Short Circuit | Episode 151
Lifetime Leases and Butterflies on Walls

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. This week we're talking about takings and the wall, although not in the way you're expecting.
But first I want to remind all of you about IJ's other podcast options. You know, about *Short Circuit*, obviously, and you might also know about *Bound by Oath*, whose second season focusing on governmental accountability. Which'll be premiering in about a month from now. What you might not know about is *Deep Dive*. Unlike *Short Circuit*, where we blather on unshaven, tired, poor, and hungry--safe from the intrusive eyes of modern cameras. *Deep Dive* presents, IJ attorneys on screen; hence, they've only invited me on once, and it explores what those much more beautiful people than me inside and out do in fighting for liberty. Hear about the cases, issues, and tactics advancing IJ's fight for freedom directly from the people on the front lines.

Deep Dive with the Institute for Justice explores the legal theories, strategies and methods IJ uses to bring about real-world change, expanding individual liberty and ending abuses of government power. Each episode gives listeners an in-depth inside look at how and why we do what we do. That's *Deep Dive* available on any podcast app, if you're driving, and on YouTube or at ij.org for IJ, inter attorneys incarnate.

Meanwhile, I have before me today, who I actually can see, but you'll just have to wait for them on *Deep Dive* for that, Kirby West and Jeff Redfern, both Institute for Justice attorneys and both big fans of the Federal Courts of Appeals. In fact, Kirby clerked on the Fourth Circuit while Jeff clerked on the DC Circuit.

Let's not wait any longer, Kirby is going to tell us about a case from the Ninth Circuit involving takings and condos. And Jeff is going to tell us about a case from zone stomping grounds of the DC Circuit involving The Wall, capital T capital W. But funnily enough, not involving takings, but just about everything else, especially butterflies.

Kirby, let's turn to you first. This is a denial of a petition for en banc review, which normally would be way too unimportant for us at *Short Circuit*. What's up with this one?

KIRBY: So, we'll get to what exactly that means for I'm sure time *Short Circuit* listeners may know, but we'll cover that in a minute. But the background of the case is that a couple in San Francisco purchased an interest in a tenancy in common property in 2009. And they bought this property as a retirement property, but in the meantime, they plan to rent it and, you know, hold it for when they eventually wanted to retire there.

It matters that it's a tenancy in common property, because as part of the purchase of the property, they signed an agreement that they would have to cooperate with the other owners to take all steps necessary to convert the building into condominiums. This sounds kind of boring, and if you're not familiar with property law, it might mean nothing to you, but basically what it means is it changes the type of ownership that you have.

And it matters in San Francisco because with condominiums, unlike tenancy in common properties, you are not subject to San Francisco's rent control laws once the, once the property is sold by the converting owner. So, the properties are much more valuable if they're held as condominiums, rather than as tenancy in common.

So, what used to happen in San Francisco for conversion from tenancy in common properties to condominiums was that there was a lottery system. So, at the time that the couple purchased this property, there was this lottery system in place, and they had intended to cooperate with the other owners to go through the lottery system, to try to convert the properties.

In 2015, however, San Francisco shifted over from the lottery program to an expedited conversion program or the ECP, which basically would allow any, any properties to convert as long as they fulfilled certain conditions and paid an application fee, but with a major caveat and that major caveat is a lifetime lease requirement. So, if you're currently renting your property to a tenant, then when you convert to condominiums, you have to offer that tenant a lifetime lease. So, since the couple had signed this agreement that they would cooperate to try to turn the property into condominiums, you know, they went along with the owners and fulfilled this application, they paid the application fee. They took all the steps necessary to convert, it was approved. They offered the lifetime lease to their tenant as required, but after this was all approved and done and the property was approved for conversion, they requested an exemption from the lifetime lease requirement.

