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SPEAKERS

Nick DeBenedetto, Mike Greenberg, Anthony Sanders

A **Anthony Sanders** 00:16

"Think big, think positive, never show any sign of weakness. Always go for the throat. Buy low, sell high. Fear? That's the other guy's problem. Nothing you have ever experienced will prepare you for the unlimited carnage you are about to witness. Superbowl, World Series - they don't know what pressure is. In this building, it's either kill or be killed. You make no friends in the pits and you take no prisoners. One moment you're up half a mil in soybeans and the next, boom, your kids don't go to college and they've repossessed your Bentley. Are you with me?"Well, that stirring passage from trading places with Louis Winthrope III, of course, that being Dan Aykroyd, came to mind this week when I was reading the case that we're going to discuss from the Fifth Circuit en banc; which is about the stock market, the NASDAQ stock market, and trying to make the place a little bit more diverse and equitable than that passage may lead you to believe. Well, it turns out it didn't work so well. And the challenge to the SEC handling of those rules in the Fifth Circuit, we're going to discuss that case in something from the Sixth Circuit, about two of our favorites here in Short Circuit: dirt and the Fourth Amendment. Here on 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, December 17, 2024 but you probably will be listening or watching this in the new year of 2025, so Happy New Year to everybody. I have two of my colleagues here with us today to discuss these two cases. One of them you've heard from many times before, and I'm happy to have him again. But the other is a first timer. So Nick DeBenedetto is here. He is a graduate of Rutgers law school, and is a true Jersey boy. So Nick, welcome to Short Circuit and tell us a little bit about where you went to law school, because it's, it's a favorite of mine, because you guys will actually talk about state constitutions there, which listeners know is kind of close to my heart.

N **Nick DeBenedetto** 02:30

Well, thanks for having me, Anthony. I've been a long time listener of Short Circuit, and it's very cool to finally be on an episode myself. So as you mentioned, I am a graduate of Rutgers Law

School-Camden, which for many years was the home of Professor Robert F Williams, who recently retired just before I started taking classes at Rutgers in 2018. Professor Williams is one of the OGS of state constitutional law, and he, along with Alan Tarr, set up the Center for the Study of State Constitutional Studies at Rutgers back in I believe it was the late 1980s. Since then, the Rutgers University Law Review has dedicated its summer issue every year to state constitutions. And so the Law Review will publish articles by scholars, as well as notes and comments from students, either raising interesting topics of law under state constitutions or writing up commentaries on recent decisions of state high courts. I was fortunate enough to be published myself when I graduated in the summer of 2021. My comment was about an eminent domain case from the state of Iowa that rejected the Supreme Court's holding in Kelo, which was near and dear to IJs heart.

A Anthony Sanders 03:51

That's right, yeah. And that was a wonderful tradition that they have at Rutgers of that edition of the Law Review, and so it's great to have you bring some of that tradition to us at IJ. Now moving on to Mike, and I should say first, very careful listeners will recognize that I've stolen from trading places before in the last couple years, I did a quote from Eddie Murphy's character. So I apologize people getting sick of lines from 'trading places', but it's so rich theres so much to take from it and apply to the law. We're going to apply Mike to the law in the Sixth Circuit. So, I would describe one facet of Mike's practice as Michigan drone law. If you need to sort out a drone in the state of Michigan, Mike Greenberg is the guy to talk to. So this is not a case about drones, but it takes from a case that he did have and applies it in a way that raises some eyebrows. Would you say that's true, Mike? Or how would you describe how they're taking your case?

M Mike Greenberg 05:10

That's right, Anthony, I would say that they are turning a case that I suffered an unfortunate defeat in Michigan into something of a Motte-and-Bailey game. And so we're gonna hear about that now this is Satkowiak vs. McClain. I hope I'm pronouncing the plaintiff's name right. Its out of the Sixth Circuit. And our story starts in a Michigan State circuit court where the Michigan Attorney General's Office brought an action on behalf of the Michigan Department of Environment, Great Lakes and Energy, which is a delightful trio to have under one department name. I did not know that was going to be a thing. They brought that action against Mr. Satkowiak, alleging that unlawfully dredged water that was classified as protected wetlands and filled it with waste. So this case does not involve a drone, but it does involve some environmental allegations, and that could subject Mr. Satkowiak to fines. He, in his briefing before the Sixth Circuit, maintains that this is not regulated wetlands at all, but doesn't really dispute the filling water with waste part of it all. But we don't have to get into that, because nevertheless, the state court awards the government a preliminary injunction in that state court action, which, among other things, ordered Mr. Satkowiak to halt the dredging and filling activities while the case proceeded. And most importantly, for our purposes, authorized the state agency to conduct periodic inspections of his property with sufficient notice. Now, the injunction authorized officers to inspect the property, but didn't authorize them to seize anything from the property, and that distinction is where our federal case comes from. During one of those inspections, three officers with the environment Great Lakes and Energy Department came out and they inspected, but they also collected and took away soil and water

