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SPEAKERS

Ari Bargil, Anthony Sanders, Erica Smith Ewing

A Anthony Sanders 00:00

"We have troubled you too long, and high time it is for poor pilgrims to take the day before them lest being benighted they strain courtesy in another place. And as we say in Athens, 'fish and guests in three days are stale.'" That was the character Euphues from whom by the way we get the word euphemism in Euphues and His England, a work by Elizabethan writer John Lyly. That last quip - fish and guests in three days are stale -- you may recognize as similar to Benjamin Franklin's famous saying: guests, like fish, begin to smell after three days. Franklin may have adapted his quip from Lyly, but Lyly himself didn't invent it. It's an age old proverb that's repeated so often, because we all know it's true. However, it's not true if you rent your home out via an online platform. Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. My name is Anthony Sanders. I'm the director of the Center for Judicial Engagement at the Institute for Justice. And we're recording this on Friday, September 2, 2022. And you might have guessed that today we're discussing a couple cases about short term rentals and the government's regulation of them. People are voluntarily allowing others to stay in their homes, even for more than three days. What's the problem? We'll find out from a couple of IJ's experts. They are not experts on hosting guests. Well, not to my knowledge, but they are both seasoned litigators for liberty and proud members of a posse we at IJ have called Team Euclidean Zoning Sucks. They are Erica Smith Ewing and Ari Bargil. Welcome to both of you.

E Erica Smith Ewing 02:18

Thanks for having us.

A Ari Bargil 02:20

Yeah, thank you. As always, I always appreciate the Anthony Sanders etymology lessons.

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Anthony Sanders 02:24

Well, aside from that, do you agree with that old adage about a guest smelling like fish after three days?

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Ari Bargil 02:34

I think it depends on the guest. But generally, yes.

A

Anthony Sanders 02:38

Yes. Well, I was talking with Ari earlier -- we'll except out grandparents. They don't count. But maybe maybe other guests can have some problems. Well, we got a Dormant Commerce Clause case from the Fifth Circuit that Ari's going to take talk about and a takings case from the Third Circuit that Eric is going to talk about once from New Orleans once from New Jersey. The New Jersey was one has some amazingly stereotypical New Jersey facts that I'm really looking forward to.

E

Erica Smith Ewing 03:09

I wasn't gonna say that, but thank you for saying it for me.

A

Anthony Sanders 03:13

Yes, me sitting out here in Minnesota. I tried to be nice about other states. But this one's a little too perfect. But first, New Orleans. Ari, how does the Dormant Commerce Clause protect our right to rent out our homes?

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Ari Bargil 03:28

Well, it turns out it protects your right to rent a home if you're an out of stater, who wants to offer a property for rent in New Orleans. As you said, Anthony, this is a case originating out of the Fifth Circuit Court of Appeals based on a challenge that was filed against a New Orleans restriction on short term rentals. In a nutshell, in 2017, the city of New Orleans acknowledged that there was growing demand for short term rentals in its city. And so they changed their ordinances to allow people to rent properties on a short term basis. A couple of years later, though, they realized they were having some issues with problem properties. They wanted to protect quality of life. They wanted to, you know, make sure there weren't too many people who were being too loud or weren't cleaning up after themselves. So in 2019, they decided to pass restrictions on short term rentals. And the problems arose with respect to how they went about doing that. What they decided to do was rather than cracking down on the problem properties, they said, Look, if you want to offer a property as a short term rental in a residential neighborhood in New Orleans, Louisiana, you have to be not just an in-state resident, but you've got to be residing in that property. And they codified that and they said and we're going to define that by having you prove that you have your homestead designation on that specific

