



**RM 251: The Wheels of Justice Grind Us Down
Recorded 1-14-23**

Announcer 00:00

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Andy 00:18

Recording live from FYP studios, east and west, transmitted across the internet, this is Episode 251 of Registry Matters. Good evening, sir. How are you?

Larry 00:30

Doing awesome. How do you know we're actually transmitting across the internet? Can you confirm that?

Andy 00:36

Since we have people in chat--first of all, welcome everyone in chat--and I know somebody listening is behind the bars. There's somebody in Maryland, and you're obviously on the other side of the planet. And some like there are people all over the place. So yeah, I can confirm we have at least two thirds of the United States covered.

Larry 00:57

Okay, so we are transmitting across the internet. Good.

Andy 01:00

We are definitely transmitting across the internet. Last week, I don't think I did the make sure that you press the likes and subscribe buttons on YouTube and do the bells and all that stuff so that you get notified. Al in chat confirms he is getting the podcast through the interwebs. So he's getting it through those tubes on the internet—that's what-you-may-call-him said. Who was that? Who said the tubes of the internet. I always think it's Orrin Hatch, but it was somebody else. Do you know what I'm talking about?

Larry 01:31

I don't remember who.

Andy 01:33

You remember the most obscure crap and you can't remember that. It's like Al Gore invented the internet, this doofus said that the internet has a whole bunch of tubes. All right, sir. So we've done all the intros and the welcomes and all that stuff. So give me the rundown for the night.

Larry 01:54

We're gonna do a bunch of stuff. We've got a couple of listener questions, and we've got three cases to go over. And the cases are going to consume our time. So we're going to have to leave out all these articles that I carefully selected with a great deal of diligence and thorough analysis. And then I've got a correction to make from the transcript from Episode 248. Our fabulous transcriptionist didn't catch it. I referred to a judge, a US federal judge in New Mexico, and her name is Martha Vazquez. And that's spelled V-A-Z-Q-U-E-Z. So anybody who read that, and they saw that Blscoz or whatever it said there, we're talking about Judge Vasquez who's a federal judge here in the state.

Andy 02:47

All right, then. Well, I guess we will then move over and start things off with a question that was submitted. And it says, In the state of Hawaii, indecent exposure is no longer a sex crime, but it is now classified as petty misdemeanor, therefore, you are not required to register for this offense in Hawaii. My question is, does a registered person with an indecent exposure offense require a passport with an identifier to travel since this offense is not specific to a minor? That's interesting. What do you think?

Larry 03:24

Great question. Remember, this is marginal legal advice that you're receiving here on this program. For those who've ever heard a program on the radio called "Handel on the Law," he says, "it's marginal legal advice." But it would be my opinion for whatever it's worth, that you have very little to worry about on that because first of all, indecent exposure is not even recommended to be a registerable offense by the big old bad federal government. It's not on the list of offenses that the states are encouraged to require registration of. So since the government doesn't suggest that it be covered as a registered offense, it would be extremely unlikely to me that they would require the data be on the list of offenses that would require a marking on the passport.

Andy 04:19

Oh, okay. Moving along. This one's long. So, sit back, have a sip of whatever you're drinking and hang on. "I was listening to episode 248 or 249 and you mentioned that NARSOL took cases based on it being a very good chance they could win - a slam dunk for financial gain. I understand the money angle and that is the very reason I thought I would send this to you. I believe my situation could be a win based on what has gone down in Tennessee over the past couple years. I'm not a legal beagle at all, but I have

included references (below) to a couple cases that you and NARSOL have noted, one with a great follow-up authored by you. I am oversimplifying, but I think my case is so similar to any of these cases, you could change a few phrases and submit a case for me. I really think it is another slam dunk--if the landscape is still the same. In a nutshell, I was arrested in a sting in December of 1996 and sentenced in January 1997. I got out of prison in June of 2000 and have registered without any issues since. My charges are 2 counts of Sexual Exploitation of a minor and 1 count of Aggravated Sexual Exploitation of a minor. Aggravated only because of transportation on diskettes in my car at that time. My time period under the disabilities and restraints of the registry is exactly the same as some of the cases mentioned. I would love it if you guys would choose to take this on. I also understand what I'm asking is no small thing."

Larry 06:04

Well, what I would say is that I don't believe that it would be fair to characterize what I said, as we take on cases for financial game, we being NARSOL, because the podcast doesn't do cases. What we do is what every organization does. They look at the viability of a case. And they look at--if they win the case, would they be compensated for their fees. These cases drag on and on for years and years. And you've got hundreds or thousands of billable hours in them. And it makes it prohibitively expensive to do these cases that are going to run on for years and years. So you're looking at is this case winnable? And if it is winnable, then the financial gain is going to come with it if you actually do prevail. But you don't sit down and go through cases and ask, "Is there any money there?" That's not what you do. You look at the merits of the claim that the person is making, and you look at the existing body of case law. We don't look at whether it's right or wrong, or that it's morally repugnant, because that doesn't necessarily mean anything. We have the right in a free society to make laws and impose them on ourselves that are not wise from a public policy perspective. And we have the right to do things that breach the Constitution. And therefore when we're looking at these cases, something may be an unsound public policy, but it may not be unconstitutional. And therefore we're looking at is there a body of case law we cite to. Is there something that's binding precedent that would allow us to have a good shot of winning based on the facts this person puts forward? In Tennessee, I do believe, based on the binding case law in the Sixth Circuit, that there are a lot of winnable claims that could take place in Tennessee. NARSOL is a very small organization. We pale in comparison to anything out there, like the ACLU, the NAACP, the Pacific Legal Foundation--which we're going to talk about later tonight--that they have a huge legal staff. We have absolutely no legal staff. What constrains us is we're looking for contract attorneys that we can give a small amount of money to and agree to cover their out-of-pocket expenses,

