

Short Circuit | Episode 141

ANTHONY: Hello, and welcome to *Short Circuit*, your podcast from the Federal Courts of Appeals. My name is Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. And with me today is senior attorney Rob Frommer, also of the Institute for Justice. But more importantly, joining me is a special guest: civil rights attorney in Chicago, Joey Mogul. Joey, welcome to *Short Circuit*.

JOEY: Hi, thanks for having me.

ANTHONY: Now, Joey, you recently litigated a very bizarre and interesting case with the City of Chicago about criminalizing giving away, free food to protesters. And I should say the reason why we got interested in this case is we at IJ are interested in the rights of people to share food with one another. And so, we didn't like the looks of what the City of Chicago was doing, so please tell us what happened.

JOEY: Well, I like that you support sharing food with one another. I think it's particularly important in the midst of this COVID pandemic that we share food with as many people as possible. On May 30th of 2020, as the nation experienced and witnessed several uprisings in response to the murders, the police murders of George Floyd and Brianna Taylor, as well as Tony McDade and too many other Black people at the hands of police officers. We had a massive protest here in the City of Chicago. Thousands came to downtown Chicago; they were protesting in the streets. And as time wore on the police department and the City of Chicago tried to shut those protests test down, so they ended up I'm imposing a curfew at 9:00 PM that night that they announced publicly at 8:40 PM. They put bridges up over the Chicago river that prevented people from walking to and from different parts of the downtown area. And they had suspended our CTA, our public transit system, in the downtown area, which essentially locked many Black and Brown young people downtown with no means of being able to get home that night, particularly to the South and West sides where they live here in Chicago.

And so, there's an organization here it's called the Chicago Freedom school. It's a youth organization based on the freedom schools in the sixties, in the South that provides support and services to young people. They had opened up their doors and they let young people know that there at the Chicago Freedom School in the South loop of downtown Chicago was open and available to provide space to people, bathrooms as well as free food, including takeout, pizza, granola bars, and bottled waters, bottled water. As well as face masks and, and other, you know, materials people could do use to stay safe in the pandemic. And then they had young people come in droves to their, to their office. And young people were tweeting out using social media that this was a safe space. And at 11 o'clock that night as the protests were dying down and the Chicago police department called on members of the Business Affairs and Consumer Protection Agency to conduct an investigation of the Chicago Freedom School's premises.

And essentially they then were raided by members, the Business Affairs and Consumer Protection department of the City of Chicago, as well as Chicago police officer's clad in riot gear. And said they

needed to investigate the Chicago Freedom School's premises based on allegations that they were housing and feeding, feeding protestors, like that was some sort of crime.

They didn't have a warrant and they ended up coming and they inspected and searched the Chicago Freedom School's premises. They took pictures of the premises, including items that they hung on their wall. They could see that they were passing out takeout pizza, granola bars, pre-commercial, prepackaged snacks, and bottled water.

And they then left them with a **cease and desist order** saying that they had violated Chicago, the Chicago municipal code, because they didn't have a retail food establishment license, essentially a license that restaurants need to prepare and sell food to its customers.

ANTHONY: I'm guessing when you give food out to guests of yours, that license doesn't apply.

JOEY: That license does not apply. If you're not selling food and that license doesn't apply if you're not preparing food. And that night they were not preparing or selling any food, they were providing pre-packaged commercially prepared food to individuals who were coming. None of it was prepared on and premises and of course it was being given out for free.

And this is what any youth organization does. You know, this is what churches do. This is what religious organizations do. This is what we do at our offices sometimes, right? I mean, you don't need a retail food establishment license, but what was particularly chewing about this was that they said, and they told them that night and it was included in the cease and desist order, that if they continue to prepare, to provide food to people in this manner, handout takeout pizza, they were going to arrest members of the Chicago Freedom School and fine them 500 to a thousand dollars every time they do this. So that is essentially shutting down the Chicago Freedom School as an organization that works with youth every day, many of whom have food insecurity issues who aren't going to come to a day long program or come seek services if they're not able to eat, and they're not able to provide them with food. And so, as a result of this and after hearing this, you know, Sheila, Betty and I--I work at the People's Law Office, Sheila works at Northwestern Law School in the Community Justice Clinic we filed a civil rights complaint in federal court here in the Northern District of Illinois in Chicago on behalf of the Chicago Freedom School. And we sought a preliminary injunction on their path, essentially raising that the Chicago Police Department and other city officials violated their First Amendment rights and their Fourth Amendment rights. You know, and essentially arguing that, and I think that this was about **Schilling**, the Chicago Freedom School support of these protesters, protesters who were, you know, righteously, protesting anti-Black police violence here in the City of Chicago and the Nation. And by, you know, coming and illegally searching, raiding, and providing this cease and desist order, they were seeking to chill their First Amendment expressive activity.

