Short Circuit 309: O'Scannlain O'Rama

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SPEAKERS

Anthony Sanders, David Lat, Daniel Sullivan

A Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast 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 Tuesday, January 30, 2024. And I am so extremely excited by the two special guests that we have on today. It's going to be a pairing I think you all will love, and we'll get to it in just a moment. First of all, an announcement that we've made a couple times in recent months: We are hiring here at the Institute for Justice, including an attorney position at the Center for Judicial Engagement. So if you like researching judicial engagement and liberty and justice and all that stuff, and maybe you'd like to do something one day like, I don't know, host an episode of Short Circuit, then you should apply to us. You can find us on our jobs page. We will put a link in the show notes for that. And IJ is also hiring more generally for litigation positions, so please check us out if you're interested in a career change. Now, we have two guests that I'm gonna give you their names right up front and then tell you why they're here. One needs no introduction. He is David Lat. He has been on the show before, and we're very happy to have him on again. The other is, in a just universe this man would also need no introduction, Dan Sullivan. And I will tell you why you should know all about Dan Sullivan in just a moment. So the genesis of this episode is a couple of months ago, I was traveling, I was tired, I was in an airport, and I was waiting for my flight. I checked my phone, looked at my email, and immediately, my frown got turned upside down because I saw there was an email for one of my favorite newsletters, Original Jurisdiction. And that, of course, is the newsletter that David Lat produces. Now, it wasn't the every Sunday Original Jurisdiction. It was a special bonus you get as a subscriber to Original Jurisdiction, which is Lat's Legal Library. And in Lat's Legal Library, where David gives some blurbs of a few recent books, he included my book. And I was just tickled pink. I was so excited to be in there. So I was all excited, and then I look at my next email. My next email is from Dan Sullivan. Now, Dan Sullivan, I should now fill in, is a very successful litigator in New York City. He is a partner at Holwell Shuster & Gilbert. He also, a few years ago, clerked for a certain Justice Scalia. But a few years before that, he was an intern rat in Washington, D.C. Now, I was also an intern rat in Washington, D.C., and we were kind of part of the same program. We lived in this housing complex, and one day, I was walking to Safeway to get some groceries, as we had the little self-catering units. And I passed Dan. He was like just sitting on the curb. And Dan, I'm sure you have absolutely no memory of this. And he's like, why are you going to Safeway? You should go to Giant. And I was like Giant?

And he's like yeah, there's like a special passage through the woods. And then there's like a Giant on the other side that I didn't even know about. So I went to Giant, which Giant is fine, but they had a really good cheap wine selection. So I got some of that, which all of us interns at the time, you know, that was a thing we'd like purchasing. So I got some cheap wine. Then a few years later, Dan is attending the University of Chicago Law School, and my wife is attending the same school. And so we hung out, and he introduced me to Harold's Chicken Shack. Now, if you like good, cheap chicken, and you live in the Chicago area, you should go to Harold's Chicken Shack. If you instead went to KFC, you made the wrong choice. Go to Harold's Chicken Shack. So, because of Dan, I am thankful for cheap wine and cheap chicken, which I will always be thankful for. Going back to David, not only does he have Original Jurisdiction, he has his own podcast, which will tell you all about the movers and shakers in the legal world. It's Movers, Shakers & Rainmakers. And all of you know he also is the founder of Above the Law and way back in the day was our favorite anonymous blogger, Article Three Groupie. So why do I have these two random characters on my show? It's because they both clerked for the same judge, Dan before the days of Justice Scalia, and that's Judge O'Scannlain on the 9th Circuit. Now, Judge O'Scannlain is a senior judge these days, but for many years, he was, I think it's fair to say, the great dissenter on the 9th Circuit. The 9th Circuit's changed a little bit, but maybe not that much. And so we're gonna get a case from the 9th Circuit that involves Judge O'Scannlain in a little bit. We'll also have a case from the 11th Circuit that I guess has a Judge O'Scannlain twist on it. But before we do any of that, I have been talking way too long. So I wanted to thank my friends David Lat for coming back on the show and Dan for coming on for his first time and hear a little bit about their bond, which is clerking for Judge O'Scannlain. Welcome, gentlemen.

D

David Lat 05:47

Thanks for having us.

D

Daniel Sullivan 05:49

Thanks for having us, Anthony.

A

Anthony Sanders 05:50

Okay, so what was it like clerking for Judge O'Scannlain? What was it like going to live in Portland for a year? This was back in the day when Portland really was Portlandia, I believe for both of you.

D

David Lat 06:03

I think that might have been more your time, Dan. You're a little younger than I am. When I was there, it was pre-Portlandia, and so it was not as hip and cool as it is today. Although they've had some recent troubles there as well. But, anyway, was Portlandia during your time there?

D

Daniel Sullivan 06:21

Yeah. In fact, the show ... I think the first season came out while I was clerking there, or maybe it was the year later, but it was very much the land of Portlandia. And a lot of episodes of the show, you know, rang true to our own experiences.

A Anthony Sanders 06:37

And more importantly, what's it like clerking for Judge O'Scannlain? And also, the courthouse he is in is like an ancient, beautiful courthouse there in Portland. Am I right?

D David Lat 06:52

Yes, the Pioneer Courthouse. I believe it is the oldest federal courthouse west of the Mississippi. And clerking for Judge O'Scannlain is wonderful. He's not only a great judge, but he's also a great boss. And that is not always true unfortunately. There, in fact, is now an organization, The Legal Accountability Project, focused on people who are not in good clerkships. But clerking for Judge O'Scannlain was wonderful. He is a great mentor of mine to this day, and my co-clerks were and are some of my dearest friends. So it was really one of the best years of my life to be honest.

