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Anthony Sanders 00:03
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. If you enjoy this podcast, you should check out our newsletter, an often irreverent take on recent court of appeals opinions, which we publish every Friday, you can subscribe at shortcircuit.org or find it on the Volokh conspiracy blog. And please also check out our sister podcast, the documentary series Bound by Oath. We're recording this Thursday, June 3, 2021. And we're asking the academic question, Conjunction Junction, what's your function? As I learned in my law school legislation class with Professor Jim Chen, who asked that question several times in class exactly as I just put it, that Schoolhouse Rock catchphrase can teach us a lot about statutory interpretation. And that certainly is true with a couple cases we will discuss today. Specifically, does and that's “a n d.” Mean, and, or does and mean “or”? The trouble is the English language can go either way, in two cases that are sure to increase sales of the famous legal writing handbook by Bryan Garner and the late Justice Scalia, because each opinion relies on it for the opposite conclusion. The 11th Circuit and the Ninth Circuit recently had dueling opinions only three days apart on the meaning of that commonplace three letter conjunction “A N D.” In a moment, my colleague Wesley Hottot, will explain all you'll ever want to know about conjunctions and canons of construction. Wesley, welcome once again to Short Circuit.

Wesley Hottot 01:50
Thanks, Anthony.

Anthony Sanders 01:52
First, I'm going to welcome Alexa. Canons of construction or not the only annoying intrusion into our personal space that we're going to look at this week. How about an unsolicited text message? Not from your mom, the federal courts can't do anything about that. But what if it's a restaurant you happen to have ordered from in the past? Does that one little text message really rise to the level of a constitutional injury? Is it akin to a public nuisance like a malarial pond or a brothel? Well, last week, the Fifth Circuit said yes, it is like those two things. IJ’s Alexa Gervasi is going to tell us all about that opinion, with no article three injuries along the way. Alexa, thanks for coming on Short Circuit.

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Alexa Gervasi 02:41
Thanks for having me.

Anthony Sanders 02:43
And now Wesley, let's hear from you on both of these cases, United States v. Garcon and United States v. Lopez, and, and maybe or,

Wesley Hottot 02:54
Yeah, sorry to have jumped the gun there. The Garcon case involved a man, Julian Garcon, who pleaded guilty to attempting to possess some 500 grams of cocaine with intent to distribute them. His lawyers invoked a provision of the so called “First Step Act”, listeners may remember this from the Trump administration. It was one of the great Jared Kushner initiatives that actually passed through Congress and the First Step Act attempts to carve out certain offenders from the mandatory minimum structure of the sentencing guidelines. It requires offenders to affirmatively prove five conditions, one of which is then subdivided into three sub conditions. So, it relevant part it says that the defendant does not have: A, more than four criminal history points, B: a prior three point offense, and C: a prior two point violent offense. And Garcon’s lawyers said well, he's got a prior three point offense, but he does not also have more than four criminal history points or a prior two point offense. So therefore, he qualifies for the First Step Act’s safety valve and can't be sentenced to a minimum sentence. The District Court agreed, while saying that it believed its construction led to an absurd result. The 11th Circuit's opinion doesn't really explain what that absurd result would be, because it says that the statute unambiguously, when it says “and” means “or” that “and” is used in the conjunctive because according to the 11th Circuit panel, it would not make sense for a person with to have subsection B's three point offense and subsection C, two point offense, that would add up to five points. And it would make subsection A more than four-point criminal history, surpluses. This is the idea of statutory and statutory construction that everything in the statute should have an effect. And that if your reading of the statute results in some part of the statute not having effect then that reading should be disfavored. So, as you mentioned in the intro, the 11th Circuit goes through these canons of statutory construction, it relies heavily on Scalia and Garner's treatise on reading law. And it reaches the conclusion that “and” means “or”, and that, in fact, Garcon should have been subject to the mandatory minimums in the sentencing guidelines. What makes this so interesting is that just three days later, the Ninth Circuit reaches the opposite conclusion, relying on the same canons of construction, and relying on the same Scalia and Garner treatise. For the Ninth, the language is also an ambiguous, but it goes into a bit more detail, the