As I said, they wanted to eventually retire to this property. So, it kind of, you know, put a major burden on them to then have to offer this tenant a lifetime lease, kind of rained on their plans to eventually retire there. The exemptions were denied twice and eventually the couple sued under 1983 for violations of the Taking Clause, Takings Clause under the Fifth Amendment. The district court dismissed because the plaintiffs had not sought compensation in state court, which at that time was required by Supreme Court precedent while on appeal from the district court. However, the Supreme Court decided a new case, *Knick v. the Township of Scott*, which overruled parts of that Williamson County decision. The, the two parts of the Williamson County decision are first the finality requirement is the decision final with regard to the property, and second, the exhaustion requirement. The exhaustion requirement means that the plaintiffs would have to pursue all state remedies and exhaust all state remedies before filing a 1983 suit. And this is the part of the decision that was overruled by the Supreme Court in *Knick.* Nevertheless, the panel on the Ninth Circuit, hearing the appeal, ruled against the plaintiffs.

And that's where we get to the current procedural posture. The plaintiffs then petitioned the Ninth Circuit, the Ninth Circuit to rehear the case en banc, which means all of the judges would hear the case together and to try to get the panel decision overruled. These petitions for rehearing en banc are usually just issued, you know, yes or no, occasionally though you will get a judge or a group of judges that dissent, especially unusual if it's a denial of a rehearing, but in this case the, the Ninth Circuit denied the petition to rehear en banc.

And we have a dissent from Judge Collins joined by a number of other judges on the Ninth Circuit saying that no, this should have been reheard because the panel got it wrong. And, uh, you know, I think they make a compelling case for why the panel got it wrong. As I said though, Williamson County decision had set out two requirements for people who wanted to have a Takings Clause claim heard. First, the finality requirement is the decision makers decision final with regard to the property. And second, the exhaustion requirement, which means you have to exhaust all state remedies.

Now here, the petition, the, the plaintiffs had not exhausted all state remedies the panel said because during the application process, they never made a request for an exemption. It wasn't until after the full application process was over that they requested their exemptions, which were denied.
In spite of the Supreme Court overruling, this exhaustion requirement in *Knick,* the panel decision said, no, still the finality requirement and Williamson County was left undisturbed. And the plaintiffs didn't meet that finality requirement because they had not asked for this exemption during the application process.

Importantly, there's no opportunity for them now to ask for an exemption, the decision would be, what I would describe as final because there's nothing left for them to do. But despite this, the Ninth Circuit panel said, no, you, you know, they should have asked for this exemption, we can't call this a final decision.

And this is what, you know, the dissent of this, of the denial of the rehearing petition en banc said was incorrectly decided. And, and I think that's pretty compelling. I don't know what you guys think.

ANTHONY: Jeff, what about you?

JEFF: Well, what, what struck me about this? I, I certainly agree that now that it's, it's impossible to apply for the exemption, it's hard to see how it's not final. I wonder though, if, if this could be characterized almost as, as like res judicata because the, one of the problems with Williamson County was what they called the preclusion trap. You're required to exhaust your state remedies before you can go to federal court, but if you exhaust your state remedies and the state says you don't have a claim, then the federal courts are going to give full faith and credit to that, so you don't have a federal claim then either. And it's also possible to have your claim precluded by res judicata even through an administrative process where you don't go to court, if there's a, a procedural default. So, I wonder if that would be a stronger basis for getting to the same result than the basis that the court actually used in this case.

What do you think, Anthony?

ANTHONY [10:02]: Yeah, I, I think that could have been a route they would go. I have to say I'm a little, I think it's just because Williamson County is such a thicket even, even now that, that most of it as has been overturned. And these, these administrative methods that you go through that are still part of that are still good law can be such a thicket and depend so much on the, you know, the specifics of the actual law, whether it's a zoning law or this rent control measure, what, what have you, that it's hard to, it's hard to paint a broad brush about it. Like I can see, if you have a typical zoning situation where a, a homeowner say wants to do something with their property and they could go and get a variance from it, but they don't. And they go to federal court and say, you know, this is a taking up my property. There's a more of a compelling case there to say, well, look, all you need, all you need to do is go ask for a variance and, you know, given the facts, maybe you would actually get it. Maybe it would be futile and then, and then, you know, that that really shouldn't apply, but a hard rule, you know, would make the property owners still, still do it.

