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SPEAKERS

Anthony Sanders, Patrick Jaicomo, Anna Goodman

A **Anthony Sanders** 00:25

Hello, and welcome to Short Circuit your podcasts on the federal courts of appeals. I'm your host Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, October 13th 2022. And at the very beginning of the show today, I unfortunately would like to give some very sad news, but also a very warm memory. And that's that we at IJ lost someone very dear to us a member of our team over the weekend, unexpectedly. And that's a member of our communications team Conor Beck. Conor was a young man who had been with us nevertheless a few years and had warmed so many hearts of us at IJ, had talked to many IJ clients and members of the media and done his best to spread the message of liberty. And it is a deep and tragic loss to us at IJ, to his family, to his many friends. And so we just want to state that we remember you, Conor, and we're going to miss you and for everyone who was touched by him, may his memory be a blessing. We're going to move on now for our Short Circuit. And we've had a good time the last couple of weeks on the road. We enjoyed meeting the Columbia Law students last week and I hope all of you listeners enjoyed that show with our friends, David Lat and Mike Yaeger. We had a lot of fun there in Morningside Heights in Manhattan. We're going to have even more fun in a couple of weeks at our Short Circuit Live that we've talked about on the show before but it is getting close now. So if you live in the New York City area, and you're interested in coming to Short Circuit Live, now's the time to RSVP so we know how many appetizers and drinks to have at the at the Short Circuit Live, although we will be taking walk-ins also as space allows. That'll be at a venue in the financial district on Wednesday, October 26. And we have the link in the show notes show notes for you to RSVP. So we look forward to meeting many of you there. Now, one person who will be there is our own Patrick Jaicomo, who, among many other things, is our musical consultant here on short circuit. So Patrick, welcome back to the show.

P **Patrick Jaicomo** 02:53

Hey, thanks, Anthony. I'm looking forward to seeing you in person in New York.

A **Anthony Sanders** 02:58

A Anthony Sanders 02:58

He's speaking to all of you, not me, because I won't be there. It will be hosted by our good friend Anya Bidwell, who helps Patrick, actually, Patrick helps her, direct our Project on Immunity and Accountability. But also joining us today, for the first time is one of IJ's fellows, a new attorney with us, Anna Goodman. So Anna, welcome to short circuit.

A Anna Goodman 03:26

Thanks so much, Anthony. I'm excited to be here today. And Patrick, it's great to be with you guys.

A Anthony Sanders 03:32

Well, we're looking forward to hearing about a new case from both of them. Patrick has a case from the Fifth Circuit, a Fourth Amendment case. And Anna has a case from the First Circuit, which once again, is written unfortunately, in courier font. But we're not going to go down the path of talking about fonts again. We will do that again sometime, but not today. So, Patrick, let's begin in the Fifth Circuit with Crane versus City of Arlington.

P Patrick Jaicomo 04:04

Yeah, so this is a tragic case out of Arlington, Texas. It's probably more aptly called Crane versus Craig Roper, who's a police officer at the center of what happened here. And this case involves kind of a lot of things at the intersection of why policing can go wrong in very tragic ways. And how a lot of court doctrines essentially can underlie those tragedies. And so in this case, we start from the premise that the United States Supreme Court has approved the use of pretextual stops by police officers across the country under Fourth Amendment principles. And so this means, as many people already know, that police if they can find some minor traffic infraction that they believe you've committed, they can stop you and that sort of opens a whole Pandora's box of all the things that come next. It doesn't matter whether they had a bad reason for stopping you or no reason for stopping you until they found a reason, which there have been several viral videos lately where police say this openly they can find a reason to pull you over. The problem is we have too many minor laws that allow officers to engage with citizens, which inevitably as that number goes up, so will the number of incidents that are that escalate to violence, unfortunately. And this is one of those cases. And so here around midnight, a man named Tavis Crane was driving a car with a friend in the front seat. In the backseat were his pregnant girlfriend and his two year old daughter. An officer for the Arlington Police Department named Elsie Bowden pulled up behind Mr. Crane and saw something thrown out the window of the car, which for some reason, she believed to be a crack pipe. So she pulled the car over and went up and investigated and realized that she was standing at the car's passenger window, and the two year old in the backseat threw the top of a plastic candy cane out the window -- that what she'd seen thrown out the window was the plastic bottom of the candy cane toy. Something we're all very familiar with. Officer Bowden recognized that, but instead of simply saying, oops, this is just a misunderstanding. Everyone goes on about your way she decided to run all the numbers. And in doing so she discovered that there were five misdemeanor warrants out for Mr. Crane, and potentially a felony probation warrant, although that was never actually confirmed. While all this was going on and she was radioing, other

