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SPEAKERS

Arif Panju, Christie Hebert, Anthony Sanders

A Anthony Sanders 00:24

Texas has been a second chance for me. I expect that might be true for many of you as well. It has been a chance not only for land and riches, but also to be a different man, I hope a better one. There have been many ideas brought forth in the past few months of what Texas is and what it should become. But we are not all in agreement. But I'd like to ask each of you what it is you value so highly, that you are so willing to fight and possibly die for. We will call that Texas. Well, that in my impeccable Texan accent was Patrick Wilson playing the part of William Travis in the 2004 film, The Alamo. Now, I don't think that William Travis actually said that. I think that was redone for the movie, his speech at the Alamo. But he did famously send a letter to the people of Texas and all Americans in the world, where he asked for reinforcements for the Alamo and ended with victory or death. Now, today, there will be no victory or death, I hope. But we will be talking a lot of Texas. So this is Short Circuit, your podcast on federal courts of appeals. I am Anthony Sanders, very much not from Texas, the director of the Center for Judicial Engagement at the Institute for Justice. But I am joined here today by to Institute for Justice attorneys from our office in Texas. And this for the first time is a dual Texas episode, where they're both going to be talking about cases from Texas in the Fifth Circuit. And we'll have all things Texas all the time. So a huge welcome to Arif Panju and Christie Hebert.

A Arif Panju 02:23

Thanks, Anthony. Happy to be here.

C Christie Hebert 02:25

We're excited to be here representing Texas,

A Anthony Sanders 02:28

I'm sure I'm sure. And is the the story of the Alamo. Is that still like a central part of you know,

Texas elementary education? Or, what's kind of its status these days?

C Christie Hebert 02:41

Well, I can't say that I know about Texas elementary education because I didn't go to elementary school here in Texas, but there is still a lot of Texas pride. And you know, if you watch any TV, all the commercials have the Texas sized or the Texas brand or the Texas whatever. So everything's branded Texas.

A Arif Panju 03:01

And remember Anthony, come and take it. That's a flag that flew for a long time and Texans are very proud about it. And the Alamo does loom large, both as a historical matter, but also as a rallying cry for Texas' independent spirit. And I think that will remain true, most likely for a very long time.

A Anthony Sanders 03:22

Well, great. Well, another thing that has some Texas spirit is judicial engagement. So we're gonna see if if we can find some, maybe not a lot, but some in the Fifth Circuit with a couple of recent cases. So first, Arif is going to tell us about the Texas State LULAC versus Elfant. And it looks like they're talking some standing.

A Arif Panju 03:48

You're correct. This case that arises out of a dispute brought forth by LULAC Texas and Voto Latino, who are two voter registration organizations who are challenging Texas's recently revised requirements for voter residency. During the 21 legislative session last year, the Texas Legislature sought to address election integrity. One of the bills passed with SB 1111. There are three relevant changes that made its way into this case. One was a PO Box provision that required individuals who had registration forms that didn't correspond to a physical address, such as a PO Box or a UPS Store to provide the registrar with documentation that they had a physical residential address somewhere in Texas. The second is a residence provision that barred voters from establishing or maintaining a residence quote, for the purpose of influencing the outcome of a certain election end quote. And the third restriction in SB 1111 is a temporary location provision. And the way that worked was it prohibited voters from establishing your residence at any place the person has not inhabited or to designate a previous residence as a as a home and fixed place of habitation unless they first inhabited that place at the time of designation, and they intended to remain there. This lawsuit was filed by LULAC and Voto Latino in the Western District of Texas. And the AGs office intervened, along with some other officials, county officials that enforce election laws and went to summary judgment in front of Judge Yeakel. Judge Yeakel largely upheld the law. Judge did strike down the PO Box provision and found a reason to uphold it. But it struck down rather and enjoined the residence provision and the temporary location provision. But to get to the merits there, the court had to find organizational standing was present, and agree that it was, agreed with the plaintiffs. So Texas took an appeal up to the Fifth Circuit and argued otherwise. I think it's important to kind of look