with the hope that we get those funds back if we prevail. And that means the attorney or the law firm is also taking a substantial risk. And they're just gun shy about these cases because they drag on and on and on, and they devour their practice, particular if there are one- or two-person law firm. So that's what goes on here. But I would love to see the submitter of this question. Go out and find an attorney in Tennessee that is willing to work with an organization such as NARSOL. Bring that case back to us through the website where we have a case submission process to submit it, answer the questions thoroughly that we have in terms of is there an attorney out there, has the attorney researched the case law? Is their attorney willing to work with us? And does the attorney believe you have a meritorious case that you can win? Do all those things, and we might very well take a look at your case. But a lot of the work is going to follow you because we don't have a vast staff to go out and find an attorney in Tennessee that would be willing to do that for us. We just do not yet.

Andy 09:43

And also, what we're going mention later is an attorney for the Butts case and how many hours did he put into it. When did that go to court, in 2018?

Larry 09:58

I think we started in 2019, but here we're on 2 to 3 years later and hundreds of billable hours that were wrapped up in that case we're going to get into.

Andy 10:08

I'm saying that I know that it was pre-COVID. I know that part is true. The more that I have been following how court cases go--anything that you hear on the news of a case that took this long when it started and all that stuff, and then more directly working with you and so forth--these cases take ages to go through. It took me a year to do the termination of finishing my sentence, and then getting off the registry took me something close to a year, or even longer. I forget exactly when I started and when I stopped, but it took forever.

Larry 10:44

And that was a case that did not have any impact beyond you. That was a process that exists in the state. And therefore, right, the larger cases are constitutional challenges. They are going to be appealed. They're not going to let a statute be declared unconstitutional and just say, yep, we agree. They're just not going to do that.

Andy 11:03

Right. Okay. Are you ready to dive into the meat and potatoes of the night?

Larry 11:08

I am. So we're going to do three cases. We've got one from the Seventh Circuit Court of Appeals. We've got the one from Georgia, the Bucks County that went up to the 11th circuit. And then we have the challenge mounted by the Pacific Legal Foundation. So there's going to be something from those three cases that you will find interesting, I hope.

Andy 11:33

I hope so too. All right. So Seventh Circuit Court of Appeals from Indiana. You people put in this case that's pending-- God, Larry, can we not do the pending stuff? We need stuff that's like now. But so this one is pending in the Seventh Circuit Court of Appeals. I recall that we've talked about this case numerous times. Why can't you let it go?

Larry 12:01

Well, I can't, because the litigation continues, and people want to know about it. So I can't let go of it.

Andy 12:08

All right. Well, let's do a recap. This is an ongoing saga of the case of *Brian Hope v. Commissioner of Indiana Department of Correction*. Last Friday the United States Court of Appeals for the Seventh Circuit heard oral arguments over Indiana's Sex Offender Registration Act. Why is this case taking forever?

Larry 12:29

Well, this is the latest skirmish in an ongoing protracted legal struggle between the Department of Corrections and the District Court for the Southern District of Indiana, and the judges on the Seventh Circuit Court of Appeals. So there's a three-way struggle here.

Andy 12:50

All right, and here's some background. Indiana enacted the law known as SORA in 1994, requiring that those convicted of sex offenses in other states must also register as PFRs in Indiana if they live or work there. It also contains a provision stating that convicted offenders moving to Indiana must register even if their offense took place before the enactment of the law. This isn't that unusual as most states have similar requirements. Do they not?

Larry 13:24

They do. But due to previous decisions from the Indiana Supreme Court, this contrasts with the law's treatment of those who committed pre-SORA sex offenses while living in Indiana, and those who continue to live there after their offense. Those in-state residents are not required to register if they weren't required to do so prior to SORA's enactment or its subsequent revisions. This divergent treatment between in state and out-of-state offenders

prompted a constitutional challenge to the law in October 2016.

Andy 14:01

I see. All right. So let me explain a little bit more. The plaintiffs are six men placed on the SORA registry despite being convicted of sex offenses prior to SORA taking effect. The men claimed that SORA inhibited their constitutional right to travel across state lines and violated the state's ex post facto clause and the federal equal protection clause. The assertion was that they are punished under a law that did not exist when they committed their offenses, and more severely than longtime Indiana residents. What did the court say in regard to their assertions?

Larry 14:39

In a July 2019 ruling, U.S. District Judge Richard Young agreed. Judge Young barred the state from applying SORA the registration requirements to the six men, which in turn prompted the Indiana Department of Corrections to appeal his decision to the Seventh Circuit.

Andy 15:00

Okay, now I'm starting to remember what we talked about. Following a lengthy appeal process that concluded with an *en banc* hearing, the majority of the appellate court in August 2021 chose to overturn Young's ruling on the travel and ex post facto claims and remand the case for further evaluation on the equal protection claim. Explain that ruling.

Larry 15:22

Well, let me first say that Mr. Hope reached out to us some time ago after we had discussed this case. And he pointed out that I had missed something because I speculated whether or not there would be a cert petition file. And he reminded me that there were actually unresolved claims. In this case, they were being referred back to Judge Young. The plaintiffs argued that SORA violates their right to travel by treating them differently based on their length of residency in Indiana. Writing for the Seventh Circuit, U.S. Circuit Judge Amy St. Eve, wrote in the 2021 majority opinion. "SORA may affect newer residents disproportionately, but it does not discriminate based on residency. Consequently, it does not violate the right to travel as the Supreme Court has articulated it."