officers showed up. One of them named Craig Roper, who's the main defendant in this case, and by all accounts here, and again, we're taking the facts in the light most favorable to the plaintiff here. Roper was this sort of hothead hotshot type police officer whose first impulse was to immediately use physical force and so despite being brushed back by both Officer Bowden and others on the scene, Roper, time and again did that and in this case, that manifested in the following way. Once the officers found the warrants for Mr. Crane, they told him to get out of the car he refused. He said he needed to take his daughter home to her mother. And he didn't know what these warrants were for. And furthermore, the police couldn't actually tell him that information. So he essentially refused to get out of the car. In response to this, for some reason, Officer Roper, pulled out his gun, climbed into the backseat of the car over the pregnant woman, put Mr. Crane into a chokehold and put the gun back behind him and continued to shout at him while Officer Bowden was trying to get Officer Roper to get out of the car. And at some point, in the chokehold scenario, Mr. Crane pushed down on the accelerator in the car, and it went backwards. And based on the passengers testimony, that was after Officer Roper shot Mr. Crane two times, and then two more times a total of four times at point blank range, killing him and causing the car to move, thereby explaining the Fifth Circuit statement in this case that a two year old girl threw a candy cane out a window and 25 minutes later, her father would be dead. To further underscore the legal doctrines like the pretextual stops that allow for this sort of escalation to occur. We have both the doctrine of qualified immunity, which was asserted by Officer Roper in this case and ultimately denied thankfully, by the Fifth Circuit, though it was awarded by the district court here, which looked at the facts in the light most favorable to the officer in doing so and basically said that no reasonable jury could accept the plaintiff's statement of facts. And the other one, which is it comes out the wrong way in the Fifth Circuit, is that when police look at the or when courts look at the use of excessive force, in the Fifth Circuit, and several others, they view as irrelevant, any any actions taken by police that cause the escalation of the force in the first place. So other circuits, in the Tenth, for instance, they will look at everything that led up to the use of deadly force. In the Fifth Circuit, they just look at a snapshot of the moment and so they're not considering the unnecessary climbing into the car and pointing the gun and the other reasonable officers telling Roper to get out of the car. All they look at is the use of force in the moment. And even with that context here, the Fifth Circuit still said this is excessive force. And thankfully, they also lean on the obviousness exception to qualified immunity here and say that we have these broad principles that say you can't use violent or deadly force on a fleeing felon unless they're a threat to you or others in a serious way. And here, that wasn't the case based on the plaintiff's statement of fact. So we ultimately get the right result in this case, but unfortunately, we're still living in a world where all these standards allow for and in many ways, incentivize this sort of policing, where we have a stop that never even needed to occur, was extended to find additional crimes because it was pretextual. And then you have an officer who escalates it to deadly violence, and kills a man in the street in Arlington, Texas. And there's just no way to unring that bell, even if this case does get to go forward. And so this is sort of the state of affairs that we live in now. And, you know, to people who can't imagine themselves in the situation, you know, a lot of people who do thought that about themselves until they did. And so this is something we should all be very concerned about, because it essentially, is predicated on the very flippant violation of our Fourth Amendment rights that occurs on a daily basis, thanks to the myriad laws and regulations that allow police to interact with us, which is kind of going to be a theme, I think, on this call, but we're not dealing with police. In the second case, we're dealing with more sprawling regulations and laws that essentially allow for a lot of misbehavior.

A Anthony Sanders 11:01

Anna, your thoughts?

A **Anna Goodman** 11:03

Yeah, I mean, it's such a tragic, I was reading it a little bit before we got on here this morning. And Patrick, that case is just one that speaks so loudly about the issues that are here. Do you think does the Fifth Circuit's refusing to apply qualified immunity here does that at all signal maybe a hopeful sea change? Or is do we think this is a one time that it was egregious enough that they were willing to take that into account?