And so, as a result of filing the lawsuit a week later, we, you know, we filed the lawsuit, we filed the motion for preliminary injunction and a week later, essentially the City of Chicago agreed to rescind the **cease and desist order**. I think, which is a tacit acknowledgement that it was completely bogus and fraudulent in the first place, and it should have never been brought. And, you know, we're now working to finalize and resolve and settle the entire case.

ANTHONY [7:45]???: Can I thank you for that, Joey? That's interesting. Why do you think it sounds like the CPD wanted into the building? Why do you think they tried to, why do you think they looped in the Consumer Protection people? Why do you think the police just didn't, you know, march in themselves?

JOEY: Well, they have what we can, I understand from Freedom of Information Acts that we, you know, FOIAs that we filed, that there is this new summer division that they've created to do some policing and surveillance of individuals and the BACP was part of that. And I think that they were hoping to use the BACP along this issue of food lines to somehow provide some legal justification for getting in the building. Otherwise, there's no way that the Chicago Police Department could get in cause like I said, they had no warrant and there was no probable cause that any crime was being committed.

So, I think they were using this pretextual justification around the passing out of food.

ANTHONY/ROBERT?: And did BACP that agency say that they didn't need a warrant to come into the building because they were because just because they were searching for food that somehow the Fourth Amendment's warrant requirement didn't apply to them?

JOEY: Right. I mean, there is an understanding under *Berger v. the United States*, that if you are a regulate, a highly regulated business, there may be a lesser standard for conducting a search, particularly whether it's health precautions and arrest [9:16]. And so, but that doesn't mean you don't need a warrant in certain circumstances, even for a highly regulated business.

In this case, I think they were arguing and they were trying to argue with you're acting like a food retail establishment. Therefore, we have a right to come in and inspect your business. But, you know, again, let me be clear: the Chicago Freedom School is not for-profit. Okay. It is not a restaurant. It is, and it is not a commercial business. So, these laws that they were applying to them are just inapplicable.

ANTHONY/ROBERT [9:48]. Yeah. And it sounds like no reasonable person, even given the facts and the confusion that might've been happening at that time, thought that they were actually violating the city ordinances and that therefore, somehow they can shoehorn in the, as you said that the Berger test which allows you to do warrantless inspections of businesses that you actually know are, are, are selling food. So, it sounds like they almost had three layers of BS inferences in order to enter the building.

JOEY: And I think what's troubling too, is after filing these FOIA requests, you know, we find out that the BACP, the Business Affairs and Consumer Protection just routinely goes and inspects, which I can understand they maybe want to inspect various restaurants or various commercial establishments to make sure that they are complying with health codes, but then they routinely just issue these cease and desist orders. But in this case, they made fraudulent allegations in the cease and desist order that the Chicago Freedom School was both preparing and selling food, which it was not, and to then provide them with the cease and desist order. So I, you know, I definitely have concerns about what is their basis

providing a cease and desist order. And just so you know, You know, the Chicago Freedom School is an amazing organization here in the City of Chicago that does really beautiful and righteous work with young people, you know, educating them, doing political education, telling them about their rights, helping train leaders to help organize social movements. And we have so many leaders in the City of Chicago who are alumni of the Chicago Freedom School. It's beautiful. And they are a beloved member of our community. And so, 300 people ended up writing the City of Chicago, condemning them for this, this raid and demanding that they pull the cease and desist order.

Before we filed the lawsuit, I wrote the Business Affairs and Consumer Protection Department demanding that they rescind the cease and desist order and their response is, "we just issue these cease and desist orders all the time. And if your clients aren't violating it, then it's just fine. They can go about their business." Without understanding that what they did in the first instance was wrong, without acknowledging that what they did was fraudulent and should have never, you know, you know, it's one thing to inspect the business, but to then provide them the cease and desist order was just outrageous.

ANTHONY: That, that reminds me of arguments we get in some of our cases about standing where a cease and desist order has been issued and the government will basically say, "well, yeah, that's it. I mean, you know, you actually, haven't been prosecuted with any of this, so what, what you have no worry and you know, never no reason to come to court."

JOEY: Right. And I think you routinely ruin it depending on what the violation of the cease and desist order is you have. Like, we were able, I think I felt very strong that we would be awarded this preliminary injunction because there was, you know, actual injury here and the future likelihood of injury was very strong, right, which is what we needed to get the preliminary injunction. So, I assume you win on that most of the time in your cases, right?

ANTHONY: We do, but it does sometimes take some educating of, of certain judges who need to be more engaged with, with these issues. Well, Joey that you may not know it, but Rob actually was involved in a long fight with the City of Chicago about some of its food ordinances regarding food trucks.

