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SPEAKERS

Ari Bargil, Anthony Sanders, Alexa Gervasi

A Anthony Sanders 00:07

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 Friday, May 6, 2022. And I would like to let all of you know, as I let you know on last week's show, of our upcoming Michigan State Forum on the Michigan Constitution, which will be in two weeks on Friday, May 20, in Plymouth, Michigan, at the end of St. John's, nice facility that we have there ready for a discussion on the Michigan Constitution, how it protects various liberties, how it should be interpreted in light of its history. It's going to be a wonderful couple hours of constitutional exploration. I hope you can join us, learn a little bit about judicial engagement, about the state constitution, and about the Institute for Justice. So again, that's Friday, May 20. You can find a link in the shownotes to join us there. Former Justice Stephen Markham among many other people will be speaking. And there's also a free lunch, which some people might tell you, there's no such thing. Well, this is one exception. But today is free information about some of our freedoms, and even a little bit about free money. Actually, it's not so free; you have to fight pretty hard for it. Here to tell us about these issues of money and speech are Ari Bargil, an attorney at the Institute for Justice, and another attorney at my employer, Alexa Gervasi, Welcome to both of you.

A Ari Bargil 01:53

Thanks for having me, Anthony.

A Alexa Gervasi 01:54

Yeah. Thanks, Anthony.

A Anthony Sanders 01:56

Well, Alexa, tell us a little bit about attorneys' fees and how sometimes they're a little hard to

get.

A Alexa Gervasi 02:05

Yeah, so I'm sure that any listeners on this podcast who are attorneys, their ears just perked up because we're talking about something that they care about, getting your fees paid by the other side. So in this case of Grabarczyk v. Stein. Yeah, I'm gonna call him Kenny. So in 2002, Kenny pled guilty to second degree sexual assault in Wisconsin. Three years later, he moved to North Carolina and, as required, began registering as a sex offender. Then in February 2019, he had had enough and filed a Section 1983 class action lawsuit against North Carolina's Attorney General and others for due process violations. Specifically, he sought to challenge a North Carolina law that requires individuals who have been convicted of out-of-state offenses that are quote unquote, substantially similar to a North Carolina offense to register as a sex offender. And whether an offense is substantially similar is decided by local officials on an ad hoc basis. So basically, Kenny argued, North Carolina was forcing people to register as sex offenders based on a system that provided neither an opportunity to be heard or an opportunity for post decision review, a big constitutional nono. So if the district court agreed, and it enjoined the practice, and as per usual, the government filed a notice of appeal. But, and this is where things get interesting, just a few weeks after filing the notice of appeal, the North Carolina legislature amended its law providing judicial review of substantially similar determinations, and it even created a review procedure for all of the class members in the lawsuit so that their earlier determinations would be reconsidered. Since this change basically mooted the lawsuit, the defendants moved the Fourth Circuit to vacate the district court's order and remand the case. The court obliged and then the district court also agreed, holding that if the class still had issues with the new law, those issues would be need to be raised in a new lawsuit. And finally, we get to the good stuff. After the case was fully resolved, Kenny filed for attorneys' fees, arguing that he was the prevailing party of a Section 1983 action. The district court agreed and ordered defendants to pay that money, honey. So on appeal, the government argues that because the judgment was vacated following the legislative amendment, Kenny didn't actually prevail, and he is not entitled to recover attorneys' fees. In this opinion, the Fourth Circuit basically tells the defendants, you're dumb. Section 1988, the statute that enables prevailing parties to recover attorneys fees for 1983 lawsuits, clearly applies to this case. Kenny secured a ruling in his favor, and he was also ordered pretty legitimate relief; he got an injunction. And then, because of that ruling, the legislature changed the law, mooting the case. Just because the case was mooted by defendants after and because the merits of the claim were adjudicated, does nothing to reverse the clock.

