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SPEAKERS

Arif Panju, Paul Avelar, Ari Bargil

P **Paul Avelar** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeal, presented by the Center for Judicial Engagement at the Institute for Justice. I am not your usual host, Anthony Sanders. Instead, I am Paul Avelar, Managing Attorney of the Arizona office of the Institute for Justice. Being not Anthony, I will host this a little differently. For example, I'm a lot less likely to mention Anthony's recent book, Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters, or to encourage you to buy Anthony's recent book, which is now available on Amazon. But otherwise, as hosts, I think I'm effectively the Richard Dawson to Anthony's Bob Barker. Little more disheveled, a lot more drunk, and far more likely to kiss the participants on the mouth. Speaking of the participants, I would like to welcome first of all, to my immediate right, Arif Panju, who is the Managing Attorney of IJ's Texas office. And also Senior Attorney at IJ Florida, Tommy Lombard. I mean, Ari Bargil. That's right, we have an extra special lineup today. All IJ state office people. They rarely let us all be in the same place at the same time, so we're really going to take this opportunity to seize the means of production. Ari and Arif, thank you for being pressed into service today as well.

A **Ari Bargil** 01:47

Happy to be here.

A **Arif Panju** 01:47

Also happy to be here.

P **Paul Avelar** 01:49

Also extra special today we are recording this live the morning of Sunday, June 4, at IJ's 2023 Law Student Conference, where it is very early for those of us who are still on West Coast time and who did the dinner, and drinks, and drinks, and drinks, and drinks boat cruise last night.

But we'll muddle through. For the law students with us today live, welcome. If you learn nothing else from today's podcast, at least you now know that Ari and Arif are different people. This puts you ahead of some folks at IJ already, and we'll not talk about them anymore. We have a couple of cases to talk about today, one from the Fifth Circuit, one from the Sixth Circuit. And I think appropriately for the setting, they are both related to IJ's work. The first is about a court that isn't really a court, but nevertheless, makes people homeless by ordering that their houses be destroyed. And the second is about a drug detective who, you know, rather than detecting drugs, just make stuff up to get no knock warrants and which result in the shooting death of the homeowners and their dog. So you know, that'll be a fun one to make jokes about. And with that, I will now turn it over to Arif to talk about our first case.

A Arif Panju 03:11

So the first case is an IJ case that was decided by the Sixth Circuit just a few weeks ago on May 19. And it was brought by two clients, Sara Hohenberg and Joseph Hanson, who sued as Paul mentioned, this court that we like to call the Environmental Court, that's what's referred to. They sued also Shelby County, which is where Memphis is in Tennessee. And the reason they sued is because by the time they had to sue they had no home to live in. And the reason they had no home to live in is because this court resulted in a process that was far from fair, certainly not due, and not constitutional. In fact, you couldn't even raise constitutional claims in there, and over time with moving goalposts and lack of process and protections, you lose your home in this place. Now, it's important to note that this Court was created to deal with abandoned homes, but it has become a Court that goes after people who the government thinks aren't taking care of their homes, or perhaps neighbors or an association thinks that home over there needs to be upkept a little bit better. And so, the panel consisted of Judges, Sutton, Larsen and Davis, and Sutton wrote for the panel, and he always has great lines, so I will be pulling from the opinion directly as I go through it. But in a nutshell, Sarah Hohenberg had a tree that fell on her house and after a tree fell on her house, the neighbors complained. A homeowner, a neighborhood association, and the state of Tennessee sued her in an Environmental Court. And this Court hears cases involving alleged violations of county ordinances including environmental ordinances. One of the problems here is that she had not repaired her roof in time. She was dealing with an insurance company, and it didn't go fast enough for the neighbors. Mr. Hanson, his neighbors also complained to Memphis official, they emailed Memphis officials after a tree fell on his house. He also had grass that was long, had personal belongings in his yard, the neighbors didn't like that it wasn't kept up to their standards. Things did not go smoothly once the lawsuits were filed against these two former homeowners in the Environmental Court. And Judge Sutton agrees, "things did not go smoothly". Now, the problem here is that this is not a court. It's a court in name only. There are no rules of evidence, so the Tennessee Rules of Evidence don't apply. There are no rules of procedure. The Tennessee Rules of Procedure do not apply. Witnesses would often just provide testimony from the audience. They're not sworn in. Hearsay is flying left and right. There's no foundation laid to establish the underpinnings of the evidence that would be persuasive and have any weight. There are no records kept. So although you have a right to appeal, if you lose, and there's a judgment and you go up on appeal in the courts of appeal in the state of Tennessee, you have no record, because this court doesn't maintain files very well. And there is no report of the proceedings. So you have an appellate right in name only. So what happened is, Hanson was ordered to remediate his home. He kind of cleaned it up, but then a violation recurred. Eventually he was thrown in jail by court order of this environmental court. And this just dragged on for a while. Eventually Memphis bulldozed his home. There was never a judgment in his case after he was sued. The suit was just dismissed. That's an important part of