D Daniel Sullivan 07:26

Yeah, I would second that. He was, you know, as David said, a wonderful boss and a wonderful judge. And the experience was, you know, it was a bit like kind of being a country lawyer. You know, for one thing, we were oftentimes the only workers it seemed in downtown Portland in suits. But, you know, I would take the light rail five or 10 minutes and then walk to the beautiful courthouse there, which is exceptionally well maintained. And Judge O'Scannlain has been a part of, you know, renovating and maintaining the courthouse over the years. And it's kind of a jewel in downtown Portland. And he's just a prince of a guy. And, you know, I think we all learned a great deal and could not have asked for a better launching pad for our legal careers.

A Anthony Sanders 08:23

And is there something special ... So he was one of, at the time, both of you were there, right, very few more conservative judges on the 9th Circuit. Now, there's a few more with the Trump appointments. And so he was well known for a while being the one to kind of call out as a dissent or a dissental, as sometimes is said, that the Supreme Court should look into this issue. Was there a certain, I guess, kind of subcomponent of the job that was focused in that? Or is it just kind of it would come up as the cases come up, and maybe it doesn't affect the work of the clerk that much?

D Daniel Sullivan 09:02

No, it was. I mean, it was a part of our job to sort of, you know, monitor is probably not the right word, but be kept apprised of the decisions of the court as a whole as they came out. Of course you had your own workload, the workload that the judge had on the panels that he sat on, but

part of what we did was to keep abreast of new decisions as they were arising. And, you know, there might be a petition for rehearing en banc in those cases. There might not, of course, but that was sort of a part of our regular activity. And I think this will come up a little bit later when I talk about the case that I'm going to talk about. It was part of how Judge O'Scannlain saw his role in the court, and his job was to, you know, flag issues like where there were circuit splits or where there was an inconsistency in 9th Circuit precedent so that if it was appropriate and it was necessary, that the Supreme Court could be made aware of the case. And that would happen with, you know, frequency that he would want a case to be reheard en banc and then would dissent from the denial of that rehearing if the vote didn't go his way. And then that central denial might become the basis for a Supreme Court decision at the end of the day.

A Anthony Sanders 10:24

And David that your experience at the time you were there too?

D David Lat 10:27

Absolutely. I would probably say that a quarter to a third of my work, at least, involved monitoring cases and opinions. Each opinion that was issued, we would get the little white hardcopy slip opinion, and it would be funneled to one of the four clerks. And the clerk would have to read it and see whether or not it was something of interest that might be worth attempting to call for rehearing en banc. As Dan mentioned, the court was a little different then. It was significantly to the left of even its current incarnation, and so it could be sort of an uphill battle to actually get the case reheard. But if the case was not reheard, then you could issue the dissent from denial of rehearing en banc, AKA dissental. And Judge O'Scannlain was really a master at that, and he still does it. Technically, because he's a senior judge, he can't vote. So these are not dissents from denial of rehearing, but they are statements regarding denial of rehearing. So I think we all still think of them as dissentals, if it walks like a duck and talks like a duck, but technically, that's why you'll see on an opinion that it's a statement, not a dissent.

A Anthony Sanders 11:34

Is there a word that's been made up to say a dissental by a senior judge? Because, I have to say, I'm not a huge fan of dissental. Although I understand its use, we make fun of it some weeks in the newsletter and Short Circuit, but you haven't heard of a new word in that regard?

D David Lat 11:50

I have to say, I did not like it initially, but I have learned to actually like it because it's very functional. And, to me, language at the end of the day is about function, and dissent from denial of rehearing en banc is quite a mouthful.

A Anthony Sanders 12:04

That's true. That's true. And the economy of words that we have, there's something to that. Also, I should, before we turn to the case, give a shout out, you mentioned The Legal Accountability Project that's led by Aliza Shatzman. And we had her on a couple years ago when she was just starting the project, which is really good for judges who maybe aren't the best bosses and resources that clerks for those judges can use. So if you're interested in that issue, search Legal Accountability Project. You'll be able to find it. So, now, we're going way away from Portland to the 11th Circuit. And David, you have a case to tell us about that involves one of our favorite things here on the podcast, which is a Judge Newsom concurrence. But it also involves someone who has been in the news very much lately, although perhaps not so much in the future. And that's Ron DeSantis.