But usually that kind of process doesn't make rate for res judicata, but I know in other situations it can, and that's, you know, that's the harder case. And I think without knowing the, all the ins and the outs of what you have to do here in San Francisco, which I'm sure is pretty awful considering all the property

rights cases that come out of conversions of property in San Francisco, some, some of you listeners may know the San Remo Hotel saga that lasted for decades and created a lot of bad case law there. You know, it, it sounds, it sounds like that these people really didn't have, get a fair shake, but it also, there are elements of it that sound like, you know, there, there could have been a, a normal exhaustion procedure that they could have gone through, but it does seem unfair at this point to, to force him to go through that when they can't.

KIRBY: Yeah. I, I, I agree with that. I think the two things that strike me here though, are one just what an impossible position the property owners were in here, because they had signed that agreement that they would do whatever they could to convert the property to condominiums, which at the time had nothing to do with the lifetime lease requirement.

And so, they kind of had bound themselves to this without knowing it in advance, and, and then the other thing that, that just kind of strikes me when I'm reading it, this case is this is the kind of thing that IJ lawyers, we just spend so much of our time thinking about. And I think when you think of public interest, constitutional law, you think, you know, the questions in this case that we would be spending our time thinking about are what constitutes a taking, and what's just compensation and these are the constitutional issues that I wish we, and the courts would spend more time thinking about, and instead we just are bogged down so frequently by have we jumped through all the right procedural hoops to get to the court in the first place. So, this is the kind of case that as a, a non-lawyer or a non-IJ lawyer, you might read and think, gosh, what a snooze, but as an IJ lawyer, you read it and you think, oh gosh, my blood is boiling, this is so frustrating.

ANTHONY: One other procedural hoop that this case illustrates is en banc in the Ninth Circuit, which, you know, every, every lawyer knows the Ninth Circuit and a lot of on lawyers that the Ninth Circuit is kind of this Wild West when it comes to federal, federal practice. But I believe the math is that there's 29 active, so not senior, but active judges on the Ninth Circuit and you need a majority of them to get banc, but then when you actually get en banc, you only have like 11 who rule on it.
And, and I see here, and so the reason why we picked this was not just because of what it's about, but I think if my counting is right, there's nine judges who ruled en banc and you know, any other circuit, nine judges, wow you, you get en banc review, but here, I think that's, you know what, that's less than a third of the whole court.

KIRBY: Yeah, that's crazy. And I couldn't remember what the number was in the Ninth Circuit, which is why I kind of glossed over that earlier on, but we can always rely on Anthony for the knowledge of the courts that I'm lacking here

ANTHONY: Well as long as the internet's correct, I think, I think that those are the numbers, so well, thank you Kirby for the, the analysis and I guess this might not be the last week we hear of this case, perhaps there'll be trying for, for the Supremes. We'll put a link to it on the web website, it's *Pakdel v. City and County of San Francisco.*

Now, also I believe involving land in that region of the country, but actually heard in our nation's Capital is this case about the wall that President Trump wants to build, butterflies, the Fourth Amendment, the Fifth Amendment, and a few other things. So, Jeff, what do you want to start with first?

JEFF [15:15]: Well, I'll just start with a little background here. So, this is a case about the national butterfly sanctuary, which is exactly what it sounds like. It's a hundred-acre wildlife preserve, but it happens to be located right along the Southern border. So of course, they're coming into conflict, conflict with DHS as it proceeds to construct this wall and these barriers.

So, starting in 2017, DHS essentially took over the facility. they're widening roads, put sensors all over, they've been placing personnel there pretty much all the time. And they're planning to construct this wall right through the middle of the butterfly sanctuary. And that would make most of the sanctuary actually inaccessible. Now most, most of this border wall, I think people sometimes picture it as being right up there against the border, but it's actually typically set back a considerable distance. Which means that if you own property, that's on the wrong side of the wall, you pretty much lose access to it. Now, generally, there's no dispute that these property owners are going to be entitled to compensation for that land.

That's actually not what this case is about. The sanctuary here doesn't want compensation, it wants the sanctuary protected. So, they sued, bringing several statutory and constitutional claims. Now the statutory claims are basically that the DHS did not do the environmental review that's required under the National Environmental Policy Act, NEPA, or the Endangered Species Act. The sanctuary also argued that DHS was violating the Fourth Amendment by seizing part of its property and the Fifth Amendment by depriving it of property without due process of law.