this. The same situation with Mrs. Hohenberg. She gets sued as I mentioned after a tree falls on the roof. She has issues getting it repaired on time. She's ordered to repair it, doesn't get repaired in time, the environmental court then orders a receiver to take over. She doesn't pay the receiver's expenses. Now she owns this home outright. She's getting drained of her resources. And after she doesn't pay the receiver, the court orders that the home be sold at auction. She doesn't sign anything over. She keeps her possessions in the home. She's ordered by the court to be arrested. She flees to Mississippi, she declares bankruptcy. A bankruptcy trustee is eventually ordered to auction off the house. So her case in the Environmental Court in the state of Tennessee, also is mooted out and dismissed. The fact that these two cases never received a judgment and were both dismissed after being declared moot is an important fact here because of what happened in the District Court. But first, the very first thing that happened in the District Court is that these two property owners, or former property owners, teamed up with the Institute for Justice, and we filed a Section 1983 Fourteenth Amendment lawsuit challenging both the Environmental Court and the County. The County funds the court, oversees the court, should know better. And both are sued and taken to federal court under the Fourteenth Amendment and Section 1983. And the things I mentioned are what's raised in the complaint. The Hanson and Hohenberg complaint that these courts don't use the rules of procedure, don't use the rules of evidence, don't keep records, don't consider constitutional claims or defenses. You can't raise those there. And you know, the result here is a kangaroo court, and that's why you get situations where there's no records kept and witnesses can just talk from the audience and are never sworn in. Things go sideways, goalposts gets moved, and then eventually you lose your home. Either it's bulldozed or you're broke, you're bankrupt, and then it's just taken away from you. So they sue in court and something happens in court, and that is the the complaint gets dismissed, and it gets dismissed for lack of jurisdiction. The District Court said that this was an improper appeal in a federal court of a state court judgment. In other words, the District Court said, Listen, you have these judgments in the Environmental Court. And I remember we don't have a judgment, the cases were mooted out. And you can't just go to federal court and ask for a review of a state court's judgment. There's a doctrine in federal court, the Rooker Feldman doctrine. It's not used very often. It's misapplied very often as Judge Sutton makes clear, and that's why I want to pull some of his lines because they're great. Only the United States Supreme Court has jurisdiction to resolve appeals from final judgments or decrees rendered by a High Court in a state. That's clear, that's well established. You can go to 28 U.S.C 1257(a), look at Rooker, look at Feldman. It's very clear that you need two things for Rooker Feldman doctrine to kick you out of federal court. You need a challenge judgment, so you need to have a judgment rendered by a state court. And then you're bringing that in federal court to try to get it, and this is the second thing, reviewed. You're trying to get that review to undo a state court judgment. And as Judge Sutton concludes here, today's lawsuit does not satisfy either requirement. And that's true. Hohenberg and Hanson never lost in state court. Their cases were mooted out once the process and this Environmental Court wore them down, and they lost their homes, either at auction or under a heavy bulldozer. That's what happened. Those are not judgments. Now, Judge Sutton does some great things which we like here because this is a frustrating doctrine because it's misapplied. And it should not. It's pretty straightforward. You need a judgment and you need someone trying to review a state court judgment in federal court. So Judge Sutton uses this opportunity to explain Rooker Feldman, what it is and what it's not. I have to quote him here. "There are many, many types of lawsuits that this discrete jurisdictional limit under (the Rooker Feldman doctrine), does not cover. It is not claim preclusion. It is not issue preclusion. It is not, in short, 'preclusion by another name.' It does not amount to a backstop to 28 U.S.C. 1738, which entitles state-court judgments to the 'same full faith and credit' in federal court as they receive in state court. And it is not an all-purpose abstention doctrine, lying in wait to untangle snarls when state and federal litigation mix." That's absolutely right. It is not. And it's, it's unfortunately, something

