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SPEAKERS

Anthony Sanders, Christie Hebert, Justin Pearson

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 May 12, Friday, 2023. You'll be hearing this in a few days when it is released, but joining me here on May 12, 2023, are two of my Institute for Justice colleagues who are going to tell us about a case from the Ninth Circuit and a case from the Fifth Circuit. Thanks, everyone, by the way, who so far has either downloaded, for free, or purchased my book online. Thank you very much for all the support. I've been overwhelmed with the response for the book. It's been fun. But we've talked enough about Baby Ninth Amendments lately here on Short Circuit. It's time to get back to the federal courts of appeals, and for that, I am joined by Justin Pearson from our Florida office and Christie Hebert from our Texas office. So welcome to both of you.

J **Justin Pearson** 01:26

Hey, Anthony.

C **Christie Hebert** 01:27

Thanks, Anthony. Congratulations, too.

A **Anthony Sanders** 01:30

Thanks, I appreciate it. Well, let's start out west. For some reason it's out west. I don't really get why, with Justin. This case is from the Ninth Circuit, which sounds like kind of a Massachusetts history or melodrama: Robert F. Kennedy Jr. vs. Elizabeth Warren. But actually, it's not really all that. Is it?

Justin Pearson 01:55

No, not really. And before I start ranting and raving, which will happen eventually, I do want to point out that the panel, at the end of the day, probably got the ruling correct. It's just that the opinion was so dismissive that I think it really exemplifies a huge blind spot that the federal judiciary tends to have, especially when a government official is one of the parties. And so, there's really the dismissiveness of the majority opinion that really bothered me, and that's what I really want to talk about. But first, I should give some background to what's going on here. Robert F. Kennedy Jr., undoubtedly, to the chagrin of his relatives, is a bit of a COVID conspiracy theorist. And he wrote the foreword to a book written by fellow COVID conspiracy theorists. I have not read the book. Maybe it's brilliant. I suspect that I probably disagree with some of the things that it says, but that's not really the point. Right? That's neither here nor there for the purposes of this First Amendment challenge. In reaction to the book, Senator Elizabeth Warren sent a scary letter to Amazon complaining that Amazon's algorithm was referring people to the book. She phrased the letter, which I'm sure her staffers wrote, in the form of a request. But then she also talked about how this conduct was potentially unlawful. I think when most reasonable people get a letter, or most businesses get a letter from a relatively powerful, even comparatively speaking, U.S. senator, saying that they're engaged in potentially unlawful conduct and requesting that they answer four questions posed in that letter within 14 days, it's going to get your attention in a way that a letter from someone who doesn't have the power of the government behind them wouldn't. And so, in reaction to the letter, Amazon stopped advertising this book. And, I should point out, Senator Warren also posted the letter to her website. The day after she posted it, Barnes and Noble decided to do the same thing. Perhaps it's just a coincidence that it was the next day, but it seems like a pretty big coincidence. So anyway, Robert F. Kennedy Jr. and the authors of the rest of the book, like I said, he wrote the foreword, bring this First Amendment challenge, arguing government coercion. And of course, there's the famous Bantam Books case about the government trying to coerce sellers of books as a way to stifle free speech and to censor the actual authors, even without going after the authors directly. And so, they brought a case under that logic saying that this letter was coercive and caused Amazon and Barnes and Noble to take these actions that will make it so that fewer people read the book. The district court ruled against the plaintiffs when it came to their motion for preliminary injunction. This is up on interlocutory appeal for the denial of the disciplinary injunction ruling. The district court did something that's going to become important for the purposes of the Ninth Circuit opinion, which is, the district court not only denied the PI, but the district court also said that the plaintiffs failed to even raise a serious question of a First Amendment violation. And that's because of precedent about the standards that have to be met to obtain a PI. Typically, one of the prongs is likelihood of success on the merits, but then there's also some precedent saying that if you don't achieve that level for that prong, as long as you raise a serious question, you can still sometimes get a PI if you really exceed the other prongs of the analysis. The district court said that this claim of coercion wasn't even a serious question. It didn't call it frivolous, but it's kind of in that ballpark. And so, the appeal goes up to the Ninth Circuit, and the panel agrees that the PI should be denied, but they disagree about whether a serious question was raised. Two of the panelists say that no serious question was raised. And again, I thought this was very dismissive in a way that I'll get to in a minute. But I should point out that Judge Bennett wrote a concurrence saying that he still would have affirmed the denial of PI because the district court judge did not abuse their discretion. He thought that the majority opinion was wrong in saying that there was no serious question raised and that he could see how reasonable people could view this as coercion. I'll go through the four prongs of the analysis for