at the district courts basis for finding that there was standing. And the district court found that there was standing on two grounds, one that the organization had organizational standing, distinct from associational standing. And then second that because the law chilled their speech, there was a separate ground for organizational standing as well. Listeners who have been longtime listeners will know that standing is important. You need to have standing if you want to reach the merits of your case. And an association for it to have standing has to either show that it can sue on behalf of its members as associational standing, or sue in its own right, that's organizational standing. The district court found that the plaintiffs lacked associational standing because they had failed to identify any members affected by the challenged provisions directly. And for associational standing, you have to show that at least one of your members has standing throughout the case. However, it did find, the district court did, that the plaintiffs have organizational standing based on two distinct theories, the first being a diversion of resources theory, and the second being a chilled speech theory. So the state of Texas and the rest of the appellants took the case up to the Fifth Circuit, and argued it before Judge Duncan along with judges Clement and Wilson. And judge Duncan writes the opinion for the panel and opens up by quoting a principle of constitutional law established by the Supreme Court. And the Supreme Court has recognized that when an organization's ability to pursue its mission is perceptibly impaired because it has diverted significant resources to counteract a defendant's conduct it has suffered injury sufficient to demonstrate Article III standing. Now such an injury must be concrete and demonstrable. And an organization can show standing through this diversion of resources theory by identifying quote, specific projects that it had to put on hold, or otherwise curtail in order to respond to the challenge laws. And so in support of this organizational standing argument, the district court had found that LULAC and Voto Latino had identified specific projects. They specifically pointed to LULAC scholarship programs, its law reform programs, as well as Voto Latino's voter registration efforts outside of Texas. And the district court noted that in 2022, that was the first year since 2010 that Voto Latino would be unable to run its program in the state of Colorado because of this diversion of resources to Texas to deal with Senate Bill 1111. And the court also observed, the district court that is, that 2022 was the first year sorry, it was the first time for LULAC where it would have to spend over maybe a million to $2 million in Texas to counteract laws like SB 1111. Now Texas, of course opposes this and argued that the evidence that was in the record at summary judgment failed to link the claimed diversion specifically to SB 1111. They pointed a testimony from LULAC during discovery, where both LULAC and Voto Latino representatives testify consistently that the diversion of resources was not to SB 1111, specifically, but to a broader group of election related laws enacted in Texas and other states. At the panel also -- the panel opinion in the Fifth Circuit -- also points to testimony from the plaintiffs were they address their injury by invoking Senate Bill 1111 and quote all other laws that came into effect post January. This was after January of this year, the effective date of SB 1111 and other provisions of other laws as well, and also pointed to other laws that were passed in the state of Texas that led to the shutting down of the Colorado program. And so, here you have the plaintiffs trying to defend their organizational standing, which looks to specificity to how they're advancing their mission, but having to divert resources in light of the law that was passed. But you see the panel and the state of Texas pointing specifically to the fact that in the testimony during discovery, not only was Senate Bill 1111 invoked, but the witnesses were also invoking other laws as well, including Senate Bill 1. And Senate Bill 1 is a wide ranging election integrity statute that was passed in Texas that imposed penalties on certain forms of intentional voter fraud and required the Secretary of State to carry out some other audits and things of that nature. And so, during discovery, you have comments and statements that are made that don't point specifically to SB 1111 as being the but for cause for the diversion, but as one of more than one restriction that may have led the plaintiffs to divert resources. And so the Fifth Circuit points to this and says, Look, you know, even assuming this evidence adequately showed a diversionary injury, there's

