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SPEAKERS

John Wrench, Anthony Sanders, Jared McClain

A **Anthony Sanders** 00:06

Hello, and welcome to Short Circuit, your podcast from 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 Wednesday, June 29, 2022. There's been a lot going on at the Supreme Court the last couple of weeks. But remember, most of the law's impact on people's lives comes in the lower courts. And today we're sticking with our bread and butter with a couple fascinating cases. First, we'll dig into something I used to dig into in my private practice days: labor law. Specifically, when is a union a joke, and when is it no laughing matter? I can tell you from experience representing unions, that there are a lot of jokes you can make in relationship to them, many of which would be told by union members themselves. But if someone in management makes the joke, what happens then? We'll see what the Third Circuit had to say about that. Then it's off to the Sixth Circuit for something that, I contend is also a joke: the open fields doctrine. It's an interpretation of the Fourth Amendment that we've discussed here before, which is that if a government agent trespasses on your private property, but doesn't go in a building or somewhat close to a building, it's not a "search" as the Fourth Amendment uses that term. But what if an agent seizes something in an open field? "Seizures" is in the amendment rights along with searches. And what if the seizure is of, oh, I don't know, a cow. Yes, that's the fact pattern of this case, open fields, seizures, and cows. But before we turn to unions and cows, I'd like to introduce our guests. We have Jared McClain, IJ Attorney, and this the first time he's come on Short Circuit. Welcome, Jared.

J **Jared McClain** 01:57

Hey, Anthony.

A **Anthony Sanders** 01:59

And returning for another spin is IJ's is John Wrench. How you doing, John?

J John Wrench 02:04

Great, Anthony. It's great to be here.

A Anthony Sanders 02:06

Have you ever searched or seized a cow, by the way, John?

J John Wrench 02:10

I'm invoking my Fifth Amendment rights here.

A Anthony Sanders 02:16

Yeah, okay. Well, we'll have to do a different podcast on that one another time, and more on the Fourth Amendment and cows and John's seizures later. But Jared, the case you're going to discuss, I should let the audience know, is actually one you argued. Now, I should be clear to our listeners, it's not an IJ case. You argued it before you joined IJ, but it's still a terrific accomplishment to you and your own colleagues at the New Civil Liberties Alliance. So, tell us about this case and whether you've ever worked in a salt mine.

J Jared McClain 02:49

Well, for starters, I have not worked in a salt mine. This case started with a tweet as some people don't always follow the maxim of never tweet. Ben Domenech, the publisher and one of the founders of The Federalist, the online magazine, tweeted during the Vox labor walk out: "@Federalist FYI, if any of you ever tried to unionize, I will send you back to the salt mine." And people responded as they do on Twitter. There were a lot of people who support unions that were mad about it. And there were a lot of other people just joking along and saying The Federalist needs to unionize so they could have Negroni hour and that we need a union so maybe we can actually get an office because none of us have an office. And it proceeded as things do on Twitter. And then people forgot about it. But there was a attorney from Boston who saw the tweet and reported it to the NLRB as an unfair labor practice. And his act of filing that charge was important because the National Labor Relations Act only gives the NLRB authority to prosecute and investigate unfair labor practices when someone has filed a charge. So unlike the police, they do not just have roving investigative authority. They can only act when there's a charge that has been filed. And this case, interested a lot of people because it was about a joke on Twitter, but there were a lot of technical, administrative and statutory interpretation questions about the scope of an agency's authority, because not only did the NLRB investigate and charge The Federalist based on the charge filed by a stranger to the company, but the attorney who filed the charge filed it in New York City, a region of NLRB that has nothing to do with where the tweet was sent from, where The Federalist is incorporated, where its offices are, where its employees live, where any harm that could be alleged might have been felt. And it didn't even have a relation to where the attorney lived, because like I said, he was in Boston and lived in a different division. So, NLRB started prosecuting The Federalist in New York City based on a tweet filed by a stranger over this joke. And they have a

hearing, basically a trial before one of their in house judges who sits at a desk next to the attorney prosecuting the case, and the only evidence that they put on that to show that this was a threat, rather than a joke was that The Federalist is an organization that has anti-union viewpoints based on a long list of articles that The Federalist has published over the years. NLRB then sued under the idea that anything that the publisher of Federalist says is necessarily anti-union because his organization is anti-union.