A Alexa Gervasi 06:01

I think my favorite argument from the defendants is when they claim that there was no cause and effect here between the judicial decision and the legislative claim. Okay, I'm sure the legislative will just like, apropos of nothing, maybe we should consider this statute and make specific accommodations for the plaintiffs who just won a lawsuit against the state, but it is definitely not because of this lawsuit we just lost. The court obviously didn't buy that. And they ruled in favor of Kenny saying that he could recover his attorney fees. But the Fourth Circuit did specifically note that this was a limited ruling, whereas other courts have held that no matter what if a case is mooted after judgment is entered, you can still recover your attorneys' fees. The Fourth Circuit didn't go quite that far. It said if it is mooted because of an award in the

prevailing party's favor. So for instance, exactly what happened here, the legislature made a change based on a judicial ruling that therefore mooted the case, your ability to recover fees under 1988 stays. But basically, the Fourth Circuit is going to retain this causation element. And I think we have to take a moment and talk about the amount of the attorneys' fees, which I'm sure we'll we'll get into later. And we'll discuss more but, so that the listeners know, Kenny applied for $60,381.15. And the state seriously tried to argue that that was excessive for a class action that was resolved at the summary judgment stage. And don't get me wrong. 60k is a lot of money. But for any of the attorneys on the call, is it? So that is this case, and I'd love to hear your thoughts.

A Anthony Sanders 08:06

Ari, is that big money for you?

A Ari Bargil 08:07

It sure is big money for me. I think it's big money for most people, though, it's not anywhere near some of the sums that you would expect for a well litigated action against the government. And it's far lower than what you would expect somebody to even ask for, much less be awarded. So it struck me as a relatively low sum. And you know, one of the other things that struck me, as I was reading this opinion, apart from just the general audacity of the government's positions throughout, was what this would mean for fees under 1988. I mean, the entire idea behind this entire fees provision is to discourage legislatures from passing unconstitutional laws and to discourage government attorneys from defending those laws and here the government is basically saying, you know, don't worry about all of that, you can still pass unconstitutional laws, and we can still foolishly defend them. And we won't have to pay fees as long as the legislature goes in and changes the law really quickly before a fee application comes in, then we won't have to pay them. And that just struck me as so bizarre. And the court never really got into what this would mean from a policy point of view. But the entire argument being offered by the government here was just wrong in so many ways and was entirely contrary to the intention, and the obvious intention, of the statute that provides for fees in these types of cases.

A Anthony Sanders 09:29

Yeah, I mean, the Supreme Court has already kneecaps a lot of attorneys' fees in civil rights cases where you're not asking for an award of damages with this case that they interpreted in, in this case, Buckhannon from 2001, which rejected the so called catalyst theory, where if you sue about a law and then the government repeals the law before you actually get to a judgment and it's obvious to everyone that what was going it was because of your lawsuit that they repealed the law, and so it's mooted, but you should get something for it. The Supreme Court said, no, no, we're rejecting that. That gets into, you know, intentions and all that we don't want to mess with it. So you need an actual judgment in order to get paid. And so hear the government saying, it's like the catalyst theory in reverse, that if you get a judgment, but then the law is repealed, then it doesn't count, because the judgment isn't what is important and we don't want to get into the intentions of the legislature. It is a way overreading of Buckhannon. And, I mean, anything could happen. But I don't think the court that decided

Buckhannon would then go the next step, after you know, talking about essectially the sanctity of getting the actual judgment to that, well, you can't get a judgment, but then you can't get fees, you know, if there's an appeal that takes a number of years, and they can monkey around and repeal the law anyway, after judgment, when they really know they might have to pay fees. So this is good to see. But, Alexa, you're talking about how there's a split now of the other circuits on whether it matters that the repeal of the law was connected to the lawsuit. But I mean, under that logic, it shouldn't be connected at all you know, if it repeals it because they're just cleaning up the code and they happen to repeal that law and it's a week after you got the judgment, you still got that judgment. And the reason for the attorneys/ fees in the first place is to make the civil rights actions happen that wouldn't have happened without that incentive. I mean, the entire reason we have Section 1988, that Congress passed it in the first place, is still there. I know, the government is going to argue whatever it can to not pay attorneys' fees in the rare instances where it actually has to pay attorneys' fees. But it strikes me as pretty darn duplicitous.