D David Lat 13:01

Yes, exactly. So I'm going to be discussing the case of *Warren v. DeSantis*. And this was a case that was in the news quite a bit. It involved Andrew Warren, who was an elected state prosecutor. He was the state attorney for Florida's 13th Judicial District, so that's around Tampa, I believe. He's a Democrat. He campaigned as a progressive prosecutor. He was elected to a second term in 2020. But, in 2022, he was suspended by Governor Ron DeSantis, who is a Republican and quite conservative. And, essentially, there was a dispute over the correctness or legality of Warren's suspension. And he sued under Section 1983, alleging that his First Amendment rights were violated. So let me give a little bit of background that's relevant to the case. He had a couple of policies that became an issue in the case, Warren (the prosecutor. He had what was called the discretion policy, which essentially says that prosecutors need to exercise discretion in the cases they bring. I think the progressive slant on it probably means don't be too quick to pull the trigger on not very serious cases. The second was actually more explicit in that direction. It was called the low level offense policy, and it was a list of offenses or charges that the office would presumptively not bring or prosecute, types of crimes that they would not prosecute, and the third was called the bike policy. And this was a non-prosecution presumption in cases resulting from non-criminal bike and pedestrian violations. And very importantly to this opinion, he adopted all these policies through a specific process. So when Andrew Warren wanted to make something off his policy, he would consult his executive committee, they would draft and revise the policy, it would sometimes get outside input, it would be finalized, managers would be briefed on it, relying lawyers would be trained in it, and it would be put in this guidebook of official policies and would be put on their intraweb. In addition to these formal policies, he engaged in certain advocacy. He signed four statements that were put out by a nonprofit organization called Fair and Just Prosecution, and essentially, that is also a progressive prosecutors organization. And the four statements involved capital punishment, election security, transgender care, and abortion. The transgender statement basically expressed "concern about bills targeting the transgender community." And the abortion statement said that the prosecutors would be "committed to exercise their well-settled discretion and refrain from prosecuting those who seek, provide, or support abortions." But neither of these statements, importantly, went through that policymaking process that I described. So what happened was in August 2022, Ron DeSantis, who was incensed by some of Warren's actions and statements, suspended him. And the governor in Florida has the power to suspend state attorneys for things like neglect of duty or incompetence. And the order issued by Governor DeSantis cited Warren's supposed blanket non-prosecution policies, and he said that that constituted grounds for suspension under the constitution under Florida law. It cited the abortion and transgender rights statements that Warren had signed on to, and it also identified those two policies I mentioned earlier, the low level offense policy and the bike policy, and also suggested that they involved a kind of dereliction of duty. And Governor

DeSantis appointed a political ally, Susan Lopez, as acting state attorney, and to this day, I believe she is still acting. So what happened was war ensued under 42 USC 1983, a statute your listeners will be very familiar with, and he alleged that Governor DeSantis suspended him in retaliation for exercising his First Amendment free speech rights. And he asked the court to declare the suspension unconstitutional and require that Governor DeSantis reinstate him. So this went before Judge Robert Hinkle in the Northern District of Florida. That's Tallahassee, so it includes things like the governor's actions. Judge Hinkle held a bench trial, and he identified six factors motivating the suspension, and this is a little down in the weeds, but it's kind of important to understanding how the case came out. So one, Warren's political affiliation as a Democrat; two, his advocacy for various criminal justice reforms, including the statements; three, a single sentence in the abortion statement that committed to not prosecute abortion cases; four, the adoption of that low level offense policy and the bike policy; five, his overall performance as a prosecutor; and six, DeSantis' anticipated political benefit from suspending a progressive prosecutor. So Judge Hinkle concluded that only two out of these six factors were protected by the First Amendment, namely his political affiliation as a Democrat and his advocacy for these certain criminal justice reforms. And, ultimately, Judge Hinkle concluded that Governor DeSantis would have suspended Warren anyway based on two unprotected factors, namely, his performance as a prosecutor and DeSantis' anticipated political benefit. And when he refers to anticipated political benefit, this refers to things about how, for example, Governor DeSantis is always condemning wokeness and progressive prosecutors and things like that. And his recently concluded presidential or I should say, technically, his suspended presidential bid sort of revolved around some of these types of issues. So on appeal, the 11th Circuit, in an opinion by Judge Jill Pryor, no relation to Chief Judge Bill Pryor, concluded that Warren engaged in protected First Amendment activity, that he suffered an adverse action, namely his suspension, and there was a causal connection between the two. And it concluded that Judge Hinkle committed error in two ways. First, by concluding that the First Amendment didn't protect Warren's support for that sentence in the abortion statement I mentioned, about not prosecuting abortion cases. And second, Judge Hinkle erred in concluding the First Amendment didn't preclude DeSantis from suspending Warren to gain political benefit because you can do something for a political benefit, but if it violates the First Amendment, it is still a problem, even if other things that don't violate the First Amendment can be done for political benefit without a problem. So, technically, what the 11th Circuit panel did is it remanded for the district court to reconsider whether DeSantis would have made the same decision based solely on one, Warren's performance, which is an okay factor, and two, the office policies I mentioned: the low level offense policy and the bike policy. And in reaching this conclusion, the panel concluded that the First Amendment protects Warren's signing of the transgender care statement and the abortion statement. There's a lot of very interesting stuff for people, who sort of like me and you, are sort of First Amendment junkies. There's discussion of cases like *Garcetti* and *Pickering* and all of that good stuff. But, in the end, really Judge Hinkle just has to redo the analysis on remand. Reading between the lines, it sounds like the panel is kind of nudging him to rule in favor of Warren, but we shall see.

A Anthony Sanders 20:33

I think it's a pretty hefty shove, but you could call it a nudge.

D David Lat 20:35

Yeah, exactly. Sometimes, you know, they won't say it outright, but I'm trying to think, you