samples from the property over the protest of Mr. Mr. Satkowiak's attorney who was present. He was arguing that's a seizure without a warrant in violation of the Fourth Amendment. And the very next day, he sues the three officers that were involved in that seizure in federal court for violating Mr. Satkowiak's Fourth Amendment rights. Invoking Section 1983 he sought a declaratory judgment that this was a seizure in violation of the Fourth Amendment, and he sought both damages and an injunction ordering the return of the samples and destruction of any data or records that the officers had gathered from them. The officers moved to dismiss, not on the merits, but they invoked Younger abstention. And dedicated listeners will recall that the Younger abstention doctrine comes from Younger vs. Harris, where the Supreme Court, about five decades ago announced a rule that federal courts should not enjoin ongoing criminal prosecutions in state court, even where the federal complaint makes a decent allegation that the prosecution is unconstitutional in some way. Instead, you have to raise your constitutional arguments defensively in state court. And the basis for that abstaining famously or infamously, depending on who you ask, is 'Our Federalism.' That classic legal text. The founders would be proud they like their random capital letters also. Eventually this doctrine gets expanded, not just to criminal prosecutions, but to civil enforcement actions as well. So if some such proceeding is going on when the federal complaint gets filed, then younger abstention applies so long as one, the underlying state proceeding involves an important state interest, which it always does. And two, the underlying state proceeding gives the federal plaintiff an adequate chance to raise their constitutional claim. There are also exceptions to Younger, it doesn't apply if the action that was brought in the state court was brought in bad faith or for harassment, or if the underlying state court action is flagrantly unconstitutional. The district court found the Younger applied, and spoiler alert, the Sixth Circuit affirmed. On appeal there's very little dispute about several of Youngers requirements. This resembled a criminal prosecution. It was ongoing at the time of the federal complaint. And no one is going to dispute that the state's environmental laws serve an important function. The dispute is mostly over whether the state court action provides an adequate opportunity to raise these constitutional claims, and then over whether the seizing of the soil and the water samples was so flagrantly unconstitutional as to be exempt from Younger. And I'll handle those in reverse order from how the court handled them. The flagrant unconstitutionality first. You might think that seizing property without a warrant or invoking an exception to the warrant requirement is quite obviously unconstitutional. Yet the court is not convinced. It holds that this flagrant unconstitutionality exception is a very high bar. So high in fact, that unless you have a Supreme Court or Circuit Court precedent on the absolute identical facts, then it's not even remotely in play.

A Anthony Sanders 11:12

Sounds quite like qualified immunity.

M Mike Greenberg 11:14

That's my reading of it as well, is that it's that really, really narrow version of qualified immunity. And, I'm not honestly aware of any cases applying this flagrantly unconstitutional exception. So it's almost like, why do we even have it in the first place? But, there's the quote, "There is no controlling Supreme Court or Sixth Circuit case law holding that the warrantless removal of soil and water samples from private property pursuant to an environmental investigation violates the Fourth Amendment." So if you have to get that hyper technical, then no one's ever going to win under this. What grinds my gears a lot more, and what Anthony