property. They also passed a number of other restrictions that aren't super important for what we're talking about here like restrictions on advertising. But nevertheless, of course they got sued. And the plaintiffs who sue the city of New Orleans brought three primary claims. They said first, this is a taking, because they had a property interest in renewing their license on an annual basis. They said we were allowed to do this before, even though we didn't live in the home. And now you're telling us we can't and now we can't renew our license. And we have a property interest in that. That's a little bit different from the property interest articulated in Erica's case that we're going to talk about a little bit later. They also challenged the ad restrictions as violating the First Amendment. And the primary focus of our discussion today will be the third thing that they raised, which is that the residency requirement violated the Dormant Commerce Clause because it discriminated against interstate commerce. Now, the court hung its hat on the Dormant Commerce Clause issue raised by the plaintiffs and they said, look, there are two basic types of Dormant Commerce Clause violations. There are the cases where a law plainly discriminates and there are cases where a law only imposes an incidental burden. And the case really turned on the way that they classified New Orleans' ordinance here. They said this is plainly discriminatory and, therefore, it may only be upheld if it advances a legitimate local purpose that cannot be adequately served by reasonable non discriminatory alternatives. Sounds a little bit like what would be considered heightened scrutiny in an economic liberty case or something like that. Whereas the other alternative, which was, you know, the idea that this could only impose an incidental burden, they said that that would mean that the law would only be invalid if it was clearly excessive in relation to the putative local benefits. And city of New Orleans presented a handful of really interesting arguments. The primary one was look, we're not we're not trying to discriminate. We're just addressing problems with short term rentals. And the court said, look, it doesn't matter that you had a benign purpose. What we're actually looking to is what the ordinance that you passed actually does. And here, it makes it so that anybody who lives outside the state of Louisiana cannot offer a short term rental to anybody who would want to visit the city of New Orleans, because obviously they're not going to be able to comply with the requirement that you have to be an on-site resident. And the city also argued, you know, there's no limitation on you owning something outside of a residential neighborhood and offering that as a short term rental within the city. And they also said, Look, this doesn't violate the Dormant Commerce Clause, because it's not intended to prohibit just out-of-state residents. This also is discriminatory with respect to people who live in Louisiana. They too have to be residents on-site in order to offer the property for a short term rental. And the court said none of that matters. It doesn't matter that there was a benign purpose, it doesn't matter that you've also swept in in-state residents into your discriminatory scheme. What matters is whether these two groups -- out of staters and in-staters -- are being treated differently when you look at the ordinance that you passed. And because the only way that you can offer a property for a short term rental in New Orleans is to be a resident of the state of Louisiana, we're going to say that that is on-its-face discriminatory, and therefore you're going to have to meet that higher standard. And the court basically says that that finding that it falls into this sort of the heightened scrutiny bucket, for lack of a better term, that that puts this ordinance on death's doorstep, and therefore, it's only going to survive if the government can show that these interests cannot be adequately served by reasonable non discriminatory alternatives. And that brings me to the court's discussion of all of the things that the city of New Orleans could have done short of imposing this on-residence requirements. Some of these things are bad ideas. And some of these things are good ideas. But it should be refreshing for anybody who routinely listens to this podcast or is familiar with IJ's work to hear a court saying, hey, there are a bunch of things that you could have done that would have been less onerous. And that actually matters. And some of those things that the Court said is, Hey, first and foremost, you could just enforce your existing ordinances better. If you're worried about people being loud, then enforce

your noise ordinance. If you're worried about people not cleaning up, then enforce your no dumping and no illegal trash ordinances and step up the fines and punish people who are consistently violating these ordinances. Heck, you could even suspend or revoke their licenses if they're habitual offenders. You could accomplish all of the things that you want to accomplish simply by enforcing the things that are already on the books. You don't need to strip people of their property rights in order to accomplish these legitimate government goals. They also suggest a few other things that I think are terrible ideas. They said, Well, you could just increase taxes on on these platforms, which would supposedly discourage younger, presumably more rowdy guests from booking Airbnbs in New Orleans. They say you could require an on-site adult at every property, which I don't know if that would really accomplish. I don't know what that would accomplish. Surely, although I don't consider myself to be a very rowdy guest, I would be highly hesitant to book an Airbnb if there were a chaperone on the property at the time. But the city also or the court also acknowledges something that I think is very important because one of the one of the interests that the city articulates here is the interest in promoting and providing affordable housing. And they argue sort of without evidence, as far as I can tell, that short term rentals decrease the housing supply available to permanent residents of the city who don't own homes and who need to rent them. And as a result that drives up the cost of rental properties for permanent residents. We have this interest in making homes more affordable for those people. And by restricting the number of people who can offer their properties as short term rentals. We're making housing more affordable in the city of New Orleans. And the court says, you know, that may well be the case that that's what you're trying to do here. But you don't need to discriminate against out-of-state residents in order to accomplish that. You could, and here are some bad ideas, you could cap the number of rentals. You could increase the cost of a license to discourage people from wanting to offer their properties as short term rentals and instead maybe would incentivize them to offer them as long term rental options. But the court says and you know, anybody who listens to this podcast or cares at all about what IJ does, would agree, the court says you could just increase supply. That's one way to deal with this demand issue. If you're serious about dealing with this demand issue, there is one tried and true alternative here. And that is offering more supply and allowing people to build more housing units.