that happens improperly many times. And so what does he do? He also, Judge Sutton says, look, the Supreme Court has reminded us nearly once a year for almost two decades, we should not lightly use jurisdictional rules to pinch hit for non-jurisdictional ones. And then he does something which warms my heart because Professor Vladeck is someone that's been on Short Circuit and on Short Circuit Live as well. And he quotes a comment that he wrote, an article that he wrote and he says "Even these stop signs, by the way, may not fully capture the point. Commentators have not been kind to the lower courts' extravagant use of Rooker and Feldman as a...", quoting Professor Vladeck at the University of Texas go Longhorns, "...'quasi-magical means of docket-clearing.'" That's what, I'm not sure if that's what was happening here, but it was certainly a misapplication of the doctrine. And to drive the point home even harder, "The Supreme Court, again and again, has seen fit to prune it back." And that's true. There was unanimous opinion in 2005, Exxon Mobil Corp v. Saudi Basic Industries Corp., in which Justice Ginsburg, writing for a unanimous Supreme Court, described this doctrine as applying only with cases brought by state court losers, complaining of injuries caused by state court judgments rendered before the district court proceedings commenced inviting district court review and rejection of those judgments. And then Judge Sutton's words, "Today's lawsuit does not satisfy either requirement," that you need for Rooker and Feldman. The injuries don't stem from state court judgments. They don't. There was no judgment at all. What the clients argue in this case, is that the Environmental Court dragged out these proceedings, complicated these proceedings, and all the while cost them money, time, resources and effort in a process that was not fair and unconstitutional. Judge Sutton explains quite clearly the problem with a District Court's opinion. So the first part is you need a judgment from a state court. And I've hammered home I think, and Sutton certainly has, that there's no judgment here. The second problem that he goes through in the Sixth Circuit opinion is that the former homeowners are not seeking review and rejection of anything. And that reality becomes pretty clear when you look at the relief at the end of the complaint that they're seeking in federal court. That they were seeking in the Western District of Tennessee. There are two things that these two property, former property owners, were asking for. One is damages and two, a declaratory judgment. A declaration of your constitutional rights. And damages are not review and rejection of anything, of anything that's binding on the claimants. The Environmental Court did not review, did not issue of judgment awarding anyone any monetary relief at appointed receivers. It ordered sales of property, it held the claimants in contempt, and so on. Awarding damages to the former homeowners would not void those judgments awarded, or the federal court awarding them damages would not, in any way, void that type of judgment or reject anything because there's nothing to reject. The only thing that they were seeking to do is vindicate their constitutional rights, get damages, and get a declaration that their rights were violated. Sutton then turns to, Judge Sutton then turns to the request for relief, the declaratory judgment aspect of it. And it's pretty clear just by reading the complaint that you can see clearly that all that these two former property owners are doing is challenging the systemic policies and practices and customs of Shelby County and the Environmental Court because those were violating constitutional rights. Now, there's several arguments that were raised by the defendants in this case on appeal, and Judge Sutton addresses them. But one of them is tossed immediately, and it was the lead one here. The defendants here in federal court, the government, argue that the legal theories call the Environmental Court's orders into question. As Judge Sutton says, "True or false, that is not the test." It's true that they made some bad decisions, and those were decisions that violated constitutional rights, but it's not a judgment, and it's not a judgment that's being reviewed to be undone in federal court. I think the takeaway here on the Rooker Feldman doctrine is that it's not an overly complicated thing to get right. Yet, courts don't get it right, District Courts when it's applied. And Judge Sutton clearly, concisely marches through this doctrine and explains and puts on full display how obviously wrong this decision was. So, reversal. But that does not end things. Now, the government here, specifically the

