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SPEAKERS

Joe Gay, Robert McNamara, Anthony Sanders

 00:00

A Anthony Sanders 00:01

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. We're recording this on Thursday, February 17, 2022. Which means this is the first episode since the Super Bowl. And if you watched the game's halftime show, you'll remember that it thematically kept things close to the stadium with some 90s West Coast rap, even though some of them rappers like 50 cent were from elsewhere. Now, we're not going to get into the debate on whether West Coast rap nostalgia is a millennial or a Gen X thing. But we are going to keep things west coast with an immersion in the music of the Ninth Circuit. Now, there's been a lot going on in the Ninth Circuit recently, especially gossip on how the judges are sniping at each other. But we're not going to get into that either. We're going to focus on a couple more standard hits. If you package them in an album, Straight Out of the Ninth might be the title. Now I and I'm guessing probably our guests would come out against the government's position in each of these cases if we were on the court. But I still think it's pretty funny and very much straight out of the Ninth that in one case, the court said it was unconstitutional to forbid people from advocating to break the law through outright fraud. While in the other, the court said it was completely constitutional to force people to pay 1000s of dollars to move back into their own home. Joining me today for a review of these Ninth Circuit numbers are first MC Bobby Mac, aka Bob McNamara, senior attorney at IJ. Welcome, Bob.

R Robert McNamara 01:55
Great to be back.

A Anthony Sanders 01:56

And also for his first time on Short Circuit, Funk Dr. Joe, aka Joe Gay, an attorney at IJ as well. Great to have you, Joe.

J Joe Gay 02:07

Thanks, Anthony. Excited to be here.

A Anthony Sanders 02:09

Well, Bob, please tell us about this, this poor man who now does not have a conviction on his record because of what the Ninth Circuit said. Although it sounds like he's got some other problems as well.

R Robert McNamara 02:22

He has some other difficulties. So we'll start off with United States v. Hansen, which gives us the tale of Helaman Hansen. Mr. Hansen ran a group called Americans Helping Americans Chamber of Commerce. Which the -- I can't tell if the court calls it Aha or if Hansen himself called it Aha. But I really hope that instead of Americans Helping Americans, he just told people he ran Aha. Which should have been a red flag, because what Aha did apparently was persuade people to give it money so that it could help them fix their immigration status through the process of adult adoption. They would arrange adults to adopt other adults, which would convey citizenship in the United States. Which in my expert legal opinion, does not work.

A Anthony Sanders 03:06

It sounds like some kind of 19th century novel or estate case more than immigration.

R Robert McNamara 03:12

I mean, it's I think the thing is, immigration law is so complicated, you can just kind of say any crazy nonsense, and people will give you money. Because it's like, that's not crazier than how immigration law actually works, I guess. But it's fraud, you cannot become a citizen through adult adoption. And Aha was not helping people become citizens through adult adoption. And that turns out to be a crime. It turns out to be a number of crimes, actually, one of which is that federal law makes it a crime to encourage people to come, enter, or reside in the United States illegally. And the question for the Ninth Circuit here is whether that's overbroad under the First Amendment, whether it sweeps in so much free speech that it has to be struck down on its face, no matter what Hansen himself did. And I like this case. I like this for a few reasons. One is that the Ninth Circuit already struck exactly this law down on exactly these grounds about four years ago in a case called US v. Sineneng-Smith. The Ninth Circuit had this statute before it, and the panel was like, whoa, this law seems insanely overbroad. Why has no one argued that this case is insanely overbroad? We insist that people argue right now that this case is insanely overbroad, and then they held that the law was insanely overbroad. And that case went up to the US Supreme Court and the Court said, This isn't how litigation works. You can't