a failure to link that diversion of resources, specifically to 1111. It's not nearly enough, according to the Fifth Circuit, to claim that the organization spent money to counteract SB 1111 and quote, all other election laws passed by Texas the last legislative session. Instead, an organizational plaintiff has to show that it diverted resources, quote, As a direct result of the challenge law, not as a result of the law and others like it. And here, this is the weakness in the standing argument under organizational standing, because the Fifth Circuit points to a case from the year 2000. And some folks might remember this, there was a case brought on by the Louisiana ACORN Fair Housing versus LeBlanc in 2000, where acorn alleged that it had organizational standing. And there, the Fifth Circuit points of that case and says, Look, you had specific evidence there. There was evidence that the organization regularly conducted voter registration drives in Louisiana. They registered people at welfare waiting rooms and unemployment offices. And they were concentrating their efforts in areas where households received food stamps and there was a low rate of voter registration. And in that case, the record showed that ACORN was expending resources to register voters that would have already been registered if Louisiana had complied with the public aid requirement under the National Voter Registration Act. So that level of specificity was in the record. It supported standing in the ACORN case, but the Fifth Circuit reasons that level of specificity supporting organizational standing is absent in this case. And as a result, it rejects the district court's holding, says, Look, you have failed to satisfy the traceability and redressability problems of Article III standing under your diversion of resources theory, and as a result, you don't have standing here under your organization theory. The court then turns to the second theory that the district court seized on to find organizational standing and reached the merits. And that is that the restrictions in Senate Bill 1111 chill speech. It's clear that a plaintiff suffers in Article III injury if the credible threat of a law's enforcement chills speech or causes self censorship. That's settled law. The court points to Susan B. Anthony List as an example, back in 2014, a decision by the US Supreme Court. And so to assess standing on this basis, there's three questions a court asks: one, whether the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest. Here the court assumes that that's the case. Second, whether that conduct is arguably proscribed by the challenge policy, and third whether the threat of future enforcement is substantial. Now in the district court at the district court held that the threatened enforcement of SB 1111 objectively chills the speech of the plaintiffs. It credited the plaintiffs' fear of being prosecuted if there is advice that's given to voters that conflicts with SB 1111. And the district court found that that fear was credible and reasoned that because helping someone commit voter fraud is a crime and because Texas' avowed priority in combating voter fraud, that there was a sufficient chilling of speech to warrant standing under this theory. Fifth Circuit disagrees. And points specifically to prongs two and three of the governing test where, while the plaintiffs may have had constitutional interest in conducting voter registration drives, the Fifth Circuit find that they never show that prong two or under prong three, that they've satisfied those two requirements. So under prong two, you have to show that the conduct is arguably proscribed by SB 1111. But Judge Duncan points to SB 1111 and says, Look, SB 1111, or any other law cited by the plaintiffs arguably prohibits the activities here. You know, Texas law does not criminalize giving good faith but mistaken advice to prospective voters and the court points to the statute on which the plaintiffs rely and says, Look, if the person knowingly or intentionally requests commands or coerces or attempts to induce another person to make a false statement or application, you know, that's what you'd have to show. But to argue that it's a crime under Texas law to help someone register to vote in violation of SB 1111s confusing requirements fails to satisfy the requirement that that statute, whether it's the PO Box restriction, the residency restriction, or the restriction on establishing a new residency -- that latter two were enjoined by the district court -- that those are chilling your speech. And so then the court just moves next to prong number three, which is the prong that looks to whether there's a threat of future enforcement and whether that threat is substantial.

And again, the court finds that that's not so. There's no credible threat that they will be prosecuted according to the Fifth Circuit. And they call it the fanciful notion that the plaintiffs will be charged under SB 1111 requires a highly attenuated chain of possibilities. And then the court lays out several dominoes that would need to fall for this theory to work. You'd have to first knowingly and intentionally encourage or induce someone to vote or register to vote in violation of SB 1111. That person would have to do so and vote illegally or submit a false registration form. The registrar would have to discover it and find the violation, refer it to a prosecutor. You then have to have the prosecutor unearth, the initial connection between the offender and the plaintiffs in this case that gave the advice. And then the prosecutor would have to determine that there was an intent to intentionally violate SB 1111 and then exercise discretion to bring charges. And so the court finds that you need more than that to satisfy organizational standing on a chilled speech theory. And more specifically, you'd have to point to the statute itself and show a connection between SB 1111s future enforcement and a direct chilling of speech. I think it's notable that the Fifth Circuit looks at SB 1111 and points to it not facially restricting any of plaintiffs expressive activity. It applies to voters, not organizations like plaintiffs who advise and register voters. And that's where the court leaves it. And so despite the district court, having found organizational standing, and doing so on two different theories and reaching the merits, enjoining two of the three restrictions. And I think if you look at the original restriction earlier on, it's obviously vague. It's hard to kind of wrap your head around how you could satisfy it. You're prohibited from establishing or maintaining a residence quote, for the purpose, purpose of influencing the outcome of a certain election. And that's the same thing as prohibiting someone from establishing a residency for doing something else that's illegal: voting or engaging in advocacy or whatnot. So you've got some restrictions on there that are real head scratchers, but you've got to have standing to challenge them. And the Fifth Circuit rejected the theories advanced, whether it's a diversion theory, or chilled speech theory for LULAC Texas and for Voto Latino to have organizational standing. So not a good day for them in the Fifth Circuit on standing grounds. I think it's good to have broad standing doctrine. But that's where we land.