alluded to early on is whether these Fourth Amendment claims, can adequately be raised in the state court proceeding. And just to recap here, there's one claim for damages against the individual officers who conducted the seizure, and one claim for an injunction ordering the return of the samples and destruction of any records made from them. There's zero discussion in the Court's opinion of whether the damages claim can be raised in the state court proceeding. Which I don't know if that's a fatal flaw in Mr. Satkowiak's briefing or on the courts part, but it's just not mentioned. And for what it's worth, I'm less than 100% sure that damages claim can be raised in state court. Recall here that our federal plaintiff, is seeking damages from the individual officers, but the individual officers are not the ones on the other side of the v. in the state court action. It's the state agency. The state agency is not a person that can be sued under Section 1983. Even if it could, it's probably sovereignly immune from damages. Maybe you can do some artful third party pleading to get the individual officers into the case- but it gets messy. And it's just curious that there's no mention of it at all. But relatively speaking, the claim for the return of the samples and destruction of records gets several paragraphs here. Astute listeners might be thinking that this return of the samples and destruction of records remedy sounds an awful lot like the exclusionary rule; which is the remedy that's mostly used in criminal cases, preventing the use of evidence derived from an unconstitutional search or seizure to be introduced in the proceeding against the target of that unconstitutional search or seizure. And if that's where your mind went, you'd be right, and that's where Mr. Satkowiak's argument goes. And he points to a Michigan Supreme Court case that we at IJ litigated in recent years and unfortunately, we suffered a tough defeat at the Michigan Supreme Court. It's called Long Lake Township vs. Maxon, and it arose from, as Anthony previewed, a local government's repeated use of a drone without a warrant to gather evidence of alleged zoning code violations in our client's backyard. We took the case over on appeal, arguing that that warrantless drone spying was an unconstitutional search, which was a first of its kind. But when we got to the Michigan Supreme Court, the court sua sponte ordered briefing instead on whether the exclusionary rule applies to civil zoning enforcement cases like the government's prosecution in that case; a point that the government hadn't disputed until the court brought it up itself. We made the best arguments that we could. We even made some relatively persuasive, originalist arguments. But listeners might be aware that the last several decades of US Supreme Court precedent has been unkind to the broad applicability of the exclusionary rule. The US Supreme Court has had the opportunity to apply it in non-criminal proceedings several times over the last few decades, and each time they've opted against it. But at the same time, and this is what annoys me so much, they've never foreclosed applying it in non criminal cases, writ large- each time they have paid lip service to the idea that the exclusionary rule is supposed to be kind of a case by case basis sort of thing. They've derived a test for whether it should apply, which is whether the deterrence benefits of exclusion outweigh the cost to the government. But there's never been a case where they have found that balance to weigh in favor of exclusion in non criminal cases. It's much like the state of play for Bivens right now, as listeners might be aware, it's Schrödinger’s Exclusionary Rule. It's not dead in civil cases, but it's also never really been alive either. And so that's exactly what the Michigan Supreme Court did in the Maxon case. It pays lip service to the idea that we decide the exclusionary rules availability on a case by case basis, and then it held that it didn't apply in that particular zoning enforcement prosecution for reasons that were never really going to matter, because it's just a balancing test; the court could have decided that it doesn't apply because the search was conducted on a Tuesday, and there's nothing that we can really do about that. But the court said, "look, you have other remedies that you might be able to bring, like an affirmative constitutional lawsuit invoking your Fourth Amendment rights. So it's not like we're giving officials carte blanche to violate your rights here." And so that brings us back to our Sixth Circuit case. Mr. Satkowiakbrings that Michigan Supreme Court decision to the Sixth Circuit and says, aha, look, this shows I won't be able to get my equitable remedy in state

court, and the Sixth Circuit, in this opinion, promptly reveals that it's not in on the joke. Here's here's the quote: "At no point did the state Court of Appeals or the state Supreme Court hold that the exclusionary rule can never apply to civil proceedings." So the Sixth Circuit seizes on that lip service, that each particular case gets its own analysis, and that's the end of the game. What is so different about zoning enforcement prosecutions versus Environmental Enforcement prosecutions that might have yielded a different result, such that the exclusionary rule would be available here- the Sixth Circuit doesn't say. And it's also not moved by the Michigan Supreme Court's observation that people should file constitutional tort lawsuits instead, which is exactly what Mr. Satkowiak did here. At bottom, it's just a heads, we win, tails, you lose, kind of setup. And I find it very, very frustrating, because having lost out on the exclusionary rules applicability, you'd think that the other remedy would be available. The good news for our plaintiff here is that because he has a damages claim, abstention results not in a dismissal, but in a stay until the state court proceedings are concluded. That's the rule for younger abstention and damages cases. But that's not a huge panacea, because all kinds of things might happen in the state court proceeding while this case is stayed that could affect the contours of the federal claim. Not least of which could be that the officers could continue to, at least allegedly, unlawfully see samples from his property. So all in all, just a frustrating result based on a kind of Motte and Bailey game going on in the courts over the availability of the exclusionary rule.

A Anthony Sanders 19:06

Nick your thoughts on this Motte and Bailey game?

N Nick DeBenedetto 19:09

So I'm struck by the similarities that you can see between the analysis of the application of the exclusionary rule to a civil context with qualified immunity, in the sense that you know if you'll never get clearly established law, if the courts aren't going to take the time to establish that there was a constitutional violation. This clearly seems to be a cause for pessimism moving forward. But I would think that with the movement, at least in the criminal context at the Supreme Court, taking seriously the idea that the Fourth Amendment would have some real property implications beyond just the privacy Katz test that we're used to. I'm a little surprised that a poperty justification for the exclusionary rule wouldn't take firmer hold in either the lower courts or the state courts. And I was wondering if you guys are surprised by that, or if you think this will be just par for the course moving forward.