just make up your own arguments and order the parties to address them. Unless those arguments help the government then you can do that. But when you're striking down a law, you can't strike down a law by making up your own arguments. And so that opinion got vacated. But now when when different charges come up, the parties say hey, you know who was very smart, that panel that struck down this law four years ago. You should do what they did. And that's what the panel does. They say it's overbroad. It sweeps in a lot of free speech, which I think honestly, it does. The fun thing about overbreadth arguments like this is it kind of flips the traditional role of the government and the defendant. Usually the defendant is saying, my conduct doesn't fit this statute. The statute is narrowly drawn, and I didn't commit a crime under it. And the government's trying to say, no, no, no, this statute reaches anything we want it to. But in overbreadth cases, the court says, Hmm, it seems like this statute gives the government a lot of power to punish people for free speech. And the government is in the position of saying no, no, no, no, this is a very narrow statute. This barely reaches anything at all. And what the government tries to say here is look, when we say it's illegal to encourage people to come, enter, or reside in the United States illegally, really what we mean is it's illegal to aid or abet a crime. And the problem with that argument is that there's a different provision of the statute that makes it illegal to aid or abet a crime. And a lot of the time staying in the United States illegally isn't a crime, it's a civil violation. And you can imagine a lot of situations where someone might encourage someone to stay in the United States illegally. If someone has overstayed their student visa, and is about to marry their college sweetheart. They're staying here illegally. That situation is going to resolve itself in a few months. But if that person goes to Canada, they're not going to be allowed to come back across the bridge because their visa expires. And so you can imagine someone in perfectly good faith saying, oh, man, don't go to Canada the day before your wedding. That's a terrible idea. And saying that's a felony, and that presents a problem for the government. And so the Ninth Circuit says, Look, this is overbroad, we have to throw out this conviction. And the difficulty is, which you only really see kind of in in the footnotes of the case, is that the counts that Hansen was charged under for encouraging people to come and reside in the United States illegally were counts 17 and 18 of his criminal indictment. Which means counts 1 through 16 still stand. So he he has this wonderful First Amendment victory on this cutting edge First Amendment issue, which eliminates one-ninth of the charges on which he was convicted. Which I think is often the case when you get criminal appeals. There are a lot of a lot of moral victories. But I think that's -- it's bad news for Mr. Hansen. But it's worth bearing in mind as we read these decisions. That I think it's very easy to say, oh, you know, I care about the First Amendment, but also this guy, you know, he seems to have committed a lot of fraud. It seems like he should be in jail. And I think that's natural discomfort. And it's part of why I think it's important to emphasize that when convictions like this get thrown out, it frequently is in situations like Mr. Hansen, where what the Ninth Circuit said is he can't be punished for that crime, and the government has to instead be restricted to punishing him for the many, many other crimes of which he was convicted. But it is the the interesting thing about overbreadth cases is the government's position is always like, look, the statute may seem broad. Congress may have, you know, not drafted this as narrowly as they could have. But you should trust us. What we really want to do is go after bad guys who are committing crimes. And the courts have generally said we don't trust prosecutors. And one reason we don't trust prosecutors is a case the Ninth Circuit actually points to in this opinion, where sure, you can say that mostly you want to prosecute people who are aiding abetting crimes, but in fact, the Department of Justice, only about 10 years ago, prosecuted a woman after the feds wired up her cleaning lady. They got her cleaning lady to be a cooperating witness. And the cleaning lady went and said, I'm an illegal alien, I'm thinking of leaving the country and coming back in. And the woman said, Oh, don't leave the country, they won't let you back in. And she was prosecuted for a felony for her advice to her cleaning lady. So the insight of overbreadth law, which seems true and sort of the lived experience of anyone who's

ever seen that the machinery of the criminal justice system up close, is that if you give prosecutors power, prosecutors use that power. And so if a law does authorize the punishment of an awful lot of protected speech, then that law kind of on its face has to be struck down. Otherwise, all of that protected speech is going to be at risk.

A Anthony Sanders 09:15

Joe, do you have the same take on this law's plainly legitimate sweep as they say?

J Joe Gay 09:21

Yeah, I mean, I agree with everything that Bob said. One thing that really struck me when I was going through the opinion is when the panel turn to trying to figure out what the word encourage meant -- when you're encouraging somebody to reside in the United States. And, you know, they turn to some some dictionaries and some prior case law. And their definition they settle on is that encourage means, among other things, to inspire with courage, spirit and hope. And I just sort of stopped reading, like, like, first of all, I'm not convinced that that was really maybe what Congress meant when it enacted this law. But I also just sort of chuckled to myself, because I think if you're a government lawyer, and you're defending a statute against the First Amendment overbreadth challenge, and the the definition that the panel settles on is inspiration with courage, spirit and hope. Like, I think you're just really starting in a hole, trying to defend a statute with that kind of broad reading. So,

R Robert McNamara 10:23

But it's felonious hope, Joe. That hope is a felony,

J Joe Gay 10:27

Exactly, you can, you can encourage with with courage or spirit, but if you add a hope in there, that's just a bridge too far for the government.

