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SPEAKERS

Justin Pearson, Anthony Sanders, Brian Morris

A Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeal. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, September 7, 2023. We are going to take a journey down the Ohio River today with a couple cases from the Sixth Circuit from the states of Ohio and Kentucky. So we'll get to that in a moment with a couple of my dear colleagues. First, I just want to state for the record like I did last week that we have some openings at the Institute for Justice that, if you are a recent grad or a longtime grad of law school, you might be interested in. First, there's our senior fellow position at the Center for Judicial Engagement. You can join our team here at CJE and research and write and podcast about all kinds of Center for Judicial Engagement stuff. Please check us out on the IJ careers page. Also, if you are a recent grad, we may be interested in you as a fellow. And so please check those positions out if you're a recent grad or maybe about to be a grad from law school. And of course, we are always hiring law students for our Summer Fellows Program. And those positions will be available later this fall for current law students. Now, some law students will get to see some live action from the Center for Judicial Engagement in just a couple of weeks, and that is our annual Supreme Court preview that will be at the University of North Carolina. This year, that will be hosted by my dear colleague, Justin Pearson, who is joining us today. So, Justin, we're going to hear from you again in a couple weeks on Supreme Court stuff at the University of North Carolina, but for today, welcome to Short Circuit.

J Justin Pearson 02:32

Thanks, Anthony. It's always fun to be here. I'm looking forward to the event at UNC, but I'm also looking forward to this recording today.

A Anthony Sanders 02:38

Okay, great. And also joining us is a second timer now on Short Circuit. He is Brian Morris who works at our headquarters, but hails from the hills of Kentucky. Brian, welcome back.

B Brian Morris 02:53

I'm glad to be here. Thanks for having me back.

A Anthony Sanders 02:56

Okay, great. Well, I emphasize Kentucky and Ohio because we have a couple Sixth Circuit cases today. Now the Sixth Circuit is Michigan, Ohio, Kentucky, and Tennessee. An interesting thing about Ohio is it has a number of what historians have called cultural zones in it. So the very northern part was settled by Yankee folk from New England. And Connecticut somehow had this part of Ohio that it reserved for itself that never, of course, became part of Connecticut. Case Western Reserve today is a university that's a remnant of that idea. Just along the lake there in Cleveland, it kind of has a Yankee settler feel from New England. My grandmother actually was part of that journey from Vermont, and her family came to Cleveland. Then in the middle of Ohio, you get more of the settlers originally from New Jersey and Pennsylvania, so very Quaker and German influenced. You have a lot of German settlers in the middle of Ohio. That was my grandfather's family, actually. And then southern Ohio and into Kentucky, you get the Appalachian culture, the Scots-Irish. And all of this is developed in detail, if you're interested in this kind of thing, in a book called "American Nations" that came out a few years ago. I don't endorse all of its findings, but it's very interesting talking about this mixture. And so all that mixes together in what happens in the Sixth Circuit. Now, the first case we're going to be talking about actually has very little to do with American cultural mixing in Ohio because it's a facial challenge to a federal statute. The second case you can argue maybe has a little bit more to do with the story, but the first case is nevertheless very interesting. It is about an old friend of Short Circuit, the nondelegation doctrine; the doctrine that has a very Rodney Dangerfield feel to it. It gets no respect. And so, once again, it gets no respect, but it did get a vote. So, Justin, tell us about this nondelegation and a law that everyone loves to talk about, the Occupational Safety and Health Act. So it's OSHA, or it's Occupational Safety and Health Administration?