know, there was a case that we actually considered as a possibility for today's discussion. The Second Amendment Instagram ownership opinion by Judge Michael Park, and that too, technically, was a remand to reconsider, but, you know, the judge can read the writing on the wall that it's gonna go a certain way. So there isn't an O'Scannlain connection to this. Judge Kevin Newsom wrote a concurrence in this case. He went into the political considerations a little bit more and talked about, for example, in the opening paragraph of his concurrence, Governor DeSantis' presidential bid, but he emphasized in his concurrence that Warren's comments on transgender and abortion issues were never turned into policy. That was in the majority opinion too or, I should say, the opinion of the court because there were no dissents. But Judge Newsom really, really stressed this, and then I'll just conclude by reading this one paragraph that I think is a great paragraph of his. This is Judge Newsom. "The First Amendment is an inconvenient thing. It protects expression that some find wrongheaded, or offensive, or even ridiculous. But for the same reason that the government can't muzzle so-called 'conservative' speech under the guise of preventing on-campus 'harassment,' the state can't exercise its coercive power to censor so-called 'woke' speech with which it disagrees. What's good for mine is (whether I like it or not good for thine." And that really sums up why I like this opinion so much. It shows that the First Amendment is not this partisan issue. You had Jill Pryor, an Obama appointee and one of the more liberal members of the 11th Circuit, joining with Judge Newsom, a Trump appointee and one of the more conservative members of the circuit. The third member of the panel was Judge Anne Conway from the Middle District of Florida. I like when judges rule against maybe their political interests, and here, that happened in the sense that Judge Newsom is regarded very highly as a judge and could be a Supreme Court nominee in a Republican administration. But, here, he did not hesitate to rule against a leading Republican presidential candidate. So this probably didn't help his Supreme Court chance as much in the DeSantis administration, although at the rate we're going, I guess DeSantis will have to wait until 2028. And, by then, you know, Judge Newsom is going to be a little older. I don't know, but we shall see. So, anyway, that's the case I selected. And I think for folks who are interested in the First Amendment and politics and all of that, it's well worth reading.

A **Anthony Sanders** 22:59

So that was an excellent summary of a well-written case. I have to say, I am still a little confused by both of the opinions here. Dan, were you confused, or do you have a smart take on this one?

D **Daniel Sullivan** 23:14

Well, I don't know how smart the take is, but I'll do my best. I just had a couple of thoughts. I'll breeze through one very quickly. There is another O'Scannlain alert on this opinion, which is there's a discussion about the applicability of the *Garcetti* case, *Garcetti v. Ceballos*, which governs the First Amendment doctrine applicable to retaliation against government employees. That Supreme Court decision came on the heels ... reversed the 9th Circuit decision with which Judge O'Scannlain had specially concurred because he felt bound to do so under 9th Circuit law. But he wrote a special concurrence saying I think the 9th Circuit is wrong. I think the Supreme Court should fix this and tighten the rules, basically, around personnel retaliation doctrine. And that's exactly what the Supreme Court did. And that was one concurrence that the judge was very proud of, so just a little O'Scannlain tidbit there. On the opinion itself, you know, I guess a few things struck me. One is, you know, the language of the opinion and the way that the facts

are laid out I thought was ... The panel opinion is pretty strident. You know, it comes after a trial, and as I was reading through the decision, at first, I thought is this on a motion to dismiss? Or, you know, I've got to read through it quickly, and then I realize, oh no, this is after the trial. And it may be that there really wasn't much offered from the DeSantis side to dispute the facts as they were found by the trial court or cited by the appeals court, but I did sort of wonder, you know, were there factual disputes here? I didn't go back and read the briefs, to be candid, but was there a bid by DeSantis to argue that certain facts were clear because it's an intensely factual case, right? What would the governor have done if he had not been considering these two or three or four factors and only been considering the remaining factors? You know, that's the kind of thing that trials are supposed to be all about. And, usually, trial records are at least, you know ... If there aren't ... If it's not an apropos, at least there are signs pointing both ways. That's usually how these things go. And so that was sort of one thing that struck me, and, you know, I agree that the remand push, shove, you know, whatever the word is, seems pretty clear which way the panel thinks it ought to go. But, you know, one wonders whether there's a factual case to be made about the performance of the prosecutor, right? And, again, you have no idea whether there is or there isn't, but the panel didn't seem to leave much room for it. But, again, that ought to be a factual question. And, you know, one wonders whether there would be another trial or whether the judge is being asked just to reweigh the evidence in light of the panel opinion. I think that's unclear. But, you know, the last thing that I was also struck by is there is a discussion about whether *Garcetti* and *Pickering* apply in the context of elected officials, right? So let's say that, you know, a line prosecutor disobeys the district attorney or something because the line prosecutor has a disagreement with the philosophy behind a prosecution, and the district attorney fires them or suspends them or whatever. That was essentially the *Garcetti* case. And the Supreme Court says well, that's part of his job, and that sort of fits within the ambit of what he's supposed to do. And so no First Amendment retaliation claim can lie in a circumstance like that. And the panel says that *Pickering* is kind of a different situation, but it's a similar idea. And the panel says well, we don't know whether they even apply to elected officials, but we're going to assume that they do because DeSantis loses anyway. Okay. And that's all fine, but I was thinking about it from the other direction, which is ... It's kind of odd for a federal court, I think, to be sort of weighing into what's essentially a political spat between two state-elected officials over a sort of just intensely ideological fight, right? And one might wonder whether when you have two elected officials sort of taking potshots at each other and maybe using whatever levers of power state law affords them if it's really a First Amendment case at all. And I was trying to think of parallels like, you know, if the president vetoes a bill that's passed by both houses of Congress because, you know, not because he just disagrees with the bill as a matter of policy, but he just doesn't like the fact that it was passed by majorities of the other party. He just doesn't like it; he doesn't want to give them the victory. And, you know, it will help his reelection prospects that he's allowed to do that and veto for any reason or no reason, I suppose. Or, you know, if there's an impeachment, which there is right now (articles of impeachment with respect to the Secretary of the Department of Homeland Security, can that be challenged under Section 1983 if it's decided or if there's a case to be made that it's not based on the policy decisions the secretary took, but because of what he ideologically represents or his political profile or, you know, something else? You know, the implications are potentially significant. And it doesn't ... Again, it just may simply be a function of the arguments that Governor DeSantis made. Maybe he didn't raise those arguments and so the court didn't address them, but they're sort of interesting, larger questions that I thought the decision raised. And we'll have to see whether those are addressed at some point in time.