coercion in a second. But really, again, going back to my opening, the reason I wanted to flag this was because through this entire four prong analysis, the majority opinion is extremely dismissive in a way that I think illustrates a problem that I know has been talked about before on this podcast. This is the disproportionate number of former government lawyers who are judges compared to former public interest lawyers or defense attorneys. And so, I'm not even criticizing this specific judge who wrote this because I think it's emblematic of a much larger problem. But the judge who wrote this opinion is a former government lawyer, I looked it up, in a federal judiciary disproportionately filled with former government lawyers. Our friend Clark Neily, who's now at Cato, I think has said that it's a seven to one ratio: former government lawyers and prosecutors for every one criminal defense attorney or public interest lawyer. And so, when you have that imbalance, you get these incredible blind spots, where when you read this majority opinion, it's just clear that the author cannot fathom how anyone could think that this was coercion. Meanwhile, I suspect that if you ask the majority of ordinary Americans, they could very easily see how someone could view this as coercion. And so, I'm not even necessarily saying that at the end of the day, they got the analysis wrong. Based on the precedent, it might not have crossed the line into what the precedent considers to be coercion. But this was, I think, a much closer call than the majority opinion would have you believe, and it's a shame that the opinion was so dismissive. In fact, it was so dismissive that it kind of makes it hard to really say if the PI should have been granted or not. But what I can tell you is that this majority opinion was just a little off. And so, I'll go through the four prongs and kind of what the court said before hopefully talking about Judge Bennett's excellent concurrence in a second. The first prong was the government official's word choice and tone. And what the court said was the tone of the letter was in the form of a request. Even though it uses words like "potentially unlawful," because of the word choice and tone that was picked under this prong of the four prong analysis, it leads you to think that what's really going on here is the government official trying to persuade someone, not coerce them. But again, it's this kind of lack of reality going on here, where Elizabeth Warren has, I'm sure, many staffers, I don't know firsthand, but I'm willing to guess, including people with law degrees. And when you read the precedent, it's not that hard to choose the words that the precedent says fall on one side of the line or the other. Even with that in mind, it didn't say that Amazon is doing something that's potentially unlawful. You would think it would still possibly have caused them to at least, arguably, cross the line, but no, the majority panel doesn't think it's even plausible. The words "potentially unlawful" don't change the fact that this was a very, very polite letter. Going onto the second prong, regulatory authority, again, the panel is shocked that someone could think that a letter from a sitting U.S. senator could give someone the appearance or the impression that Elizabeth Warren has any power whatsoever. They point out that she doesn't have any unilateral power, which is true to a degree. And then they just drop a footnote talking about when the events happened. She was on the Senate Finance Committee that was holding hearings investigating Amazon for antitrust violations and just dropped that in a footnote. Then they go on saying how this isn't even a close call, she has no authority, a senator can't do anything on their own. She's a high ranking member of the party that was in control of Senate at the time, but she's got no power. Okay, fair enough. Move on to the third prong: the perception of the recipient. And again, it's just this kind of lack of touch with reality, where there's a willingness to kind of bend over backwards to make excuses for a government official, where they say, well sure, Amazon actually changed after they received the letter. And sure, the very next day after it was posted, Barnes and Noble changed their actions as well. But we don't know for sure that it was because of the letter. It could have been for other reasons. And by the way, even if it was in part because of the letter, maybe it was because they found the letter persuasive, not because of coercive aspects. This brings us to our final prong: whether the letter expressly states that

there will be adverse consequences. To be fair, the panelists point out that you can have coercive language that doesn't say "or else." You can have language says, "Oh, that's a nice business you got there. It's a shame if something were to happen to it."

