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Off-premises signs and an on-premise subpoena

ANTHONY: 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. Joining me today are two of my colleagues.

We have Rob Frommer, a Senior Attorney at IJ who you have heard provide erudite commentary on Short Circuit many times before. And we have another Rob who has provided erudite commentary on this podcast many times before, but as Captain Lawrence Oates once said, "it has been some time." I'm speaking of Rob Everett Johnson, who just rejoined IJ after an expedition over the last two years.

We're going to hear from each of the Rob's about exciting cases from the Fourth and Third Circuits, we are very happy to have Rob back, but first I'm afraid I need to get something off my chest. I'm gonna read him the Riot Act. The Riot Act, 1714: "Our sovereign Lord, the King chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business. Upon the pains contained in the act made in the first year of King George for preventing tumults and riots as assemblies. God save the King."

ROB JOHNSON: Anthony. I feel like you've been waiting to say that for a long time, but that's the Riot Act. My case is actually about the Anti-Riot Act.

ANTHONY: Oh, okay. Yeah, well, I got it off my chest and, and I guess we all have rights on the brain these days. So, tell us about that.

ROB JOHNSON: So, this case is out of the Fourth Circuit and it involves two members of a group called the Rise Above Movement. This is a group; they meet every weekend to engage in training for martial arts and use of other sort of tactics that they then use. They go to protests and they use them to beat up on other protesters. So, you know, it sounds like an interesting club and they, these folks live in California and they actually travel all the way out to Charlottesville to attend the Unite the Right Rally. Um, they're initially there they're members of this group that I'm sure everybody remembers seeing pictures of, you know, marching through the streets with Tiki torches. They assault other protesters first with the Tiki torches and then later they're, you know, kicking, punching, and engaged in would sound like pretty serious acts of violence and they are charged under the Anti-Riot Act. Now, this is a statute, a federal statute passed in 1968 with the Fourth Circuit observes was a time not unlike our own. And it, paraphrasing here, prohibits to, makes it unlawful, to incite, organize, promote, or engage in a riot or to commit acts of violence in furtherance of a riot. And as the case comes to the court, the defendants have basically conceded that they were not themselves engaged in first amendment activity or at least that they were being that they're being charged for violence and, you know, sort of physical conduct that isn't itself protected by the First Amendment. Nonetheless, they have mounted a First Amendment

challenge to the Anti-Riot Act, and they do this under what's called the overbreadth doctrine, sort of a special doctrine of First Amendment law. And the idea here is basically that, you know, the government often, you might have a statute that prohibits a significant amount of, of protected speech, but then also protects, you know, speech or prohibit speech or conduct that's not protected by the First Amendment. And the idea of the overbreadth doctrine is that the government often is going to charge the worst offenders, but the statute still has significant First Amendment implications because it chills the speech of everybody else who worries that they might get charged.

So we let the worst offenders challenge the statute, even though they themselves don't necessarily have a constitutional claim because we want somebody to challenge the statute and the people who aren't being charged, perhaps don't have standing, or at least don't have an incentive to bring the claim.

So that's the idea, the court reviews, the Anti-Riot Act and it essentially holds that it is overbroad, that also, you know, you can prohibit people going to somewhere and, you know, engaging in violence or even, you know, engaged in some amount of speech to organize a riot. You can't prohibit inciting a riot in the sense of, you know, telling other people that they should riot you can't prohibit promoting a riot or encouraging a riot that this a lot of what this statute prohibits is essentially advocacy, advocacy of violence, which the Supreme court in a case called *Brandenburg* in 1969, held us protected by the First Amendment.

So, statute is overbroad. But then the question arises: Well, what does that mean? And what is the result of that? And then the court applies another doctrine called severability, which basically means if you have a statute and it has one provision that is constitutional and another that's not, under something circumstances, you quote sever the constitutional provision from the unconstitutional provision, strike down the unconstitutional one and allow the constitutional one to go on its merry way. And the court here says that the statute is severable and it's sort of an interesting opinion because it doesn't, there's really not separate provisions that issue here. It's more words within the provisions and what the court basically does is it takes its pencil and it says, this word is okay, but this word is not. So, it strikes out the word, you know, promote or the word, you know, encourage, and it says if we just take out those words and a couple other words, then the statute can stand.

