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SPEAKERS

Jared McClain, Anthony Sanders, Andrew Ward

A **Anthony Sanders** 00:16

Hello and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, January 14, 2025 and we have a fun show for you today with a win from the Institute for Justice, a case out of the Ninth Circuit with some crazy facts about excessive fines that we'll get to in a moment. And then a case from the Fourth Circuit about a lot of our favorites here, including standing, mootness, and racial discrimination. But, the very first thing I want to do is introduce our guests today; they are Jared McClain and Andrew Ward, both colleagues of mine at IJ. How you doing, guys?

J **Jared McClain** 01:08

Good. How's it going Anthony?

A **Anthony Sanders** 01:12

Good. And I am excited to talk to Jared in a moment. Andrew, first I want to ask you about the argument at a state Supreme Court in Nebraska. You want to tell us a little bit about that?

A **Andrew Ward** 01:28

Yeah, that was back at the beginning of December. Thanks for having me on the pod, by the way. And yeah, that's a economic liberty case about a guy who wants to start a transportation business. He can't do it because the existing companies told the government not to let him. We think that's bad. We sued about it. Now it's up at the state Supreme Court deciding whether that sort of thing gets like fake review, or whether it gets real review.

A Anthony Sanders 01:56

And that's a state constitutional case, not a not a federal claim, right?

A Andrew Ward 02:00

Correct, that is under Nebraska's constitution from 1875

A Anthony Sanders 02:05

As many listeners know those kind of claims are close to my heart. But another thing that's close to my heart is updating our viewers and listeners on what has been going on with cases that we've talked about in the past, and what happened to them now and where are they now. But instead of talking about washed up stars from the 1980s it's about old cases and old meaning, like six months ago. Now, the last time we did this update, we had a couple cases that had been not denied cert or denied en banc review. This time, the funny thing is, andI think it's a seasonal thing- So we're in January, right? The long conference at the Supreme Court was a few months ago where they kind of wash out a lot of the stuff that builds up over the summer, then the build up starts again, and people file their cert petitions, and then they get extensions for more briefing. And I think right now we're in the middle of when everyone has gotten a lot of extensions, and so the court just had 27 realists from the orders that just came out yesterday at the Supreme Court, which was January 13. So basically, there's not a lot of news on a lot of the the cases that have built up over the months. For example, we talked about a case way back on May 2, 2024 which was U.S. vs. Gregory Rogers. It's about a guy who was sitting in a car in the passenger seat. Our friend Rob Frommer told us about this case, and it was whether there was Fourth Amendment standing to search the car and his person. That was docked at the Supreme Court back in November. It's currently in briefing and the response is due in a few weeks, and so no update there. And the update

A Andrew Ward 04:02

The update is that the court will never take a Fourth Amendment case again.

A Anthony Sanders 04:07

Well, it's true they did take a Fourth Amendment case this term, but it's really a section 1983 damages. But they haven't done a true scope of a search claim in quite some time now. So a few other cases that have that have built up- but I'm sure there will be a flood of updates soon in that regard. But our big update this week is out in the Ninth Circuit, where Jared has this case where in the District Court we will say things didn't go according to plan, but then it gets the Ninth Circuit and we win on almost everything right. So not win, win, but a win in the sense that the case can continue. And now you go back down below and the case can go forward. So, I don't think we've really discussed this case before on this show, but I think it's come up a couple times. It has absolutely insane facts about people charged fines for millions of dollars for something they didn't even do. So can you explain how this could happen in America.

J Jared McClain 05:22

So, this case takes place in Humboldt County, California, which is in the Emerald triangle- they call it that because it was known for its weed growth. And I'm sure there's still people growing weed there, but after legalization, you no longer needed to hide in the mountains to grow your weed. And that is something that I don't think the city planners in Humboldt really anticipated. And so back in 2018 when California legalized recreational cannabis, the county of Humboldt thought that was going to be a cash cow for it, because it was already a place known for cannabis growth. And then it turned out that the people up there don't have a ton of money and these permits are really expensive. It costs 10s of 1000s of dollars to get an operation off the ground. And why would you not just go down to the valley where you can grow on fertile soil, rather than like unpaved mountain roads where people were doing it back when it was an illicit trade. And so Humboldt really wasn't realizing the profits from cannabis that it thought it was and it just kept searching. And one way it did that was in 2018 they decided that any violation of the building code that relates to cannabis would go from a $1,000 fine, that you had 75 days to correct the error and you'd get a hearing before any fines would kick in, to a category four offense, which means it's a minimum $6,000 daily fine and a maximum $10,000 daily fine. And you no longer get 75 days to fix it, you just get 10 days, and the fines kick in automatically- you no longer get a hearing before the fines kick in. So now any beat cop, any code enforcement officer in Humboldt County, can go around and look for violations. Do you do you have a permit for that greenhouse in your yard? If you don't, he can just assume that greenhouse contains cannabis, and that you had to grade some land to build the greenhouse, and that right there is three violations. Each of those violations is a minimum $6,000 daily penalty, and those fines kick in after just 10 days.

