New York. And sort of funnily enough, when you look at the limited amount of actual evidence that the court cites in the opinion, it's all corruption by the major parties. It says, you know, the concerns that independent bodies will be corrupt isn't implausible because they imposed contribution limits on political parties, for example, because there was this widely documented pay-to-play system in New York in which political parties were extorting money from people. And so that's the group that should have fifteen times higher contribution limits than independent bodies? Very odd. And you could imagine a system that was drawn differently that could still address the government's concerns. So at the federal level, for example, you can become a national party committee. And this doesn't have to do with the share of the vote you get. Instead, it's basically a fact-based inquiry that the Commission engages in, where they look at, are you a real party? Are you running multiple candidates in multiple states, doing the kinds of things that national parties do? And if you show them that you are, then they say okay, you're a national party and you have the higher contribution limit. It doesn't turn on your success as a party. And of course, when it turns on your success, then what you have is this sort of reinforcing thing that keeps the nascent political parties and the third parties down, in the name of combating circumvention by things that are actually not political parties. So I'm disappointed in the outcome of this case. I'm less mad at the Second Circuit because I think they're sort of using the case law that the Supreme Court has allowed to linger. But it does show that that case law is just totally divorced from political reality and the type of factual inquiry that courts typically engage in in First Amendment cases. James, your thoughts?

J

James Dickey 41:36

Yeah, you know, there's a couple of things that I guess—and I'm not a campaign finance expert the way that you are, Paul. But what jumped out to me, and maybe there's a simple answer to this, is whether you're applying strict scrutiny or some kind of closely drawn intermediate scrutiny chimera, it seems that the state could potentially satisfy its anti-corruption concerns by simply applying the same standards in terms related to these party organizations, as opposed to parties, that they apply to independent expenditure groups like PACs. If you're worried about coordination between the party and these non-party parties or whatever you want to call them, wouldn't it—couldn't they just directly address that interest by saying, just like PACs can't coordinate with campaigns, these other groups can't become essentially like a super super PAC that is allowed to coordinate with campaigns?

P

Paul Sherman 42:36

Yeah, you know, there's an interesting tension in the case law there. That derives—and it's been a long time since I read these opinions, but they were in the early 2000s—involving the Colorado Republican Party. And it was a series of two cases that concerned whether parties could be limited in their independent expenditures and whether they could be limited in their coordinated expenditures. And the coordinated expenditures issue matters because under federal law, a coordinated expenditure is a contribution. So if you arrange the expenditure with someone, it's just like giving them the money and letting them spend it. And what the Court held at the time was that you can impose limits on coordinated party expenditures for candidates. This has always struck me as a really weird holding, because the notion is that somehow the Republican Party is capable of corrupting its own candidates. So it can engage in unlimited party expenditure as long as it's not coordinated, and that's not corrupting for the candidates. But if it coordinates with someone who is a member of this very organization, that's corrupting. You know, to get back to your question, I think that would run into some related constitutional issues, but also, I think, the parties who—and realistically it's the Democrats, Republicans, and Conservative Party in New York who are getting these limits enacted—they want to be able to coordinate with their candidates. So they're not going to make that trade-off. Then the question is, well, is the possibility of that trade-off a more narrowly tailored alternative that the court should consider? And I think what you see in this decision is that at least under this form of intermediate scrutiny, narrow tailoring doesn't mean very much at all. What it really looks to is not whether there's a less restrictive means, but whether the means the government has adopted is in some vague sense reasonable. And what does that mean? It just kind of means whatever the three judges on a federal court of appeals think it means.

J James Dickey 45:13

And I think that gets answers my question mostly. But there's one other thing in this opinion that irked me, which was the decision by the court to say we're not even going to consider an as-applied challenge to this; we're just going to look at it facially. And the reason that irks me is that in the Citizens United case, back in 2010, the court said that facial versus as-applied only goes to the breadth of the remedy, not whether you have this particular claim pleaded in a particular manner. So the idea that, especially with one party arguing that we do want the court to review this as applied, and the court says no, we're just not going to do that, we're just going to look at this super strong medicine of a facial challenge and we're not going to get into the actual facts of the case to determine whether there really is any actual appearance of corruption in this case—it seems to me like a dodge. And I imagine Justice Thomas shaking his fist at the fact that they're going for the facial approach instead of looking at the as-applied challenge when you have people here to whom the law has been applied in a way that they are complaining about. Very obviously.

P

Paul Sherman 46:21

Yeah. I mean, so the facial/as-applied distinction is something that IJ deals with in a ton of our cases. I'm sure you see it in your own litigation. And it's enormously frustrating. It's a source of major confusion in federal courts. And *Citizens United* was so great because it does have this language. It's like, it's not about what you plead. It's about the scope of the remedy. You know, here I think there's also maybe a little bit of doctrinal confusion, and without having read the briefs, I don't know who to blame for it. But the court says, because this is a facial challenge, you have to prove there's no set of circumstances under which it could constitutionally be applied. That is the normal standard for facial challenges outside the First Amendment context. Outside the First Amendment context—very important. Within the First Amendment context, there's a second test, which is the First Amendment overbreadth doctrine, where a law can be held facially unconstitutional if a substantial number of its applications are unconstitutional in comparison to the law's plainly legitimate sweep. So I think more accurately, that should have been the standard that they announced, although I don't know that it would have made a difference in this case. Because I think what the court sort of hints at with that footnote is, we think that there may be a couple of very specific unconstitutional applications of this—groups like the Libertarian Party and the Green Party that used to be parties and are now no longer parties. But we definitely think it's constitutional as applied to these groups that are just the alter ego of a candidate. And then the question is, has Upstate Jobs pleaded sufficient facts to show that it is unique from these alter ego groups? And the court does a fair amount of discussion saying, well, it's not that much different. And since most of these groups are alter ego groups, I think if the court had been a little more doctrinally precise, what it would have said is, we're not going to hold it facially unconstitutional because most of the groups are these alter ego groups who we think this can constitutionally apply to. And then Upstate Jobs hasn't sufficiently distinguished itself from those groups. I think maybe Upstate Jobs should be considered distinguished because it does seem like they're trying to be a political party. They're just not very successful. And I don't think the question for whether you should be subject to these contribution limits should turn on how good you are at being a political party. It should be, do you pose this threat of corruption? And it doesn't seem super plausible to me that Upstate Jobs does, at least compared to a group that is truly the alter ego of a candidate. So yeah, that's a source of frustration. I don't know how much difference it made to the outcome of the case. But another indication that one of these now-delisted political parties, if they have the means, which is by no means clear, could consider challenging this. And I think this decision wouldn't foreclose their challenge.

J

James Dickey 49:52

I agree with that.

A

Anthony Sanders 49:53

Well, we will be watching this case to see if yet another case that we talked about on Short Circuit goes to the Supreme Court. I was realizing the other day that a bunch of cases from last term were cases that we talked about on Short Circuit sometimes like three years ago, and then through the machinations of the lower courts eventually they got up to the Supreme Court. So I think what we might do soon on the show is a kind of "where are they now" on some of those past cases that we talked about and that got to the Supreme Court. Of course, most cases we talk about, that is the apex of their career, and that's fine. They're good stories. But some of them go further. So that will be a future show. This show, thank you guys very much for this great First Amendment conversation. James, good luck in the rest of your case and your other efforts at the Upper Midwest Law Center. And, Paul, for all your matters going forward, I'm sure we'll have you on again soon. But for the rest of you, stay tuned. We've got a couple special episodes coming up in the next couple of weeks. But in the meantime, I'd ask that all of you get engaged.