A Anthony Sanders 19:13

Christie, where do you land do you find standing for this organization?

C Christie Hebert 19:18

You know, I think that the standing here really is driven by the context of the summary judgment procedure. You remember last week on Short Circuit, you discussed Curling versus Raffensperger, which is a case out of the 11th circuit. And in that case, the 11th Circuit said that there was standing, that the resources had been diverted, but it was on a motion to dismiss. And so the court had a really quick cursory: The organization had credibly made the assertion of diversion without really doing much more of analysis. Here we have a summary judgment standard, and the court is looking to what was the actual testimony. And the plaintiffs didn't link the actual diversion of resources to the challenged law at issue. And so it's a good lesson, I think, for all other would be organizational plaintiffs challenge: all bases for the government's allegedly unlawful action in one suit, not just okay, we're challenging this law in this suit and this other law in this other suit or just part of the problem. And then specifically link the diversion of resources to the challenged government actions. So because of this law, we are having to do X and Y -- not combat all other laws in the state of Texas.

A Anthony Sanders 19:19

I agree that they definitely could have had some better evidence in that deposition that you're referring to in the case where they essentially said, Well, what resources were diverted because of this law? Well, you know, there's all kinds of laws going on. And so we couldn't do this thing in Colorado or what have you. But it did seem like there's a little bit of a perverse incentive that this case sets up, which is that if your organization's mission is just totally impacted by a bunch of different new crappy laws, but you're challenging one of them. You kinda can't show that you that you have standing, because there's just so there's so many changes at one time, that you can't just focus on challenging one law and. And they're not challenging these other laws in this lawsuit. And so therefore, it's like, it's not enough for this one part of the new changes, which seems counterintuitive that it should be that if there's a bunch of new laws that have been passed, well, you can challenge just one of them. And you can't you don't have to show that, you know, it was this, this 10% of your budget was changed by this one law, instead of just all your budget was changed because of all the laws.

C Christie Hebert 20:49

Right, and I get what you're saying there. But I mean, in terms of these three provisions of the voting election law that are being changed, the plaintiffs could have done a drawn a clear line between Okay, here's how we are combating those three efforts. And that's what our budget is looking at.

A Anthony Sanders 22:22

We hired these three canvassers because of this or what have you.

C Christie Hebert 22:26

Correct, or we're having to talk to everybody who has a PO Box and make sure that they're also having a residency and fill out this other paperwork, and that's going to cost, you know, X dollars. So pointing to the discrete efforts that the organization is doing in response to that challenged law doesn't mean you can't attack kind of the atmosphere generally, but you have to be able to show that this challenged law is causing these different efforts by the organization.

A Anthony Sanders 22:59

Arif as a public interest lawyer who's had to litigate standing, what what do you see as like, you know, the good takeaways from this case in putting a public interest case together?

A Arif Panju 23:11

Standing is justiciability doctrine that you have to take seriously, obviously, to get in the court.