A Anthony Sanders 07:55

And how much would you say like these properties are? Not that this justifies it at all. I'm just wondering, how much would you say these properties are worth?

J Jared McClain 08:02

Much, much, much less. So our our client, Rhonda Olson, for example, bought three adjacent parcels of land in Orleans, in Humboldt, which is like a two and a half hour drive through the mountains from the county seat in the middle of nowhere. She bought the land for $60,000. 10 days later, she was accruing what added up to around $9.5 million in fines and Rhonda reached out and she was like, "hey, but I just bought this property. I know there's some debris, and an old bus that needs to get taken care of. But, I'll clean up the property. But, I didn't grow cannabis here. I just bought it and none of this stuff was mine. And the county's position was, "well, it's still your responsibility." Someone else grew cannabis on that property, and somebody else violated the building code. And the interesting thing on Rhonda's property is that the person who violated the building code and the person who grew the cannabis were two separate people. The county acknowledged that the building code violations were committed in the 1980s by an unpermitted logging venture, and then somebody later came in and grew cannabis on the land. And they said, "Okay, we have a building violation, we have cannabis growth, we have your ownership. Those are the three pieces to the puzzle that we need." But they did graciously reduce her fines to $83,000 a day, and those fines ran for 90 days, and this

is after they admitted publicly that they knew that she had not done either the grading or the cannabis. And so she accrued $7.47 million of fines on property that she had just purchased for $60,000 and to this day, she has still not gotten a hearing.

A Anthony Sanders 10:02

The word excessive comes to mind.

J Jared McClain 10:05

Yeah. So, one facet of this case is these fines are crazy. This is an excessive fines case, and I think that's how the Ninth Circuit saw it because the published portion of their opinion focused on our excessive fines claim. But there are a litany of other constitutional violations baked in, just in the way that Humboldt rolled out and enforced this policy. So when they accuse someone of growing cannabis, they admit in like 95% of the cases, basically, that they don't have probable cause to believe that you grew cannabis. They purchased satellite data, and so they're looking at historical satellite photos of your property and trying to identify anything that might be an unpermitted structure. So they're looking down from the sky, and they're like, "Well, that looks like it could be a building, and I don't see a permit on record. So they must have built that to grow cannabis, and in order to build it, they had to grow the land that right there, that's that's three violations." That's $30,000 in daily fines, and they've admitted that they don't have probable cause. They said, "if we had probable cause, we'd get a warrant and we'd go search, but we don't, so we'll just issue millions of dollars in fines." And when they issue these violations, they don't tell you where the violation is on your property. They just tell you which which parts of the code you're in violation of. And so one of our clients, Cyro Glad, lives on 40 acres of property that he had also just purchased, and they're like, "you have an unpermitted structure, and everything on Cyro'sproperty is built by hand. And this is like a side tangent, but they created a 10 year amnesty period for people to come out and get their structures permitted, because they knew since the 80s, everyone had been building their own houses, barns, sheds, and greenhouses without a permit. So, basically nothing in Humboldt is permitted. And so you get this violation that one of your unpermitted buildings has cannabis in it, and you're like, well, it doesn't so how am I to know which one I need to destroy? Because that's the only way to stop the fines, is to destroy it. But the problem is, in order to destroy it, you need to get demolition permits. And Humboldt did this funny thing where, if you are accused of growing cannabis, you are categorically ineligible for permits. So you can't get the permits you need to abate the nuisance. You can't get the permits you need to demolish these supposed nuisances. You're just trapped in this situation where fines are accruing within 10 days on a structure that they haven't identified, and you're lost and you don't really know what you can do to stop the fines. And the point we made to the court was like, the pressure is the point here? They're not actually looking to adjudicate these claims. They're not looking to make the properties any safer. What they're doing is trying to force people into these settlement agreements. And so you get hit with these 90 days worth of fines, and the county comes in and they say, "Hey, if you request a hearing, the hearing officers, they work for us. We have never lost a hearing. And we'll give you your appeal, but you're going to lose and you're going to owe 90 days worth of penalties." You could just settle for one day worth of penalties, which in most cases, is about $30,000. And just going back to Rhonda's property- She bought her property for $60,000 so the settlement is half the value of her property. Most of these people in Humboldt don't have anywhere near that sort of money. The average yearly income is like $27,000 so the

run of the mill settlement that they're offering is more than the average income. And along with paying this obscene amount of money, you have to waive several rights in perpetuity. So you have to sign the settlement agreement where you rate you waive your Fourth Amendment rights forever. You often can't sell your property without the county's permission, and code enforcement can just walk onto your property whenever they want and look around for other violations and fine you again. And so the point of this program is really to pressure people into settlements. And interestingly, the trial court, where we lost on every claim that we brought, acknowledged that the point of these excessive fines was just to promote speedy resolutions of claims. And that brings me to the fourth way that we think that this violated due process, which is, there is no speedy resolution of claims. Our clients requested hearings in 2018, 2019, and 2020 and to this day, they've never received hearings. At the time we sued, some of them had already been waiting for their hearing for five years.