E

Erica Smith Ewing 11:52

Yes, make it easier city.

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Anthony Sanders 11:54

Somehow that didn't come up.

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Ari Bargil 11:55

What a novel idea. And because this standard requires the government to show that there aren't really any reasonable alternatives, the court says, you lose. And that's because we've identified all of these possible alternatives that could accomplish all the same objectives. You didn't need to go nuclear and make it so that the only people who can rent are people who own properties and reside there. And so that kind of brings us to the decision where they basically say, look, as we're applying this heightened standard of scrutiny, we've found all these

different alternatives that you could apply, and therefore you're going to lose. And I think it's interesting, because I, you know, they sort of glide past the question of whether this is an incidental burden, or whether it's discriminatory on its face. And they sort of glide past the question of how this how the analysis might change given the fact that even if you live in Louisiana, you are still subject to this restriction and impacted by it. So it's not the traditional Dormant Commerce Clause case where you know, state A imposes a restriction that is designed to be protectionist and imposes limitations on someone or a business in state B. But it'll be an interesting case if the Supreme Court decides to take it up. Obviously, this is a topic that isn't going away anytime soon. Localities are constantly looking for new and different ways to make short term rentals go away, even though everybody likes staying in them. Many people don't want them next door. And so, you know, this is something to monitor as a potential cert petition might be in our future.

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Anthony Sanders 13:34

Erica, have you ever stayed in New Orleans short term rental?

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Erica Smith Ewing 13:38

I have.

A

Anthony Sanders 13:39

And did you behave yourself?



13:44

I did. I've stayed in short term rentals all over the country. I'm a big fan. And I agree with Ari that raising the taxes on them or raising the fees is not a good idea. Because the more expensive the short term rental, the more likely it will be used as a party house. Because if it's expensive to rent, people are gonna have to pool together all their friends, and then you wind up for 10 or 15 people getting drunk in the backyard. So it's better to make them reasonably priced.

A

Anthony Sanders 14:13

Yeah, that this is, I mean, that's a very good point about incentives and how to structure this kind of regulation. Because, you know, there are obvious deleterious effects of some short term rentals, and there can be ways to address that. But usually courts don't get to that kind of thing in in a case where essentially you have a rational basis standard, like we often talk about here on on the podcast, and that that other kind of scrutiny that Ari was talking about, which is often called Pike Balancing for something that's not discriminatory, but it has discriminatory effects. You could say it across the board but but an out of state person has standing to challenge it. It's pretty close to rational basis, although it's arguable, you know what the difference is. What I thought was most interesting about this case is how the court got to the strict scrutiny bucket,

