Short Circuit 170

**Anthony Sanders** 00:04

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, April 15, 2021. Happy Tax Day. You guys do your taxes yet, Adam and Diana?

**Diana Simpson** 00:28

I have. I am ahead of the curve because it's not technically Tax Day this year. Thanks to the pushing of the deadlines.

**Adam Shelton** 00:35

I have as well, and I think it was just, I think it's the corporation stuff to file today. But the individuals don't?

**Anthony Sanders** 00:42

Well, well. Very, very good news for everybody. I actually didn't know that and got mine done several weeks ago. So. But for all of you who take your time, I'm very, very happy that you have that in your back pocket. That's Adam Shelton of our Center for Judicial Engagement fellow and Diana Simpson, IJ Attorney. Welcome back to both of you. Of course, you can get a no questions asked for extension, even in years where it really is the deadline when it comes to your taxes. But that doesn't apply to registering for our Section 1983 150th anniversary celebration. If you're listening to this before noon, Eastern Time, Tuesday, April 20, 2021. Wherever you are in the world, I know we have some foreign listeners out there who love the podcast, you can get in on this event too, you still have time to sign up. And then see a number of scholars and lawyers discuss the 150th anniversary of the signing of the Ku Klux Klan act of 1871. Section one of which we now know is the Civil Rights cause of action Section 1983. Celebrate one of the most important acts of Congress that has ever been passed. And the only party on its actual birthday that I know of is the one we're hosting. Find out how to register in our show notes. Just click the link easy to register. I want to apologize ahead of time, however, that there will be no birthday cake. But I will raise a class, even though it will only be early afternoon where I live. And I will invite all of you to do the same. I mean, a lot of you guys are at home anyway. So, what gives? Unfortunately, we don't have any federal appellate opinions this week on whether the income tax is constitutional or not. Those are always fun. But instead, we have a hot mess, perhaps even two hot messes, and what might qualify as the FUBAR opinion of the year, Diana is going to walk us through 325 pages from the Fifth Circuit. And then Adam will tell us about some magic that the DC Circuit just recognized. Most books are less than 325 pages. When you read a court decision, you certainly hope it'll be shorter than a book. Yet the Fifth Circuit ruling en banc on the constitutionality of the Indian Child Welfare Act gave us 325 pages of which you kind of have to read the whole thing, as Glenn Reynolds has taught us all to say, “to know what the holdings actually are.” Well, Diana has read just about all of these pages. So you, and indeed, so Adam and I don’t have to. Diana, did it read like a novel?