Andy 16:20

And as I recall, there were some undecided issues that Judge Young was ordered to consider on remand. Do I have that right?

Larry 16:27

Yes, you do. And that's how he corrected me because I was thinking that was the end of the case. And yes, the case returned to the district court and Judge Young once again

found for the plaintiffs. He ruled this past May that SORA violates the equal protection clause and barred the state from requiring the six men to register as PFRs. As expected, the Indiana DOC appealed Judge Young.

Andy 16:52

And so now we're back at the Seventh Circuit. Again.

Larry 16:59

You're correct. Why do you even bother having me here? You've already got this stuff down.

Andy 17:02

Because the 25 people that are listening in chat right now want to hear you talk about it. I noted in the article that during last Friday's oral arguments, U.S. Circuit Judge Frank Easterbrook voiced frustration with the case as a whole, calling the now six-year-old legal procedure "annoying." I don't think I've ever heard a judge use that kind of term before. Have you?

Larry 17:27

I have not. That's generally considered disrespectful to litigants. But apparently, that's what he said. I wasn't there. This article is going to be in the notes. We took great lengths to de-politicize this. But the writer of the article that built the foundation for the story was very critical and tried to paint it as a red versus blue and pointed out which judges were appointed by whom. I've totally eliminated all that from here. But if you want to see what the writer of the article said, you can go through that. And they did, they did paint this as a red versus blue issue.

Andy 18:00

You hate when I do that?

Larry 18:03

Well, that's why I depoliticized it, because I don't believe that judges rule that way. And I'm in some denial, although when they come from conservative appointments, they tend to be more conservative in how they apply the law. And that cannot be good for us on many things. But in some instances, it can be good. So I just don't like to go down that path. But the politics are in the article for those of you who want to look at it.

Andy 18:28

I don't see how, under any circumstances, you could completely remove all of your biases and just read the text. I mean, even as textual as Scalia would have been, there would always be some level of personal bias that you can't get around. I just can't see that you could operate any other way. How can you operate completely like an autonomous robot, and not factor in your own personal biases? Even preferences to things like well, I think that we should bring

that up. As I recall, you had written for the NARSOL newsletter, when the Seventh Circuit overturned Judge Young. You People wrote, "It is worth noting that the Seventh Circuit was very creative in how it managed to undo the previous victory. Judge St. Eve writing for the court noted that Wallace v. State, 905 N.E.2d 371 (Ind. 2009) did not foreclose all retroactive applications of SORA because the same day that the state Supreme Court decided Wallace, it issued its opinion in Jensen v. State. Unlike Wallace, Jensen pleaded guilty in 2000 which was after SORA's enactment." Why is that significant?

Larry 19:50

It's significant because they crafted a way to avoid the ex post facto clause. They reasoned that at the time of Jensen's conviction, SORA required that he register for ten years. And before the expiration of Jensen's ten-year registration requirement, the Indiana General Assembly amended SORA to mandate that offenders like him register for life. He had argued that this extension as applied to him violated Indiana's Ex Post Facto Clause. Unfortunately, the Indiana Supreme Court disagreed. This is crucial because it contrasts to Wallace, who had no obligations before the legislature amended SORA to cover him. The circuit decided that to escape this deluge of people moving here they would say, well, it's a different situation. And they were very careful and crafty about that.

Andy 20:38

I see that. The Jensen court stated the broad and sweeping disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January 2000. Nothing in that regard was changed by the 2006 amendments. They found that merely increasing the length of an existing registration obligation did not rise to the level of punishment such that it violated the Indiana constitution. So what do you think happens next?

Larry 21:06

All we should do is wait for this Seventh circuit that flipped Judge Young before to see if they're going to flip him again. If they flip him again, I think that this case is either done or has to go to Supreme Court. Mr. Hope may correct me, but I don't think there are any remaining claims. So this would send us to assert petition posture or it would be done. But I don't have a prediction because I'm Mr. Doom and Gloom.

Andy 21:40

You are that for sure. You are Mr. Doom. I was going to ask you to put on your little seance hat. And get your crystal ball out with your long fingernails and like, move around like a fortune teller would and see if you had any predictions. That's what I was going to ask you to do.

Larry 21:57

I can predict that if I am correct, that this is the end of the litigation, except for a cert petition. I can predict that NARSOL would very favorably review an application for assistance and partnering on this to the Supreme Court. We would be interested in this case because it's a very significant question.

Andy 22:17

Very well. And then we shall move on to what we probably saw coming. So it's the Butts County Halloween update, which we're going to circle back to this again. And you put this in here in. We've discussed this previously. It's the Halloween challenge in Bucks County, Georgia. And you are clearly obsessed with this case. We've conveyed to the audience that the 11th Circuit Court of Appeals ruled in our favor, yet, here you are, again. FYP has so many issues to obsess over one case.

Larry 22:53

While we do have a lot of issues, we shouldn't obsess over a case unless it's relevant. And this is relevant. There's news that just came out and I'm confident the audience would want to know.

Andy 23:05

And so we had this dry spell for a month from Thanksgiving to Christmas. And now here we are--a deluge of information comes out all of a sudden in the first two weeks of January. So tell us, Larry, what is this earth-shattering news?

Larry 23:22

Well, as a prevailing party, our legal team was awarded \$298,000 for fees and expenses related to the challenge.

Andy 23:32

I'm sorry, could you please repeat that number? That was \$298,000?

Larry 23:40

For legal fees encased out of pocket costs that were incurred.

Andy 23:45

That sounds like a lot to me. Yeah, so I guess that qualifies as at least as news. Is there anything else besides 300,000 bucks?

