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SPEAKERS

Tori Clark, Anthony Sanders, Sam Gedge

A Anthony Sanders 00:06

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, April 28, 2022. And that means we're just three weeks away from our forum on judicial engagement and the Michigan Constitution. If you live in the state of Michigan, and would like to learn more about your state's constitution and also about judicial engagement and what we do at IJ, then please come join us. It's Friday, May 20, 2022, at noon at the Inn at St. John's in Plymouth, Michigan, which is basically near Detroit and Ann Arbor. We have a bunch of speakers discussing the Michigan Constitution, including retired Justice Stephen Markman. It's free and there's even a free lunch. It's the latest in our series of forums on judicial engagement and specific state constitutions. You may remember we had one in Georgia a couple months ago. Earlier than that we had one for Pennsylvania, and we started things off a couple years ago in Minnesota. If you want to come, please RSVP, and you can find a link to do that in our show notes or at our webpage at IJ.org. Today, though, it's all First Amendment all the time. First, we're going to look at why it might be that if you're sued to prevent you from speaking, so someone sues you to stop you from speaking, you might nevertheless not have any reason to fear the law you were sued under. It sounds strange, but that's what the Eighth Circuit said last week. Also, we get into some speech drama in the Oregon legislature. Oregon might not always represent the chill Left Coast haven that it's made out to be, as the Ninth Circuit recently detailed. Joining us to exercise their First Amendment rights are, first, IJ Law and Liberty Fellow Tori Clark. Welcome back, Tori.

T Tori Clark 02:15

Thanks for having me.

A Anthony Sanders 02:17

And IJ's greatest beard grower, Attorney Sam Gedge. Sam, welcome back.

S Sam Gedge 02:23

Thank you, Anthony.

A Anthony Sanders 02:25

Well, Tori, this is a case kind of near and dear to my heart because it talks about a newspaper, the City Pages, that in college I would sit in coffee shops and flip through it and look at all the the shows and theater openings that I could go to. And now it doesn't exist anymore. But this case has nothing to do with my theater habits. But everything to do about what you might read in other parts of the City Pages that I never took any notice of. So, Tori, tell us the story.

T Tori Clark 02:57

Yeah, absolutely. So this case is called Christian Action League of Minnesota v. Freeman, out of the Eighth Circuit Court of Appeals. And this case is super interesting for several reasons. But standing on its own, it illustrates the legnths to which courts will sometimes go to get rid of a case on procedural grounds and avoid answering important constitutional questions. So this case, as you mentioned, kind of arises out of a dispute about advertisements in a newspaper. So the parties here, the original parties, were a private individual and an advocacy group called the Christian Action League or CAL, and CAL specifically targeted sexually oriented businesses and publications. And one of those publications that that CAL targeted, as you mentioned, was a Minneapolis newspaper publication called City Pages. And City Pages, like you said, ran advertisements for lots of different companies. But some of those companies were sexually oriented businesses. And because of that CAL targeted other businesses who also advertised in City Pages, because CAL believed that anyone who advertise alongside the sexually oriented businesses was like tacitly endorsing those businesses. So out of City Pages, one of CAL's targets was a lawyer named R. Leigh Frost. And Frost ran an advertisement for her firm in City Pages, and after that CAL sent her a charming postcard that basically said, you know, how can you sleep at night because City Pages promotes porn and you advertise in City Pages? So basically, you're promoting porn and how can you live with yourself as a woman? CAL then followed up with another postcard and an email expressing similar sentiments. And after that Frost asked CAL to stop contacting her. But then about a week later, CAL sent her a third postcard. And so that third postcard was the straw that broke the camel's back, apparently, and Frost sought a restraining order against CAL under a Minnesota state statute that allows victims of harassment to obtain a restraining order against their harasser. So an astute observer might wonder, are three nonthreatening postcards and an email really harassment? Which is a good question and we'll come back to it. But the state court evidently agreed with Frost at that point that CAL's behavior was harassment under the statute and entered a restraining order against CAL that if CAL had violated it would have carried criminal penalties. And then after a few months Frost and CAL came to a settlement agreement and the restraining order was dissolved. So after the state suit was over, CAL sued Minnesota state officials in federal court and argue that the anti-harassment statute under which the restraining order was entered was unconstitutional, because among other reasons, it hampered their First Amendment right to free speech. But the federal trial court dismissed the case, in part because it concluded that CAL didn't have standing to challenge the statute. And just as a quick refresher, the idea of standing basically requires a claimant in a case to be actually injured or very likely to be injured