But I think that sometimes when you're dealing with cases against the government, you get to see the building blocks of case law that seemed to restrict standing. And that's not necessarily good. I think here, I think Judge Duncan;s reasoning makes sense. I mean, I think if you had more evidence, like Christie mentioned, that is that binds up the traceability and then can make a good faith argument that on redressability, if you enjoy these laws, we won't have to divert these resources anymore. You could have had a a tighter picture to get you in the box that you needed to. But just taking a step back from this case, having litigated public interest cases here in Texas. The standing doctrines seem to be stacked against the individuals that try to bring cases to bring constitutional change. And a lot of these doctrines, whether they're standing or ripeness, or redundant remedies or you name whatever you like, seem to stack the deck in the government's favor. There's many ways they can knock the stool off so that the merits never get reached. And when you're dealing with profoundly important questions of constitutional law, involving the state's use of its police power and plenary power against the people to restrict what everyone agrees should be uncontroversial exercise of rights, here it's voting, and trying to sign up people to vote. It's incumbent upon courts to recognize the public interest implications here. The default under Article One of our state constitution is liberty. It's the Bill of Rights. And the exception is government power that lends itself to having a pretty generous standing doctrine, if you will, for plaintiffs. You don't see that here. And here you have federal challenges as well, but the result should be no different because you're in federal court. So it's discouraging to see that standing continues to be a difficult box to check if you want to bring meaningful constitutional claims that courts should take seriously. And Judge Yeakel did exactly that in the district court. But I think here specific to this particular case, and based on this record, I think the court reached that conclusion and had to reach based on the precedent it applied. It'd be good to see more generous standing in public interest cases like this, or others like IJ brings as well.

C Christie Hebert 25:30

I will say that it does seem like the court for the chilled speech part didn't give quite enough wait to the fact that the threat of prosecution of a crime is a discretionary activity. And while a conviction for the these organizations under SB 1111, might not stick, there can be a significant chilling effect in the prosecution itself. So even though the -- the opinion talks at length about the fact that giving good faith advice to folks who are registering to vote wouldn't be actually be a crime. But you'd have to prove that in response to a criminal prosecution. And while that criminal prosecution may ultimately be unsuccessful, the prosecution itself can have an ever have a serious chilling effect.

A Anthony Sanders 26:20

Yeah, and it could be that in the future, this law might be abused. Imagine that a voting rights law or a voting law abused by some prosecutor somewhere and then that evidence might, you know, lend greater credence to standing to say well this actually has happened in the past. And therefore, you know, I think that might hopefully cut through a lot of those dominoes and being able to have the merits heard. Well we're going to move from profound issues of constitutional rights, as Arif put it, to the word: and. What does "and" mean. You may think, well, this doesn't really mean all that much. But actually it means quite a lot, quite a few years of prison for a lot of people under the First Step Act, this new legislation that was passed just a few years ago, and is now percolating up in a few different ways through the federal courts of appeals. So the latest has been this battle over "and" in the Fifth Circuit. Christie, how do you define and?

C Christie Hebert 27:27

Well, you know, there are three ways at least three opinions in this case to talk about how you define and, and I guess the tagline of this case is interpreting a sentence about sentences. Or perhaps I should say, and to put a little more meat on that bone, interpreting a statutory sentence to say who gets relief from mandatory minimum sentences. And while this case is in the criminal sentencing context, it offers a great textualist rumble. With these three writings, the majority, a concurrence, and a dissent that may well be cited in a host of future statutory interpretation cases. And so I'll briefly kind of talk about the facts. As Anthony was just talking about, this is about a provision of the First Step Act. And that specific provision is what is commonly referred to as the safety valve provision. If a criminal defendant satisfies the requirements of this provision, then a court can give a sentence that is less than the mandatory minimum -- doesn't have to but it can. Now buckle up folks because it's going to be a bumpy ride full of textual references, which I know is difficult to go through on a podcast. But the safety valve provision features two lists, one list that is nested within another list. And four out of five items on the higher level list, the safety valve provision generally, deal with the offense that a criminal defendant is being sentenced for. So no violence, as part of the offense, no death. The defendant was not an organizer, and the defendant helped the government as much as possible.

A Anthony Sanders 29:13

No victory or death.

C Christie Hebert 29:15

No, a little victory or death. I thought we might get to this point. But the fifth item deals with criminal history and includes a list of its own items. So a list within a list. And the statutory interpretation question here is whether that second list, the criminal history list, the one nested within the general safety valve list should be read conjunctively or distinctively. Whether the "and" that links these listed items should be interpreted as an AND, or an OR. And putting this question into context, the criminal defendant here in this case, Palomares, pled guilty to possession with the intent to distribute one kilo or more of heroin, and that offense has a mandatory mandatory minimum sentence of 10 years in prison. Her PSR, which is a pre sentence investigation report, prepared by a probation officer to aid the judge in sentencing -- folks in the criminal defense field will be well familiar with that. But for those of us who are civil practitioners, it might take a little refresher. The PSR calculated Palomares' potential sentence as between eight and 10 years, but because of the mandatory minimum, the PSR elevated, Palomares' sentence to 10 years. So we're looking at a difference of two years in prison here. And 10 years is exactly what the district court gave Palomares. Palomares appealed to the Fifth Circuit, arguing that the district court should have found she was eligible for safety valve relief. That under the First Step Act, she could have received a sentence below the mandatory minimum. Now here's where it gets a little tricky. Palmomares argues that her criminal history should not disqualify her from safety valve relief. The part of the safety valve provision dealing with criminal history subpart F.1 says that a court can deviate from the statutory minimum

