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SPEAKERS

Anthony Sanders, Evan Lisull, Ben Field

A **Anthony Sanders** 00:17

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, March 17, 2022. Which, of course, is St. Patrick's Day. So Happy St. Patrick's Day to all of you, whether you're listening to this later today, or in a few days from now/ I will be celebrating St. Patrick's Day later today with a shamrock shake, and then rooting for various different teams to win different games in support of my brackets in the NCAA Tournament. Joining us today are Evan Lisull, who is an IJ attorney and our proofer and cite checker, and Ben Fi eld, who is an IJ attorney. Welcome to both of you.

B **Ben Field** 01:11

Slainte, Anthony.

E **Evan Lisull** 01:12

Thanks for having me.

A **Anthony Sanders** 01:13

Now, I am not Irish myself at all. Ben, you look kind of Irish. Do you have any in your background?

B **Ben Field** 01:25

Probably a long, long, long time back, but my partner is very Boston Irish, so I can borrow from his family to claim some Irish cred

his family to claim some Irish cred.

A Anthony Sanders 01:35

Well, that's good to have in your back pocket. And Evan, you? Any same situation?

E Evan Lisull 01:42

Yeah, no, Irish only by marriage.

A Anthony Sanders 01:45

Oh, wow. So this is like an Irish through your partner kind of podcast.

E Evan Lisull 01:50

Exactly.

B Ben Field 01:50

Irish in law.

A Anthony Sanders 01:53

I can't even do that. I think my wife had like two generations of Scotch Irish, these people who were kicked out of Scotland and went to Northern Ireland for a bit and then on to America. So nevertheless, we're going to enjoy this as best we can. We don't have any real Irishness in our cases we're going to talk about, but they're nevertheless fun cases. However, first, I want to remind all of you about something else that's fun. And that's Short Circuit Live. Short Circuit Live is coming up, the latest edition, on Wednesday, April 6, 2022, at the National Press Club in Washington, DC. Now I talked about this last week. I think we got a pretty good response from that. We've also been getting the word out in other ways, because we are almost sold out, ladies and gentlemen, for Short Circuit Live. If you want to come there are only about 100 seats available. Most of those are already RSVP. So if you want to come, go to the link in the show notes and click on that and then RSVP on our webpage. If you don't do it pretty soon there might not be a chance to do so. Again, we have an amazing lineup for Short Circuit Live. We have Lisa Blatt, Kelsi Brown Corkran, and Paul Clement, all three big powerhouse Supreme Court attorneys and also former powerhouse DC Circuit clerks, will each be presenting a case from the DC Circuit. And moderating the panel would be our very own Anya Bidwell. So please if you want to go, get on that RSVP today or the chance we'll be missed. So we have two cases, one of them about chalking and criminality, which we're going to hear from Evan in a little bit. Both of these are from the Ninth Circuit. The other one, though, is about owls. Now, Ben is going to tell us about this owl case. But first I want to share a family story, because whenever I hear about owls, I think about my dad. So my dad grew up south of London in this town called

Epsom, which is where they run the Derby every year in June. He's a big time birdwatcher his whole life, even when he was a kid. And he must have been about 12, maybe a little older than than this, when this happened. He was walking in the park one day and he saw an owl on the ground. And being a child seeing a wild animal, he of course picked it up and took it home. I think it was, you know, partly injured, maybe its wing. And so he took this little owl. I think it was an immature owl. He took it home. And, of course, as one does, put it on the mantelpiece in the living living room, what they would call the sitting room and the drawing room. And then he left for some reason. So there's this little owl sitting on the mantelpiece and my grandpa walks in and he looks over and he sees an owl. And as an owl, it's, you know, just sitting there. It's not like fluttering its wings or anything. And he thought, Oh, someone must have picked up like an antique figurine owl and put it on the mantelpiece, because my dad's old brother, my uncle, he was kind of into antiques, and my grandma was into antiques. So he figured someone must have just brought home this owl. So he reaches his arm out to pick up this figurine. And the owl's head swivels around and looks at him. And needless to say, he was pretty shocked by that. Somehow, I guess my dad then got in the room and, you know, rescued this little owl. And he actually lived in the house for a while. And eventually, so there were two owls. There was this owl and there was some other owl that has had a similar rescue story. And my dad rehabilitated both of them. I think maybe one was re-released to the wild, but one for whatever reason couldn't. And somehow I think a teacher of his had like a big attic where an owl could live and kind of fly around a little bit. But not, you know, it wasn't ready to go back to the wild. So I guess it lived there for a while. So in any case, in my family history, we have a tale of two owls. And this case is a tale of two owls. So Ben, what's going on with these owls? It sounds like some of them are meeting a fate a little more more unkind than these couple that that my dad dealt with.