by something before they can sue about that thing. So the trial court in this case concluded that CAL wasn't injured and wasn't likely to be injured and therefore didn't have standing. Because CAL's conduct was not harassment under the statute, and therefore the statute couldn't possibly hurt CAL. It so ruled even though, again, the statute had actually been applied to CAL in the state suit. And a panel of the Eighth Circuit, over a dissent, agreed with the trial court. And the majority opinion turns on the issue of whether CAL's conduct was actually, again, harassment under the statute. And the court acknowledge at the outset that the text of the statute was ambiguous, that they couldn't tell from the face of the statute whether it actually applied to CAL's conduct, and there was no case law from the Minnesota Supreme Court either way on that either. But nonetheless, the Eighth Circuit resorted to some intermediate courts of appeals' decisions and some more general principles of statutory interpretation to conclude that CAL's behavior didn't fall under the statute's purview. But as the dissent in this case points out, that the outcome doesn't make sense for several reasons. First and foremost, again, the statute had already been applied to CAL's behavior. So you don't have to guess about whether the statute would ever apply to that behavior, or whether CAL would ever be injured by the statute, because CAL was actually injured by the statute, in the exact circumstance based on the exact same facts that CAL was suing about. And the majority opinion tries to get around this by saying, well, it was only the private individual Frost who enforced the statute against CAL and not the state defendants that CAL ultimately sued. But at least in my read of the statute, you know, there is no mechanism for government officials to go after harassers directly. So it's not even clear that the government would be able to do this thing that, you know, the Eighth Circuit is saying CAL would need them to do in order to have standing to challenge the statute. And, you know, on a more fundamental level, you can't bring constitutional challenges to statutes against private individuals, because the Constitution only limits the power of the government. So under the majority's interpretation of the statute, basically, someone could seek the government's power to enter a restraining order against you. That restraining order could restrict your conduct in your life, but you still can't bring a constitutional challenge against it because it's not the government who's actually enforcing that order, or enforcing the statute. Now, there is a scenario in which someone could create standing perhaps on this set of facts. For instance, if they got an order entered against them, violated that order, and then subjected themselves to potential criminal liability. But that raises its own set of issues, right? And you know, students of standing will know that there's a lot of case law on that. And the majority doesn't even engage with any of this. It just kind of glosses it over and doesn't really discuss it all that much. So that's the first big bucket of issues there. The second problem with the majority opinion on a more technical level is that the Supreme Court has already said that a claimant has standing in this kind of case when their conduct is even arguably proscribed by the statute in question. So if you'll remember the majority started its analysis by saying the statute was ambiguous about whether it applies to CAL's behavior, and that probably should have ended the analysis. Because if the statute is ambiguous, then the statute arguably proscribes CAL's behavior, which gives CAL standing. And again, this is consistent with what happened in the real world because the statute was actually applied to CAL. So, you know, whatever you think about CAL's tactics, agree, disagree, you know, this is really a case about when can someone sued to protect their constitutional rights? And, you know, the statute, again, was actually enforced against CAL, but then two federal courts in a row said, well, sorry, the statute might not actually apply to you. So you don't even get the chance to try to vindicate your constitutional rights. So you know, that's what happened here. I think there's probably some other things going on under the surface. So again, like more astute observers will look at this, and this case, actually, the Eighth Circuit case was submitted just four days after Whole Woman's Health came out in the Supreme Court, so there's probably

some of that going on. But, you know, in terms of, like, on the face of the opinion, you know, the Eighth Circuit really does actually say, there's this statute and you can't sue, even though you were hurt by it.

A Anthony Sanders 11:17

And they cite the Whole Woman's Health even near the near the end.

T Tori Clark 11:21

They do, yeah. And like I said earlier, they said, Well, you know, you can't sue about the statute, because it's only a private person who's enforcing it. But at least on my understanding of it, in Whole Woman's Health, there was no possibility of any kind of criminal penalty, it was all civil liability. And here, the restraining order, if you violate it, it did subject you to criminal penalties. And depending on the exact circumstances of that violation, it could even be a felony to violate that order. So you know, the court did, again, kind of cite Whole Women's Health, but it didn't really grapple with the real issues and the real substance, in my opinion, of what Whole Women's Health said.

A Anthony Sanders 12:08

Well, Sam, you, unlike most constitutional lawyers, have actually litigated private parties enforcing state laws and whether there are constitutional issues with that. So what's your spin on all these tribulations of what you read in the defunct City Pages?