P **Patrick Jaicomo** 11:26

I think this has more to do with this particular case in this particular panel than it is a signal that the court is changing gears on this. I mean, another case just came out where police tased an unarmed man and the Fifth Circuit panel, in that case, gave the police a pass. So I don't think we can read into anything more broadly than that, unfortunately. But it's always possible.

A **Anthony Sanders** 11:48

Yeah, I would say this is just about the best panel you could want in the Fifth Circuit if you're trying to have qualified immunity tonight. Judge Higginbotham wrote it. It is a very good opinion. But then Judge Dennis and Graves who are two of the more likely to find fault in a case like this joining him. What what's struck me, Patrick, well, first a question, you knowing much more of the ins and outs of qualified immunity than I do this idea that you only look at use of force in the moment and not, you know, I don't know if the two minutes leading up to it or the background of the situation. What is the justification for for doing that? It sounds so alien to, you know, how you would consider any kind of constitutional violation?

P **Patrick Jaicomo** 12:41

Yeah. So I mean, this is obviously more of a Fourth Amendment issue than a qualified immunity issue. But yeah, it is frustrating. And it kind of stems from the fact that the Supreme Court has articulated this objective standard when looking at reasonableness, and so I guess the logic goes, that you have to look at the moment of the shooting to decide whether an objective officer facing those circumstances would have reasonably believed that they could have met the standards for the use of deadly force. Of course, the counterpoint is you can probably draw up in your own mind and the Tenth circuit has explained is that, you know, that reasonable officer would have also been the officer who brought the moment to that to that apex. And so they should have thought that through before they escalated everything to that point, you know, kind of similar to the fact that you can't assert self defense when you're the one who's created the danger that you're now defending yourself against.

A **Anthony Sanders** 13:35

My takeaway from from this case isn't so much the qualified immunity bit, although I liked the bottom line of what the court did, but from what you said, Patrick, this is a situation that never

bottom line of what the court did, but from what you said, Patrick, this is a situation that never needed to happen. You know, people have outstanding as we know, now, because this has become more of an issue. People have outstanding warrants for all kinds of reasons. Often, it's not for paying a traffic ticket, and then you get something in the mail saying you haven't paid. This happens in many states, if you don't pay within 30 days, there'll be a warrant issued for your arrest. A lot of people for whatever reason don't pay their traffic ticket of course, they should pay their traffic ticket. But if they don't, and there's a warrant issued for your arrest, does it mean that this kind of situation should result from that? You know, my thought when this when this cop is running his name in the in the car registry to see if there's anything outstanding, and there is and this was at, I think, 11:30 at night or something like that. Why is the solution to call for backup and arrest the driver when there's other people in the car and there's all kinds of details I could go into here but just thinking of the situation. There's other people in the car they're gonna have to find -- either drive the car home or find their own way home. There's a two year old trial in the car. Why isn't the solution to go to the guy's house the next day? And arrest him then if he has these outstanding warrants? Why do we have to do it right now and at night with several cops with guns? I don't understand why in police training, that they think that this is a good idea.

P Patrick Jaicomo 15:25

Yeah, this has been a consistently perplexing issue. And obviously, it's been something we've been talking about a lot since Breonna Taylor was killed. And you have so many scenarios like this. And you know, there's this one, there's the why are we using raids at all, if we could just wait to arrest the person when they went to go to the grocery store? Or any number of other examples like that? And I frankly don't know, because even if you look at this purely from the perspective of officer safety, the officers would be much more safe, if that's how they addressed it. Why would you want to deal with this on the side of the road at midnight in this case? Or why would you want to deal with the alleged crimes underlying Breonna Taylor's house raid with a raid as opposed to just waiting for someone to leave the house? I have no idea what the actual answer is. But I do think another thing too, is that, you know, at least as the Fifth Circuit tells the story, Elsie Bowden, the officer who made this stop, you know, she was just kind of doing the normal thing here. And I don't think that she thought she was doing anything bad. But you realize that, you know, the fact that this is the modus operandi for most police departments across the country allows for officers like Roper to inject themselves in the situation, even if the first impulse of someone like Officer Bowden is to not escalate to violence. And so you just realize that by putting all of these officers in so many scenarios where they're in conflict with people that they don't need to be, you're putting them in danger, and you're putting people in danger, and I can't really see the upside in most instances.