B Ben Field 06:38

Yes. And I hope those two owls got along better than the two types of owls at issue in this case. So I don't think I can do better than Judge Lee in setting up the case. The beginning of the opinion, he said, starts in a very Dickensian fashion, that this case is a tale of two owls. For the northern spotted owl, it has been the worst of times. It remains a threatened species and its population continues to dwindle. But it has been the best of times for the barred owl. Its abundant population burgeoning, the barred owl has expanded westward and encroached on the spotted owl's habitat. So as that introduction from Judge Lee says, there are two owls that's at stake here. The first is the northern spotted owl, which is threatened. It's kind of the hipster owl between the two. It can really only thrive in very particular old forest growth in British Columbia and the northwest United States. And then the other type of owl is the barred, originally from the East Coast. But it's more ecumenical in its taste, it can kind of stop at any McDonald's along the highway, and it's slowly been making its way west. And unfortunately, as it's moved into the spotted owl's territory, it's been displacing them. It both will take their mating territory and things like that. And it's also been known to even attack the barred owls. So going back to 2008 at the latest, the Fish and Wildlife Service was trying to come up with a plan to save the northern spotted owl. And one element of that plan was to experiment with what would happen if they got rid of the barred owl, would the spotted owl be able to make a comeback? And though the opinion and all of the underlying documents are very sanitized, what removing the bardell entails is killing them with a 12 gauge shotgun.

A Anthony Sanders 08:33

Yeah, some of the sounds like, you know the CIA sometimes talks about taking out foreign dictators, this little bit of sanitized language here.

B Ben Field 08:42

Yes, the original protocol for this study says that the barn owls will be removed using a 12 gauge shotgun.

A Anthony Sanders 08:51

Lethally removed.

B Ben Field 08:54

So, you know, the the spotted owl doesn't like the barred owl. But the barred owl also has friends, particularly a group called Friends of Animals. And they, upon hearing about this, filed a whole host of lawsuits both in California and in Oregon to try to stop what they view as a macabre and grisly experiment. And this case was litigated in all these. It first went up to the Ninth Circuit in 2018, where the Friends of Animals were claiming that this experiment violated the Migratory Bird Treaty Act, a treaty that we have with Mexico for protecting migratory birds. And the Ninth Circuit said then that No, it doesn't. But this case that we have before us now came to the Ninth Circuit before addressing whether Friends of Animals had standing, the Ninth Circuit said that they did, and now we get to the merits of their claims, which are under two federal pieces of legislation. First, the Endangered Species Act and second, the National Environmental Policy Act. And so to start with the Endangered Species Act claim, what Friends of Animals says is that, you know, under the Endangered Species Act, if you're going to do something that harms a species that's threatened or endangered, in this case the northern spotted owl, then whatever you're doing needs to have a net conservation benefit. And so this experiment, even though it's principally shooting barred owls, by having scientists go on to these habitats, there will be incidental potential negative ramifications for the northern spotted owls that live there. And what Friends of Animals says is that, you know, that this informational benefit that you'd get from the experiment isn't directly conserving the spotted owl. And so the incidental harm to the spotted owl violates the Endangered Species Act. The Ninth Circuit said no, that's not right, that the definition in the statute for what counts as a conservation benefit is very broad. And that, in fact, it actually, if you look at the Endangered Species Act, it actually has language in it that says that scientific resource management such as research is one of the things that counts as a conservation benefit. And so the the Ninth Circuit said, No, look, getting information that might help the owls down the line is sufficient to be a conservation benefit for Endangered Species Act purposes. And then the second claim that they brought is under the National Environmental Policy Act. And anybody who's dealt with it knows that basically, what this Act, commonly known as NEPA, does is it's in principle non substantive. It's just supposed to make the government take a hard look at the environmental ramifications of major activities that it's undertaking. But what this means in practice is that you get these environmental impact statements that can be hundreds or 1000s of pages long. And then anybody who's not happy with it can go to court and say, Well, you didn't look at these specific issues as much as you should have, and litigate those issues. And the specific or the most specific thing that Friends of Animals has a concern about with the environmental impact statement here is that