J Justin Pearson 05:48

Right. OSHA can actually have two meanings. One is the act, and then the other is the administration. And they have the same acronym, so that could get confusing. But, for our purposes, I think we can just say OSHA. This case was named *Allstates Refractory Contractors v. Su*. And although you never want to predict that a case is going to go all the way up, this one, I think, has a better chance than most, and I hope it does. It takes on an issue that bothers me, as I'm sure it bothers many of our listeners, which is the way that the Supreme Court's nondelegation doctrine precedent has gone off the rails. And, in fact, at least three different current U.S. Supreme Court justices have talked openly about how the precedent is wrong and needs to be corrected by the Court in the future. And maybe this will be the vehicle to do so. It's really a fascinating opinion because when I first read it, knowing what I know about the nondelegation doctrine, I figured the challenges are going to lose three to nothing. But maybe it'll tee up a nice cert petition, and we'll kind of preview what could end up being a Supreme Court case. But it turns out that even under that extremely and, sadly, deferential precedent, this case might be corrected. Challenges might be correct. This law might actually even fail the

current test before the Supreme Court. Hopefully, somebody fixes it. And so basically, what's going on here is a challenge to OSHA, as we just mentioned, and in particular, language saying that the agency has the ability to create any workplace standards that OSHA thinks (or the secretary of OSHA thinks) are either necessary or appropriate. That's an extremely vague, broad, unlimited delegation of power that seems to cut directly against the defining feature of our Constitution, which is separation of powers, right? I mean, in Federalist 47, Madison famously talked about how combining the legislative, executive, and judiciary into the hands of one group would be the very definition of tyranny, and this seems to cut against Madison's warning here. But that said, the majority opinion, in finding that this was not an unconstitutional delegation, points out the court can't rule based on what justices have said they should do in the future. They're bound by the current precedent. And as the majority opinion also correctly points out, that precedent is very lopsided in favor of upholding these types of delegations, or at least delegations in general. And so I don't like the way the precedent is, and hopefully, the Court will correct it someday. But as I read the majority opinion, I realized that this is actually the type of case where, even under the current precedent, the law might be unconstitutional. This is one of those rare situations where I read the majority opinion, and the majority opinion itself convinces me that it's wrong. It has to do with the current test, which is the intelligible principle test. And it requires that Congress must delineate the general policy that the public agency needs to apply and also delineate the boundaries of that delegated authority. And that's to make sure that Congress is the one actually legislating, and the executive branch is merely executing those laws. And what's interesting is this law is so vague and so broad that the majority had to really take some huge logical leaps in order to find that it even fit within the current precedent. And so, for example, the majority at one point explains that according to the majority, the word "or" actually means "and." That "necessary or appropriate" actually means "necessary and appropriate." Because if you could just say that OSHA can do anything that it thinks is appropriate, that's no limitation at all, which is true. But that doesn't mean you can change the definition of "or" to "and" and say that it can only do things that are necessary. Later on in the opinion, the majority says that "may" actually equals "shall." And it appears to be an effort at textualism. I'm hesitant to say this, but because of their motivation to kind of rationalize this law, it almost looked like it was textualism by people who don't know textualism. What they did was they found a dictionary that had like an ancillary, tertiary definition of "may" that said that in some rare situations, based on context, "may" can mean "shall." Then they said well, "may" must mean "shall" here. By the time I get done reading this, the majority opinion is so clearly wrong. I mean, it's a bedrock principle of construing statutes that legislators know the difference between "may" and "shall." They don't mean the same thing, and legislatures know how to write "shall" when that's what they mean. And so I get to the end of this majority opinion saying, basically, maybe the Supreme Court is going to change the precedent someday, but based on the current precedent, this delegation is not an unconstitutional delegation. I get to the end of this opinion, and I'm like, wow, this opinion is clearly wrong. Please dissent. Please say these things that I'm thinking. And it did. And so I want to give a shout-out to Judge Nalbandian. I have never met Judge Nalbandian, but he clearly does good work if this opinion is any indication. He basically goes through everything I was just saying. He points out that sure, the court can't rule based on what the Supreme Court might change in the future based on some comments made by justices; they have to follow current precedent. And sure, that precedent tends to come down on the side of the government in these types of challenges, but not always. There is a test. Sometimes a law is ruled to be an unconstitutional delegation. And this law seems to fit into that narrow category of cases where, under the current precedent even, this type of delegation is unconstitutional. And Judge Nalbandian takes the majority to task for their clear logical errors. He points out that "or" means "or." "Or" doesn't mean "and." If you have a supposed restriction saying that OSHA can do anything that's "necessary or appropriate," that means it