**Diana Simpson** 03:35

Um, some novels, I suppose read in a similar fashion. Those aren't necessarily the novels I prefer. I prefer a little more pace to mine. But you know, the subject matter is, I think, quite interesting. And so in this case, this is called Brackeen v. Haaland. And the Fifth Circuit went en banc to tackle a challenge to ICWA the Indian Child Welfare Act, and its implementing regulations. As Anthony said, it is a behemoth of a case. There are seven separate opinions. And thankfully, a courtesy from the court, a five page per curiam explainer of the various holdings before they get into them. And so, you can kind of go get the highlights before you dive in, or instead of diving in depending on how much time you have. But I just want to talk a little bit about the basics. And so that law regulates the removal and out of home placement of American Indian children. It enshrines preferences for placements in foster care and adoption proceedings to a member of the child's extended family, other members of the Indian child's tribe, or any other Indian family. The tribe has a right to intervene at any point in a foster care placement or parental rights termination proceeding. There's a lot more going on, but that's kind of the basics of it. Congress enacted it in the 70s after finding that an alarmingly higher percentage of Indian families are broken up by the removal of their kids from non-tribal agencies, and then placing them in non-Indian foster and adoptive homes and institutions. So, after Congress enacted ICWA, the Bureau of Indian Affairs promulgated guidelines to help implement it. But those guidelines lacked binding effect until 2016, when the BIA promulgated a new rule making its regulations binding. And so Judge Dennis presents the majority opinion for parts of it, but it's one of the main opinions in the case. And he does a deep dive into the history of the American Indian sovereignty of the tribes, their relations with the US and the state of affairs that led to ICWA. It is a very dark history. It's an interesting one, but it's not a pleasant one. But one portion worth mentioning is the removal of Indian children in the late 19th century from their homes. So, government officials took Indian children from their homes and their tribal lands, sometimes by force, and then enrolled them at these coercive off reservation Indian boarding schools, some of which were run by the federal government, some of which were run by private entities with federal money. And these schools sought to stamp out all vestiges of Indian culture. They were horrible in both in terms of what they taught the students in and the physical dangers they posed. These were just not great places that anyone would want to be. And they continued all the way through the 70s of this century, or this past century, I guess, the 1970s. But in any event, that's what led up to Congress enacting ICWA. And so, this particular lawsuit was filed a few years ago, and there are three categories of plaintiffs worth mentioning. So, the first category are plaintiffs, who are people seeking to adopt or foster Indian children. The second category is a woman who wants her Indian child to be adopted by non-Indians. And the additional category is three separate states that filed the case as a plaintiff or as plaintiffs. And so the lead plaintiffs are the Brackeen’s and they successfully adopted a boy whose mother is Navajo and father Cherokee. And they went through the entire adoption process, navigating ICWA. It took a long time and a lot of effort. And so, they are also they're now trying to adopt their son's biological sister, but the Navajo Nation contests that adoption. And so, they're in the throes of it. They want to be able to adopt his sister without having to go through everything that ICWA imposes upon them. So, the defendants are a slew of government entities, the United States federal agencies and officials who administer ICWA and its regulations, as well as several Indian tribes that intervened in support of ICWA. So, the District Court declared that ICWA and its regulations violated the Equal Protection Clause of the Fifth Amendment, violated the 10th Amendment’s anti commandeering doctrine, the non-delegation doctrine, and the Administrative Procedures Act. It was a big, big deal. So, it went up on appeal, and the panel reversed in the panel upheld ICWA and its regs in its entirety. That panel was with Wiener, Dennis and Owen. And so, Owen concurred and dissented in part and would have held that the law violated the anti-commandeering principles. But the court ended up taking the case en banc, and there were 14 amicus briefs filed. So, if you go to the Pacer page, you have to scroll for a long time to find everything related to this case. And so, the main claims in the case, the first one is equal protection. And so, this arises under the Fifth Amendment and not the 14th Amendment, because is federal law rather than state, but the analysis is the same. And so the big question under equal protection is whether the phrase “Indian Child,” which is the linchpin of ICWA is based on a racial classification or a political one. And so the definition of Indian Child is based on the enrolled status of parents in Indian tribes. But whether it's a racial classification or a political one dictates which level of scrutiny applies, and which ultimately likely dictates the outcome of the case. The anti-commandeering claim is rooted in the 10th Amendment, which states that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people. And so, the Constitution does not provide Congress the power to issue direct orders to the governments of states. So if Congress wants to legislate it has to do so itself directly, rather than conscript, excuse me, state governments as its agents. And then the last big