Short Circuit 159

Anthony Sanders: 00:01
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. If you're a regular listener of this podcast, you're very aware of the rational basis test, the standard that essentially lets the government do whatever it wants. But I bet you haven't heard of the sub rational basis test, which apparently lies beneath the rational basis test, and makes it even easier for the government to do whatever it wants. Well, luckily, you haven't heard of it because it doesn't exist, at least in the Fifth Circuit. That's what the court said in a case last week. Today we have IJ attorney, Josh Windham on to tell us what that's all about. Welcome, Josh.

Josh Windham: 00:56
Hey, Anthony. Glad to be here.

Anthony Sanders: 00:58
But of course, to have a court tell you if something exists, you need to first have standing. And we're going to hear about a Seventh Circuit case where the plaintiff, unconventionally argued she did not have standing and should have her case dismissed. Now, this was much to the disagreement of the defendant, who asserted she did have standing. Are you confused? Well, IJ Senior attorney, Rob Frommer is here to explain everything as to what's up with all that, even though he's not standing right now. Welcome, Rob.

Rob Frommer: 01:33
Thank you for having me.

Anthony Sanders: 01:35
But first, Rob's gonna give us some practice pointers. So last week, he argued a case before South Carolina's Supreme Court, in a challenge to that state civil forfeiture laws. Things went pretty good for Rob, but we're going to hear just a snippet about how they didn't go so well for his opposing counsel. So Rob, tell us a bit about what the case is about. And then we're gonna set up what we're going to share with our listeners.

Rob Frommer: 02:03
Sure, Anthony. Well, the case set up, IJ got involved after a state Trial Court held that major parts of South Carolina's forfeiture law were unconstitutional. This is after it was that case was previously up at the Supreme Court. And there the trial court had asked for briefing from both the parties and they ended up ruling that South Carolina's allowance of 95% of all forfeiture proceeds going to police and prosecutors violated due process, and as well as the South Carolina's requirement that people prove their own innocence, and that they really have no way of getting into court until the prosecutor gets around to filing a forfeiture action. The lower court said all that violated due process. And so we went up to the state Supreme Court to see if it agreed. And there, the Supreme Court was very interested in th e

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issue. It's important to understand that in South Carolina, there's been a huge Maelstrom around civil forfeiture in recent years. There was a recent series called “Taken” by the Greenville news that shined a light on how civil forfeiture practice in South Carolina was really harming a lot of ordinary South Carolinians, including disproportionately African Americans and African American males. And the court was very concerned about that when we went to the state Supreme Court and talked about the case. We have worked on this issue for years and have a deep understanding of both the legal issues and the real world effect of civil forfeiture. My opposing counsel, on the other hand, didn't necessarily have that same basis. And as you'll hear in the clip that's coming up, it seems that he didn't even have a full understanding of how forfeiture operated in his very own office.

Anthony Sanders: 04:09
And if I understand it, Rob, you guys had, as is typical for a lot of arguments, just a half an hour for argument, but it ended up going over an hour, I believe.

Rob Frommer: 04:21
Yeah, it was it was originally scheduled for just 15 minutes aside very small. And the judge at the justices at the beginning, were like, oh, we're sure we can get this done. An hour and 15 minutes later. The Chief Justice has some, well, let's say choice words, for the quality of argument.

Anthony Sanders: 04:41
And so this is just near the end. This is going to be just before an hour and 10 minutes into the argument that we're going to hear we're going to hear just about a minute of the closing of the state's attorney here.

Clip from Court:
SC Supreme Court Chief Justice Beatty 04:59
Do you dismiss criminal charges after you've made consent agreements. On the forfeiture?

State Attorney: 05:05
I don't handle the criminal charges.

Chief Justice Beatty: 05:07
What happens in your office? Mr. Battle? You know, you've danced around just about every question we've asked you today without really complete answers. Answer the questions that you're asked without filibustering…How many of these cases that you do consent agreements on? That you dismiss the charges?

State Attorney: 05:30
I don't know, I'm not. I don't know. I mean, my expectation is that most of them go forward. I'm exclusively devoted to civil forfeiture.