A Anthony Sanders 16:57

Well, another case where it seems like nobody was in danger in any way, but nevertheless, it's still a case is Anna's case. That's Laufer versus Acheson. So, Anna, it seems like this, this woman, Deborah Laufer, she is very good at going to court. And so give us a little bit of background about her about why she's suing this hotel in Maine.

A Anna Goodman 17:26

Yes, as our plaintiff in this case, Deborah Laufer is an interesting individual, she is a self

Yes, so our plaintiff in this case, Deborah Laufer is an interesting individual, she is a self-proclaimed tester. And what that means is, so she is an individual that falls within the protection of the Americans with Disabilities Act. And she has taken it upon herself to go out and to find organizations, entities that are not in compliance with some portion of the ADA and then to file suit based on that. And so that's what happened in this case is in this case, the suit was filed against Acheson Hotels LLC. And Acheson runs the Coast Village Inn and Cottages up in Maine. It owns that. And Deborah went online, she looked at the Coast Inn's website, and she didn't actually want to stay there, she had never had any interest in that. Like I said, she actually has hundreds of suits pending across the United States. And a couple of the suits in other circuits that we'll talk about, and that the court talks about, in this opinion, are actually suits where she was also the named plaintiff in those cases, which just kind of shows you that she's prolific in what she's done. But she went online and looked at, if she was going to book a room, whether or not the website was compliant with the ADA's requirement that there has to be accessibility information listed on the website. And there wasn't that on either the Coast Inn's website or the third party booking websites, I believe there's about 13 of those she looked at. So based on that she filed this suit, seeking declaratory and injunctive relief and basically saying, Hey, you have to have this information on there per the ADA. And Acheson responded by filing a motion to dismiss based on a lack of subject matter jurisdiction, effectively pointing to her status as a tester and saying, look, she never wanted to stay here. She was never coming here. She just went online found this and use this as a basis for suit. And the district court agreed with them and dismissed the case. And Ms. Laufer appealed and that's how we got to the First Circuit and to the opinion in this case. So it's an interesting setup for sure, based on that. And in the First Circuit, the court really focused a lot looking at kind of the history of development around in informational injury and they really key in on one case, in particular after laying the framework for standing and talking about what exactly is an injury in fact. They focus in on this case called Havens Realty Corp versus Coleman, which was a 1982 Supreme Court decision involving an apartment complex. And in that case, there was a another tester involved who went into this apartment complex and was a minority and went several times and asked, Hey, are there apartments available for rent? And was repeatedly told no. There are no apartments here for you. And then another individual who was not a minority came in asked the same question and was told, yeah, we have apartments you can rent here. A suit was filed in that case, and pretty much a parallel issue came up, where they, the defendants argued, there is no standing, they were never actually going to rent from us. And the Supreme Court in that case, ended up holding that there was standing to sue. That this misinformation that they were given, was sufficient to establish the name. Because the purpose of the Housing Act was to protect against discrimination. And the misinformation was discrimination. So this is the case that the court really keys in on and then it talks about several other cases, subsequent to this, that have dealt with disclosure of information. And then we turn to what Acheson really focuses on, which is a 2019 case, which was TransUnion LLC versus Ramirez. And TransUnion LLC versus Ramirez dealt with the Fair Credit Reporting Act, and a group of individuals that were looking at information and specifically, there was information that was being given to them by the credit agency that was not in the format required by the statute. And the Court looked at this and actually concluded that there wasn't standing for them to sue and said, basically, look, the fact that they're not giving it to you in the exact format, that's not harming you, that's not an injury that is in and of itself, a basis for a suit. And then the Court went on, and this is really what Acheson keyed in on after reaching that conclusion, the court included this, moreover paragraph and said, moreover, there's not any downstream consequences coming out of this information or this misformatted information. And if you don't have some type of downstream consequence, you don't have standing under Article III. And that is this language that Acheson talked about that's become more of a conversation in recent years, and actually has led to the circuit split that makes this case worth