A Anthony Sanders 20:13

Yeah, your thoughts on that, Mike? On whether states have responded to this by having more protection under the exclusionary rule or, or whether they, like Michigan, or just seems like following the Supreme Court. I would say that to do that it has to be a state constitutional claim and so Mike's case was Fourth Amendment, and so that wasn't really available. I think generally some states have had more protection under the exclusionary rule under their own constitutions. But it's not super widespread. But there is some of that in a number of states. How it would apply, in this case, in the civil context, I really can't tell you.

M Mike Greenberg 21:03

Yeah, as you alluded to- as the property-based framework for the Fourth Amendment has taken hold over the last decade or two, at least in federal courts it hasn't led to any change in the calibration of the exclusionary rule. If anything, the fact that so many of the more conservative justices seem to just not really want to apply the exclusionary rule is actually something that has been speculated upon as to why the US Supreme Court is actually taking fewer and fewer Fourth Amendment cases, because they might want to reach the Fourth Amendment argument, but if there's not going to be a remedy defensively in that case, then then they they won't grant cert. If I can also just comment on a more abstract level here, because I'd be remiss if I didn't our colleague Sam Gedge would would get upset with me about about this Younger abstention issue. This is a case that spotlights how courts have like lost the plot on Younger abstention and what it was supposed to be all about. Younger starts out as a case just saying "we don't enjoin state court criminal prosecutions once they've started," eventually it expands to "we don't interfere with state court proceedings that resemble criminal prosecutions once they've started." And that's what the underlying policy is, as much as you know the Our Federalism concern is a thing it's supposed to be not about deferring to a state proceeding simply because there is one, but about interfering with the state proceeding that started first. But there wouldn't be any interfering in a case like this. The state court preliminary injunction didn't authorize the thing that the officers did, and so declaring that that thing that was not authorized by the state court proceeding violated the federal constitution, and remedying it wouldn't interfere with the underlying state court case. But no matter, because what Younger has become, its just that there's a state court proceeding, we don't care about the federal one. Now, I find that very frustrating as well.

A Anthony Sanders 23:27

We've talked about Younger many times, we had a special about it a few years ago on the show. And it seems to me something that, at its core, seems like it makes sense. Like, if you have an ongoing criminal case in state court, maybe it makes sense that you wouldn’t also have a federal lawsuit about it. That kind of makes sense at first. But the more you think about the ramifications of applying that as a black-and-white rule—with only rare exceptions that don’t work very often—it starts to feel problematic. It puts a lot of your rights out of reach, forcing you to figure them out in state court. And then, it turns out state court isn’t always a great place to do that. For various reasons, you can’t effectively raise your claims, you can’t sue the right parties—like in this case—or you face other barriers. Well, Mike, that was well put. I have a question about the exclusionary rule. It’s not entirely true that the exclusionary rule doesn’t apply at all in civil litigation. In civil forfeiture cases, for example, there’s older, but still on-point, Supreme Court precedent that says the exclusionary rule applies there. Am I right about that?

M Mike Greenberg 24:43

That's right. That's the one instance where the US Supreme Court has applied it to a technically civil proceeding. They called that civil forfeiture proceeding quasi-criminal. And you know, that's a point that we make about civil forfeiture all the time here at IJ, is that your property is about to be taken- it's certainly punishment, but you don't get all of the procedural benefits that you would in a criminal case. There's no right to counsel, etc. But it does kind of resemble a criminal case otherwise. But another frustrating thing about all of this is that in order to

invoke Younger, it has to be kind of like a quasi-criminal case, right? It has to resemble a criminal prosecution- that's literally the factor for Younger. And this is apparently close enough to a criminal case to invoke Younger but not close enough to a criminal case to invoke the exclusionary rule; another aspect of the Motte and Bailey kind of game here.

A Anthony Sanders 25:50

Rock and hard place really. Well, we will leave that rock and hard place there in the Sixth Circuit. I should also point out it's an unpublished opinion, but it's still important and interesting. And although it goes the wrong way, it's something to pay attention to. So a reminder that published opinions are not exactly unpublished opinions. And now on to the Fifth Circuit en banc. So we've done a few en banc cases recently and this is another one. This is very closely divided on a very hot button issue, although really at its core it's about what goes on at the stock market. So explain this to us Nick. It is the Fifth Circuit, being the Fifth Circuit, although at its core, it's kind of like a administrative law case. Am I right?