Environmental Court, had an environmental defense, had an alternative defense. And that is that it argued, its lawyers argued that this is an arm of the State of Tennessee, and states cannot be sued under Section 1983. Section 1983 creates liability for, "'persons' who deprive others of their federal rights under the color of state law," color of law rather. And so, only a person can face liability under that statute. And the government, at least the Environmental Court argued that we cannot fall within this bucket because we're an organ of the state. Judge Sutton agrees. He rules that the Environmental Court is not a natural person. It's not a body politic, or corporate or municipal entity, either. It is created through the state legislature and exercises that judicial power under the Tennessee Constitution. Quite different than the county of Shelby, which is created as a municipality, a corporate entity, you can sue cities in federal court. You can ask for $1 to preserve your claims or damages like that. But the Environmental Court gets out on this basis. So Judge Sutton wraps this up, and one thing he does which is interesting is that at the very end, he turns to the County and he says look, the County also argues that the claimants have not plead a plausible Section 1983 claim either. And they're arguing that the Environmental Court did not violate anyone's rights, and that, you know, we we can't get sued here because we're not the ones doing anything. We're just, we fund the court, but that's really all we do. And at the end of the opinion, Judge Sutton just leaves it with two observations that he makes, and they're really tied into one, and it's the observation that you're not necessarily entitled to a proceeding that has the rules of civil procedure, you're entitled to a fair proceeding. And it was unclear, based on what had popped up into the Sixth Circuit, whether the county's role in all this is closely tied enough to the fair proceeding that's required to allow this case to proceed. So it's going back now to the District Court. And in the District Court, he details I think what the Sixth Circuit would like to see if it comes up again. And when we bring these cases, it's important that you bring cases where there's bulletproof standing, where there's injury, where you're not going to fall into a trap of these abstention doctrines, all these pitfalls and traps that prevent people from actually reaching the merits of their constitutional claims. If you look through the Federal Court opinions over decades, it's replete with decisions where people whose rights were being violated, never get to a point where a judge judges the merits of the constitutional claim. All those doctrines, like abstention, like issue preclusion, claim preclusion, these things have all bubbled up, and they're all a one way ratchet. They're a one way ratchet away from getting a true adjudication of your constitutional rights. This country, liberty should be the default. Government power is designed to protect it, it's the exception, but a lot of these doctrines flip that on its head. But Rooker Feldman is no exception. But here, Rooker Feldman did not carry the day. That's an important decision. And it's a decision I think that'll be useful in the Sixth Circuit, and also that other circuit should emulate if they run into this.

P Paul Avelar 21:15

Well, I was going to thank you for the bait and switch because you you started us off with a story about these constitutional violations. And then we spent, you know, however many minutes we did talking about procedural nonsense like Rooker Feldman, which he said, there are two things that apply. You need two things for Rooker Feldman to apply. I think the rule to take away here is your name has to be Rooker or Feldman, for this thing to work, for Rooker Feldman to apply. That's the rule, I think that Judge Sutton would like, would really like to, to hand down. Do you talk more a little bit for the law students about all of this procedural nonsense. You started to talk about it a little bit. But you know, you're here, and we spend two days teaching you guys substantive constitutional law, and we don't have any panel on

procedure. And yet, procedure is like, I think half of what we do here sometimes. Like, just figuring out who you can sue, and how you get that into a court in a position for a court to actually decide it?

A Arif Panju 22:14

Yes, that's absolutely one of the key things you have to do if you're bringing a constitutional case against the government, and you're trying to find relief for your clients and broad relief for everyone that's impacted in the same way. Think of it this way. When you're going into court, the government has a lot of things cutting in its favor. If you think of a stool with some legs, all they're trying to do is knock one of the jurisdictional legs out. What's on top, they are the merits of your constitutional claim, and they fall. And so that's the game. And so when you're suing the government and bringing a case, you have to drill down and make sure that your case will be able to navigate all of these kind of jurisdictional issues that the government likes to throw out to avoid the merits. And there's many. We deal with 12(b)(6) standards on plausibility. That's one that's you're going to deal with often, you have to state a valid claim. But at the same time, let's say you're in federal court representing a food truck, but there's a citation in state court still bubbling around somewhere. It's Younger abstention, get kicked out. Let's say for example, that you're I mean, there's some there's some standing decisions that will blow your mind where it's obvious that someone's been injured, that something has been restricted. Think of a case that just got argued in the Supreme Court this term and that just came down, Tyler v. Hennepin, where a 94 year old grandmother lost her condo for failure to pay her taxes. The government takes the condo, offsets the debt, and then keeps the rest. It's equity theft. And counsel for the government was standing in front of nine Justices arguing standing. Now they took her house, they sold it, they paid off her debt and then kept everything else. Obviously there's an injury here. Yet, they're still arguing, standing. They're still arguing that there's no injuries, you can't reach the merits all the way to the end, even in a case like that. And so when you're bringing a case, you got to think it through. You got to go through the process of identifying every procedural pitfall that the government is going to throw your way, and then work your way back and ensure that your complaint is bulletproof. That everything else surrounding the set of facts that you're alleging is tied up together in a way where you can navigate all of that and reach the merits of your claim. And when you do, it's game on.