A Anthony Sanders 12:04

That's exactly what I was thinking of. I mean, mob bosses has never used the language that would satisfy this prompt.

J Justin Pearson 12:12

Right. And so to be fair, the panel does point out that you don't need to say it expressly. You can say it the way that you and I just said, but then they go through the analysis as if they forgot that sentence that they just written and point out that the letter didn't say any express threats, which in some ways, is even scarier when it's coming from a senator in our omnipotent, unfortunately, U.S. government. And so, then they end up agreeing with the district court's conclusion that this wasn't even a serious First Amendment question that was raised, let alone one with a likelihood of success on the merits. And so, they didn't really have to get into the other prongs of the PI analysis. And again, it's not even that they were wrong to affirm the district court, but it's just every step along the way you could just see how unfair and unbalanced the analysis was. I'm not, again, trying to insult the judges. It's just you see this problem over and over again when you have such a disproportionate makeup of the judiciary, where you have so many more former government lawyers than anyone else. And I just think that that implicit bias just kept working its way into the opinion in a way that really made it hard to tell what the result should have been if it had been presented more fairly. Although I'm not necessarily, again, saying that the panel was even wrong, I just didn't like the way the opinion was written. Now, that brings us to Judge Bennett's great concurrence, which he pointed out that this was the abuse of discretion standard. He said that he would still affirm what the district court did, but he disagreed with the district court that no one could possibly find this to be coercive, and that therefore, it's not a serious question. He thought that a serious question had been raised, and so therefore, the PI question should have been analyzed under the kind of the traditional rubric. And I thought it was great. Although as kind of heartening as Judge Bennett's concurrence was, and one that I think was probably just exactly correct in every way, it almost made me that much more troubled by the majority opinion because presumably, the other panelists saw the concurrence before issuing their opinion, which means one of two things happened. Either they saw the concurrence to kind of politely encourage them to not be so far out in left field, and they just completely disregarded it. Or, they saw the concurrence, and what we're reading now is actually the toned down version, and the earlier version was even wackier. I don't know which one is worse, but what I do know is I appreciated judgments concurrence. I agreed with it. I don't even necessarily think the majority opinion got to the end result at the end of the day, but just the dismissiveness and the glaring blind spots that permeated that opinion really bothered me.

A Anthony Sanders 14:55

Chrissy, if you received a letter from Elizabeth Warren in the mail suggesting that you be quiet, would you treat that letter seriously like it had some kind of consequence?

C Christie Hebert 15:11

You know, if Elizabeth Warren was still a sitting senator, I would definitely sit up and take notice for sure. I don't get letters from my senators very often besides when they asked me for money, but if they were sending me a letter for a purpose other than asking me to give to their campaigns and telling me to be quiet, I might respond accordingly. And I think that point, Anthony, is a really important one because senators and other public officials send letters all the time, and they kind of allude to this a little bit in the the opinion. Various public officials will send letters to people expressing their opinions regularly, and it is a fact question on how coercive of that that letter is. So, I'm with Justin here in that Judge Bennett got it right. It's a little too on the nose to say they didn't even raise a substantial question or a question at all, but maybe there's not a substantial likelihood of success. And I'll add this other observation: I think this case kind of embodies this larger trend of trying the whole case at the PI stage that we're seeing so much of these days. The PI decision really takes the wind out of the rest of the case. It's awful hard to continue litigating after the Ninth Circuit has effectively said, you don't even raise a serious question. And so, it makes litigants have to have their entire case read to go when they file. There's no let's see how this plays out. Let's see what the witness testimony looks like after you've uncovered things. Your whole case has to be packaged almost when you start. Otherwise, they could kick your complaint.