sentence if quote, if the defendant does not have em dash, close quote, a) more than four criminal history points b) a prior three point offense, quote "and" close quote c) a prior two point violent offense. Now it is that quoted "and" that is creating all the fuss here.

A Anthony Sanders 31:45

Well, the em dash gets some play too.

C Christie Hebert 31:48

It does we'll get to that.

A Anthony Sanders 31:49

For listeners who know what an em dash is.

C Christie Hebert 31:51

A long dash that is longer than a hyphen and longer than an en dash -- not to be confused. The "and" means that an ineligible criminal defendant must have all three thingsin her criminal history. This is Palomares as argument, a total of more than four points, a prior three point offense, and a prior two point violent offense. She only has one, one of those three, a prior three point offense, and therefore she's arguing that her criminal history doesn't bar her from getting a sentence below the mandatory minimum. She could have gotten that eight year sentence. The government, by contrast, says that the criminal history portion of the safety valve provision is more like a disqualification checklist. If a defendant checks a single box, then she can't use the safety valve provision to get a sentence below the statutory minimum. The Fifth Circuit's conclusion, Well, a split panel agreed with the government joining the Seventh and Eighth Circuits -- because there's a circuit split here on this issue -- in concluding that the criminal history list is disjunctive Judge Jolly -- he's a senior judge appointed by Reagan -- wrote the majority and said that Palomares was ineligible for safety valve relief. A criminal defendant can't qualify relief if any one of the three criminal history criteria is met. And although Judge Oldham sided with the Judge Jolly, he also wrote a separate concurrence. And we'll walk through that in just a second. Judge Willett, on the other hand, wrote a dissent that would have had the Fifth Circuit join the Ninth Circuit in holding that a criminal defendant must meet all three of the criteria A, B and C before she is barred from safety valve relief. Now, the majority opinion, just a quick review of that, concludes that the structure of the safety valve provision and negative phrase -- the defendant does not have -- followed by that em dash -- that longer than a hyphen longer than an en dash dash -- means that the negative phrase gets distributed to each of the subsequent requirements in the list. In other words, a criminal defendant must show he or she does not have each item in the list. Now, all this is pretty abstract. To make it a little more palatable, the majority uses the example of a baseball stadium sign saying that to enter the stadium, quote, You must not have a) a weapon, b) any food and c) any drink. And the majority really says that readers of that sign would easily understand -- despite the fact that there is an em dash and an and -- that you can't enter the stadium with any of the prohibited items. A reader wouldn't think that you can enter the stadium if you only had a