ANTHONY: Rob, that is very interesting in, I'm a little confused by that though, because in that situation, it sounds like the judge witches are essentially rewriting the statute. I mean, literally taking an eraser and does erasing out certain words. Why didn't, is it, is it that they didn't want to send it back to Congress to have to do a new law?

ROB JOHNSON [6:49]: Yeah, I mean, so that's sort of an interesting thing here, right? So, and this is the criticism of severability in general, that we saw, you know, last term at the Supreme Court from Justice Gorsuch and a fascinating case involving robo-callers. But which we're not going to talk about here, but basically what Justice Gorsuch says is, you know, look at some point you're just basically writing a new statute and it's not the statute that Congress enacted and, you know, if there's a constitutional problem, you strike down the law and then let Congress start over. You know, with the, with the court here says is

basically, we think Congress's intent was to prohibit everything in anything associated with riots, to the extent that it's constitutionally permissible.

So, we're just going to limit the law to everything that constitution allows and strike down the rest. Maybe that was Congress's intent. On the other hand, you know, how, how they're supposed to divine that I'm not exactly sure.

ROB FROMMER [7:52]: Especially since the act is what, over 50 years old at that point, you know, it's pretty hard to suss out like what legislators were thinking in 1968.

ROB JOHNSON: Yeah. You know, I think another thing that's going on here is there, the overbreadth doctrine is controversial because it allows people who don't have a constitutional claim to, you know, get out of, you know, or to escape from the enforcement of laws that are constitutional as applied to them. And I think some people think, you know, that that's not a good thing. You know, I think obviously overbreadth doctrine does have strong policy reasons behind it, but you can see why some judges say, well, you know, if the law can constitutionally be applied to you, then, you know, what's the problem here. And I think, you know, there is a sort of an undercurrent of that running through this opinion that they basically say over breadth, this is strong medicine that should be applied sparingly. And it may also matter that not only in this case or these particular defendants, you know, not engaged in constitutionally protected speech, but it doesn't even really seem like they're engaged in speech at all, or they're not being punished for speech anyway. You know, there is a sort of an expressive element of going to the Unite the Right riot or protest, but that's not why they are being prosecuted. They're being prosecuted for, you know, intentionally going there to beat people up.

ANTHONY: One other thing that to come out of the, their analysis is their, their facial, what they say is how you make a facial challenge analysis. So usually as we have criticized many times at IJ to make a facial challenge, you have to show that every single application of the statute would be unconstitutional, but in over breadth challenges, there's this exception where they have a plainly legitimate sweep which is its own little thing within, within over breadth. What do you make of how they operationalize that plainly legitimate sweep so that they, they put a lot of emphasis on how, how many times, you need this, the, the statute to be unconstitutional within the, you know, this rubric, they, they don't have like a percentage I've always wondered on this standard.

Like, is it 75% of the time it would be unconstitutional, 30% of the time? But they seem to, you know, even under that, they seem to think these couple of words in there go beyond whatever that is.

ROB JOHNSON [10:19]: Yeah, and it is sort of weird, right? Is it, is it a hypothetical, like, cases that we can imagine, but clearly it's not like, you know, just like hypothetical in sort of any universe, but it has to be somewhat realistic, but it doesn't have to be cases that are actually brought, so, you know. Yeah, I don't, I don't really know. And they do seem to sort of almost skate past that. I think it's sort of an inherent weirdness in the doctrine, but you know, it seems like, at least in this case, right, there are, if

you take the statute at it on its word, anybody who says, “Hey, you should go to Charlottesville and, you know, beat up those lefties,” you know, or, or, or vice versa, it'd be to beat up those righties,

I mean, those people could be prosecuted for their tweets, you know, and I think that, that is sort of the First Amendment issue that the court is worried about it. You know, on the one hand look, I mean, I think that it's concerning how they basically use severability to, to get out from underneath the overbreadth doctrine.