some of the land that's going to be used for the experiment is from private landowners. And the Fish and Wildlife Service is allowed under these statutes that we're talking about to enter into agreements with them that essentially say, Look, we're going to treat the current lay of the land for spotted owls as the baseline, and we do this experiment. and if spotted owls happen to move into more territory as a result of this experiment, then you're allowed, essentially, to force them back to where they were before. And the reason that this is important, is because private landowners, you know, if there are endangered species on their land, they have to conserve them. And so if you have an experiment that is having endangered species expand onto more of their land, they're put in a worse situation. And so what these agreements say is, you know, if you do us the favor of participating in this government experiment, we're going to hold you harmless, and you're allowed to go back to what it was when the experiment began. And what the Friends of Animals says is that, well, you need to do a another full-blown environmental impact statement for every one of these agreements you make with these, in this case, three or four private landowners. And what the court said is no, you only have to do a new environmental impact statement when the new activity wasn't encompassed within the original impact statement. And here are the original one contemplated that there would be these agreements with private landowners and also said that it wasn't even really necessary to have the private agreements, using government land would have been sufficient. And so these private agreements didn't change the scope of the study enough to justify the need for a supplemental environmental impact statement. And so, you know, the subject matter is somewhat scurrilous, with the, you know, the Fish and Wildlife Service shooting a bunch of owls, but it seems, you know, somewhat like you wouldn't encounter it in your normal everyday life. But I think that what, you know, the typical person should take from this is that there is just this raft of legislation out there that imposes restrictions on what people can do with their land, whether it's the Endangered Species Act, the Migratory Bird Treaty Act, or the National Environmental Policy Act, and that if you're doing something that your neighbor or someone else doesn't particularly like they can impose, as in this case, a decade of litigation and multiple trips up to the court of appeals. And, you know, the Fish and Wildlife Service and the Department of the Interior have lots of taxpayer-funded lawyers to be able to go through that rigmarole. But if you're a private landowner, and you want to do something that requires a federal permit, you can be subject to all of this same stuff. And it can become very, very, very expensive. And you see, you know, at the state level, the equivalent of NEPA, you know, for instance, in California with the California Environmental Quality Act. You know, you can have situations where it just cost millions of dollars to build a condo in San Francisco, because people can go to court and say, Well, you didn't study this issue exactly the way you should have and you needed to do a supplemental environmental impact statement. And, you know, this is just one example of how difficult it is for the government to do something to a few owls; you can imagine how difficult it could be for private homeowners or land owners to do the same.

A Anthony Sanders 16:00

Evan, have you ever had a pet owl?

E Evan Lisull 16:03

I have not had a pet owl. We had a bat run into our house. It's probably the closest we got, when I was younger and my sister was even younger. In the house, yeah. And so I was chasing it around with a broom. you know, I think she might have still been in a crib. Very early

childhood memory of that. That's as close as we got to owls. And I don't think that's very close at all.

A **Anthony Sanders** 16:26

So friend of the show Mike Chase, who wrote the book, How to Become a Federal Crimina, he has this amazing story, although he thinks it's terrible story about a bat in the house. And he live tweeted it a few years ago. So if you go to his Twitter account and look up, there's some blow by blow of how do I get this bat out of my house? So how did your family get the bat out?

E **Evan Lisull** 16:52

My father specifically, I know a broom was involved. There's a lot of screaming. I couldn't tell you the details.

B **Ben Field** 16:59

Well, at least it wasn't a 12 guage shotgun.

E **Evan Lisull** 17:02

Yeah, he did not use a shotgun. That's true. The 12 gauge right through the crib. That would have been something.