A Anthony Sanders 17:14

Yes, I had a similar thought about the PI standard, and I think you guys both make really good points about how maybe the concurrence was the best way to go in this case because it doesn't poison the well of the rest of it. I had not thought about the Bantam Books case I think probably since law school because I just haven't come across this kind of situation in my own work since then. And so, it's funny, Justin, you describing all the problems. I'm kind of starting this almost from the ground up because it's been so long about how this type of situation should be treated under under the First Amendment. And it seems to me, it could be that this is pretty basic stuff, but it seems to me that there's a huge difference in whether you treat it from a subjective standard or an objective standard. Because if it was Amazon that was responding to this and not the actual plaintiffs, who would have even better standing because they were the ones that letter was directed to, Amazon has very sophisticated attorneys who work for them and businessman. They would understand that...

C Christie Hebert 18:34

And businesswomen.

A Anthony Sanders 18:35

Businesswomen too, of course. And they would understand that she is just one of 100 U.S. senators, actually doesn't have power, that she's a blowhard and says things like this all the time to all kinds of people. And of course, all public officials do that a lot. And so, they probably weren't too concerned about it. Though, it does seems like they did respond to her actions because God knows what else was going on in the executive branch at that time. Say you put

yourself in the shoes of just some lowly author, or a bookstore, someone who's not sophisticated, let alone a lawyer, and they get a letter like this. They don't know the intricacies of how the U.S. Senate works, let alone the federal government works. I mean, they just know she's a powerful person. When they get this letter, they're going to respond probably differently than someone in a sophisticated party that knows that this just some noise. And I don't know, frankly, where the answer lies there, but I think a lot depends on that. And probably, when we put a First Amendment hat on, we should be thinking of what the more average listener is going to think of this than the more sophisticated types.

C Christie Hebert 20:16

I hear your point there, Anthony. But I also think it has to come down with whether a person is thinking that it's the power of the government because Elon Musk could tweet out a whole bunch of bad things about a given book. And if nobody's going to be confused that it's the power of the government that's coming down on you, then no problem under the First Amendment. The real issue comes in here, given Senator Warren's power as a government official in her role in this committee that Justin rightly points out that they relegated to a footnote. Because if she was an ex-senator, and she's just paving the way for future campaigns, that's a different story. But she has, at least arguably, the cloak of government power in in writing this letter, and that's where there's at least something to think about.

A Anthony Sanders 21:13

Yes, and I think that it might be a case where there really isn't an easy answer sometimes. What if it was someone who just works for the government, has no power, sends a letter, but the receiver doesn't know how state, local, federal government works, versus someone who is the actual enforcer of the law. And so, I think in this case, she's obviously cloaked with what seems like a lot of power, even if she's just, as we all know, 1/100 of 1/2 of one branch of the government.

J Justin Pearson 21:49

And it does matter, and the Court does talk about how it matters, who's the one sending the letter, whether that person has unilateral authority to enforce. But I would argue this also illustrates a problem with the underlying precedent, which is I don't think the precedent really grasped, yet at least, the point that it perhaps takes less coercion to get a seller of someone else's book to stop selling that book, than it does to get the primary author to be quiet. And so, if you're looking at it from really any booksellers point of view, especially a large bookseller like Amazon, with huge potential liability that they're always worried about and that they're always trying to manage their risk. You get a letter like that, even if it's not the type of thing that would make some people be quiet, you got to realize from Amazon's point of view, they're going to be like, well, this is not worth the headache. This is not worth making the government mad at us. It's just one of countless books. And so, I think the precedent needs to reflect that fact when you're dealing with this kind of third party aspect of censoring someone indirectly instead of directly that I just don't think the precedent fully deals with yet but should.

A Anthony Sanders 22:53

Well, we're going to be moving. Thank you for that discussion, Justin, but we're going to be moving from letters and books to jackets. And I'm sorry, this is not about fashion. If you're worried about what the latest jackets for the fall catalog are going to be. But Christie, we had this incident with a jacket in Texas, and apparently, the guy still wanted it, and that is a key fact for the case.