P Paul Avelar 24:36

And speaking of doctrines that allow you to skip the merits of the claim and just get rid of it, Ari has a case for us out of the Fifth Circuit that is relatively, it's a relatively short decision, but it has an incredibly long history.

A Ari Bargil 24:48

Yeah, that's right. And it's tough to follow a discussion, excuse me, on Rooker Feldman and municipal personhood but I, I will do my best. So this is a decision out of the Fifth Circuit, it's Tuttle v. Sepolio and since you were giving me a hard time about the proper full case name, it would probably be something like ex rel Tuttle v. Sepolio et al. and I'll come up with the full Latin title at a later time. But Rhogena Nicholas and Dennis Tuttle were a married couple in

their late 50s, who were shot by police in their home in Houston. Some of the facts of the case are in dispute, but based on just what we do know, this is yet another outrageous example of police abuse. So it starts out with, in the same way that a lot of these cases unfortunately start out, a supposed tip from a confidential informant who calls the police in Houston and says, Hey, I think they're selling drugs over in that house, and there are some guns, you should check it out. So the police, and this is Rhogena Nicholas and Dennis Tuttle's house. And so the police head over there, they go to check it out, they find nothing. And they submit that information to their superior, who then tells somebody else about this, and that person's name, who they told, is Gerald Goines. And Officer Gerald Goines, and this is not in the opinion, but we'll take a quick sidebar, is a now completely disgraced officer of the Houston Police Department. Gerald Goines, is now under indictment for felony murder in this case for the deaths of Nicholas and Tuttle, and is also under investigation for literally hundreds of other violations that we will get into. So anyway, Officer Goines finds out that they did this search and that it turned up nothing, but he decides that there's got to be more here, I guess independently. And so he does what he thinks is appropriate, and he falsifies an affidavit to get a warrant to do a no knock raid on the home. He says that, you know, he sent a confidential informant over to the house to buy drugs. That person bought drugs and viewed in addition to the drugs that he purchased more drugs in the house and a bunch of machine guns. So using that false information, which by the way, Officer Goines has admitted to providing false information to get this warrant. On the basis of that false information, the warrant is issued, and he along with the Squad 15 I believe they call themselves, even though there's only about 10 officers, they also loosely refer to themselves I think as the "jump out boys". They head over to the house in the dark of night, they kick in the door, and this is where things get a little bit unclear. Everything I told you up to this point is completely undisputed. So there's shooting. Of course the police say Tuttle shot first. Tuttle's family say that can't possibly be true. What seems to be plausible is that the police shot the dog first because police shoot dogs for sport. And after that point, it became a little bit of a free for all with a lot of guns being fired. And after all the dust settled and the smoke had cleared, Rhogena and Dennis are both dead in their home and four officers are injured. The dog also did not make it. Now, a lot of this is unclear because the police refused to provide a lot of helpful information, like what the ballistics reports are telling us. An independent investigation conducted by the Nicholas family concluded that Rhogena Nicholas was shot while sitting down in a chair inside her home from the gun of an officer who was standing outside the residence and fired it through a wall striking her in the chest. I hope that's not true. But in any case, Tuttle's family files this lawsuit. Officer Goines is actually not named in this lawsuit. The 10 other people who are with him were named in this lawsuit. I presume officer Goines is named in a different lawsuit. But they challenge and they say this is excessive force, and as for Officer Goines' supervisor, he should be held liable for failure to train because as we now know, this was something that Officer Goines routinely did, and Lieutenant Robert Gonzales, his supervisor, knew or should have known about this and did nothing. And so the Court, the District Court concludes that qualified immunity does not protect these officers for their excessive use of force, and it does not protect Lieutenant Gonzales for his failure to train Officer Goines because he was aware at least on the face of the complaint, that Officer Goines routinely did this. And of course, because it's a qualified immunity case, they have an immediate right to appeal a decision from the District Court saying that qualified immunity doesn't apply to protect the officers. So they take this up to the Fifth Circuit, and in a per curiam opinion, the Fifth Circuit mostly upholds the findings of the District Court, says all of the claims against all of the officers for excessive force can go forward. The claim against Lieutenant Gonzales also can go forward for failure to train because based on the test for failure to train, you've got to be able to show 1) that there was no training 2) that that lack of training contributed to or caused the constitutional injury that was alleged, and 3) that that failure to train amounted to a deliberate indifference to the constitutional rights of the injured