A **Anthony Sanders** 17:11

With that background about bat habitats, your thoughts about this particular case?

E **Evan Lisull** 17:18

Yeah, I mean, it seems like this is kind of an issue that goes back a long time. And I know with owls specifically, I have a vague recollection of owls being a big Pacific Northwest debating point even in the 90s and maybe before.

A **Anthony Sanders** 17:31

Yeah, when I was in high school in the 90s, it was it was huge in Washington and Oregon.

E **Evan Lisull** 17:39

And there's just something very, I think strange, and I don't even know if this is legal or extra legal, but the whole wildlife management is almost an oxymoronic phrase. And it just seems

like there's kind of this up and down with the wolves and the owls where, you know, there's all these efforts and studies being made. But, you know, as infamously said in Jurassic Park, nature finds a way. And there's a sense that, you know, you're trying to manage these very complicated environments, and maybe making progress. But there's something I think fundamentally odd about, you know, trying to kind of alter nature to reach some preconceived perfect level of owls. I don't know. It all seems very odd, you know, especially when you add in the LEAP elements and, you know, how these ESA claims have developed over time. You know, there's always been something in the background very strange about that.

A Anthony Sanders 18:34

Ben, one question I had is about the admin law, so the not so interesting admin law going on in this case. At one point, the court says that the lower court applied Auer deference, which is something we've talked about on this show, which is deference to administrative agencies interpreting their own regulations. But it doesn't get applied in interpreting these actual regulations, when they're interpreting regulations and not the statute. And also Chevron never comes up in interpreting the statute. But Judge Lee does say a couple times that the these regulations are not ambiguous, or maybe the statute is not ambiguous. So I think he's kind of winking there that we don't have to go into those different doctrines in order to interpret it then. But it did seem a little odd that, other than referring to what the district court did, it didn't seem to come up.

B Ben Field 19:30

Yeah, I think that's right. As you know, the Supreme Court has been somewhat walking back those doctrines. And so what both of them say, Chevron is for statutory interpretation, Auer is for interpreting regulations, is that if they're ambiguous, then, you know, essentially, the tie goes to the government, it gets to lend its expertise to interpreting it. But the courts, the Supreme Court and the courts beneath, it have become stricter about what counts as ambiguous. And in this case, as he said, I think that Judge Lee said, look, the statutory term says research is encompassed within a conservation benefit. And the regulations that the plaintiffs brought up say that indirect benefits are sufficient to create a conservation benefit. And so there's just no ambiguity to resolve. The 2018 opinion that I talked about that had to do with the Migratory Bird Treaty Act actually did expressly address this. And there was a brief section at the end that said, you know, we don't even have to get into the Chevron issue, because the treaty and the legislation here are just clear on their face.

A Anthony Sanders 20:38

You know, on that point, it was another another thing the court did say. So this is on page 17 of the opinion. And this really struck me. You talking about the other opinion made me think of this. It says whether this informational benefit outweighs the harm done for many incidental take is an expert judgment that we generally defer to the agency. So it seems like there they're talking about the deference to the agency on, you know, technical matters, but they don't shroud it in any kind of one of these doctrines. It's its own thing about deference to the agency on technical stuff, and they cite a Ninth Circuit case for that proposition. So I'm not as familiar

with these kinds of cases, I think, as you are. Is that a common thing to do? Or do you think they're trying to avoid that Pandora's Box by just, you know, talking about this is an expert, technical kind of issue.

B Ben Field 21:46

So the way I read that is that, you know, the basic idea behind Chevron is that Congress, you know, you can't expect Congress to determine whether or not this specific owl experiment in a couple states in the Northwest is a good scientific idea. And so Congress delegates those kinds of technical decisions to the agency, the Fish and Wildlife Service, in this case of the Department of the Interior. And where Chevron has become controversial is that it used to be the case that agencies were kind of really just applying their expertise or filling in small details that Congress didn't fully clarify. But in the last few decades, Congress has really just stopped legislating and answering big questions. And so the agencies have been asking for deference on bigger and bigger questions. But this one, you know, really is the kind of thing that you would expect an agency to decide. And I think even the critics of Chevron, Justice Gorsuch in particular has this bigger theory on what does get deference and what doesn't, and even he would say that something that's like very technical and scientific and a relatively small decision and not a major policy choice is the kind of thing that Congress can delegate to an agency. Well, don't you want to know what the result was of the experiment? So while all this litigation was going on, it turns out they actually did the experiment, and published a paper in the Proceedings of the National Academy of Sciences last summer. And it turns out that killing the barred owls actually worked. So in the areas where the barred owls were removed, the spotted owl populations stabilized. And in the areas where they weren't removed, the population of spotted owls declined by 12%. So it was actually quite a significant victory for the spotted owls. Even if it was a loss for Friends of Animals and the barred owl.