A Anthony Sanders 02:52

That seems like an incredibly boneheaded litigation strategy. To talk about a core First Amendment concern, and what the Federalist does, and not whatever labor practices this tiny little company has. I'm sure they could have come up with something, but they had to actually talk about the product of the company itself.

J Jared McClain 06:53

Right, and that turned out to be important because this was a tiny company. There's only six employees, and they didn't call any of them as witnesses and they all live in other places. Of course, none of them wanted to travel all the way to New York City, because it's a place that has no relationship to them or their case. And so two of them got independent counsel and submitted affidavits that said, "we thought this was a joke. We took it as a joke. No one took it seriously. No one was offended, let alone threatened." And the Administrative Law Judge (ALJ) accepted those affidavits, but said, "you know, these don't matter, because I can tell that this wasn't a joke. I don't find this funny." And so The Federalist appeals, the decision from the NLRB's ALJ up to the board. And the board says, probably sensing the problem that you saw with the First Amendment and protected speech, "you know what, it was wrong for the ALJ to consider that evidence of anti-union bias. And it was also wrong for the ALJ to accept the affidavits of these employees who didn't have a good reason for not traveling to New York City." But at the end of the day, what that left was no evidence. But the board in a footnote in two sentences of analysis says "we adapt the ALJ's conclusion that this was a threat. No one could find this funny. He said he was going to send them to a salt mine. And that's an idiom to mean hard labor. So he was threatening them with hard labor and unfair labor practices." So The Federalist appeals this case to the Third Circuit and raises three challenges. One, a challenge to the NLRB's authority to investigate in the first place because the charge was filed by a person who's a stranger to the lawsuit. Two, a challenge to prosecuting the case in New York City, a venue that should not have personal jurisdiction over The Federalist. Three, a challenge to punishing the company for its publisher's speech, which is a First Amendment problem based on no evidence that anyone felt threatened by the speech, just on the prosecutors' own supposedly objective standard and ability to discern without any context, what counts as a joke and what does not. And so, at the Third Circuit, they ruled on the first issue in a split decision. Two judges, Judges Hardiman and Scirica, ruled that they agreed with the NLRB that anyone can file a charge. To get into the statutory language here, the NLRA says "whenever it is charged that a company has committed an unfair labor practice, the charge has to be filed within six months, unless the person aggrieved thereby was prevented from filing the charge because they were in the Armed Service." The statute was passed in the 1940s, so this was a response to how many people were enlisted in the Army at the time, and it's sort of a passive voice problem. The provision says whenever it is charged, so there has to be a charge filed, and the question then becomes by whom, and what The Federalist argued was the next