can do anything "necessary or appropriate," right? That means it can basically do anything it thinks is appropriate, which is no limitation at all. And as for the majority opinion's other argument that all of these lists of things that OSHA may do that somehow, the word "may" means "shall" and thereby imposes limits on OSHA, that's not true. Judge Nalbandian also correctly points out that legislatures know how to write the word "shall." They know that "may" and "shall" mean different things. And if they wanted these to be real limitations, which there's no indication at all that they did, they would have written "shall," not "may." It's just a tour de force opinion by Judge Nalbandian. I think it's really interesting too because I was figuring that this case was going to come down three to nothing (the wrong way based on the incorrect, current precedent.) But it would tee up a nice cert petition where you have this issue where Justice Gorsuch and Justice Thomas and Justice Alito clearly want to revisit this precedent, and you come to this question of whether they can get a fourth or fifth justice on board. And now, thanks to Judge Nalbandian's dissent, I think there's a path for someone like, for example, the Chief Justice, to get on board and say, okay, well, we don't have to overrule everything. We can just kind of breathe new life into our current precedent by showing that it is really a meaningful task. I hate to make predictions, but I could envision a scenario where the Supreme Court takes the case. The Chief Justice writes the majority opinion saying that this is an unconstitutional delegation, kind of following the path that Judge Nalbandian laid out, and then you get like concurrences from Justices Thomas, Gorsuch, and Alito saying that the Court should have gone even further. I could definitely see it playing out that way. But I just love this dissent, mostly because it agreed with everything I was thinking, but also because it was really well done. And I do want to point out, as I mentioned earlier, I've never met Judge Nalbandian. I've never had a case in front of him. But Brian, you actually, unlike me, do know Judge Nalbandian. You clerked for him on the Sixth Circuit. And so, am I correct in figuring that you enjoyed reading your judge's dissent as much as I did?

B Brian Morris 14:24

Yeah, I don't think I'm biased at all. But yeah. Perhaps my only claim to fame in life is that I was Judge Nalbandian's first clerk. So I think his dissent was a homerun. And you're right. I think his writing was fantastic. But if you've listened back to the oral argument, and you look at Judge Griffin's majority opinion, there's a lot of emphasis on this presumptive well, it's been this way for 50 plus years and under the current doctrine, we can't do this. Judge Griffin even opens his opinion saying that we're talking about how more than 50 years ago, Congress passed this and Nixon signed this. And throughout the next, I think he says, half century, all of these challenges have been rejected. And I really love how Judge Nalbandian kind of immediately disarms that narrative with his opening, where he talks about how, for 88 years, federal courts have tiptoed around the idea that an act of Congress could be invalidated as unconstitutional delegation and held the majority is continuing that trend. But he wants to end that streak. So I think his writing is a great read. And as he describes, Justin, you are describing, this type of delegation as pretty troubling, where you have an administrative agency, unaccountable to voters, setting these standards of what is appropriate for everybody working across the country. In his opinion as well is talking about how that's especially troubling with how the executive branch has acted during COVID and the reality that Americans work from home now. And that was kind of a colloquy they had at oral argument kind of pressing the government saying well, could you reach into everybody's home now that we all work from home and deem what's appropriate? So I would give it a top five Judge Nalbandian opinion, I suppose. It'll be interesting to see if it goes on bank too because neither Judge Griffin or Judge Cook are in the controlling group in the Sixth Circuit for taking things on bank. Currently, it's what I would call the the Trump judge coalition, which includes Judge Nalbandian with Chief Judge Sutton. So it would be interesting to

see if maybe there's some traction there. I could see that happening, but I agree with you, Justin. I think this is a perfect tee up for SCOTUS, which is my favorite vindication for Judge Nalbandian. He dissented in a case a couple years ago. It was CIC Services versus another agency, the beloved IRS, and a colleague on the Sixth Circuit called Judge Nalbandian's dissent (I had to look this up to make sure I got it right "an attempt to inflict death by distorted originalism on the modern administrative state." And SCOTUS reversed and adopted his position nine to zero. So hopefully, maybe we'll see if this case is headed to a similar fate.