A Anthony Sanders 23:47

Does that mean they have to keep killing these barred owls going on in the future? Or maybe they just don't know yet?

B Ben Field 23:55

While I guess that they'll have to decide whether to pursue this. And when they do, I'm sure that there will be more litigation to follow.

A Anthony Sanders 24:02

Well, we look forward to that, of course, and Ben maybe to filling us in on those matters as they arrive in the circuit courts. You know, my first inkling on this case was to go to our go to bird expert and IJ official birdwatcher Wesley Hottot, who the last couple times he's been on has talked about birds, and he did a case that involved birds. But I didn't want Wesley to get typecast. And so Ben, I appreciate you broadening our bird expertise on the podcast. But now

we're going to go to something that is definitely not for the birds, and that is free speech. And we go to Evan, who is going to talk about a recent case, but also talk about a case from the past where he was involved.

E Evan Lisull 24:50

That's right. So this case is from the Ninth Circuit, originally from the district of Nevada and it involves chalking as a form of protest. And one of the questions in the case is whether people are actually arrested for chalking as part of their protest. That jumped out to me saying, Oh, that never happens. I said, That's not true, because that actually happened to me. So this would have happened, gosh, over 10 years ago now. I was a senior undergraduate at the University of Arizona. We were rabble rousers in college. We had a blog, this is when blogs were a big deal rather than Twitter or anything. So now you know how old it is. We criticized administration, speech rights, all these sorts of issues. During this time, there was a budget protest, as often happens at campuses, especially public universities. And during these protests, there were some grad students who were talking messages about the administration on the sidewalk saying don't cut our program, save our schools, the usual fare. This apparently rubbed the administration the wrong way and they arrested one of the students, charging him with graffiti, or you know, leaving graffiti, I don't remember what language Arizona uses. And this seemed way too far for us, to arrest somebody for chalking, which, I don't know if this happened on your campuses, was a pretty common way to leave messages at ours. Come rush our fraternity, come to our club meeting, potluck social, all these sort of things would fill the mall, which was our quad, day in and day out. And so to arrest somebody, this is for saying something against the administration, is pretty clear viewpoint discrimination, or at least as we saw it. So we decided to kind of up the stakes and organize a protest of our own to encourage people to say chalk is speech. You'd almost call it a meta protest, at that point, about the chalking rather than chalking an actual message. I was part of this group that organized this and living closest to campus was going to be kind of avant garde, you know, to go out there and leave messages in the early morning, to encourage people to take chalk that we would leave around to leave messages of their own, chalk is speech, don't suppress our rights, things like that. This rubbed an employee of the university the wrong way. And he followed me for a couple blocks, called the police. Police followed me and detained me and then arrested me. And so that brings us to what happened in Nevada, where something very similar happened. And not very long ago. This is actually quite an old, factual pattern.

A Anthony Sanders 27:29

And we should we should finish. The charges were dismissed,

E Evan Lisull 27:33

The charges were dismissed. I guess we don't want to leave them in too much suspense. I'm not on the lam here. I'm not dodging Arizona authorities here in Northern Virginia. The charges were nolle prossed pretty quickly. There's a bit of furor about the whole event. And, you know, how can they be arresting multiple students about, again, a little national coverage? And then that that was enough to allow the President to say, Okay, we're not gonna go forward with this. But yeah, that was in 2009. And this case, even though the opinion just came out, relates to

events in 2013. So not that too different in time, but very, very similar situation, protests in front of the Las Vegas Metropolitan Police Department, writing messages about the police a little cruder than the messages we went with. But, you know, one man's crude is another man's emotion.