which all of these Dormant Commerce Clause cases really come down to. Is it discriminatory? Or is it not? If it's not discriminatory, you get that Pike Balancing standard. If it is discriminatory, it's what the Supreme Court has actually called the strictest scrutiny. I mean, it's arguably even stricter than some First Amendment type scrutiny. And it says that it's discriminatory because only people by definition who are residents can rent the home out. Whereas if you're in other parts of Louisiana or in other states, then you're not. That is pretty close, it comes out the other way. But it's pretty close to some reasoning that's happened in some some winery cases that I'm familiar with, where say, the state will say, if you're a winery, you can ship your wine directly to consumers. But you can only do that if you have a winery in the states So then out-of-state wineries who want to ship into the state will say, hey, that's discriminatory. Now, IJ actually won a case of the Supreme Court that had, essentially that law at its basis. And then the Court said it was discriminatory. But there are other cases that have gone the other way, because of like a nuance that, well, if you're an out of state winery, you can ship in state, but only if you have an office in the state, which basically, of course means that you're an in-state winery, because hardly any out of state winery is going to set up an office just to ship bottle, maybe some very, very large ones from California, or somewhere like that could do that. But most wineries aren't going to be able to do that. Here I guess the nuance is if you say you live in Mississippi, and you own property in New Orleans, that is your other branch, and even then you can't rent it out. So I guess it's a fine line. But it's not that different. And I could see a court kind of wriggling out of that analysis by defining what it means to be a resident differently, what it means to rent out property differently. So I will be curious if there is is other challenges to the similar laws or if this case does get to the Supreme Court, on how courts wrestle with that. Well, a different kind of regulation of short term rentals happened in New Jersey. So Erica, fill us in on what happened there. And because it wasn't kind of an in-state / out-of-state thing, the challengers were left with less tools at their disposal. And unsurprisingly, the case came out a different way.

E

Erica Smith Ewing 17:58

Yeah, so this was Nekrilov versus Jersey City from the Third Circuit. And this case has some really juicy facts, but also some disturbing facts, and I think a very disturbing outcome. This was another set of plaintiffs challenging severe restrictions on short term rentals, nothing new there. But Jersey City is not just any city, because back in 2015, Jersey City had actually passed an ordinance, legalizing short term rentals and making it very easy to rent them out. It was a great ordinance. And the city did a massive public relations campaign inviting folks to come and invest in Jersey City and do short term rentals there. The mayor did a press release, there was lots of media. The mayor even had a national op ed in the Huffington Post about this. So the plaintiffs took him up on his offer, they bought a bunch of properties, some of which were in very rough shape, and they invested tens of thousands -- some of them invested hundreds of thousands of dollars to get these properties in good shape. And they rented them out and they were very successful. Notably, these were not corporate investors, but regular folks who were just trying to have a business. One was a guy with his mom, for example. But the problem was politics got in the way. This mayor is not a good dude. And he was working very hard behind the scenes to get Airbnb to donate to his campaign and he actually started harassing Airbnb because they were not giving him this this donation. The Third Circuit didn't go into too much details about this but it seemed like the the record did have a lot of details and it was not a good look for the mirror. Eventually, Airbnb did give them their 10,000 donation, but because they had taken so long, the mayor was a little butthurt. So he went to the hotel lobby instead to get donations from the hotel lobby. So predictably almost immediately after all this went down the city changed its ordinance and made it very, very difficult to have a short term rental and

practically destroyed the plaintiffs' business. So the plaintiffs sued. And they brought a takings claim and a contract clause claim and a substantive due process claim, which is what regular listeners know is what we do a lot of at IJ, substantive due process. And all claims lost. The takings claims lost no surprise. The court said this was not a per se or total takings because it wasn't a physical invasion of the property, and the property was not deprived of all value. For example, the plaintiffs could still do long term rentals or they can sell the property. So even though the plaintiffs showed that they had lost 70% of their income from this business, it was not zero value. The court then did an analysis for a partial takings under Penn Central. As some listeners may know, this is kind of a notoriously fuzzy balancing test that almost no one ever wins under. It does not have a good reputation. But the what the test is supposed to ask is what is the economic impact of the regulation? The extent it interfered with distinct investment-backed expectations? And also the character the government action? You know, what, what is the extent that this government action is for the public good? And, you know, it really struck me how the court kind of went through these very quickly giving a lot of deference to the government. This was not like the Dormant Commerce Clause analysis in Ari's case where the judges were really looking at the record and analyzing things. It was really perfunctory. And what really got lost in the opinion was the illegitimate motive of the city in passing this ordinance to begin with, and then repealing it, or, or later amending it. The court was very dismissive of the relevance of this. And even though it wasn't even just the mayor, who had had this motive. Another city council member was on the record, saying, oh, yeah, I voted to amend the ordinance because I want to support the hotel trade unions. It's like really? Come on. And the Third Circuit had no discussion about, hey, was there any actual harm from these Airbnbs? Was there evidence that they were actually hurting or harming any neighbors or causing a problem, no discussion about

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Anthony Sanders 22:37

Talk about legitimate expectations with the statements from the mayor.