sentence that says "unless the person aggrieved thereby informs who Congress had in mind when it was requiring a charge to be filed," so only an aggrieved person can file a charge that will trigger the agency's prosecutorial authority. And the problem for The Federalist was there's a 1943 Supreme Court decision that came out before the aggrieved person language was added to the statute that said a union acting in bad faith when it fails a charge does not divest NLRB of its enforcement authority. Basically, it doesn't matter if the charging party has acted in bad faith. But the court went on to say there's no requirement here that it even has to be in an employee or union, which is a question that wasn't at issue in a case when the charge was filed by a union. So then, four years later, Congress amends the statute to add the person aggrieved language. But since then, there have been several circuit court decisions that just didn't follow. One cursory sentence has said that the any person can file a charge, the Supreme Court has held this and what The Federalist argued was none of those cases can stand for the proposition that a stranger can file a charge because none of those cases have ever dealt with an instance where a stranger has filed a charge like this one. And now that we're living in the age of social media, statements from employers are being spread across the country, and it just creates an entire internet full of possible charging parties that have nothing to do with the labor relationship. But the judges on the panel ruled in the second sentence of the analysis that they were bound by precedent, and there was nothing they could do about it. But then they went on to say that the charging party is basically like an informer or a witness to a crime. But again, that analogy doesn't make sense because police don't need a complaining witness in order to investigate a crime, and the NLRB does, so the Congress chose to limit the authority of the agency here by requiring a basis for the filing of charge, so that must mean something. And if just anyone could file a charge, that would mean that the board itself could file the charge, the prosecuting attorney could file a charge the prosecutor, Prosecuting Attorneys spouse could file a charge. There's really no limit based on the majority's interpretation here. And then they went on to the second jurisdictional argument, the personal jurisdiction one about whether it was a problem that NLRB prosecuted this in a forum that had no relationship to the company. And what Federalist argued was there's cases going back to the founding written by bushwhack Bushrod, Washington and and Joseph Story, saying that it doesn't matter whether whether a sovereign has nationwide jurisdiction, if it subdivides its own authority, it's necessarily bound by those subdivisions. And those individual subdivisions can't exercise jurisdiction beyond their regional boundaries. And the Third Circuit just north of those cases, it didn't cite a single one of them. And it said the due process clauses, test of minimum contacts the traditional test that is applied to figure out whether there is personal jurisdiction in a case, it says due process doesn't require that when an agency is involved, due process only requires that an agency follow its own rules. So as long as an agency's rules allow it to prosecute you in Alaska, rather than where you live or anywhere in the country that might regardless of its connection to the case, its convenience to witnesses, that doesn't matter as long as it's allowed by the agency's rules. The problem in this case is that NLRB zoning rules don't allow this. And NLRB rules require the region to have a connection to the company. But the the third circuit here said that was Federalists fault because they could have moved for a change of venue and they didn't so objecting to the venue isn't sufficient. It was on us for failing to move for a change of venue. But then the court got to the First Amendment, which at oral argument was what it wanted to do in the first place. Judge Hardiman interrupted my introduction during oral argument to basically say, "Why did you bring these jurisdictional claims in the first place? This is all stupid. I just want to talk about the First Amendment."

A Anthony Sanders 15:18

You're getting in the way of us making good law for you.

J Jared McClain 15:23

Right, except, I guess, there were only two judges that ruled against The Federalist on the subject matter jurisdiction, it did draw a concurrence from Judge Matey, who ruled that The Federalist had the better reading and that a person must be aggrieved in order to be a charging party under the NLRA. So Judge Hardiman was speaking for himself when he said he only cared about the First Amendment in this case; there was a very colorable jurisdictional argument that he just wasn't so interested in. But on the first amendment, we already touched on this earlier, when we talked about just the complete lack of any evidence, the board just basically treated tweets like pornography and was like we know a joke when we see one, and we're just the arbiter of humor on the internet when when labor is involved, and all three judges on the panel agreed that was just wrong. The Supreme Court has said that regarding the NLRA, the limits that it puts on employer speech are coextensive with the First Amendment. So you're not just protecting employees rights to be free from threats, you're protecting the employers rights to have free speech. And in order to balance those competing interests, you need to consider the context. And there's case law, including Supreme Court precedent, that says any assessment of the precise scope of an employer's expression, of course, must be made in the context of its labor relations setting. And we all have these cases that the board relied on before the Third Circuit that upheld findings of an unfair labor practice. They all involved incidences of labor strike, there was an active push to unionize, or there were labor negotiations going on between an employer and a union. And there might have been something that could be taken as a joke said, but what the court found was in the context of what was happening here, the employees testified that they actually felt threatened, the employees themselves filed the charge. So it was clear they thought that something was wrong here. And so even though judge Hardiman didn't agree that an aggrieved person needed to be the one to file the charge, it did undermine the board's authority to prosecute the case, because having someone aggrieved file, the charge necessarily sort of shows that they didn't take the the joke as a joke, and they felt threatened. And we didn't have that here, so Judge Hardiman pressed the NLRB is counsel at oral argument. And he was like, where's your proof? What did you consider? And counsel said in footnote four, and footnote four is the one I alluded to earlier, where there's two sentences that just said, objectively, this wasn't a joke, and that there was no analysis. There was no evidence and so what the Third Circuit said the record contains no evidence that any employee perceived this to be a threat. And although it was within the board's discretion to exclude the employee affidavits, and to exclude the evidence of anti-union bias, there was no other evidence remaining. And the panel was concerned with the the NLRB's authority to prosecute humor in the social media age, and they raised it in oral argument, and they mentioned the amount of characters that go on a tweet in the opinion, and they're like this is just a forum for pithy comments. It's 280 words, people are not being precise in their speech. People use it to make jokes and to offer social commentary. And that's exactly what happened here. And it was the agency's burden to prove that someone felt threatened and they didn't carry that burden. So at the end of the day, even though the Third Circuit agreed with the board that there was jurisdiction in the case, they ruled that it violated the First Amendment to find that there was an unfair labor practice in this case.