On the other hand, you know, there is sort of a, there is a First Amendment victory here in this case, in a sense, right? If, if the government were to use this statute now to go after those, you know, people for their tweets or, or their blog posts or what have you, that is pretty clearly struck from the statute.

ANTHONY: So, well, so on that, that I, as listeners know, and anyone who's read what I've written, know I'm, I'm all about finding laws unconstitutional and joining them and joining them beyond just the plaintiffs in the case. My colleague Adam Shelton and I have written about universal injunctions. But even so the language of this case does strike me a little odd and how it, it talked about invalidating those words, which I agree that seem pretty unconstitutional in the statute. This is a criminal prosecution, there's no injunction, there's, there's no kind of remedy other than just, you know, throw out what it would be for these two criminal defendants throughout their, their trial, or just find that they can't be found guilty. And yet, the law says we invalid--, or the court says we invalidate this language in the statute. I mean, they're creating a precedent that it's unconstitutional, sure, but that precedent really is only binding in the Fourth Circuit. So how can they, why are they using this invalidation language? It seems like, and I think, in that in the case you were, you were discussing, there was this conversation between Gorsuch and Justice Kavanaugh, I think, about what we really mean when we invalidate a statute. It, it seems there, there needs to be a little bit more conversation about what those words really are saying.

ROB JOHNSON: Yeah. I mean, I think that's a fair point, right? And it's particularly weird cause that judicial precedent already existed, you know, it's *Brandenburg,* right? So, I mean like that, that aspect of the constitutional holding is like not really, particularly new or controversial. You know, look, and of course it's only one circuit, right? And you actually have other circuits that have addressed this law and reach different results, right? So, yeah. I mean, what does it really matter? I don't know. It's sort of, maybe it's an empty exercise and certainly for these particular defendants, you know, the holding is, is no help to them. On the other hand, you know, not clear that they had much of a claim themselves. So, I don't know. I, you know, I look, I mean, did he say there, there's a concern with this case?

I think my concern would be that, what does this do for the incentives of people to litigate overbreadth First Amendment challenges, right? So, if you're basically not going to get to take advantage of the, of the constitutional holding yourself, you know, then there's no incentive to bring the constitutional claim.

And like I said, the whole point of overbreadth is that government often the people they actually prosecute and take to trial who would bring these claims are the unsavory characters who maybe aren't the right ones in a perfect world to be litigating it. But the people who are the right ones and who are affected by the law, in the sense of their speech being chilled, they're not necessarily in a position to

litigate it. So, you know, you sort of worry that the long term effect of this is basically that nobody has the incentive to litigate these, these issues.

ANTHONY: Good point. We shouldn't leave this case before hearkening back to *Brandenburg* case from 1969, which should be remembered as the case that introduced the word *revengent* Into the English language, because they may have prosecuted in this case, says we're not a revengent organization. And then if the president, the Congress, the Supreme court continues to support yes, the white, Caucasian race, it's possible that there might have, it'd be some revengeance taken. Which to tell you the truth seems pretty mild compared to the, some of the, what went on with these people who were prosecuted. But I must say, well--

ROB JOHNSON: --I think that's a word that entered English language and then left it fairly soon thereafter.

ANTHONY: Thankfully, thankfully, so. Well, someone who is very much not a revengeance man is Rob Frommer, and we're going to hear from him about something, a set of facts that, that tell the truth that ever happened to me, I would, I would pursue revenge to the ends of the earth considering what happened to this, this woman. So Rob, tell us about her story.

ROB FROMMER [15:50]: Oh, Crystal has a lot of revengeance that she, a deservedly should be going after. So, Crystal's story started on a cold January morning in 2001 when Connellsville police, this is in Pennsylvania, found a man named Curtis Haith dead outside of his apartment, who he'd been beaten and shot in the face.

Now Haith hosted a lot of parties, so they spoke to people who attended the party at his apartment the night before, including Crystal Weimer, who's our plaintiff in this case. Now she had left the party early and she had a good alibi, but she also had some minor injuries to her face and foot and blood on her clothes. But she had said the injuries were from horseplay with the boyfriend and the blood turned out to in fact, be her boyfriend's. Plus, when police found blood at the crime scene that wasn't the victim's, they checked it and determined that none of it belonged to Crystal Weimer. And in fact, it probably come from a man.