A Anthony Sanders 15:04

I'm curious Jared, is that because there's a backlog, or is it just because they're super, like lazy, or worse than lazy on scheduling?

J Jared McClain 15:12

No, it's worse than lazy. So, we allege this in the complaint and I'm mostly sure that it's true; that the only claims that get scheduled for a hearing are ones where the sheriff's office has actually rated a property and found cannabis. So if they have probable cause and they know they can prove their case, you get your hearing, and if they fine you without probable cause, and you request an appeal, they just put your appeal on a shelf indefinitely. They tried to say that there was a backlog because of COVID, but they were still arguing this COVID backlog in 2024 and, there were only 1200 active cases. So, if you do the math, I think that there had been a couple dozen hearings with over 1200 people who had been fined. So, IJ sued, and we alleged five different constitutional violations. Each of our constitutional violations, then had a subset. Like one of our constitutional violations was procedural due process, but we also alleged it violated due process in five different ways. And we alleged a subset of due process violation, and there were two of those. So, we alleged probably roughly 10 constitutional violations. We said that there's inadequate notice, because they don't tell you where the problem is on the property. They don't tell you how to fix it. If you ask for an appeal, they don't schedule a hearing. They're charging you without probable cause. And then there's immediate consequences, because the fines start to run immediately, and then you're categorically excluded from obtaining any permits. So because there's these consequences, they need to have probable cause before they charge you, or they need to give you an immediate post deprivation hearing, and they're not doing either. So they're just sticking these people in this legal purgatory for years. So we had our PDP claim there, and then we said it violated substantive due process because they are charging people with indifference to their innocence, these charges are not attached to personal guilt, and that violates our substantive due process rights. And they're doing that in two ways. The one way, is the enforcement by satellite, where they just are charging people without regard for probable cause. But the second way is they are charging new owners for things that the prior owners had done. Basically, they're saying, if cannabis had ever touched this property, the current owner is responsible for whoever put cannabis on it sometimes in the past. And so that's our substantive due process claim. Then we had an unconstitutional conditions claim, because they were coercing people into these

settlement agreements when they needed permits unrelated to cannabis. So we had a client named Blu Graham, for instance, who built his home himself. So, he had an unpermitted home, and he was trying to take advantage of this amnesty program and get his home permitted. And the county said we're not giving you a permit for your home until you settle your abatement case. And so he's now facing more penalties. He has to choose, "they know now that my home's on permitted because I've come forward and asked for a permit for it, and my only way to get that permit is to sign this settlement agreement under which I waived my fourth amendment rights in perpetuity, and I agree to pay this lump sum of money to the county." And so we had an unconstitutional conditions claim for that. And our excessive fines claims, as the unseemly amount of fines, pretty much speaks for themselves. And there was a second type of excessive fines claim that we brought, which was, every time they issue these notices of violation, they require you to return the land to its pre cannabis state, and so that means destroying any building that has had cannabis inside of it, regardless of whether there's a public safety reason for doing so, regardless of the cost. It's just this building is permanently tainted. It needs to come down now and you're not eligible for a permit. And we argued because this is not a typical abatement case. This is not there's a dangerous situation on your property, and you need to remedy that. This is there was once cannabis, so we're going to punish you by imposing this demolition order. And so we said that was also an Eighth Amendment violation. And then we said that this violated the Seventh Amendment as well, because, the county hires private attorneys to decide these cases. You don't even get to see a real administrative law judge, let alone a real judge or a jury. And so we said that it violates the Seventh Amendment as well, and we filed as a putative class action on behalf of all the people who had received these fines and requested a hearing and never gotten one. And the trial court dismissed our complaint in its entirety. He held that our claims were untimely because we didn't sue within two years of the laws passage, even though our clients had not been fined back then and could wouldn't have had standing to sue. He held that our facts were unripe, which I still haven't quite made sense of, and

A Anthony Sanders 20:54

They haven't happened yet.

A Andrew Ward 20:55

Yeah, it's too late and it's too soon, is always a fun combo.

J Jared McClain 21:00

It was too late. It was too soon. And the general tenor of the opinion was that we were liars, we didn't have any credibility, nothing we said was true, and the county would simply never do this. He said, everything in the county's enforcement has been proportionate, non arbitrary, even handed and fair. And this was at the motion to dismiss stage when the inferences were supposed to go in our favor.

