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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 Monday, August 9, 2021. If you enjoy this podcast, you should check out our newsletter, an often-irreverent take on recent court of appeals opinions, which we publish every Friday. And please also check out our sister podcast the documentary series, Bound by Oath. Also, if you're in the D.C. area, you're invited to join us for a conference on September 10, 2021 at George Mason University in Arlington, Virginia. It's all about the concept of the "Will of the People" and its relationship to judicial review. You can find a link to the conference in the show notes where you can read all about it and register to attend. "Chill." Usually, we think that's a good word, "Hey, man, chill out, Take a chill pill or chillax" as the kids are now saying. Indeed, when I was in high school, a schoolmate of mine had "Chillin'", with an apostrophe at the end in place of the G, calligraphy across the back of his truck. As you might imagine that chillin' truck caught the attention of many, including the police. But we don't like it when our freedom of speech is chilled. And when is your speech chilled? Well, the 10th Circuit said that if you're going to keep speaking, it's not chilled at all. Which is why the court denied standing in the First Amendment case last week that some of us think doesn't make a lot of sense. Returning today is Adam Shelton of IJ to explain what's chilling in New Mexico. Welcome, Adam.

Adam Shelton 01:51

Thanks, Anthony. Happy to be back.

Anthony Sanders 01:53

Now, one company that is especially chill in its advertising at least is Uber. But that didn't prevent an entire fleet of taxi cabs from suing it for unfair competition. Well, what's unfair about competition, you might ask? After reading a 52 page opinion from the First Circuit, I still don't really know. But you know, who does? Alexa Gervasi, who today joins us to tell us the latest in the ride sharing versus taxi cab regulatory saga. Thanks for coming on again, Alexa.

Alexa Gervasi 02:30

Thanks, Anthony. Happy to be here.

Anthony Sanders 02:32

Well, great. Well, let's start with Adam and the Big Chill. What is the 10th Circuit a say about freedom of speech and how it doesn't really matter if it's threatened??

Adam Shelton 02:44

Right, so the 10th Circuit, basically, in this case, Rio Grande Foundation v. the City of Santa Fe, held that if you're going to keep speaking, even if the law may or may not be unconstitutional, it doesn't matter, you don't have standing. So, this case dates back to a 2017 city election in which a soda tax was on the ballot, the Rio Grande Foundation was not in favor of the soda tax. And they posted a YouTube video that explained all the reasons why the soda tax would be a bad policy for the city to adopt. The YouTube video, however, was donated to them. They didn't think that donation qualified for something that they would have to disclose and disclose their donors under the city of Santa Fe's campaign disclosure requirement. Once they found out they did, they were going to have to, they quickly disclosed the name. But then they found the lawsuit challenging the restriction or challenge the ordinance because they didn't want to have to do it. Again, they wanted to continue speaking in future elections. But they didn't want to have to always disclose the identity of their donors when they spent over \$250 in their own funds, campaigning for or against a certain issue. But before the court gets to the merits in this case, before any court gets the merits, they have to determine whether or not there is standing or whether the plaintiffs have standing. So, we all know the traditional rules for standing and you have to have an injury, as Justice Kavanaugh would say, no concrete injury, no standing. That injury has to be fairly traceable to the regulation that you're challenging, and the court has to be able to give you a remedy that's going to solve the injury. That seems pretty straightforward here. There's an ordinance that requires them to disclose their donors. They don't want to do that. They argue that it violates their First Amendment rights. Their injury violating the first amendment is clearly traced to the city's ordinance. And the court could declare the law unconstitutional and grant them an injunction. Seems pretty straightforward. But the 10th Circuit to make cases where First Amendment chilled speech is at issue decided to give us some help. At least they thought they were giving everyone some help when the 10th Circuit en banc in 2006 created a three part sub test for the first part of the three part standing requirement. No wonder the three-part sub test to determine whether there actually has been an injury. You have to present evidence that in the past, you've spoken and been affected by the government regulation, you have to present affidavits or testimony that you want to speak in the future in the same way, but that you don't have any specific plans to and that you, you aren't going to speak because you are fearful of the government regulation, you don't want to comply with it. So, you're not