weapon, but had no food or drink. And I think I think that makes sense. But there is one wrinkle and if you remember a few minutes ago when I was introducing the safety valve provision, I mentioned that this criminal history list is nested within another list. Well, that list is also introduced by an introductory clause followed by an em dash and by linked and in the list. And the majority says this higher list is different. It is applied conjunctively -- not with an or -- as an ordinary and would be because the phrase before the em dash is positive. So, under the majority opinion, it really comes down to whether the phrase before the em dash is positive or negative. If it's negative your and becomes an or. If it's positive, your and can be an and. And Judge Oldham concurs. He wrote separately for two reasons. First, he makes some general points about textualism. So any would be future textualists out there or folks looking to apply statutory interpretation in future cases, take a look at this concurrence. Most of his points about textualism are directly in response to Judge Willetts dissent. And good textualism, Oldham says, means interpreting the statutory language in the context of the whole statute. Bad textualism, by contrast, is hyper literal. It takes that text out of the context and it attempts to apply a wooden, there must be one size, one correct answer approach to every statutory interpretation question. Oldham notes that some textualist inquiries result in one more than one potential answer, and it's the judge's job to pick the best one. Now, the second part of Judge Oldham's concurrence really turns to the specific text in this case, and I have to laud Judge Oldham for being the only one of the three writings to include more than just the criminal portion of the statute. The other two talk about it, but he's the only one that quotes it. And so I found myself referencing his concurrence a lot in reading the opinions. And he concludes that looking at the context of the entire safety valve provision as a whole decides the question. But unlike Judge Jolly'ss majority opinion, Judge Oldham doesn't think it matters that the overarching safety valve list uses a affirmative statement in the beginning and the nested list on criminal history uses a negative statement. He says that both clauses, the one for the higher level and the one for the criminal history list, are distributed. You distribute them out to the items below in the subsequent list. And that means here, for a court to find that a defendants criminal history does not bar him from using the safety valve, the court would have to find that a defendant does not have item a), does not have by item b), and does not have item c). It doesn't really have to interpret the and or the or. Now Judge Willett in the dissent, the Willett dissent in contrast to Judge Oldham's concurrence, you start seeing where the fireworks are really going off. In dissent, Judge Willett criticizes the majority for holding that "and" can mean either "and" or "or" depending on the context. He argues that courts should hold Congress to the task of using language consistently, rather than allowing judges to decide what meaning to apply. Willett emphasizes that the plain meaning of and is conjunctive and that plain meaning doesn't change whether it follows an em dash or it follows a negative clause. And instead, if Congress wanted to wanted this particular defendant to be disqualified from a safety valve relief, if she or he had any one of these criteria, these criminal history criteria Judge Willett says the proper word was or. And Congress didn't choose to use that. Then a couple of just tidbits there. Willett uses de Morgan's law from math and logic to prove that and is conjunctive even when there's a negation. This reference provides Judge Oldham with a lot of ammunition for his concurrence. But in essence, Judge Willett's biggest criticism of the majority's holding is that it's inconsistent. The majority is interpreting and one way with the nested criminal history list, but interpreting it a different way with the higher level safety valve list. And he also knows that there are several other places in the First Step Act that use and. He accuses the majority of playing statutory Calvinball, which was a reference that I loved, which is a game from Calvin and Hobbes where there are no official rules, and the players essentially make up the rules as they go along. Now with all this information, Anthony and Arif, what do you think? Do you think Congress meant the and in the criminal history provision to be interpreted conjunctively or disjunctively -- as an and or an or?

A Anthony Sanders 40:23

And we'll go to Arif first.

A Arif Panju 40:26

I agree with Judge Willett. I think that and is an and or is or and as much as I like the, as Willett describes it, the versatile Swiss Army army knife of punctuation marks, the em dash, you have to be consistent. And that's where I land as well. I think consistency matters. You can find canons of statutory construction that do all sorts of things. But I think ultimately, especially when you're dealing with people's liberty here and you have someone that's being sentenced, and that he, Judge Willett, would want to be resentenced because he didn't agree with the panel's holding, you have to whether you're using an em dash or using interpreting an and, you have to do it consistently. And what I like about his dissent is that he points out that, okay, if you're going to conclude, majority, that the language before the em dash is distributed, here's what it looks like. And then if you you go to page 26 of the slip opinion and then you see him. He scratches off the opening, the defendant does not have, and then injects it into a, b, and c, and says, Look, this has some merit here. It has a benefit of obscurity. The problem, as he notes and I agree with it, is that if you apply that same construction to a different part of the statute, the umbrella clause, and set it off the exact same way -- it contains an introduction that's set off by an em dash just like the section at issue in this case -- it basically says that the court shall not apply any mandatory minimum sentence if em dash. And Judge Willett notes that if we buy the government's argument for and in the issue that we've been talking about the provision, then consistency rather, would require us to do the same for and that closes out the umbrella clause. And what that would do is tell district courts to disregard mandatory minimums in five separate scenarios, you know, and it would effectively eliminate mandatory minimums for drug crimes. If the majority is right that em dashes means everything before them independently modifies what follows, however, then Palomares should still win. And I agree. Consistency is important by appellate courts, by district courts, but especially with canons of statutory construction. Because one knock on them is that you can find a canon to lead you where you want to. And here, you're seeing the battle on using canons. But in a way where you're left with a little bit of head scratching. If Congress at a minimum knows how to use and or or, we should interpret and construe the and or ors in statutes accordingly. And if you're going to use an em dash to distribute the meaning of that canon throughout the text that follows, then you should apply that way of interpreting other parts of the statute as well, which would lead to results which I don't think the majority would agree with. And because that's the case, you shouldn't be shoehorning a use of that canon in a manner that ends up with Palomares on the losing end.