A Anthony Sanders 29:03

David, do you find some of those kind of undercurrents there that Dan's identified?

D David Lat 29:08

Yeah, definitely. There are a couple of points of Dan's that I would pick up on. The standard of review is interesting. And it was mentioned in the opinion a bit because, as Dan mentioned, this was actually off of a five-day bench trial. And so, here, the First Amendment, they acknowledge, kind of changes things a little bit. They said that they have not decided in a published opinion whether review of a factual finding about what motivated the employer to take an adverse employment action is de novo or clear error. So there were a bunch of questions, unanswered questions, that the panel identified here but declined to get into, saying that it doesn't matter how we resolve this one way or the other. Then, second, they pointed out that whether the First Amendment protects a particular activity is ... So they drew this distinction between constitutional facts and historical facts. Constitutional facts are reviewed de novo, historical facts for clear error. And they said here whether the First Amendment protects a particular activity is a question of law that is reviewed de novo. So I think that this had a very de novoish flavor here because even though there were various factual disputes (for example, there was a whole dispute over how DeSantis went about or the DeSantis administration went about researching which prosecutors it was going to suspend and the versions of the order before it was finally issued and all of that, at the end of the day, I think the constitutionally relevant facts were fairly straightforward. The other point I would make, in response to Dan's comment about the political nature of the spat, I do agree that federal courts would normally be reluctant to inject themselves in this. But look. 1983 is there; the First Amendment and the 14th Amendment are there. And one thing I would mention, just for people who are used to the federal system, is the Florida Constitution cabins the governor's suspension power. It has to be for enumerated reasons. These are elected officials who do not serve at the pleasure of DeSantis. So it's not really correct to say oh well, you know, this is kind of like whatever, at will employment or something like that. He is a duly elected state official, and the Florida Constitution says he can be fired, or suspended, only for specific reasons like neglect of duty and malfeasance. So if you kind of think well, the president can get rid of an agency head or a cabinet member because they have policy disagreements, fine. But that's not the case here. This is under Florida state law.

A Anthony Sanders 31:43

Yeah, that's the part of the case that really stood out to me, being the state constitutions nerd that I am. This is an example of the sometimes frustrating split executive that we have at the state level. So we're very used to the unitary executive at ... I mean, even people who don't agree with the unitary executive like doctrine, or whatever you want to call it, at the federal level recognize the president has pretty wide authority. And so you have like independent agencies that maybe those people can only be fired for certain reasons. And that's a big spat going on right now. At the state level, it's nothing like that. And so you can have executives above executives, but then exceptions to their executive power, which you have here, which, to me, kind of meant like ... I agree with the court to some extent that this case law is like a square peg in a round hole. It just doesn't kind of make sense. But also, so that also calls to me the very last footnote in the case, the last footnote of the concurrence, of Judge Newsom's concurrency, says that the trial judge got into the state law issue, which is, you know, whether it was the reason that you mentioned, David, whether it was an okay firing under those

exceptions or a suspension. And you don't ... You shouldn't have gone there, essentially, where, as I see it, the state law issue could mop all this up without even having to worry about the First Amendment. And maybe, you know ... Often, I like getting to the federal constitutional issue and have that taken care of, but here, it's just such a different situation with kind of no guidance in the case law that maybe that should have been more part of it, or at the least, you need to know that framework in order to then decide, okay, how does the First Amendment apply? Because it's just not the normal kind of presidental press secretary, you know. That's the ultimate example: the press secretary comes to the White House and says I think what the President did yesterday was terrible. Well, that guy can be fired, and there's no First Amendment violation. Very different situation here where you really need to know what the state law means before you even get into that.

D Daniel Sullivan 34:02

Right. Yeah, I mean, I was gonna say something similar. And I think Judge Newsom in that last footnote of his concurrence is very interesting. You know, whatever the state law provides in terms of the standard that Governor DeSantis has to meet in order to support the suspension of the prosecutor is a matter of state law. That's not what the federal court is addressing, right? I mean, there have been fights in the past in state courts about whether or not a governor can intervene in what an elected district attorney can do. There was a fight like that in New York during the Pataki administration over whether or not Pataki could supersede the offices of district attorneys who refuse to bring death penalty cases. And, ultimately, the New York Court of Appeals upheld the governor's ability to do that as a matter of New York law. So there are fights like that, right, and there all these complex webs of how the governor interacts to other executive officials under state law. But, again, there are areas of state law, areas that are primarily governed by state law, where there's a federal constitutional overlay. It's kind of like, well, you can do this under state law, but if you go so far, you know, then that's going to be sort of a ... It's not a good faith use of state law. Think about like *Lewis v. Maryland*, for example, in the due process context, or, you know, there's some interesting, perhaps in October term 2009, for example, several opinions around the nation doctrine of judicial takings, right? At one point does a judicial construction of state law, state property law, amount to a taking under the federal constitution? So there can be sort of like you went too far under state law, and then you've now wandered off into some federal constitutional problem. But, you know, the opinion took for probably function of the briefing and how the case was postured and the like and just didn't get into that. But those sort of issues are lurking in the background.

A Anthony Sanders 36:00

Dan, you seem to be hinting at a case that maybe you knew something about, but I'm not going to go there, October of '09, and instead, we're going to go cross country. So we just talked about a current culture war issue: woke prosecutors, reform prosecutors, whatever. Now, we're going to talk about another culture war issue that none of us even knew was a culture war issue until a few months ago, and that's gas stoves. So I guess the city of Berkeley was way ahead of everybody about this gas stove thing. So this case came out originally last May. So some of you may be like oh, yeah, I remember hearing about this. It's a 9th Circuit case about gas stoves in Berkeley. But then there was a call to ... There was an attempt to go en banc. And then the denial en banc was just a couple of weeks ago. So that's kind of the further version of the case that we now have and that Dan is going to tell us about.