S Sam Gedge 12:28

Yeah You're right, Anthony. So IJ had a case a few years ago in Colorado. And at the time, Colorado had a really bizarre system of private party enforcement for really Baroque campaign finance laws, basically the state outsourced to whoever wanted to kind of harass their political opponent that power to basically bring the full power of the state against them for any kind of penny-ante campaign finance violation. We didn't end up kind of getting into the rat's nest that these folks in the Eighth Circuit did because the Secretary of State who was in fact a state actor was an integral part of the at least a ministerial part of the enforcement mechanism. So we had a government official we could sue, which was great, because we ended up winning and that system is no longer in place in Colorado. But more broadly, I mean, my initial reaction to this case was that it's like the rare First Amendment case where the, like, the least annoying participant is the government. Right? Because this nonprofit that like, bless them for exercising their First Amendment rights, like they seem super annoying. This lawyer seems like really trigger happy and apparently was filing a restraining order despite binding intermediate court precedent saying she couldn't do it. And I don't know, like, I don't really like either of those parties. But my general thinking is, you know, if this nonprofit had the stomach to have this fight and raise these First Amendment issues, like why didn't they just do it in the state court action when they were actually part of a live lawsuit? There would have been no question that they could have raised this as a defense when the lawyer sued them in state court, and they presumably could have won under that binding intermediate court precedent in Minnesota. So

it just befuddled me a little bit why they would settle that case, and then wait a year and then sue a local prosecutor who sounds like sincerely had zero interest in prosecuting them in the first place. So maybe the answer is that, you know, they didn't have a lawyer who's willing to represent them the first time around. They did the second time around, but struck me is kind of just a weird situation, where it's not really kind of clear why people were having this fight to begin with.

A Anthony Sanders 14:33

Yeah, I'm guessing the federal case that they have their ducks more in a row in making a federal case out of it and a First Amendment case out of it. But even though I guess it would have been good if they brought that First Amendment defense in the state action against this private party, something that the majority completely ignores is not just that this, you know, one wild cat person brought this claim that they don't think even was allowed under state law, but a court ruled in her favor. Now it was an ex parte TRO, so there was no one on the other side, it was just, you know, courts often grant that, especially when it doesn't seem like there's going to be a lot of prejudice by entering that order. But still that state judge thought that this law was okay, not just was constitutional, but applied to this set of facts. And for the majority to just, you know, blithely brush that aside is quite extraordinary, as it seems like the dissent thinks. It seems like they have a little better argument about Mike Freeman, who is a long-time county attorney in Hennepin and has been sued many, many, many, many times in his career. And this little lawsuit, I think, and this little statute, was the least of his concern. So of course, they're gonna say, well, yeah, we're not gonna do it, a lawsuit like, that we never have. And even if, you know, a woman like this actually succeeds, we probably wouldn't enforce the judgment and who knows what else is going on there. But they have the power to enforce this law. And they are the proper person to the sue. This also brings up, you know, another question that was swirling around right in Whole Women's Health and the SB 8 litigation for those listeners who followed all of that the last few months about the the abortion law in Texas. It was swirling around there, but because the Supreme Court found a couple folks, but then later the Supreme Court of Texas said that those folks actually you can't sue, who enforce that abortion law. Here county attorneys can enforce this law. They usually don't, but I mean, they just like anyone else, because the access is pretty open-ended, can can enforce this law. And a lot of people don't realize but county attorneys in a lot of states, including Minnesota, they are like the executive. So if you want to challenge a state law and say it's unconstitutional, the question we know very well from Whole Women's Health now is you need someone to sue. Well, the county attorney is usually the person you sue. Campaign finance laws, when they're often challenged in Minnesota, you don't sue the state attorney general, you don't suethe governor, you sue the county attorney, even if it's maybe a county where, you know, the political persuasion of that person is completely different than the statewide officers who enforce the law. You sue the county attorney. We have a kind of multifaceted splitting of the executive, unlike the theoretical unitary executive at the United States level. At the state level we have all these little county attorneys and so part of Mike Freeman's job is to get sued and have constitutional issues litigated. And if you can get out of court by just saying I wouldn't enforce that law, even though maybe the the next county attorney might or private people might, really seems like a huge example of judicial abdication.