A Andrew Ward 21:33

It's kind of like a reasonable conclusion because of how nuts the stuff that they're doing is. Like

It's kind of like a reasonable conclusion because of how nuts the stuff that they're doing is. Like, if you just went up to somebody on the street and were like, "do you think the government's gonna fine you, $2 million for something somebody else did 30 years ago?" You know, the normal response would be like, "No, that should not happen. And I don't think that is happening. Is that happening?"

J Jared McClain 21:59

Yeah, and I would love to give him the benefit of the doubt that maybe he just wasn't that dug in on our allegations. But, the county knew that Rhonda Olson didn't do the grading or grow the cannabis. We know that because the county put it in emails and then attached it to their motion to dismiss.

A Anthony Sanders 22:27

That's an interesting litigation strategy.

J Jared McClain 22:35

It is, and it worked for a bit. They did not see any problem with what they were doing. And then they got a trial judge who did not see any problem with what they were doing. It was just like "we elicit cannabis growth going outside the permitting process. That's a problem. And, the county needs to take a heavy handed approach to fix it. And while these people might not have been personally responsible, they should have known better." And they said that at the trial court, the trial court agreed. And then they stood up in the Ninth Circuit and they said the same thing. They said, "if you looked at that three story garage behind Doug and Corrine Thomas's house, you would have known that there used to be cannabis in there, and so you should have expected that you were going to get hit with $1.8 million in fines and a $200,000 demolition order."

A Anthony Sanders 23:32

And that's what I thought about when we bought our house.

J Jared McClain 23:35

Yeah. And so we appealed this to the Ninth Circuit. And the joke that I've made is it was a sovereign citizen style appeal, because we raised no fewer than 10 questions presented, and that was with IJ's greatest minds getting our heads together and trying to figure out how we could make all these issues only sound like 10. And we said our claims were both ripe and timely. And the trial court just completely ignored the standard of review and didn't grant any inferences in our favor, and actually just drew conclusions of fact against us at the motion to dismiss stage. And then we said that we did state these five constitutional claims, and we asked for a new judge on remand, because we did not think that, given the things that he said about us and our clients and the county, that he'd be able to fairly judge things if we went back

down after the motion to dismiss. And I think what we said was, if he kicks this case on summary judgment, it's not going to look like justice even if there's some good reasons behind his decision there were none behind the first one. And people in Humboldt are going to have a real difficult time believing that he's actually applying the law fairly the second time around. And, the case went pretty well at oral argument. The second question, I believe, was from Judge Paez. He asked, which of the trial courts errors did I think was the worst.

A Anthony Sanders 25:31

And that made you feel good?

J Jared McClain 25:33

Yeah, it really broke the tension. And because this case, got dismissed in, like, May, 2023 and the arguments in April, 2024. So, for a year of all the press about this was, " oh the Institute for Justice brought this nonsensical claim that the county's not doing anything wrong. And then we bring, like I said, a sovereign citizen style appeal, where we look like crazy people. And so it was validating to get to the Ninth Circuit and immediately have them say, "hey, this was pretty bad. Which ways do you think it was worse?" So, December 30, we got two decisions from the Ninth Circuit. They issued a both a published and an unpublished decision. The published decision was only on our excessive fines clause claim, and the unpublished ran through the rest of our claims pretty quickly. And the top line resolution is that the Ninth Circuit agreed that our claims were ripe and that they were timely. It said probably 17 times throughout the opinions granting inferences in the plaintiffs favor as we must. And they held that we stated claims under for procedural due process, substantive due process, unconstitutional conditions and the excessive fines clause. The only claim that we lost was our Seventh Amendment claim, which we conceded was foreclosed by Supreme Court precedent.

A Anthony Sanders 27:16

And that's a right to a jury trial?

J Jared McClain 27:18

Yeah, the right to a jury trial. There's some 1800 decisions and a 1920 decision from the Supreme Court, pre selective incorporation era, that says the Seventh Amendment does not apply to the states. And so we were bringing this as a test case to challenge that, and knew we would lose that. And that turned out to be the only thing that the Ninth Circuit thought we should lose.

A Andrew Ward 27:42

Uncontroversially so, right? Like the standard for an unpublished opinion is, "this doesn't make any new law. Nobody needs to read this ever again, because this is just the obvious answer."