A Anthony Sanders 20:07

John, has anyone, an employer, ever tweeted a threat to you and you took offense by it?

J John Wrench 20:14

Um, no, I think I've even if they did, I probably took the threat as a joke, which makes it more difficult for them to get those threats across. But I did want to ask, when you read the joke, which it clearly is, I don't think there's a colorable argument that it's not a joke, and then it's just so striking because of that, to see the ALJ's conclusion, and I was wondering, you know, not to say "what world is the ALJ living in," but kind of, you know, what do you think is driving this conclusion? Let's assume that it was a good faith conclusion. I just want to know what you think could have possibly driven the ALJ to think that this is not actually a joke, it's actually getting at something deeper. Like, what was going on? Do you think the ALJ sees things like this regularly, and like really knows what's going on there?

J Jared McClain 21:19

So I don't think that he sees things like this regularly, it is cropping up more. I believe, Matt Bruenig, he filed a charge in this case, and Joel Fleming has filed charges in several cases, so there are people online doing this more often. I believe there was one with Barstool Sports, there was one with Ben Shapiro and the Daily Wire. Typically, they were just straightforward threats. There was no humor involved. It was basically like if you tried to unionize, I will fire you. And people reported those tweets and the NLRB investigated and like I think reached settlements or didn't substantiate the charges in those cases. But it does push the bounds. And that's why this, this holding, I think, from the Third Circuit is important because after the decision came out, Joel Fleming the attorney who filed the charge was like The Federalist is celebrating but this is a victory for us, because now there is a mechanism that says that anybody can file a charge and we can just patrol the internet and continue to report these things. And if there is a vast difference between a joke at a company with no ongoing labor relation, labor strife, that only has six employees and no obvious threat, and this at least forces the NLRB to do its job and to put on some evidence when it's prosecuting a company and to carry its burden of proof. But also, wouldn't you ask how the ALJ could could have found this to not be a joke? I know that union and labor relationships are serious and the law is very serious. But the ALJ hearing room at the NLRB was the most humorless room that I've probably ever been in. It was windowless, it was damp. It was dark. Nobody smiled.

J John Wrench 23:22

You're saying it was kind of like a salt mine?

J Jared McClain 23:28

Yeah, yeah. So a salt mine in Manhattan?

J John Wrench 23:34

Yeah. Sorry. Go ahead, Anthony.