Larry 23:56

Well, there is. We have some nuances to get into in terms of the disingenuous arguments put forth by Butts County.

Andy 24:02

Oh, disingenuous. I like to hear that. All right. The court stated, "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." I'm guessing that the attorneys and Butts County did not agree on an amount, which is the reason the court had to decide. Okay, so for example 10 bucks an hour, 10 hours, you get 100 bucks. I'm guessing that the attorney and Butts County did not agree on the amount, so the court had to decide. I bet the defendants said we should pay you 100 bucks. And our attorney said you should pay us a whole lot more.

Larry 24:35

You guessed correctly; the fee proposed by our side was \$350,000. And Butts County offered 110,000 bucks.

Andy 24:46

Really? It's clear that the court came closer to what we requested. What were some of the points of contention.

Larry 25:00

The court noted that "It is well-settled that a plaintiff is a prevailing party and thus ordinarily entitled to a fee award of 'some kind' if the plaintiff has succeeded on 'any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" So Butts County was trying to imply that we didn't prevail.

Andy 25:25

How, how, how would they bring that up and say that we did not prevail when the judge said, "No, you can't do that"?

Larry 25:38

Well, this was prior to the judge ruling. But when they saw the handwriting on the wall, they said that they would no longer enforce the ban. They would voluntarily not place the signs. But it was a bit late in the process after they saw the handwriting on the wall because they only saw the handwriting on the wall after litigation. Remember, we had a personal courier deliver the notice to Butts County attorney and to the sheriff's office? Do you remember that?

Andy 26:07

I seem to recall a story where the courier couldn't even find one of the attorneys. It was almost like where you rent a box on the floor of a big office building and that's your whole presence--Suite 200. And the courier couldn't--excuse me, I almost misspoke there--the courier couldn't even find one of the attorneys.

Larry 26:28

But we did everything trying to not litigate. It was Butts County's choice to litigate. But since we don't have a vast arsenal of attorneys, we were hoping that they would say, gee, this is a well written letter. We're on thin ice here. We probably should not do this. But they chose this path of action. So we're where we are. And as the Court said, it cannot be reasonably disputed that Holden, who is one of the plaintiffs, is a prevailing party.

Andy 27:00

Okay. All right. They stated, the Court entered a permanent injunction against the defendants in Holden's favor—materially altering the legal relationship between Holden and the defendants by permanently preventing certain behavior by [Sheriff] Long against Holden. The defendants' assertion that Holden obtained a 'symbolic injunction' is without merit. Although Reed and McClendon did not prevail, that does not affect the Court's analysis. Whether representing only Holden or all three plaintiffs, the Court finds that plaintiffs' counsel would have performed the same work." He was arguing the same thing for all of the people that were brought forward. Whether they agreed with one or all of them, he had to do the same work to bring all six up.

Larry 27:46

That is right.

Andy 27:48

So they argued about what the hourly rate was going to be.

Larry 27:52

Yeah, they did that as well. They did indeed. Mark Yurachek billed at \$500 an hour. And they didn't like that much.

Andy 28:04

I mean, is that a reasonable rate for an attorney roughly in the Atlanta area?

Larry 28:08

Not in that market, but it seems to be based on what this Court decided.

Andy 28:13

Okay. Mr. Yurachek, an Atlanta attorney, testified that, when applicable, he charges a \$500 hourly rate, and believes that rate of \$500.00 per hour for complex federal litigation in metropolitan areas within the Eleventh Circuit. Mr. Begnaud testified he charges \$450 an hour when working non-contingency cases. He further stated that "contingency work justifies at least a \$500 hourly rate." Moreover, Bruce Harvey, who has worked with experienced § 1983 Georgia litigators-- § 1983—what is that?

Larry 28:55

That is the provision of the federal code that allows for a prevailing party to collect attorney's fees? That's the Civil Rights section, where you follow this as under Title 42, subsection 1983.

Andy 29:06

Okay. And he testified by affidavit that his observation has been that attorneys in Georgia who litigate section 1983 claims on the plaintiff side with over 10 years of experience, we charge at least \$500 an hour. And what did the court ultimately decide then?

Larry 29:23

They decided that that rate per hour is reasonable. It is noted in the order on page seven.

Andy 29:29

You indicated that Butts County argued that the hours expended were redundant and unnecessary and constituted overbilling. And what was the court's response to that?

Larry 29:40

On balance the court disagreed. They stated, "except as noted below, the Court does not find that any hours claimed by counsel are excessive, redundant, or unnecessary. Apart from its detailed examination, the Court holistically considered the novelty and complexity of the case in determining the reasonable number of hours."

Andy 30:07

And I notice what appears to be a jab at Butts County. The court stated, "The defendants nitpick nearly every hour. First, the defendants argue that the plaintiffs did not carry their burden to show time entries were not duplicative, that is, to demonstrate that Mr. Yurachek and Mr. Begnaud did not spend time doing the same work. Second, the defendants ask the Court to deduct "vague" and "block billing" entries. The defendants assert "Plaintiffs' billing entries are almost all so vague that there is no telling what was done," and that counsel committed a "sin" by "block billing." The Court does not find that counsel's entries are "so vague" to require deductions. On the contrary, unlike the defendants, the Court had no difficulty "telling what was done." Now that's funny.

Larry 31:02

Oh, well, I agree. And I'm happy that we finally have found some unity on the definition of funny.

Andy 31:07

Okay. So without going into all the items that the court disallowed in the fee recovery, I'd like to focus on the issue of the paralegal time. Did Butts County contest that too?