person. And the court acknowledges that that's a really high bar to clear, but says here, based on the on the four corners of the complaint, we know that at least they've met that standard if everything turns out to be true, which is how the district courts are required to review complaints at the motion to dismiss stage. So the Court says we're gonna, you know, say, some of these people, there's some jurisdictional arguments, they sever off some people, but primarily, the claims can go forward. And Judge Oldham in dissent says, you know, I would have reversed on qualified immunity for Lieutenant Gonzales on the failure to train question because, you know, there's no clearly established precedent that the plaintiffs could point to showing that every supervisor should know and train on the matter of falsifying affidavits for the purposes of obtaining arrest warrants under false pretenses so that you can conduct no knock raids on people, which as we now know and should have always known, are extremely fraught. Most people are familiar with the Breonna Taylor story and how she was killed during the execution of a no knock warrant. Nevertheless, you know, Judge Oldham excuse me, Judge Oldham would have reversed on the on the question of qualified immunity for Officer Gonzales, but it's unanimous on the question of qualified immunity for all of the officers and the excessive use of force. So this is going to go back down. I hope we're gonna get a lot of factfinding. But in the meantime, Officer Goines is in a whole lot of trouble. As it turned out, and as I alluded to, Officer Goines, routinely did this in a lot of his cases. A LOT of his cases. Falsified affidavits for purposes of getting arrest warrants, said that he saw drugs that he didn't see, insisted that confidential informants were purchasing drugs when the confidential informants didn't exist. In this case, he said, Oh, actually, it was me, even though that's probably not true. And in many of those instances, those raids led to arrests, lengthy jail sentences, and, of course, the seizure of large amounts of cash. So the Houston Police Department has a mess on its hands because of the behavior of Officer Goines. And they have decided or will decide to reopen, I think hundreds of cases to determine whether or not those cases were tainted by Officer Goines' misbehavior.

P Paul Avelar 32:34

So I was going to ask you very exciting questions about this immediate right of appeal, and we all know interlocutory appeals aren't allowed, and how did this come up, and where exactly does does the clearly established law sort of find itself these days? I think instead, since I know Arif is just out of a week long trial in Harris County, which is where Houston is, and I think, in a forfeiture case, and I think has some strong feelings about Harris County law enforcement, I'm just going to cede a couple of minutes to Arif so he can vent.

A Arif Panju 33:10

Stuff like you just heard doesn't happen over many years without no one at a District Attorney's office knowing what's happening. There is no way. And that's why it happened for so long. And eventually something like this happened, people die. And then you start seeing what's happened in the rotten core at the bottom of this, which is, if you see something like this, you've got to have noble people at the levers of government power, and they've got to say something to stop constitutional violations and here, people getting murdered basically. But when nothing happens, and it's left to fester, things happen that really scratch your head and it affects all sorts of people. In our trial, a civil forfeiture trial, Harris County is the biggest County in Texas, right? It's where Houston is. And it's the biggest abuser of civil forfeiture. The power of government that Texas has given County DAs to take people's cash and cars under the mere suspicion that it's involved in a crime, no arrests necessary, let alone a conviction. And they get

to keep the proceeds in their own budgets, what could go wrong? And in that case, we've sued the District Attorney as well in a class action including the Forfeiture Unit. And we had the Assistant District Attorney show up in Natchez, Mississippi in the middle of discovery, unannounced, to go onto property of civil rights plaintiffs and start taking pictures with an armed person. We had on the eve of trial, the Assistant District Attorney litigating the forfeiture case, working an invalid subpoena, two states over, and making family members of our clients, who lost their life savings, think that they're under the Court's compulsion that they have to show up in Harris County. Misrepresenting the Court's power to try to lean on family members of the people trying to fight to get their money back. If the people at the District Attorney's office are willing to do that, it's no surprise that things like Mr. Goines' multi-year tirade, tearing through a part of Houston and taking people's money and violating their constitutional rights, is left to continue. I think on the stand, one of the officers was asked about an affidavit submitted in our forfeiture case. And he goes, Well, it's the one you wrote for me. Yeah, three years later, after the seizure, can you imagine? And the facts kept changing from this officer's original narrative to the one that the DA's office was pushing. At the end of the day, it's the people that elect the District Attorney, and at the end of the day, it's the District Attorney's job to get it right. And their job is to protect people's rights, not proceed over an environment where things like Ari just described are left to go on for years or years. And when people try to get their life savings, are being basically retaliated against, and subject to things that are frankly, illegal. You can't serve a Texas subpoena two states over that hasn't been domesticated. And in our case, they scratched it out with a pen and just wrote Mississippi, instead of Texas. But these things happen, which is why you have to find cases and have to have people fighting back like the plaintiffs, the family members in the case Ari just described, or the IJ forfeiture case, the class action, against Harris County.