J Jared McClain 27:53

Yeah, and it's interesting that you make that point about about how straightforward this should have been. Because even our published decision on the excessive fines clause, was like 28 pages long or so and 23 of those are setting out the facts and dealing with just the ability. I guess, the issue that the Ninth Circuit found most novel and interesting was the ripeness decision. So the Trial Court had held that you can't bring an excessive fines clause claim until you have paid the excessive fine. And we said, well, Rhonda Olson, shouldn't have to pay seven and a half million dollars before she gets to go into court and say that this violates your constitutional rights. But there was really only one Ninth Circuit case on on ripeness and Eighth Amendment claims. And it was prisoners who were bringing an Eighth Amendment claim about having to double bunk in prison, and it was a new policy that got enacted, but it was only actually going to take effect if there was overcrowding. And the plaintiffs couldn't actually show that they were ever going to have to double bunk, just that it was a possibility. And so the Ninth Circuit dismissed it on ripeness grounds. And that was really the only decision that was out there. And so we went through a bunch of out-of-circuit precedent and mostly all it set a good standard of law, but they all came out in favor of not finding ripeness. So there really wasn't much out there actually pointing to a situation where somebody was hit with an ascertainable amount of punishment and sued before they paid it. And so that turned out to be the bulk of the Ninth Circuit's published decision.

A Anthony Sanders 29:48

And that's not terribly surprising, right? Because there just isn't a lot of excessive fines law out generally. I mean, it wasn't even incorporated against the states officially, until we had our Timb's case just a few years ago at the Supreme Court.

A Andrew Ward 30:03

There's that one merits case, right? That says that a fine, that's like 20 times smaller than the fines here, for doing something that actually is excessive when it's pretty minor. Like not filling out a cash declaration.

A Anthony Sanders 30:17

I think that case is from 1998 and its the only merits case from the Supreme Court.

J Jared McClain 30:25

Yeah, and there are maybe 3 Ninth Circuit cases applying Bucha and most of them are the same case. There's Pimentel one and Pimentel two. And so there's really just not much out there. But yeah, so we got the published decision on the excessive fines clause. They went through the Bucha factors and really had no trouble determining that these fines were excessive, in part because there were four permitting violations. We didn't want to make this case about whether the government could fine someone $6,000 for violating cannabis laws.

Our point was they're making every fine about cannabis even when the permitting violation has nothing to do with cannabis. Just because you built a greenhouse without a permit, even if you did put cannabis inside, there's a separate penalty for the cannabis, and they're double counting by hitting you with cannabis level fines for building a greenhouse. And were it not for cannabis, everyone agrees that it would be a maximum $1,000 fine, and you'd be able to fix it without accruing any money. And so the court ran through that and said there was real, no government interest to support this. It was basically a paperwork violation and we state an excess of fines claim. The Court said it was a closer call, but I think the interesting holding for us was the court agreed with us that those demolition orders, the requirement to return the land to its pre cannabis state, that could also be an excessive fine if it was punitive and not remedial. And we alleged that this was purely punitive. It had nothing to do with whether the building was able to get a permit separate from cannabis. It was just because there used to be cannabis and it had to be destroyed. And so those were the wins on the excessive fines. They waved away the the statute of limitations issue pretty quickly on the excessive fines, because the trial court had also said that we had to sue within two years of the laws passage, and the Ninth Circuit has already said that that's wrong. Basically, the idea was that, oh, there's a rent control case where, a rent control provision kicked in, and somebody waited five years before they sued over it. And the Ninth Circuit said, well, this had been affecting you the whole time and you knew that this was happening to you as soon as the law passed, and it started affecting your property interest as soon as the law passed. But unlike that our case is about an enforcement statute, and our clients had no reason to believe this law was going to apply to them until code enforcement showed up and applied it.

A Anthony Sanders 33:16

That's always an amazing argument that I know various governments make- that you need to challenge law when it's passed, even if you weren't born yet. Yeah, 40 years ago when the law was passed, that's the time to do it. Which, once you think about it, doesn't make any sense. But for some reason it gets thrown up in court. Andrew, your thoughts about all the Ninth Circuits fixing here.

A Andrew Ward 33:42

I think, for a case about marijuana its shocking, that everyone is not a little more chill. It's not legally interesting, right? Like, this insanely bad behavior obviously violates several provisions of the Constitution. And, the interesting thing is that we encounter bad behavior, and it's like, yeah, you know their hearts in the right place, but just because the government wants to do something doesn't mean you can take that little old lady's house and give it to Pfizer. But then there's stuff that's just, like, truly, how could anyone possibly do this. Like a different one of our cases where a prosecutor was also a law clerk on his own cases. This strikes me as like more in the latter camp, that nobody could have ever possibly thought that this was okay, and yet here we are. So those are my comments as someone who's not on the case and doesn't have to be as judicious as Jared does.