Larry 31:19

Yes, they did. And to no avail. After voluntary reductions, the plaintiffs requested 27.3 hours at a \$75 rate for Ms. Mimi Duong, Mr. Yurachek's legal assistant. At the evidentiary hearing, Mr. Yurachek stated that Ms. Duong can do the same work as someone with a paralegal certification, and that she does the same, if not more, work as his associate attorneys.

Andy 31:53

The court stated, "Time for work done by a legal assistant is "recoverable as part of a prevailing party's award for attorney's fees and expenses, but only to the extent that the [legal assistant] performs work traditionally done by an attorney." What is your take on the rate of 75 smackeroos per hour?

Larry 32:15

That is extremely reasonable, particular if the person does substantial legal work that would have had been done by an attorney. They're actually saving money. And \$75 an hour for a good paralegal for billing invoices, is not uncommon. I'm in a much smaller city, and our paralegals are built out at that rate and higher. So no, that's not unreasonable.

Andy 32:36

You're point for putting this in is to illustrate how much our opponents will fight tooth and nail?

Larry 32:43

Yes, it is one point. And to convey to the legal community that there's good money to be made in the pursuit of quality cases. And that goes back to the point of the question from Tennessee. If we have a quality case, and this was a quality case from the beginning which I personally selected. I wanted to undertake this challenge because everybody was wringing their hands saying that they're tired of having to put up signs of this. And I'm saying, well, you know, then let's do something about it. And I got criticized because people said, well, there's bigger fish to fry. But this helps lay the foundation for those bigger fish to fry. We established that we can take on the establishment. And when we get a circuit precedential decision that's binding in the 11th circuit. It's also persuasive authority throughout the land. And it is also, hopefully, an inspiration to other attorneys. It's kind of nice to cash a \$300,000 check now. I expect Butts County will probably appeal this. And I bet you're going to ask me why, right?

Andy 33:44

Well, yeah, sure why?

Larry 33:48

Well, it's a part of how the system is designed in our great capitalist system. Some say it's the greatest thing that's

ever been devised. And it has a way of figuring out how to make money. Butts County is a relatively small county. Their population is somewhere in the 20 to 30,000 range. I'm not sure, but it's a small tune. Since they don't have a full office staff attorney, they generally go with contract services for the smaller counties. So the contract will be awarded with a maximum amount is say for \$300,000. So whatever the county commission sets the budget, well, the county attorney likes to bill that to \$300,000. So this is an opportunity to not only extinguish the full amount of the contract, but also to come back to the county commission and ask for additional funding--because we had this fair, complicated constitutional challenge. Like all the things that they protested about that generated billable hours taking this up on appeal again. I think it's a long shot. Judge Treadwell did a remarkable job of laying out his reasons for the award. But that doesn't stop the fact that they will get paid. So everybody who believes the capitalist system is the greatest thing has ever devised, it probably is, but it's not without some drawbacks. And this is one of them.

Andy 35:04

Hey, riddle me this though. So Butts County, I wouldn't exactly call it affluent either. Does this dip into their county budget as far as what they're able to then provide for other services, public library, whatever else they would be responsible for it. Does this dip into those funds?

Larry 35:23

It theoretically does, unless Georgia provides their counties with some sort of insurance pool, or unless the county has set aside a specific amount. Some counties set aside money for litigation as a part of their budget. So if they don't use that, they're putting money into a contingency fund for litigation. So it very well could dip into their budget. Based on what our attorneys are going to be paid, the county attorney has been paid that much as well, or in all likelihood close to it. So you're talking about a half million dollars. Folks, we delivered a letter to you. We asked you please don't do this. We told you it was unconstitutional. So if it has dipped into other things, you can only blame yourselves, because we begged you not to do this.

Andy 36:13

I just struggle to think--I don't know what their budget is. So I you know, how much does a half million dollars kick in because they paid their attorney for them to lose to then pay us the money that was spent and not pay the attorney that was representing our side. And I just think that it's ridiculous. Do the people of the county then go, come on, Sheriff, they delivered you a letter that you could have complied with basically for free? But now we're out a half million bucks. Good job!

Larry 36:45

I think it's probably gonna be not that significant to their budget, their budget is probably \$100 million or more. I'm guessing at least between 50 and 100 million dollars, but it certainly has an impact. And the citizens will never know that that letter was delivered. I can assure you that the sheriff is not saying, well, folks, you know, I did get these bunch of liberal do-gooders came down here from out of state and sent me a letter, and I told him that they could go F-themselves, and I decided to go on this wild goose fantasy of mine and would have taken this thing to the Supreme Court. He's not going to tell the people that. They'll never know that.

Andy 37:19

Alright, enough of that, then. Well, anyway, good news. Congrats, Mr. Yurachek. And I hope that covers some level of expenses. And you get to drive a nice car and live in a nice house. But thank you very much for your work. It was an incredibly interesting process to observe firsthand. I'll tell you that.

Larry 37:36

You were in the courtroom as I recall it, weren't you?

Andy 37:39

I was in the courtroom. And I was also the courier. Ssh-- don't tell anybody. God, I was scared. I was scared off my ass that day, Larry. I was scared to death that day.

Larry 37:51

Well, it would have been funny if they'd locked you up.

Andy 37:54

That's why I was scared. All right.

Announcer 37:58

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Andy 38:46

We shall move on to the Pacific Legal Foundation slash ACSOL court update. And this is breaking news that just came in late yesterday afternoon. It's regarding the Pacific Legal Foundations challenge filed back in May. Can you remind me of your reaction at that time?

Larry 39:22

My reaction? I don't remember.