claim is the APA and whether the Bureau of Indian Affairs properly promulgated a rule making ICWA binding on all of the states under the Administrative Procedures Act. So I don't want to go through all of those claims one by one to talk about what was upheld and what was struck down. It is a hot mess, as Anthony said, and that per curiam explanation of the holding on pages two through six is very, very helpful. But basically, everybody has standing for at least some of these claims, or at least one person has standing for a variety of the claims such that they can address it. Standing ends up being a big portion of this decision, and the different opinions and I'll circle back to that in a minute. But basically, Congress had the authority to enact ICWA under Article One according to en banc majority of this court. ICWA’s Indian Child classification does not violate equal protection, according to an en banc majority of the court, then it gets kind of into some of the split decisions and so when the en banc court is equally divided, the district court's ruling is affirmed without a precedential opinion. And so, whether ICWA’s adoptive placement preference for other Indian families violates equal protection is upheld in that fashion or is struck down in the fashion, excuse me, so, the en banc court was equally divided. And so the district court's ruling that that placement preference was unconstitutional is affirmed without a presidential opinion, when it comes to the anti-commandeering claims, those all split. And so, three provisions unconstitutionally commandeer state actors according to the en banc majority, three provision split the en banc court So again, we have an unconstitutional ruling affirmed without a precedential opinion, and 10 provisions do not involve an anti-commandeering or don't violate the anti-commandeering principle. And then the APA, the BIA did not violate the APA by concluding that it may issue a final rule binding on state courts according to the en banc majority, to the extent that it implemented unconstitutional provisions, it violated the APA. But that's more or less the gist of it. The two kind of big opinions in this case are from Judge Dennis and Judge Duncan. And so those go through everything, and they take a few 100 pages between the two of them. And one of the ironies that Judge Dennis points out with this case is that it arises in the Fifth Circuit, and 1% of the country's Indian tribes and 4% of the country's Indian population live within the Fifth Circuit, plus Ohio, which filed an amicus supporting the plaintiffs. 26 other states plus the District of Columbia filed amicus briefs urging the court to uphold ICWA those states are home to 94% of Indian tribes and 69% of the Indian population. So you have a very small portion of this country, and a very small portion in terms of population percentage that is Indian, involving this case, and all of these other states say, you know, we're fine with it, and they end up having more. But of course, constitutional litigation is not just based on numbers. That's not how this works. So then, you know, goes through all of the decisions, and then Judge Costa has kind of the lead substantive dissent. And Judge Costa is very sharp writer, very strong. And so I would, I would encourage people to read his concurrence and dissent, in part his opinion, just because I think it explains a lot of the issues. But it also takes this position that is just baffling in its scope. And so he is displeased by the majority's holding that the plaintiffs have standing in this case. And so he takes the position that this entire decision is an advisory opinion, because Texas State courts are not required to follow the Fifth Circuit. And when you think about that, that it's just baffling. So, Texas, state courts have to follow Texas courts above them. And they also have to follow the US Supreme Court, but they've said that they're not required to follow the Fifth Circuit. And it just baffles my mind because federal courts are established by the Constitution to hear disputes. Federal law allows people to bring these cases in federal court under a variety of causes of actions. And I wonder if Costa’s position, if taken to the extreme means that there's not a single federal case that could have an impact on the state's unless it goes all the way up and, and I just I don't know, I've been thinking about that, and it kind of scares me. But at his end, his conclusion is a very sharp-tongued conclusion. And so I would like to read it just because it's so sharp. “Why bother with these objections to the substantive aspects of today's opinion, if as I have explained, they will have all the binding effect of a law review article, because the procedural and substantive problems with this case are two peas in the same activist pod. Judicial restraint is a double victim of today's helm. The court ignore standing requirements that enforce the proper and properly limited role of the courts in a democratic society, and a willingness even eagerness to strike down a 43-year-old federal law that continues to enjoy bipartisan support, scorns the nation that declaring an act of Congress unconstitutional is the bravest and most delicate duty that federal judges are called on to perform. Whether the passive virtues, whether the conviction that it is an awesome thing to strike down and act of the legislature approved by the Chief Executive, heaped one must conclude on the pile of broken promises that this country has made to its native peoples.” So that's kind of my big overview and going through the case. If this sounds interesting, I recommend you read it, it's going to take a long time. So maybe print double sided, maybe print four pages on a on a sheet. It's going to take a while to get through everything. But it's a fascinating case.