A Anthony Sanders 17:30

Well, one thing that I thought is kind of lurking in the background, that didn't really happen this case, is that the majority in a footnote mentions what we now know as the major questions doctrine. The Court itself hasn't said (the Supreme Court, but Justice Gorsuch has said, major questions is kind of doing some of the work of nondelegation and what it looks like going forward is that'll be how we do a lot of what maybe we shouldn't be doing under nondelegation, but it's like a compromise. And it seems in footnote three, so I haven't read the briefs in this case, but it says, "*Allstates* also argues that this case implicates the major questions doctrine." But then they say it's not a non major questions case. And they say well, they kind of don't argue it the right way. The dissent never talks about it. But if it goes to the Supreme Court (I guess if they don't argue it at all, that's a different story, I could see the Court deciding this in a major questions format, instead of nondelegation. Maybe I'm missing something, but that very broad language, Justin, that governs all kinds of workplace safety rules, I think sounds like it makes you question. I mean, it has a huge impact on the economy. So would the Court go that way? Because then it wouldn't have to go the nondelegation way.

J Justin Pearson 19:03

So I respectfully disagree with you, Anthony. And that's rare. But I don't view this as a major questions doctrine case. When I think of like the EPA case from a year ago, when I think of the major questions doctrine, I think of the famous quote about hiding an elephant in a mouse hole. That's not what's going on here. This is Congress basically saying hey, OSHA, here's an elephant. Have at it. And so I agree with you that perhaps sometimes compromises happen. Sometimes certain justices on the Supreme Court, who may or may not be the Chief Justice, look for kind of an incremental approach, and perhaps kind of expanding the EPA precedent and kind of augmenting the major questions doctrine is a way to address this, but I don't think currently it fits squarely within the major questions doctrine precedent. I think this is just straight up nondelegation doctrine.

A Anthony Sanders 19:53

Yeah, that's a good point. And we don't have a lot of meat on the bone yet about what a major question is, but you're right. It does seem like Congress was more clear here that it wanted the agency to do a lot of stuff. It's just it didn't give really any details about what that stuff is. Well, one case where we get a little bit more details is the one where Brian's about to discuss quite a few interesting details about what was going on in a couple's home one night and what the

police thought about all that. So Brian, I believe this took place not far from Cincinnati on the Kentucky side of the border: Campbell County, Kentucky. Can you tell me a bit about Campbell County, Ketucky, and then what happened there?

B Brian Morris 20:53

Yeah, so Campbell County is my home county. And this entire case happened about 15 minutes from my parents' house. The Campbell County police are always out there doing their best. But Campbell County is right across the river from Cincinnati, so it's this rare place where Ohio doesn't really accept us because, after all, we're in Kentucky. And the rest of Kentucky doesn't accept us because we're not real Kentuckians. But it's funny. Your intro, Anthony, is totally right. There are definitely divides in Ohio, where us who hail from the northern Kentucky/Cincinnati area call your relatives "the mistake by the lake" up there by Cleveland. So it still rings true today. But this case is from Kentucky, which I unintentionally realized that I'm two for two on Kentucky cases, so now I've created a typecast. But this case shows the problems with I think two areas of the law that have kind of gone off the rails, and that's qualified immunity and exceptions to the Fourth Amendment. So this case involves, like we said, the Campbell County police, where the dispatch received a phone call from a woman who said that the people who live behind her, she didn't know if they're having a domestic dispute or what was going on, but she was in her backyard and heard someone yelling. And it sounded like someone was hitting something, but she didn't know if they were hitting dogs or if they were hitting humans or what was going on.

A Anthony Sanders 22:36

You would think those sound quite different from each other.