A Anthony Sanders 10:34

Bob, this, this is a bit beyond just this case. But I think this case, an example of it, I've never really been able to wrap my head around how the Supreme Court says, you're supposed to quantify the plainly legitimate sweep of the speech. Because you have a statute that says you can't do this kind of speech. And then you think, okay, what are examples of that speech? And of course, speech is infinite. I can have an infinite number of sentences that probably fit within that statute. So how are we supposed to think about like, you know, the denominator of that speech, so to speak? Is it anything imaginable? Is it probably what's typical? Do I need facts to show what typically is spoken? I mean, they don't really get into this here, they just say, Well, look, you could say this, this this, and that plainly, is is legitimate. And that's legitimate. And so that's enough. But is there a rule of thumb on how to go about that? Or is it just kind of firing blanks?

R

Robert McNamara 11:38

That is a great question. And you're right, the Supreme Court talks about overbreadth. And kind of this mathematical sense, where you figure out the the plainly legitimate sweep of the law. And then you compare against that the parts of the law that are overbroad. But I don't think in practice, courts really do that. They don't really bother quantifying the plainly legitimate sweep of the law. Most laws are going to have some plainly legitimate sweep. And in fact, overbreadth only comes up when there is a plainly legitimate sweep of the law. Otherwise, you would just say, oh, what you said is protected by the First Amendment, right? We can't prosecute you. You can't say that here. Because defrauding people of their money with this farce about adult adoption is not in fact, protected speech under the First Amendment. And so always you are going to have some plainly legitimate sweep. And my read of the case law is it really doesn't matter how broad that legitimate sweep is. What matters is how much of the rest of the law there is -- how much protected speech is it sweeping in. And it doesn't seem to be based on facts. Overbreadth cases don't deal in sort of how many people have actually been frightened by this law. Because the insight of overbreadth is really that if a reasonable person looks at this law that says you can't inspire hope, a reasonable person isn't going to go up to the Ninth Circuit in the hopes that they get count 17 and 18 thrown out. A reasonable person is just not going to say those things, right. And so overbreadth happens really on the face of the statute. And if the statute says a whole bunch of protected speech is a felony, courts are supposed to say you're not allowed to say that, Congress. Having that on the statute books is gonna scare a lot of people out of talking. And the solution to that is to write a law that reaches the plainly legitimate sweep. Write a law that's directed at fraud. Write a law that's directed at aiding and abetting. And part of the reason that like, frankly, I don't get that worked up about overbreadth being a risk to strike down too many laws is that just the way the criminal code is written is if the statute has a plainly legitimate sweep, it is almost a certainty that the plainly legitimate sweep of the statute is also covered by a different criminal statute that proscribes the same conduct. And so really, overbreadth doctrine is a way of cleaning up the margins of the Criminal Code, to make sure that people can have a certain sense of security that they can say these things, that they can speak freely, that they can, you know, encourage and inspire hope, should they feel the need to encourage and inspire hope, without worrying that they need to actually go and litigate in the federal court of appeals to see whether their speech was protected or not. When obviously, their speech would be protected if they bothered with the two years of frightening litigation under the threat of years of jail time.

A

Anthony Sanders 14:22

Well, perhaps that plainly legitimate speech is what this man was going for in naming his group Aha. Which of course is not a West Coast rapper but still would be protected by the First Amendment. So moving on, Joe, we're going to hear about a couple of lovely homeowners in Oakland, who apparently Oakland is not very happy to have reside there.