N Nick DeBenedetto 26:46

Yes, and thank you for that. My case is Alliance for Fair Board Recruitment v. SEC (en banc). And as you teed up, Anthony, this is an administrative law case. So although it deals with a hot button issue, which in this case is the NASDAQ's diversity imperative for corporate boards- what listeners should keep in mind is that administrative law usually will boil down to two bedrock principles. The first is, did an agency explain itself or justify its actions well enough when it acted? And second is, did the agency actually have the power it claimed to wield in the first place? And that will be relevant as we explore this opinion. This opinion was written by Judge Oldham, who was joined by Chief Judge Elrod as well as Judges Jones, Smith, Richman, Willett, Duncan, Engelhardt, and Wilson. And there was a dissent penned by Judge Higginson, who was joined by Judges Stewart, Dennis, Southwick, Haynes, Graves, Douglas and Ramirez. So before delving into the facts of this case, I think it would be helpful to get a little bit of history out of the way and just a little bit of fundamental law in terms of how the Securities and Exchange Commission governs entities like the NASDAQ. Now I have to issue a little bit of a disclaimer and an apology to any practitioners in this area who may be listening. This is not my wheelhouse, and this is not something that IJ takes a position on. But, in broad brush strokes, the entities like the New York Stock Exchange, which have facilitated securities transactions, have been around since the founding of the country. The New York Stock Exchange itself dates back to 1792 and for much of its history, the New York Stock Exchange sort of ran itself. It had an internal set of rules that participating entities had to follow. There was an internal adjudicatory process, and there was certain disclosure requirements that firms would have to abide by in order to participate. And this system did kind of run itself. And the New York Stock Exchange and the Nasdaq are known as self-regulatory organizations for this reason. That is until the early 1900s after the First World War, Congress decided that there was a problem with widespread fraud and risks surrounding speculation. So that led to Congress passing the Securities Act of 1933 and the Exchange Act of 1934. And the principal idea behind these pieces of legislation was to protect investors and other participants from fraud and speculation and the associated volatility that would accompany that. In 1975 Congress amended the Securities and Exchange Act of 1934 to bring these SROs, like the NASDAQ and New York Stock Exchange, under the auspices of the SEC. Insofar as when they create rules that govern participants in the exchanges, the SEC would now have to approve them, and upon approval by

the SEC, the exchange rules then carry the force of federal law, but this also means they can be challenged as if they were regulations promulgated by the SEC itself. And the purpose of these 1975 amendments were to promote fairness and transparency in the market, efficient execution of securities transactions, and to protect investors and the macro economy from speculative, manipulative, and fraudulent practices. Of particular importance to us for this opinion is Section 708(f)(B), which states that an exchange may not regulate by virtue of any authority conferred by this chapter, matters not related to the purposes of the Exchange Act or the administration of the exchange. So if we fast forward to 2020 we have the unfortunate death of George Floyd, which sparked widespread social justice protests and various movements throughout the country. So in response to this, the NASDAQ in 2021 decided that it was going to take an internal look at participating firms and institutions to see what corporate diversity looked like on their boards. NASDAQ was encouraged to do this by various institutional investors and investment managers such as BlackRock, Vanguard, State Street, CalPERS, TIAA-CREF, and Goldman Sachs. And as a result of its internal survey NASDAQ decided to issue three rules as part of its diversity imperative, which ostensibly aimed to increase diverse representation on participating corporate boards. So three rules were as follows. First, NASDAQ submitted to the SEC a disclosure rule, which required NASDAQ listed companies to provide statistical information in a proposed, uniform format on the company's board of directors; related to directors self identified characteristics with things like gender, race and LGBTQ status. Second, NASDAQ submitted a rule that these companies would need to have at least one director who self-identifies as female and one director who self identifies as one of several eligible minority category categories, or as LGBTQ. So NASDAQ, on the one hand, said that this rule was aspirational, so it doesn't formally impose a quota, but if a company failed to meet this rule, it needed to have some kind of statement explaining why. And then third, NASDAQ said that if a participating firm was not able to meet the diversity initiative, it would offer access to a complimentary board recruiting solution, which would provide access to a network of board ready candidates who met some of these diverse characteristics in advance. So the SEC ended up approving all three of these rules in related but separate orders. But the approval drew the dissent of two SEC commissioners. And then, as a result, you had two organizations file challenges to these rules. So the majority here conducts what is a two step analysis. First, it looks at the challengers arbitrary and capricious claims, under the APA. And then decides to take a look at the major questions doctrine. So Judge Oldham, writing for the majority, ultimately concludes that the objectives pursued by the NASDAQ and approved by the SEC here were not the kind of thing that the Securities and Exchange Act was implemented to create, regulate, orcontrol, and the subsequent 1975 amendments were created to influence either. So, first he takes a look at three justifications that the SEC gives under Section 708(f)(B). And the SEC said that these diversity initiative rules were permissible because they pursued just and equitable principles of trade. This is statutory language that comes from Securities and Exchange Act itself. So. So Judge Oldham says, first, the provision here, although it uses broad language, it really is concerned about regulating securities related misconduct. When Congress sits down to try and prevent fraud and other kinds of speculation and other kinds of misbehavior related securities trading; this is a hard thing for Congress to figure out all the details of upfront, so you have this provision that essentially provides for some open ended encouragement of ethical practice and fair dealing. So Judge Oldham essentially points that out, going back and looking at the history and says it's clear that when Congress passed the Securities Exchange Act and also these 1975 amendments, they were after something that is much more narrowly circumscribed and does not Give the Securities Exchange Commission the ability to sign off on NASDAQ's disclosure requirements for their own sake. It is true, Judge Oldham notes, that the exchanges have used some of the rules promulgated under this provision before, to discipline people for securities related behavior, but it's always been related to this central goal of regulating fraud and speculation. Judge Oldham also points out