A Anthony Sanders 23:36

No, I was just going to say I didn't do very much work in my labor law practice with the NLRB itself, but it is actually not the most efficient mechanism of a litigating these issues. And, and usually the remedy is quite paltry. And so it's one of these things where, like, the process is the penalty, and so it's unfortunate here that if you had a real unfair labor practice charge, what they would go through, whatever you get out of it at the end, you know, "promise not to make these kinds of threats" is probably close to actually what the penalty would be in the future for the enforcement process. That's not too different than what your client had to go through in this case for something that, you know, all but the most humorless bureaucrat is going to realize is none of their business and it's a joke.

J Jared McClain 24:41

Yeah, and the the remedy that the supposedly aggrieved employees would have gotten in this case is that the NLRB wanted them to post a notice in their break room. But again, this is six employees who work on the internet and there is no break room. So if they're going to be accepting these charges from the internet, the NLRB needs to do a little more work to think about how it's prosecuting, what it needs to show, and what it's looking to get out of them, because it does seem like it's just going through the motions and rubber stamping everything that comes through.

A Anthony Sanders 25:22

I love the idea of a break room. And like, you know, the virtual economy is some like web page that no one ever goes to. Yeah. Well, we'll see if that that goes elsewhere. Final question, Jared, do you think that, regarding the jurisdictional question, do you see it coming up in other circuits? Or was this a little bit of lightning in a bottle because of the really weird way that it came up?

J Jared McClain 25:54

So I think that traditionally, it has not come up and that 1943 Supreme Court opinion had not been cited very often, it was only a handful of sites. It was unfortunate for your Federalist, the two of them happen to be from the Third Circuit. But these were all in the traditional labor context. And now, as you said, with the virtual economy and with people on social media now feeling empowered and aware of the fact that they can file charges, I think that this will start to come up more if NLRB is going to continue to prosecute, particularly if it does it in inconvenient forums. Luckily, for us, you just took the Amtrak for two hours, but if you can file these charges anywhere, they can really start to harass employers, and generate case law. My sense is that the court as it's currently composed, and just in the past couple of years the way that the court has been approaching personal jurisdiction under Justice Ginsburg and the way it's been approaching statutory interpretation, the opinion from that 1943 case is not going to hold. So if NLRB continues to prosecute cases the way that it has on complaints from people like Joel Fleming, this is eventually going to make its way to the Supreme Court, and they're probably going to lose that authority.

A Anthony Sanders 27:25

Well, another issue that some of us at IJ would like to get to the Supreme Court is narrowing this concept of an open field, a constitutionally free zone on private property. John, it seems that there's a there's a bit of a line in the sand from the Sixth Circuit, at least when you're dealing with cows that perhaps haven't been treated very well. So tell us the story there.