J

Joe Gay 14:51

Exactly. So this case is called Ballinger v. City of Oakland. And the plaintiffs are Lyndsey Ballinger and Sharon Ballinger, who are an Air Force couple who owned a home in Oakland and lived in that home until they were temporarily redeployed to the DC area. And so they they did

what I think most people would think to do, is natural, which is they rented their home out to a to some local software engineers, starting in 2016, with the plan that after their temporary deployment ended in a couple years that they would then move back into their home. And around this time, there were a couple of laws that were already in effect in Oakland that would impact their rental to the software engineers. Oakland had a what's called a Just Cause Eviction ordinance, which means as a general matter, you just you can't evict tenants unless you can show that you have that so called just cause. And the only exceptions where basically, if you're making repairs to bring your unit into code compliance, if you are withdrawing your unit from the rental market altogether, or if you're the owner, and you or relative want to move back in. And so at the time that the Ballingers leased their their home in 2016 around that same time, Oakland also amended that that regulation to say that, if you are ending your lease for the first two reasons, for code repairs or to take your unit off the market, then you also have to pay so called relocation fee to the tenants. And we'll talk a little bit about that in a moment. But those were sort of the facts on the ground at the time that they rented their home to the software engineers. And so their one year lease ends in 2017. And then it converts into a month to month lease. And so, so far, so good, everything's going to plan. And when their deployment ends, they can end their lease and move back into their home, with no no problems. But then in 2018, in early 2018, Oakland amends this rental ordinance again, and it says now you also have to pay a relocation fee, even if you're just moving back into your own home. And so that's sort of a big change. And I think the expectations the Ballingers had about how this rental was going to go. And so a couple months after that new ordinance goes into effect, the Ballingers deployment ends and they're returning to the Bay Area. And so they are then required to give their tenants this relocation fee, which in this instance, means they had to pay the software engineers a little over \$6,500. And when I saw that, I mean, that stuck out to me, because I thought, well, these are moving expenses, right? I mean, moving can be expensive, but but not that expensive. But it turns out that this relocation fee is actually a lot more than the cost to move homes. The city is actually basically estimating your upfront cost to rent a new unit too. And so because these leases often require things like security deposits, first month's rent, last month's rent, the relocation fee actually is intended to basically set somebody up with their deposit, pay their first month's rent, in some instances, also to pay their their last month's rent. That's how the amount is determined. But of course, you actually have to pay that amount no matter what the tenant is doing with that money. So if they are moving in with one of their own relatives or with a significant other, and if they don't have any relocation fees at all, or any relocation expenses at all, the landlord who wants to move back into their house still has to pay this exorbitant fee. And so anyway, so the Ballingers pay this fee to their to their tenants, the tenants move out and the Ballingers move in. And then they they bring a lawsuit against the city of Oakland in federal court, basically alleging that that forcing them to pay this relocation fee as a condition of moving back into their house violates their their constitutional rights. And so they bring a couple of claims. The main claim that they bring is a takings claim under the Fifth Amendment, which of course applies to Oakland through the 14th Amendment. And so their claim basically is that the Takings Clause prohibits taking private public for public use without just compensation. And so the threshold issue then becomes Well, was there even a taking? And and as you know, there's often two types, at a broad level, there's often two types of takings, you have a regulatory taking versus a physical taking. And regulatory takings are basically, often are just restrictions on how you use property. And whether there's a taking is this sort of fuzzy ad hoc, multi part test. And basically, if you're a plaintiff, you never want to be in the world of regulatory takings. Because it's just not a pleasant place to be litigating a constitutional claim. Or you can have a physical taking, and you can say that my property has been physically invaded or occupied. And that would basically always be a taking. And then you're in the world of asking, Well, was it taking for a public purpose, was I justly compensated, and so forth. And so you can imagine as a plaintiff,