going to speak because you don't want to comply. The Rio Grande Foundation easily met both the first and second prongs of this three-prong sub test. But they said that they weren't going to stop speaking, regardless of this government regulation. So, because their speech wasn't chilled, even if it was vile, even if their rights were violated, the court held that they didn't have standing. Even though if you look at just the original standing test, it seems pretty clear that they would have standing. Interestingly, here actually, in the 10th Circuit case that actually came up with this whole three parts sub test, they actually said the first part wasn't actually required all the time, because you have the right to speak for the first time. And they never really actually said that all three parts were required and had to be met entirely in order to have an injury that qualifies for the first prong of three-part standard test. So, the Rio Grande Foundation has said they plan to appeal, we'll see what happens. The Supreme Court, just at the end of this past term had one case about finance disclosure or campaign disclosure requirements. And they had a whole other case about standing. So maybe this will be an interesting pair for the Supreme Court to take up all in one case

Anthony Sanders 06:50

It's a perfect marriage. Alexa, were you chilled by reading this decision?

Alexa Gervasi 06:58

You know, I was, it honestly made me think of like being on the playground, and you've gone to the teacher and said, "I'm being bullied," and the teachers like, "Well, did you grow up in the fetal position?" And, if your answer is no, then the teacher is not going to do anything to take care of the bully. Um, it's just, you know, it's it changes the chilled requirement into a frozen requirement. And it's just baffling.

Anthony Sanders 07:24

One thing I really don't get that I was sharing with Adam, before we started recording is it seems what happened in this case is the group started, while they started talking, they had their ad, there was a complaint. And the complaint said, so that then the authorities went to them. And then they rectified what they had done, which is that really what happened is they hadn't filed their paperwork. So, they did file their paperwork. But their point is in the future, we don't want to have to do that, again, because we don't think we should have to for me, this is \$7,000, which in the grand scheme of things is not a lot of spending on a on an issue. We don't want to have to file paperwork again on that issue, or when we run an issue ad. And yet, that seems like an injury. I mean, they're going to speak, but they're not going to file the paperwork. How is that not an injury? What Adam, what am I missing?

Adam Shelton 08:30

I don't think you're missing much. I think most likely the court that was missing.

Anthony Sanders 08:35

And the court got hung up on this whole chill thing, I guess.

Adam Shelton 08:38

Right. The courts issue is entirely speech based. It was you're looking kind of for prospective relief here. You want an injunction that says you don't have to do that says this loss unconstitutional, instruct a plot to comply with it in the future. And they focus entirely on the speech aspect, ignoring any potential for like the actual actions that you can have to do. Maybe that'll come up on appeal. Who knows? Who knows?

Anthony Sanders 09:03

Yeah, I'm just baffled by I mean, really what, though to be cynical, what I think's going on here and is disappointing for our friends at the Goldwater Institute, who litigated this case, is they court doesn't want to weigh in on the underlying issues of whether this is unconstitutional, because this is the kind of case you know, when you're talking about disclosure cases. There's a big difference between, right, not disclosing a very large contribution to a candidate running for office, and not disclosing a small contribution often self-funded for a for a ballot question, which is very different, of course, then a candidate. And so, this is this is much more the sympathetic type of case. I mean, IJ Won a case on a similar issue a number of years ago in the 10th Circuit, which isn't cited in this case at all, I guess, because they didn't talk about standing so much in that case, because it was obvious but there was something like a few \$100 of spending that was not registered, and then that there was a lawsuit about it. And the 10th Circuit said it was unconstitutional in that case, this isn't that dissimilar from that. So, I think instead of that very tough question, it's easier to just say, well, you're not your speech has not been chilled, which I would say it has.

Adam Shelton 10:23

I think that's exactly right. I mean, the dollar requirement here is \$250, which is not a large sum of money, especially when you're kind of trying to run an ad even for just like a local city election. That's not a lot of money, but you have to expend. And I think this is just a case where situation where the court in the past had been trying to simplify a complicated question of standing in the way that they

simplified it and made it much more complicated in the simple standing cases that may come up in the future.