D **Daniel Sullivan** 36:58

That's right. Sure. So this is *California Restaurant Association v. City of Berkeley*, you know, the stayed, retrograde city of Berkeley, California. And it is a case that, as you say, it's sort of ostensibly about the hot button issue of whether to ban gas stoves in the name of mitigating climate change and protecting public health. In fact, so ostensibly about that, but in fact, is about the vagaries of federal preemption doctrine. And most recently, with the rehearing opinions, raises what I also want to talk about, which is the nuances of the en banc process and how the circuit courts manage their precedent. So this might be an instance of lawyers making fun stuff not fun. But we'll see. We'll see how we go. So okay. So Berkeley adopted an ordinance essentially prohibiting what they call natural gas infrastructure, basically the piping that goes from the point of gas delivery to the building to the the apartment where you install your gas stove. So they're not saying you can't ... They're not saying you're not allowed to install a gas stove. They're saying the building can't have any piping that would allow you to install it.

A **Anthony Sanders** 38:13

Completely different.

D **Daniel Sullivan** 38:15

Completely different. This was gonna apply to new buildings starting January 1, 2020, so the California Restaurant Association, because this applied to commercial buildings as well as residential buildings, sued the city claiming that the ordinance was preempted by everybody's favorite federal statute, the Energy Policy and Conservation Act, the EPCA, which until looking at this case, I have to confess I had never heard of it. But I'm confident that it is protecting us every day. So the district court judge, Rogers, up in the Northern District of California granted a motion to dismiss the federal preemption claim. There are some state law claims as well, which then she declined to exercise supplemental jurisdiction over. And she held that the Berkeley ordinance does not facially regulate or mandate any particular type of product or appliance and that, therefore, it wasn't preempted and that its impact on consumer products is "at best, indirect." So that's essentially what she held. Then it was appealed to the 9th Circuit. It goes before the panel, which is Judge Patrick Bumatay (recent appointee of President Donald Trump, our former boss, now Senior Judge O'Scannlain, and Miller Baker of the Court of International Trade sitting by designation. So that was the panel. In April of 2023, the 9th Circuit reversed, holding the EPCA preempts the Berkeley ordinance. Judge Bumatay wrote the decision. Judge O'Scannlain and Judge Baker each filed separate concurrences. We'll talk about them, but I'm really going to focus on Judge O'Scannlain's concurrence just in the interest of time, not because Judge Baker's concurrence is wrong or not interesting or anything, but I'm a former O'Scannlain clerk, so we're going to focus on the boss. And then as you said, Anthony, just after the new year, the 9th Circuit denied a petition for rehearing en banc over the dissent of 11 judges in total. So Judge Friedland wrote a lengthy dissent joined by Chief Judge Murguia and Judges Wardlaw, Gould, Koh, Sung, Sanchez, and Mendoza. That was the main dissent. And then Judge Berzon, joined by Judge Paez and William Fletcher, wrote a sort of very, very short separate kind of me too.

A Anthony Sanders 40:45

So quite a few dissenting judges overall.

D Daniel Sullivan 40:49

Quite a few dissenting judges overall. That's right. Coincidentally, we have the Judge Berzon group. I believe they're all senior, but I could be wrong about that. But so that's why they wrote separately, but 11 just so happens to be the number of judges that a limited en banc panel would number in the 9th Circuit because, of course, the 9th Circuit is so big, they can't hear things en banc with the full court. So when they hear things en banc, they hear them in a smaller panel, which happens to consist of 11 judges, although the three seniors wouldn't be eligible to sit on it anyway. And the panel also made some small amendments to the decision. So, just quickly, through the holding of the decision, I mean, the factual background is pretty straightforward. And this, as I say, came up on a motion to dismiss. There was a little spat about whether the California Restaurant Association had associational standing. I'm going to pass over that. Everybody agreed that they do. Judge Baker's concurrence spent a little time on some of the nuances, but as I say, I'll pass over that. So the court addressed the preemption question and how that the EPCA does preempt the Berkeley ordinance. And I think to sort of appreciate some of the interesting nuances in the analysis, you have to hear the statute. So the EPCA says in relevant part, except as provided in certain sections not relevant and effective on the effective date of an energy conservation standard established or prescribed by the agency under another statutory provision for any covered product, no state regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product unless the regulation meets certain conditions, which the Berkeley ordinance did not meet. So the question was what the scope of that express preemption provision is. And for preemption nerds out there, and I know there are some ...

A Anthony Sanders 42:53

There are dozens of you guys.

D Daniel Sullivan 42:55

Yeah. You know, in a large country, I'm surprised we number that many actually. There was implied preemption doctrines, and this is not about that, you know, field preemption, conflict preemption, and obstacles preemption. Those are not at issue here. Those can be controversial. This is express preemption, right? We have specific statutes, so it was about what that statute scope was. And the statute defines energy use as the quantity of energy directly consumed by a consumer product and point of use. Natural gas is included within the definition of energy. A consumer product includes anything that consumes or is designed to consume energy and is distributed for personal use. So to get energy, use the quantity of natural gas directly consumed by any product that uses energy. And a covered product, which is the preemption provision, operates on covered products and includes consumer products, such as kitchen ovens and industrial equipment, which would include commercial equipment used in restaurants. So that's how we get to the California Restaurant Association. So the panel basically said look, the preemption provision applies to any regulation concerning energy use.