B Brian Morris 22:39

You know, in Kentucky, you never quite know. So the police responded to the residence. There was two cops that arrived, and the dispatch just told them to respond to a domestic, they're outside, there's a verbal and physical altercation. But they arrive, and they don't see anything. They walk around the house. They walk the backyard. There was nothing that they saw on the body cam. The opinion talks about how the officers seemed a little confused, where they said to each other, I thought they were outside. So they're a little confused and can't kind of figure out what's going on. So they decided to go up to the front porch, and they knock on the door. And a man came to the door, and there was a woman that they could see inside. One police officer, this was later at a deposition, said that the woman looked timid or standoffish. But importantly, he did not express that opinion at the time. It's kind of a post hoc thing. And just kind of said she was just kind of standing there. But both officers' body cams show there were no injuries. There was no crying. There was no indication of harm. She didn't say anything. Just a woman standing inside, and a man comes to the door. And when the plaintiff in this case answered the door, it was just kind of a fantastic interaction. Maybe listeners can take note. The cop knocks on the door and asked the guy (this guy's name is Rob), "Can you step outside and talk to us?". And he immediately just responds, "You got a warrant?". And the cops says, "Nope." And Rob asked, "Well, what's this about?". And the cop explains about the domestic violence call. And Rob was quick to point out, "Well, that wasn't here." And the cop kind of pries a little bit and

says, "Well, is anybody else here?". And Rob responded respectfully, "Well, there may be, but have you got a warrant? Because you sure don't have probable cause to come in here." And the cop then kind of pleaded a little bit with him and said but we've been really nice and respectful, so can we please talk to whoever's in the house? And Rob again, responded, "I don't want any cops in the house." And at that point, things started to turn a little bit where the cop threatened to come in and forcibly talk to the others in the house. But Rob responded, "Well, if you don't have a warrant, goodbye." And then closed the door on the cops.

A Anthony Sanders 25:05

Before you get to the next bit, I love how the cop says, "If you don't, we can come in because it's called exigent circumstances."

B Brian Morris 25:13

Yes, setting the scene for what's to follow.

J Justin Pearson 25:17

He knows just enough to be dangerous.

B Brian Morris 25:19

Exactly. It's like when somebody arrests somebody and they always just start yelling, "Stop resisting." But this whole interaction does not make the officers happy. So after Rob closes the door, they kick the door down, step into the house, they draw their loaded gun and point it at his head, grab him, pull him out onto the porch. And then the other officer dragged him down the driveway and pushed him up against the police car. So a great escalation here. And then, eventually, while he's being detained outside, they spoke with the family. They realize everything's okay. There is no domestic violence disturbance, so the police left without arresting or charging or citing anybody with anything. So, as we often see, the next step is when Rob sues the officers under Section 1983. And he kind of took what I would call a kitchen sink approach where he just threw every claim he could think of at the officers. And at this point, at the appeal on the Sixth Circuit, it's down to three claims. There's an unlawful entry claim for when the officers came into the house. There's an excessive force claim for when they pointed the gun at him, and then kind of like the rough handling of him outside. And then there's a false arrest claim, which is for the temporary detention. And the district court denied qualified immunity on all three of those claims. So as I know our listeners are probably well aware of, qualified immunity is a two-step analysis where you ask is there a constitutional violation? And if there was, was it clearly established that that was a violation, which typically means that there has to be this case on point with the same facts that gives officers fair warning that what they're doing is wrong. And here, the majority went into each claim, analyzed both steps of the qualified immunity analysis. It started with the unlawful entry, which under the Fourth Amendment, we all know is your right to be secure in your home and explain how there's a presumption that cops need a warrant before they can come into your home. And then as you previewed, Anthony, the cops shouted out that exigent circumstances is an

exception to the Fourth Amendment, which I think it, again, is one of these exceptions that has kind of turned the Fourth Amendment into Swiss cheese, so to speak. And as a sidebar, this case reminds me a little bit of what I think is the most wrongly decided Supreme Court case. It's *Navarette* from 2014, which, if you remember that case, was the police received an anonymous tip about a drunk driver. And the police locate the truck, followed him for five minutes, and there was nothing suspicious that happened, no reason to pull them over, which, in itself, is remarkable that you could follow a driver for five to 10 minutes and find not any swerving or anything.

A Anthony Sanders 28:16

Yeah, I don't think I could pull that off.