**Adam Shelton** 16:35

Well, thank you, Diana, for reading that whole case for all of us. This whole decision just is, you know, it strikes me as one that SCOTUS is definitely going to have to take up for, I mean, for no other reason, then the Supreme Court has not really had the opportunity to deal with a lot of the issues with this particular act. And then just the, you know, the language of the dissent, kind of saying that this is all just an advisory opinion, because Texas State courts aren't bound by the Fifth Circuit, just because that they say that they aren't, you know, I think that even though it's a dissenting opinion that deserves its own kind of Supreme Court majority opinion or Supreme Court, you know, review just have that, you know, the fact that he kind of just concludes that hey, well, since Texas courts say they aren't bound by us, that he just accepts that kind of assertion, and doesn't really test it or doesn't really argue it at all, is striking. And you know, what it can mean just for the Fifth Circuit, but I mean, if state courts aren't bound by federal courts, I don't know why all states don't just say and by the way, we're not actually bound by any of the federal court decisions. But yeah,

**Diana Simpson** 17:42

And one of the things that's interesting about that, is that I mean, this is a federal court interpreting a federal law, and to say that state courts don't have to find that in interpreting of federal law under the Federal Constitution, which is the floor beneath which no law can follow.

**Anthony Sanders** 17:56

Well, let me ask a question about that. So I, again, have not read Judge Costa’s dissent, but are the Texas, are the Texas courts, the Texas courts are not a defendant in this case, right?

**Diana Simpson** 18:13

The Texas courts are not a defendant.

**Anthony Sanders** 18:14

Right. So who are all the defendants?

**Diana Simpson** 18:20

So the state of Texas is a plaintiff in a case, the defendants are a series of U.S. agencies, US officials, and there's some intervener defendants who are tribes.

**Anthony Sanders** 18:35

And then so this is such a weird situation. And so I played a little bit devil's advocate, but a little bit I think I see where Judge Costa is coming from that, you know, in a normal situation with a circuit, Federal Circuit Court ruling on whether a state law or a state action or policy is constitutional or not, that is not binding precedent on that state's courts, which is an odd wrinkle that, you know, comes up in constitutional litigation, but it usually doesn't matter if you have an injunction against the state actor. Right? Or in sometimes even the state court if the state court has to do with, you know, a court procedure or something like that. But here, um, if the law is declared unconstitutional, by which is a federal law, I'm kind of thinking out loud here. I apologize, but I kind of see where he's coming from. If it's declared unconstitutional by the Fifth Circuit, that precedent is not binding on Texas courts. So the Texas courts could then still adjudicate this stuff, although the federal officials would be barred from you know, if there's an injunction from or res judicata even on just like doing whatever they're not allowed to do now because of the ruling. So I see how he's saying that the Texas courts, in his sense are not bound if like, just by operation of law of how this act works, they would start doing stuff to do with, you know, Indian adoptions.

**Diana Simpson** 20:22

But the state of Texas is a plaintiff in a case. And so doesn't that complicate matters such that the state of Texas can't later say that their courts, which are part of the state of Texas aren't bound by a Fifth Circuit decision.

**Anthony Sanders** 20:40

But a plaintiff usually isn't bound by a ruling, the defendant is it? It sounds a little bizarre. But I guess all I'm saying is I kind of see where he's coming from. And with this hot mess, already been so much a mess. Maybe that's like, a little more messy part of the mess that no one else really picked up on.

**Diana Simpson** 21:01

And further bit of the mess is that there is a petition challenging the constitutionality of ICWA pending with the Supreme Court of Texas, so any of the adoption cases? I don't know. I, you know, it's, and that's relates to the Brackeen’s. That's their daughter. Or so the child that they wish to adopt as their daughter. And so that's pending at the Supreme Court of Texas now. And so? I don't know. It's a tough question. But it just seems to me that federal courts should be in the practice of analyzing the constitutionality of federal laws.

**Anthony Sanders** 21:51

Yeah. And it seems I mean, it does seem like well, here's goes my practical question that I was going to ask you, Diana, knowing a lot more about this law now than I do. What is the practical effect of this ruling on, say, Indian adoption for people in the Fifth Circuit, whether they're, whether they're tribes, whether they're non Indian people, like what is different now? Because of this ruling?

**Diana Simpson** 22:17

It depends. The lawyer’s favorite answer, right? It depends.

**Anthony Sanders** 22:19

Like, it's anything different. Like, there's some stuff that just isn't gonna happen anymore?