talking about today. And the court considered this and considered Acheson's argument about it in this case. But ultimately, splitting with several other circuits. So between 2021 and this year, we have the Second Circuit, the Fifth Circuit and the Tenth circuit have all considered pretty much the same issue. Two of those cases, as I mentioned, Laufer was actually the plaintiff in those. And those courts looked at TransUnion and that downstream requirement and said, there can't be standing here because there isn't that downstream requirement. She doesn't want to go to the hotel. She's not actually going to take advantage of these services. But in looking at this case, the First Circuit said, we understand that. We see that. But we don't believe that three sentences in TransUnion overrules Havens Realty. And we think Havens Realty is so directly factually on point, that we've got to stick with that. And if the Supreme Court wants to do something different, if this isn't sufficient, then they need to say that. We're not going to be the ones to. And that's the biggest and most impactful part of this whole thing. They talk some specifically -- Acheson raises a few different arguments saying that, you know, this in this particular case, the lack of representation wasn't discriminatory. The court is just not convinced by that and says, again, the statute is supposed to protect against discrimination. And it says if you're not giving this information, that is discrimination, so of course it's discriminatory. And then going out from that they go on to talk about how Acheson also raised a couple of general arguments about particularity and mootness. And the court very quickly dismisses those but really focuses the bulk of its analysis on the fact that, look, we recognize that this is -- and they also, though, do something interesting as well in that they don't stop by saying, Not only is this a situation where the informational standing is enough, based on Havens Realty, but even if it weren't enough, even if we needed downstream consequences for Laufer in this case, she actually has sufficiently established that and talks about the idea of dignitary injury. And in the complaint she which, on this motion to dismiss phase, where looking at everything in the complaint, in the light most favorable to Deborah Laufer and she says in the complaint that this lack of information made her feel very isolated, very humiliated. And the court says ultimately, even if we needed downstream consequences, that would actually be enough in this case. Which is kind of an interesting pivot after their language that seems to indicate, hey, we'd be fine if the Supreme Court wants to change this, but we just don't feel like we have the authority to do it.

P Patrick Jaicomo 25:29

Yeah. So I first want to start off here, by chastising Anthony for obviously hazing Anna, by giving her standing case on her first Short Circuit.

A Anthony Sanders 25:40

She she was into it.

P Patrick Jaicomo 25:41

Yeah, I think I think

A Anthony Sanders 25:43

We had a couple other available, but she's like, Let's do standing

We had a couple other available, but she's like, Let's do standing.

A Anna Goodman 25:48

Let's just go for it.

P Patrick Jaicomo 25:49

I think the court is right about the standing issue. And I think the real thing that is upsetting about a case like this doesn't have anything to do with standing, it has more to do with the overbreadth of the ADA and potentially, in a delegation sense, the enormous amount of regulation that it's allowed. And obviously, disability access is important. But I you know, if I take off my public interest hat, I, when I was a private litigator in Michigan had several run ins, with these sorts of ADA shops. And I can't speak to Ms. Laufer, her attorneys who, by the way are in Massachusetts, but I can talk in my personal experience about a couple others and there are at least a handful of law firms across the country that specialize in these ADA shakedowns. And this is a kind of new cyber step that makes them even easier because you know, Ms. Mrs. Laufer just has to look at a website. And now the violations occurred, which is why I think standing is fairly easy here, because Congress through the regulation that the Attorney General adopts, has approved the fact that the information on the website itself is the thing that you're owed. And so here, she didn't get that. That seems like an injury to me whether I would have passed that law, regulation is a separate issue. But the way that this has traditionally worked, is you'll have a law firm, and they will find a disabled person or two or a dozen, to essentially go to, you know, a strip mall and go to every single place, just go in each store, leave the store, and then they'll follow behind and they'll do all the measurements. And if you've ever looked at the regulations for the ADA, it's impossible to fully comply, we're talking about thousands and thousands of things you have to do, like how many inches off the ground, the sink can be. But it can't be too many inches, how much pull weight there has to be on the door, how long the door closes from 90 degrees, a lot of things that will change over time, you know, the hinges of the door will loosen, you have to tighten the door back up. The handle for flushing the toilet needs to be on the close side instead of the far side, so on and so forth. And so they come in, they'll inevitably find a handful of violations because the sink is one inch too high or something like that. And then they send a demand letter based on what they think they can get out of the case to say like, Hey, you violated this, we're gonna sue you unless you give us $10,000. And a lot of times,

A Anthony Sanders 28:04

But then the interesting thing, right is you can't get damages, but you can get attorneys fees and prospective relief.

P Patrick Jaicomo 28:10

Right, which is, which is how you get the settlement, you're thinking of nuisance value. So if you're running a Subway sandwich shop, and you have to pay lawyers to defend this ADA case, it might make a lot of sense to just give these people $10,000 to walk away.