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11th's opinion is just 12 pages long, the nine says 35. And lays out the ways in which it actually works, you know, the statute uses "and" twice, I said before, there are these five conditions, one of which is broken into three sub conditions. Well, between the fourth and the fifth condition, Congress uses the word "and", the criminal defendant has to prove all five of those things. And so there, the government concedes that "and" is used conjunctively, meaning that all of those conditions have to be met. But then they want to read "and" as "or" in the subsection that has sub conditions, right. So, it's meaning two different things in one statute, according to the government is offensive to another statutory construction cannon, that word should mean the same thing. And the Ninth emphasizes that that's particularly true, where the word is used in the same statutory sentence as it is here. So the Ninth Circuit points out that, you know, it, apparently they weren't aware of the 11th Circuit panel decision three days earlier, because they don't address it. But they get at the same points that the 11th Circuit is making, by pointing out that, you know, you can, you don't add up B and C to get to five, and that makes A superfluous, as the 11th Circuit said, because the person could have a prior three point offense, which would be, you know, a serious offense of some sort, spending, I think it's like 13 months in prison. You could have a prior three-point offense and not have a prior two-point violent offense. And that would mean that there are people out there who would have a prior three-point offence, but not the total, four points, criminal history that is that you cannot have under subsection A. Now, all of this probably sounds tortured to our listeners. And it is, I mean, statutory language is often tortured. There are several reasons for that. I mean, we might be inclined just to slag on Congress for sort of doing sloppy work. But, you know, one thing that I've always found persuasive is the idea that there's functional ambiguity in statutes, the people that are voting for and against them, you know, they want to, they all want to see something for themselves. And if you can use language in a way that makes it vague, you're more likely to get consensus, and therefore, it stands to reason that statutory language is more likely to become law when it is vague. And you have what's grown up around. The reality that statutes are often confusing, is the suppose its system of canons of construction that are supposed to guide us to the correct resolution. And yet, we see in all kinds of contexts starkly illustrated here, that judges can reach diametrically opposed conclusions applying the same canons. So what use are they? Right? And I mean, I think they are, they are helpful in the sense that they focus courts on what their role is, you know, understanding the language not imposing a policy preference. But I think what these two cases really illustrate is how malleable they are. Not only is the language malleable, not only does Congress often, I think, intentionally write statutes in a vague way. But judges also have a great degree of flexibility despite all of the protestations about how they're neutral umpires, who merely seek to apply the unambiguous text of a statute, that they very much bring something to bear in in reading these statutes. That's something that came up in both opinions that I think is very relevant here is the rule of

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lenity. The idea that when interpreting a criminal statute, the tie goes to the defendant, if you can't really tell what the language means you should read the statute leniently, so that the defendant has a leg up over the government and when dealing with an ambiguous statute. Now, the 11th Circuit points out correctly that the rule of lenity is only for unambiguous statutes. I'm sorry for ambiguous statutes, just the opposite, that you would only apply it where the statutes played meaning is debatable. But according to them, the statutes meaning is not debatable. That's kind of belied by the fact that a panel of the Ninth Circuit three days later, reaches the opposite conclusion. So, you know, I don't know where that leaves us with only the supreme court could resolve the split at this point. And on the one hand, they're often interested in these narrow issues of statutory construction. On the other hand, you know, it might be something that they've used Congress's problem,

Anthony Sanders 12:13
Alexa, whose problem do you think it is,

Alexa Gervasi 12:16
You know, think it's all of our problems, because we're the ones who have to read about it. And, you know, I read both opinions. And I went back and forth, and I even went out and got my, not purchased, I pulled off my desk, my copy of reading law, and started going

Anthony Sanders 12:32
That’s the Garner in Scalia treatise?

Alexa Gervasi 12:34
That's right. Yes, the book that both cases referenced, for what rule should apply when? And, you know, I think, there at some point, when you're writing these opinions, and you know, someone's going to dissent, and say, I disagree with your interpretation, that, you know, the idea that some red flags might go up that maybe this isn't unambiguous, if, if my colleague, who sometimes it joins me, so I'm going, in my opinion, so I'm going to assume he is a reasonable mine is coming to the opposite conclusion, maybe we should pause and assess the ambiguity. But I think, you know, we're, we're drawn to, as lawyers, we're drawn to the statutes, or the canons of construction, because they're like, our math problems, right? They're, give us these rules. And, and it's almost, it's almost like a math problem trying to work backwards to figure out what “and” means when it comes after this comma. And it's like this attempt to find something concrete. But unfortunately, the cannons themselves are so

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ambiguous, and you can always find a rule that's going to fit the conclusion you're leaning toward. And I think we see that here.