Anthony Sanders 10:55

Well, Alexa, how complicated is it to run a taxicab in Boston?

Alexa Gervasi 11:02

You know, it seems like it's a little bit more complicated to run a taxi than it is to drive an Uber. So let's picture it. I'll take you back to the year 2013 and Uber is just earning its own gerund Uber-ring. This is the time period when you get into an Uber, your mom would lecture you on getting into a stranger's car and tell you about a Lifetime movie that like ended horribly. So that's the time period we're in. And Uber hasn't yet released Uber x in Boston but thinking about doing so. The complication is that Boston has an ordinance for taxi companies, which requires them to have medallions like we've talked about in New York. They have to be associated with a radio dispatch service, jump through all sorts of licensing hoops, etc. And it's unclear whether that provision applies to rideshare services like Uber. So, Uber begins communicating with Boston's leadership and talking with the mayor, the mayor Commission's a report that determines that the ordinance does not apply to ride shares. And so basically, all signs point to Uber being in the clear, but because the ordinance is ambiguous, Uber still holds off on launching. And it waits first Sidecar, which is an Uber competitor that I have never heard of, to open, and it opens in Boston without a problem. And then Lyft, Ubers mustachioed competitor opens in Boston without a problem. So, they don't need the medallions. This ordinance isn't being enforced against these other rideshare companies. And so, about a month later, Uber launches Uber x in Boston, and it lets drivers know that on average, they can expect to earn about 30% more than taxi drivers and customers can expect to save about 30% compared to taking a taxicab. And obviously Uber x is a is a booming success. Then in about late 2014. About a year later, officers begin ticketing Uber drivers for failing to follow this Boston ordinance about requiring a medallion. And when asked about the ticketing on a Boston radio program, the mayor said that the police and the city do not have jurisdiction over Uber. The ordinance does not apply. And the mayor's chief of staff was he was quote unquote, dumbfounded by the ticketing and he took steps to stop it. So, over the next three years, there are about 500 tickets headed out. So, .001% of Uber rides in Boston are resulting in a ticket for not following this ordinance. So, we're going to fast forward to 2016 and the state of Massachusetts passes legislation that makes it clear once and for all, municipalities do not have jurisdiction over rideshares. And only the massive Massachusetts port authority can regulate rideshare programs. And so, with that ambiguity gone, a group of 30 plus taxi companies come together to sue Uber for anti-competitive practices. The cab

companies claim that Uber egregiously acted outside of standard business practices when it violated the Boston ordinance and was operating between 2013 and 2016. And Uber was all "Are you talking to me?" So, the case makes it all the way to a bench trial. And the judge ruled in favor of Uber. And the district court held that Uber's behavior did not rise the level of quote, "egregious business wrong, or a similar level of rascality that raises an eyebrow of someone turned in nerd to the rough and tumble of the world of commerce."

Anthony Sanders 14:38

Is that the rascality doctrine?

Alexa Gervasi 14:43

Yes, but Massachusetts has since supplanted its rascality. And now we use egregiousness but, you know, when you have the opportunity to say that somebody is not behaving like a rascal, you got to tell them they're not being rascals. So, the Uber didn't violate Massachusetts law governing anti-competitive practices, nor did it violate common law regarding unfair competition standards, nor did Uber engage in a conspiracy or aid and abet anti-competitive practices. Basically, Uber wins. And the first court at First Circuit Court of Appeals affirmed. First, it ignored the cab companies challenged to be a great business standard, because back in the district court, they had conceded that that was the correct standard, and it can't change horses midstream. And the Court of Appeals said what Uber did was not egregious. They followed standard business practices, they got assurances from the mayor that they were not violating the law. They waited for other businesses to open and operate without a problem. When they were ticketed, which only occurred in .001% of rides. They weren't sure that that was not the city's practice, and that the police officers didn't have jurisdiction for those tickets. So basically, the court said they would not opine on whether rideshares are good or bad for the transportation industry. But Ubers behavior here was not unlawfully competitive. So, there will be no surcharge of damages against the company.