Chief Justice Beatty: 05:42
For how long have you been working in that office, Mr. Battle?

State Attorney: 05:45
I've been handling civil forfeitures for about five years.

Chief Justice Beatty: 05:49
Five years, and you have no idea how many of those cases are later prosecuted.

State Attorney: 05:55
Your Honor, I'm a special prosecutor assigned and to handle the forfeiture. So I don't follow..

Chief Justice Beatty: 06:01
Quite frankly, I don't believe you. But that's the end of that.

Anthony Sanders: 06:06
That's the end of that. Hmm. What was that typical of the argument, Rob? And do you think, do you think that's just the nature of how indefensible these laws are in South Carolina? Or was there a little bit more that those of us who are, who are listeners who argue before courts could take away from this example?

Rob Frommer: 06:30
Well, I do you think that's how civil forfeiture in South Carolina is a very hot button issue and what the chief justice was getting so exercised about there is that in South Carolina, and to be honest, this is crazy, prosecutors can tell someone, look, I'll drop the charges against you, if only you agreed to give me all your stuff. And of course, once they, those people give over the stuff to the prosecutors in exchange for the charges being dropped, it's those police and prosecutors who get to keep it. And it's that very pay to play prosecution that the Chief was so angry about and with that creates so much injustice. Of course, Mr. Battle didn't help himself, because he didn't have a firm understanding of the facts of his case and the facts of the office. And so it's really a good lesson in when you're going to be talking to the state Supreme Court about keeping an entire program alive, you should probably do your homework.

Anthony Sanders: 07:27
Yeah, that that's a good lesson. That's true. That also reminds me something pretty basic in the law that that you can't buy your way out of being prosecuted. I would think that's something that you know, most would understand. I just happened to have before me here, the original copy of well translated of Magna Carta, which is, of course adopted in 1215, paragraph 40: To no one will we sell or sell to no one deny or delay, right or justice. Sounds like the selling clause of that paragraph was perhaps not quite being followed there. Well, we will look forward to the opinion in that case in due course. But for now, we're going to leave civil forfeiture instead talk about something also near and dear to IJ's heart. And that's the good rational basis test. And also the Fifth Circuit, which, which we've been very familiar with lately. Josh, what's going on with bars in Louisiana? And whether they're rational?

Josh Windham: 08:30
Yeah, well, the context for this challenge, which is called Big Time Investments v. Edwards and is about a COVID Executive Order. And so for a bit of background, you know, as folks are well aware, when

COVID hit, you know, early last year, governors across the country started issuing executive orders, restricting the ability of, you know, what were called non essential businesses to operate. And then those businesses were allowed to come back in so called phases and sort of every state had its own, you know, set of phases, depending on the status of COVID spread in that state or in that locality. And in Louisiana, in about March of last year, the governor started issuing executive orders allowing these phases. And so there was a distinction in the in the orders between bars and restaurants. And in effect, what the order said was that bars could not do on site consumption of food and alcohol, but restaurants could. So this is a distinction that turned on what kind of permit the relevant facility got whether you got a bar permit or a restaurant permit. And, you know, bars were understandably upset about this, their businesses, you know, wouldn't really allowed to operate. And so they filed a constitutional challenge in federal district court, and basically argued, this is a violation of our equal protection rights under the Federal Constitution, the 14th amendment. And so that case made its way up to the Fifth Circuit and in a decision earlier this month, actually, I think last week, the Fifth Circuit said, this is not a violation of equal protection. And I'm sure you want to talk about some of the legal issues in that case. But that's, that's kind of the background of what's going on there.

Anthony Sanders: 10:12
Right. And then this is one of these cases, we've talked about this on this podcast before, many cases involving COVID orders that try and apply this old precedent from 1905, which is not the 1905 precedent we usually talk about at IJ, Lochner v. New York, but Jacobson v. Massachusetts. And so the Fifth Circuit had this precedent from right at the start of the pandemic that applied Jacobson in a maybe a little different way than some might have applied it. What did the court do about that here? And what you know, what did it try and work out as happened in the meantime?