Concerning is a classically broad term. At point of use is not defined. They say at point of use ... It means the point at which you use it. So any regulation, either of a product itself or of its use, how much energy it uses, is preempted. So the panel is essentially rejecting the district court's more narrow reading of the statute that only direct or facial regulations of covered appliances would be covered by the preemption provision. The court says no, it goes more broad than that. So the punchline for the panel, and they say this at the beginning of their opinion and at the end of the opinion, is that a state cannot ban the installation of gas stoves entirely, or they couldn't ban the installation of gas stoves directly, so they can't do it indirectly by like going after the piping, which is where I began. So Judge O'Scannlain wrote a concurrence, which is really interesting. He basically says, look, I'm joining in the opinion only because I think that 9th Circuit precedent interpreting a Supreme Court decision called *Puerto Rico v. Franklin California Tax-Free Trust* from 2016 requires me to say, the 9th Circuit cases interpreting *Franklin*, require me to say that the presumption against preemption does not apply to express preemption provisions like the one in the EPCA. So, first of all, what on earth is the presumption against preemption? This is one of the many substantive canons in the firmament here. And there's a bunch of cases, Supreme Court cases, from the early 90s stretching into the late 2000s, that there is this presumption that it applies to express preemption provisions. And it says that you interpret those provisions narrowly, you require a clear statement before you displace historic state police powers, and as part of the narrow construction, you look at a fair representation of congressional purpose informed by text structure and the goals of the statute. Now, if that presumption sounds to you like a throwback montage from an earlier era of statutory construction, you would have a point. Clear statement rules based on policy concerns and broad purpose of interpretation are, you know, kind of reminiscent of an earlier era of statutory interpretation ...

A Anthony Sanders 46:27
Heady days.

D Daniel Sullivan 46:28
... at the Supreme Court. Yeah, the heady days, you know. What some people call the bad old days. The court, right, with textualism in ascendance has sort of largely been set aside. But Judge O'Scannlain's point is, you know, look, these old cases are still on the books in this particular context, and he has to follow them as a court of appeals judge, and the 9th Circuit has followed them before. So you would, you know, think that would lead him to dissent, but he says my problem is that in *Franklin*, the Supreme Court addressed an express preemption provision and specifically refused to apply a thumb on the scales. And so the circuits are now split about what that means in the 9th Circuit in five decisions since *Franklin* as expressly or implicitly held that there is no presumption against preemption for express preemption provisions. So, you know, Judge O'Scannlain says, look, I think my hands are tied here. But he goes on to sort of, in a very, you know, Judge O'Scannlain way with respect, I'm not sure that we really thought this through. The court didn't really address these other cases. It didn't overrule them. You know, the 9th Circuit didn't address the tension between *Franklin* and these earlier cases abound to follow the post-*Franklin* decisions. But I think we ought to, you know, someone ought to give this some thought. And it would be nice to have some guidance, and I think that someone he has in mind is the nine men and women sitting up on 1st Street in Washington, D.C. So his concurrence is a really interesting bit of, I think, judicial custodianship. And I think it's one of the things that I admire most about the judge. As I say, his opinion sure seems like without the 9th Circuit decisions in *Franklin*, he would have felt compelled to go the other way. But, you know, he outlines a confusion in the law and identifies who ought to address it, the Supreme Court, and kind of lays it out for them in a way that makes it as clear as possible. But there is a puzzle in his concurrence. And from the opinions from April, in general, it's not totally clear why the presumption against preemption would have made such a

difference because you read Judge Bumatay's decision, and you think, you know, it seems like he's defining the terms and some of them are defined, some of them are not. What exactly do we have? Where's the rub? And I think the Friedland dissent from denial en banc kind of answers that question because she lays out, I think very helpfully, the other side of the argument. She says, look, the statute uses terms that, although they're not defined in the statutory context, have technical term of art type meanings. So she says energy use and point of use have to do with how much energy an appliance is made to expend. It's not about how much the customer uses, you know. If a customer uses no energy or a lot of energy, that's not what it's regulating. It's regulating, you know, what is the energy efficiency and the energy use that the appliance, according to its specifications, will expend. And that then, you know, tends to narrow the scope of the express preemption provision. So that's a reasonable alternative construction. I think that's the reasonable alternative construction that Judge O'Scannlain was worried about and had in mind. And, you know, the contextual evidence for it is real. I mean, it's said there's an honest to goodness debate to be had there. And so it may be that the applicability of the presumption has a lot to do with how the decision or how the case is resolved. So, you know, real quick, what's so interesting about the case? You know, I think it draws some interesting fault lines on how to use the en banc process. And Judge O'Scannlain himself, as we said, has been a longtime believer that the en banc process is a valuable tool, both to fix circuit precedent that is confused and to draw the Supreme Court's attention to bad law. Here, he is a senior judge, so he can't vote anymore, but he recommended against going en banc. But he wrote a concurrence that sort of spotlights the issue. So one wonders why not vote to go en banc? And I think the answer is in his concurrence where he explains there's already a circuit split on this issue. So, you know, there's only so much the 9th Circuit can do en banc. It can't fix the split with the other circuits, so it's destined to go to the Supreme Court anyway. Might as well flag it, you know, as clearly as you can and try to get some help from upstairs. And that's a sentiment I know he's expressed in the past. And so that's one reason. Another interesting thing about the case is it raises questions about the duty of lower court judges to follow Supreme Court lines of jurisprudence that have sort of fallen into their disquietude or disrepute or whatever. And, you know, Judge O'Scannlain says, look, as long as they're still alive, you know, you're supposed to follow. And so there's an interesting point to be made there about sort of the orderly handling of precedent, particularly, you know, among the judges in the circuits. And there's sort of underneath all that, or maybe above that, I don't know, is the question of substantive canons themselves, which has become a hot topic. You know, Justice Barrett wrote a really interesting concurrence in the *West Virginia v. EPA* case about what substantive canons mean and what the basis for them is from a textualist perspective. Is this one like the substantive canons that the court has endorsed more recently, like the canon against or the presumption against extraterritorial application or retroactivity, or is it more like sort of more obviously policy-laden presumptions? That's an interesting question how the court will separate the wheat from the chaff. And, you know, the en banc dissent, I think, raises really interesting questions as well about how to read statutes contextually. You know, what's appropriate context versus sort of an over literal reading. And I think that opinion, coupled with Judge O'Scannlain's concurrence, nicely tees the issues up for the Supreme Court if the court is inclined to hear the case.