P Paul Avelar 36:16

It was a tough week trial, and Arif is clearly still in his feelings about this. I'd like to turn back to the case for a second, though, and talk about this clearly established thing, because there does seem to be an open question maybe in this area about obviousness, right? The traditional test for clearly established is, you have to point to essentially a case that's almost directly like yours, within the Circuit, to say whether or not a law is clearly established. And not surprisingly, that means this, for both good and ill probably, not a lot of cases that say, you have to train your officers not to submit plainly made up affidavits. Because why would you ever need to say that, it's bloody obvious? That's the case. That didn't seem to carry the day for at least some people here. But what's going on with that?

A Ari Bargil 37:09

Well, I mean, it wouldn't have carried the day for for Judge Oldham. You know, there should be a bloody obvious exception to that. I mean, there essentially is a bloody obvious exception to that obligation on the part of civil rights plaintiffs to establish that there's, you know, there's this clearly established precedent. I don't think that would have persuaded Judge Oldham here, but I think that's one of the bigger problems is that some of the most outrageous violations that you see are ones that are so outrageous, because it should be so obvious that you can't do this thing. And so, how impossible is it for me to find case law, saying you can't falsify an affidavit for purposes of obtaining a no, and this is the degree of specificity that you would really need to supply a court. You can't falsify an affidavit for for purposes of obtaining a no knock warrant

to raid somebody's house because that should just go without saying. That's, you know, basically fraud. And nevertheless, it wouldn't have persuaded two of the three, or one of the three judges on this panel. But thankfully, it gets to go back down. And the you know, the good thing that can come of this is maybe we can establish some of that precedent. That's kind of the you know, the catch 22 of this entire test is that you've got a point to clearly establish precedent, but it's really hard to get to the point where you can establish that precedent, and then the cycle just continues and continues.

P Paul Avelar 38:32

Gotcha. Well, continuing our theme that all constitutional law is really about procedural nonsense, how is this appealed, right? We have a bunch of law students with us. They all probably learned in civil procedure, at least they should have learned in civil procedure, and they would have unless they went to Yale, that there's something called an interlocutory appeal. And you don't get to do those most of the time. Why is, and this is, so complaint is filed, a motion to dismiss is denied. The case goes on. That's clearly an interlocutory order, because you don't have a final judgment yet. And yet, you can appeal from this sort of order. Why?

A Ari Bargil 39:10

Yeah, well, for the rest of us, when we get a decision that we don't like, that doesn't ultimately resolve the case on the merits. We have to continue arguing the case all the way till its bitter end, even if essentially the the order is going to be dispositive. Maybe you get, you know, refuse some discovery that you absolutely must have in order to win a case, you still have to litigate it all the way through to the bitter end. You get your decision, and then you take that up on appeal. And you appeal both the final judgment, and whatever other orders occurred below, that you think were decided erroneously. And the appeals court will sort those things out. And if it turns out that the thing that was decided early on in the case was done incorrectly, then you get remanded and you go back down and you do it all over again, and you get your new judgment and you take that back up. And it's not super efficient, but it's the way it works for everyone who aren't essentially police. The police, you know, the doctrine goes are different because they've got really important jobs, and we don't want them to be super busy having to defend against lawsuits. So once the court decides that qualified immunity doesn't attach, they get to appeal immediately, and ultimately get, I mean, multiple bites at the apple. They get to do it here, and then they get to do it again, if they lose on the merits.

P Paul Avelar 40:26

Yeah, so I think what the courts have said in that area is that qualified immunity isn't just immunity from liability, it's immunity from being sued. Like, the right is I don't even have to go to court when it applies, and so that's, that's the reason like there's Oh, well, that ruling means that you have to stay in court. That's important enough that we will, we'll consider that now. I've got a list of other things that maybe they should be thinking about as well, but that is that's that. So what happens next, in this case? You talked about it a little bit, it goes back down.

A Ari Bargil 40:58

So it's gonna go back down, and the plaintiffs are gonna get the opportunity to present evidence that the behavior of the police rises to the level to amount to a constitutional violation and can hold these officers liable in civil court for their abuses, and perhaps even obtain damages.