A Anthony Sanders 28:27

So there's a word from the famous Cohen case about that, explicitly referring to the police.

E Evan Lisull 28:37

Exactly, Cohen the police. And so that rubbed the police the wrong way, just like it robbed the police the wrong way for us. And they were ultimately charged, not only with the graffiti, but actually conspiracy to commit graffiti, which was a charge I never actually got. They may have not known there was a conspiracy until after the fact, I'm not sure, but they never went that path in my case. And ultimately arrested them, charged him with the two offenses. And those were dismissed, not surprisingly, and the 1983 action followed. And the 1983 action is framed as a violation of a right not to be arrested in retaliation for your speech. So in this case, you know, it's a qualified immunity case, unsurprisingly, from the officers, including my favorite, Officer Liberty, which kind of is a nice little touch on top of everything else, you know, Officer Liberty telling you you can't exercise your speech rights. So as the listeners probably know well, there's two steps in every qualified immunity analysis, whether a right was violated is the first step and whether that right was clearly established at the time of the act. And the first element is pretty agreed upon by both the district court and the Ninth Circuit. There's a right in question here. You can't retaliatorily arrest someone for exercising their First Amendment rights. Police come back and say, Well, wait a second here. He did commit graffiti as our statutes define graffiti, you chalking on the sidewalk is graffiti. At one point they say, look, this is very expensive for us to clean up. It's, you know, $300 for 250, 240 square feet or something like that. It's, you know, surprisingly expensive. And this is something that came up in our case, too, they would talk about the 1000s of dollars in damage from chalking on the sidewalk, which always seemed a bit odd to us. But I don't know, you have to justify it somehow. But they say, look, I had probable cause to arrest him. If I have probable cause there's no animus in basically, you know, exactly executing law. How on earth can you say that I was violating a right here, rather than just performing my duties as an officer? There's an exception turned to this exception, which says, Look, even if there's probable cause, and this is a Supreme Court case, Nieves V. Bartlett in 2019, says, Look, even if you have probable cause, that's normally going to be enough to say there's no right being violated here. But when it's an offence that officers don't typically exercise their discretion in performing arrests, then that's just having probable cause for that offense is not going to be enough to overcome 1983 claims. And this is a case where discovery actually plays a big role. Part of the reason it's taking so long is through a motion to dismiss proceedings, went back remanded to the district court, and ultimately went through discovery. And what they found, I think, unsurprisingly, not super surprising, was nobody gets arrested for chalking, it's simply not a thing. And one of the issues in this case, of course, is that other people were chalking and we're doing messages that said, Cohen the cops, Cohen the pigs, they had different messages, and they weren't arrested. So that, you know, that against speaks very similarly to my experience, and kind of underscores how this is just being used. You're kind of weaponizing a statute that's never enforced to go against speech that you don't like. And that's classic conduct that is going to violate the First Amendment. So

both the district court and Ninth Circuit agreed there's a right being violated here. Even if you have probable cause, this is something you never arrest somebody for. I think they found one citation over the course of the relevant period of time and no arrests at all, except for these plaintiffs. In that circumstance, a right's being violated. So that brings to the second element, good old clearly established. And this is where there's a split, where the district court gets reversed. You know, we talked about the Nieves case, but that's 2019. But nevertheless, there's two Ninth Cirrcuit cases in 2016 and early in 2013, several months before this conduct, both saying what Nieves establishes at the Supreme Court level in the Ninth Circuit, you can't arrest somebody under these circumstances where there's an offense that nobody has ever been arrested for before. If that's how you're enforcing the law ordinarily, you can't suddenly turn around and say, Oh, we had probable cause to enforce this law in your specific conduct that's so happened to involve speech that we didn't like. So in that case, it said, No District Court, you're wrong. It was clearly established in the Ninth Circuit as of July 2013 that you couldn't do this. You did it anyway. You know, maybe there was a reason for doing it. That goes to trial, though. That's not something that can be resolved at summary judgment.

A Anthony Sanders 33:38

Ben, did you ever chalk in college?