S Sam Gedge 18:30

Yeah, maybe. I mean, it seems to me that this is almost like as big a win as they were ever

going to get. Right? Because if you look at the opinion, what the majority is saying is they don't have standing because we don't think this law covers what they want to do. And so the majority says nothing this organization wants to do is criminalized by the statute, it is free to encourage advertisers to oppose sexually oriented businesses. Which is great. Like that seems like a pretty clear blessing for this nonprofit to go on sending their postcards, which is what they would get to do even if they'd won on the merits. And I think kind of either way, the problem for them isn't that this county attorney is like a realistic threat to their free speech rights. It's that anybody on earth who they annoy can file one of these harassing Strassman orders against them. And even if they'd won this case against the county attorney, that wouldn't have bound, you know, some rogue lawyer who they send a postcard to down the road.

A Anthony Sanders 19:24

Well, that's a good point in that it wouldn't bind state courts because state courts are only bound by the US Supreme Court, other than, you know, if they're enjoined, and because they're all private people, they wouldn't be enjoined. It just kind of goes to show how private enforcement can be really messed up. So another place that's messed up, apparently, it's the Oregon legislature. They are not behaving well. Are they, Sam?

S Sam Gedge 19:55

They're not; This is just another example of just really, really annoying people who, at least based based on the cold record, seem like really annoying, annoying people to have to work with. So the case is called Boquist v. Courtney, out of the Ninth Circuit. The legal doctrines in the case honestly seem to be pretty kind of humdrum. But we can talk about them for a little bit. But the surrounding fact as you suggested, Anthony, are kind of wild. So in 2019, a bunch of Republican state senators in Oregon marched out of the Capitol building to break a quorum. They were opposing, I think, a cap and trade piece of legislation or something like that. And the Senate Majority leadership, the Democrats, called on the governor for assistance and things kind of escalate, the governor authorizes the state police to bring the absconding Republican senators back into the chamber. Ultimately, no one's actually arrested. But one of the absconding senators makes some pretty inflammatory comments to the media and on the Senate floor. So he's talking to a reporter, he says, I told the police superintendent, that if the police come to get me "send bachelors and come heavily armed," and then he's on the Senate floor and he tells the senate president, who was like a Democrat, Mr. President, if you send the state police to get me, Hell's coming to visit you personally. So, you know, it's pretty inflammatory stuff. All of which led the Senate leadership to hold a hearing on this gentleman's conduct, and they ended up requiring him to give 12 hours written advanced notice before entering the Capitol, so that they could have extra police on standby. So the senator, the guy who's making the inflammatory comments, he sues, you know, his counterparts, the Senate leadership in federal court. He's sues a few other people too. He's floating a bunch of different theories, all of which the district court dismisses, and it goes up on appeal. And the Ninth Circuit reverses in the senator's favor on his First Amendment claim against the Senate leadership. And the analysis, as I said, is pretty straightforward. It's kind of a straightforward First Amendment retaliation theory. And the gist of this doctrine is that the government can't punish you because they don't like what you're saying. And, you know, the doctrine can get a little bit complicated, but the idea is that to at least get in the door on one of these First Amendment retaliation theories, a plaintiff needs to be able to plead, to show, three different

things. First, that they are engaging in constitutionally protected conduct, or that they're engaging in speech, in this circumstance. Two, that the folks they're suing the folks, they're saying punish them, because of their speech, in fact took some kind of adverse action against them, like punish them, did something that, you know, you don't want someone to do to you. And three, that there's a link between these folks, you know, harming you and the speech that you're saying is being retaliated against. And it's a lot of jargon. But it's basically trying to identify situations where government officials are just punishing people because they don't like what they're saying. And what the Ninth Circuit said here is that well, at least taking the senator's complaints, allegations, as true, he at least gets in the door of making out this kind of First Amendment retaliation claim, because he says that he was engaged in protected speech. He's making these comments to the media and on the Senate floor. The defendants, the other senators, tried to say that the speech wasn't actually protected. They tried to say it was like fighting words or true threats, which are some narrow exceptions to the First Amendment. Ninth Circuit said no, this speech as protected by the First Amendment. And then they said, being subjected to a requirement that you give 12 hours notice before you can basically enter your place of employment, that's the kind of material adverse action that we can couch as being punishment. It's something that, you know, makes your life more difficult and makes it harder for you to do your job. And at least accepting what this guy saying is true, you know, the reason that the Senate leadership instituted this 12 hour rule against him was because of the stuff that he was saying. So Ninth Circuit says, Okay, he's at least got himself in the door here on this First Amendment claim. Case is going to go back to the district court where, frankly, the folks being sued will probably be able to make a record that the whole reason they established this 12 hour rule is because they thought this guy was a security threat, because he was talking about killing police officers. But that is more of a fact question that can be fleshed out on remand. And, you know, that's kind of what happened. As I said, you know, the application of this retaliation standard was seemed pretty run of the mill. A couple of things that jumped out at me and maybe you guys too, was that Senator Boquist, the guy who filed this lawsuit, has been pro se the whole time. He's, in fact, not a lawyer. He was pro se in the district court, and he lost and he's pro se at the Ninth Circuit and you know, credit to him for notching apublished Ninth Circuit victory. You know, I think credit's equally due to whoever in the Ninth Circuit, you know, waded through all the briefing and identified this viable First Amendment claim, because with all respect to Senator Boquist,there was kind of a lot of stuff in his briefing that hid the ball here on some of the some of the First Amendment issues.