J John Wrench 27:54

That's right, Anthony, and I would say it's, it's a line in the farm. The issue in this case is whether some officers had qualified immunity from claims arising out of two warrantless seizures that occurred at a cattle farm. So officers in Marshall County, Tennessee received a complaint regarding the treatment of cattle on a farm owned by a Mr. and Mrs. Hopkins. And so an officer drove by the property and observed a dead cow and several others in poor health, so it seems like the complaint was pretty accurate. The officer returned to the farm with a Department of Agriculture veterinarian, and when the officer arrived, Mrs. Hopkins was home making lunch for her children, but Mr. Hopkins wasn't, and so the officer knocked on the door. Mrs. Hopkins answered, and the officer demanded that Mrs. Hopkins take the officer in the vet to go see the cattle, and so Mrs. Hopkins asked if she could wait until after her husband returned home, or after she was finished feeding her children, and the officer replied, "absolutely not. I need to see them right now." And so that that'll matter later when the court is looking at this, so Mrs. Hopkins takes the officer and the veterinarian to see the cattle, which were also not in good health. And about a week and a half later, the officer and a veterinarian returned to the property without speaking to either Mr. And Mrs. Hopkins, and they searched the farm. And in addition to the poor condition of the cattle, generally, they also find a sinkhole containing remains of multiple cattle. And so the next day, officers returned to the farm without a warrant, and they seize the remaining cattle. And so, Mr. And Mrs. Hopkins sue, arguing that the officers violated the Fourth Amendment by conducting two warrantless seizures. And so, I just mentioned the cattle, but the first potential seizure is when officers told Mrs. Hopkins to bring them to the cattle immediately, when she asked if she could wait, and they insisted. So the first question was whether that was a seizure. And the second was whether the officers returning to the property and seizing the cattle was a seizure. And so the officers argue that they're entitled to qualified immunity on both claims, and the district court denies qualified immunity, so the officers appeal. And so the court begins by addressing the potential seizure of Mrs. Hopkins. The court notes that consensual interactions between police and citizens can become a seizure or detention if a reasonable person would have believed that they were not free to leave the interaction or detention. And so the court says, look, the officer said, "Take me to your cattle." Sounds a bit like taking a cheerleader take me to your cattle. Mrs. Hopkins says, "Can I wait until my husband gets home or feed my children first?" And the opposite of says, "No. I want to see the cattle right now." And then Mrs. Hopkins takes him. And the court says a reasonable person and Mrs. Hopkins situation would have taken the officer statement to mean that she must comply with his demands. And so the court finds that that was a warrantless seizure. The court also rejects the officers qualified immunity argument and says that, after looking at a couple of cases were a bunch of circumstances including the officers language, their tone of voice, where they've positioned themselves and interacting with the person. Were all of those circumstances indicate a seizure. And so after looking at those cases, the court concludes that it was clearly established at the time that forced compliance with an order like this violated the Fourth Amendment. And so the court moves to the question of whether the officers warrantless seizure of the cattle, violated the Fourth Amendment. So the ordinary rule

is that seizures are per se unreasonable, and therefore, unconstitutional, without a warrant supported by probable cause, you typically need a warrant supported by probable cause to seize property or a person. But there are exceptions to that rule. And the officers here argued that a couple of those exceptions might apply. And so the most important one, the one that at least the court spends the most time on, is the so called open fields doctrine. The officers argue that they were allowed to be on the farm and seize the cattle without a warrant under the open fields doctrine, and according to that doctrine the Court has held that people have no expectation of privacy in open fields. And as the Supreme Court has cheekily put it an open field need to be neither "open" nor a "field," which is, you know, great. You can tell that a doctrine is making sense when you have to totally torture the common meaning of words to apply it. And so, in a series of cases, beginning in 1924, the Court has recognized a couple of times that open fields just don't implicate the Fourth Amendment. And just an interesting little tangent on this: one of the reasons why this doctrine makes absolutely no sense, is in one of the earliest cases, which is a Justice Holmes opinion, he decides that the open fields doctrine exists in part by looking to Blackstone's distinction between burglary and robbery. And his point is that you can burgle a farmhouse because people live in it, but you can't burglar a farm building that people don't live in. And so Justice Holmes said, "aha, that means that there is no reasonable expectation of privacy in the outcropping building or in areas away from the home." That is, that is a pretty incredible stretch and it's at the founding of this doctrine, and it has never really gotten better from there. But the the officers argued this doctrine allowed them to be on the property. And the court actually agrees with that point. The court says, under the open fields doctrine, the officers were allowed to be on the property. But the court makes a distinction. It says that even though the officers were allowed to be there, they were not allowed to seize property that they observed, even though they were on the property legally under the the open fields doctrine. And so the court reaches that conclusion by looking at all the open fields cases, and saying none of these cases allowed officers to seize property without a warrant. And I think they were thinking we're not going to be the first ones to do that. I think that it's worth asking whether the open fields doctrine is broad enough to allow seizures. I'm not sure what the answer to that is, it is an extremely broad doctrine as currently applied. But that is where the court draws the line and says, "No, we're not going to allow seizures in open fields." And the court also rejects that the officers could have seized the cattle under a plain view exception. So let's say they're in the open field, legally. And then the officers see cattle that are in poor condition, the officers argued, well, under the plain view exception, we should have been able to seize the cattle, the court rejects that and says that you can't seize something in plain view without a warrant. Unless there is some types of of exigent circumstances or an emergency. When there's no exigency, you can't seize what's in plain view without a warrant. The whole the whole point of that is, if there's no emergency, you have time to go get a warrant. And the court says multiple times here, you know, these cows weren't going anywhere. They weren't doing well. They weren't healthy, but they weren't going to go anywhere. And so nothing prevented the officers from leaving the property after seeing the state of the cattle, obtaining a warrant, coming back and seizing the cattle under the warrant. Interestingly, the court also not only finds that the officers seizure wasn't justified, but it concludes that the officers don't get qualified immunity. And so this is a I think, you know, it's better than the alternative. It's interesting, because if the court really wanted to be sticklers about qualified immunity, one could imagine them saying that they can't find a case close enough to a warrantless cattle seizure, to find that the officers had qualified immunity. But the instead the court looks to a series of cases where officers attempted to seize property that was in plain view without a warrant, and the cases say you can't do that. And the court says that's a that's clearly established enough, where you should have known better that you couldn't do it