A Anthony Sanders 34:40

This case reminds me a lot of a case I was a part of a few years ago in Charlestown, Indiana, where the city had a plan to redevelop a neighborhood, but it couldn't use eminent domain

because of state law, and so they issued these fines for pretty minor housing code violations. And they would accrue daily and start on the first day; those were like $50 a day, although there'd be like 10 violations, so they added up. They started with rental housing but the plan was to move on to owner occupied housing too. And we thought that was absolutely outrageous, and there was a big lawsuit that we won at the preliminary stage about it. And eventually we settled, and we saved a lot of people in the neighborhood. But, this is the same thing, but just taken way up to the next level. The two cases combined give the realization that a lot of people, if you'd explain it to them, kind of think that they are a black helicopter type of person. But your security in your property, or wherever you live, is kind of hanging by a thread. If a local official just wants to engage in bad behavior, and then if you sued them and tried to get damages or get consequences, then they have qualified immunity and all these other immunities that we also talk about here at IJ. And so the whole system, to some extent, depends on just people being good people, and if they're not it you really need someone like IJ to come in and do a lawsuit like this, because otherwise they really can get away with this kind of stuff.

J Jared McClain 36:29

I mean, they did get away with it because they started this in 2018 so we're talking seven years later. At the time we filed I want to say that they'd already foreclosed on about 40 properties from people who just didn't appeal these fines. And that was three years ago now, and so like, the county government is just going to own a lot of people's property in Humboldt, because there wasn't a lot of media up there. There's not a lot of constitutional lawyers, and people were just not equipped to deal with this bad behavior. And it makes me think of the importance of the Seventh Amendment claim that we still have out there and are going to try to get the court to weigh in on. We had the decision last term, from the Supreme Court in Jarkesy about the Security and Exchange Commission needing to give jury rights to people that it's fining lots of money for securities fraud. And a lot of people saw that as like, "Okay, these are bankers." They didn't really appreciate the importance of the Seventh Amendment right applying to these out of court proceedings. But when you take it down to the local level, if the people in Humboldt knew that they could just appeal and get a jury, rather than this private law firm hired to do the county's bidding. I think a lot more people would still have their property, wouldn't have signed their rights away in these settlement agreements, and would have paid off this money. A lot of people's lives could have been helped if they had access to a jury.

A Anthony Sanders 38:18

Well, we will see how things go now that you are remanded. And, as we know, justice can take some time. So it may be some time before Jared is back here with the next appellate ruling in in this case, if that happens. One funny last thing is that Northern California is a huge area that most people don't even think about when they think about California. But there is a Weed, California, but it's not in Humboldt County, it's like way out on the I5. So when you come down in Oregon, one of the first towns you see is weed, but then Humboldt County is like four hours from there. So gives you a sense of how big that place is.

J Jared McClain 38:58

Humboldt County itself is huge. To get from Rhonda's house to the Thomas's house is over a

Humboldt County itself is huge. To get from Rhonda's house to the Thomas's house is over a two hour drive, and then to get to Blu's house is another 90 minutes. So, it takes hours and hours to traverse this county. And that was basically the county's excuse for relying on satelittes. They're like, "it would be too hard to do our job if we had to actually drive on these roads that we've never paved."

A Anthony Sanders 39:21

Of course. Well, one person who thought it was too hard to get a grant from the government ended up suing, but things haven't gone that well. So that is in the Fourth Circuit, and that's the case that Andrew is gonna tell us about. And here we got some more mootness and standing, but also some racial discrimination.

A Andrew Ward 39:46

Yeah, this is another case about standing, ripeness, and mootness- what public interest litigators sometimes call that trifecta of issues. It's a bit of a mixed bag, with some doctrinal outcomes that are questionable, doctrinally, on that point. This is Hierholzer v. Guzman out of the Fourth Circuit, a case about the Small Business Administration and its minority aid program rules. The SBA has a program that gives aid to small businesses, and you need to prove two things to qualify: social disadvantage and economic disadvantage. However, if you're a member of a racial minority or meet certain other criteria, you don't need to prove social disadvantage; the government assumes you're affected by that status, though it's a rebuttable presumption. For the most part, if you're a member of a racial minority, this is just taken as a given- unless, perhaps, you're someone like Jay-Z, where they might challenge that. But for the most part, it's presumed if you're a minority, not if you're white. The plaintiff here, Marty Hierholzer, is not a member of a racial minority; he's of Scottish and German descent, which seems likely given his name. In the wake of the Harvard decision striking down affirmative action in admissions, he sues the SBA because he wants to qualify for this program, despite not being a racial minority. The Fourth Circuit's opinion is interesting at a nerdy level because its analysis didn't quite mesh together, and the doctrine wasn't treated with the seriousness it needed. Two things happen in the case: First, the government argues the case is moot because a different district court, in a separate lawsuit, already enjoined the rule. A federal court in Tennessee ruled that the rule was unconstitutional, saying all applicants should be treated equally, regardless of race, and no one should be presumed to be socially disadvantaged based on race. The SBA responded that this is how they'll operate now, so the case is moot because there's no longer a problem. The Fourth Circuit says no, that's wrong, the case isn't moot because there's no final judgment. This is more like a temporary, voluntary cessation of the rule; there's been no formal rulemaking. The court says that the case is not moot, but this conclusion is essentially dicta, and I'm not sure why it's in the opinion. The court then goes on to say the plaintiff lacks standing. For the legal nerds out there: You can address these things in any order, but jurisdiction is always mandatory. These are different subcomponents of jurisdiction, so the mootness question could've been left unresolved if there was no standing to begin with. That would be a doctrinally sound outcome, and from a public interest standpoint, it's the right call. So, what the court says is that Hierholzer doesn't have standing for two reasons: He's neither economically disadvantaged nor socially disadvantaged. He's not economically disadvantaged because he's actually fairly well off, with a net worth of $850,000 and an adjusted gross income of about $400,000 over the past few years. And he's applied for the program in the past and been rejected because he's not socially disadvantaged. In essence,