So, Rob, in a moment, let's turn to the case you're going to be talking about in the Fourth Circuit, but first, could you give me some comments on what the, the city did to the Freedom School regarding its food laws, surprises you at all from what, from what you know, with, with the City of Chicago and food? Or if this is more par for the course?

ROBERT: Unfortunately, I'd say it's par for the course, and it shows the danger of doctrines, like the Berger doctrine and its expansion across a lot of industries. Back in 2012, I actually sued the City of Chicago over its food truck laws. And one of the things I sued them about was the fact that they were requiring food trucks to carry GPS devices. So, the question of whether that was permissible under the Fourth Amendment went directly to this exact issue that we've been talking about, this case called *Berger v. New York*. And what the, what the Court said there is that in very dangerous, highly regulated

industries, we can allow for warrantless inspections. But what has happened, and the Supreme Court's been very clear that that's supposed to be a very, very narrow category of ultra-hazardous activities, and what has happened over time though, is that the lower courts have expanded it to pretty much every business under the sun.

And we actually filed a cert petition--we showed the how, like throw to like 30 different industries that have been declared by the lower courts to be closely regulated, including people like taxidermists. And what it allows is it allows these people to go in without a warrant. So, once you give a government that kind of tool, it's a powerful tool and they're going to use it anytime they have a problem. Like in this situation, I think that would probably be BACP was probably front and center, partially because they knew that they would be able to, CPD knew that they could never get in without a warrant, but BACP could use this idea, Oh, maybe you're a retail food establishment, and Berger to bust right through.

And that shows the danger with these kinds of doctrines, to how they can prevent people from really being secure in their property and also to be able to protest it, just like the Freedom School and the people there were doing.

ANTHONY: So, Rob, speaking of dangerous situations, some judges in the Fourth Circuit disagreed about what exactly that was, one night in a, in a certain neighborhood a few years ago.

ROB: Oh boy, I tell you that this is, this was a bit of a wild case, and it comes, it's a 99-page opinion then with four concurrences and two dissents and all comes out from a very, very brief instance. So, one night in Richmond, some police officers are patrolling, and they hear some shots fired a few blocks away. And so it's just random gunfire. So they turn around and get into their car. They think it's two or three blocks away.

The zoom over there, and in the meanwhile, there's some contemporaneous 911 calls come in, same thing, just hear random gunshots. They get there to the, to the building, and there's a field behind the building, which is where they think the gunshots came from. But they don't see anybody with a gun. They don't see anybody on the ground shot. They just see people serve, either standing or walking about just normally, and then, yeah, just walking up to people and saying, "Hey, did you hear any gunshots? What happened?" What they started doing is approaching people, shining a light in their face and next thing you know, just ordering them to stop. Like you have to stop and talk to us. And not just that--we are going to, even though we don't have any suspicions about you in particular, none of these people, they had nothing to tie them to the gunshots, they just started making them like it show whether they had any weapons on them or anything like that, lifting up their shirts.

And they approached this man named Curry, he's one of like the dozen people out there, and he says, "Oh no, the guy who—" He actually says to the police, "The guy who shot went that way, who was firing the shots went that way. And I'm actually here looking for my nephew."

The police undeterred tell, do the same thing, tell him to stop, tell him to show his shirt, lift up his shirt. There's a scuffle. And next thing, you know, he has a weapon on him that they discover. He is a, and then they try to charge him with felon in possession under a federal law. And the district court said no.

They asked to suppress the evidence and the district court agreed saying, “No, you don't get to just walk up to people you have no suspicion of doing anything wrong and order them to show, you know, to expose themselves. You can't stop them.”

A panel of the Fourth Circuit in a 2-1 opinion disagreed and said, this was perfectly fine under the **exigent circumstances exception**. And then the, the, it went en banc to the full Fourth circuit and we ended up with a 9-6 opinion with, like I said, four concurrences, two dissents, and a lot of heat between the judges. For a very small incident, it turned into a major constitutional issue.

JOEY: And, but how did they ultimately, how did the en banc panel resolve it?

ROBERT: Well, the, en banc panel by, like I said, 9-6, they said that the panel, the Court said that the panel was wrong, the district court was right. That they had no basis to stop the stop Curry under a **doctrine called Terry**, which allows the police to stop individuals when they believe they have a reasonable suspicion of eminent criminal activity and they can do a protective frisk of the person to make sure they don't have a weapon.

But again, they didn't know anything about Curry here. They didn't have any reason to suspect Curry. And so, they tried to lean on the exigent circumstances--the idea, like there was an--by reading the dissent, you would hear them say like this was an active shooter situation. And they would continually point out that one officer testified that maybe one person was favoring, like favoring one of their arms. And they thought, well, maybe he was shot. I mean, they subsequently talked to him and they didn't get him any medical attention, so, it doesn't seem particularly likely. But the dissent keeps harping on this like “there was potentially a shooting victim and there were shots fired and we don't know what's going on.”