Now what's interesting here for me as, as a public interest lawyer, who has to think strategically about what claims to bring is it, the sanctuary did not raise the really obvious claim, which is a Takings Claim. In fact, they explicitly disavowed taking theory. Now I think the reason for that is that the sanctuary doesn't want money, it just wants its property back. But this is interesting because it actually illustrates a change in the way that Takings cases have been decided over the last a hundred years. So, if you were the butterfly sanctuary in the 19th century and a bunch of government officers were setting up shop on your land, typically you couldn't file a suit for compensation. Your remedy would be to sue and get an injunction to kick them off your land. But now this presumption is basically been reversed in, in the *Nick* case that we were just talking about actually, the court last year, strongly indicated that damages are now the preferred remedy. So it's, it's likely sanctuary figure that one way or another, they're going to get compensated if the government keeps the land, that's not a difficult claim here. But that if they included a Takings Claim in the case, it could complicate the issues or it could maybe give the court a way to rule for them that isn't really giving them what they wanted. So, they don't want to give the court that kind of--

ANTHONY: Plus, plus, I'm good. Sorry to interrupt it, Jeff, but I'm guessing whatever damages they get for this open wildlife, you know, just a wall easement, isn't going to be enough money that the government were really bat an eye at.

JEFF: Right. And, and the other issue is that, how do you, how do you value a butterfly sanctuary? I mean, in a lot of eminent domain cases, it's pretty easy to say, okay, I've, I've lost my gas station on this corner. We know what a gas station on this corner in town is worth because it's a business. But a butterfly sanctuary on the border, you know, there isn't a market for those. They can't relocate it because it's a habitat. So, you know, I'm not really sure how you come up with a number that would be

adequate and clearly they, they would not be able to just reconstruct this anywhere else, So, it would, it would be the end of the organization probably.

So, let's get to the claims that the sanctuary actually brought. So, regarding the environmental claims, there's really no question here. The DHS did not do what it was supposed to do under these environmental statutes. The catch though, is that after the suit was filed, the secretary invoked a, another statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which allows the secretary to just waive the application of environmental laws with respect to the construction of border security structures. So, the DHS can just say, poof, these laws don't apply to us. Now, of course, that only applies to statutes. Congress can't, Congress doesn't have the power to exempt the executive from complying with the Constitution, so that doesn't do anything to the constitutional claims.

Now, the statute also provides that district courts don't even have jurisdiction to hear challenges arising out of DHS as waiver determinations. Now a so-called jurisdiction, stripping statutes can be controversial because rather than changing the substantive law, they just make it harder to hold the government accountable when the government violates the law. Well, the DC Circuit concluded that the jurisdiction stripping provisions didn't apply in this case because the waiver decision was made after the case was filed. So obviously the case isn't, it's not a rising out of the waiver decision, it arose out of the actual actions that DHS personnel were taking on the ground. But the DC circuit did agree that the waiver provision constituted a complete defense to the statutory claims. There are some argument that DHS didn't engage in enough discussions before exercising its waiver or that some appropriations bills had limited its authority, but the court was, was unpersuaded by that.

Now let's get to the constitutional claims. This is where things get a little weird. So, the Fourth Amendment claim failed the court said because everyone agreed that this land that was being occupied by DHS was what courts have called open fields. And that's basically what it sounds like. Courts have held the Fourth Amendment has diminished power when you're not, you know, indoors in your house or in what is called the curtilage which is what a lot of us would think of as like the yard immediately surrounding your house. Because this is just open fields, you don't have an expectation of privacy. Now what's weird about this Fourth Amendment ruling though, is that the court acknowledged that there are probably, probably some limits to the open-fields doctrine.

Here's the quote: “We do not for example, on whether continuous monitoring by sensors or CBP officers in person, on center premises might violate the association’s reasonable expectation of privacy and therefore amount to a Fourth Amendment search,” end quote.