**Diana Simpson** 22:24

I mean, so I'm confident that this case will be, a cert petition will be filed. And I am equally confident that the Supreme Court will great review of this case, this is a big deal case. And so that's a non answer. But I imagine that this particular en banc hotness is not the end of the discussion about it. But if you're, I mean, if you're involved in a guardianship or adoption, or third party termination in Texas, right now, this might very well impact the ability to conduct those proceedings in the standard way. And so the state isn't going to have to do a number of things that ICWA requires under the anti-commandeering principles, they're still going to have to do some things, but not other things. And so it's not necessarily over I mean, ICWA was held to be generally constitutional, there was a facial challenge. And that, you know, that didn't really go anywhere. The phrase “Indian Child” is deemed, you know, constitutional and as a political definition rather than a racial one. And so, you know, it's not that there's going to be an altogether holding of the ability of Indian tribes to get involved in these proceedings. But it's a mess. And so if you're in the middle of a proceeding in one of these states, where you're trying to adopt one of these child, one of these children, or you are yet in some other kind of proceedings related to the children, whether adoption or placement or something like that. Your attorney is probably going to be working overtime, figuring out what to do.

**Adam Shelton** 24:11

Yeah, and I think this case is going to be really interesting once it does go up to SCOTUS for review, given Justice Gorsuch’s kind of opinions on different cases dealing with kind of Native American issues. And now we have a new Justice Barrett, who hasn't been on the court for any of those two or three cases that have come up with over the past couple of years. I think it'll be just really interesting to see kind of how Justice Gorsuch views this as well.

**Anthony Sanders** 24:40

And not only that, but you know, we have an actual real here holding or two that something violates the non delegation doctrine. Well, and the anti-commandeering doctrine, I mean, equal protections in there too. Of course we get we get more of those rulings over the years, but non delegation that's like, you know, catching lightning in a bottle. Or historically it has been. And so now the Supreme Court, I think, just absolutely has to take that, you know, this is one of those cert petitions that everybody knows that the court has to take, because if they don't, it's it, it would be a hot mess. It reminds me a little bit of when the court found the, again to get the acronym long, but the DACA policy of the Obama administration when the Fifth Circuit found it unconstitutional, and then you had this, you know, weird situation where the federal government couldn't carry out these processing of these undocumented people. And so it had to go to the Supreme Court. But of course, split four to four because Justice Scalia died. Hopefully nothing like that happens in this case, but the court is going to absolutely have to deal with this.

**Diana Simpson** 25:58

Yeah. And as Adam was saying, I think it'll be an interesting resolution. Regardless, you know, Justice Gorsuch is from the west, is very interested in Indian Affairs. And, you know, this is a different kind of case than they normally hear. And so, you know, in the plaintiffs, the individual plaintiffs are represented by attorneys at Gibson Dunn. So, I think they've perhaps had their eyes set on SCOTUS the whole time. And I mean, and you see the different types of plaintiffs in the case that's very deliberately done by public interest firms, when they're when they're trying to survive challenges to standing because you need at least one person to have standing to, you know, to take all of your claims. And so you need people in slightly different positions. And that's what they have here. And as much as it perturbs some of the judges on the Fifth Circuit,

**Anthony Sanders** 26:51

Well shout out as a second shout out in two weeks, to the firm of Gibson Dunn, who is winning the poll on a shout outs from Short Circuit. We had a few other firms that were mentioned last week. We'll see if they get in the running and future episodes. Well, that was one big case. A pretty big case. It's hard to top that one. But still a pretty big case, not nearly as long thankfully. So I did read the whole thing, is what Adam’s going to take us to now in the DC circuit where it seems like there's a little bit more than meets the eye on what the both elite opinion and the dissent are talking about.