Josh Windham: 10:51
Well, I think a little bit of background on Jacobson is probably helpful. So Jacobsen, as you notice, in 1905 case, and the context for that was that, you know, vaccinations were growing in popularity and scientific acceptance. And Massachusetts had enacted a law that allowed local health boards to enforce, you know, mandatory free vaccinations for adults. And so there was a pastor who said, you know, I don't react well to vaccinations, my children are probably not going to react well. And so he wanted to avoid getting a smallpox vaccine. And so he brought a challenge, constitutional challenge under the substantive due process protections of the 14th amendment. And the Supreme Court held basically, I think, I'm quoting here, “a community has the right to protect itself against an epidemic of disease, which threatens the safety of its members.” And it announced a test or framework for kind of analyzing these cases. And the test is, and I'm quoting here, again, “whether a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has this, as you could call it”, prong one has no real or substantial relation to those objects. And then prong two, or is beyond all question a plain and palpable invasion of rights secured by the fundamental law. And so this is, you know, this this kind of test has, it predates tiered scrutiny, and the idea that there were certain protected, more protected and less protected rights, you know, fundamental and non fundamental rights, and kind of the rational basis, intermediate scrutiny and strict scrutiny framework that would be adopted, you know, in later cases. So, it's interesting that the Jacobson case has kind of cropped up in recent years, as the go to test for challenges to, to executive orders during the COVID pandemic. But in case the Fifth Circuit held, Jacobson does apply in this case, and that the, it doesn't really amount to

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much more than the modern rational basis test in practice. And we can talk about how the court applied that test. But the main thing to know here is that the bar owners, were complaining that the Jacobsen test was basically a sub rational basis test that it was affording less protection than the rational basis test offers, and you know, as listeners to this podcast, probably know, the rational basis test is the lowest level of scrutiny. It's you know, some have called it not a test at all. And so the idea of there being a sub rational basis test is galling, to say the least. And fortunately, the Fifth Circuit rejected that idea and said, No, no, you know, Jacobson is basically just kind of a pre-version of this test, you know, a test by a different name, but really just the same testing practice. And ultimately, the court held that the executive order easily satisfied the modern rational basis test.

Anthony Sanders: 13:33
Rob, do you have an understanding of a sub rational basis test? Perhaps it's like a sub-treasury that they talk about in the slaughterhouse cases?

Robert Frommer: 13:42
Yeah, it could be that I think I've run it feels like I've run across a couple of my economic liberty cases. But this idea that there's a sub rational basis test is just insane. The rational basis test itself is a below white course traditionally provided, as Josh just noted, the test in Jacobson is whether there's a real and substantial connection to the public health and safety. And that actually puts judges a bit in the game, because it makes them ask those questions whether there is any basis for this, it doesn't put the government on a burden to have to prove something and prove that it has a real central connection, but at least makes judges involved. The modern rational basis tests rejects that. And it creates this idea of judicial minimalism, that judges shouldn't even be bothered at all to look at these laws. So I'm glad that the Fifth Circuit didn't go below the map, modern rational basis test. And I'm hopeful that they look at Jacobson and the real substantial test because that is a workable test that is used in a lot of states and provides actually more protections than what modern rational basis case law does.

Anthony Sanders: 14:59
Right and what I think really what Jacobson was doing was applying kind of the old test, the pre, you know, New Deal court test for what, whether legislations constitutional which was kind of across the board, right? We didn't have fundamental rights versus non fundamental rights, that distinction that we have now, maybe the parallel kind, but not what we have now. And so this real and substantial question was applied to lots of different legislation, in fact, we'll put a link up to it, but I wrote a piece a few months ago about Jacobson and Lochner. Really it's a similar test to what was applied in Lochner, which in Lochner, which was decided, two months later. The same nine justices were on each panel by the way, Jacobson and Lochner, three of them in Jacobson that upheld the law, then in Lochner voted that the law was unconstitutional. And so that's how you can see that how much continuity there is between the two opinions, even though the government wins in one and the government loses and in the other. But the notion that there's this sub rational basis test, I think, is this perversion of Jacobson that happened in this case, from last year this case, Abbott, that the Fifth Circuit applied, it was a very early pandemic case last April, involving abortion restrictions. And so what happened was, it's like this trump card that if there's an epidemic, it's a trump card over everything, whether you have a fundamental right rational basis. And although it you could still find a law unconstitutional, it's very, very hard. It's, I think, maybe a good way instead of sub rational basis. The court could have said the