A Anthony Sanders 10:23

Yeah, I totally agree. I think it is interesting that the court didn't talk about any of these policy issues. Like you guys, that was what was lingering in my in my mind. And again, we're talking about $60,000.

A Alexa Gervasi 12:12

For a class action! I mean, somehow they made this a class action successfully, and it's only sixty. They must have had some serious cutting of their bills, and they must have had a very conservative rate that they would have charged.

A Alexa Gervasi 12:41

Yeah, yeah, I should have looked before we started talking to see who their attorneys were, but it seems, you know, maybe they did it pro bono. And they were like, Oh, now let's figure out, which is a fun position to be.

A Anthony Sanders 12:54

In case people are wondering, by the way, because all of us being public interest lawyers and we talk to ordinary people, and they're like, Well, how do you get paid? And how does that work? Just in case, people are wondering how this works in the public interest arena. Organizations like Institute for Justice, most of the money they get is from donations from very kind people, maybe some of the listeners. We don't get very much from attorneys' fees awards, because there's so much involved other than just the attorneys fees. But there are a lot of civil rights lawyers out there or just ordinary Joe's trying to make a living where this is the bread and butter of how they get paid, because they take on cases of folks who can't pay them upfront. And so what happens is, you have an hourly rate, but you don't charge your client, whether you're on contingency or you're doing it pro bono or you work at a place like IJ. But then when you actually win, and then you get an attorney's fee, you have to come up with some number

that you would have charged your client if you had charged your client, because otherwise, you know, how do you do it? And basically, they go, as you might imagine, they at go what the market is. So what would you charge if you were just a regular for profit lawyer, given your experience, given the market of the city that you're in at the time you got the judgment? And so that all goes into it, and this process spat out, in this case, about 60 grand, which again, sounds incredibly reasonable. I bet really lowballed, to tell you the truth, for what they were able to do here.

A Alexa Gervasi 14:33

Yeah, so for the not yet lawyers, but law students who are listening, this is the sexy part of being a lawyer, calculating attorneys' fees.

A Anthony Sanders 14:44

Well, another sexy part of being a lawyer is engaging on social media. And someone who's not even a lawyer thought he'd engaged with his local police department. But then things took a interesting turn. So Ari, tell us a bit about that.

A Ari Bargil 15:00

Sure. This is a Sixth Circuit decision originating out of a town in Ohio called Parma. I'm not sure if the cheese there is as good as its Italian namesake. But in any case, Mr. Novak was a gentleman living in Parma, Ohio, who wanted to have some fun with his police department. And he set up a fake Facebook page. Well, it was a real Facebook page, but a parody Facebook page, on which he made a few outrageous statements that would have led anyone to believe that this was obviously a parody or joke account. It was made a little bit to look like the official police page, except it said things like that the police were offering free abortions to teenagers using an experimental technique discovered by the Parma Police Department to be performed in a police van in a giant eagle parking lot. He also said that the police would be hosting a pedophile reform event with a "no means no" learning station in which anyone who passed a series of puzzles and quizzes could be removed from the sex offender registry and accepted as an honorary police officer of the Parma Police Department. This was very obviously not a real Facebook account of the Parma Police Department, nor was it intended to trick anyone into thinking that that's what it was. So this joke spreads on Facebook. A lot of people laughed at it and a few other people commented on the page saying that it was fake and Mr. Novak happened to delete those comments. And about a dozen people call the police station and there's some lack of clarity about whether anyone thought the page was real or not. But according to Mr. Novak, at most one person thought maybe it could be real and all told the page was up for no more than 12 hours. The police got nine calls. And in the entire time police dispatch didn't miss a call. There was no time last that the plaintiffs argued. But nevertheless, you know the deed was done. And so what did the cops do once they found out about Mr. Novak's page? Well, at first their response started somewhat rationally, they posted on their page, their actual Facebook page, that there's another page out there and it's fake. They warned that they were investigating that page, and they wanted to make the public aware that it was out there. Mr. Novak then takes an additional step of copying that statement released by the police on their page onto his page. And this sort of rankles the police a little bit more and