you would much rather be in the world of physical takings. And so that's what the Ballingers do here. They basically say that, requiring them to pay this relocation fee was a physical taking, because it basically took away all of their right to possess and use this money that they were required to give to the software engineers. And moreover, it related to their exercise, their ability to move in to their to their own home. And the panel, the Ninth Circuit panel basically just rejects this, this argument. It draws an analogy to basically other cases that have upheld rent, things like rent control, against takings challenges. And it basically says, you know, this, this just looks to us like you're regulating the the landlord-tenant relationship. And so we're just not even going to get into the world of viewing this as a physical taking. Because this just looks like a lot of the other things that we've that we've already upheld. The court then kind of takes a little detour into whether you can even have a taking claim based on taking somebody's money. There was a previous Supreme Court case that had suggested that doing something like that would be unconstitutional. But the court splintered on why it would be unconstitutional, basically, with four justices saying that it would be a taking. Justice Kennedy by himself saying it was unconstitutional for due process reasons. And anyways, because those judges couldn't agree on why it's unconstitutional and because those holdings were not -- one was not really a subset of the other -- lower courts basically say, it doesn't really mean anything at all. And that kind of doing this kind of thing is, is perfectly fine. And so basically, applying that rule, the Ninth Circuit says, for the most part, taking money is not a taking, unless you're really taking like a specific pile of money. Like if somebody has a bag of money, and you take it, that can be a taking. But if you just require somebody to pay a fee or something like that, you're not in the world of takings at all. So so that kind of does away with with that aspect of their takings claim. But they also then say, well, this is also an unconstitutional condition or an exaction. And their theory here basically, is that the Supreme Court has said that you can't condition somebody's use of their property on them by agreeing to give up something in return, unless there's a nexus and a rough proportionality between what you're asking that person to give up and the harm that you're trying to remedy. And so the Ballingers here, they argue that that requiring them to pay this hefty fee in order to exercise their right to live in their home is just such an exaction. And one bright spot here is that the Ninth Circuit used to say basically, that this doctrine only even really applied if these exemptions are basically being applied administratively. So if it's like a planning commission that's imposing this, this condition on you, then it's subject to the doctrine. But if it's just a municipal regulation, then really you don't have any hope for relief at all because the doctrine just doesn't apply at all. But after some guidance on that matter from the Supreme Court, the Ninth Circuit does at least say that, you know, if you exaction is legislatively determined, as opposed to administratively determined, this doctrine does still apply. But unfortunately, where the Ninth Circuit gives you something, it can also take something else away. And what it does here is it says, well, it doesn't matter who does the exaction. But we're going to define exaction in a really narrow way. And basically, it's only really going to apply if the government is offering to give you a benefit, like a permit, license or registration. And here, they're not offering a permit. They're just offering you permission to move back into your home. And so that's just not something that this exaction doctrine applies to. And so the challengers are out of luck there.

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Anthony Sanders 25:46

It's even worse, so it's not an exaction.

J

Joe Gay 25:50

Yeah, and then as a as a final twist of the knife, they also say, also, the thing that government is exacting from you has to be subject to a taking. And because this is just money, again, it's also not taking for that reason at all,. Which is which is a little bit humorous, because they cite a Supreme Court case called Koontz, in support of that, that literally involved the government exacting money as a condition of giving a land use permit. So the Supreme Court has literally held that that money can be something that can be subject to the exactions doctrine. And then finally, I'll just briefly mention the Ballingers also then had a Fourth Amendment claim. The Fourth Amendment, of course, protects your effects, your things from unreasonable searches and seizures, with with the emphasis here being on seizures. Their theory being basically that requiring them to give money to their tenants in order to move back into their home was a seizure within the Fourth Amendment. And again, they want to be here because once it's a seizure, then you're really in a situation where you're looking at whether that seizure is reasonable or unreasonable. And they think maybe they have a better fighting shot of victory here, if they're arguing over over those things. So I mean, that was, that was an interesting theory. And I don't think I've personally ever seen a regulation like this attacked on Fourth Amendment grounds. But ultimately, the Ninth Circuit rejects this, because it just says, you know, in this case, the the software engineers that that have the money are not state actors. And we just don't see enough involvement with the state here with what the engineers are doing to to really quantify this as a state action. So sort of the quintessential example that that the Ballingers cited was a tow towing company that's working with the police, to tow vehicles is sort of intertwined enough for that to be to be state action. But the Ninth Circuit just didn't see that kind of situation here. So it rejected those claims, as well.

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Anthony Sanders 28:05

So Bob, is this a taking?