A Anthony Sanders 43:28

For my take, I mean, I think for me to really have an answer, I would need to understand better federal criminal sentencing law and the whole point system, which I really just know from a few cases that I've read like this one and have never practiced in and never done any scholarship in. And so I hesitate before I go too far into there. It seems like one side or the other can make the argument that this whole point thing of listing, you know, three different kinds of points that you can have, or you can't have, to get relief mean that one of them is going to be superfluous, as they put it. And it's like each side is arguing that the other side's argument

makes part of it superfluous. And so I don't want to wade too far into that. Because I frankly have no clue who's right. I will say, though, I usually, if there's two different opinions, I'm going to side with with Judge Willett over Judge Oldham because that's just usually where they end up and where I end up in the opinions and where they come down. But in this case, I was not convinced much at all by the majority. But Judge Oldham's concurrence when he lays out, as you said Christie, lays out the whole statute -- just puts it in one place -- and you start reading down and you're like, Okay, so if the court finds that sentencing and then there's got there's a list of five okay, so you need all five. And then you go to one. And then there's three subparts, a) b) c), it kind of makes sense that a), b), and c), you would need, you need to strike them all off. Because you also have to kind of include all of these, the bigger five of the list. And I know listeners, if they're not already confused or totally confused at this point, but it makes sense that -- I actually thought it made sense when I read his explanation of it that you would put and there. And so although I'm tempted to go with Judge Willett, on and means and, I kind of think it might make sense there. But again, I think to really get into it and what whether Congress, you know, was at all had any intention here, including all three or saying it's just one of the three, I would need to know more about the point system.

C Christie Hebert 45:57

Yeah, the point system is difficult when you're not practicing giving the point system. And I had to spend a good chunk of time just kind of trying to follow exactly what the opinions were saying given my lack of familiarity with the point system. But I will have to say I was persuaded by you know, Willett's dissents comments about the about the canon of superfluity. I can never say that word.

A Anthony Sanders 46:24

Superfluous.

A Arif Panju 46:26

Surplusage.

C Christie Hebert 46:29

Superfluity. I can never pronounce that. Well, I was persuaded by Willett's point that courts don't avoid superfluity at all costs, that sometimes a part of a statute is superfluous. And you still have to construe the statute to make sense to to ordinary language, even if there are some pieces that might be superfluous. So I was persuaded by that point from him, and I think he takes that from the Ninth Circuit's perspective in Lopez, and is really just agreeing with that. So it's interesting that we're all kind of coming down a little bit on the side of Judge Willett, which seems to be the minority approach, compared to the Seventh and Eighth Circuit and now the Fifth versus the Ninth Circuit's kind of out on its own with this conjunctive interpretation. But as Judge Oldham really hints that he expects to see this issue making its way up to the Supreme Court eventually.

A Anthony Sanders 47:39

Yeah, I think all these recent cases show that this absolutely is going to have to go to the Supreme Court, and they're going to need to take it sooner rather than later. Because comes up a lot. And there's a lot of people losing their liberty, because of this issue that could have a little bit more their liberty returned. There's also other of course, First Step Act related splits like when we talked about at our Columbia Law episode a few weeks ago, so those will be going there as well. Well, thank you, both you Texas size attorneys for these Texas sized issues, even if we were talking about the word "and," there was a lot going on there. I think there's plenty of room in Texas for for both viewpoints it seems. So I'll let you get back to your Texas size cases. But thank you both for coming on Short Circuit.

C Christie Hebert 48:29

Thanks, Anthony.

A Arif Panju 48:30

Thank you.

A Anthony Sanders 48:31

And to everyone else, I hope you have a Texas sized week the rest of the week. I'm gonna get asked you all to get engaged.