inc ome the detectives and the lieutenants and I like the names of these characters. It reminds me of like a primetime police drama. Lieutenant Riley issues a press release. He has a news conference. He warns the public about this dangerous fake Facebook page and then he tells detective Connor to get on it. So Riley and Connor are on the case. Connor contacts Facebook, he tells them preserve all of your records about this page, we're gonna find out who's behind it. He gets a warrant finally for Facebook's records, and they determine that Novak is the man behind the fake page. Riley and Connor then contact Parma's law director, a gentleman by the name of Timothy Dobeck. Now, I'm not familiar with what a law director is. It sounds like some sort of a city or county attorney. And Mr. Dobeck says that there's probable cause for them to get two more warrants, one to arrest Mr. Novak himself and the other to search his apartment. And, you know, these warrants are obtained potentially under false pretenses. But we'll get to that in a moment. So the crimes that they're charging him with when they arrest him, are using a computer to impair or disrupt police functions. Now this sounds a little bit more like a charge that you would levy at some sort of a computer hacker. But nevertheless, this is what they've come up with to charge Mr. Novak. Sounds a little specious, but nevertheless, they haul him in, they arrest him. They search his apartment, they seize his phones and his laptop. He spends four days in jail until he bonds out. And then a grand jury indicted him. Now mercifully, this all ends when he finally gets this in front of a jury and the jury acquits him of the charge. Now, that isn't where this case ends. That's actually kind of where this case begins. Because Mr. Novak then sues the town and the police officers under Section 1983 saying, Hey, I was just making fun of you and you arrested me, you hauled me into jail, and you charged me with a crime. And so now I'm going to sue you and seek damages for what you did to me. And, you know, first I think we should take a moment to point out Mr. Novak's courageousness. Unless I'm missing something here, he would have needed to take this case all the way to trial, risk being convicted and sent to prison, in order to bring these constitutional claims. for those who listen frequently, this might remind you a little bit of James King, an IJ client who had to do the same thing after he was severely beaten by police. He needed to go all the way to trial and eventually get acquitted in order for him to bring those claims. And so that's that's what Mr. Novak bravely did here.

A Ari Bargil 20:10

And he brings multiple claims, but he sues both the city and the police. And now this case kind of becomes a lesson in various immunity doctrines. First, with respect to the claims that he brought against the police, he said, you retaliated against me and I have a First Amendment right not to be retaliated against for speaking out against my government. And the officers say, well, you know, qualified immunity applies here. You need to point to a clearly established right, and Mr. Novak says I have one, it is a clearly established right to be free from retaliatory arrest. And the court says, well, maybe but you don't have a clearly established right to be free from retaliatory arrest if there's probable cause for that arrest, it kind of doesn't matter if it was retaliatory. Now, we're gonna find that there was probably probable cause here you used a computer. Cops could have reasonably reasonably believed that you were disrupting police behavior. And there's there's probable cause right there. So it's not retaliatory, Mr. Novak says, ah ha. But you can't base probable cause in this instance solely on protected speech. And because everything that the probable cause affidavit was based on was speech that I engaged in that's protected by the First Amendment, that's not enough of a basis for you to have probable cause to arrest me. That's where the court kind of says, well, maybe it's the case that you can't be arrested solely on probable cause stemming from protected speech. But it's not clear to us here that everything you were doing was protected speech under the First Amendment, after all, impersonating a police officer or impersonating a police department is