that it's obviously unethical to violate the law or disregard a contractual promise. But it's also not clearly unethical that the court was able to point to no long standing ethical practice about declining to disclose the information about racial, gender and sexual orientation characteristics of its board of directors. It just doesn't really play into the analysis here, according to Judge Oldham. So the second thing that the SEC offers is that under this same statutory provision, the rules function to remove impediments and perfect the mechanism of a free and open market in a national market system. So this relates to the 1975 amendments. One of the things that Congress was looking to achieve was to make securities markets more competitive, more open, and more fair at that time. As I recall from the opinion, the New York Stock Exchange had really leveraged its position to the exclusion of other exchanges, and Congress felt that this was anti-competitive and was detrimental to investors and firms alike. So the national market system provisions from this 1975 amendment aimed to produce economically efficient execution of securities transactions, fair competition, and broader information available to investors with respect to transactions in securities and the practicability of brokers executing investor orders in the most efficient way possible. And so Judge Oldham says, in the context here a free and open market refers to a free and open market for security securities transactions, not the free flow of information . Judge Oldham says that the exchange rule would relate here. Or I'm sorry, let me back up. Judge Oldham points out that this disclosure requirement would be relevant if it did something to reduce transactions costs and make it easier and more efficient for participants in the exchange to conduct their business. But the SEC never actually contended that the diversity proposal did that. All it said is that this information might contribute to how some investors invest and vote. And so as a result, the majority found that the SEC failed to justify its finding that the that the proposal was related to the purpose of this national market system. And finally, the SEC offered that these diversity requirements protected investors and the public interest. Judge Oldham points out that the public interest provision is a catch all at the end of a list of things located in this section, 708(f)(B), and so it needs to be read in context. The question here is whether or not NASDAQ rule making protects the public interest insofar as it limits the harms that the Exchange Act and subsequent amendments aimed to alleviate it. And whether or not it sufficiently addresses those harms. So certainly it is true, the majority says, that the exchange regulates boards in a manner that support this goal, such as requirement of board independence and that board and audit committees be comprised of independent directors. But once again, the majority says the SEC can't establish a link between the racial, gender, and sexual orientation of the board members and the quality of the company's financial reportings- in addition to things like internal controls, public disclosures and management oversights. And Judge Oldham also points out that it's kind of difficult to find the logical connection between these two things: the immutable characteristics of some group of people and the way that firms are governed. So next, Judge Oldham points out that it's true that the SEC doesn't need to provide conclusive empirical evidence to make these findings, but it can't simply declare the existence of this fact. It has toflush these claims out with more than it did. And for obvious separation of powers reasons to control administrative agencies, they need to be limited to their given statutory authority and if you begin reading too much additional authority into the statutory provisions, they exceed their mandate rather quickly. And finally, Judge Oldham in this section, notes that even if there was some kind of link between the immutable characteristics of the board representatives and the performance of these different firms, NASDAQ, would still need to show that there was some sort of link between non-diverse boards that have no explanation for why they're non-diverse, going back to the explanation requirement. And second, NASDAQ would still need to show some sort of link between the fact that non-diverse boards that have no representation still behave differently than non-diverse boards that have good reasons for their non-diversity. So in addition to the fact that there needs to be some kind of link between the characteristics of the directors, NASDAQ would also need to provide some evidence that there was further difference between