A Anthony Sanders 28:24

So they'll take so sorry to interrupt again, Patrick, but they'll so that law firm in that case will take the $10,000 and not like a binding agreement between their client and the restaurant to make sure that the hinges are properly oiled or whatever is

P Patrick Jaicomo 28:39

Correct. In my experience, at least there will be an ask for certain changes to be made. And usually these restaurants are happy to make the changes. The problem is that the ADA allows the lawsuit without any corrective step before it. So it's not like you have to give them a warning and then they can change it. I think if that were the case, it would work a lot better.

A Anthony Sanders 28:55

Right.

A Anna Goodman 28:56

Well, and that's a good point. Because in this and part of what they talked about briefly with that mootness argument is that Acheson itself has now changed its website. And that's what they tried to bring up. The court doesn't spend much time on it because the 13 other websites that they sell through haven't made the changes yet. But they have tried to comply and they have taken those steps forward. And clearly they would have been willing to probably up front if that had been the conversation.

P Patrick Jaicomo 29:19

Right, in every case that I've worked on it, and I've only done a handful in private practice, our client immediately offered to change every fix everything. And that was never enough. It was oh, you know, and like I said, the initial thing would be like, Okay, you have to change these things and give us this money, but they would be happy to settle just for the money. And so I do think that this is a very suspect area of the law. Although you know, disability rights are important. I just think the ADA has not struck the correct balance when it comes to this sort of thing. And frankly, I think this is a great case to illustrate that because regardless of the standing issue, you know, I think a lot of us have looked at websites for hotels and not found information we wanted. And I don't think that was because the hotel was discriminating against us for one reason or another. I think it's just because a lot of hotels have really crappy websites.

A Anthony Sanders 30:11

That is true. I think this is a good this is a good case to kind of test yourself if you maybe believe in, you know, people's ability to vindicate their rights. But you are suspect of some plaintiffs' lawyers, like, you know, many normal people and even even lawyers often are to the

plaintiffs' lawyers, like, you know, many normal people and even even lawyers often are to the the kind of tactics that that Patrick was talking about. Because if someone in this situation, as Miss Laufer was in this case, was suing about, say, suing the government about some constitutional right or even a statutory right, then a lot of the time courts are going to find her to not have standing. So we at IJ, have had many, many cases where we've had lawsuits thrown out on standing and either that sticks or we have to go on appeal and have it reversed, where the person had way more going on, than is going on in this case. And what what helps this case is this precedent about testing, that is important for many fights against discrimination that Congress and legislatures have set up where the the government itself can't do all the enforcement. And so they rely on lawsuits like this to do that. And to do this kind of testing, because of course, if the federal government itself prosecuted this case, standing is not an issue, because it's the government and someone's violating law. And so you have to rope this, the standing into that scheme. And so if you're if you're going to have testing yet, you can't have someone actually want to rent all those apartments to do that testing. And so we have this precedent that it sounds like, you know, it should be an Article III injury and in under the Constitution, and the court makes the point about this damage that just by seeing the discrimination to have the discrimination affect the person that that itself is an injury, but you know, that that could be applied and should be applied, I think in a lot of other areas, such as, say free speech. So if you have a law that discriminates against your speech, and then you sue about that law, but then the government's like, oh, we never enforced that anyway. So um, you are never even going to say that stuff. And so you weren't ever going to like put that sign up or give that tour, which we had a case about tour guides that get decided in this way, a number of years ago. And so you don't have standing. And courts will buy that. And of course, it's because they're suing the government. They're not suing some small hotel somewhere. Yeah. And so I just wished that this kind of reasoning was used in civil rights cases where the government's on the other side. Then I think things would look a lot different.

P Patrick Jaicomo 33:14

Yeah, I think I think to kind of bring it back to the the first case and the broader picture is like what you said is totally right, Anthony, you see this issue of standing when it comes to civil rights cases, where the court will say, well, it's not clear that you have an injury. But then if you do have an injury, then you can only sue for damages. And now we apply things like qualified immunity. And so just to give a little tidbit here, there was a case that was just decided by the Sixth Circuit involving a woman who had posts deleted on Facebook that were critical of her local government officials. And she sued citing some policies they had about deleting certain types of comments. And ultimately, the court held that she had no standing because it wasn't clear that she was going to post the sort of comments in the future that would be deleted. Meanwhile, in an IJ case, Novak versus City of Parma, you had a man who posted on Facebook, mocking police and then was arrested for it. And when he sued the police then after having actually been damaged, the court applied qualified immunity. So it's really damned if you do damned if you don't, and that's in the sensitive case, like the First Amendment and criticism of the government. And so it's very frustrating to see how these doctrines work with a special protection when it comes to claims against the government that don't apply when we have private litigants.