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argument is that this is the this becomes a political question. If you say that there's a pandemic and an epidemic going on. And thankfully, of course, that was thrown out because as many courts have said in the last year, there's no trump card, no emergency trump card to the Constitution. And so that was good to say. One other interesting thing about the case is there's this concurrence from good old Judge Willett near the end talking about some of these issues. Judge, what did the former Twitter laureate, former justice Willet, will it have to say about all this?

Josh Windham: 17:27
Well, first of all, Anthony, I appreciate you calling me judge. But Jacobson

Anthony Sanders: 17:34
I think I said Judge Willett, but if it was judge Windham, maybe that's a foretelling of something I'm unaware of…

Josh Windham: 17:40
We can only hope. So judge Willet's concurrence was interesting. He basically says, look, Jacobson was decided, you know, 116 years ago. So it's crazy to think that it supplies the test that we should, you know, we should use in kind of pandemic litigation in 2021. You know, and challenges to emergency public health measures. And ultimately, you know, Jacobson was decided before courts started to adopt. And, you know, the Supreme Court started to adopt this kind of formalistic framework for tiered scrutiny and certain fundamental and non fundamental rights. So Judge Willet's perspective is Jacobson isn't really useful here. Now, we're kind of bound by starry decisis, to follow the rational basis test. And that's the test that applies. But it doesn't make sense to think that Jacobson is binding here. Another thing I found interesting, Anthony, before we move on from this case about the decision, was the way in which the court the Fifth Circuit engaged with the record. So the court does start in explaining the rational basis test by quoting kind of the infamous Beach Communications case, which says, you know, a loss arise, rational basis review, if there's any reasonably conceivable state of facts that could provide a rational basis for this distinction between bars and restaurants. But the court then qualifies that and says, of course, under our decision in St. Joseph Abbey, which was an IJ case, even a hypothetical rationale can't be a fantasy or betrayed by the facts. And so the court then looks at what the record showed, and it's useful that the court engage in that analysis, because it shows that, you know, even though the rational basis test in theory is supposed to be this kind of fact, free test. In practice, courts actually do look at the record, and they actually do engage with what facts were brought before them before they decide cases under the rational basis test. And ultimately, the record here, you know, didn't show that this was a crazily arbitrary distinction, but I think the door is left open for the possibility that that could happen in the future case.

Anthony Sanders: 19:42
Right. And essentially, what it said is, it's okay to close bars and not restaurants because people are more likely to be listening to loud music and yelling at each other and mingling in bars, but they don't do that so much in restaurants.

Josh Windham: 19:56

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Yeah, there's a few things going on. So there was a public health director who testified in the lower courts, and basically it was, there's a higher spread rate in bars and then restaurants, you know, in restaurants you have kind of families and couples who are related and live in the same household who are sitting at these socially distance tables. But in in bars, you know, it's like strangers who are bumping together. And you know, when you're intoxicated, you're more likely to kind of take your mask off or, or if there's music playing, you have to speak louder and shout in order to be heard. And so there's all these factors that actually do give rise to a distinction, with COVID, spread between bars and restaurants.