non-diverse boards that explain themselves and ones that don't. And Judge Oldham points out that here, NASDAQ offered no such reason to believe that this data exists. So that concludes the Fifth Circuit's arbitrary and capricious analysis. Judge Oldham next notes that the major questions doctrine also supports the outcome that the majority reached in this case. And here, Judge Oldham is quick to note, that Congress certainly did not hide any elephants in mouse holes. And long time listeners to Short Circuit probably recognize that phrase. And this strikes at the heart of the major questions doctrine, which says that Congress only gives administrative agencies the power that it does in the statute. Agencies can't infer all these additional greater powers than what's there in the text. Because if Congress really intended to give the agency all of that power, it would have done so explicitly. Further, kind of introducing the idea of the major questions doctrine here is that the NASDAQ Judge Oldham notes, is the second largest stock exchange in the world, and so to give the NASDAQ the the ability to transform corporate boards in this way, by dictating to these firms how their boards must be structured, would certainly contemplate a major economic question, given how far reaching the economic activity of these firms is. He also notes that this is a significant political question as well, and he cites the contentious ongoing debates that arise out of things like affirmative action, the Supreme Court's recent decision in Students for Fair Admissions v. President & Fellows of Harvard College, and alludes to the fact that if it sought to give this power to the SEC, it would have done so explicitly. He further notes that since 1934 or 1975 the SEC has never claimed such power to structure corporate boards in this way. And he notes that we would expect that if this power was available to structure corporate boards, it's possible that someone like the EEOC or DOJ would wield that power instead of the SEC. And he finally notes that the regulation of corporate boards is typically something that's left to states, which is also a suggestion that the major questions doctrine could be at play in the background here, because this is not something that the federal government has the power to do. And on the final NASDAQ rule, the recruiting rule, the authority for the recruiting rule lapsed, and so that question was moot, and the majority did not feel obliged to address it. So one of the things that I thought was especially interesting about this case, and I would be interested in hearing your guys thoughts is the role of the major questions doctrine. I know this has been a point of intense scholarly debate since West Virginia vs. EPA and even before them. And what struck me is that here, Judge Oldham situates the major questions doctrine as sort of the background reinforcement to the arbitrary and capricious analysis that the majority did under the APA. And so I was wondering if that suggested anything to you guys about where we might be headed with the major questions doctrine, or if perhaps this is what you would expect to see out of a federal court taking a stab at major questions analysis?

M Mike Greenberg 46:24

Yeah, I mean, there's always been this kind of weird overlap, and not overlap, between the non-delegation doctrine and the major questions doctrine. And is the major questions doctrine just kind of like a basic principle, or is it kind of imbued in the Constitution? Where does it come from? This opinion seems to put Judge Oldham in the "it's not a constitutional principle" camp, because there's a footnote in there that they're expressly not deciding the separate constitutional claims that got raised. So I suppose we can infer some things about that. I don't really have a firm feel for whether the majority or the dissents reading of the statutory interpretation is correct. I felt reasonably persuaded by Judge Oldham's points that the statute has never required disclosure of all things, or even allowed all disclosure of all things. My bigger feeling on the major questions doctrine point was that as I was reading this case, it felt like it was all backwards. Normally, when we're having these regulatory authority or major questions doctrine fights, the starting premise is that private actors can do as they please, unless there's

a statute granting the regulatory agency the ability to interfere with those actions, and if not, the regulatory agency's action is is void, and the private entity can do what it wants. That's where we're usually having these fights. But here, the private entity, NASDAQ, can only do what it wants if there's a statute granting the regulatory agency the power to oversee that action and adopt it. If there's no regulatory authority, then the private entity can't do as it pleases. And that seems to be the coloring of Judge Higginson's dissent, which is like, "Hey, you conservatives in the majority, you're typically wielding this major questions doctrine to demand that regulatory agencies get out of the way of private actors. Now you're wielding it to demand that regulatory agencies stop private actors from doing what they want, when you don't like what those private actors are doing." I don't know it. I found that curious, because I've always thought of the major questions doctrine is this kind of like due process principle for the benefit of private actors subject to regulation. And this case kind of flips that understanding on its head a little bit. It's just the nature of the statutory scheme, I suppose. But I found it curious as I was reading it all.

A Anthony Sanders 49:00

Well, I was just going to say that it is just a very curious system, because you have a private entity that can only change its own rules if it gets government approval. And so it's not really a private entity, and yet, then you have this non-delegation doctrine principle in the background, like some cases we've done at IJ, about how Congress shouldn't be able to delegate law making power to a private entity. And so then you have the SEC kind of saying, well, it's not really a private entity making rules, because we have to sign off of them. And so you get some circular logic there.