not protected speech. And so maybe it's a question for probable cause purposes. But it's an easy one for qualified immunity purposes. The cops made a judgment call, they thought that they had probable cause to arrest you. And so qualified immunity applies. And so out goes his claim for officer liability on the grounds of First Amendment retaliation when it's very clear to anybody who's reading this opinion or who knows anything about what was going on that that's precisely what happened here. But it was about a Fourth Amendment argument. He said, you didn't have probable cause, this arrest was wrongful. And the court says, well, you know, there's a complete defense to any sort of Fourth Amendment argument here brought against the officers where they have a warrant, unless you can show that they knowingly and recklessly made false statements or omissions on their probable cause affidavits in order to obtain that warrant. And here's where things get a little bit interesting. Because what did the police actually say in their affidavits to get this warrant? It's not entirely clear from the opinion. But what is very obvious is that Detective Connor told the magistrate, Magistrate Fink, he said, Magistrate Fink, there's a fake page and that we're getting some calls about it. And that's pretty much what's clear from the opinion was said. He doesn't say that it's a parody or that it's a joke account. And he doesn't say that nobody thinks it's real. He just says we're getting calls. And that is what Mr. Novak says is what led to the issuance of this warrant that led ultimately to his arrest, his imprisonment and his incarceration. And the court says, well, that's not enough. Maybe Detective Connor's statement could be considered an exaggeration, but not an outright falsehood. And that's a quote from the court. And so they say, these aren't lies. They're just Detective Connor's quote, portrayals. And he's not required to say it's a parody account. Because parody is a legal term, and Detective Connor isn't required to supply the magistrate with the law, just the facts. And so maybe he exaggerated a little bit, or he left a thing or two out. But ultimately, he didn't lie in order to get this warrant. And so you don't have a claim against the officers for a violation of your Fourth Amendment rights. Now, to me, that stinks. It should seem pretty obvious that there's a very big difference between a probable cause affidavit that says there's a fake page and we're getting phone calls from people who may think it's real, and some guy created a parody account and we're getting some phone calls from people who aren't sure what's going on. I think the action of the magistrate in those two instances might have been different, but nevertheless, out goes his Fourth Amendment claim. And so all that really he's left with against the officers is this claim of malicious prosecution. With respect to the prosecutor, they say, hey, he made a totally independent decision. He reviewed the page, he found out they'd received some phone calls, he determined it wasn't protected speech, and he decided to move forward with the case. But you could have a claim for malicious prosecution if you can show that Detective Connor lied at trial. And Mr. Novak says, ah ha, Detective Connor did lie at trial. He lied when he said his police work was disrupted because he said he had to stop working on another case, he postponed a DNA swab. He said he missed a pretrial conference. But if you look at his actual calendar, both of those things were on different dates, dates that didn't coincide with the investigation into my fake page. And the court said, Well, that's quote, not quite a smoking gun. It was just negligence or an innocent mistake. And so boom, out goes that claim, no malicious prosecution.

A Anthony Sanders 25:30

So that's the smoking gun standard that I don't remember.

A Ari Bargil 25:35

I wasn't taught that in law school. And I just actually learned the smoking gun standard last

night when I was reading this opinion. But nevertheless, that brings us to municipal liability. There's this case out there called Monell that some people might be familiar with, especially if they're familiar with these various immunity doctrines. And basically what Monell stands for is the idea that you can't sue a municipal government for the actions of its agents or its officers, unless you're able to tether those actions of its agents or its officers to an official policy or custom of the county or municipality that you're suing. And so Mr. Novak, brings a Monell claim against the city of Parma. And he starts out by saying, look, this was an authorized action by by Law Director Dobeck, who said that it was official policy for them to go after me when he made the call that there was probable cause. And the court kind of dispenses with that pretty quickly. And they say, well, if every time a city attorney decides that there's probable cause to pursue something that equates to, you know, an authorized action sufficient to justify Monell liability, then everything is a municipal action. And so they kind of kick that. But there are two other bases that I think he alleges for Monell liability that are a little bit more persuasive. One is that by failing to train your officers on the First Amendment, you're establishing a policy or custom that allows them to violate people's First Amendment rights and that enough can be sufficient to satisfy the standard necessary to get liability under Monell. And the court says, well, yeah, they do provide some First Amendment training. The First Amendment training they provide is on protests. And because that's a key duty of the police, that makes sense. But the police aren't trained on the, quote, intricacies of parody, because that's not a key duty of the officer. And so there's no failure to train because their failure would have only been as to the failure to train on the intricacies of parodies. And so it can be justified in this instance. And finally he says, Okay, well, this is at least an established policy or custom because you have a systematic habit or custom or pattern of indifference to protected speech and criminal investigations. And the way that you show this when you're trying to establish a policy or customer under Monell is you can point to a series of actions that are consistent with what happened to you and say this pattern of things is exactly what happened to me, this shows a policy or custom on the part of the police department. And he handed the court a list of cases where Parma had to backtrack or got it wrong on protected speech oriented issues. And the court, and this is, you know, really aggravating, the court said well, just because you have a long list of cases where the same thing happens over and over again, doesn't mean you've established a pattern of behavior sufficient for establishing liability under Monell. And so boom, that's his last minute claim. He's got no claims against the officers, no claims against the town, at least under federal law. And then the court moves quickly to what it frankly derisively refers to as a jumble of his state law claims, which are all grounded in the idea that Mr. Novak has to show maliciousness. And so Mr. Novak says I can show maliciousness. You know, they testified that they were paying no attention to my First Amendment rights when they initiated their investigation. They weren't even thinking about them. Detective Connor lied in his PC affidavit, when he said that people thought the page was real, when in reality nobody thought it was real. He didn't say that it was parody when it was clear that it was a parody. Instead, he just said it was fake. And then he lied to the grand jury when he told them that people honest to god believed the page was real when there was no evidence of that. And most of the phone calls that they were getting just wanted to confirm that the page was, in fact, fake. And the court said, and this was kind of the