Now fast forward, 20 months later, the case is still unsolved. It's now 2003, cold case investigators looking at some autopsy photos for the victim. When she saw what she thought might be a bite mark, they took it to a dentist and the dentist said, "I can't tell what teeth, if any teeth made this mark," but then the district attorney, who's the defendant in this case took that same, those same photos, to a bite mark expert. For all those who are in the know, who might remember expert testimony about bite mark, bite marks were all the rage back then as it supposedly could lead to useful evidence.

Well, the expert took a look at the mark--remember this is a picture from 20 months ago-- and some dental impressions from both Crystal Weimer, her boyfriend, and then quickly said, "Oh, it's Crystal

Weimer." And then the district attorney asked, well, when was the bite made? And again, 20-month-old picture and then the, the bite mark expert without any additional evidence quickly said, "Oh seven to ten minutes before the victim's death."

So, they ended up charging Crystal Weimer and the case at first fell apart almost immediately with witnesses recanting their prior stories and the judge dismissed the charges. But the investigators still focused on Crystal and brought charges against her. After a witness agreed to testify in exchange for a later sentence, this time she was convicted and spent nine years in jail. In 2015, a judge vacated her convictions and ordered a new trial. And that witness who got her in the pokey last time, recanted his statements and she went free.

So, Crystal having just lost nine years of her life in prison sued the district attorney and others in federal court for wrongful imprisonment. And among the claims, she alleged that the district attorney was liable for telling officers to investigate the timing of this bite mark. Now the district attorney in this case, who's, who's now actually a judge, asked the federal court to dismiss the case against her based partially on qualified immunity. The district court refused and the DA, now a judge, immediately appealed to the Third Circuit. And there the Third Circuit reversed the lower court on qualified immunity.

And it pointed out, even though we all pretty much agree that bite mark evidence is considered junk science now. In fact, the bite mark expert back in 2015 after Crystal had been, had her conviction vacated said is much said it was junk science. It wasn't completely discredited back in 2002 or 2003, when the district attorney was the one who ordered the bite mark investigation.

So, the Third Circuit concluded that there was no clearly established law at the time of her actions, that that would suggest to a reasonable person that maybe getting the timing of a bite mark from a 20-month-old photo isn't the most reliable of investigative tools. So, it's all the same, it still means that the DA's now, out of the case, or at least as to the bite mark and Crystal has one less avenue of revengeance.

ANTHONY [20:16]: So one thing that just jumped out at me in this case, it's just outrageous, is the way that the, both the initial witness who, you know, by the way, was her ex-boyfriend, and then the second witness who by the way, is a jailhouse informant who is getting a cut on his sentence for his totally unrelated crimes in exchange for testifying against this woman. Both of them say that the police orchestrated their testimony and told them what to say. And, you know, the, the plaintiff here, Crystal, she basically says that the DA was aware of this and should have intervened to make it, you know, to stop it. And the question is, you know, one question that I thought was fascinating was you, is that something that you have immunity for?

I wondered what you thought about the distinction that they made between absolute versus qualified immunity. It seemed to me that the, what the court was saying was that, if the DA had done that before the case was filed, as part of the investigation, that it would just be qualified immunity, but that if it happened after the case was filed, you'd be absolutely immune. Which I guess that means that if a prosecutor interferes with witnesses so long as they do that after the case has been filed, there's no constitutional claim that could even potentially be brought.

ROB FROMMER: It is very interesting the distinction in the Third Circuit's opinion because the judge or the district attorney, who's now a judge, also asked for that absolute immunity and they gave it to her for one small aspect of her actions, the actual filing, but lot of the other parts of it were investigated. And then, and it does seem like it's partially based on timing that this was all done before the charges were brought. And I agree with, it'd be an interesting case, like if this had happened during the middle of the trial. But yeah, the record here is pretty clear. The Third Circuit, despite not giving a Crystal any sort of relief, and they named the DA off the hook, paints a picture pf some pretty rampant misconduct, both by the police and the prosecutor here where it appeared they had a cold case and they just sort of focused in on a person that they want, wanted to pin it on and then sort of bent the levers of justice to try and make it happen.