Anthony Sanders: 20:34
Well, that, unfortunately, will not be the last COVID case that that comes our way about these orders. Hopefully, we don't have too much longer to go. But I know there's a lot of businesses and civic organizations suffering out there that are having to live under this state of affairs. So I'm sure this isn't the last case we'll be talking about on Short Circuit to do with COVID. Well, turning to something very more standard and non COVID. But also kind of bizarre is the Seventh Circuit. And by the way, this Seventh Circuit case by Judge Wood, it's called Thornley v. Clearview AI, Inc. But a good friend, Judge Easterbrook, good friend to all appellate attorneys, Judge Easterbrook was on the panel and probably the worst appellate experience I've ever had was before Judge Easterbrook. So when we heard that clerk, that clip earlier, I did kind of feel for opposing counsel because of what an experience I had when I was in private practice, which is a for a story for another day. Anyway, just make sure he's not on your panel, although you don't find out until seven am the day of the argument. So judge, again, not a judge, Mr. Frommer, please tell us about standing and this case and what was going on with the party's arguments.

Rob Frommer: 22:05
I'll tell you what modern technology led to a standing mess in the Seventh Circuit. This case, Thornley v. Clearview is about something called biometric data. And for those not in the know, that means things like your fingerprints, the dimensions of your face, other personal input like that. And, obviously, given the privacy implications of biometric data, a lot of states have established rules for how that data can be collected, used and retained. For instance, Illinois has a Biometric Information Privacy Act, that prohibits companies from selling, leasing, trading or profiting from someone's biometric data. And a lot of states have that. Well, early last year, The New York Times ran an article about a company called Clearview, our defendant in this case. And it noted that third us business model was about scraping people's pictures from public websites. That means having a little automated program, go out there and grab them. And then it takes those pictures, calculate the facial dimensions, and store that information in a database. Then, when, let's say a law enforcement officer comes along, and they have a picture of a suspect, they don't know who it is, they can upload that picture into Clearview. It does the same biometric calculations and then it looks at its database and sees if there's any matches. And if there are, then it brings back the picture of the person from along with the social media website where it came from. So it's a way that people can be identified just based off of pictures. So it sounds a little creepy, a little -- not Orwellian – but a little panopticon for the Benthamites out there. So when the New York Times story landed, the litigation against Clearview as you might expect exploded, including in Illinois. So Melissa Thornley originally sued Clearview in state court, and she was alleging that clear

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views actions violated Illinois' Biometric Privacy Act, and then Clearview because it didn't want to be in the state court tried to remove that case and bring it into federal court.

Anthony Sanders: 24:28
Yeah, anyone who's litigated as a defendant in the circuit court of Crook County, as I have a few times would want to get into federal court

Rob Frommer: 24:38
Me too. So Clearview wants to get up into federal court, Thornley wants to stay down in state court. Here's the kicker. In federal court, you, in order to have standing, in order to be able to sue, you need to show how someone's actions actually injured you. That's different than in Illinois. In Illinois, all you need to do to have a lawsuit is being able to say that someone violated the law, this particular Biometric Privacy Act, and that lets you get into court. So you end up in this bizarre situation, where Thornley wants to be back in state court, she likes it better there, and Clearview wants to be up there up in federal court. So Thornley start saying how well no, no, I'm not alleging that this injured me at all. I'm just saying that they violated the statute and Clearview, by contrast to saying, "Oh, please, really, we all know what's really going on here. Everybody understands that you were really complaining about how you were injured, and therefore we can be in federal court." The District Court said, No, that's not the case and partially, that's because the plaintiff was very careful in how they wrote their definition. This is a class action, by the way. So it's not just on behalf of Thornley, but on behalf of potentially 1000s of other people. And she wrote her class action definition, the definition of people who would be in the class, based on people who, whose information had been violated under the Illinois law, but who had not suffered any injury, other than a violation of the statute.

Anthony Sanders: 26:27
So that class excludes people who actually have been injured. Tricky.

Rob Frommer: 26:31
Yes, and they did this intentionally. Because they, this was actually their second time on the merry go round. The first time Thornley filed a few months before, Clearview tried to bring it back up to federal court, and Thornley realizing, oh, this will actually stick me in federal court, I don't want to be here, dismissed the action. Then Thornley said, "Ah, if I rewrite that class definition to get rid of any allegations, that anyone is actually you know, hurt by it, then they'll they won't be able to bring me up into federal court. And that's what the Seventh Circuit said.