A **Anthony Sanders** 52:55

David, you've been in the clerk's chair by Judge O'Scannlain in similar matters. Do you read the playbook the same way as Dan here?

D **David Lat** 53:04

Yes, I agree. I think it reflects a lot of Judge O'Scannlain's traditional concerns. He wants to help reconcile and to clarify the law. Judge Newsom often writes opinions like this where he identifies a fault line or a confusion or some disarray and identifies possible ways to address it. So I think that's what's happening here. So I could definitely see the Supreme Court taking this or a case like it for a couple of reasons. One, it factually does involve this hot button, political issue of gas appliances, which is on my mind because we recently had the gas company come because we got a generator, and they have to upgrade our meter and change some piping and stuff like that. And I guess this would not be kosher in Berkeley, but we don't live in Berkeley. So one, it involves this very salient, controversial political issue. But two, it involves an issue that is actually doctrinally important: this issue of preemption. And it's sort of a trans-substantive issue. There are many areas of law where preemption is important. For example, ERISA (the employee benefits retirement income statute) preemption is a recurring issue. And so it's an important issue, and it keeps coming up in different areas of law. And if the precedents of the Supreme Court are not clear, you would think that the court might want to do something about that. And in another sign of its importance, Judge Friedland in her opinion, in a footnote or maybe the opening paragraph and a footnote, says, I've been on this court for 10 years. I have never written a dissental. And she kind of throws shade at them saying, I don't know if they're really helpful to our decision making process. She cites an article by Judge Berzon to that effect, but she said, here, I really feel compelled to write in. And so that suggests that this issue is very important to the 9th Circuit and to the country, in a way. I can imagine lots of municipalities around the country, whether it's Cambridge or certain parts of New York City, that might want to go after gas appliances, and then you do have to address this issue. So it'll be very interesting to see what happens next in this case.

A **Anthony Sanders** 55:13

This is going to be, I mean ... If it does go to the Supreme Court, I think this would be really interesting, especially for people who actually know kind of the minutiae of this doctrine like you guys do, and I do not so much, versus how the media is going to try to frame this case because, of course, there's so many crosscurrents with the usual ideologies here. There's this new weird gas stoves are bad kind of left, right divide. But there's also the dislike of preemption by so many conservative judges, I mean, especially Justice Thomas, who I know has had problems with preemption jurisprudence over the years. And then there's the new kind of textualism versus the old purposivism and how that works with a preemption. And so watching all those parts come together at the court would be really fascinating. And, hopefully, you know, after realizing a little bit of what's going on, the kind of cultural war stuff would be more in the background, and the court could get to some serious issues that aren't just going to affect gas stoves in the super blue cities, but are going to affect all kinds of things like you say: employee benefits and, you know, a bunch of statutes that maybe some of us at the Institute for Justice think are unconstitutional under the Commerce Clause. But once you say they're constitutional, they can do all kinds of things versus city and state laws.

D David Lat 56:44

So it's interesting in terms of this balance between federal and state law, sort of behind the veil of ignorance, you don't necessarily know issue by issue, whether you favor the federal side or the state side. So, for example, take the issue of immigration where Texas is right now fighting with the federal government over Texas' use of this concertina wire to help keep out migrants. The federal government is saying, hey, it is our responsibility and our duty and our power to control the border, so Texas, back off. Whereas Texas is saying, hey, well, you're not really doing your job, so we're doing it for you, in essence. So it's just interesting. Sometimes as a liberal or a conservative, you might favor federal power on one issue, you might favor state power on another issue. It might depend on which state you're talking about. So this is an important issue, even if it doesn't have an obvious ideological valence.

D Daniel Sullivan 57:35

That's almost like this is one of those cases where the methodological and the ideological are potentially at odds. And, you know, because the issue cuts across so many areas, and because it touches on so many methodological disputes, I mean, like I said, substantive canons and textualism and yeah.

A Anthony Sanders 57:59

Well, I'm glad we got to cut across so many areas today with our two wonderful guests. So thank you, David. Thank you, Dan. Always a pleasure to have both of you on now. Maybe Dan will be a recurring guest as well in the future. I know you both have things to do later today, so you've been on long enough. I so very much appreciate your time and appreciate everyone listening. Next week, we have another couple of special guests. I hope you enjoy it. We're going to have a little bit more of a Supreme Court focus next week in some ways, so I won't spoil who those people will be, for our listeners, but tune in again. But, for now, I would ask that all of you thank our guests for coming on, and I'll ask all of you to get engaged.