And there's a lot of hand ringing by the dissent that if we, the majority's decision saying that you can't just stop people without any suspicion. They said this ruling is going to essentially unleash chaos upon the, I mean, largely like the inner city and areas where there are already, as we've been talking about historical, issues with policing.

ANTHONY: And, and Rob, it seems like, it didn't exactly add up all the concurrences and dissents on this point, but much of what's going on there is this, this dissent by **Judge Wilkinson** that talks about predictive policing and how this, undercuts predictive policing. And the concurrences are basically saying that that's resting on a bunch of pseudoscience which, which leads, leads the reader to believe that there's a heck of a lot more to come down the pike on, on figuring out what all this means.

JOEY: You know, this gets at a lot of, I do I've I done a lot of cases where I represent protesters, right. And this comes up a lot, particularly when we have mass arrest situations where they believe that there's some sort of mass probable cause that they can arrest because people are at the scene of a crime, which is in this case, my case is the protest.

And so I think it's really important this case, I haven't read this case, but it's like, again, I think it's very important that, you know, the Fourth Amendment requires individual, particularized probable cause or in this case, reasonable suspicion **under Terry**. And this, to be honest, sounds like a classic violation of **Ybarra versus Illinois**, which is a US Supreme Court case where essentially they had evidence that maybe one person in the bar may have had drugs, so they went and searched all 10 people in a bar to see who had the drugs, and they said that's a violation. In this case, too, sounds like just, they didn't have individual, particularized reasonable suspicion to search this individual, so he shouldn't have been searched. So, I'm glad they came out this way, but predictive policing seems to completely undermine this concept of individual particularized justification, right?

ROB: I, well, I agree in one extent and then disagree in another. Like the predictive policing, it's interesting because a lot of these opinions are about the predictive policing. And that really seems to me that that's mostly about like, where do you put officers generally, like in what precinct what, you know, what block. But the constitutional issue here is not so much like where the officers were at the beginning, it's what they did once they got to the scene. And that's the problem is that once they got to the scene, they didn't engage in voluntary consensual encounters. They didn't act as members of the community, just trying to enlist the support of people. Instead, they started to use their authority to just stop people, to force them to expose themselves with no suspicion whatsoever.

So predictive policing, it's interesting because yeah, you're right, there's two concurrences about it, there's a dissent about predictive policing, but ultimately then the day it's about the officer's actions on the ground cause that's where the Fourth Amendment truly gets violated. When the agent of the government orders you to expose yourself without any suspicion whatsoever, that's just unconstitutional.

JOEY: Right, and it's something we see that happens in the cities all the time, right. I mean, look at the **Floyd v. New York** case in New York, where there was just all these massive stops and frisks of young Black and Brown people in the City of Chicago on a routine basis. Let's be clear a frisk, isn't just often a pat down, it is also often having to lift up your clothes, exposing yourself cause they don't limit it to just patting your clothes down. They often go inside your pockets or inside your, your clothes to search for things. So, I mean, I agree with you. It's an interesting case, and I am now I'm going to go read it, but, and I'm sorry, I haven't beforehand, but I do think that this is something that we see routine violations of all the time.

ANTHONY: Rob, do you see, do you see further life to this case? And is there a split that might be involved, a petition coming, a cert petition?

ROB: I don't know if there's a split, they don't reference a split anywhere, they don't acknowledge the split anywhere in the opinion. The majority does, however, point out that there's very little case law about, there's, there's a decent amount of case law about exigent circumstances with regard to like

entering a building, you know, like I'm chasing a suspect or, you know, if there's someone who I know is laying, you know, on the verge of death inside, like that's pretty common. But the majority opinion says, like, we're not really sure how we're supposed to deal with exigent circumstances in the context of seizing and stopping people. And there's very little case law on this. I think that plus the 9-6 opinion, 9-6 decision, split here, could potentially mean that there's a cert petition. I think it's something that would benefit from further explanation from the Court, from the Supreme Court, in lines of like Carpenter Riley but we'll see what happens.

ANTHONY [25:14]: Well, Joey, before we go, how can people learn more about, about your practice and the cases you're working on in Chicago with the Freedom School and with others?

JOEY: I mean right now I'm working with Sheila Betty. If people want to find out more, you can look me up, I'm at the People's Law Office. We're on the web, we're on Facebook. And you can look up Sheila Betty at the Community Justice and Civil Rights Clinic at Northwestern Law School. Unfortunately, we've seen a lot of police violence and response to these protests against police violence, which I think is, is not, is sort of a given. But, so we'll, you'll, we'll be continuing to try to support the protesters and fight back against this police violence with the courts to the extent we can, understanding that's their severe limitations to it.

ANTHONY: Well, we'll keep our eyes on the windy city and elsewhere, and I'm reminding you to stay engaged and we'll see you all next time.