Well, that's exactly what's happening in this case. The court said it doesn't have to reach that issue because ultimately the plaintiff is seeking the same relief under the Fifth Amendment that it was seeking under the Fourth. And, and the court concluded the plaintiff did prevail on the Fifth Amendment claim. This is weird because the court is saying you lose, but actually we don't have to decide if you lose. Well, which is it? Also, it's not clear that the relief sought under these two amendments is actually the same. Now a procedural due process violation, that's the Fifth Amendment claim, we'll get to that in a second. It's basically a claim that the government had to give you notice and an opportunity to be heard before doing something that affects your rights. But once you get that opportunity, it's entirely possible. The government will go ahead and do what it was going to do. With the Fourth Amendment, though, if the court concluded that this was a Fourth Amendment violation, then there's no amount of process that would make it okay. So, I'm not sure that this was really a fair way of ducking the question about the scope of the open-fields doctrine.

Now let's get onto the Fifth Amendment. The court recognized that the occupation of the sanctuary's land by DHS personnel constituted a deprivation of property interests, and there's clearly no notice or opportunity to be heard prior to this deprivation. So, the Court held pretty easily that the plaintiff had stated a Due Process Claim. Now, the weird thing though is that it's totally unclear what happens next because normally if you have a procedural Due Process Claim, it hinges on some sort of clear substantive legal entitlement. So, it could be like the right to contest liability in a civil enforcement action or the right to some welfare entitlement where a statute or regulation specifies the criteria for eligibility. But here it's not clear like what purpose the hearing is going to serve? What, what are the two sides trying to prove on remand? If, if there's going to be more process So I really don't envy the district court here on remand, I have no idea what the court's going to do.

You know, finally I want to know there was a vigorous dissent in this case. I haven't talked about it before now, because I think the issue's a total snoozer, but Anthony and Kirby might disagree with me. Basically, the dispute here was whether the District Court's dismissal in this case was a final appealable order, even though it was without prejudice. The dissent thought it was not a final order. Now the question or the precedent on this question is, it is unfortunately a bit murky, but I think the important thing is that everyone agrees that the touchstone here is what did the District Court intend when it was dismissing this case? Did it really intend to end the case?

So, I think the solution here is for district courts to be more careful and clear when entering dismissals under 12(b)(6). It's unfortunate when they're not, and it can make things difficult for litigants but I don't see that as, as the most difficult issue in this case, but maybe, maybe Anthony disagrees with me.

ANTHONY [25:45]: Well, before we get to my boring comments on that, Kirby, what do you, what do you have to say?

KIRBY: You know, I think the issue with the Fourth Amendment question is the most interesting to me in this case, the open-fields doctrine that I'm familiar with is about this privacy interests that you have in your land. And so, well, I don't know that I always agree with the outcomes on the open fields, especially, you know, listeners should check out our Tennessee open-fields case or an issue, a situation that really pushes the boundaries on the open-fields doctrine. But the privacy interest at least makes sense to me. You know, you have this area that's not right by your home and people can kind of see it or easily observe you, your, your privacy interests might be lessened. But to transfer that to your possessory interest in your property, and that's a distinction, the parties made in this case, is just to me, it seems bonkers. Like you to, to say, you know, the, the Fourth Amendment protects not just against searches, but against seizures and that rationale of this is kind of open, everybody can see it. I just don't see how that really transfers when you're talking about your right to actually have your property, but I don't know, Anthony, as our resident historian, maybe you can educate me. Is this consistent with the history of the Fourth Amendment?

ANTHONY: Well, I think that this whole Fourth Amendment claim, it's fascinating, but it's a little bit of a, a round peg in a square hole because first of all the, the, yeah, the Fourth Amendment, the open fields doctrine doesn't have a lot of historical basis. It was basically made up by Oliver Wendell Holmes and a case in the early 1920s of prohibition case. And then it was latched on years later by the, the Rehnquist

court. But it does have a bit of a basis in the text of the Fourth Amendment, which enumerates certain things, I always forget exactly what they are, but houses, papers, effects, effects being the broadest word. But the, the court has said, and Justice Scalia in, in more recent years said that, you know, just general land your, your possessions are not enumerated, their effects means a little narrower than that. And so, yeah, there's some textual basis for the open-fields doctrine. But in that way it really is just, you know, fields, and so it gets thrown, you know, you get, you get things like, well, what does an outbuilding, that's not a home. Is that an open field? Courts generally have said no, but like, do you have curtilage around outbuildings or is it just an open field?