Andy 39:24

You probably laughed a little bit at the time. Actually, I do personally recall. You're like, that's probably not going to go really well. And then I'll set it up a little bit. In December 2021, the Attorney General adopted a final rule that specifies various registration requirements, which went into effect on January 7, 2022. The Registration Requirements Rule states that it was promulgated pursuant to the Attorney General's authority under 34 U.S.C. § 20912(b), as well as other provisions authorizing the Attorney General "to take more specific actions in certain contexts. The rule declares, the Attorney General has exercised these authorities in previous rulemakings and issuances of guidelines under SORNA, as detailed in the rulemaking history and section-by-section analysis below, and the interpretations and policy decisions in this rule follow those already adopted in existing SORNA-related documents. The present rule provides a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements." Can you simply admit that this is the Attorney General making law and making shit up?

Larry 40:47

I cannot admit that because it would be totally untrue to make such an admission. The United States Congress passed the Adam Walsh Act back in 2006 and President Bush signed it into law. They made the law, not the Attorney General. So no, I cannot make that admission.

Andy 41:01

Okay, you're hopeless. They sought an injunction. The standards for getting an injunction are really, really high. Can you please explain what's going on there?

Larry 41:10

Sure. They're listed on page 13. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." If you've had a full trial, that may be one of the items you've requested as your prayer for relief. If you've had a full trial, then you've won the injunction. What were you asking for what's called a preliminary injunction, you're getting relief that you haven't won yet. You haven't had a hearing on the merits. So therefore, the standard has to be high because the status quo is being potentially altered by relief that you have not won. So therefore, you must establish that you're likely to succeed on the merits, and that you're likely to suffer irreparable harm in the absence of the preliminary injunction, and that the balance

of equities tips in favor and injunction is in the public interest, and that's directly from page 30. I just changed a couple of words, but that's directly from the court's order.

Andy 42:12

Okay. The Plaintiffs presented four challenges to the Rule in the Motion. They argued the Rule is unconstitutional in three ways: "(1) It is an exercise of an unconstitutional delegation of lawmaking authority; (2) It unlawfully limits protected speech in violation of the First Amendment; and (3) It violates due process by presuming Plaintiffs' guilt of a federal crime." Plaintiffs also argued that the Rule contradicts statutory text regarding its definition of "conviction." And I've heard you pontificate about the ripeness doctrine. The government argued that the case is not ripe, and they challenged standing of the plaintiffs. In fact, I think you said that this case is not ripe for judicial review. What did the courts say to that?

Larry 43:01

The court disagrees with me. The judge stated, "The Court rejects these arguments. Far from an imaginary or speculative injury, Plaintiffs allege that they are already suffering serious injuries, not least because they are already presumed to be in violation of the law by the Government. Moreover, because there exists a credible threat of prosecution, the Court finds that Plaintiffs should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." I agree with the court that a person should not have to wait to undergo a prosecution for the issue to be ripe. I disagree that there is a credible threat of prosecution. There is not. No prosecutorial entity has even hinted that anyone who has been lawfully relieved of the duty to register will be prosecuted. This is a solution looking for a problem to remedy.

Andy 44:03

As we all know, Larry, you are very stubborn. Plaintiffs allege that the rule has already changed their behavior, including burdening their freedom of speech. As they explained, plaintiffs have refrained from speaking because they fear quite reasonably that California will comply with the Department of Justice's rule, which conditions federal funding on California's collection of remote communication identifiers. And what do You People have to say in response to that?

Larry 44:33

Oh, it does not change my mind. The fact is that California has not changed its policy. And it does not collect the information from people who are not required to register. If you choose to be afraid of an imaginary boogeyman, I can't help you.

I'm sorry, afraid of what--

Larry 44:50

An imaginary boogeyman.

Andy 44:52

And would you tell me what an imaginary boogeyman would be if I'm imagining it? There are real boogeymen, Larry.

Larry 45:00

If you've dreamed up something here, which in my estimation they have, because there is no threat of credible prosecution here if you've obsessed over this and you've been released from the registry by order of a court or by simply timing out. I think in California the only way you get off is by order of the court. They just have that process that they've developed. But if you've been relieved of a duty to register, or if you've had the expungement, which one of the plaintiffs had. They had their certificate of rehabilitation or expungement. If you've gone through those processes, and there has been no federal state, or local official has suggested that they're interested in prosecuting you, that's the imaginary boogeyman.

Andy 45:46

The plaintiffs alleged that the Government has issued an indictment for failure to register under SORNA, even though the defendant's predicate sex offense convictions in California had been set aside under--I can't read all these things, please, please, please, help me.

Larry 46:10

Ok. It's California Penal Code section 1203.4(a). See U.S. v. Hardeman, 597 F. Supp. 2d 1040, 1047-49 (N.D. Cal. 2009). That's a district court case of a criminal nature. And it's not a binding precedent at all. But there were some nuances to that case. There was a person charged who had been registered in California and thought he didn't have to register anymore. He was traveling back and forth to Mexico. And that's what happened to that case.

Andy 46:41

The court stated, "In light of the specificity and gravity of the current and potential injuries Plaintiffs allege, the clear nexus to the conduct they complain of, and the potential for redress in the form of injunctive relief, Plaintiffs establish standing for all their claims. The Court also finds each ripe for resolution." What do you people say in response?

Larry 47:05

Well, the law is subject to interpretation. I say that the judge is giving every benefit of the doubt, and allowing the case to move forward. How long it remains alive remains

yet to be seen because the injunction is very narrow. And most of their claims actually have been extinguished by this ruling, and we'll get into those later.

Andy 47:24

Let's see. Can we take a look at the various claims and the court's decision or their likelihood that they will succeed on the merits of trial? What did they say about due process?