here. So the officers went 0-and-2 here. And I think, an interesting takeaway, at least one that I thought of is, you know, these officers technically took the cattle unlawfully which I think makes them cattle rustlers.

A Anthony Sanders 38:52

I think you'd be right. I think you'd be right about that. There must be some tort of cattle rustling perhaps that the property owners could have brought?

J John Wrench 39:01

Yeah, that was a huge mistake not to not to bring that claim.

J Jared McClain 39:07

Definitely. Another thing that's interesting is the court found that there was the seizure of the of Mrs. Hopkins. It's interesting that the court found that there was a seizure of Mrs. Hopkins when, under its own application of the open fields doctrine, they didn't need to seek her permission in the first place. They could have just wandered, trespassed onto this property, walked all the way back and checked out the cows for themselves, but because they knocked on the door and asked her permission, like they should have, it's a seizure. I'm not saying it wasn't a seizure. They had the full force of the law. They had their gun, their badge, they told her that she had to comply with their orders. It's just shows how perverse the open fields doctrine is that the cops can just trespass onto your property and check out what's going on on your farm without the warrant. But, yeah, the whole time I was reading this setup to this case, like the standard of review and how the court applies qualified immunity. It just stressed me out so badly. And I knew that this case was going to come out the wrong way, because they're like, You need a very specific case. That's exactly the same. And I'm thinking how many cases with a bunch of dead cows and a sinkhole are there that are going to allow the court to hold that these cops aren't entitled to qualified immunity. But I like I was genuinely surprised that the officers lost on both claims here. It's a good outcome. It's just the way the case law has gone. It was surprising to me.

J John Wrench 40:50

I completely agree. I was also surprised reading this. I was expecting, you know, even if the court was willing to find a constitutional violation, I was a little surprised that they rejected qualified immunity. And I do think that that was the right decision, it's just and I wouldn't even call it a generous application of qualified immunity, it just seems like what you would expect if someone says you violated my rights. I think it's a pretty good call to say that they did. It is interesting, your point that the open fields doctrine is so absurd that the officers could have gone on that property 500 times at any given at any time, morning, day or night, and walked around doing anything, and that's fine under the Fourth Amendment, but it was problematic that they made Mrs. Hopkins feel like she was compelled to take them to see the cattle. And I do agree that that was a seizure, making her feel like like she was compelled to do that. But it's so absurd what the open fields doctrine allows, and I think these two seizures show that.

A Anthony Sanders 42:18

One wrinkle that is always seems unclear in in open fields doctrine is how it applies to stuff that's on your property that's not a home, and I couldn't really tell in this case. If you could remind me, John, when the officers are walking around, did they go in a building where the cattle were? Or was it purely, like, a field with cows in it? Because it always seems like there's uncertainty in the law. If you go in an outbuilding where no one's living, or no one's in right now, and maybe a door is open and you just walk in the door in this barn? Is that an open field? It seems like probably it's not from some Supreme Court cases, but it very well could be. Yeah, so what was your take?