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Erica Smith Ewing 22:41

I know. And the court said, Oh, well, it's not like they had a contract with the mayor, you know, they should have expected that this ordinance could have changed at any time. So it was a really disappointing opinion. And another thing that was a little disturbing was that the court said that: Well, the city made some generic statements about wanting to protect neighborhoods, and therefore, of course, this ordinance was in the public good. And it's like, okay, well, that means that if you're a corrupt city official, all you have to do is say a couple of sentences here or there saying how you're working for the common good. And you're okay, and you could do whatever you want. So not great. And I do feel bad for the plaintiffs here. Did you want me to talk about the concurrence? Or Anthony, did you want to talk about that?

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Anthony Sanders 23:31

Yeah. Tell us a little bit about the concurrence, then.

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Erica Smith Ewing 23:34

Yeah, this was a concurrence from Judge Bibas about how the Penn Central test is a terrible fuzzy test. And Judge Bibas was talking about how we really need to bring our takings jurisprudence back to the original intent of the Constitution and have a clearer, more grounded test that actually has predictable results. But I don't -- I mean, I think he he made excellent points about a lot of the deficiencies with the test, but the way I read it is that his alternative, clearer test would still allow the government to take someone's business and make it almost completely worthless. And as long as it wasn't 100% worthless, if it had still had 10% of its value left, then that would not be a taking. So I think we still have this, this problem that needs to be addressed with either the Takings Clause, or maybe better yet the Substantive Due Process Clause of what do we do when the government takes your business for no good reason? And that's what we work very hard at IJ to stop and protect every day.

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Anthony Sanders 24:42

Yeah, well, a lot can be said about this case. But on the on the concurrence, I mean, what what Judge Bibas is trying to do -- a lot of judges, of course, trying to do with a concurrence, where you say, Look, this case came out this way, but Supreme Court, you might want to take a look at X, Y, and Z. And everybody knows that Penn Central is uh I don't know what adjectives to use. But Penn Central is a is not a good test. It is not a good interpretation of the takings clause. It is definitely it's not in accord to anything close to the original meaning of the takings clause. I don't even think it's a fair way to interpret the takings clause. Even if you are highly suspect of regulatory takings, it really doesn't serve a purpose other than to allow the government to win, I suppose. So is it is very high time that that test has been re examined with what the Supreme Court has been doing in recent terms, and and its its use of or its re examination of takings jurisprudence in the the California union inspection case from from last term that some of you may remember. I think there's a good chance that this could happen in in the next couple terms, that there'll be at least some kind of reexamination of regulatory takings doctrine. I don't know if this is the greatest case for it. But I do agree with you, Erica, that I mean, he basically says the value of your business, you know, goes up and down, like the value of your house. And that can depend on the market, can depend on all kinds of things. But I don't see that as an argument at all. Because if the value of your house goes down, because, you know, the government passes a regulation that say doesn't allow you to build on your property, you at least have a takings claim. It's not like it's not anything and your business is is a piece of property. It may be intangible, but it's property. So I don't I don't get how he applied it to the facts of the situation here. But I do get his call for re examination of Penn Central.

E

Erica Smith Ewing 26:56

Yeah. And another example that he used that stuck out to me was a mining business. And he said, well, if the government completely bans mining, then you have a takings claim. But if they only deprive if they just pass regulations that deprive the mining of 90% of its value, that would not be a takings, because you still have some value left. And I think it just having a doctrine like that just encourages governments to be smart, when they're regulating and say if they want to regulate someone out of business, they just do it in a clever way. And suddenly, that person doesn't have a remedy because they have little scraps leftover. And I don't think that we should live in that kind of society where the government has that power.