Anthony Sanders 13:56

Yeah, it seems like judges are afraid to just call a statute ambiguous, and then apply that then, of course, at that point, you apply whatever tools you're already applying to the statute. But there, I think there's this fear that if you call it ambiguous, then you open the doors to things like legislative history, or the spirit or the purpose. And then of course, that you know, there's worries if you're a more textualist judge, you'll get up to all kinds of Hanky Panky, if you can start bringing that stuff in kind of like with contractual interpretation, right? We learned in law school, you stay within the four corners until you get real ambiguity, and then you can bring in, you know, negotiating history or what have you. This all raised I've learned my co-panelists about this today, but this all raised, in my mind a really interesting article from a couple years by Minnesota Supreme Court Justice Paul Thissen, who's currently on the court, and he wrote an article essentially critiquing our modern textualist. You know textualist paradigm that that we're in, in how most judges now are more of the School of Textualism than they were, say 30, 40 years ago where they very much were not. And so, as a pushback against that, but and so you can make it that what you will, and we'll put a link up in the show notes to Justice Thissen article, but the really interesting thing to me, in the article is they did a survey, it was actually high schooler, although the high schooler did it with help from someone else, of Minnesota state legislators. Now the response rate wasn't great. It was like 15%. But still, that's a fair number of legislators. And they asked them, you know, when you're reading a bill, and you're voting on it, do you use, say canons of construction, and they specifically asked about a few and one that that really struck me because the 11th Circuit put so much weight on the rule against surplusage that you need to have rule that you need to have at all the text means something in a statute, you said, assume every word means something different than other words? Most of the legislators said no, we don't rely on that. Like we have all kinds of repetitive text in our statutes, so that it'll get the job done, essentially. So, I don't know how much weight you put on that, of course, we're not reading legislators minds, we're supposed to read the text as the ordinary citizen would read it, because that's what the law actually is. But we're also, our judges are when they're interpreting statutes are trying to get it what you know, Congress is trying to do here. And if congressmen or legislators aren't even thinking about the rule against surplusage, then why are we using them? I mean, I don't want to sound like nihilistic here. But I think that the weight that is taken on these, on these canons of construction, as Wesley was saying, definitely can go overboard.

Wesley Hottot 17:06

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Yeah, or the doctrine that we presume legislators know, all of constitutional law and attempt to conform their laws to, to the Constitution. I mean, that's, that's like ostrich head in the sand kind of thinking. The other thing I wonder about these two cases is, you know, who, who anointed Bryan Garner. And for that matter, Justice Scalia, as you know, the arbiters of language. Language is inherently confusing, and it changes over time, depending on the speaker, the context, intent, and the reader. And the, as Alexa was saying, I mean, it's just silly, the extent to which courts try to reduce this to a game of logic that can, can be made into equations. It's not that simple. Now, I mean, you're afraid of sounding nihilistic, I'm afraid of sounding pollyannish. Because I think that the role of a judge is to work justice. And when you see a statute that tells you to do something, you should ask yourself, like, well, what does it allow me to do? And if one of the things that allows you to do is just and the other thing is unjust, then you should do the just thing? That's, I think, why we had courts to begin with in the Anglo-American system?

Anthony Sanders 18:41
Well, I think that's exactly right. And another thing we had courts to do in the Anglo-American system is to judge public nuisances. And so that's what we're going to turn to now with Alexa and the Fifth Circuit Cranor v. Five Star Nutrition. So, Alexa, is a text message a public nuisance in your mind?

Alexa Gervasi 19:04
Oh, yeah. So many public nuisances that I have received in my life, that’s probably coming in right now. But yeah, so this case is Cranor v. Five-Star Nutrition. And in this case, a gentleman named Lucas Cranor, he made a trip down to Austin, Texas, and visited a company called Five Star Nutrition, which I should note that according to its Google reviews would more aptly be named 4.9 Star Nutrition, but who's counting? So, Lucas gets to the checkout and in a rookie move, gifts Five Star Nutrition, his cell phone number. Later that month, Five Star starts sending him some marketing, unsolicited marketing text messages. Lucas after receiving the second one, sends the very famous “stop” message. And then he sues them. And the parties they go, and they settle. Five Star Nutrition says, “Listen, we won't text you again, you won't sue us, and we'll pay you $1,000.” And it should all be done right? And for