Josh Windham: 27:09
So I think there's something interesting about this case. You know, it's something that isn't that remarkable or, or that insightful, but that I just found interesting to hear written into an opinion, which was, you know, in general, if you litigate cases in federal court, you probably know that the burden is going to be on the plaintiff to establish standing. But the court noted that here, we're faced with a really weird situation where the plaintiff doesn't actually bear the burden. And technically, the burden is on the party seeking to avail itself of the forum to establish standing, which is language that you like you really don't hear a lot in opinions, because it's so often it's ubiquitous, that it's the plaintiffs seeking to establish, you know, the court's jurisdiction. So it was just an interesting thing for the court to kind of

say, actually, as a technical matter, it's if you're the party seeking to use the forum, you're the one who bears the burden. And here it's the defendant.

Rob Frommer: 28:03
Yeah, that was fascinating. And you know it when we're all litigators at IJ, you all know that we spend a lot of time with our complaints, making sure we have all the allegations in there, that we need to prove outstanding. And that's because yeah, with the burden is almost always on us in this weird situation, though, as Josh pointed out, the burden was on the defendant. But again, this plaintiff was very careful, right, that this plaintiff intentionally crafted this, their class definition, this lawsuit, precisely to avoid federal court. And the Seventh Circuit said, well, when the plaintiff made that choice, the plaintiff gets to live with that choice, and we're not going to disturb it. But I agree, it's fascinating,

Josh Windham: 28:52
I also appreciate the courts recognition of the fact that litigants do this, right? They plead in artful ways to ensure they get the best forum for their clients. And the court sort of gave a head nod to that it's like, look, it's obvious what they were doing here. But this is commonplace, you know, this is just what, what litigants do.

Anthony Sanders: 29:09
And it's a reminder that in state court, whatever state you're in, you aren't necessarily confined to the same case or controversy requirements that Article Three that the US Constitution has. So standing can mean slightly different things and in different states. Some states you know, and how states do that is a really fascinating, complicated issue. Some states constitutions don't really use case or controversy. They just say there's some courts, you can go into court. Okay. Well, what does that question that's usually sorted out by statute or by case law. And often states will have these doctrines that you know, that the capable of repetition yet evading review standard, for example, that we have in federal court, but it's a little narrow, is much more is much wider in some state courts. Some states say you can sue without any standing at all, as long as the statute allows you to do that which they're claiming is true in this this state statute in Illinois. So if you want to get into court, and you're in a weird situation like this where you're not seeking damages, you're not seeking something on behalf of your exact client. But there's some, there's some better, there's some cause that you're after, whether it's a public interest cause or whether it's just looks like some low hanging fruit, going after someone who has violated a statute consuming a protection statute, there might be a path for you.

Josh Windham: 30:45
And I would also note, you know, to the list that you just gave Anthony, there's at least some states that I've that I've worked in, where there's a kind of constitutional standing, where it's like if your case raises an important, sufficiently important constitutional question with a broad impact, that's going to be sufficient for standing as well. So for public interest litigators out there, you know, keep your eyes open for that if you're in state court.

Anthony Sanders: 31:07
Yeah, there's an interesting Oregon case from a few years ago that that went through all that the original understanding of the Oregon constitution, whether it was the same as the US Constitution, and

essentially said, yes, there's this important exception, and a lot of a lot of states have that. Now, how important is your case? Well, I guess you got to prove that to the court. And then if the court thinks it's important enough, maybe it's going to rule for you anyway. But, of course, those two aren't synonymous. Well, I'd like to thank these important people for coming to our show today. We're going to, as I said, look forward to the ruling in in Rob's case, which I'm guessing like most state Supreme Courts could be months and months and months. Is that true, Rob?

Robert Frommer : 31:52
We're not sure. I would say it's probably at least going to be a couple of months, hopefully sooner because there are 1000s of people that need help now.

Anthony Sanders: 32:01
That's very true. And that's a good reminder to all of you, that we'll see you next time. But in the meantime, all of you should remember to get engaged.

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