B Ben Field 33:41

I never chalked, but I definitely saw chalk everywhere. And I don't believe that anybody was ever arrested for doing it or that the university ever had to spend 1000s of dollars to clean it up. Usually, the snow and the rain did a good enough job in Chicago. But this is a big issue. And I think that listeners might not understand how big an issue it can be. Because what the Supreme Court has said in a series of cases going back a while is, you know, in that Nieves case, and in cases before it, you know, leading up to it, they said if there's probable cause, you know, we're pretty much not going to look any further except in very narrow circumstances. And in other cases, they've said, you know, the officer can arrest you and then decide later what crime it was you violated. And as long as they could like point to there being probable cause, then that's okay, too. And as the aforementioned Mike Chase has has taught us in detail, there are just so many crimes out there in both the federal and the state books, that if an officer doesn't like what you're saying, doesn't like how you're exercising your First Amendment rights, there is always something that you've done that they can go after you for. And so it's really important that this exception be read reasonably. And in that Nieves case that Evan was talking about, Justice Gorsuch and Justice Sotomayor wrote separately to say, you know, lower courts should be reasonable about applying this exception to allow plaintiffs to show that nobody else really would have been punished in their circumstances. And I think that there was a fear that courts would be very strict and would require you, for instance, to have very precise statistical evidence that, you know, we have 100 different cases where this ordinance has been invoked and in zero of them have there been a prosecution except for our one client. And that would be very, very difficult for most plaintiffs to prove. But the Ninth Circuit here was much more common-sensical, I think and said, Look, if you can point to a few examples of people who have engaged in similar conduct, that's going to allow you to get to a jury, in that you don't need, you know, a professional statistician to prove it for you. And I hope that other courts

follow a similar pattern. Otherwise, you know, given that there's just so many criminal laws out there, it's always going to be possible for police to retaliate against you unless courts are taking the Ninth Circuit's approach and being reasonable about this.

A Anthony Sanders 36:17

One other issue that I see here is there was a Supreme Court case from earlier this year, it was one of these shadow docket, you know, per curiam, well, I think it involved a per curiam opinion, but it was an opinion on qualified immunity, which my panelists may remember, and there was a statement, I think it was from the court's opinion or might have been a concurrence, there was a statement that it has actually not been established whether qualified immunity and clearly established law is set by circuit court cases, or whether it has to be at the Supreme Court. Which everyone was like, I thought it was circuit court cases, and all the circuits assume circuit court cases is enough. And so this is a case where there would be a difference, right, because it's not clearly established at the Supreme Court level until 2019, but it is at the Ninth Circuit before this incident in 2013. So if they wanted to bring this to the Supreme Court's attention, it could be a case that would address that issue. I'm thinking this is a pretty unsympathetic, given that the free speech rights that are in the background, and it's not it's not something about a police making a split second decision as defenders of qualified immunity like to say, I think this would probably be a poor vehicle on the facts for that. But it does show how that could be an issue in some cases.

E Evan Lisull 37:50

Yeah, and I don't think that aspect gets, you know, mentioned. I mean, it's a shadow docket decision. So it's kind of odd to cite to it in this context. But, you know, it could happen again, you know, where they would just, you know, summarily send it back and say it, but that seems like such a big principle. So it's a big shift in how everything has been understood that you would almost have to announce that in a published opinion, you would think at some point, just to say that, look, this is what clearly established means, even though we've been operating under very different norms for a long time now.

A Anthony Sanders 38:23

And to be fair again to the court, it wasn't that that was the rule, but that there was a question about that. And that's what made it seem very questionable. The other thing about this case is it, you know, the judges on the on the panel are pretty widely across what is usually thought to be the ideological spectrum, with Judge Bea a very conservative. Judge Murguia is not. Judge Wallace is a senior judge, but he was a Republican appointee. So it's free speech, it's pretty noncontroversial. But, you know, in other circumstances, I could see that being a bigger deal. So thank you, Evan, for telling us about your criminal past as well as the criminal past of these protesters, noncriminal past now it seems. So we'll keep our eyes on chalking news and also on owl news, and I hope everyone has a beautiful, or did before, a beautiful and fun and safe, as we like to say, St. Patrick's Day this year. And in the meantime, I want everyone to get engaged.