**Adam Shelton** 27:36

Right? So this case, Citizens for Responsibility and Ethics in Washington v. The Federal Elections Commission, or CREW v. FEC really started in 2014, when CREW filed a petition with the FEC, alleging that New Models was a political organization or apolitical organization that failed to register as such, and therefore failed to follow all the reporting requirements. New Models is now a myth. It's now defunct, it's a nonprofit agency or organization. The Commission decided to look into this but they deadlocked 2-2 over whether to go forward with any sort of enforcement action. The two commissioners who voted not to go forward issued a lengthy 30-page single spaced memo explaining their decision, giving what they said were two independent, sufficient legal reasons why they weren't moving forward. Why they determine that New Models was not a political organization. And then at the end, and one last in the last paragraph, so that one paragraph, and one footnote in the 30 page memorandum decision, said, and by the way for all of these, you know, in addition to these two, you know, independently sufficient legal reasons we’re also exercising our prosecutorial discretion, to not go forward with an enforcement action because the agency or the organization is now defunct, and most likely judgment proof. So it's not going to be worth our time and resources to expend to go to after them and further enforcement proceeding. The interesting thing here is under the Federal Elections Communication Act, organizations like CREW can file a petition in the District Court for the District of Columbia, basically, to have that decision overturned if it was contrary to law. The problem here is, and it's the issue that the district court and the Court of Appeals focused on was whether or not the kind of assertion of prosecutorial discretion in the last paragraph makes the entire decision to not go forward with any sort of enforcement proceedings unreviewable. So the majority opinion, which is a two to one opinion, basically rested on precedent and said, “Hey, we have this case from few years ago” notice Commission on Hope, which said that prosecutorial decisions of the FEC would rest on prosecutorial discretion, which rests solely on prosecutorial discretion are not reviewable. And there's no reason why we shouldn't kind of extend that holding to issues or to decisions that rest mostly or just partially on prosecutorial discretion. And then even though there was a precedential opinion that they said bound them, Judge Rao kind of went through and explained that it was totally correct that prosecutorial discretion is not reviewable, the APA gives actions or decisions that are given to agency discretion makes them non reviewable. And Congress has to kind of explicitly overrule that in a particular statute. The dissent I think I made some interesting points, basically saying that the decision of the majority here gave the gave the FEC a “get out of judicial review free card,” that as long as they just say, “Hey, we're not going forward because of prosecutorial discretion.” The whole decision not to go forward, it's entirely unreviewable, which basically makes the statutory provision of the federal election communication act, moot, essentially, because as long as long as the commissioner say, “Hey, we're not going to go forward with this, because we don't want to expend our resources.” It doesn't matter what other legal reasons they give. So there's no reason, there's no way that a court can overturn it, if it is contrary to law. And as the dissent kind of points out, this could lead to commissioners, choosing not to go forward with an enforcement actions for entirely unconstitutional reasons. They could potentially say, you know, because of racial issues, or because of, you know, just free speech issue, because we don't, we'd like what they're saying, we're not going to enforce election laws against them. And by the way, we're also exercising our prosecutorial discretion and not going through it, the decision probably isn't going to be reviewable, which kind of defeats the, you know, part of the statutory purpose of the Federal Elections Campaign Act. And it raises kind of a whole separate issue of, you know, how explicit does Congress need to be to enact kind of judicial review proceedings over the general APA bar on judicial review for actions given to agency discretion? So, this is another case that might go up en banc. And hopefully, if it does, we'll not be nearly as split or fractured, as Diana's case.

**Diana Simpson** 32:25

I mean, it's one of the interesting things I think about CREW generally, in this particular opinion is that, you know, CREW, one of one of their primary activities that they engage in, as an organization is to file these cases saying, hey, you should have enforced against this particular group, you didn't, you should revisit that. And it's just an interesting dynamic to me. It's, you know, FECA gives them theoretically the authority to do that. But it's interesting, given the First Amendment issues at play and how severe they are, I mean, this was an organization that not CREW but the one they're trying to enforce against or get enforced against, New Models. This is an organization that didn't register as a PAC, and is just a regular organization engaging in some amount of protected speech, the enforcers of laws that limit free speech, decided not to enforce against them. And so I would think that would be the end of it. But it's not the CREW gets involved in it and tries to get an organization enforced against and that's, that's a huge part of their activities. And so that's just always kind of struck me as is an interesting provision of FECA. But also, just kind of an interesting tactic that certain organizations take.