C Christie Hebert 23:19

So we're looking at the United States v. Ramirez. It's a case out of the Fifth Circuit and I am going to give this case the tagline "stash it at your mom's house" for reasons that will become apparent as we talk. And this case concerns an appeal of a criminal conviction, so we're moving from the civil world with Justin to the criminal world, and the denial of a motion to suppress. And like most motions to suppress, it's really the whole ballgame when you come to the criminal conviction. If the evidence is allowed to be considered, the criminal conviction is going to really stand. In this case, the defendant Ramirez was charged with the crime of being a felon in possession of a firearm. So, spoiler alert, whether the gun should have been part of the evidence or not is the is the kit and caboodle. And Ramirez claims that the gun was only found because the officer who found the gun violated his Fourth Amendment right to be free from an unreasonable search, and therefore, it should be excluded. Now, the facts of the search are where we get into those jackets, Anthony, or a jacket, rather than multiple jackets. A police officer here was told to watch for a truck registered to Ramirez's mom, and we don't really know the backstory of that, but we know that he was supposed to be on the lookout bolo for Ramirez's mom's truck. It's enough to say that the officer was basically circling Ramirez's mom's house, and eventually, the officer saw the truck, which was being driven by Ramirez, pull up and saw, allegedly, Ramirez roll through a stop sign before pulling into his mom's driveway. And then, the officer made a stop. As the officer was making the stop, Ramirez got out of his truck, or his mom's truck, and the officer saw Ramirez walk over to a fence on the mom's property, and then tossed his jacket over the fence and into the mom's yard, and it landed on top of a closed trashcan. Long story short, after detaining Ramirez, the police retrieved the jacket from the mom's backyard, and then they found the gun in the pocket. The majority in this case was Judge Elrod, and she was joined by Judge Dennis. They held that the search of the jacket violated the Fourth Amendment, and the district court should have excluded the evidence of the gun. And one of the great noteworthy things about this case is that the majority examined this Fourth Amendment case under both the reasonable expectation of privacy framework and the property rights framework, and they concluded that the essential question was the same: was the jacket abandoned? And I think you can see where this is going. No, the majority says, he did not abandon the the jacket because he was looking to go back and fetch it at some point. Putting the jacket on the other side of the mom's fence didn't mean that he intended to give up all the rights to the jacket ever. He placed the jacket on the other side of this fence so he could hide it so he could keep it safe. And the fact that it was his mom's property was important. It wasn't a public thoroughfare, it wasn't a bowling alley, like there has been in another case. He was trying to put it at a place where he had a ability to go get it and it would be safe. And there was some evidence that Ramirez ate meals at his mom's house and checked out his mom daily and got his mail there. And so, that's all part of the idea that this was someplace he could store stuff. And this case is particularly noteworthy because it shows that this reasonable expectation of privacy, this kind of theme or analysis, might just be really about whether you have a property right in something or not. And maybe, perhaps one day in the not so distant future, the whole is there a reasonable

expectation of privacy analysis will no longer be the way of thinking about things, and instead, we'll just look to whether a person has a property interest in the item that the government is looking to search. And then if we do, you can't just search it. So, that's kind of the hope of that analysis and what this majority framework kind of suggests. Judge Ho dissented from this opinion, and he would have concluded that Ramirez had abandoned his jacket. He kind of rested this conclusion on two points. First, the mom's backyard was easily accessible by the public, and second, that it landed on the trash bin. And as we all know, you don't have a reasonable expectation of privacy in your trash, whether that's right or not, that's kind of the law there. Ultimately, I agree with the majority. Ramirez didn't intend to abandon his jacket. He intended to stash it. He intended to hide it from the police officer, and it can't be that the police can just have the power to search your mom's backyard because you got pulled over outside of her house. But I am troubled, for lack of a better descriptor, by the consequence of this case, that it's okay to stash some contraband close by if you think the police officers might search you. That's fine as long as they don't have a reason to search that additional spot. And I'm going say this: I'm especially troubled by the fact that it's okay to stash contraband on your mom's property, with this ruling come out coming out right before Mother's Day. That is a problem for the court, to be telling folks that they can stash their illegal stuff at their mom's houses right before Mother's Day. That's just not a kind thing to all mothers out there.

J Justin Pearson 29:42

I disagree. I think it'll motivate people to be even kinder to their moms in case they need to use their property to stash stuff. Maybe I have different stuff.