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Robert McNamara 28:07

You know, I love this case? Because that's, that's such an interesting question. And it's so fun to watch the panel struggle with just the label game that you have to play in takings law sometimes. Because the the plaintiffs' argument here is pretty intuitive, right? Like, I want to move into my house. The government says, I can't move into my house, because there's another dude living there. And I have to allow that dude to continue living there. That feels like a taking. It feels like my house has been taken for me because I can't live in it, because this other dude has to live in there. And so it's been taken. And the panel really has to kind of struggle to get around that like, Okay, this, this isn't a taking, the government hasn't taken your house and given it to this other dude. It just says if you want to live in your house, you have to pay a fee. And you say, Ah, okay, I need to pay a fee to use my property. Usually, the fees I have to pay to use my property are governed by the exactions doctrine. And then I say, Ah, but this this isn't an exaction. This doesn't quite qualify as an exaction because we're talking about money. And the Ninth Circuit has always had this kind of hang up on how exactions apply when you're talking about money. Which there's a pre-Koontz opinion from Judge O'Scannlain that points out that the doctrine has to apply to money, because otherwise you couldn't have an exactions doctrine at all. The government would just say, Okay, we're demanding that you give us the fair market value of your land in cash, and then we're using that cash to compensate you when we take your property through eminent domain. Hahaha. That's just always seem to me to be obviously, right. Like, of course, they can't do that. That

eliminates the doctrine. And so the Ninth Circuit tries to struggle to get around it's not quite an exaction. It's just it's a regulation of the terms of the contract. And what they come down to at the end is okay, this isn't a taking. This isn't an exaction. All this is is a wealth transfer. And that's the panel's term for what this regulation accomplishes. It's a wealth transfer. Which I think is a little more complicated than the panel really wants to admit here. Because there, there are a lot of laws that operate as as wealth transfers, obviously, you know, the tax system takes money from people who have more money and uses it to fund social programs and welfare programs. But generally speaking, wealth transfers are systemic, right. They're based on everyone who has this income pays this level of tax. They're not based on naked transfers of wealth from A to B, an order from the government that Anthony give Joe \$6,000. And that's because naked orders from the government that A transfer of wealth to B are taking from A to B, the classic thing that the courts have always said the government may not do. Which is, and whether you call that a taking or whether you call that as perhaps Justice Kennedy would a violation of due process, it seems at its core to get to the heart of a lot of what these constitutional prohibitions are getting at. And it's an interesting opinion, because essentially, what the Ninth Circuit is saying is what the government is doing here is at the heart of what all of these doctrines are trying to say the government cannot do. But none of these doctrines is specifically the heart. And so because we're sitting right at the heart of the prohibited thing, we're not in any of these narrower doctrines. And that must mean it's okay. And it's a wonderful little kind of class in the different categories of takings, and in the sometimes Herculean efforts that courts have to go through to avoid landing in one of the categories or another.

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Anthony Sanders 31:43

Well, and that heart of the doctrine is exactly what I mean, you, you were saying this yourself, exactly what the court has many times said, is why we have a takings law. Because if it's not a broadly based tax, if it's an extraction from one person to another, that's when we applied just compensation. Because we need to compensate that person. So if we take your home for Walmart, we will give you money for your home, because that's not the same thing as just a property tax. And this is, this is exactly that at least in my mind. But it's also really unusual and weird. And so they, they don't quite know what to do with it.

R

Robert McNamara 32:27

Right like kind of the instead of taking this law is if it's important that there be public support for these software engineers to move to a new home, that public support should kind of fall on the shoulders of all taxpayers equally. You shouldn't just be able to single out one person and say you're the one who has to pay these software engineers. But that's how this law operates. It's a wealth transfer from, you know, from owner to renter, but not in a way that necessarily is even a wealth transfer from wealthy to poor. It's not at all clear to me that sort of these, these two service members are wealthier than the software engineers who were renting their house. It just so happens that they happen to own that asset. The other people rent that asset, and the government has decided to transfer money from from one group to another. But it would not be at all surprising to find that the people who are paying the \$6,000 have, you know, on net fewer assets than the people who are receiving the \$6,000, which is why this is just not -- to the extent this is a wealth transfer program, it is A) a wealth transfer program that falls on the

shoulders of like specifically identified individuals who have to pay and B) just doesn't seem at all designed to transfer wealth from, from wealthy to poor. It's just transferring almost arbitrarily from one set of people to another.