the problem is not the racial preferences; it’s that he’s not qualified for the program in the first place. The issue with that, and what Mr. Hierholzer argued, is that this isn’t the standard in equal protection cases. The standard is that you need to be ready and able to apply, regardless of whether you'd ultimately receive the benefits. The discrimination itself is the injury that allows you to proceed. For instance, in the affirmative action cases, you don’t need to know whether the student would have been admitted but for the lack of affirmative action. It’s enough to show you were treated differently. Similarly, in older contracting cases, you don’t need to prove you would’ve been awarded the contract; it’s enough to show you were treated differently because of discrimination. The Fourth Circuit didn’t really engage with this point, and I thought they should have. The court says it doesn’t matter that Hierholzer isn’t in the right racial group for social disadvantage because he still needs to show economic disadvantage. If he’s not economically disadvantaged, he doesn't meet the standing requirement. The court seems to imply that because he’s not qualified for the program, the racial preference doesn’t matter. But that’s not how those earlier cases worked. For example, a Black applicant with the same net worth might have a better chance of being deemed socially disadvantaged. This isn’t as clear-cut on economic disadvantage, where he’s definitely not economically disadvantaged, but on social disadvantage, the court's reasoning seems incomplete. He has various social disadvantages, including disabilities and psychological problems, some likely stemming from his military service. A candidate from a different racial group might have been able to show social disadvantage, but Hierholzer doesn’t get to go through that inquiry because of his race. I’m curious to hear your take, but for me, it seems like the court got it mostly right on economic disadvantage because Hierholzer is clearly not economically disadvantaged. On social disadvantage, though, I think the court missed a deeper analysis. I think a Black applicant with similar social disadvantages would have been allowed to proceed with the inquiry, even though the case is debatable. It feels like the outcome is half-right, but I’m not sure it aligns with the rules from affirmative action or contracting cases.

J Jared McClain 47:38

So is your sense that even after the even after SBA changed the way they were enforcing the rule, do you think that the court was addressing this pretend way that the rule works, based on on SBAS affidavits, or whatever they submitted? Because I didn't really take them to be grappling with the rebuttable presumption. They were kind of just like, presuming it was dead.

A Anthony Sanders 48:04

Jared, can you mesh those together?

A Andrew Ward 48:46

I think they were dealing with the original claim, but just as a like, if you got what you wanted sense, which it's true that that is also what's going on now because of the injunction and the policy change. Maybe it was different on on social disadvantage, but everybody has to show economic disadvantage. That part seemed right to me, that like even if you had this presumption in your favor on the one prong you still couldn't get through on other.

J Jared McClain 49:23

Yeah, like, if you look at the hotel case that got kicked last year, the point in those discrimination cases is the act of being discriminated against is a harm, right? And I read this opinion pretty quickly so I kind of just assumed that they were saying, "Well, if this rebellable presumption is gone, you're not actually being harmed anymore, because you're not socially disadvantaged; and you're kind of just complaining that some people are more likely to be socially disadvantaged than you.

A Anthony Sanders 50:03

I think they were assuming it was still the old system.

J Jared McClain 50:09

I was working with that presumption in mind, so I think the opinion came off much differently.

A Andrew Ward 50:17

No, your conclusion is right. Because, if there is a flat, absolute rule that discrimination is bad and confers injury, then it doesn't matter how crystal clear it is, you wouldn't qualify for the thing. But the problem is that this guy clearly wouldn't qualify for the thing. I think, that drove the opinion, because it's bad vibes. This guy has gotten $130 million over the last 20 years in SBA grants and contracts, just not in this program, in a different program that helps veterans. The panel clearly doesn't like him. He might have not gotten the best panel for this claim, all of these are democratically appointed judges who maybe don't want to do anything further to chip away at these kinds of preferences. although, you

J Jared McClain 51:15

If the act of being discriminated against is no longer an injury, then that hurts people other than this guy. Yeah for sure. I just wanted to comment on your last point about how many SBA contracts this guy has gotten in the past. Because there was a line in the beginning that was like, "you can get an SBA contract because you're socially disadvantaged, or you can get it because you're a disabled veteran." And this guy's claiming that he is socially disadvantaged because he's a disabled veteran. And the whole opinion I'm reading and wondering what am I supposed to do with that fact? And it's not until they get into the third prong of standing where they're like, "Aha, you're just trying to double dip. You've gotten all of this money from the SBA because you're a disabled veteran and you're trying to become eligible for a second program." And so that, to me, felt like what was probably driving the outcome in this case.