**Anthony Sanders** 33:51

And it highlights just how hard it is for courts to try to force the government to act proactively. Right? I mean, that often, there are legitimate ways, things in law for them to ask the government to do something, usually, because the government's already done something to somebody, and it needs to remedy that. Here, Congress, for whatever reason, probably because it was trying to do a whole lot of stuff with it and campaign finance laws, broke that mold, and in some way, you know, gives a private cause of action to try to force something to happen. I mean, usually, right, in our equal understanding of equal protection, if we look back at the word itself, that we often forget about in equal protection, that the states are supposed to equally protect people and can't, you know, only lock up people when they murder white people and not when they murder black people. The government has given a lot of deference on that equal protection. But the remedy generally, is that well, if you're not protecting one group of people then the other group of people can't have state action foisted upon them. Right? So you're not, you're not enforcing speeding laws against this one group of people, I'm of another group of people, you're enforcing speedy laws against me. And so I get immunity from that, because you're violating equal protection, right? That would be where you could break this, this barrier of usually not questioning into enforcement policies. Here's the opposite. Here, Congress has said, “Well, we want you to do the opposite. We want when they when they decide not to enforce against someone else over there, someone over here can say, ah, but I do want you to enforce against them.” And so understandably, you can tell that the judges in the majority here, and in the previous case that there they say they're relying on are very wary of allowing for that. And so they give this seven words, seven magic words, opt out, for the commission that I just don't, I don't really buy, but I kind of get the subtext of where they're coming from, which is that well, there's some, there's some constitutional issues here that have never really gone explored. And so we're just not going to try to look into them.

**Adam Shelton** 36:17

I agree. And I think it's, you know, I definitely think that you can see that underlying in the majority opinion that they just don't really want to deal with these cases, they don't really want to deal with second guessing like, well, should they have been, should the FEC proceed with an enforcement action against certain organizations and kind of lost in the discussion of prosecutorial discretion here is the fact that the two commissioners did issue like a long 30 page decision almost devoted entirely to explaining the legal reasons why they weren't going to kind of go forward with this complaint, or this enforcement action, and that all kind of gets lost in the discussion of whether it's reviewable or not. So I think, you know, I don't think that the court really wants to get involved with these types of decisions. I mean, we see that pretty frequently of the court not wanting to do more things, and not wanting to get involved with kind of government action and how government's going forward with things. So I do think it'll be very interesting to see what happens with this case, for no other reason, then, you know, that provision of the federal election communication act is now really dead on arrival, essentially, as long as as the commissioners just say, hey, prosecutorial discretion somewhere in what they're saying. It's, the court cannot overturn it as contrary to law.

**Diana Simpson** 37:32

There's something in the campaign finance waters about magic words, because this case, theoretically turned on those seven magic words that in exercise of our prosecutorial discretion, but then if, for those of you who have read lots of campaign finance cases and are deeply familiar with Buckley v. Valeo, and, and it's kind of its progeny, there are eight magic words in Buckley about the basically expressly call voters to vote for or against a particular person, and that if you do not invoke those eight magic words, your language is more or less exempt from campaign finance laws. So magic words abound in in all things related to campaign finance, what will the next magical number be?

**Anthony Sanders** 38:21

Well, whatever that magic is, I'm glad none of us mentioned, George Carlin’s seven dirty words. We’d much rather have magic words on this show. So thank you to Diana and Adam for giving us a whole bunch of magic, a whole bunch of hot mess, and a whole bunch of looking forward to when these cases go to higher powers. In the meantime, please check that link on your phone or on the website. You're getting this feed from and sign up for our event on Tuesday, unless you're listening to this after Tuesday, April 20, 2021. In which case, you can celebrate on your own time the wonderful statute that is section 1983. And in the meantime, like some but maybe not all of the judges have been doing that we've been talking about this week, we want all of you to get engaged.