Larry 47:37

Well, they said in conjunction with 18 U.S.C. § 2250, fails to provide the minimum procedural safeguards required by the Constitution, it violates due process. Plaintiffs demonstrate a likelihood of success on the merits of their due process claim. That's on the order on page 31. On their due process claim, they have established a likelihood of success on that point.

Andy 48:06

All right, and then what did they say on the First Amendment claim of the chilling of speech?

Larry 48:11

On balance, the Court finds that Plaintiffs raise a substantial question as to whether the Rule imposes an impermissible burden under the First Amendment. Nonetheless, on the sparse record before it, as the current procedural posture demands, the Court is unable to conclude that Plaintiffs demonstrate a likelihood of success on the merits. In light of the Court's ruling on their due process claim, however, the ongoing burdens on free speech Plaintiffs allege and the meaningful chance that they prevail on their First Amendment claim further tips in favor of granting the Motion." So again, that's in the order on page 37 and 38. So they're saying that claim is somewhat alive. But there's not enough of a record to really evaluate the likelihood of success. But they're combining it with a claim that's alive on the due process. So they're given the benefit of doubt. So they got one good claim. They've got a claim that could possibly gain traction, depending on what the evidence brings to the court later.

Andy 49:15

And then on to the big one, in terms of the non-delegation. This is the whole Deep State, big state, whatever. Isn't that what the non-delegation clause was? Um, I can't remember the guy's name. What was that case?

Larry 49:30

Gundy.

Andy 49:33

Gundy. Thank you, sir. Isn't that what this is? I know that this is the one that drives you insane. You've repeatedly pontificated that there's no merit to that claim. And what did the court say to that?

Larry 49:43

Oh, well, thankfully, they agree with me on that. The court finds that plaintiffs do not demonstrate a likelihood of success on the merits of their non-delegation claim. That's an order on page 37. And so that one's effectively going to go down the crapper. In my opinion.

Andy 49:58

I'm sorry, go down the crapper? [laughter] You were around when that guy invented the thing, weren't you? You knew Mr. Clapper.

Larry 50:07

I helped him invent it.

Andy 50:10

One of the claims was that the government violated the Administrative Procedures Act. What did the court say about the likelihood of success on that claim?

Larry 50:19

Well, the court said that while the equities may favor Plaintiffs, and the Court might have been inclined to rule in their favor if this were a matter of first impression, the weight of statutory and precedential authority cuts against the interpretation Plaintiffs seek. Accordingly, the Court cannot conclude that Plaintiffs are likely to succeed on the APA, the administrative practices act, and that's on page 43. So again, when we talk about precedential cases in the lower courts, this is a federal district court trial level court, they're bound to take into account existing precedent, and then press the precedent of this. They need to let go this claim. It is not going to go anyplace folks. It just isn't.

Andy 51:10

So, do we need to move on? I mean, is there anything else that we're going to cover on this one?

Larry 51:18

Well, we're going to talk about the injunction itself.

Andy 51:21

The Court begins with the easiest questions of scope. The Court has held that Plaintiffs are likely to succeed on the merits of their due process claim, have raised a substantial question as to the lawfulness of the Rule under the First Amendment. Since any relief must be tailored to that which is "necessary to give prevailing parties the relief to which they are entitled," it must follow that Plaintiffs would not be "entitled" to relief redressing harms flowing from their nondelegation and conflict with statutory text claims. Moreover, while the Court is mindful of the present and future chilling effects Plaintiffs allege under their First Amendment claim, the Court has found that that claim

alone would be insufficient to justify granting the Motion. Accordingly, injunctive relief must be tailored closely to Plaintiffs' due process claim. This suggests that the injunction is very narrow indeed. Would you elaborate? Please explain that?

Larry 52:15

Yes. And I found that language there in that long paragraph you read to be interesting, because on the First Amendment claim, which is the biggie that people are so obsessed about having to give up their monikers, or their internet identifiers. That standing alone, the court just told you that it would be insufficient. So therefore, that is a weak claim as it exists right now, unless there's some significant development that comes forward. The Court's solution, imperfect as it is, is the following. The federal government is enjoined from prosecuting any California resident under 18 U.S.C. § 2250 for any violation of SORNA, the Rule, or any other regulation, without first abiding by the following requirements:

(1) In all such prosecutions, the federal government must seek and obtain certification from the State of California that the individual was required to register under California law.

(2) In a prosecution concerning a failure to provide specific information required by statute or regulation (as opposed to a failure to register altogether), the federal government must seek and obtain certification from the State of California that California law allows the individual to furnish that information to state authorities. What do you think?

Andy 53:52

Um, the language is not good to say the least, right?

Larry 53:58

Yes, it should not be difficult to obtain the certification as required in the first bullet point that a person was required to register in California. Their databases would probably have that information. Because if the person was convicted there, they would probably have that. If that person was previously registered, they would probably have that. But what about the person who wasn't convicted there and who relocated to California and was relieved of registration in another state prior to their arrival there? What about that person? Now they're having this imaginary boogeyman in their head that they're going to be prosecuted even if California didn't even know they were there because they were released in whatever state lawfully. And they're sitting and trembling in fear that they're going to be prosecuted. How would California deal with that? And oh, bullet point number two. What does it mean? It says that when it says California law, they must get certification that California laws to collection information. What if the person is not required to register in California, and the law discharged

them? This is a viable scenario. So what does it mean when they say, permits disclosure, as opposed to requires disclosure of information? I don't know if the California law requires it. I don't register there. I don't know that. But you're getting into some very dangerous territory here because this is problematic from a constitutional standpoint. The law is supposed to be specifically as succinctly tailored and drafted with language that anybody of ordinary intelligence can understand. And what the judge has created here for further language for the injunction to be as per the confusion.