P Paul Avelar 41:16

Novel concept. Are we, are they done with qualified immunity? Are they still going to have to wrestle with that?

A Ari Bargil 41:21

They're going to still have to wrestle with it. And that'll end up on appeal again, as well, I believe.

P Paul Avelar 41:25

So qualified immunity for the students here is is an issue that exists throughout the proceeding. You can raise it on a motion to dismiss. You can, if you lose, you can raise it again on summary judgment. And if you lose then, you can raise it again at trial. So it's something that at each step of the proceeding, you have to continue to deal with at a different sort of level of 12(b)(6) standard versus a Rule 56 standard, versus a preponderance of the evidence standard. But it's, it does not go away that easily.

A Ari Bargil 41:56

That's right.

A Arif Panju 41:57

I, you know, the Fifth Circuit has a really interesting place right now, if you're interested in qualified immunity, because there's some very active decision making and opinions and concurrences and dissents going on. IJ has a case right now that went through the Fifth Circuit we've lost. It's First Amendment retaliation against the City of Castle Hills outside of San Antonio, within the San Antonio area. And Judge Oldham dissented in that case, because he believed that qualified immunity should not apply. And now that case has now bubbled up to the US Supreme Court, and the court has called for a response, so we'll see how that goes. But in the First Amendment retaliation space, in particular, you see a lot of things going on. Judge Ho is another one in a case called Villarreal v. City of Laredo with a citizen journalist who is basically set up and arrested for reporting. And that's teed up, argued en banc. And so, it's a Circuit to keep a close eye on, especially with qualified immunity, because a lot of the more recent appointees on the Court are very active in this area.

P Paul Avelar 43:01

So closing thoughts on today's cases.

A Ari Bargil 43:04

You know, I didn't really talk too much about Arif's case, but what struck me about that is how problematic local code enforcement really can be. Most of these codes are I mean, you can surely make the argument that a lot of them involve on constitutional restrictions on people's property. It turns neighbor against neighbor. These are people who are reporting on one another, and you end up funneled into these courts that are highly unsophisticated, both the people running them and the people who appear in them. Most people don't have lawyers, and most people don't know what they're doing, and yet, it can, the consequences that often flow from being involved in those processes can be catastrophic. People losing their homes, I have clients who owe tens or hundreds of thousands of dollars in fines as a result of the decisions that are made in those courts, so it's a really big deal. I'm glad that IJ is challenging it, and despite kind of the tone of Judge Sutton's opinion, I'm interested to see how this ultimately turns out on the merits because this is a deeply important issue. It's not something that we typically tend to think about, especially when we spend so much time kind of at this higher level thinking about these constitutional issues. But these types of courts have very real consequences for a lot of people and have the ability to ruin lives. And I think it's important that we're taking this stuff on.

A Arif Panju 44:20

I agree with everything Ari just said. And you know, the common thread here is that it shouldn't be this hard to vindicate your constitutional rights. And the absence of being able to truly check the political branches through the judicial bulwark that was designed to act as a judicial bulwark to protect rights should exercise as one. It should operate as one, you should be able to reach the merits because if officers think they can get away using qualified immunity by violating someone's rights, just a little bit different than something that's already clearly established, maybe I leaned on his temple with my knee instead of his neck, so I'm entitled to qualified immunity. It's not clearly established at putting my knee on the neck is a violation of right. You get away with a constitutional violation, and in the procedural context, the same thing. If you don't have a process, and you're not sophisticated, and the process is just a charade, the absence of the check on what's going on there is going to lead to just a stream of constitutional violations. And then it gets embedded like it's normal. And that's where we've gotten. And that's why we have to continue to bring cases and fight back and insist that judges engage independently in a genuine pursuit of the truth on the basis of actual facts and evidence and reach these important constitutional questions and write great opinions making clear when they occur.

P Paul Avelar 45:37

So it seems like you're arguing for judicial engagement.

A Arif Panju 45:40

And also that everyone should buy Anthony Sanders' book.

A Ari Bargil 45:44

Available on Amazon.

P Paul Avelar 45:45

Yeah, someone should start a center about this judicial engagement thing. Well, that, with that will bring the today's podcast to a close. Thank you to Ari and Arif for being our guests on Short Circuit this week. We, and by we I mean not us, maybe not ever again after Anthony actually hears this, we'll be back next week with the latest from the federal courts of appeal. And in the meantime, I would ask that you all buy Anthony's book. No, that's not right. I would ask that you all get engaged. Thank you.