N Nick DeBenedetto 49:40

One of the things that I was struck by as I was reading the opinion is I couldn't think of another example where you've got government power being wielded by a private entity to enforce both. See, that's the. hard thing. It confused me a little bit as I was reading it, because I was thinking about who is responsible for the enforcement here? My read of the situation, which could be mistaken, is that NASDAQ would be responsible for enforcing all of these rules. But at that point is NASDAQ really the state actor after itsrules have been blessed by the SEC? That seemed weird, and I couldn't think of another, you know, analogous situation that I was aware of.

A Anthony Sanders 50:30

Yeah, a lot of it is just artificial. I did not think this case needed to get to the major questions doctrine. It really wasn't as you say, it arbitrary and capricious analysis. It is straightforward, does this agency have this regulatory authority? And they said, "No, it doesn't have that regulatory authority." And I guess they went to the major questions doctrine, because it's hot right now and why not and maybe this case is going up to the Supreme Court, and we might as well do it while we're while we're here. But it the other thing about the major questions doctrine part is then they went there, and said, "Well, this, of course, is major question, because the stock market is huge. NASDAQ has all these companies on it." Whereas the issue here is not about the value of those companies. It's that you may not like this rule, this diversity disclosure

requirement. The silly thing about the debate, whether a company is following it or whether it's a problem, is that, of course, many people would think this is a bunch of flim-flam. But it’s not really affecting most of those companies. As our friend David Lat calls it, this is like the 'United Colors of Benetton' type of view of the world, where we're just putting these rules in place.We're going to placate people. It's not going to change very much. And then we're going to go on. That is not a major question of the economy. It's not going to change how many billions of dollars these companies are worth. So that doesn't seem a major question. And then he says, "Well, it's a major political question. So is it under this precedent now?" Which is this was out of left field for me. If something is like a hot potato politically, it's a major question, and therefore we need more explicit language from Congress? This is a really weird direction for the major questions doctrine to go, and I'm guessing it's not going to go anywhere else. And you could almost argue that that part of it is dicta, because it's a description of an alternative holding, but it's a little weird to me. And so the dissent doesn't really catch on to that too much. They just say you know, this is a private company, and SEC has got all kinds of leeway, and it's fine. But anyway, that created some worries for me.

M Mike Greenberg 53:06

To your point, Anthony, about you know this not being that major, because it's not really changing all that much- the dissent dropped the footnote saying the companies that don't meet the diversity requirements can just say, "well, our preferred method of diversity is diversity of thought." Which is kind of exactly what you'd think the judges in the majority think should happen anyway.

A Anthony Sanders 53:31

Yeah, we hire based on merit.

M Mike Greenberg 53:33

Okay, yeah. So like that can just be your statement for why you don't meet the the aspirational goals, and it doesn't have to change anything. So, I don't know.

A Anthony Sanders 53:43

On the other hand, I want to be clear the major questions doctrine, in some ways, seems good because it's curtailing some of the covacious powers of Congress and the executive and making Congress be more careful. And it's about big questions. And it's kind of a way to do the non-delegation doctrine without actually doing the non-delegation doctrine. But it still is a work in progress, and I think this case really shows that. One tiny thing I was going to point out is in Judge Oldham's history section, I had some quibbles with how they wrote that. And some judges, I'm guessing, signed on to this without maybe being totally in on the history, because it was written in a kind of real pro New Deal type of history. The way it reads is that we needed the Congress to come in and fix all this stuff. But anyway, that's beside the point. But at one point he goes this stuff happened in the 1920s after the Great War.And this has nothing to do with law, but I have noticed that in the last 20 years or so, people say Great War more for

World War One, than they used to. And I wonder if that term is coming back, maybe it's just me and Judge Oldham, because I like saying Great War too. I think way in the future people think of the world wars as just kind of one big war with a intermission. So anyway, I was struck by his use of 'Great War.' But I don't know if you guys have opinions on this.

N Nick DeBenedetto 55:29

I was just gonna say I was struck by the same sort of pro New Deal framing that you pointed out. And I thought to myself, as I was reading the opinion, there are probably some members of the Short Circuit audience who have some additional context that they could offer to frame the history a little differently.

A Anthony Sanders 55:52

It's not exactly the kind of view you'd expect from someone like Murray Rothbard, let's put it that way.

N Nick DeBenedetto 55:57

And to your point about the Great War. I don't know if I've noticed an increase in usage of the term Great War, I just have always understood that to be the way that Europeans tend to refer to World War One. Whereas, here in America, we more frequently will just go World War One and World War Two.

A Anthony Sanders 56:16

Yeah, that could be. Of course the British will say the First World War not World War One. I think that's not allowed in certain British audiences, but do not need to discuss that now. But thank you both, gentlemen for these great descriptions of these great cases. Everyone can go check them out in the show notes. So thank you both for coming on. Please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.