A Ari Bargil 29:40

Alexa, do you have any lines to add to this ballad?

A Ari Bargil 29:40

ecore I guess, or the fitting coda in this opinion, where the court says this is closer to a mischaracterization than a misrepresentation, all of these, quote unquote, inaccuracies that Detective Conner offered both the magistrat then the grand jury then the actual jury. And at the end they say this is at worst a negligence, not maliciousness sufficient to satisfy the, quote, jumble of state law claims that you brought. I had to read that sentence four times, "this is closer to a mischaracterization than a misrepresentation," before I fully understood what it meant. I'm still not happy about it. But then, you know, that kind of tosses all of his claims, and then at the end of there's this weird parting shot, after very dismissively addressing and rejecting and brushing aside all of Mr. Novak's claims, there's this weird parting shot from the court about how none of this should have happened. Because evidently, somebody in the police department should have just acknowledged that this was all foolish. They should have stopped what they were doing. And the court cites to a Barry Weiss article about having courage to say no, and that is how the court ends its opinion. Mr. Novak has no cause of action either under state or federal law against the police officers or the municipality, despite the fact that he very obviously was engaged in protected speech under the First Amendment. And anyone who has any sense would determine that this was obviously a retaliatory arrest, because he made them upset because he made fun of them and he made them look foolish by saying that they were offering abortions in a van by a grocery store. So that is the ballad of Anthony Novak in Parma, Ohio. And it's quite a shame that his claims were just dispensed with so summarily.

A Alexa Gervasi 31:26

I have so many bees in my bonnet right now, just so many. So for one, for regular Short Circuit listeners, you know that there is a two-prong test to the qualified immunity analysis. First, was there aconstitutional violation? Second, was that violation clearly established? But because the Supreme Court did some things that it did, courts no longer have to address both of those prongs? And we see the problem with that rule so clearly, in this opinion, right? The court clearly went out of its way to avoid saying that Novak had a constitutional right in that Facebook page, and that it was parody and it was protected speech. And there are a few ways that we know that that is what the court believed. One, this is not the first time that this case came up on appeal. It came up on appeal earlier and judge Thapar, who wrote the opinion here, probably mispronounced that, that's the theme today, who issued the opinion here, he issued a previous opinion where he was like, this is obviously parody and it was very clear that he knew that this was a joke, which parody is obviously protected speech. But when we get to this opinion, we see a real recoil from that previous position. And it causes problems throughout the whole opinion. So, Ari, those Monell reasonings that just didn't make sense all the way throughout, there would have been a really easy way for the court court to have avoided all of those reasonings. It could have just said there wasn't a constitutional violation here. If that is what the court actually believed it could have just said no constitutional violation, so no Monelll claims at all. But the court knew that what happened here was wrong. But it skirted past, it just skirted past that question to the clearly established prong. And, you know, it got it wrong there too. This is a clear example of an obvious violation and courts going out of their way to find a factually identical case and demanding that, which the Supreme Court in Taylor and McCoy in the last couple of years has said we do not need. The Fifth Circuit in a similar first member retaliation case as said obvious constitutional violations are obviously clearly established. And so it's just a real shame to see that the Sixth Circuit isn't recognizing that and has gone so far out of its way to avoid recognizing what is a constitutional violation and doing so protecting the government. And then I think that closing line is almost an apology from the court. Like, we

know we're not doing the right thing here, our bad, but we're going to give a verbal indication to the officers that maybe they shouldn't do this again, but we're not actually going to give you law to protect this type of violation from happening ever again.