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Ari Bargil 27:39

I would just add much ink has been spilled about Penn Central. And I think Erica was being polite when she said, it's just a fuzzy doctrine. You know, I think we would all agree that it's, it's, it's terrible and needs to be revisited. And I agree with you, Anthony, that the Court may well do that in in coming terms. But what struck me as most problematic about this case, for me was that if this result holds, this becomes the playbook for just eliminating short term rentals in America. Because what the court basically said is, you don't actually have a right to do this. And there is no real remedy that you can draw upon. If you want to bring any of these claims in federal court. They're saying you don't have any real property interest at stake here. You can always just sell the property or offer it as a long term rental, and that you don't have any interest in operating an ongoing business, because you are just sort of generally aware that at any time the government can pass a regulation or rezone you in a way that would impair your operations. And given that you don't have any basis for arguing that the government has stripped you of any right. In fact, it seems like the court here is saying you don't actually have any articulable right to vindicate in this court. That's what's super problematic about it. To me, this feels a lot like amortization, even though they don't call it that, which is something that IJ routinely litigates which, which is a you know, extremely controversial tool whereby the government tells you, you're no longer allowed to operate as you've been operating, even if that use has been completely legal for decades, and they give you a short period of time to stop. And there's no legal remedy for you, if this is the standard,

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Anthony Sanders 29:24

And that short period of time is quote, just compensation. Because you got to make money while you were still operating for that period.

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Ari Bargil 29:32

That's right. They're they're openly acknowledging for the most part that the reason for doing that and giving you that little narrow window to wind up your business, is because if they did it any sooner, they'd have to pay you. So they're saying you're gonna pay yourself the money that we would have had to pay you if we just did this through eminent domain, which many in many places you can't do any more. So just another another, in my view, controversial approach to regulating property in light of Kelo, where government's might have just eradicated or eliminated properties or taken them they're just getting more crafty as Erica said.

E

Erica Smith Ewing 30:07

And I think another thing to remember is I don't think anybody here would say that the government shouldn't be able to regulate short term rentals. Nobody wants to live next door to a party house. Nobody wants to live next door to a house that has garbage all over the lawn. But Ari, as you said before, the government already has tools to deal with that situation. And I would even be okay with some sort of an ordinance saying, Hey, if you get X number of noise complaints, you know, we're going to take your license away or something like that. But just to be able to come up with any reason they pull out of the air, and come up with whatever ordinance they want, no matter how rational and the court to uphold that is, is disappointing.

A

Anthony Sanders 30:49

On Penn Central, by the way, before we go, I want to recommend my my favorite article, which is by our friend at IJ, Gideon Kanner, it's from 2005. But it was it's a quarter century respective of Penn Central. And he actually goes in and interviews like the clerk who worked on the case. And it's a good example of sausage making in action which of course, happens at courts all the time, but we don't usually can look into it. And anyway, how that case came together and how it really was a little random how we got that standard. And now that standard has been with us for for more than four decades. So we'll put a link to that in the show notes. You know another thing we're going to put in the show notes is a link to register to Short Circuit Live, which it will be on Wednesday, October 26 in New York City. My colleague Anya Bidwell will be leading that. And so if you'd like to meet some IJers, learn a little bit about Short Circuit, learn from some erudite New York practitioners and professors who are going to be on our panel, please come to that if you're in the New York area. That again is October 26. That's a Wednesday and we'll put a link in the show notes. Well, thank you both Ari and Erica, coming up on a long weekend. So maybe you have some guests, and I hope they don't stay more than three days, but I hope you treat them well or you have a good weekend otherwise.

E

Erica Smith Ewing 32:16

I hope you have a good weekend too. Anthony.

A

Ari Bargil 32:18

Likewise, Thank you, Anthony, the Bard of IJ.

A

Anthony Sanders 32:22

Right. Well, there'll be no singing. I will promise everyone that at least for this episode. But for everyone else, if you're listening to this right after it comes out. I hope you have a lovely Labor Day weekend. And I hope that you all get engaged.