Andy 55:44

So is this good news or bad news?

Larry 55:49

Well, it's good news is that the case remains alive. If you're wanting the case to remain alive, it's good news. It's bad news if you don't get the answer you're looking for. Everybody assumes magically that they're going to get the right answer from the court. What happens if the court ultimately decides that this is all good stuff, and the case is resolved against the challenging parties? And they say, Now, nobody's ever told him that they had to register? And what the court says, well, after reviewing everything, you do have to register again, even though you were dutifully discharged? Is that the answer you want? If not, why did you pose the question?

Andy 56:40

So tell me, then what will happen next? We're starting to get a little short on time. But so what will happen next, do you think?

Larry 56:48

Well, either this case proceeds to trial, or the parties will file motions for summary judgment.

Andy 56:55

Well, that's your favorite thing in the world.

Larry 56:58

It is indeed. But that's what's going to happen here. I can't see this case settling. I really can't see how they would settle this case. I don't know what you could do to settle this case. So therefore, if it's referred for settlement negotiations, I don't know what a settlement would look like. And therefore, it seems like it has to play itself out as at trial. And nobody likes to go to trial. They like to have summary judgment. They don't like to develop an evidentiary record that can hold the support the case on appeal, like we happened to have in Colorado with the case that Judge Bates decided without evidence which ended up in a bad situation. I'm afraid. I have great trepidation about this case. I really do.

Andy 57:39

Do you see that there could be harm depending on how the judgment goes?

Larry 57:43

Absolutely. If they rule against the plaintiffs and say, absolutely, you do have a federal duty to register even if you're off the registry. And you've got a federal court saying you have a duty to register. If California wants to, they say "Welcome back."

Andy 57:59

And so if they all of a sudden say that there's a federal duty to register, does that then apply nationally?

Larry 58:06

I don't think so. The court was very careful in the junction that saying that, and that's what has been posted in another question. What happens nationally? Well, I don't think that we'll know that until the cases are lodged across the nation. But this could set the precedent for answers that we don't want.

Andy 58:25

Because you frequently argue with people that there is no federal duty to register if I'm not mistaken. You've argued with actual attorneys. Attorney saying that there they say there is a federal registry.

Larry 58:41

Well, I mean, clearly there isn't. They can argue until they're blue in the face.

Andy 58:47

I know that there's a federal website. I know that.

Larry 58:51

There is a duty to register that the feds can enforce when they have the requisite jurisdictional hook. And arguably, that would be for all federal offenses. They could conceivably create an independent registry of people who've been convicted of federal offenses. But if you've been convicted of a state offense, there just isn't the jurisdictional hook for the feds to require you to do anything. That's the same thing when you look at your automobiles. You register them with the state. There's no federal registry. Now, there is something that resembles a federal registry for trucks because guess what? They're engaged in interstate commerce, which creates that jurisdictional hook. But folks, there is no jurisdictional hook for PFRs. The feds have created a social hook when you cross state lines when you travel in interstate commerce, and you fail to register. But again, my position remains that if the state that you are in doesn't want you to register and will not register, you're done. Because the Feds cannot

continue to prosecute you if the state won't register you.

Now what this is going to potentially do is a lot of states are going to start registering people. They are going to change their statute language, either by administrative or by legislative action. They're going to change their wording and the regulatory scheme to say that if the person is defined as a PFR, under the federal SORNA guidelines, that they're going to be required to register their state. Folks, why are you asking these questions? These are bad answers that you're gonna get. I don't understand it. I'm not able to comprehend it. I'm just a slow learner, I guess.

Andy 1:00:30

Clearly, you need to do one of those brain game things on your phone so that you can increase your IQ. That's what you need to do there. So you're gonna be smarter.

Larry 1:00:40

I'm working on it. But I'm too old now. 279 years old.

Andy 1:00:46

Is there anything else? I will give you 60 seconds of rant.

Larry 1:00:52

I've ranted enough tonight.

Andy 1:00:56

Well, without anything else, then I will say that one of our patrons is incredibly generous and has become even become more generous. And I can't thank you enough. You know who you are. You've recently further can increase your support of the program, and I can't thank you enough. And so I'm gonna close things out unless you have anything else there.

Larry 1:01:20

Well, I think that proves that what was said in that spot last week in episode 250--you people listen to anything.

Andy 1:01:31

We do. Listen to it again.

Unknown Speaker 1:01:34

Registry Matters. And FYP studios are proud to present their 250th episode. It just goes to prove you people will listen to anything.

Andy 1:01:47

There you go. Alright, so you can find all of the show notes over at registrymatters.co and fypeducation.org, where the transcript lives these days. And you can find all the other links to everything there at registrymatters.co. And finally, make sure if you want to support the program, you can go over to patreon.com/registrymatters to support the program, which is greatly appreciated. It helps that you

support the program. That's what I want to say. That's what I have. Anything else, Larry, before we get out here?

Larry 1:02:25

Well, this case is one of the most interesting cases that people are fixated on, this and the International Megan's Law. These things are really fascinating to people. And I think that if you've been discharged from the registry, you need to move on with your life. There are better things to worry about than all this stuff, really. But that's just my personal opinion. You can worry and obsess if you want to. But I think you're overthinking this. This overthinking is just not good. It isn't.

Andy 1:02:57

Great. Well, thank you all very much. Thank you, all the folks, in chat. There's a whole slew of people in there. I thank you all for joining us this evening. And for those of you out in internet land, thank you all for listening or watching on YouTube and all that and we will see you in a week or so. Thank you all very much and have a great night. Good night.

Announcer 1:03:22

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