A Anthony Sanders 34:44

Yeah, the cops should get some courage, but we're not going to express that courage ourselves. The cops should get engaged but the judges, they're not gonna.

A Ari Bargil 34:54

Yeah. And Anthony, what struck me the most about this opinion, or I shouldn't say struck me the most because there are a lot of things that struck me very heavily in equal ways. But if you kind of juxtapose this decision with the decision that Alexa was talking about earlier, and just reading for tone, on the one hand, Alexa had the government coming in with an untenable position, in my view, and the court methodically and politely addressed each argument and finally said the government doesn't win. Reconcile that with this opinion, which admittedly is from a different appellate circuit, but reconcile that with this opinion, where they rather dismissively, I think, address Mr. Novak's very legitimate arguments and almost kind of brush them aside and make it seem as though they don't even belong in court. I just think it says a lot about the way that government often gets treated and government lawyers often get treated in court, very politely when they're wrong and with extraordinary deference even when they're well, also wrong here, but in the in the view of the court, correct.

A Anthony Sanders 36:02

Yeah. What blows my mind is that the court does all this analysis on the intricacies of how First Amendment law and Fourth Amendment law relate with these claims that someone can make after they've been charged with a crime. And so there's this stuff about probable cause and what the state law prosecution was, when really at bottom here is this law as applied to a parody page is totally unconstitutional. And maybe that's why the jury acquitted him. We don't know what grounds juries use. But they never actually get to that question. Even in the qualified immunity context. It's all dressed up in this probable cause, and, you know, there's a three prong test or what. I, frankly, kind of lost track in some of that analysis. And so how, at the end of the day, can the court does not address that? I just thought about, some of our younger listeners may not remember this, but Jerry Falwell Hustler case from the Supreme Court from the 80s. About this outrageous article about Jerry Falwell, and nobody who read that would think is actually a serious article about all these heinous things that like he did with his mother and other things I think we're in the parody. No one looking at this page is going to think that it's actually a police department. And if they do, you know, we have to have an objective standard, because there could be some just Looney Tunes person out there who would believe it. And none of that comes up in the in the opinion. I don't get how. It's a sign of our immunities law when the court never even gets to that question.

A Anthony Sanders 36:02

Yeah. And just to add to that, Anthony, which I totally agree with, as we're sitting here talking

Yeah. And just to add to that, Anthony, which I totally agree with, as we're sitting here talking about it, it occurs to me that this is very much why people hate lawyers. If you look at this through the eyes of any normal person, it's very, very obvious what's going on here. This guy made a Facebook page mocking the police. So they arrested him. And then there's 16 pages of judicial hand wringing about whether or not there's anything wrong with that. And that is, I mean, that's obviously also part of what makes some of our work aggravating and why we're doing what we're doing. But that's another thing that I just found very interesting is that, you know, leave it leave it to the lawyers to confuse what is very patently obvious to anybody who's looking at what's going on.

A Anthony Sanders 38:47

Well, if the listeners live in the state of Michigan and want to, in a live setting, learn some of this about what's going on, as Ari was just describing, or in other constitutional settings, please, as I said earlier, check out our link in the show notes to come in two weeks from recording this podcast to our forum on the Michigan Constitution. But before then, I would like to thank both of our panelists for coming on. Really appreciate you guys joining us today. We talked about two opinions that were real opinions of real courts, not leaked opinions that you might have just found on the Internet somewhere. We're not talking about leaked opinions today. And so I want everyone to go out and get engaged with real law. And so that's why we're gonna sign off by asking that all of you get engaged.