Anthony Sanders 20:09
Sorry, but for our listeners benefit, how is he able to sue them? I barely knew about this, this law before the law at least,

Alexa Gervasi 20:17

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It's Under the Telephone Consumer Protection Act, but I'll get into the nuances there in just a just a second, because after he sues them and they settle, you would think that it's all done. But then Five Star sends him another text message, even after they've reached a settlement. And again, Lucas sends a “stop” message. But in this time, he goes back to the courts, and he files a class action. And this is to your point, Anthony. He files it Under the Telephone Consumer Protection Act. And the TCPA basically, it says you can't use the telephone lines for unsolicited marketing. And it gives individuals a cause of action, meaning that they can sue the violating business for breaking this law. So, that is the statute that Lucas relies on to haul Five Star into court. But the district court dismissed his case. And the district court said that he didn't have standing. Basically, the court said that while text messages can amount to a violation of the TCPA, receiving a single text message doesn't actually harm you. And if you haven't been harmed, you can't sue. So, this case now goes up to the Fifth Circuit, for them to decide does he have standing. And in an opinion, that's about as long as a text message, Judge Oldham, he says, hold the phone, let's actually look at what it means to be injured. And to do that, he looks both at Congress's stated intent, what's actually written in the TCPA, not, we're not going to like the floor debates or anything like that, actually, what is written in the TCPA, about what Congress is trying to do. And also, let's look at history. And what did an injury mean, at common law to find out if he was harmed enough for him to have a lawsuit here? So first, he looks, we look at why Congress passed the TCPA. And explicitly, Congress was saying, “Listen, we want to prevent the nuisance of getting these types of marketing communications. And we want to prevent the invasion into privacy that these unsolicited communications costs. And you know, while a single text message may not be a huge invasion, it's an invasion. And it's a nuisance.” And, then the court turns to the history, and it notes that at common law, a person experienced a harm, and they could sue if they were subjected to a public nuisance. And you know, what’s a public nuisance, basically, any interference with your ability to just live your life. So, are you subjected to a bad odor, public nuisance. Are you forced to hear loud noises, public nuisance, and here, Lucas just wants to use our nation's telecommunications infrastructure, quote, unquote, “without harassment,” but Five Star Nutrition has gotten his way. And specifically, the court says, Lucas had to read these stupid text messages that took time, he had to take the time to reply “stop.” And those text messages depleted the battery life on his cell phone. So basically, the harms are just endless for what Lucas suffered here. And so, you know, the Fifth Circuit holds, yes, he has standing, and his class action can continue. But the Fifth doesn't stop there. It goes on to note that the 11th Circuit, in 2019, reached the opposite result in a similar case. And the Fifth Circuit says why the 11th Circuit was wrong. And specifically, the 11th Circuit had said, you know, the TCPA doesn't, it doesn't really cover up cell phones. And the Fifth Circuit says, wrong. And the court goes on to note that the 11th Circuit didn't get into this issue of public nuisance. And instead, the 11th Circuit was

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focused on the tort of trespass, as we understand that today and the requirement that you have an actual harm, but that we're not interested in what modern port law is, we have to look at 18th century common law and an 18th century common law you couldn't be subjected to a bad odors, you couldn't be subjected to sounds you didn't want to hear, as Anthony, you mentioned at the start, brothels were a public nuisance. And that's, that is what we're talking about. And you know what getting a text message you don't want that as a public nuisance, and you're harmed, and you deserve some redress. And so, you know, my final point is, I need to know how I start one of these class actions, because I am tired of my phone being spammed.

Anthony Sanders 25:12
Well, we were going to write some injustices here. Wesley, do you feel the same way when you get an unsolicited text message?

Wesley Hottot 25:20
Yeah, I get a lot of unsolicited duck pics, as you know, from my birding life, and those can be annoying. You know, I think like a lot of Americans, I've been getting calls about my warranty expiring for years now.

Anthony Sanders 25:40
it's amazing how many warranties I've had.

Wesley Hottot 25:42
Yeah, and I wonder, you know, didn't we pass a bunch of laws that were supposed to prevent this type of stuff? And it seems to happen anyways. Alexa, do you have a sense for kind of like what the overall landscape is about the privacy of other person's cell phone? Is it just this statute or are there others like the National Do Not Call Registry and the like? And how can Congress do something to protect us from overseas scammers that nevertheless seem to get my number?