J John Wrench 43:20

Yeah, I think it's I think it's a maybe, maybe not, in terms of the buildings that are in the open fields. In this case? It seems like so there's there's a couple times that the officers see something on the property. One is when they drive by and they see the cattle, that doesn't even implicate the open fields doctrine. When they're walking around, it seems like they don't go into a building. I don't think the opinion says that they've walked into a building, I think that they actually were just viewing cattle out in a field. And I don't think it clarifies when they come back, whether they also went into a building.

A Anthony Sanders 44:01

One of the Supreme Court cases on open fields that from the 80s, which is, like most of them about drugs, was that the officers went up to a barn that was quite aways from the actual homes. It wasn't on the curtilage as the as listeners may know, that area around the home, but like they went right up to the barn and look through a window I think and saw basically a meth lab, or something like that. And I think that was okay, but it's like they had actually opened the door to the barn and it was a little uncertain. So just so listeners are aware, if you have a rural property, you're planning your open fields, that's kind of where the lay of the land is. There's one thing I've never really got about open fields we could close on. So, Justice Scalia, I don't think it was an opinion about open fields, but he kind of hinted that in some of his work that the Fourth Amendment names a few items of property such as persons, papers, effects, and you can argue that just real property, pure real property of field, whether it's grass or rock or whatever, that is not enumerated in the Fourth Amendment, so it doesn't have that kind of protection. So I mean, you can make a textualist argument for open fields on that, but that's not where the court is anchored. And I don't know if that textualist argument works, by the way, but the court has anchored it in Justice Holmes' kind of free flowing read of Blackstone where he even say what he cited. And I wonder if the court is into re-examining this issue, if that contradiction is going to be a fruitful new way to overturn the open fields doctrine or very much narrow it. So like a case like this where you're seizing, which is, of course not not the same thing in any way as a search, is not going to be within a stone's throw of coming out that way.

J Jared McClain 46:18

Yeah, it because it also seems under the Holmes's interpretation of Blackstone that the burglary vs. robbery distinction wouldn't matter if it's a search or a seizure. If that's the distinction he's making, it shouldn't matter whether they're just walking on the property or taking something while they're there.

J John Wrench 46:42

Yeah. And I think, you know, Anthony, your point about the textualist argument? I think that is out of the arguments. I think it's a better argument for the open fields doctrine. I don't think it wins, though, because I don't think that you can look at the court's Fourth Amendment decisions at any point and think that the Fourth Amendment only extends to, you know, like the Court starts with exactly the word that's in the Fourth Amendment and then moves on from there. That's not at all what they do, and I think that really what the courts should be doing. If and when it re-examines the open fields doctrine is taking a look at, you know, especially what what type of events did the framers of the Fourth Amendment deal with? And is this one of the things that they were probably trying to prevent with the Fourth Amendment? And I think that the answer is almost certainly yes. And so I think the historical argument for what was going on and what the Fourth Amendment was trying to achieve, I think that is where the court should be looking. And I think that the open fields really has no basis in the history of the Fourth Amendment.

J Jared McClain 48:11

Would the founders be cool with a bunch of red coats just walking through your yard and snooping around through your barn? Yeah, probably not.

A Anthony Sanders 48:18

I think we can all agree with that. I mean, we should remember as, as our Fourth Amendment project at IJ grounds, actually our mission that the Fourth Amendment begins the right of the people to be secure in their persons, houses, papers and effects. That word "secure" is so often overlooked, but that's really what the amendment is trying to do. And yeah, having redcoats walk through your barn and in your fields, near your home is definitely no part of security. Thank you both for coming on. Congratulations against Jared on the victory in in the Third Circuit case. We'll look forward to speaking to you guys in future podcasts about future cases. And for the rest of you, in the meantime, I'm going to ask that all of you get engaged.