A Anthony Sanders 29:51

That reminds me of Joe Pesci's mom in Goodfellas and how he used to use her house, so maybe a similar thing. Justin, do you ever stash jackets at your mom's, and what else do you think about this case?

J Justin Pearson 30:09

So sometimes, I do leave things at my mom's house, but it's rarely to avoid the police. I basically agree with everything that Christie said. I did agree with the majority opinion, but I actually liked Judge Ho's dissent as well, even though I respectfully disagree with his conclusion. And what I liked is that both the majority opinion and the dissent were really engaging with the facts. Now they were prioritizing different facts and coming to different conclusions, but I think this is the type of situations where reasonable minds can disagree, right? Because on the one hand, it's his mom's property, and I do think that there's a good chance that he intended to wear that jacket, again, provided that the top of the trash can lid was not all grimy or anything. But on the other hand, it was on top of trash cans, it was next to a sidewalk on the edge of the property. Now, of course, the majority opinion points out that there's a fence between the trash cans and the sidewalk, but the dissent points out that there's a chain link fence and not that high. So it's like, you've got these competing facts going back and forth. It's on his mom's property, on top of a closed trashcan, separated by a fence. But it's on top of a trashcan. Unfortunately, neither opinion talks about how dirty the top of the trash can is, which is something I would have liked to know. Or someone can kind of reach over when

they're walking down the sidewalk and grab it. And so, I was really left with two kinds of thought experiments. One was if a stranger is walking down the sidewalk, and they reach over that chain link fence, and they grab the jacket off the top of the trashcan, is that theft? And I think it is, right?

A Anthony Sanders 31:38

It's theft if they take your trash.

J Justin Pearson 31:39

Well, there you go, that too. And then the second one is was he really planning to wear that jacket again? Maybe. But again, I wish one of the opinions had talked about how filthy or not filthy the top of those lids were. But I think the majority got it right. I'm glad. The thing about these constitutional issues is that you can't let yourself get too bogged down by any one case. You have to think about the broader implications of the precedent. I think that the rule coming from this case is the right one, both as a matter of constitutional law and as a matter of people being extra nice to their moms in case they need their property. And so, I'm glad the majority opinion came out the way it did, but I do want to give a shout out to Judge Ho with his dissent. Even though I respectfully disagree with his conclusion, he was engaged with the facts, both sides were engaged with the facts. When you have kind of reasonable minds, both engaging in the facts and kind of engaging in a good faith debate, it really helps to illuminate what's going on and helps to explain things to the reader, and so, I just enjoyed reading this whole thing.

A Anthony Sanders 32:48

With all due respect to both of you, and also I will include Judge Ho, I am actually flabbergasted that this can even be considered a close issue. I think the majority was absolutely right, and I think the government seems to have completely botched what they were arguing. And in some ways, I'm worried about this defendant. He may be a terrible person in real life, but considering they need this evidence to convict him, I'm a little worried about what's going to happen to him on remand, considering the victory he just had. So, the action of putting the jacket over the fence, even if it's to try to avoid a search, that shows he's not abandoning the jacket. For one thing, it's on his mom's property, and maybe the only thing that kind of gets close is that it's on top of the trash can. But this all goes back to this case that we at IJ sometimes rail about, about trash abandonment. So it's this case, where the trash cans, I think they were set out for the garbage truck to pick them up. The cops go up, technically they're on the edge of the property, but it is set out for a trash company that's going to come and take it anyway. And so, they look through the trash and find evidence. These are, as far as I can tell, trash cans that are they're sitting on the mom's property, but it's not like they're at the curb. They're on the other side of the fence. So, how does the fact that they're trashcans really factor into it at all? What if they were taken?

J Justin Pearson 34:34

Well, Anthony, let me ask you a key question that neither of them answered. Let's say for the sake of argument, these are really old grimy trash cans with really old grimy lids and other

sake of argument, these are really old grimy trash cans with really old grimy lids and other trash kind of piled on top of it, where no reasonable person would want to put that jacket back on after it was sitting there in that filth. Would that change your analysis at all? Not at

C **Christie Hebert** 34:55

Not really. You can wash it.