A Andrew Ward 52:23

The overwhelming takeaway I had from this as a public interest litigator is, I'm not sure why this was the guy. I mean, yes, they have a very good argument based on this rule that discrimination as a per se harm; and the opinion could be leaving things out, but I have no idea

why this was the guy. There are other white people in the United States who might have been better plaintiffs.

A Anthony Sanders 52:56

You know, I haven't read the complaint. I haven't even read the briefs in this case, but maybe there is more that could have been pled. But I also was very curious on how the socially disadvantaged and the economically disadvantaged rubrics actually work. So we have a lot in this opinion about the the regs and what they say about what that means. But then, of course, there's how the program is actually structured, which, if this wasn't at the motion to dismiss stage, maybe we could learn a little bit more about it. So is it that they worry that much about how much the guy made last year? Or, if you grew up in a log cabin? Is it easier, even if you've made a lot the last couple years?

A Andrew Ward 53:52

As a pure fact matter, it might be that if this person were not white, he would have gotten this grant. But it sure looks like he wouldn't have on paper because of his extremely high, top decile income in the United States.

A Anthony Sanders 54:10

It says he has $800,000 net worth or whatever. But if you buy a house and then value goes up in your neighborhood, like around Washington, DC, or parts of California- that doesn't mean you're that rich.

A Andrew Ward 54:27

It doesn't but it's also like the median black net worth in the US is like zero.

A Anthony Sanders 54:35

Well, then you get to the socially disadvantaged. But how do you do socially disadvantaged without without race, I don't know. Maybe, as a practical matter, but it's not really a thing,

A Andrew Ward 54:51

On paper, it's not the most sympathetic plaintiff.

J Jared McClain 54:54

Yeah, I was actually intrigued by the description of how the SBA categorizes social disadvantage. It didn't just say, like, "Are you from a super rural area?" But that's how it came

off to me. It was like, "Do you live in an area that doesn't have a lot of people around you, where you feel like excluded from society?" And none of these programs ever going to be perfect, but it did feel like they were trying to capture more people than just race. But one thing that stood out to me with this case, and they kind of get to it in their redressability section, is we often think when we're trying to develop cases, is if you win, is your client or people like him going to be better off? And they kept saying if you win and you strike down this preference for certain racial groups, are you going to be better off? And the court said, "No, you're still ineligible for this rule." The court's opinion was basically like, they're saying "you're trying to actively harm other people, and you can't get anything out of this lawsuit for yourself." And I don't know whether it's a pleading issue or a media issue, but you don't want to bring cases that leave judges thinking that.

A Anthony Sanders 56:30

I have been on that side of a lot of complaints that I've tried to plead really carefully. I'm still suspicious about the court's reading of the complaint, but I haven't actually read the complaint.

J Jared McClain 56:50

And like Andrew saying, maybe they just didn't think you needed to plead economic disadvantage because they thought that it was a per se harm.

A Andrew Ward 56:57

Or maybe they would have, if they could have, I don't know. This opinion raised a lot of questions for me, based on my very specific niche job.

A Anthony Sanders 57:11

I think the takeaway from both cases that we've discussed this week is that if you are in our niche job or just the wider world of law, you need to plead your complaints very carefully, because there are a lot of judges who will not be very sympathetic to them- especially if you're a civil rights lawyer.

A Andrew Ward 57:33

Yeah, that's maybe the top line takeaway is that standing, ripeness, and mootness are forever in the way of ever trying to hold the government accountable. I've been on the end of an absolutely insane standing ruling in the Fourth Circuit that never got fixed. And it is hard to hold the government to account. But sometimes, as in Jared case in the Ninth Circuit, the court absolutely does the right thing. So more that please.

A Anthony Sanders 58:06

Amen. Well, I'd like to close this week with a reminder that we are having our 10th anniversary party for Short Circuit coming up this spring. And if you live in the Washington DC area, or you live elsewhere, and you want to travel for it, we'd love to see you. On Thursday, April 3, in the evening, we are having a show/ party, with lots of very high profile people doing awesome things, talking about Short Circuit, a live show, and we got some retired judges talking about stuff. Anyway, I won't go into the details again. But please click the link in the show notes if you would like to RSVP, because I'm pretty sure it is going to "sell out,"even though it's free. But I like to thank my colleagues for coming on this week and talking some standing, ripeness, and mootness. And please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.