A Anthony Sanders 25:17

Were there any amicus briefs filed?

S Sam Gedge 25:19

No, there were not. And there wasn't even oral argument. I looked at the docket because I was very curious about all this. Ninth Circuit set it tentatively for oral argument and Senator Boquist wrote, you know, a motion basically saying, I don't have a lawyer and I have bad internet connection out here in whatever part of Oregon he was in. So he waived oral argument, and he still won, at least on this claim, because there were a bunch of other claims that he lost on. He like said that the Senate leadership violated these parts of the federal regulations that it turns out deal with Native Americans. So anyway, there's bunch of other stuff that we don't need to talk about, but he wanted his First Amendment claim.

A Anthony Sanders 25:59

And those were dealt with in a separate order, right? A very unpublished order.

S Sam Gedge 26:04

Very unpublished, yes. He also in his reply brief had weirdly a book recommendation. So he was responding to this fighting words issue, like whether his words fit within this kind of arcane First Amendment doctrine. The leading case is called Chaplinsky, as I'm sure both of you know, and I just love this. He basically says Chaplinsky doesn't apply, these word fighting words. And he's right. And on the way he has this great kind of just stirring account of the context of Chaplinsky. He says Chaplinsky is set in World War Two, with hundreds of thousands of American soldiers dying from fascist German bullets, while average men in Germany in the name of fascism are exterminating millions of the Jewish religion. And then he has like this whole book recommendation, he says, As analyzed in the acclaimed book Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland, which was published in 1998, which is a real book and it's just about this police unit in Poland that was involved in the Holocaust. And then now it's in this reply brief in the Ninth Circuit.

A Anthony Sanders 27:00

Anything to do with Chaplinsky?

S Sam Gedge 27:02

No. So anyway, that's kind of what this case is about. And similar to, I guess, my reaction to Tori's case, I kind of reacted to it a little bit with a kind of a plague on all of your houses here, right? I mean, we care a lot about the First Amendment at IJ. But for me, the corner of the First Amendment that I care least about is when government officials are kind of fighting with other government officials. Right? And that's kind of what was going on here. But yeah, you know, it's a retaliation case. And the Ninth Circuit said that he can at least get into court on it.

T Tori Clark 27:37

Yeah, I thought this case is really interesting, too. And I guess I was looking a little bit more at like the nuts and bolts of the court's analysis, especially the third prong on the causation of, you know, basically, whether there was an improper unconstitutional motive that caused the retaliation. And I thought the court made a really interesting comparison between this case and the retaliatory arrest context. And that was not something I was kind of expecting at the outset. But the court is exactly right that the commonality between those cases and this case is you're still, in any retaliation case, you're trying to sort out the government's motive. And the same act might be either constitutional or unconstitutional, you know, based on the government actors' motives, which is an inherently squishy thing, right? You have to sort out sort of like, okay, what did they do, and why did they do it? And if you remove this one thing, does this change? And I'm really interested to see if the government does what I expect it to do on

remand, which is to invoke the the safety justifications for its actions, I'm really interested to see what the court does on the next appeal, if it comes. For instance, in the retaliatory arrest context, the Nieves case that the court cites, it basically says, if police have probable cause to arrest you for a crime, then it doesn't matter if they also had an improper motive for arresting you, you know, they don't like your mom or whatever. And that arrest is still constitutional because they had probable cause. But then the Nieves court introduced some nuance because it said, yes, if there's probable cause their arrest is constitutional, but that arrest still might not be constitutional if you're arrested for something like jaywalking that officers typically use their discretion to not arrest people for. So I'm really interested to see what analogues the court might come up with in the future of something like the jaywalking exception, like, will the court have an inquiry into whether other Oregon lawmakers have said similar things in the past? You know, Sam, you alluded to and the opinion alluded to the fact that this is not an isolated incident. This was part of something that had been going on in Oregon for a long time. And so I'm really interested to see how the court takes that retaliatory arrest analogy and how it applies in this this different context.