A **Anthony Sanders** 34:58

Well, yes, you could wash it. Or say there weren't trash cans. Say it was a mud puddle, and I throw my jacket over the fence and it goes in the mud puddle. It's still on private property on the other side of a fence. Fences make good neighbors. We all know about fences and property rights. And so, if a stranger walked down the street and and took the jacket, that would be theft. So if the cops do it, I think it's also theft. I think the only thing that even gets close here is that, as Christie pointed out, it seems like it was pretty obvious that this guy did this in order to avoid a search. And so, does that, in some ways, give them license to trespass on the property to get it? If he had got out, looked at right at the cop, taken something and thrown it over, like maybe it was obviously a bag of cocaine, and threw it over the fence. But you can't go find it if it's cocaine because I chucked it when you had already legitimately started to seize me. You know, is that different? Yes. But that's not how they analyzed it. And then, the thing I was hinting at when I began, about what's going to happen on remand, is there was no argument here about whether the Fourth Amendment didn't even apply. And so, what I thought they were going to get at is was this an open field because they didn't talk about the curtilage, whether this is in the curtilage of the house. And if it's not the curtilage, and it's definitely not inside the house, then it's an "open field," which we at IJ are no fans of, and this doctrine, and therefore the cops can trespass. And under the Fourth Amendment, it is not a search and get the jacket. And, but of course, it's an effect, not a field, so that gets into that. Anyway, it just says that it's remanded. The guy is in jail right now, and I bet what's going to happen on remand is that they start arguing about whether there's an exception to the Fourth Amendment. You could have done that on appeal, and if you didn't, I hope that they're stopped from doing that and the guy's lead out. I think, knowing the little I know about federal criminal practice, I think that's not going to happen, and he's going to fester in prison for a while longer.

C **Christie Hebert** 37:20

Yes, I think you're right there, Anthony, that the court was leaving open for the government to try again when they went back to the District Court. I mean, there's a great footnote that they dropped in this case that is quoting an exchange with Judge Elrod, which is basically like, government wink, wink, this is all you're going to argue, really? So I think they're trying to signal to the government that hey, go back and try this again. And you've identified for the government, Anthony, some additional arguments they might make. I'll also say that I want to continue a little point that you made at the beginning of talking there, Anthony, that you don't necessarily abandon all of your privacy rights and your property rights by putting something in your trash can. That shouldn't be the way the law is, that if you put something in your trash, it then is fair game for the world to know about. There's all sorts of privacy things, medical

records, financial records, that we just throw away all the time, and it shouldn't be that once you relinquish it from your house, and you put it in your garbage can, that it's okay for the world to know about it too.

A Anthony Sanders 38:27

And I think if that actually gets up to the Supreme Court at some point and goes through this this property rights framework, which the Court also looked at. I think there's a good chance, especially with some of the justices on the Court now, that that garbage case comes out differently through a property rights perspective, where I have a contract with the garbage company, they're going to take my trash, but that contract does not allow just anyone walking past to stick their hands in my trash can.

J Justin Pearson 38:56

But what if it's the government doing the garbage service? Right? What if the what if they work for the government?

A Anthony Sanders 39:00

Well, then I want my contract to not have a cops can do whatever they want to provision.

J Justin Pearson 39:08

I don't think I have a contract with the people who pick up my garbage.

A Anthony Sanders 39:10

I have one with mine, and they raise the rates every year. I mean, I think I entered into it years ago when we moved here. But anyway, we should do a show about garbage sometime because I can see there's a lot of ins and outs to it.

C Christie Hebert 39:23

We should find a case about garbage to do it again.

A Anthony Sanders 39:26

Well, if someone does, please let Josh Windham and Rob Frommer know, our Fourth Amendment experts at IJ, and we can go from there. Well, thank you both for coming on to talk about Elizabeth Warren and jackets, in a funny way in that order. We will have a another show next week that I'm very excited about, but no spoilers. Please tune in. But in the meantime, I hope that all of you get engaged.