But more to, more to this case it seems to me, sure, you can make a Fourth Amendment claim about seizing land, which is weird to have with an open-fields argument, but couldn't the DHS just gone and got a warrant build this wall. I mean, this is all about the Fourth, you know, the thing about the Fourth Amendment is most of these cases about warrantless searches or seizures. I mean, they could get a rubber-stamped warrant to say, look, you know, we were building this wall and, you know, as long as there's legal authority behind it, give us a warrant to go. You know, I mean, when you have a road bill, the government doesn't go and get a warrant to build the road over someone's private land, they do a condemnation which I'm sure that eventually was going to happen in this case or in this whole matter. So, I really don't understand what the Fourth Amendment claim would even do. It's, it's, it's clever. And I think there's a lot of argument, a good argument to it, but yeah, I, I don't quite get what it is doing here as sympathetic as I, as I am about it.

KIRBY: Yeah. I think it gets back to Jeff's point about the strategic avoidance of the Fifth Amendment Takings Claim. And so, they, you know, it really was serves as just an alternative to that here.

ANTHONY [29:39]: Yeah, and I don't want to rain on the Fourth Amendment parade here cause I do appreciate what the lawyers were doing, but it still does seem a little odd. I would like to address the, this question about when a case is over, which is a very mundane issue, of course. But it's something that when I was in, in private practice and did a lot of rinky-dink little cases in federal court, we would often worry about, you know, do you have leave. So, what happened in this case is that the party, the plaintiff had leave to amend the complaint, or they were allowed to file an amended complaint. But you know, is, is the case really over when you have that leave and is the court sitting there waiting for you to file the amended complaint? If you don't mend the complaint, is the court going to say, hey, let's have a status conference what's going on here? Or is that just mean the case over? And it seemed like this was much more the latter category. I agree with Jeff that I think the court expected the case to be over. But sometimes you do. I have a lot of ambiguity with the district judge does and, and you feel for him because they have this huge docket and they're trying to get rid of cases. And this was what, it was like a two sentence, minute order or something like that but you know, we do, we do want the judges to, to be careful when they actually dismissing a case. I think this is a good reminder of that.

JEFF: Yeah. I was surprised that they don't, the cases on this issue, don't talk more about the basis for the dismissal, because it seems to me like the clear dividing line in practice is, was, was this dismissed on purely legal grounds or was it sufficiency of the allegations?

Because if, if it's a situation where yeah, you might have a claim, but you need to give us some more facts about X, then clearly see there's the potential for an amended complaint that beefs things up, but

when there's no dispute at all about what happened, everything's there in the complaint, and the court is just saying that, you know, on the law, there's no violation here. It, it's basically pointless to give people the opportunity to amend.

ANTHONY: Well this has proved to be a confusing case and I want to thank Jeff and Kirby for trying to, for tease some out of it. One last question for you, Jeff is, does this relate to the other wall cases that the Supreme Court just took a wall case the other day? I understand that might be different issues, so is there any relevance between these cases? Are they all just random stuff of that the federal government trying to build a wall?

JEFF: I actually don't see much of a connection between this and the recent cert grant in the other wall case. I suppose, yeah, the one connection is that any time there's a major government program that is highly controversial, there's going to be a whole lot of litigation.

ANTHONY: One thing I did see is that said nothing in this case about if Mexico was paying for it, but, you know, maybe that will be the, the next one to come out.

Well, thanks everyone for coming. This case is *North American Butterfly Association v. Wolf*. We'll put a link to, up to it on our website.

If you have been confused by this discussion today, and you, you enjoy being confused, then you're in luck because next week *Short Circuit* is going to try to end some of that confusion on recent rulings in election law and voting rights, what is going on with all these cases that are enjoining, and then the Supreme court lifting and then someone else enjoining, again, all these issues with COVID-19 and postmarks of ballots. And what have you, Diana Simpson, my colleague and I are going to try to sort some of that out in next week's episode, I'm sure will largely fail, but it will be, it should be a fun time to try and do so.

I, and in, in the meantime, I want all of you to get engaged.