Anthony Sanders 16:10

And it's true, this these are all state law claims, right? It was it just happened to be in federal court through diversity jurisdiction.

Alexa Gervasi 16:17

That's right is diversity because Uber is a Delaware company.

Anthony Sanders 16:21

Adam, is this going to mean you? Your mom isn't going to complain about ease and Uber? When you're in Boston in the future?

Adam Shelton 16:28

You know, I'm not sure if she still is not going to complain about that. But you know, this whole case really struck me as Uber or the taxicab companies really had a problem with Boston, not Uber. That, you know, Uber seem to do most of the things right here. They checked and made sure and got talked to the city and said, "Hey, before we operate in here, are we going to need to do any of these special things" and the city kind of seems like no, they've just said no, not really. And, you know, it seems like the taxicab company really needed to sue Boston potentially. And I think they did, and it didn't work out very well. But now they turned to Uber. But it seemed like a pretty straightforward case.

Anthony Sanders 17:12

Alexa, do you get a sense? So, I was utterly confused at the end of this, but I'm not very familiar with, you know, this unfair competition standards that that were they use? Would they have had a better shot if, you know, it was pretty clear, perhaps that it that it was illegal for Uber to operate at this time, which in a lot of cities early on for Uber and Lyft, it was pretty clear it was illegal, they just kind of did it anyways, and because they were so popular, nothing really happened to them. But uh, what, do you get the sense that would have been different or this like whole egregious standard? Would it have been like, really bad? Like, you know, they supplemented that with kneecapping people.

Alexa Gervasi 17:56

Yeah, so my sense and it seems like Massachusetts anti competition law has evolved some over the years. But my sense is that just because something is illegal, doesn't necessarily mean it is egregious. It would have to be in violation of standard practices. So, if everybody was breaking the law like Lyft had been operating and I don't know this other

Anthony Sanders 18:20

Sidecar! I haven't heard of them in like 5 years. They are long out of business.

Alexa Gervasi 18:25

Bless their hearts sidecar. Um, you know, they've been practicing also in violation of the law, and nobody was doing anything. I think that Uber still is going to be a victor in that situation, because they're just doing what everybody else is doing. And they're not busting kneecaps, as you say?

Anthony Sanders 18:43

Well, this case, raised a lot of memories for me, as some listeners who have followed IJ for a long time, may remember the past with that. When, when Uber and Lyft. And all of this started, yeah, around 2013. That was kind of when it really started bubbling up in 2014. And suddenly it was everywhere, right? Every city suddenly Uber and Lyft would launch, and sidecar was there as around two back then. And there were there were howls of outrage, of course from the taxicab owners because they saw their medallion values plummeting with this incoming technology and there wasn't much, they could do about it. And I think maybe there was some litigation against Uber and Lyft et al back then. But mostly Yeah, what they did was they did they went after Boston or the state of Massachusetts or the city of Chicago was a case we were involved when we represented rideshare drivers. We did not ever represent Uber or Lyft. They can afford their own lawyers but, but we represented drivers who just wanted to be involved in the system, but they were they were threatened with being shut down because the city was being sued. And so those cases went on for a while, but they kind of I've noticed petered out a couple years ago. And in every single case, they the taxicab companies have lost. Usually, they claim it was a taking, that their medallion value fell. But sometimes they claim equal protection violations as well and various other state claims. But I have a list here, it's about a year old, but I looked this up. And on the takings issue alone, six or seven circuits have found that that's, at least in the taxicab area, maybe an allied area, where you have a government monopoly, that gives you a value, but then you increase competition somewhere else. They've all failed. And some of them were suits against cities, some were suits against states, a lot of the states then legitimize this practice by, you know, having a regulation like Massachusetts did. And so, if this is, you know, kind of a coda or maybe it's, you know, maybe there's going to be more to the story. But for me, seeing this case, where they go after Uber itself after having tried against the government and lost in the government for deregulating, they try one last ditch effort at Uber. And even that doesn't work, at least in Massachusetts. So, I, you know, maybe this is a, it's interesting, you say back in the halcyon days of 2013. Because, you know, it was really interesting how people, a former colleague of mine, he said, no way, my daughter's getting in a car with a driver, exactly what you said. And yet, I bet like a year or two later, he was using Uber, you know, that was what happened.