A Anthony Sanders 34:35

But Patrick, why in the last, let's say a week or so might people have heard about that case? Novak versus City of Parma?

Novak versus City of Parma?

P Patrick Jaicomo 34:41

Yeah, you may you may have heard about it not even known because Novak vs. City of Parma is the case in which The Onion, America's finest news source, maybe even the world's I'm not sure, they filed an amicus.

A Anthony Sanders 34:54

In human history I believe.

P Patrick Jaicomo 34:55

Yeah, they filed an amicus brief in support of Anthony Novak and the Institute for justice in our cert petition for that case, so check it out. It's a great brief. I'm guessing it's already the most read legal brief of all time.

A Anna Goodman 35:09

It was an enjoyable read. I enjoyed reading that one.

P Patrick Jaicomo 35:12

But if it isn't, it will be I suspect. And I think that has a lot to do with how good the brief is, and how boring most legal briefing is.

A Anthony Sanders 35:21

We'll put a link up both to our cert petition in that case, and also to The Onion's brief, which I'm sure many listeners have already seen. One final thought on this case. So this is a really in the weeds thing. But I saw there was a new parenthetical, so many of you know, in the last few years there's been an innovation in quoting from past cases in a current case, where you put this in the parenthetical afterward and you put cleaned up. Where you you don't have to put like all these quote marks and ellipses and quote marks inside of quote marks that often make text a little bit unreasonable -- unreadable -- and maybe unreasonable when you're quoting them. But you just put cleaned up. This one said, cleaned up, comma, then a new alteration added, which I hadn't seen before. But to me, it kind of makes it you know, like, I don't know what's real at that point.

P Patrick Jaicomo 36:14

We're moving in the wrong direction either way. I mean, if the point of cleaned up was to make

it more succinct, I do feel now that I have the right to point out that the Supreme Court case I argued Brownback versus King resulted in the United States Supreme Court's first use of the parenthetical cleaned up.

A Anthony Sanders 36:31

That's right.

P Patrick Jaicomo 36:32

So there you go.

A Anna Goodman 36:32

There you go.

A Anthony Sanders 36:34

Anna you are the most you -- we all clerked. But Patrick and I believe clerked before the cleaned up era. I definitely did. Was cleaned up a thing in your chambers when you were recently clerking?

A Anna Goodman 36:45

No, cleaned up hadn't made it, but I like cleaned up. I think I'm gonna save it and try it out. But no, that was not something. We were so -- and it does, it gets so bulky sometimes when you're trying to say you know, citations omitted and you leave things out. So I think I think cleaned up could be a helpful innovation. I don't think the cleaned up alteration added is one that I would recommend, but I like the cleaned up.

P Patrick Jaicomo 37:07

Yeah, I'm a big fan of cleaned up because at the end of the day when you have a parenthetical that says something like citations and quotation marks omitted emphasis added, internal citations omitted. Now nobody even knows what it would have looked like anyhow, so let's just say cleaned up, and they can go to the source document if they really need to see exactly what it looked like.

A Anthony Sanders 37:27

Well, on that note, we're gonna go clean up this podcast, as anyone does take take out a few of the awkward pauses that one has. Nothing awkward between us today, though. This has been a wonderful discussion about these couple of cases. If you're in the New York City area, again,

check out Short Circuit Live so you can come meet Patrick in person in a couple of weeks.

P Patrick Jaicomo 37:52

But not Anthony. I'll be there. He will not.

A Anthony Sanders 37:56

That's right. That's right. Have to wait for another time for that. And thank you Anna for coming on for the very first time and we should give a shout out, because we were talking about cleanup, that Jack Metzler who's a DC area lawyer. He is the one who first came up with the cleaned up parenthetical. And I remember when your case came out, Patrick, he was absolutely ecstatic that it had made it to SCOTUS and as he should be. Well, thank you guys. Thank everyone for listening. In the meantime, I hope that all of you get engaged.