B Brian Morris 28:20

No, no. But Justice Thomas writing for the majority says that they could still pull them over because just the call was enough. And this is one of my favorite Scalia scathing dissents, where he said the majority opinion was a "freedom destroying cocktail," which I think is right. And here, I mean, the police in this case wanted the exact same rule. They wanted to say you could create exigent circumstances to enter a house just based off of the phone call. So this case ended up being two to one. You have Judge Moore and Judge Griffin in the majority with Judge Rogers in the dissent. And Judge Rogers would have gone along with that rule. He said well, there was this timid woman, and the cops only wanted to talk to them. And the call was kind of enough that it would have been reasonable to enter the home. And perhaps the most frustrating part of his dissent is where he blames Rob and says well, if you would have complied, there wouldn't have been any issue. So it's his fault that his constitutional rights were violated. So it's kind of this catch-22 where, if you know your rights and you tell the cops to come back with a warrant, that's suspicious, but if someone's timid, sitting inside, that's suspicious, too. So thankfully, the majority in this case rejected this approach, and it distinguished cases where there's reasonable suspicion to enter a house after a 9-1-1 call where there's always some corroboration to the call. So the 9-1-1 call is not enough to justify a warrantless entry into the house. Here, if anything, it was the opposite. The cops showed up, there was nothing outside, there was no dog, there was nobody yelling outside. So if anything, it dispelled the phone call, rather than gave them reasonable suspicion to go in. So to establish an emergency in the house, it has to be something beyond the 9-1-1 call. And for the majority, this timid observation isn't enough. The police can't evade the Fourth Amendment off of a subjective hunch of what the cops think might be happening. And they also denied qualified immunity, which is great. And in that oral argument, they kind of tease this out a little bit, which in a lot of these cases, whether there was a previous case establishing that this kind of was unlawful, unfortunately, it usually comes down to how general or specific the judges want to define the right in a particular case. So there's always differences, right? It could be it could happen during the night, the previous case could happen during the night, and this could be during the day. The previous case, it could be raining; this case, it could be sunny skies. But really, and that's part of the problem with qualified immunity, but the majority here is talking about do those differences really matter? And here, it was clearly established that a warrantless entry into the home without an exception is unlawful, and here, since the jury could find no exigent circumstances, then the police violated clearly established law. So Judge Rogers in the dissent, he would have defined it a little differently, saying that it wasn't clearly

established that cops couldn't insist on talking to a victim inside the home. But of course, that would kind of eviscerate the Fourth Amendment. But I think what shows or underscores how radical the officers' position was here is that you have Judge Moore writing for the majority, who is perhaps the most liberal judge on the Sixth Circuit (who I'm not sure you could count on one hand how many times she's probably granted qualified immunity, but Judge Griffin joined her, who's a conservative judge (usually very pro qualified immunity. Their coalition shows how extreme, I think, the government's position was here. I mean, I remember (if I'm allowed to go on another sidebar) a case a couple years ago with Judge Griffin where he wrote for the majority with Judge Rogers to dissent in this case called *Shanaberg*. It infuriated me because it was a case about a report of a stolen vehicle that was wrong. The car was not stolen. So the police pulled over this car, thinking it's stolen. So they approached the car with guns drawn, and this guy gets out of the car and is like what is going on? He has no idea what's happening. They yell at him to get on his knees, so he's on his knees with his hands in the air. And he's just saying like, "What happened? What's going on? What's happening?". And they're yelling at him to get on his stomach. And in that case, Judge Griffin said when the cops tased him while he was on his knees with his hands in the air asking, "Why did you pull me over?", that wasn't even a constitutional violation under prong one because it was reasonable for the cops to tase him because he wouldn't get on his stomach. So you start from there, and at least maybe qualified immunity has gone so off the rails that even Judge Griffin now is saying some of these positions are kind of extreme. So I would love this outcome and more Fourth Amendment and Q.I. cases where you're letting the case go to the jury, rather than decided at the 12(b)(6) or the MSJ stage where, in my view, the judges are pretending to decide legal questions that are really factual disputes, or here, it's kind of characterization of those facts, which really, we should kick it to the jury more often to let them decide. And then the rest of the opinion kind of goes a little quicker on the false arrest claim. The majority explain that you can't forgo the warrant requirement off of a minor crime. And what I think an important part was if the police were correct that they could arrest somebody for this conduct, you're basically criminalizing when someone refuses a warrantless entry into their home. So you'd be criminalizing someone exercising their rights. Judge Rogers dissented from that as well, but then he actually agreed, all three judges agreed, on the last point that pulling the gun out and roughing the guy up was, and at least they get no Q.I., excessive force. That is an excessive force claim that goes to the jury. So all in all, I think in qualified immunity cases with how many appeals you get and the judges always trying to kick it, it's good to see a case that's going to go to the jury on three claims.