Alexa Gervasi 21:58

And then it became safer, or people felt safer taking an Uber where they were being tracked, at least, you know, it's just funny the way that it progressed into that being the norm.

Anthony Sanders 22:09

Right. Yeah, because that was the whole point is that your Uber driver, and you know who each other are, at least because at the very least you have your credit card information and your account information, versus just hopping in a taxicab where who you might have no clue. And of course, things happen to Uber passengers and Uber drivers, but things happen the taxicab passengers and drivers too and this, I think the world has moved on to being comfortable with this technology. As I told an economist that I know, he said to me, you know, I think there's really, this is, you can rarely say this, but you this is complete and utter benefit is the introduction of right, sorry. And my response was, well, who knew it was perfectly safe to get an ordinary car, but apparently it is. And people were okay with that. So, I don't know if there's going to be more cases like this. But this seemed like it was the only one of its kind. Right. Right, Alexa, and like they didn't cite from other circuits having similar unfair practice litigated.

Alexa Gervasi 23:16

They didn't. They didn't. And of course, you know, since this is state law, maybe we'll see a little bit different. But you know, like I was saying that seems pretty open and shut, Uber did what I was supposed to do, sorry, they're doing it better. You know. That's, that's just kind of the way the cookie crumbles.

Adam Shelton 23:33

That's right. When this case came out, I was honestly, a little bit surprised. I was like, really, this, this type of litigation is still going on. The introduction of Uber and Lyft, and just rideshare companies in general feel feels so long ago, I can count on my hand, like the number of times I've taken a taxi. But Uber and Lyft. I'm always almost in Uber and Lyft when I'm traveling, unless for some reason I'm unable to get one and that then I look for a taxi.

Anthony Sanders 24:00

But you know, I will say to that, that I still do sometimes use taxis, especially at airports because of the taxi queue, it can be just being more handy versus the person, you know, dialing up on the phone. And there is something to be said. And I don't just say that because at that at IJ, I've

represented taxicab drivers, not Uber and Lyft drivers, but taxicab drivers in that case, that they you know, because they really do it for their job. They, they can give you a little bit of service at time. So, you're going to pay a little bit more for that service too. So

Alexa Gervasi 24:36

and I'll say, you know, if I'm running late, and I really need to get somewhere I'd much rather be in a taxi with somebody who knows all the shortcuts instead of following Waze which is going to accidentally take you through a river, you know. So, there are definitely benefits to taxicab drivers.

Adam Shelton 24:51

That is true. I the last I last time was in New York, which seems like forever ago now. I definitely hopped in a taxi.

Anthony Sanders 24:59

By the way I just looked up sidecar. It seems there may be something called Sidecar still going on, but the Sidecar

Alexa Gervasi 25:08

It's a drink?

Anthony Sanders 25:10

I think, well, that too. Yeah, I actually mixed one of those not long ago. But the sidecar I knew that our clients who were ride sharing drivers, they said it was the best platform. But it just didn't work out for whatever reason. But Lyft and Uber were the ones that survived. So, I hope I hope our listeners have enjoyed this nostalgic trip back to 2013 and 2014. Which the wild west of ride sharing, you know, now we've had some consolidation and you know, that happens with everything, though things, things get boring and safe. So we'll leave it at that. But I'd like to thank our panelists for coming on. Thanks to Adam. Thanks for Alexa. Thanks for coming on again. Actually, next week, Adam will be guest hosting as I am going to flee the country for a little bit. But then I'll be back after that. We'll have more to say about our upcoming conference on the will of the people and judicial review. But in the meantime, whether you're taking an Uber or a taxi, I would ask that all of you get engaged.