Alexa Gervasi 26:15
Yeah, I, you know, I won't claim to be an expert. But I, you know, I do believe especially in this world where we only have our cell phones, right? Like, if you have a landline, you're making bad life choices, because you're just asking for telemarketers to call you. And so, you know, they have to, they have to

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reach cell phones. And the as the Fifth Circuit was saying, the point here is to stop these nuisances and stop people from invading into your daily life. And whether that's your cell phone, or that's your landline. And whether it's in the form of a text message, or heaven forbid a voicemail, it's an invasion.

Anthony Sanders 26:55

Spoken like a true millennial. I'm not listening to a voicemail. I believe the TCPA, the interesting issue here that I think the Supreme Court would be more likely to address is the 11th Circuit address whether the TCPA, which was passed in 1991 applies to text messages, because it definitely applies to cell phones, because it states cell phones, but you know, in 1991, I think text messages maybe kind of were around back then, maybe they weren't. So, whether it leaps to the level of a text message is, you know, is an argument that that we could have, I think probably the Fifth Circuit has it right here that it does. What I found interesting in this discussion, which by the way, in the equity font that we've just talked about in the podcast before, the Fifth Circuit uses these various treatises that are in small caps looked absolutely beautiful processor and you know, the restatement. Um, so I encourage everyone to click the link on our show notes just for that alone. But the discussion of public nuisances is interesting. And I think Judge Oldham in discussing it is correct, how he presents public nuisances. But there's one thing that I found missing that I know a bit about in my work in eminent domain cases is that there is a distinction under the common law between public nuisances and private nuisances. So, a public nuisance is something like about malarial pond, or even something like a house of ill repute, which gives off either impedes the public right of way or public space, or makes a nuisance towards, say, the public as a whole. Whereas a private nuisance is like a trespass upon one person. And a text message. I mean, if you blast a text message out to all of your former customers, I guess that could be a public nuisance, but if it's text messages to one person, it seems like a private nuisance to me. Now, it definitely could be a trespass. And so, I think there's Article Three, you know, under the Constitution injury here, but I thought it was a little odd how we went into this public nuisance way, you know, as much as I'd like, the history there, and it's interesting, and as much as I like small caps and equity font, I think it was a little bit of an odd detour that, you know, we perhaps didn't have to go there. Because one danger about making public nuisances, any kind of harm like a text message is a lot of a lot of nuisance law. And in laws that are allied with nuisance law such as eminent domain, right, when is something, when is a neighborhood dilapidated enough that you can use eminent domain under a statute or when can you abate a, quote, "nuisance" and tell someone they have to move out of their house, or they have to pay fines or whatever that can. That's often an a, quote, public nuisance. And so, if a public nuisance can be something as much as sending a text message, does that mean, you know, your neighborhood is blighted because you're sending out too many text messages? That's a bit that's a bit extreme there.

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But I worry about the expansion of the of the idea of public nuisance. And of course, Judge Oldham doesn't equate the two, but one builds on the other.

Wesley Hottot 30:38
Yeah, I mean, we have in my neighborhood in Seattle, we have two pot shops that face each other. And there's always, you know, something of a stoner element hanging out in front of them. And there's the ubiquitous kind of smell of marijuana in the neighborhood. And I've often wondered, like, what, what's the future of that? You know, is there is there going to be some sort of action for public nuisance, given that that's not strictly in compliance with the state's recreational marijuana laws? They do such interesting things as when there are too many people around, they start blasting classical music. So, they'll move along. Does it work? It works? Yeah.

Anthony Sanders 31:23
See, they're one nuisance combat in another. And it all works out through private action.

Wesley Hottot 31:30
I got to tell you what, I think we'll be citing this in all of their cases where our standing is challenged, I'm now going to be relying on this and saying if one text message can be an injury then certainly being prohibited from pursuing your occupation as an injury.

Anthony Sanders 31:45
That's absolutely the underlying thing to take away from this is how little you must have to have standing despite what a lot of judges often say and in public interest cases. Well, thank you both to Wesley and to Alexa for coming on Short Circuit once again to discuss the heavy issues of the day, the words “and” and private text messages. In the future we will be talking about less weighty words, but for now, I would ask all of you to get engaged.

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