J

Joe Gay 33:44

Yeah, and I would just add that the the court wants to characterize all of this as voluntary by the Ballingers. They chose to enter the rental market, and then they chose to move back into their house, which, which is, you know, I don't know if I buy that to begin with. But it also never wrestles with the fact that all this happened after they chose to rent out their home. So when they started this transaction, they had the right to move back into their home when their deployment ended. And then just before they moved back in, there was this sort of switcheroo, that divested them have that right to move back into their home without paying this hefty fee. And to me, that just sort of changes the complexion of this whole transaction. And the Ninth Circuit never addresses that at all in its opinion.

R

Robert McNamara 34:30

That's another thing you do see a lot in these takings cases is you will see, appellate courts say, Well, look, if you wanted to avoid the taking, you could have avoided it by not doing this thing. That's what the Ninth Circuit said in *Horne v. Department of Agriculture*, which was about the government's seizure of raisins. The Ninth Circuit held look, if you wanted to avoid the taking, you could just not grow raisins in the first place. So this is just a voluntary exchange. And the Supreme Court in that case said obviously not. You don't have to just avoid the activity to escape the taking. And it's similar reasoning here. Like, if you didn't want to have to pay a fee to reenter your home, you shouldn't have rented your home in the first place, because renting your home, I guess just subjects you to the vagaries of whatever taking Oakland wants to attach to that in the future.

A

Anthony Sanders 35:17

That also raises the labels game, which you've already talked about Bob on this case, because a couple other labels, one of one being that because of the change of the regulation that Joe points out, of claims that could have been brought in this case, and I'm not faulting at all that they weren't brought, because this panel was not going to uphold them. But that it seems like there could have been a Contracts Clause claim. Because the the contract, the lease, it's not in the lease, but you know, the rights you have as a lease holder of the as a lessee change during the course of the lease, and also that maybe you could make this in an Excessive Fines Clause claim. And I say that because one part of the ordinance is that if they hadn't paid these software engineers, if they had moved out and the Ballingers move back in, they could have sued them with triple damages and attorneys fees. So of course, the smart thing to do was to pay them, and then the sue the government. And I mean, I don't know, they have sued their own tenants to like, you know, have this happen before they moved out. So they wouldn't have this, this happen to them. So it could have been, you know, it could be argued that this is that's some kind of excessive fine. I don't know if they'd win if it's actually excessive or not, they probably wouldn't in the Ninth Circuit. But I could see it as a colorable claim here if we're not going to go down the takings route.

R

Robert McNamara 36:45

No, I mean, that's really the and you're right, this is not in any way a criticism of the lawyers. It's not like this panel was going to be turned around if only you'd brought a Contracts Clause claim. But in sort of an original understanding perspective, what's really going on here is the government has altered the terms of the contract. Because this isn't, you know, it's not like the the plaintiffs here signed a two year lease and regretted it. The way residential leases work is the leases for a term, when that term expires, it automatically becomes a month to month lease. So they have no way out of it without paying this fee. And that is sort of a term that was imposed on the contract after it was signed. It alters the obligations. It eliminates the obligation of the lease to end. And I think there's an argument, not an argument under current doctrine probably, but an argument from original understanding that really, this isn't a takings problem. This is what the Contracts Clause was designed to ameliorate. And when you eliminate the Contracts Clause, the question becomes like, Okay, well, how much can the government mess around with contractual obligations before it gives rise to these takings or due process problems or whatever you want to call?

A

Anthony Sanders 37:55

Yeah I mean, if this case came before say that the John Marshall Court, they would say this is a violation of the Contracts Clause. I think it fits in right, right in with with other Contracts Clause cases from that era, when it was it was much more of a thing.

R

Robert McNamara 38:14

Also the John Marshall Court would say, Why are you bringing me this case from outside the United States?

A

Anthony Sanders 38:20

Well, there's a few other reasons that they wouldn't go down the West Coast route at that time. So that that's a good point. But I'd like to thank both of my west coast rappers for coming on today. It's been a pleasure to have you.

R

Robert McNamara 38:35

Thanks for having me.

J

Joe Gay 38:36

Thank you. Well,



A Anthony Sanders 38:37

Well we'll look forward to talking about more cases next week. Maybe not quite so west coast at that time, but I'd like to, again, thank our our attorneys for coming on. And thank all of you for listening and ask you that in the future, everybody get engaged.