A Anthony Sanders 30:09

I was interested in this case, first, because it's a follow up to a case the Supreme Court ruled just a month ago, the Houston Community College System v. Wilson case that some of our listeners might have heard about, where there was this board of a community college that censured one of its members because they didn't like what he was up to. And so is that censure, can that be a First Amendment injury? And the court said, well, no, they're just really saying you're doing bad things. And of course, all legislative bodies say that to each other, such as in Oregon it seems all the time. Now, this was pretty darn distinguishable as, Sam, you explained, because he now can't go inside the building unless he gives 12 hours notice. And that's very different than just, you know, having your feelings hurt from what the board said, but I thought it was it was an interesting kind of first application of that case. The other thing I would commend people to read the case for, as Tori said, it gives a pretty good explanation for how First Amendment retaliation works. What you need to look at the burden shifting if it's in the context of an arrest how that works. This is now a big issue out there of First Amendment retaliation because of what's gone on in Florida and the retaliation against Disney. Now, the weird thing about that whole dispute that I'm sure most listeners all the details of so I won't go all the blow by blow on what's happened there, But that is different because it's a legislative body retaliating against an actor who has said something that they didn't like, and so it seems like it's retaliation. But the retaliation itself isn't squelching speech. It's just doing things against them in retaliation for their speech, and similarly, here, wasn't really regulating this fellow's speech. It's just saying you can't come into our building unless you give 12 hours notice. That's not content based or anything like that.

S Sam Gedge 32:30

I was just gonna say, it's like punishing him for speech that he did rather than stopping him going forward. I think that's right.

A Anthony Sanders 32:34

And so this is usually how it comes up, where it's like, you know, a cop or a sheriff or something

or a public employee's employer, punishing them for speech that they've taken. But it's a little bit closer to the Florida example, because it is actually the legislature. Now, it's the majority party in the legislature can acting as, I guess, a landlord. But it gets a little bit closer to that, and so it might be a case to think about if that whole issue ever erupts in court. It might not. I mean, God knows what Disney is going to do about all that. But it's a way, I think, to think through that more unusual situation of the legislature doing something, not an executive. Sam, you look, you look like you might disagree.

S Sam Gedge 33:25

No, I was processing. I think I do agree with you. I may have given a little bit of a short shrift to the doctrine on this. But you're right. I mean, it's certainly one of the earlier cases that was applying that recent Houston case that you pointed out. Here, too, though, I feel like once you get in the weeds on this case, it's a lot less clear that this is that distinguishable from the censure case, right? Because the Ninth Circuit just like on the pleadings, accepting these these filings as true, basically says, yeah, there's a difference between censure, where you have legislators just saying, we don't like what you did, that in itself is speech, it's not really punishment. Versus this kind of onerous 12 hour notice, which actually stops you doing your job. But based on the briefing, there's this one line in one of the gentleman's briefs where he says he actually isn't notifying the police on a daily basis, he's just kind of going about his business unchecked. And nobody really seems to be stopping him. And this has been going on for three years now, right? Like, I have no idea if this 12 hour rule is still in place. But everyone's just been like fighting it out for three years, even though based on the briefing it's not obvious that it actually has any impact on his ability to do anything. But you know, I guess that's what discovery is for.

A Anthony Sanders 34:35

Well, the Seventh Circuit once famously said, and it was per curiam, but Easterbrook and Posner were both on the panel and so it's probably one of those two, that judges are not like pigs, hunting for truffles buried in briefs. But Sam, you have just proved that you can do that hunting better than the judges and find those truffles. So I thank you for bringing that truffle to our listeners attention. Tori, I thank you in a very non-pig-like manner for beautifully presenting the case we discussed earlier. And I think there's a lot of really provocative thoughts to come out of that case that will be in the Eighth Circuit's future. We'll see if it's in en banc news in Short Circuit newsletter in future weeks. And so thank you both for coming on. And to the rest of you, please check out our forum in Michigan if you are a Michigander. And to everyone else, I ask that you get engaged.