ANTHONY: Yeah, I think this case is a great example of the layers of immunity and the layers of barriers to relief that that people have to go through. I mean, if anyone deserves relief from the wrongs brought by a prosecutor, it's this woman. But first she has to get around prosecutorial immunity, which the district court, did, you know, it's kind of split both levels of court kind of split the baby on, but that means that she can't be sued at all.

And, and she actually gets, Crystal actually gets through that, which you think, wow, if you can get through absolute immunity, that must mean you're, you're there, right? But no, then the qualified immunity was actually even harder to get around. And so, there was very little left at this prosecutor who, now as a judge and really if the system worked, she should have had been, had some kind of criminal penalty, for what, for what, she, the malpractice she, she took in this case.

ROB JOHNSON: At least a professional penalty. I mean, gosh, right?

ANTHONY: I mean, and this is promotion.

ROB FROMMER [23:54]: Yeah, indeed. I mean, and we see that over and over that even when prosecutors behave badly, sometimes they can move up the chain.

We know another Pennsylvania, DA now judge, in one of our cases are fulfilling, our Pennsylvania, forfeiture case, FOIA case where that happened. But it, it, this goes to show how these doctrines really undermine any sort of accountability by officials. And they know that at the time they're committing their actions. If you are sitting there with qualified immunity and knowing that there's going to be such an incredibly high bar for anyone to ever be able to come back and hold you accountable for what you did, you really know that your playbook is wide open. That you don't need to really fear any repercussions.

And do you lead to an injustice like this? Where again, the all, none of the evidence really pointed at Crystal, it appeared that the prosecutor and police just decided this is our person, and we're going to

make the charges stick, come hell or high water. And it's an unfortunate thing about qualified immunity and it's part of why we're trying to bring it to, or at least make major reforms to it.

ANTHONY [25:10]; Yeah, I mean, it just went, so there's something sort of infuriating about it and that sort of refrain that you hear from the government as well: you know, how can we do our job if we don't have immunity?

But it just seems like, you know, everybody, every doctor, every lawyer, every, everybody in this country does their job subject to potential liability if they do something wrong. So why should government officials be any different?

ROB FROMMER: Exactly and you know, all those people, they used to set doctors and everyone who could be sued for malpractice, they carry liability insurance. It's not clear to me why we can't have the same for police officers and prosecutors, carry, have the, have, make it part of their, give them money and tell them to go out on the market and buy liability insurance and let that, and then, you know, for good officers and good prosecutors, the price would be low. But for the bad apples, the people who are really violating people's rights, they would soon, quickly find themselves priced out of a job.

ANTHONY: One other thing I should note, doctors and lawyers don't have is a, a very powerful union to back them up. Like, we've thankfully finally had this discussion about police officers and in recent weeks, that wasn't part of the, the discussion in this case, but that's very much part of what prevents police officers from getting accountability.

If you would like to learn more about governmental accountability, we have coming up in the next season of our sister podcast *Bound by Oath*, which we'll be launching later this fall. And there's going to be an episode on quality immunity, prosecutorial immunity, all kinds of other, immunities that we need to take another look at to get a full accountability for government.

Well, I'd like to apologize for reading Rob Johnson the riot act that was actually passed by the British Parliament in 1714--one of the first bits of legislation for the new King George at the beginning of the Hanover in reign after the, the Stuarts were rightfully or wrongfully banished from the country, depending on your take of who is the rightful heir of the British crown. But that was actually a phrase in the act that you would, that you would read out to get rid of a congregation of 12 or more persons who were engaged in a riot. So, if you want to take that to the streets, to try to prevent some of today's rioting then more power to you.

In the meantime, though, it has been a riotous time with Rob and Rob. I'd like to thank them both very much for coming to Short Circuit, and I'd like to remind all of you to get engaged.