A **Anthony Sanders** 35:05

Justin, have you ever said, "Come back with a warrant,"?

J **Justin Pearson** 35:09

We actually, I know we're not the only IJ office to have this, but we actually have that on a doormat by our front door. I have a couple thoughts about this case, but before I do, I feel like we have to address something that Brian said. And I want to point out, Brian, that I agree with you that Justice Thomas' opinion in *Navarette* was mistaken. But did I hear correctly that you said it was the worst opinion in Supreme Court history?

B Brian Morris 35:31

Well, I just think it's on the top of my list of the wrongly decided.

J Justin Pearson 35:37

Because that's a long list. The Supreme Court has had some huge missteps over the years. I just wanted to give you a chance to clarify.

A Anthony Sanders 35:44

You have the Slaughter-House cases, and then you have *Navarette*.

J Justin Pearson 35:51

It's a long list.

B Brian Morris 35:52

There is a long list, but I mean, especially these Fourth Amendment exceptions just really grinds my gears. And that's one of the worst ones, I think.

J Justin Pearson 36:03

Is that a Family Guy reference?

B Brian Morris 36:04

Yeah, that is.

J Justin Pearson 36:05

Nice. Well done. Well done. Alright. So first of all, I agree, other than perhaps that one hyperbolic statement, with everything Brian said about the case. And so my two additional thoughts are these. First, I was struck by how important it probably was that there was body cam footage. The opinions didn't go at length about this and talking about this, but they made sure to point out that there was body cam footage. And I couldn't help but think that this case might have gone very differently but for that body cam footage. I'm not necessarily saying that the police officers would intentionally lie, but I think it's just human nature to kind of remember things a little differently than how they really happen and kind of overstate things that would support your own position. And for too long, pretty much anything that police officers testified to was taken as gospel, even though we know it was often extremely wrong. And so thankfully, there was body cam footage here to show what really happened and to allow these victims to

vindicate their rights. The second thing I was struck by was how, even though the dissent was totally wrong, the dissent was very similar to most Q.I. cases we've seen over the years. There's been this unfortunate trend of judges, in trying to determine whether something was clearly established, finding the most meaningless, de minimis distinctions in order to uphold, or not even upload, to protect the government from accountability. How refreshing and sadly unusual it was for the majority opinion to not fall into that trap and to actually do some real judging, be engaged, if you will. That was great to see, but it's sadly all too rare to see. And I hope it continues a trend in that direction because that's where the precedent needs to go.

A Anthony Sanders 37:53

I like the irony in this case that wasn't really part of the opinion but it's neat to think about how in qualified immunity, you need the law to be clearly established and that has this particular meaning too. It seems, I mean, you have case law in the jurisdiction, unless it's something that's just super duper obvious. And yet, the private citizen in this case, Rob, who we don't know, maybe he's a lawyer, maybe he's some kind of judge; probably not, probably just an ordinary citizen. He knew enough. It was clearly established to him that if I say there's no probable cause, and let alone probable cause, but if you don't have a warrant, then I don't have to talk to you officers, and you can't come in the house. And then the officers mumble this thing about exigent circumstances, which, of course, there wasn't here. And so if he can get that, then the officers should be able to get that. And therefore, although that's not the reason they have the case, qualified immunity, of course, has no place in preventing the claims against the officers. So there's a little bit of a poetic justice there. Well, there'll be more poetic justice in the coming weeks here on Short Circuit. You guys should all check out Justin's Supreme Court preview that is coming later this month, but in the meantime, I would ask that everyone go check out a map of the various cultures of Ohio and learn a little bit of Ohio and Kentucky history. And in the meantime, I hope that everyone gets engaged.